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## Cassandra's Curse or Cassandra's Triumph: Three Tales of Intellectual Property Revised

Mira Moldawer

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# CASSANDRA’S CURSE OR CASSANDRA’S TRIUMPH: THREE TALES OF INTELLECTUAL PROPERTY REVISED

*Mira Moldauer\**

Cassandra’s curse, which assured that her prophesies will come true, but that no one would ever believe her, evokes three major predictions in regard to Intellectual Property in the information era. First, the information era requires no “Law of the Horse”, as phrased by Judge Easterbrook, as a sound law of intellectual property be applicable to digital technologies as well, instead of creating new law for every new step in technology’s evolution. Secondly, Lessig’s seminal “code is law” reframed this dilemma, in reference to private conglomerates versus legislative authority. Thirdly, John Perry Barlow, in his ‘Declaration of the Independence of Cyberspace’ predicted that selling information, i.e.: wine, will not require any bottles, namely, IP Law.

Prima facie, Perry Barlow was over optimistic. Justice Eastbrook succumbed to “The Law of the Horse” in *ProCD v. Zeidenberg*, in which he preferred the legitimation of the new era’s contract, i.e.: shrink-wrap licenses, over Copyright Law paradigms, and Lessig, who advocated for governmental legal interference, ended up confronting the Digital Millennium Copyright Act (“DMCA”) with partial success in *Lenz v. Universal Music Corp.*

Yet, parallel to the legal axis that led to “code is law” by creating a “para-copyright” through the DMCA and the EU Digital Single Market Directive (“DSM”), that are backed by the monolithic vocabulary of the En-

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lightenment era, the evolution of the audience axis, that leans on Postmodernist vocabulary, as seen through the “Cultural Dominant” media design in Western culture major stages, from the Greek tragedies to the recent case of *Bel-Air* (film), defies the former. Hence, tacitly, code creates a new law; not from the superior layer of imposed legislation downward, but from the users’ undercurrent of creativity upward. The transformation of Cassandra’s curse into Cassandra’s triumph will assure that we live free of fear of imaginary bottles, with the ability to create our cultural code as our law of the horse.

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## I. INTRODUCTION

Cassandra, the daughter of Priam, the last king of Troy, was cursed by Apollo that her prophecies will come true, only, no one will ever believe her.<sup>1</sup> That applied to her predicting the fall of Troy, as well as her own murder.<sup>2</sup> On one hand, Cassandra's curse is the story of the unavoidable failure of those who understand reality without the ability to change it. On the other hand, it could be interpreted as the victory of the defeated in the long run, as proved by her story. Such a predicament, reflected through Troy's ashes, is a lesson in modesty regarding our perception of what constitutes a defeat or triumph.

In this article, I intend to expound on three major predictions regarding intellectual property in the information era. The information era exists in a space in which technologies have revolutionized traditional economics models, moving from models founded on the creation of value through production towards those creating values through information.<sup>3</sup> The rapid transformation of our world from a physical to digital one has proved to be Janus-faced. Copyright owners can reach far larger crowds, surpassing prior holders' wildest dreams, while also facing unprecedented risks of piracy due to the same digital blessing. As Althaf Marsoof sums the dilemma: "Despite the benefits of digitization, the relative ease by which online content can be duplicated, coupled with the relative anonymity the Internet provides to its users, enables Internet users to indiscriminately duplicate and share content in which copyright subsists. Thus, rights holders have a far greater challenge in policing and enforcing their rights in the online environment than in the physical world".<sup>4</sup>

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1. See generally *Cassandra, Greek Mythology*, Encyclopedia Britannica (2019), <https://www.britannica.com/topic/Cassandra-Greek-mythology> [<https://perma.cc/6DU6-RSC4>].

2. See *Agamemnon*, AESCHYLUS 1194 (Herbert Weir Smyth trans.) <https://uh.edu/~cldue/texts/agamemnon.html> [<https://perma.cc/82XL-H226>] (For example, her own plight's analysis, while standing on the threshold of Agamemnon's palace, prophesizing his murder, as well as hers by Clytemnestra and Aegisthus: "Have I missed the mark, or, like true archer, do I strike my quarry? Or am I prophet of lies, a babbler from door to door?").

3. See generally YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); Yochai Benkler, *Coase's Penguin: or Linux and The Nature of the Firm*, 112 YALE L.J. 369 (2002) (For the way in which the network should change our economic premises and our presumptions about commons-based creativity).

4. Althaf Marsoof, 'Notice and takedown': A Copyright Perspective, 5 QUEEN MARY J. OF INTELL. PROP. 183, 184 (2015).

Yet, does the information era require “The Law of the Horse”, as phrased by Justice Frank H. Easterbrook?<sup>5</sup> Law of the Horse is the term coined by Justice Easterbrook about the state of cyberlaw vis-à-vis the Internet phenomenon. In his seminal “Cyberspace and the Law of the Horse” article, Justice Easterbrook argued against specialized legal studies and litigation applied to cyberlaw, as the vast umbrella of the Law is sufficient to deal with the legal newcomer.<sup>6</sup> The question posed is, shouldn’t sound intellectual property law be applicable to computer networks as well, instead of creating new law for every new step in technology’s evolution? Lawrence Lessig challenged Easterbrook’s theory, arguing for the opposite view.<sup>7</sup> Not only the software that underlies the very architecture and infrastructure of the internet governs it as a whole, thus, rendering cyberspace into a new cyberlaw, but the new cyberlaw should be adjudicated by federal authorities and not by private intermediaries, as the internet should incorporate constitutional principles.<sup>8</sup> Hence, secondly, will Lessig’s seminal “code is law” decipher this dilemma?

The third tale of Intellectual Property in the Information era could be classified as contending with both Judge Easterbrook and Lessig’s hypothesis. Optimistic and zealous libertarians firmly believed that cyberspace, as a newly created digital world, would be liberated from its analogical counterpart’s chains; thus, rendering Intellectual Property (“IP”) Law obsolete. Such a sentiment is echoed by John Perry Barlow, a prominent ambassador of internet liberty, in his “Declaration of the Independence of Cyberspace”.<sup>9</sup>

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5. Frank G. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 214 n.9 (1996) (explaining that the first to coin “the law of the horse” was Karl Llewellyn, at the inception of the project that led to the Uniform Commercial Code).

6. *Id.* at 208.

7. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach You*, 113 HARV. L. REV. 501, 502 (1999).

8. *See generally* LAWRENCE LESSIG, LAWRENCE LESSIG: CODE AND OTHER LAWS OF CYBERSPACE (1999); Lawrence Lessig, Code: Version 2.0 (2006).

9. John P. Barlow, *A Declaration of the Independence of Cyberspace*, Electronic Frontier Foundation (February 8, 1996), [www.eff.org/cyberspace-independence](http://www.eff.org/cyberspace-independence) [https://perma.cc/CF35-NR7V] [hereinafter Barlow, *A Declaration of the Independence of Cyberspace*]; *see also* John P. Barlow, *Selling Wine Without Bottles*, 18 DUKE L. & TECH. REV. 8, 16 (2019) [hereinafter Barlow, *Selling Wine Without Bottles*]; Yochai Benkler, *A Political Economy of Utopia*, 18 DUKE L. & TECH. REV. 78, 78 (2019) (analyzing Barlow’s legacy as a refusal to regard creativity as a form of commodity. “Selling Wine Without Bottles is not against markets or payment as such, but rather a resistance to the totalizing vision of commodity exchange as all there is...”).

As Barlow described it, the sale of information in the future will be analogous to the sale of wine without bottles; that is, to say, a future without the need for the obsolete vessel of IP Law.<sup>10</sup> So, in Justice Easterbrook's terminology, the law of the horse dilemma, i.e.: creating special IP Law in order to fit new technology, is not relevant, as IP Law will be abolished altogether. Whereas, *prima facie*, Barlow seems to share Lessig's premise, i.e., that code will radically change the very perception of law, the latter took the opposite view:

Many believe that cyberspace simply cannot be regulated. Behavior in cyberspace, this meme insists, is beyond the government's reach. The anonymity and multi-jurisdictionality of cyberspace make control by the government in cyberspace impossible. The nature of the space makes behavior there unregulable. This belief about cyberspace is wrong.<sup>11</sup>

His famous slogan "Code is Law" prophesied that Cyberspace architecture would become a code of its own, especially in regard to copyright law, and should be regulated in order to preserve constitutional rights.<sup>12</sup> If a license substitutes proprietary transactions, then no aspect of use will enjoy the bygone protection of fair use provided by Copyright Law in the analogical world that still exists beyond Cyberspace. Hence, as Lessig warned, "the choice about code and law will be a choice about values."<sup>13</sup> Leaving the choice to private interests, instead of the customary regulative task of the

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10. Barlow, *Selling Wine Without Bottles*, *supra* note 9, at 8-10 (explaining that Barlow bases his vision on Copyright's most important dichotomy since its inception: the idea/expression dichotomy. What marks the borderline between an uncopyrightable idea and a copyrightable expression is the evolution of the work in question from the mind that created it into the physical world through fixation. "Thus the rights of invention and authorship adhered to activities in the physical world. One didn't get paid for ideas but for the ability to deliver them into reality. For all practical purposes, the value was in the conveyance and not the thought conveyed. In other words, the bottle was protected, not the wine. Now, as information enters Cyberspace, the native home of Mind, these bottles are vanishing.").

11. Lessig, *supra* note 7, at 505; *see also* LESSIG, *supra* note 8.

12. *See also* LESSIG, *supra* note 8; *see generally* Lessig, *supra* note 7.

13. Lawrence Lessig, *Code is Law: On Liberty in Cyberspace*, HARV. MAG. (Jan. 1, 2000), [https://cartorios.org/wp-content/uploads/2020/11/LESSIG\\_Lawrence\\_Code\\_is\\_law.pdf](https://cartorios.org/wp-content/uploads/2020/11/LESSIG_Lawrence_Code_is_law.pdf) [<https://perma.cc/P5VG-VK2G>] (In other words: "So should we have a role in choosing this code, if this code will choose our values?").

government, will leave us not with the utmost liberty, as per Barlow's wishful thinking, but quite the contrary:

Unless we do, or unless we learn how, the relevance of our constitutional tradition will fade. The importance of our commitment to fundamental values, through a self-consciously enacted constitution, will fade. We will miss the threat that this age presents to the liberties and values that we have inherited. The law of cyberspace will be how cyberspace codes it, but we will have lost our role in setting that law.<sup>14</sup>

Little did Justice Eastbrook, Barlow and Lessig know, that the 'information society', has evolved into the "algorithmic society".<sup>15</sup> Not only is Copyright Law stronger than ever at over-protecting copyright holders, but as argued by Maria Lillà Mongnani, the adoption of technology by online intermediaries has shifted Copyright Law from an *ex post* into an *ex ante* algorithmic enforcement.<sup>16</sup> Namely, the law can be deciphered only in retrospective, after its outcome, without letting even the most abiding law user get acquainted with what law she should abide by.

Hence, on its face, Barlow was overly optimistic about his vision of IP with no IP Law; Justice Eastbrook succumbed to "The Law of the Horse" in *ProCD v. Zeidenberg*, in which he preferred the legitimation of the new era's contract, i.e.: shrink-wrap licenses, over Copyright Law paradigms such as fair use in reverse engineering and "first sale" doctrine, and Lessig, who advocated for governmental legal interference, ended up confronting the the outcome of his wish, i.e.: Digital Millennium Copyright Act ("DMCA") with partial success in *Lenz v. Universal Music Corp.*<sup>17</sup>

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14. *Id.*

15. See, e.g., Giovanni De Gregorio, *From Constitutional Freedoms to the Power of the Platforms: Protecting Fundamental Rights Online in the Algorithmic Society*, EUR. J. LEGAL STUD., Spring 2019, at 68.

16. See generally, Maria Lillà Mongnani, *Virtues and Perils of Algorithmic Enforcement and Content Regulation in the EU – A Toolkit for a Balanced Algorithmic Copyright Enforcement*, 11 CASE W. RSRV. J.L. TECH. & INTERNET 1, 3 (2020).

17. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448–49 (7th Cir. 1996) (holding that shrink-wrap licenses are, in general, valid contracts under the Uniform Commercial Code (UCC)); U.C.C. § 2-207(1) (AM. L. INST. & UNIF. L. COMM'N 1978). *But see* Brian Covotta & Pamela Sergeeff, *ProCD, Inc. v. Zeidenberg*, 13 BERKELEY TECH. L. J. 35, 41–42, 51 (1998) (arguing that by finding that shrink-wrap licenses always survive copyright preemption, the copyright holder may be using the license to extend copyright-like protection to non-copyrightable material, such as user's ability to reverse engineering). See *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148–49 (9th Cir.



As “code is law” bears multilayered and contradictory connotations, this article will focus on two contradictory axes by deciphering their vocabulary. “Code is law” resulted in the creation of the “meta-IP right”, namely, a “para-copyright” through the DMCA and the EU Digital Single Market Directive (“DSM”).<sup>18</sup> The legal axis that led to this phenomenon derives its justifications from the monolithic Enlightenment era, as discussed in Part I of this article. The counterrevolutionary evolution of the audience axis that follows Barlow’s legacy, while leaning on Postmodernist vocabulary, will be discussed in Part II, through the “Cultural Dominant” media design in Western culture major stages; from the Greek tragedies to the recent case of *Bel-Air* (film). Hence, irreconcilable axes may converge towards different concepts of “Code is Law”, “The Law of the Horse”, and the “imaginary bottles” of Barlow, and share a joint vocabulary.<sup>19</sup>

## II. THE LEGAL AXIS: THE EVOLUTION OF THE “PARA-COPYRIGHT”

Although there is a tendency to treat the DMCA and the EU DSM as indistinguishable, the legal infrastructure of each legal system is much more complicated, requiring a separate discourse insofar as the different legislative evolution in each, respectively. Although the common utopian premise of the Law in both systems is aimed to create a liberal balance between copyright holders and users, both systems proved that the road to hell is paved with good intentions, as they ended with the creation of the “para-copyright”, an outcome very contrary to their intentions.

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2016) (Lessig was confronting Digital Millennium Copyright Act (“DMCA”), Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.) [hereinafter: DMCA]; *infra* Part I(A) (further discussion of DMCA); *see also* Jenny Lynn Sheridan, *Does the Rise of Property Rights Theory Defeat Copyright’s First Sale Doctrine?*, 52:2 SANTA CLARA L. REV. 297, 372 (2012) (claiming that “the courts have shaped judicial doctrine to accommodate software, and in the process distorted the important principles of *Bobbs-Merrill*. *Bobbs-Merrill*’s rationale and outcome supported the ‘traditional incentives’ approach to copyright, namely that societal welfare is maximized by the proper balance between protection of the copyrighted work and the public’s access to copyrighted works.”); *see generally*, Arnow-Richman et al., *The Best and Worst of Contracts Decisions: An Anthology*, 45 FLA. STATE U. L. REV. 889, 940-41 (2018).

18. *See* Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92.

19. Jessica Litman, *Imaginary Bottles*, 18 DUKE L. & TECH. REV. 127 (2019) (coining the term “imaginary bottles”).

*A. The United States "Code Is Law": From the Communications Decency Act (CDA) into the Digital Millennium Copyright Act (DMCA)*

The Communications Decency Act ("CDA") §230 is seen by scholars as "[a]n oft-cited example that demonstrates the ideals of *Internet utopianism*".<sup>20</sup> The CDA provides online platforms with total immunity from liability for user-generated content, which are not otherwise granted to distributors and publishers outside the cyber world.<sup>21</sup> The CDA perceived Internet intermediaries as passive factors, which are not involved in the creation of site content. Therefore, the inverse relation between passivity and control lends to the consequential presumptions; passivity will bear no liability, as in the passivity premise the lack of control and, hence, the lack of knowledge are deeply embedded.<sup>22</sup>

Interestingly, the technology before the social media outset designed the law benignly and likewise, forced the evolution of statutory and common law as technology became more active in our daily lives. Scholars mark the *Napster* case as a turning point that started the Web 2.0, from which the internet passivity was absent.<sup>23</sup> As the internet evolved from a passive surfing arena into an active arena of online content distribution, online intermediaries played a crucial role in shaping the cyberspace arena.<sup>24</sup> Hence, the old reasoning of passivity, lack of control, and lack of knowledge of intellectual property infringement that led to exemption from liability stands on shaky

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20. 47 U.S.C. §230 (2012); Marsoof, *supra* note 4, at 186.

21. *Id.*

22. Oreste Pollicino & Giovanni De Gregorio, *A Constitutional-Driven Change of Heart: ISP Liability and Artificial Intelligence in the Digital Single Market*, 18(1) THE GLOB. CMTY. Y.B. OF INT'L LAW & JURIS. 1, 234-44 (2019).

23. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (explaining that Napster, a peer-to-peer file sharing service, was held liable for contributory infringement of copyright. The court held that Napster had both actual and constructive knowledge of direct infringement regarding its users, and consequently, not only could Napster control the infringing behavior of the service's users, but it had a duty to do so. Consequently, neither Napster, nor its users, had a valid fair use defense); Pollicino & De Gregorio, *supra* note 22, at 238.

24. Pollicino & De Gregorio, *supra* note 22, at 238 ("From that moment on, the web has become a place to share content and other information. This first radical transformation of the online environment has also affected the role of online intermediaries, primarily, hosting providers. These entities provide access to, host, transmit and index content, products and services originated by third parties on the internet or provide internet-based services to third parties.").

ground and a different legal infrastructure is required. In addition to influential lobbying from the entertainment industry, once the courts began holding Internet Service Providers (“ISPs”) liable for copyright infringement when the providers knew or could have known of infringement on their platform, the road to the United States anti-circumvention legal regime governed by the DMCA was open.<sup>25</sup> As Marsoof argues, the DMCA sought “to minimize that regulatory control by introducing conditional immunity to Internet intermediaries that perform the access, storage and linking functions in order to let technology flourish and enable a greater freedom of speech on the Internet, on one hand, and let copyright owners secure an efficient enforcement of their rights in the online environment, on the other hand.”<sup>26</sup>

The anti-circumvention provisions from Articles 11 and 12 of the WIPO Copyright Treaty (“WCT”) and, Articles 18 and 19 of the World Intellectual Property Organization, Performance and Phonograms Treaty, (“WPPT”) correspondingly, were integrated into the DMCA.<sup>27</sup> The purpose of such an integration marked a shift in the degree of an online platform’s liability from total immunity to conditional liability, as imposed by the DMCA. Namely, ISPs would be protected by “safe harbor” clauses, provided they remove online content or block access to it once they become aware of their infringing nature (i.e.: “Notice and Takedown”).<sup>28</sup> In addition, ISPs are barred from receiving any financial benefit from infringing activity

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25. See *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs. Inc.*, 907 F. Supp. 1361, 1373 (N.D. Cal. 77 1995); *Playboy Enter., Inc. v. Frena*, 839 F. Supp. 1552, 1559 (M.D. Fla. 1993); *Sega Enter. Ltd. v. 78 Maphia*, 948 F. Supp. 923, 932 (N.D. Cal. 1996); Rachel Aridor-Hershkovitz, *Antitrust Law - A Stranger in the Wikinomics World? Regulating Anti-Competitive Use of the DRM /DMCA Regime*, 27 J. Marshall J. OF COMPUT. & INFO. L. 1, 3, 20 (2009) (outlining the development of “paracopyright,” created by the DRM/DMCA). But see Sharon Bar-Ziv & Niva Elkin-Koren, *Between Two Arenas: Empirical Study of Online Copyright Enforcement*, MISHPATIM 411 (2019) (regarding adjudication, as detailed in *supra* note 19, to be the crucial factor in DMCA inception).

26. Marsoof, *supra* note 4, at 190–91; Rachel Aridor-Hershkovitz, *supra* note 25, at 10 (phrasing the DMCA original aim as “seeking the appropriate legislative policy that adequately balances the conflicting interests of the entertainment industry and the public at large, while at the same time encourage the continuing growth and prosperity of the U.S. economy in the information age”).

27. World Intellectual Property Organization, Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65 (1997). World Intellectual Property Organization, Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76 (1997); *The Digital Millennium Copyright Act of 1998*, COPYRIGHT.GOV (1998), <https://www.copyright.gov/legislation/dmca.pdf> [<https://perma.cc/ZKQ4-F3DN>].

28. Marsoof, *supra* note 4, at 191-93.

occurring on their platforms.<sup>29</sup> The crucial component exempting liability for ISPs is embedded in the ‘Notice and Takedown’ mechanism applicable to content hosts and search engines. This mechanism starts its course once a notice of claimed infringement is provided by a copyright owner, thus, arousing ISPs awareness of an alleged infringement, the elements of which are provided for in 17 USC §512(c)(3).<sup>30</sup> In addition, the Law grants ISPs full online control by obliging them to prevent the (re)appearance of allegedly illegal content online. Thus, ISPs active role marks a volte face from its modest and passive inception by the previous CDA doctrinal basis. As Giovanni De Gregorio sums up: “Indeed, platforms will likely focus on minimizing this economic risk rather than adopting a fundamental-rights based approach.”<sup>31</sup>

It is no wonder that the law and technology’s next step is algorithmic enforcement through DMCA anti-circumvention provisions that prohibit circumventing technology protection measures or digital right managements, effectively controlling access to copyrighted material. Whereas Section 1201(a)(1)(A) of the DMCA refers to the act of circumvention itself, Sections 1201(a)(2) and 1201(b) of the DMCA forbid the production and distribution of technologies that are mainly designed to circumvent content. Thus, technology has come full circle; ISPs are no longer mere online hosting providers but are now thoroughly involved with their content by using artificial intelligence. Hence, filtering systems become the standard to avoid liability. A new meta-right/ “para-copyright,” was born: the right to control the access to copyrighted work. The entertainment industry that advocated the DMCA got the upper hand, as held in *RealNetworks Inc. v. DVD Copy Control Ass’n Inc.* and in *DVD Copy Control Ass’n Inc. v. Kaleidescape Inc.*<sup>32</sup>

According to a study conducted by *Urban Quilter*, only 31 percent of notices that were taken down in the United States according to DMCA were

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29. 17 U.S.C. §512(c)(1)(B).

30. 17 U.S.C. §512(c)(1)(C).

31. De Gregorio, *supra* note 15, at 81.

32. *Realnetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 943 (N.D. Cal. 2009) (admitting that “[t]he DMCA ... rebalance[d] the competing interests of copyright owners against copyright users”); *Caterina Del Federico*, 176 Cal. App. 4th 697, 714–15.

concerned with copyright issues.<sup>33</sup> Likewise, the *Bar-Ziv - Elkin-Koren* study reached a similar result, indicating that only 34 percent of notices that were taken down according to DMCA were concerned with copyright issues.<sup>34</sup> The 9th Circuit missed a chance to reverse the practice of reckless and careless DMCA takedown requests in *Lenz v. Universal Music Corp.*, known as the “dancing baby video” case.<sup>35</sup> In *Lenz*, a video showing an eighteen-month baby dancing in the family’s kitchen to Prince’s song “Let’s Go Crazy by Prince” was taken down by YouTube upon Universal Music Corp’s request, with no regard to fair use defense in Copyright Law. The court did not interpret the DMCA’s “knowing” misrepresentation requirement to include representations recklessly made without sufficient procedures to form a good faith belief about fair use, and therefore copyright holders are not incentivized to change their conduct. On the contrary, the ruling in *Lenz* presented supporting evidence showing that Universal subjectively believed there was a high probability the video was a fair use, while insisting on taking it down. The unworkable onus of proof placed on Copyright holders by the ruling in *Lenz* dictated such an outcome. Although, the *Lenz* decision seems to mitigate the DMCA by demanding copyright holders to incorporate fair use analysis into their infringement assertions, if the court requires a demonstration of some actual knowledge of misrepresentation, even a reckless failure to comply with this demand, will not incur liability.

The current and unprecedented evolutions in technology recall Johann Wolfgang von Goethe’s ballad - *The Sorcerer’s Apprentice*.<sup>36</sup> The ballad tells the story of a pretentious apprentice magician who casts a spell on a broom, to cause the anthropomorphic object to do his chores for him, only to reveal he was unable to control what he started. What is the difference between losing control of the recalcitrant broom and the power of technology turning against those who invoked their magic with no sufficient skill to command the outcome?

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33. Jennifer M. Urban & Laura Quilter, *Efficient Process or Chilling Effects - Takedown Notices under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA HIGH TECH. L. J. 621, 667 (2006).

34. *Bar-Ziv & Elkin-Koren*, *supra* note 25, at 438, 419 (noting in Israel, “notice and take down” mechanism is endorsed by the courts, and not by legislation).

35. *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1148–49 (2017).

36. Johann Wolfgang Von Goethe, *The Sorcerer’s Apprentice*, SCOTTISH COUNTRY DANCING DICTIONARY (1955), <https://www.scottish-country-dancing-dictionary.com/sorcerers-apprentice.html> [<https://perma.cc/VYD5-5VPB>].

As Marsoof reflects on the current criticism of the “Sorcerer’s apprentice” phenomenon in regard to ISPs becoming the overpowering “gatekeepers” of our new marketplace: “it questions the procedural fairness, transparency and accountability of the ‘notice and takedown’ system that ultimately determines the rights and interests of parties to a dispute arising from the creation, storage and sharing of online content”.<sup>37</sup> As the EU was influenced by the DMCA, it is determinative to analyze whether technology changed the parameters of copyright law, as in the United States, or whether the European framework took an entirely different path.

*B. The EU “Code Is Law”: From the E- Commerce Directive into the EU Digital Single Market Directive (DSM)*

Although there is a tendency to view the e-Commerce Directive and the DMCA as one and the same, this view is overly simplistic.<sup>38</sup> As demonstrated by Caterina Del Federico, although the aim of the DMCA and the e-Commerce Directive shared the same goal, “of limiting Internet Intermediaries liability in order to encourage the growth of the digital economy”, they differ in their statutory approach and procedural rules.<sup>39</sup>

The most important difference is that the DMCA is a federal statute while the e-Commerce Directive is a common legal framework that is meant to be implemented by the Member States of the EU. The e-Commerce Directive’s scope was more expansive than the DMCA, and in addition to Cop-

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37. Marsoof, *supra* note 4, at 193; De Gregorio, *supra* note 15, at 78; Bar-Ziv and Niva Elkin-Koren, *supra* note 25, at 438; Frank La Rue (Special Rapporteur), *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, U.N. Doc. A/HRC/17/27, at 9–16 (May 16, 2011). See generally ORIT FISCHMAN-AFORI, COPYRIGHT LAW IN HISTORICAL PERSPECTIVE: OLD WINE IN NEW BOTTLES, LAW AND INFORMATION TECHNOLOGY 321 (Michael Birnhack and Niva Elkin Koren, eds. 2011); Niva Elkin-Koren & Maayan Perel, *Separation of Functions for AI: Restraining Speech Regulation by Online Platforms*, 24 LEWIS & CLARK L. REV. 857 (2020); Maria Lilla Montagnani & Alina Yordanova Trapova, *Safe Harbours in Deep Waters: A New Emerging Liability Regime for Internet Intermediaries in the Digital Single Market*, 26 INT’L J.L. & TECH. 294 (2018); Mongnani, *supra* note 16.

38. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), 2000 O.J. (L 178). See, e.g., De Gregorio, *supra* note 15, at 76–80; FISCHMAN-AFORI, *supra* note 37, at 7; see Bar-Ziv and Elkin-Koren, *supra* note 25, at 413 n.5.

39. Caterina Del Federico, *Intermediary liability. The “Achilles’ heel” of the current legislation: the courts. A comparative analysis with the U.S, focusing on copyright infringement*, N. 1, anno V, DIRITTO MERCATO TECNOLOGIA, 111 (May 14, 2015).

yright, included four articles (12-15) regarding the liability regime of “information society service providers”. Furthermore, the e-Commerce Directive adopts a “horizontal” approach, dealing with liability of Internet intermediaries, whereas the DMCA’s different regimes of liability are in accordance with the specific kind of content ISPs provide. Likewise, in contrast to the DMCA’s detailed rules referring to takedown requests, the e-Commerce Directive’s prior fair use requirements are not specifically enumerated, and the actual knowledge standard has been supplemented by the courts, to fill in the blanks. Such a standard is in contrast with the DMCA’s application of ISPs’ liability, by not only including actual knowledge in the standard, but also requiring “sufficient awareness of facts and circumstances from which the infringing activity is apparent.”<sup>40</sup>

As Mongnani demonstrates, the EU DSM did not start from scratch, but was preceded by the European Digital Single Market Strategy (“DSM Strategy”).<sup>41</sup> The DSM Strategy began a strong trend towards algorithmic enforcement, and unlike the DMCA, many gaps had to be filled in the DSM Strategy. Many of these gaps related to the strategy’s core dilemma; namely how to handle removal and disable access to infringing content, which was ultimately left to be dealt with at the national level by the e-Commerce Directive. Hence, ISPs effectively voluntarily adopted the DMCA model of notice and take down as a standard practice.<sup>42</sup>

Although the DSM Directive is not the only legal measure produced by the EU to fill the e-Commerce Directive’s shortcomings, it is superior in its scope and implications.<sup>43</sup> As automation has been progressively replaced

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40. *Id.*

41. *See generally* European Commission, *A Digital Single Market Strategy for Europe*, COM (2015) 192 final (May 6, 2015); Mongnani, *supra* note 16.

42. Mongnani, *supra* note 16, at 8.

43. *See, e.g.*, Council Directive 2018/1808, Audiovisual Media Services Directive, 2018 O.J. (L 303/69) (amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the provision of audiovisual media services); Patryk Jaki, *Preventing the Dissemination of Terrorist Content Online*, European Parliament (Oct. 20, 2020), <https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-preventing-the-dissemination-of-terrorist-content-online> [<https://perma.cc/5USF-A2LE>] (explaining the regulation on preventing the dissemination of terrorist content online (‘TERREG’) European Parliament legislative resolution of 17 April 2019 on the proposal for a regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online). *See, e.g.*, European Commission, *Guidance on certain aspects of directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights*, COM (2017) 708 final (Nov. 29, 2017) (providing guidance on certain aspects of the Directive on enforcement of intellectual property rights (‘IPRs Enforcement

with autonomy in enforcing copyright law, technology takes over human discretion as autonomous systems learn how to adapt to the surrounding environments and transform into decision-makers.<sup>44</sup> The current phase of algorithmic Copyright enforcement is best demonstrated by Article 17 of the DSM, (previously, draft Articles 11 and 13), which survived a hefty opposition, criticizing its threat to a variety of issues. Articles 11 and 13 of the draft Directive, which moved to Articles 15 and 17 in the directive's final form, hold online platforms liable if copyright infringing material is uploaded. Article 11, referred to as the "link tax," generated concerns that it "would likely impede the free flow of news and other information vital to a democratic society, would harm journalists and others involved with news-related content, and would create uncertainty about the Article's coverage and scope."<sup>45</sup> However, a protest aroused by a group of 169 IP academics, which intended to send a statement to the EU Parliament was middle-of-the-road in comparison with Article 13, colloquially called the "upload filter" provision.<sup>46</sup> Pamela Samuelson and Kathryn Hashimoto thoroughly describe how dozens of European intellectual property scholars have written articles criticizing Article 13's chilling effect on online expression, culminating in the United Nation's Special Rapporteur for Freedom of Expression, David Kaye, drafting a letter which explained the inconsistency of Article 13 with the EU's commitments under international human rights instruments.<sup>47</sup> In addition to the five million people who signed a petition against its adoption, more than 145 civil society organizations and Internet pioneers signed an open letter urging the EU Parliament to drop Article 13 altogether.<sup>48</sup> Deep concern for freedom of expression on the Internet was integrated with widespread criticism over

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Guidance')); *Unfair commercial practices directive*, EUROPEAN COMMISSION, [https://ec.europa.eu/info/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive\\_en](https://ec.europa.eu/info/law/law-topic/consumer-protection-law/unfair-commercial-practices-law/unfair-commercial-practices-directive_en) [<https://perma.cc/RXL8-7UMU>] (providing guidance on unfair commercial practice ('UCPD Guidance')); European Commission, *Guidance on the Implementation /Application of Directive 2005/29/EC on Unfair Commercial Practices*, SWD (2016) 163 final (May 25, 2016).

44. Montagnani, *supra* note 16, at 19–20.

45. Pamela Samuelson & Kathryn Hashimoto, *The Enigma of Digital Property: A Tribute to John Perry Barlow*, 18 DUKE L & TECH. REV. 103, 108 (2019).

46. *Id.* at 106–08.

47. *Id.* at 109.

48. *Id.* at 110.



a variety of issues, ranging from the possibility that it would force most web services to stop users uploading legitimate content without authorization, to restricting users' privacy and free competition.<sup>49</sup> As summed up by Mongnani, the highly controversial provision introduced the onus of direct liability for ISPs regarding the content that they host.<sup>50</sup>

Although Article 17(4)(c) of the DSM also introduces the Notice and Takedown mechanism, Article 17's approach is relatively extreme in that the Notice and Takedown system precludes infringing work indefinitely.<sup>51</sup> Article 17 compels the adoption of filtering systems once ISPs receive a single notification of infringement.<sup>52</sup> If a licensing agreement for the content uploaded by third parties on the platform cannot be obtained from right-holders, Article 17 requires the detection and blockade of such content, lest ISPs be deemed liable for infringement.<sup>53</sup> "Absent an agreement, filtering systems become thus the standard to avoid liability."<sup>54</sup> In addition, Article

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49. *See generally id.* at 109–10.

50. Mongnani, *supra* note 16, at 6–7.

51. *See Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market*, at 16, COM (2021) 288 final (June 4, 2021) ("As regards the so-called 'stay down' obligation, Article 17(4)(c) second part requires service providers to make best efforts to avoid future uploads of the works or other subject matter notified by rightholders.").

52. *Id.* at 14–16.

53. *See generally YouTube Content ID: How It Works*, AIR MEDIA-TECH: AIR BLOG (June 15, 2021), <https://air.io/en/academy/youtube-content-id-how-it-works> [<https://perma.cc/2AZV-E82C>] (The YouTube Content ID (hereinafter: "the system") controversy is illuminating. The system not only protects creative work on YouTube, but it also enables copyright owners to earn from unauthorized uploads of their content. The mechanism of the system makes use of database of files submitted to the platform by copyright owners, against which videos uploaded to YouTube are scanned. Once a match is found between uploaded content on YouTube and an alleged copyright-protected work, the former receives a Content ID claim. On one hand, if after receiving a warning the alleged violator ignores it, the system will replace her stream with a static image and no sound, and if the matching continues, it will be terminated and the streamer may lose access to live features. On the other hand, the alleged violator can contest the claim.); *but see* Ernesto Van der Sar, *YouTube Content-ID Abusers Could Face Millions of Dollars in Damages*, TORRENTFREAK (May 10, 2019), <https://torrentfreak.com/youtube-content-id-abusers-could-face-millions-of-dollars-in-damages-90509/> [<https://perma.cc/F7BE-6L8H>] ("While there's no doubt that rightholders should be able to pursue legitimate claims, WatchMojo believes that many see the system as a revenue-generating opportunity. They simply issue thousands of frivolous claims, knowing that many won't be protested, even though there are clear arguments for fair use."); *see generally Takedown Hall of Shame*, ELECTRONIC FRONTIER FOUNDATION, <https://www.eff.org/takedowns> [<https://perma.cc/GQV9-HB3E>].

54. Mongnani, *supra* note 16, at 26.

17(4)(c), forever rules out an infringing work that was taken down, precluding such content from being reuploaded.<sup>55</sup> Hence, although the e-Commerce Directive was left intact, such measures are inconsistent with the safe harbor regime.

As demonstrated by Maria Lillà Montagnani and Alina Tropova, “the DSM detaches itself from previous case law, by stating that in this evaluation the means used by the intermediary do not matter anymore,” although “it was exactly the nature of the means used by the intermediaries that made the intermediary fall within or outside the safe harbor protection” in the *Court of Justice of the European Union* (“ECJ”) adjudication.<sup>56</sup> Thus, “transforming the negligence-based regime of liability introduced by the e-Commerce Directive into a system closer to a strict liability regime, which would in turn limit the effectiveness of the safe harbors.”<sup>57</sup> Oreste Pollicino and Giovanni De Gregorio thicken the plot by demonstrating how “the ECJ has already considered this system of filtering as non-compliant not only with Article 15 of the e-Commerce Directive but also with the EU systems of fundamental rights due to the imposition of general control over information hosted by ISPs.”<sup>58</sup> Therefore, as Mongnani argues, the algorithmic enforcement “erode[s] the shield offered to online intermediaries under the e-Commerce Directive, to the extent that we can say that although, within the DSM strategy safe harbors have not been directly revised, their indirect revision has certainly taken place.”<sup>59</sup> As summed up by Niva Elkin-Koren:

“Algorithmic copyright enforcement has tilted the balance of copyright law. It has changed copyright default: if copyrighted materials were once available unless proven to be infringing, today materials that are detected by algorithms are removed from public circulation unless explicitly authorized by the right holder”.<sup>60</sup>

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55. *Id.*

56. Montagnani & Trapova, *supra* note 37, at 302.

57. *Id.* at 302–03.

58. Pollicino & De Gregorio, *supra* note 22, at 251.

59. Mongnani, *supra* note 16, at 9.

60. Niva Elkin-Koren, *Fair Use by Design*, 64 UCLA L. REV. 1084, 1093 (2017).

Although, the doctrinal basis of Copyright, the e-Commerce Directive, and the DMCA were all unanimous in their intent to usher societal progress, the very opposite outcome occurred in spite of the Copyright Law paradigm, while simultaneously creating another facet of “The Law of the Horse”. As Jessica Litman argues, the preliminary idea of what is defined as a copy by Copyright Law since 1976 was “material objects . . . in which a work is fixed.”<sup>61</sup> Although this definition has not been revised by new legislation, the “algorithmic society” gave up the request for attachment to a material object. Contrary to Barlow’s perception of the digital files, because of their missing element of tangibility, the Law still requires society to sell wine without bottles.<sup>62</sup>

Alas, as “copy” is interpreted to include temporary and ephemeral instantiations, regardless of its definition by Copyright Law, copyright owners are allowed to sell their wine in what Litman would call “make-believe bottles”.<sup>63</sup> So:

Due to the ease of duplicating through technology, the rationale of fixation, which is still a basic requirement for copyright defense, collapses. Not only is its meaning utterly artificial in the digital era, but the inherent social need and the incentive that followed, were due to its costs of manufacturing and distribution on the one hand, and the need to avoid market failure on the other, if the system were to allow free riders to abuse such costly assets. Thus, an artificial scarcity was created in order to guarantee that both the creator and the distributor/publisher had enough control to encourage the continuous flow of creativity.”<sup>64</sup>

Unfortunately, as indicated by Karniel and Nessimyan, the maximalists who argue for the utmost protection of intellectual property had the upper

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61. Litman, *supra* note 19, at 132.

62. *Compare* Barlow, *supra* note 10.

63. Litman, *supra* note 19, at 132.

64. Mira Moldawer, “What is an Author” of a Persona? *The Taming of the Shrew—Rephrasing Publicity Right*, 20 VA. SPORTS & ENT. L. J. 156, 184 (2021); Yuval Karniel & Ehud Nessimyan, *Copyright in the Information Age: The Need for a New Balance between the Authors’ Rights and Access to Information*, 3 ALEI MISHPAT 191, 211–13 (2003).

hand on the minimalists who advocate for the opposite.<sup>65</sup> Ironically, in this aspect, Copyright Law's paradigm succumbed to technology. Thus the "Code is Law" theory evolved into a new "Law of the Horse" crafted by automation. As Lessig sums up the legal axis that begot para-copyright: "The modern economy of free speech is driven not by editors making judgments about what humans should understand, but by machines that craft speech based upon the behavior that is desired."<sup>66</sup> In the endeavor to decipher the para-copyright mechanism, the question posed is: what construes its legal infrastructure? As argued in the following section, the legal axis that begot the para-copyright derives from the Enlightenment era doctrinal vocabulary of Authorship.

### *C. Lifting the Veil: The Enlightenment Era Doctrinal Vocabulary of Authorship*

The DMCA and the DSM did not appear from thin air. Both pieces of legislation attempt to overprotect authorship. Thus, the DMCA and DSM's answer to the ancient dilemma "if value – then, right," is not only "if right, then, property right," but – "if right, then, an exclusive and sole property right," that suppresses its audience.<sup>67</sup> Why is such a paradigm taken as an inevitability of Copyright Law? The current para – copyright law vocabulary proves that eternal truths are often cemented by those who hold power.<sup>68</sup>

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65. Karniel & Nessimyan, *supra* note 64, at 197, 208–10, 214–15.

66. Lawrence Lessig, *On the Issues With "Free Speech"*, MEDIUM (May 15, 2021), <https://medium.lessig.org/on-the-issues-with-free-speech-e4308dc0ee7d> [https://perma.cc/F3WV-VYG9].

67. Elkin-Koren, *supra* note 60, at 1093; *see generally* Mongnani, *supra* note 16.

68. *See* PHILIP STOKES, PHILOSOPHY: 100 ESSENTIAL THINKERS 187, 187 (Paul Whittle ed., Enchanted Lion Books 2006) (2002) ("The theme that underlies all Foucault's work is the relationship between power and knowledge, and how the former is used to control and define the latter. What authorities claim as 'scientific knowledge' are just means of social control. Foucault shows how, for instance, in the eighteenth century 'madness' was used to categorize and stigmatize not just the mentally ill but the poor, the sick, the homeless and, indeed, anyone whose expressions of individuality were unwelcome."); *see generally* MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (Richard Howard trans., 1965) (1961); ROLAND BARTHES, MYTHOLOGIES (Annette Lavers trans., 1972) (1957) (explaining the general thesis about how new narratives reorganized post-war France's consumer culture through manufacturing collective cultural values, while abolishing the old narratives, yet, creating the belief that the new one, are the real "metalanguage", namely, the fabric of the myth, that was always present, in order to maintain the status quo).

Therefore, the question posed is: what construes this vocabulary and has it evolved?

Authorship in its current essence is relatively a new concept that was developed during the Enlightenment era.<sup>69</sup> Until then, not only were authors considered as mere craftsmen, but during Copyright's inception, when Copyright laws replaced a market that was initially regulated by a system of minting privileges at the start of the 19th century, such a system was meant to defend the interests of publishers and booksellers, as demonstrated by the Statute of Anne.<sup>70</sup> It is no wonder that the most crucial precedents of Copyright Law theory, such as *Millar v. Taylor*, and *Donaldson v. Beckett* were meant to solve the disputes of those professions, whereas the author of the creative work in question merely acted as an understudy.<sup>71</sup> Sir John Dalrymple, who argued for the appellant in *Donaldson v. Beckett* sums up this phenomena in his famous quote: "The term Literary Property, he in a manner laughed at."<sup>72</sup>

The irony of history is that although the "if value, then, property right" dilemma can be traced to *Millar v. Taylor* and *Donaldson v. Beckett*, the Enlightenment era initial vocabulary that enhanced this premise by creating

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69. See generally Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'*, 17 EIGHTEENTH-CENTURY STUDIES 425 (1984).

70. See generally *id.* (for the construction of the "Author"); MAURIZIO BORGHI, COPYRIGHT AND THE COMMODIFICATION OF AUTHORSHIP IN 18TH AND 19TH CENTURY EUROPE, OXFORD RESEARCH ENCYCLOPEDIAS, LITERATURE 116 (2018); THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., Duke Univ. Press 1993) (hereinafter: "THE CONSTRUCTION OF AUTHORSHIP"); JAMES BOYLE, SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (MLA 8th ed., APA 7th ed. 199; see also FISCHMAN-AFORI, *supra* note 37, at 342–44 (for the privilege of system pre-Copyright Law); Lior Zemer, *The Conceptual Game in Copyright*, 28 HASTINGS COMM. & ENT. L.J. 409, 420 (2006) (for the Statute of Anne 1710 as the "exemplar" of copyright law followed by every common law jurisdiction); MARK ROSE, THE AUTHOR IN COURT: POPE V. CURLL (1741), THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 211, 223–24 (Martha Woodmansee & Peter Jaszi ed., 1994) (demonstrating that the Statute of Anne, which is considered the first copyright law in history, was not taken into account even the basic distinction between the tangible property in which letters and texts are fixed, and the intangible essence of what is expressed through the means of the former, thus rendering copyright laws their *raison d'être* ever since).

71. See generally *Millar v. Taylor*, 4 Burr, 2303, Judgment (King's Bench 20 Apr. 1769); *Donaldson v. Becket*, (1774) 1 Eng. Rep. 837 (HL); 17 Cobbett's Parl. Hist. 953 (1813); see ROSE, *supra* note 70 at 113–14 (regarding James Thomson – "The Seasons," which was the cause for both *Millar v. Taylor* and *Donaldson v. Beckett*).

72. JOSEPH LOEWENSTEIN, THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT 14 (Univ. of Chi. Press ed., 2002).

the phenomenon of the author was not meant to focus on the author as a proprietor, but as an agency whose primary relationship is with her audience through the speech addressed by the former to the latter.<sup>73</sup> We tend to think about the Enlightenment era as the embodiment of the absolute truth through the doctrinal Categorical Imperative from which derives the concept of absolute originality in charge of one sole initial creator.<sup>74</sup> However, humanity's impulse to seek a rational, absolute truth as the ultimate solution for its perils is as ancient as its history. Hence, Plato's ultimate exclusive truth in *Sophist* goes hand-in-hand with Descartes, who believes in humans as rational subjects whose capacity for thinking and knowledge makes them fit to dominate nature in their unstoppable path to progress.<sup>75</sup> Hence, René Descartes' premise in his quest for an ultimate truth:

But because I wished at that time to concentrate on the pursuit of truth, I came to think that I should do the exact opposite and reject

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73. BORGHI, *supra* note 70, at 8, 9, 12 (As expressed by Immanuel Kant: "Book is a writing, which represents a discourse addressed by someone to the public, through visible signs of speech. [...] He who speaks to the public in his own name is called the author (auctor); he who addresses the writing to the public in the name of the author is the publisher. [...] The publisher, again, speaks, by the aid of the printer as his workman (operarius), yet not in his own name, for otherwise he would be himself the author, but in the name of the author; and he is only entitled to do so in virtue of a mandate (mandatum) given him to that effect by the author." As Borghi demonstrates, although the primary relationship, that is supposed to underly and regulate the series of secondary relationships from which they sprang, namely, between the author and the publisher; between the publisher and the public; between the publisher and the printer, "from value to property right" principle shifted focus entirely, "as a result of which the principle of exchange on the basis of sales, which had previously concerned only one – and non-essential – facet of the author/public relationship, is now not only central to the relationship but composes its totality."); *see also* ROSE, *supra* note 70, at 5, 7, 115–16, 121 (regarding the linkage between originality and property).

74. *See generally*, FOUCAULT, *supra* note 68; STOKES, *supra* note 68, at 187 ("The theme that underlies all Foucault's work is the relationship between power and knowledge, and how the former is used to control and define the latter. What authorities claim as 'scientific knowledge' are just means of social control. Foucault shows how, for instance, in the eighteenth century 'madness' was used to categorize and stigmatize not just the mentally ill but the poor, the sick, the homeless and, indeed, anyone whose expressions of individuality were unwelcome."); BARTHES, *supra* note 68 (The general thesis is how new narratives reorganized post-war France's consumer culture through manufacturing collective cultural values, while abolishing the old narratives, yet, creating the belief that the new one, are the real "metalanguage," namely, the fabric of the myth, that was always present, in order to maintain the status quo).

75. PLATO, *SOPHIST* (Benjamin Jowett, trans., Project Gutenberg rev. ed. 2013) (ebook), <https://www.gutenberg.org/files/1735/1735-h/1735-h.htm> [<https://perma.cc/P867-DXG5>]; *see generally* RENÉ DESCARTES, A DISCOURSE ON THE METHOD OF CORRECTLY CONDUCTING ONE'S REASON AND SEEKING TRUTH IN THE SCIENCES, Part Four, 28 (Ian Maclean trans., Oxford University Press 2006) (1637) (hereinafter: "A Discourse on the Method").

as completely false everything in which I could detect the least doubt, in order to see if anything thereafter remained in my belief that was completely indubitable.<sup>76</sup>

Naturally, an inquiry whose premise is a completely indubitable truth, utterly attributed to the capacity of rational thinking, evolves to end in finding one, asserting “I am thinking therefore I exist,” to be an unshaken principle.<sup>77</sup> This is a far cry from the general method of Skepticism and Relativism as offered by Michel De Montaigne in his *Apology for Raymond Sebond*, who denies not only the very notion of the human possibility to grasp an absolute knowledge, but any ethnocentrism that claims “one’s culture [as] superior to others and therefore the standard against which all other cultures, and their moral beliefs and practices, should be measured.”<sup>78</sup>

An absolute truth suffers no shadows and its vocabulary is binary and hierarchical. As Michel Foucault well predicted its legal outcome as implied in the Enlightenment era, that enhanced this vocabulary.<sup>79</sup>

A law which excludes all dialectic and all reconciliation; which establishes, consequently, both the flawless unity of knowledge and the uncompromising division of tragic existence; it rules over a world without twilight, which knows no effusion, nor the attenuated cares of lyricism; everything must be either waking or dream, truth or darkness, the light of being or the nothingness of shadow. Such a law prescribes an inevitable order, a serene division which makes truth possible and confirms it forever.

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76. DESCARTES, *supra* note 75, at 28.

77. *Id.* (“But immediately afterwards I noted that, while I was trying to think of all things being false in this way, it was necessarily the case that I, who was thinking them, had to be something; and observing this truth: I am thinking therefore I exist, was so secure and certain that it could not be shaken by any of the most extravagant suppositions of the sceptics, I judged that I could accept it without scruple, as the first principle of the philosophy I was seeking” (notes omitted).)

78. MICHEL DE MONTAIGNE, APOLOGY FOR RAIMOND SEBON, IN *ESSAYS OF MICHEL DE MONTAIGNE XII* (William Carew Hazlitt, ed., Charles Cotton, trans., Project Gutenberg 2016) (1877) (ebook), <https://www.gutenberg.org/files/3600/3600-h/3600-h.htm> [<https://perma.cc/N36E-5ERS>]; Christopher Edelman, *Michel de Montaigne (1533-1592)*, INTERNET ENCYCLOPEDIA OF PHILOSOPHY, <https://iep.utm.edu/montaigne/> [<https://perma.cc/6PVX-67Q4>].

79. FOUCAULT, *supra* note 68, at 109–10.

If for Descartes, even erroneous thinking was enough to establish the supremacy of “the flawless unity of knowledge,” Immanuel Kant’s “Categorical Imperative” went further in its perception of the human will as subordinate to rationalism, which begot his philosophical pivot.<sup>80</sup> Furthermore, as Kant himself admitted both his Humanity Formula and Autonomy Formula require not only free rational thinking, but obedience to the Authorities.<sup>81</sup> The Enlightenment ideology was framed by its chief designer as “Argue as much as you please, but obey!”<sup>82</sup> Kant’s perception of the author was further developed by Johann Gottlieb Fichte, who enhanced the justifications for the Author as the quintessence of authorship, and Georg Wilhelm Friedrich Hegel, who tied creativity to the author’s extension of her inner will, intellectual process and individuality with property right.<sup>83</sup> Thus, leaving us not only with the legacy of the author as the agonized genius, but with the

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80. Compare *Id. and* DESCARTES, *supra* note 75, at 28, with Robert Johnson & Adam Cureton, *Kant’s Moral Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE (Jan. 21, 2022), <https://plato.stanford.edu/archives/fall2022/entries/kant-moral/> [<https://perma.cc/89MB-4ZAQ>].

81. For the favored value of obedience to the Authorities in the Enlightenment vocabulary, especially in regard to Frederick the Great, see IMMANUEL KANT, *What Is Enlightenment?* Translated by Mary C. Smith, <http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html> [<https://perma.cc/6UJ6-4AML>]: (“When we ask, Are we now living in an enlightened age? the answer is, No, but we live in an age of enlightenment. As matters now stand it is still far from true that men are already capable of using their own reason in religious matters confidently and correctly without external guidance. Still, we have some obvious indications that the field of working toward the goal [of religious truth] is now opened. What is more, the hindrances against general enlightenment or the emergence from self-imposed nonage are gradually diminishing. In this respect this is the age of the enlightenment and the century of Frederick [the Great].” Kant believed that obedience can be amalgamated both with his Humanity Formula, that according to Johnson and Cureton); *id.* (“states that we should never act in such a way that we treat humanity, whether in ourselves or in others, as a means only but always as an end in itself” and with his Autonomy Formula. Namely, “The Idea of the will of every rational being as a will that legislates universal law.”); *id.* (For Enlightenment is totalitarian as only a system can be.”); see MAX HORKHEIMER AND THEODOR W. ADORNO, *DIALECTIC OF ENLIGHTENMENT* 4-5, 23 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., Stan. Univ. Press 2002) (1947) (hereinafter: *DIALECTIC OF ENLIGHTENMENT*) (“The expulsion of thought from logic ratifies in the lecture hall the reification of human beings in factory and office.”).

82. Kant, *supra* note 81 (“In some affairs affecting the interest of the community a certain [governmental] mechanism is necessary in which some members of the community remain passive. This creates an artificial unanimity which will serve the fulfillment of public objectives, or at least keep these objectives from being destroyed. Here arguing is not permitted: one must obey.”).

83. See BOYLE, *supra* note 70, at 55 (for the analysis of Fichte’s contribution); see generally Paul Redding, *Georg Wilhelm Friedrich Hegel*, STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2020), <https://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=hegel&archive=win2020> [<https://perma.cc/632Z-X49U>] (providing a further discourse on Hegel).



sole and exclusive control of Authorship and Originality, as the Enlightenment binary vocabulary does not leave room to Alterity, neither in thinking, nor in creativity.<sup>84</sup>

As Boyle demonstrates, originality, as the outcome of the romantic approach to authorship, “became the watchword of artistry and the warrant for property rights.”<sup>85</sup> Although originality evolved into different justifications in Copyright Law, also referred to as the incentive approach, the Lockean/Labor approach and the personhood approach, all share the monolithic vocabulary of the Enlightenment age: one absolute truth allows a narrow perception of authorship that can be granted to one author only as the sole custodian of originality.<sup>86</sup> This Cyclopean approach is naturally favored by copyrights holders who want to enlarge their control and power. As already discoursed by John Tehranian, the evolution of copyright law was characterized by enlarging the power of the initial creator at the expense of

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84. Mira Moldawer, *Myths and Clichés: The Doctrinal Myopia of Publicity Right*, UIC REV. INTELL. PROP. L. (forthcoming 2022) (“The Enlightenment unifying principle, that sees all different component as the basis of a single principle is easily understood in its exclusive concept of Authorship: One transcendental truth operates in binary language: If one is crowned to be ‘The Author,’ then no one else is entitled to Authorship. If one genius is the sole proprietor of Originality, then there is no inspiration for others, but plagiarism.”).

85. Boyle, *supra* note 70, at 54; *see also* Oren Bracha, *The Emergence and Development of United States Intellectual Property Law*, 243–245 THE OXFORD HANDBOOK OF INTELL. PROP. L. (2018) (“Originality came to be seen as a fundamental, even constitutionally mandated, feature of copyright.” Unlike the previous perception of copyright as restricted to verbatim reproduction in print, thus, entitling authors to reprint a text, but not to own an intellectual object.). Orit Fischman-Afori, *The Evolution of Copyright Law and Inductive Speculations as to Its Future*, 19 J. INTELL. PROP. L. 231, 250–53 (2012) (detailing the ever-growing concept of “originality” as expanding the scope of exclusivity enhanced by the Berne Convention and the TRIPS agreement); Moldawer, *supra* note 64, at 169–70 (explaining the indirect Originality Narrative and its connection to moral rights *see*).

86. Wendy J. Gordon & Robert G. Bone, *Copyright*, in ENCYCLOPEDIA OF LAW & ECONOMICS 189, 190–91 (A. Marciano & Giovanni B. Ramello eds., 2018) (classifying the different approaches to Copyright Law as moral (i.e., the labor and the personhood approaches and instrumental and the incentive approach), for which they supply ample doctrinal ground and for authorship justifications in copyright law); *see* LIOR ZEMER, THE IDEA OF AUTHORSHIP IN COPYRIGHT 12–14, 16 (1st ed. 2007); Guy Pessach, *Justifying Copyright Law*, 31 HEBREW UNIV. L. REV. 359, 361–68 (2000); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 288–96 (Peter Laslett ed., Cambridge Univ. Press 1988) (explaining the personhood approach); *see generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (explaining the direct and the indirect Originality narrative); *see* Moldawer, *supra* note 64, at 167–70. *See generally*, James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CALIF. L. REV. 1413, 1468 (1992) (summarizing that “[t]he author is the maker and destroyer of worlds, the irrepressible spirit of inventiveness whose restless creativity throws off invention after invention. Intellectual property is merely the token awarded to the author by a grateful society.”).

the previous artistic freedom that previously, included transformative (derivative) uses of copyrighted works.<sup>87</sup> Namely, independent works of authorship, which were traditionally non-infringing works, such as translations under the Copyright Act of February 3, 1831, changed their status under the Cyclopean approach of the new Copyright Law into derivative, thus rendering the same works to be infringing<sup>88</sup> The same phenomenon recurred before the DMCA was enacted, due to massive pressure from the media rights holders.<sup>89</sup> Lessig reaches the same conclusion: big money for lobbyists is the main factor that shifts the already fragile balance between the author and her public in favor of strong right-holders, at the expense of the users and the public domain.<sup>90</sup>

Long before Foucault explored the mechanism of power disguised as an eternal truth, Montaigne, his predecessor in skepticism, commented on the law: “There is nothing so grossly and widely and ordinarily faulty as the laws.”<sup>91</sup> As Jacques Derrida observed, borrowing Montaigne’s thinking about the “mystical foundation of authority” as embedded in any legal system, “the same “mystical” limit will reappear at the supposed origin of said conditions, rules or conventions, and at the origin of their dominant interpretation.”<sup>92</sup> So, not only the Enlightenment era enabled the totalitarian crises of the twentieth century as criticized by Max Horkheimer and Theodor W. Adorno, but this regime is no different neither from its predecessors, nor from its successors; violent interruption is at the bottom of power, that begets rights and knowledge – not a rational Categorical Imperative.<sup>93</sup> In regard to

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87. John Tehranian, *Towards a Critical IP Theory: Copyright, Consecration, and Control*, 2012 BYU L. REV. 1237, 1249–50, 1253–55 (2012).

88. *Id.* at 1249–54; Christina Bohannon & Herbert J. Hovenkamp, *IP and Antitrust: Reformation and Harm*, 51 B.C. L. REV. 905, 976–77 n.479 (2010).

89. See Aridor-HersHKovitz, *supra* note 25, at 2 (explaining the role of the entertainment industry as the main trigger to the DMCA).

90. LAWRENCE LESSIG, REMIX, MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 294 (2008).

91. de Montaigne, *supra* note 78, at 622.

92. JACQUES DERRIDA, FORCE OF LAW: THE “MYSTICAL FOUNDATION OF AUTHORITY”, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 14 (Drucilla Cornell et al. eds., 1992).

93. HORKHEIMER AND ADORNO, *supra* note 81, at 4; DERRIDA, *supra* note 92, at 14 (“Since the origin of authority, the foundation or ground, the position of the law can’t by definition rest on anything but themselves, they are themselves a violence without ground”. I refer to Montaigne,

the great catastrophes that followed the Enlightenment era, that rendered its vocabulary naïve or even fraudulent, Derrida and Foucault seem to predict our next section, that aims to understand the evolution of the audience, while adapting a contradictory vocabulary.

### III. THE EVOLUTION OF THE AUDIENCE AXIS: FROM KING OEDIPUS TO USERS GENERATED CONTENT (UGC)

The dialectic of the “algorithmic society” created a dazzling contradiction. On one hand, the legal axis diminished users’ habitat and created the “para-copyright” as a technological “law of the horse” that overcomes Copyright Law’s premise at the expense of the public domain. On the other hand, the creativity of the users seems to flourish despite Samuel Johnson’s famous quote “[n]o man but a blockhead ever wrote, except for money” and the Incentive approach that dominates Copyright adjudication.<sup>94</sup> However, the involvement of the public as an active and participating audience is not new, although greatly enhanced by our new communicative media. Hence, although it seems that fandom and fan fiction are exclusive concepts of our era, this is not a reflection of reality. Paraphrasing Fredric Jameson, the notion of the “cultural dominant” notion is correlative to the architecture of the relevant means of expression available for its users, through which they can take a crucial part in creating their culture.<sup>95</sup>

Albeit the concept of “The Culture Industry”, coined by Horkheimer and Adorno, that regarded the public as a flock of passivity, ready to be

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although Derrida ties Montaigne and Pascal together in regard to “the mystical foundation of authority”, as not only Pascal cites Montaigne’s initial “mystical foundation of authority”, without crediting his source, but the latter influenced Foucault in his analysis how what is considered to be the truth or its evidence, is the outcome of the interests of those in power); *see also supra* note 68.

94. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994); *see generally* Gordon & Bone, *supra* note 86 (explaining the doctrinal ground of the incentive approach); *but see* REBECCA TUSHNET, *USER-GENERATED DISCONTENT: TRANSFORMATION IN PRACTICE*, 31 *Colum. J.L. & Arts* 101, 106 (2008) (“The drive to assimilate every creative act to the formal market economy is a mistake both of fact and of value. Money isn’t everything, and it can prove destructive to particular creative practices.”).

95. FREDERIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* 3–4 (1991) (“Hegel’s legendary “end of art”—the premonitory concept that signaled modernism’s supreme anti- or transaesthetic vocation to be more than art (or religion either, or even “philosophy” in some narrower sense)—now modestly simmers down into the “end of the work of art” and the arrival of the text”. Whereas Jameson ties the “cultural dominant” notion with socio-economical state of society, following the Marxist tradition, this chapter dwells on the communicative media available to the public as creating and reflecting of its parallel cultural forms.”).

molded, there is room for doubt if their zealous criticism of the Enlightenment as mass deception, was not developing in itself into a total Categorical Imperative.<sup>96</sup> Such an imperative recognized only one truth, thus, ignoring the possibility of different outcomes to the same phenomenon. Horkheimer and Adorno denied Kantian schematism, in which “a secret mechanism within the psyche performed immediate data to fit them into the system of pure reason.”<sup>97</sup> However, Horkheimer and Adorno created their own schematism, assuming the public to be as homogeneous as the Enlightenment ideology, identical to one another and mere components in the mechanism of totalitarian bureaucracy, which see all human beings as numbers.<sup>98</sup> Some scholars believe that the shift from print typography to the visual mediums like television not only followed “The Culture Industry” concept, but worsened it.<sup>99</sup> So, Neil Postman, while taking Marshall McLuhan’s aphorism “the medium is the message” further, claiming that “the medium is the metaphor”, argues that the outcome of a medium to convey knowledge as appropriate to its essence, culminates in turning the viewers into a mere passive role.<sup>100</sup>

An opposite perception is offered by Stuart Hall who saw the media as a never ending battlefield and “popular culture as a contested terrain in which individuals make and establish their own cultural meanings, and, in the process, resist and even subvert the preferred meanings that are generated and circulated by the culture industries.”<sup>101</sup> John Fiske took Hall’s theory further

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96. HORKHEIMER AND ADORNO, *supra* note 81, at 7–9.

97. *Id.* at 98.

98. *Id.* at 4–6; *id.* at 4 (“For the Enlightenment, only what can be encompassed by unity has the status of an existent or an event; its ideal is the system from which everything and anything follows.”).

99. *See generally* NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* (20th Anniversary ed., 1985) (ebook).

100. *Id.* at 8–9.

101. David Tan, *Beyond Trademark Law: What the Right of Publicity Can Learn From Cultural Studies*, 25 *CARDOZO ARTS & ENT. L. J.* 913, 942 (2008). *See generally* STUART HALL, *ENCODING/DECODING*, IN *CULTURE, MEDIA, LANGUAGE: WORKING PAPERS IN CULTURAL STUDIES, 1972-79* (Stuart Hall, Dorothy Hobson, Andrew Lowe, and Paul Willis eds., 1980) (ebook); STUART HALL, *THE SPECTACLE OF THE “OTHER”*, IN *REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES* 270 (Stuart Hall ed., 1997) (ebook); Moldawer, *Myths and Clichés: The Doctrinal Myopia of Publicity Right*, *supra* note 84.

by coining the term “semiotic democracy” to describe the interaction between the codes and its unpredictable audiences that recreate them anew.<sup>102</sup> The term “audience” is meant by Fiske to include gender, age, and race as additional and challenging axes to Pierre Bourdieu’s model, which limits itself to the narrower scope of the economic and cultural capital possessed (the vertical axis) and the economic or cultural capital (the horizontal axis).<sup>103</sup> Even during the Hollywood golden age, no matter how powerful the studios were, they could not stop the audience from recreating their own preferred images of the greatest stars, thus contradicting the “official” codes.<sup>104</sup> This phenomenon is best manifested in regard to Greta Garbo, Marlene Dietrich (the ultimate femmes fatales) and Judy Garland (the neighbor’s daughter), transcoding them to be urban lesbian and gay icons, respectively.<sup>105</sup>

Many Postmodernist scholars challenged the idea of sole authorship, even before it culminated in the creation of the “Para - Copyright” Law, as described in the previous section.<sup>106</sup> Although they differ in their approach, they all use the Postmodernist query that defied the monolithic perception of the Enlightenment era. Therefore, this article will endeavor to locate the evolution of the audience through the relevant media design that enabled the

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102. JOHN FISKE, TELEVISION CULTURE 235, 239 (1987) (ebook); JOHN FISKE, THE CULTURAL ECONOMY OF FANDOM, IN THE ADORING AUDIENCE: FAN CULTURE AND POPULAR MEDIA, 31–34 (Lisa A. Lewis ed., 1992); PIERRE BORDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE, 131–132 (Richard Nice trans., Harv. University Press 1984) (explaining Fiske agrees with the model that cultural capital is acquired by the educational system and consists of the knowledge and critical appreciation of a particular cultural ‘canon,’ but argues that it should not be narrowed only to BOURDIEU’s “two-dimensional map in which the vertical, or north–south, axis records the amount of capital (economic and cultural) possessed, and the horizontal, or east–west, records the type of capital (economic or cultural)”). Thus, the model should be enlarged to include gender, age and race as additional axes).

103. See generally BORDIEU, *supra* note 102; FISKE, *supra* note 102, at 31–33.

104. See ANDREA WEISS, VAMPIRES AND VIOLETS: LESBIANS IN THE CINEMA 32–39 (1992) (contradicting the “official” codes in regard to Garbo and Dietrich). See generally RICHARD DYER, HEAVENLY BODIES: FILM STARS AND SOCIETY (2d ed. 2003) (or contradicting the “official” codes in regard to Garland); Rosemary J. Coombe, *Authorizing the Celebrity: Publicity Rights, Postmodern Politics, and Unauthorized Genders*, 10 CARDOZO ARTS & ENT. L. J. 365, 380 (1992); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 194–95 (1993) (detailing analysis of coding/recoding Garland image).

105. WEISS, *supra* note 104, at 32–39; DYER, *supra* note 104, at 137–38; Coombe, *supra* note 104, at 380; Madow, *supra* note 104, at 194–95.

106. See Moldawer, *supra* note 64, at 164–67 (for the major approaches to Authorship and the public due share in it).

audience in major stages of Western culture to convey creativity, as necessary to the essence of the “cultural dominant” media in each stage. So, the new question posed is: was the audience ever as passive as “Para-copyright” Law assumes?

### A. *The Broken Commandments of the Enlightenment Era*

Postmodernist approaches, although offering an ample and heterogeneous variety of schools and theories, remain homogeneous in their rejection of one monolithic ideal or idea, from which only one exclusive and superior categorical imperative meaning or authority can spring, thus, omitting any other narrative.<sup>107</sup> Not only do Postmodernist approaches negate the concept of one eternal truth, independent of historical and cultural nexus, but they also challenge the binary dichotomy between reality and its cultural representations.<sup>108</sup> Therefore, critically, culture was perceived as a mechanism that manufactures power and representations, and, essentially, semiotic in its nature.<sup>109</sup> As Clifford Geertz deciphers what Culture is:

Believing...that man is an animal suspended in webs of significance he himself has spun...I take culture to be those webs, and the analysis of it to be therefore not an experimental science in search of law but an interpretative one in search of meaning. It is

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107. See generally Roland Barthes, *The Death of the Author*, in THREE ESSAYS (Aspen 1967), <https://www.ubu.com/aspen/aspen5and6/index.html> [<https://perma.cc/SYT9-59SR>]; MICHAEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE 115 (Donald F. Bouchard & Sherry Simon trans., Donald F. Bouchard ed., 1977) (pointing to his famous question that studies the relationship between author, text, and reader, namely, “What Is an Author?”).

108. See generally David Gurevith & Dan Erev, *Postmodernism (in Philosophy)*, in THE ENCYCLOPEDIA OF IDEAS, <https://haraayonot.com/idea/postmodernism-in-philosophy/> [<https://perma.cc/R3BU-VQ2Z>].

109. See generally MICHEL FOUCAULT, ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE (Alan Sheridan trans., 1972) (1971); MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1970); MICHEL FOUCAULT, WHAT IS ENLIGHTENMENT?, IN THE FOUCAULT READER (Rabinow P. ed. 1984); HOMI K. BHABHA, THE LOCATION OF CULTURE (Routledge 1994); Louis Althusser, *Ideology and Ideological State Apparatuses*, in LENIN AND PHILOSOPHY AND OTHER ESSAYS (Ben Brewster, trans., New York: Monthly Review Press 1971) (dealing with the politicization of the aesthetic); Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS (Harry Zohn, trans., Hannah Arendt, ed., New York: Schocken Books 1969).

explication I am after, construing social expression on their surface enigmatical.<sup>110</sup>

The rejection of the enlightenment as a whole, and one-dimensional cultural perception in particular, was enacted by Postmodernist approaches in three areas that disassemble the centralistic keystone viewpoint of the enlightenment era. Namely, the abolishment of the meta/grand narratives, the dismantlement of cultural hierarchy and the insertion of post-Structuralism as a doctrinal vehicle that reconstructs Authorship.<sup>111</sup>

The abolishment of “metanarratives” or “grand narratives” derived from the fall of the great illusion that motivated them, for example, the messianic dogma in scientific progress and rationalism, hand in hand with political freedom, human solidarity or aesthetic redemption through Art vis-à-vis the great catastrophes of Fascism and Totalitarianism.<sup>112</sup> These circumstances caused the “postmodern condition” as coined by Jean-François Lyotard, to doubt the totalizing nature that lies at the bottom of any universal schema enhanced by metanarratives.<sup>113</sup> Hence, the dismantlement of the meta/grand narratives should morph into ‘petits récits’, or more modest and “localized” narratives competing with each other, in order to allow diversity and heterogeneous perception of humanity.<sup>114</sup> Understanding humanity after the death of the metanarrative implies a different perception of the modern subject, that unlike the enlightenment era premise, is not motivated by rationalism, but by fantasies and desires, and cannot be diminished into a mere thinking subject.

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110. CLIFFORD GEERTZ, *Part I, in* THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 5 (New York: Basic Books 1973).

111. *See generally* Gurevith & Erev, *supra* note 108.

112. *See generally* J.F. LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE xxiv (Geoff Bennington & Brian Massumi trans., 1984) (1979) (“Simplifying to the extreme, I define *postmodern* as incredulity toward metanarratives.”).

113. *Id.* at 60 (“We no longer have recourse to the grand narratives—we can resort neither to the dialectic of Spirit nor even to the emancipation of humanity as a validation for postmodern scientific discourse. But as we have just seen, the little narrative [*petit récit*] remains the quintessential form of imaginative invention, most particularly in science.”).

114. *Id.* at 37 (“The decline of narrative can be seen as an effect of the blossoming of techniques and technologies since the Second World War, which has shifted emphasis from the ends of action to its means...”); *id.* at 60 (Explaining Medawar’s perception of the scientist as “before anything else a person who tells stories,” Lyotard concludes that “the only difference is that he is duty bound to verify them.”).

The main doctrinal vehicle challenging the logocentric perception of Authorship is the text deconstruction, originated by Derrida, that defies the text “closeness”.<sup>115</sup> Thus, liberating other voices, intrinsically embedded in the text, to get their fair share. The text deconstruction never obeys so-called borderlines, as they are constantly redefined and negotiated by readers, who reconstruct it anew, as well as its relation to other texts.<sup>116</sup> These polyphonic dynamics depend on the cultural and social nexus of each reader, thus engaging her in the craft of Authorship. Therefore, the relationship between text and meaning are always dynamic and rotating, unlike the classic perception of language and meaning as ideally static.<sup>117</sup>

Once the great enlightenment axiom of an eternal absolute truth was challenged, two inevitable catastrophes followed: the representation catastrophe and the origination catastrophe.<sup>118</sup> As Barton Beebe points out, semiotics has followed two independent traditions including the ‘linguistic’ tradition of Ferdinand de Saussure, and the ‘logical’ tradition of Charles Sanders Peirce.<sup>119</sup> However, although they offer different semiotic models, they both understood semiology as a science that translates all facets of culture to everything that can be taken as a sign.<sup>120</sup> Their models simultaneously morphed into Postmodernist critical vocabulary and into Intellectual Property Law basic concepts as well.<sup>121</sup>

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115. See generally JAQUES DERRIDA, *OF GRAMMATOLOGY*, (Gayatri Chakrovorty Spivak trans., 1997).

116. See generally JULIA KRISTEVA, *DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART* (T. Gora et al. trans., 1980).

117. DERRIDA, *supra* note 115, at 216-17.

118. See generally Gurevith & Erev, *supra* note 108.

119. Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 *UCLA L. REV.* 621, 629 (2004).

120. FERDINAND DE SAUSSURE, *Course in General Linguistics*, 16 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans. 1959) (1916) (“A science that studies the life of signs within society is conceivable; it would be a part of social psychology and consequently of general psychology; I shall call it semiology”); see also 1 CHARLES SANDERS PEIRCE, *On Thought in Signs*, in *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE*, 151 (Charles Hartsborne & Paul Weiss eds., 1934) (1931).

121. See generally David Tan, *The Lost Language of the First Amendment in Copyright Fair Use: A Semiotic Perspective of the ‘Transformative Use’ Doctrine Twenty-Five Years On*, 26 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 359 (2016); Sonia K. Katyal, *Semiotic Disobedience*, 84 *WASH. U. L. REV.* 489, 513 (2016); David Tan, *Semiotics and the Spectacle of Transformation*



Saussure's influential premise is the perception of language as a system of signs that can acquire a meaning only because of their intrinsic contrast with each other. Thus:

[I]n language there are only differences. Even more important: a difference generally implies positive terms between which the difference is set up; but in language there are only differences *without positive terms*. Whether we take the signified or the signifier, language has neither ideas nor sounds that existed before the linguistic system, but only conceptual and phonic differences that have issued from the system. The idea or phonic substance that a sign contains is of less importance than the other signs that surround it. [. . .] A linguistic system is a series of differences of sound combined with a series of differences of ideas; but the pairing of a certain number of acoustical signs with as many cuts made from the mass of thought engenders a system of values. . . .<sup>122</sup>

Therefore, "The axial idea in semiotic thought is difference, which it holds to be prior to identity and to meaning. To view the world through the semiotic lens is to view things for what they are not rather than for what they are."<sup>123</sup> Saussure's dyadic model of a sign consists of 'the signifier' (a linguistic form, e.g.: a word; a 'sound-image') and 'the signified' (the meaning of the form).<sup>124</sup> Unlike Peirce's triadic model, the 'the signifier' does not correspond to the physical object it names (the referent in Peirce's model), but rather, to its psychological concept.<sup>125</sup> Hence, the linguistic sign gains its meaning from the psychological association between the signifier and the signified. "The linguistic sign unites, not a thing and a name, but a concept and a sound- image."<sup>126</sup> The sign itself is arbitrary, as "it follows no law

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*in Copyright Law*, 30 INT'L J. FOR SEMIOTICS L. 593, 600-01 (2017); Ángel Alonso-Cortés, *A Case Study of Semiotic Distinctiveness in Brand Names*, 29 INT'L J. FOR SEMIOTICS L. 635 (2016).

122. DE SAUSSURE, *supra* note 120, at 120.

123. Beebe, *supra* note 119, at 630.

124. DE SAUSSURE, *supra* note 120, at 67.

125. See Beebe, *supra* note 119, at 633-36 (explaining the difference between Saussure's dyadic model and Peirce's triadic sign model).

126. DE SAUSSURE, *supra* note 120, at 66.

other than that of tradition, and because it is based on tradition, it is arbitrary."<sup>127</sup> Saussure's binary oppositions' theory introduced the important dichotomy of *Langu*, the abstract and invisible layer of a language, as opposed to the *Parole*, namely, the actual speech that we use in real life.<sup>128</sup> Consequently, "*Langu* is structure; *parole* is event".<sup>129</sup>

Peirce's triadic sign model consists of three elements which correspond with the Saussure dyadic model.<sup>130</sup> As summed up by Beebe:

Peirce's sign consists, then, of three elements, each of which corresponds to one of Peirce's three categories of Firstness, Secondness, and Thirdness. The first element, comparable to Saussure's signifier, is the representamen, the perceptible object, the "vehicle conveying into the mind something from without". The second element is the object, or "referent" as this Article will call it, which can be a physical "object of the world" or a mental entity "of the nature of thought or of a sign. The third element, comparable to the Saussurean signified, is the interpretant, which Peirce defined as "[creating] something in the Mind of the Interpreter, "the "proper significate effect," "the proper effect of the sign."<sup>131</sup>

An integral part of Postmodernist resistance to one universal and absolute truth was its rejection of the strict anchoring of particular signifiers to particular signifiers, which evolved into the concept of the floating signifier,

127. *Id.* at 74.

128. *Id.* at 14 ("Language is not a function of the speaker; it is a product that is passively assimilated by the individual."); *id.* at 13 ("Execution is always individual, and the individual is always its master: I shall call the executive side *speaking [parole]*.").

129. Beebe, *supra* note 119, at 638.

130. *Id.* at 636.

131. *Id.* at 636, 638 (explaining that to complete the picture, this process goes for ever: The sign is "[a]nything which determines something else (its interpretant) to refer to an object to which itself refers . . . in the same way, the interpretant becoming in turn a sign, and so on ad infinitum."); PEIRCE, C. S., & WELBY-GREGORY, VICTORIA (LADY WELBY), SEMIOTIC AND SIGNIFICS: THE CORRESPONDENCE BETWEEN C. S. PEIRCE AND VICTORIA LADY WELBY, 80–81 (Charles S. Hardwick ed. asst. by James Cook, Indiana University Press 1977) (1953) (As Peirce explained his theory in a letter to Lady Welby: "I define a Sign as anything which is so determined by something else, called its Object, and so determines an effect upon a person, which effect I call its Interpretant, that the latter is thereby mediately determined by the former. My insertion of "upon a person" is a sop to Cerberus, because I despair of making my own broader conception understood.").

originated by Claude Lévi-Strauss, although heavily influenced by Derrida.<sup>132</sup> A signifier without a specific signified, known also as an ‘empty signifier’.<sup>133</sup> Hence, the free-floating signifiers are “emancipated from the tyranny of the referent, both the sign and the signified...” in rebellion from “the ideal of a rational and coherent ego, existing at the expense of the Other which it suppresses.”<sup>134</sup> This emancipation of the sign is what transforms our society into a society characterized as a Simulacra, in which the real is dead, as noted by Jean Baudrillard:

...The emancipation of the sign: remove this archaic obligation to designate something and it finally becomes free, indifferent and totally indeterminate, in the structural or combinatory play which succeeds the previous rule of determinate equivalence. . . . The floatation of money and signs, the floatation of needs and ends of production, the floatation of labor itself. . . , the real has died of the shock of value acquiring this fantastic autonomy.<sup>135</sup>

Baudrillard’s prediction relocates semiotics vocabulary anew; now, the signifier indicates nothing but itself, as “the signified and the referent are now abolished. . . .”<sup>136</sup> The David Beckham phenomenon illustrates how a

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132. Jeffrey Mehlman, *The “Floating Signifier”: From Lévi-Strauss to Lacan*, 48 YALE FRENCH STUDIES 10 (1972); see generally Ian Jensen, *Can a signifier float? Or, implications: Lévi-Strauss and the aporia of the symbolic*, ACTA STRUCTURALICA (2020), <https://philpapers.org/archive/JENCAS-2.pdf> [<https://perma.cc/F2VJ-BAC5>].

133. *Id.* at 23 (“This dissymmetry between the synchronic (structural) nature of the meant and the diachronic nature of the known results in the existence of “an overabundance of signifier (signifiant) in relation to the signifieds to which it might apply.” And it is this “floating signifier,” this “semantic function whose role is to allow symbolic thought to operate despite the contradiction inherent in it” which Levi-Strauss sees, in this elusive essay, as the reality of mana. It is “a symbol in the pure state,” thus apt to be charged with any symbolic content: “symbolic value zero.”).

134. Jeanne S. M. Willette, *Postmodernism and The Trail of the Floating Signifier*, ART HISTORY UNSTUFFED (Feb. 21, 2014), <https://arthistoryunstuffed.com/postmodernism-floating-signifier/> [<https://perma.cc/NU6D-U526>].

135. JEAN BAUDRILLARD, *SYMBOLIC EXCHANGE AND DEATH* 6 (Ian Hamilton Grant trans., 1993).

136. JEAN BAUDRILLARD, *THE MIRROR OF PRODUCTION* 7, 127-28 (Mark Poster trans., 1975) (“The form-sign describes an entirely different organization: the signified and the referent are now abolished to the sole profit of the play of signifiers, of a generalized formalization in which the code no longer refers back to any subjective or objective “reality,” but to its own logic. . . .The sign no longer designates anything at all. It approaches its true structural limit which is to refer

talented soccer player became a floating signifier, and part of our metalanguage. He is no longer considered a mere athlete, but as the quintessence of success, sex appeal and a vessel for anyone's dreams (females and males, alike).

He is a reflection of our media age; the man himself - a simple soul, with a talent that begins below his ankles - is a medium, and he exists to transmit whatever message you wish (or are prepared to pay for). Don't be racist, drink Pepsi, it's all much the same. Structural linguists would call him a floating signifier. He's significant without being much interested in the specific signals he sends out.<sup>137</sup>

Hence, Postmodernist doctrines produced Postmodernist doctrinal vocabulary, which was absorbed in the legal critical literature, as a new toolkit to deal with new perceptions of Authorship and Originality.<sup>138</sup> Researches illustrate how this new toolkit merges Postmodernist semiotics, doctrinal vocabulary and IP, as illustrated by one of their prominent advocates, David Tan:

Famous trademarks, well-known copyrighted works, and celebrity personalities can function like Barthesian myths with universal ideological codings that are recognized globally, enabling them to be read as polysemous texts open to playful semiotic recodings and post-structural disruptions. Audiences engage with

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back only to other signs. All reality then becomes the place of a semiurgical manipulation, of a structural simulation.”).

137. Peter Conrad, *Blend it like Beckham*, THE OBSERVER (May 24, 2003), <http://observer.guardian.co.uk/review/story/0,6903,962904,00.html> [<https://perma.cc/UV32-4PSC>]; DAVID TAN, *Intellectual Property and Semiotics: The Signs of the Times*, in HANDBOOK OF INTELLECTUAL PROPERTY RESEARCH: LENSES, METHODS, AND PERSPECTIVES 385-86 (Irene Calboli & Maria Lillà Montagnani, eds., 2021); see generally DAVID TAN, *The Unbearable Whiteness of Beckham': Semiotics and Political Recoding of the Contemporary Celebrity*, in TRANSPARENCY, POWER AND CONTROL: PERSPECTIVES ON LEGAL COMMUNICATION (Vijay K. Bhatia et al., eds., 2012).

138. See generally ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (Duke Univ. Press 1998) (in which Postmodernist vocabulary is interwoven with the legal one); David Tan, *De(Re)Constructing Narratives in Intellectual Property Law: Transformative Play, Culture Jamming, and Poststructural Disruptions*, 32 LAW & LITERATURE 75 (2019).

works of copyright, trademarks, and celebrities via ‘textual signification’ and ‘connect with [them] through interpretive and affective processes of semiotic engagement’. Semiotic readings of IP signs invite us to enter a world of possibilities that explore a more nuanced interpretation of legal doctrine and legislative provisions.<sup>139</sup>

As this section attempts to discourse, major concepts of Postmodernist perception of text deconstruction, which all refer to the reader/user as constantly engaged in Authorship, defy the Enlightenment perception of a sole author in charge of Originality. Although a comprehensive Postmodernist doctrinal vocabulary is beyond the scope of this article, some of the main concepts are worth attention as they seeped into the legal scholarship as well.<sup>140</sup> So, Derrida’s “différance”, refers to the possibility of attaining only a “differential” and postponed meaning in language, not only because text is always molded by its readers, but because it keeps standing in contrast to previous or contending interpretations.<sup>141</sup> To him, language is a play of identity and difference, an endless chain of signifiers leading to other signifiers.<sup>142</sup> Although Derrida attempted to emancipate the signifier from only one optional signified, he still adheres to Saussure’s concept of meaning as construed only through juxtaposition of difference inside a “system of distinct signs”.<sup>143</sup> Consequently, his famous slogan, so often misunderstood by his critics, is the statement that “there is nothing outside the text.”<sup>144</sup> Namely,

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139. TAN, *supra* note 137, at 387.

140. COOMBE, *supra*, note 138, at 89 (“Celebrity names and images, however, are not simply marks of identity or simple commodities; they are also cultural texts—floating signifiers that are continually invested with libidinal energies, social longings, and, I will argue, political aspirations.” The text is so embedded with Postmodernist vocabulary, that it cannot be understood without deciphering the essence of Postmodernist vocabulary).

141. *See generally* JACQUES DERRIDA, MARGINS OF PHILOSOPHY: DIFFÉRENCE (Alan Bass trans., 1982).

142. *Id.* at 4 (“The concept of play keeps itself beyond this opposition, announcing, on the eve of philosophy and beyond it, the unity of chance and necessity in calculations without end.”).

143. DE SAUSSURE, *supra* note 120, at 121 (“The entire mechanism of language, with which we shall be concerned later, is based on oppositions of this kind and on the phonic and conceptual differences that they imply.”).

144. DERRIDA, *supra* note 115, at 158 (“Yet if reading must not be content with doubling the text, it cannot legitimately transgress the text toward something other than it, toward a referent (a reality that is metaphysical, historical, psychobiographical, etc.) or toward a signified outside the

there is no such thing as outside context, and this context is constantly changing by the readers - the public.<sup>145</sup>

Likewise, the concept of “trace” is bound to follow from Derrida’s perception of the “différance” concept as a part of juxtaposition, without which no meaning can be acquired; meaning can be acquired because a sign is amalgamated from its differentiation from other signs, specifically the other half of its binary pair, which in turn marks the sign as a trace of what it does not mean.<sup>146</sup> Another important tool in Derridean bricolage is the “supplement,” in his vision of the sign as the supplement of the thing itself.<sup>147</sup> The supplement stands for both purposes: as an external addition, on one hand, and, on the other hand, as a supplement of what is missing, while at the same time, waiting within the text to be deconstructed and retrieved.<sup>148</sup> Therefore, it is no surprise that Derrida evolves the Plato’s *khôra* (Greek for space or site), from Plato’s interpretation to be a transitional concept between the sensible and the intelligible, through which everything passes but in which nothing is preserved, into a concept that defies attempts at naming or the either/or logic.<sup>149</sup> Resisting the classic demand for closure, Derrida uses “suspension” as a perpetual moment of pondering that sets in motion the possibility of the

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text whose content could take place, could have taken place outside of language, that is to say, in the sense that we give here to that word, outside of writing in general. That is why the methodological considerations that we risk applying here to an example are closely dependent on general propositions that we have elaborated above; as regards the absence of the referent or the transcendental signified. *There is nothing outside of the text* [there is no outside-text; *il n’y a pas de hors-texte*].”)

145. *Id.* (“This question is therefore not only of Rousseau’s writing but also of our reading.”).

146. *Id.* at xvii.

147. *Id.* at 144-45.

148. *Id.*

149. JACQUES DERRIDA & PAULE THÉVENIN, *THE SECRET ART OF ANTONIN ARTAUD* 123, 61 (Mary Ann Caws trans., The MIT Press 1998) (1986).

endless repetition of endings.<sup>150</sup> Hence, language is labyrinthine, inter-woven and inter-related, and the threads of this labyrinth are the “différance”, the “traces”, the “supplement”, the “khôra”, and the “suspension”.<sup>151</sup>

In compliance with Postmodernist doctrinal implications, Gilles Deleuze and Pierre-Félix Guattari contributed the “rhizomatic” concept to Postmodernist vocabulary.<sup>152</sup> This concept is based on the botanical rhizome, from Ancient Greek; *rhízōma* - “mass of roots”, as opposed to a single tree.<sup>153</sup> As a model for culture, the rhizome negates a logocentric origin or genesis of power, around which an organized hierarchy is built. On the contrary, a rhizome is characterized by “ceaselessly establishe[d] connections between semiotic chains, organizations of power, and circumstances relative to the arts, sciences, and social struggles.”<sup>154</sup> Thus, the rhizome becomes an integral component of Postmodernist vocabulary profoundly identified with otherness, alterity and the claims of the “differend”, as their quintessence, as coined and advocated by Lyotard.<sup>155</sup>

I would like to call a differend the case where the plaintiff is divested of the means to argue and becomes for that reason a victim. If the addressor, the addressee, and the sense of the testimony are neutralized, everything takes place as if there were no damages. A case of differend between two parties takes place when the regulation of the conflict that opposes them is done in the idiom of

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150. Leonard Lawlor, *Jacques Derrida*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE, (Edward N. Zalta & Uri Nodelman eds., Fall 2022), <https://plato.stanford.edu/archives/fall2022/entries/derrida/> [<https://perma.cc/C7KG-7C9Y>].

151. See generally JACQUES DERRIDA, *SPEECH AND PHENOMENA: AND OTHER ESSAYS ON HUSSERL’S THEORY OF SIGNS* (David B. Allison trans., 1973) (1967).

152. GILLES DELEUZE & FELIX GUATTARI, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA 6* (Brian Massumi trans., Univ. of Minn. Press 1987) (1980).

153. *Id.* at 21.

154. *Id.* at 7, 21.

155. See generally JEAN-FRANÇOIS LYOTARD, *THE DIFFEREND: PHRASES IN DISPUTE* (Georges Van Den Abbeele trans., Univ. of Minn. Press 1988) (1983).

one of the parties while the wrong suffered by the other is not signified in that idiom.<sup>156</sup>

Challenging the core concepts presented during the enlightenment, the abolishment of one central origin of genesis and hierarchy, together with the semiotic crisis of Postmodernism led to new approaches to Originality and Authorship, negates the logocentric perception of Para-Copyright Law as expressed through the DMCA and the DCM.

*B. Authorship and Originality Reversed: The Outcome of Postmodernist Crisis*

Following the negation of an absolute truth, from which every other concept originates, the core challenge that Postmodernist thinking proposes to the Western intellectual tradition, is its reconstruction of both “genesis” and acceptable “structure”.<sup>157</sup> Hence, if an absolute original truth is perceived to be obsolete, it follows that its translation by the Law into Originality and exclusive Authorship is contestable as well.<sup>158</sup> Hence, the question posed by Derrida; “what is the historico-semantic relationship between genesis and structure in general?” Such an inquiry is not only a prior linguistic question. It is a question about a transcendental reduction that enables “the unity of the world from which transcendental freedom releases itself, in order to make the origin of this unity appear”.<sup>159</sup>

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156. *Id.* at 9.

157. *See generally* JACQUES DERRIDA, WRITING AND DIFFERENCE 193–211 (Alan Bass trans., 1978) (1967).

158. Ample legal scholarship offers new perceptions of Originality and Authorship as discussed in this section.

159. DERRIDA, *supra* note 157, at 210; David Woodruff Smith, *Phenomenology*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY ARCHIVE (Edward N. Zalta ed., Summer 2018) (“His reference to Kant versus Husserl characterizes the debate between the logocentric thinking as best advocated by Kant, that derived from paradigm inherited from Judaism and Hellenism, and Phenomenology, as envisioned by Husserl. “Following Bolzano (and to some extent the platonistic logician Hermann Lotze), Husserl opposed any reduction of logic or mathematics or science to mere psychology, to how people happen to think, and in the same spirit he distinguished phenomenology from mere psychology. For Husserl, phenomenology would study consciousness without reducing the objective and shareable meanings that inhabit experience to merely subjective happenstances. Ideal meaning would be the engine of intentionality in acts of consciousness.”).



Semantically, Derrida negates the logocentric paradigm of the “transcendental signified” to which all signifiers are directly connected.<sup>160</sup> On the contrary, meaning is construed through an endless chain of other signifiers associated with it. Hence, deconstruction is the Postmodernist tool that deconstructs Western culture traditions. Postmodernist vocabulary exchanges originality for trace:

The value of the transcendental arche [origin] must make its necessity felt before letting itself be erased. The concept of the arche-trace must comply with both the necessity and the erasure. . . The trace is not only the disappearance of origin. . . it means that the origin did not even disappear, that it was never constituted except reciprocally by a non-origin, the trace, which thus becomes the origin of the origin. From then on, to wrench the concept of the trace from the classical scheme which would derive it from a presence or from an originary non-trace and which would make of it an empirical mark, one must indeed speak of an originary trace or arche-trace.<sup>161</sup>

As I argue in this chapter, Postmodernism, by and large, and Deconstruction although applied differently by miscellaneous critics, question Authorship anew. Logocentric thinking is abolished not only in negating the concept of the “transcendental signified” while deciphering meaning to the world, but through the critical process of understanding texts, as well. As the sign was liberated from an exclusive interpretation as to what it signifies or to a fixed nexus with a sole referent, the text is written anew by means of its multiple semiotic reading and is best understood as “rhizomatic”.<sup>162</sup> As rephrased by Roland Barthes who claimed that the author dies once the

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160. See Lawlor, *supra* note 150.

161. DERRIDA, *supra* note 115, at 61, 70 (explaining that trace is not an entirely original Derrida’s concept as he admits to borrowing it from others: “I relate this concept of trace to what is at the center of the latest work of Emmanuel Levinas and his critique of ontology: relationship to the illeity as to the alterity of a past that never was and can never be lived in the originary or modified form of presence. Reconciled here to a Heideggerian intention, as it is not in Levinas’s thought—this notion signifies, sometimes beyond Heideggerian discourse, the undermining of an ontology which, in its innermost course, has determined the meaning of being as presence and the meaning of language as the full continuity of speech. . . . This deconstruction of presence accomplishes itself through the deconstruction of consciousness, and therefore through the irreducible notion of the trace (Spur), as it appears in both Nietzschean and Freudian discourse.”).

162. DELEUZE & GUATTARI, *supra* note 152, at 7, 21, 25.

reader is born: “all images are polysemous; they imply, underlying their signifiers, a ‘floating chain’ of signifieds, the reader able to choose some and ignore others.”<sup>163</sup>

Hence, the reader becomes a partner for a dialogue, and not a mere passive subject, as Mikhail Bakhtin predicted in his dialogical approach. According to Bakhtin, no artistic and literal creations can be separated from their social influences and cultural nexus.<sup>164</sup> The Carnavalesque, as coined by Bakhtin, is the literary mode that bypasses the dominant and defies any uniform doctrine through humor and chaos, thus, in its broadest, ever-changing perception, is the quintessence of the ultimate polyphonic dialogue between the human collective and individual soul.<sup>165</sup> The Carnavalesque is best clarified by Julia Kristeva who amalgamated Saussure’s semiotics with Bakhtin’s dialogism, as:

[It is] A spectacle, but without a stage; a game, but also a daily undertaking; a signifier, but also a signified. That is, two texts meet, contradict, and relativize each other. A carnival participant is both actor and spectator; he loses his sense of individuality, passes through a zero point of carnivalesque activity and splits into a subject of the spectacle and an object of the game. Within the carnival, the subject is reduced to nothingness, while the structure of the author emerges as anonymity that creates and sees itself created as self and other, as man and mask.<sup>166</sup>

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163. ROLAND BARTHES, *The Rhetoric of the Image*, in IMAGE, MUSIC, TEXT 33, 37 (Stephen Heath ed., 1977) (1964).

164. MIKHAIL M. BAKHTIN, THE DIALOGIC IMAGINATION: FOUR ESSAYS 355 (Michael Holquist ed., Caryl Emerson and Michael Holquist trans., 1981); TZVETAN TODOROV, *Mikhail Bakhtin: The Dialogical Principle*, in 13 THEORY AND HIST. OF LITERATURE 30 (Wlad Godzich trans., 1984); Moldawer, *supra* note 64, at 166–67; KRISTEVA, *supra* note 116, at 36 (using Bakhtin’s ideologeme to expand the literal creations as inseparable from their social influences and cultural nexus. “The ideologeme is that intertextual function read as “materialized” at the different structural levels of each text, and which stretches along the entire length of its trajectory, giving it its historical and social coordinates.”).

165. MIKHAIL BAKHTIN, PROBLEMS OF DOSTEIVSKY’S POETIC (Caryl Emerson ed. and trans., 1984) (explaining it originated as “carnival”), MIKHAIL BAKHTIN, RABELAIS AND HIS WORLD (Hélène Iswolsky trans., 1984) (developing the idea of “carnival” further); *see also* Lior Zemer, *The Social Bargain in Copyright*, 297, 331–35 MISHPATIM (2017); KRISTEVA, *supra* note 116, at 64–65, 78–80 (explaining her homage to Bakhtin).

166. KRISTEVA, *supra* note 116, at 78.

Kristeva coined “intertextuality” as the new concept of authorship.<sup>167</sup> Namely, the shaping of a text’s meaning through “codes” transferred to the writer and reader by other texts, hence, exchanging the notion of intersubjectivity with the notion of intertextuality; denotation for connotation.<sup>168</sup> Barthes ties the notes of the logocentric system, in which denotation, as dictated by one signifier (the original source/Originality herald) is inevitably meant to create the unquestionable signified.<sup>169</sup> In his introduction to *S/Z*, his structural analysis of *Sarrasine*, the short story by Honoré de Balzac, Barthes demonstrates the deconstruction of the latter, by establishing five major codes for determining various kinds of significance, Barthes proposes:<sup>170</sup>

On the other hand, others (the semiologists, let us say) contest the hierarchy of denoted and connotated; language, they say, the raw material of denotation, with its dictionary and its syntax, is a system like any other; there is no reason to make this system the privileged one, to make it the locus and the norm of a primary, original meaning, the scale for all associated meanings....now the endeavor of this hierarchy is a serious one: it is to return to the closure of Western discourse (scientific, critical, or philosophical), to its centralized organization, to arrange all the meanings of a text in a circle around the hearth of denotation (the hearth: center, guardian, refuge, light of truth).<sup>171</sup>

In order “to make the reader no longer a consumer, but a producer of the text,” Barthes distinguishes between the “writerly text”, in which the

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167. *Id.* at 66.

168. *Id.* at 29–31, 66; *see also* PAUL BOOTH, DIGITAL FANDOM: NEW MEDIA STUDIES 2, 60 (2010) (drawing a straight line between his “philosophy of playfulness” embedded in digital fandom textual freedom to Bakhtin’s Carnavalesque).

169. *See generally* ROLAND BARTHES, *S/Z* (Richard Miller trans., 1974).

170. *Id.* at 16–20 (The title *S/Z* refers to the clash between the ‘S’, which stands for “Sarrasine,” the male protagonist of the work, and the ‘Z’, which stands for “Zambinella,” the castrato with whom he falls in love. Barthes introduces five different codesignifiers that can lead to a meaning (signified), but that can all be interwoven into the text with on prioritizing hierarchy: The Hermeneutic Code: (the mysteries of the text), the Proairetic Code (the narrative drive of the text), the Semic Code (the resonances of the text), the Symbolic Code (the symbolic structure of the text), and the Cultural Code (the background knowledge of the text)).

171. *Id.* at 7.

readers take place in Authorship and the “readerly text” in which the readers are restricted to just passive reading and submission to the current dogma.<sup>172</sup> The readerly/ writerly text distinction brings to mind Lessig’s dichotomy between Read & Write culture, as advocated by Barthes, and Read Only culture, which is favored by the DMCA and the DSM, as discussed in Part I.<sup>173</sup> Through “writerly text” the readers can express what is “the inexpressible”, in opposition to the “readerly text”, that only allows them passivity and reassurance of the current imposed dogma. As Barthes sums up: “by degrees, a text can come into contact with any other system: the inter-text is subject to no law but the infinitude of its reprises.”<sup>174</sup>

The Gordian knot between authorship and authority, although inherent in Barthes’ writing, was the core dilemma of Michel Foucault’s research.<sup>175</sup> The leitmotif in his writing is that power structures are created and enforced through his critical system of analyzing what is considered to be truth.<sup>176</sup> Accordingly, power and knowledge are vehicles of social control.<sup>177</sup> Therefore, what was traditionally considered as the absolute and universal truth, was an idea contingent on history, and the Enlightenment era is no exception.<sup>178</sup> Consequently, as a starting point to his famous question, “What Is an Author?”, he quotes Beckett: ‘What matter who’s speaking, someone said, what matter who’s speaking’.<sup>179</sup> Foucault regards the author as an “author-function”, serving the legal and institutional systems that decide our truth.<sup>180</sup> Foucault states:

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172. *Id.* at 4–5, 156.

173. *See generally* LESSIG, *supra* note 90, at 84–108.

174. BARTHES, *supra* note 169, at 211.

175. FOUCAULT, *supra* note 107 at 115; *see generally* BARTHES, *supra* note 107.

176. *See* STOKES, *supra* note 68 at 187.

177. *Id.*

178. FOUCAULT, *supra* note 109 at 37 (summarizing Kant’s explanation to what is enlightenment as a proposal to Frederick II, namely, “... a sort of contract—what might be called the contract of rational despotism with free reason.”).

179. FOUCAULT, *supra* note 107, at 115 (quoting SAMUEL BECKETT, *TEXTS FOR NOTHING*, trans. Beckett (London: Calder & Boyars, 1974), p. 16).

180. *Id.* at 130.

The “author-function” is tied to the legal and institutional systems that circumscribe, determine, and articulate the realm of discourses; it does not operate in a uniform manner in all discourses, at all times, and in any given culture; it is not defined by the spontaneous attribution of a text to its creator, but through a series of precise and complex procedures; it does not refer, purely and simply, to an actual individual insofar as it simultaneously gives rise to a variety of egos and to a series of subjective positions that individuals of any class may come to occupy.<sup>181</sup>

The controversial scholarship so far could lead to a preliminary assumption: that sole authorship is not a part of the Ten Commandments. Post-modern approaches stress the public contribution to authorship that, thus far, has not received its fair share in the manifest assumptions of the law.

Hence, two parallel axes reach a contradictory perception of Originality and Authorship. The monolithic axis of Western thinking, that holds the unity of an absolute Truth, leads to the perceptions of exclusive Originality and sole Author/Authorship by Intellectual Property Law, which are denied by the Postmodernist axis.<sup>182</sup> Postmodernist thinking rejects the very idea of one source, from which exclusive Originality is derived. As this article shall proceed to analyze major stages in Western culture, in which the audience always took a dominant role, albeit ignored by Para-Copyright Law, a shy question, that can evolve to blasphemy, comes to mind: is it a new phenomenon or was it always there, only unlabeled? Paraphrasing Oscar Wilde’s observation: do we see the public role, not because it always existed, albeit through an ever changing “culturally dominant” media design, but because scholars have taught us about its existence by using a different vocabulary?<sup>183</sup> The first step to decipher this question will be the discourse of the

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181. *Id.* at 130–31.

182. See generally PLATO, *supra* note 75 (illustrating the monolithic axis. The difference between the real philosopher and the sophist, are summed up by the stranger: “He, then, who traces the pedigree of his art as follows—who, belonging to the conscious or dissembling section of the art of causing self-contradiction, is an imitator of appearance, and is separated from the class of phantastic which is a branch of image-making into that further division of creation, the juggling of words, a creation human, and not divine—anyone who affirms the real Sophist to be of this blood and lineage will say the very truth.”).

183. OSCAR WILDE, *The Decay of Lying*, in INTENTIONS 12 (Geoffrey Sauer ed., 1998) (1891) (“At present people see fogs, not because they are fogs, but because poets and painters have taught them the mysterious loveliness of such effects.”).

“Cultural Dominant” in Sophocles/King Oedipus, which was crowned by Aristotle as the best masterpiece ever written.<sup>184</sup>

*C. The “Cultural Dominant” in Sophocles/King Oedipus: Chorus and Worshipers*

The origins of the theater are rooted in religious rites.<sup>185</sup> Although there are common components to religious rites and the theater, such as songs and dance, as Phyllis Hartnoll argues, three things are necessary in order to create theater: actors, who are independent of the original chorus, a conflict, and an audience.<sup>186</sup> If the medium designs its audience, then its architecture has a dominant role in the process too. The Greek Tragedies, in which Sophocles and King Oedipus were considered their very best, were performed in an open space that could accommodate a whole community, at the heart of which (the orchestra, used by the chorus) stood the altar of Dionysus.<sup>187</sup> Thus, the Gordian knot between religious rite and theater is conveyed in its architecture.

As we see in the restored theater at Epidaurus, the audience sat in the steep auditorium that connects with the orchestra.<sup>188</sup> As Lessig believes that the Internet's architecture reframes its Law, the same undercurrent principle applies here - the Greek audience was a massive community who participated in religious festivities.<sup>189</sup> Such an audience did not need to be reminded about the plot as the play unfolded, as the story was already known,

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184. ARISTOTLE, *POETICS* loc. XIV, XV, XVI, XXVI (S. H. Butcher trans., Project Gutenberg 2008) (ebook); *Oedipus Rex as a Tragedy of Aristotle: Tragedy of Fate or Character*, ASK LITERATURE (Oct. 8, 2022), <https://askliterature.com/drama/sophocles/oedipus-rex/oedipus-rex-as-a-tragedy-fate-or-character/> [<https://perma.cc/2UPY-9YBH>].

185. PHYLLIS HARTNOLL, *THE CONCISE HISTORY OF THEATRE 7* (Harry N. Abrams Inc. 1970) (1968).

186. *Id.* (It should be noted that she regards the audience as “emotionally involved in the action but not taking part in it.” I differ with her understanding of the audience's function, as demonstrated in this section. In a nutshell: a passive audience contradicts its essentiality for the composition of the Theater concept, as she phrases it).

187. ARISTOTLE, *supra* note 184; HARTNOLL, *supra* note 185, at 8.

188. See HARTNOLL, *supra* note 185, at 21 (detailing how the auditorium was used according to social hierarchy).

189. LESSIG, *supra* note 8, at 1–2.

as many pieces were part of Greek heritage, dating from Homeric times.<sup>190</sup> The audience's active role in the performance of such religious rites rendered them worshipers.<sup>191</sup> On the other hand, the Greek audience is Janus-faced (i.e.: it has two contrasting aspects); not only were they watching *how* the myth that constructs its heritage is retold (instead of *what* is told), but the chorus on stage functioned as its ambassador.<sup>192</sup> The chorus reflects the emotional tools that are created and enhanced by the audience. For instance, the catharsis, the dramatic irony and the use of imagination for the horrors that cannot be represented on stage (such as death scenes, like Oedipus's mutilation of his own eyes, in particular).<sup>193</sup> Sophocles/King Oedipus' chorus is an active chorus that takes part in promoting the plot as well as remaining a participant in its scenes rather than a mere spectator.<sup>194</sup> Hence, as Edward Fairchild Watling concludes: "The tragedy, whatever its subject, is *our* tragedy. We, like the Chorus, are both in it and spectators of it."<sup>195</sup>

The best demonstration of this approach is the Agon (the combat) scene between Oedipus, who claims to bring remedy to his country's plight, totally ignorant of the deadly irony of being its very cause, and Tiresias, the blind prophet who sees better than his king, who blindly promises to resolve his

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190. HARTNOLL, *supra* note 185, at 9.

191. *Id.* at 8, 10.

192. *Janus, Roman god*, ENCYCLOPEDIA BRITANNICA (Sept. 14, 2022), <https://www.britannica.com/topic/Janus-Roman-god> [<https://perma.cc/W438-UBZ8>] (In Roman religion, Janus, represented by a double-faced head, is the animistic spirit of doorways and archways, considered by scholars as the god of all beginnings); see ARISTOTLE, *supra* note 184, at XVIII (For the chorus as the Greek audience's ambassador).

193. See SOPHOCLES, *Introduction, in THE THEBAN PLAYS 10–12* (E.F. Watling trans., 1974) (explaining the dramatic irony, once the audience knows what the story is about, thus, relieved from the factors of suspense. The attendant recites how Oedipus blinded himself by thrusting the late queen's golden brooches into his eyes, immediately after he united the rope with which she hanged herself when she realized she was both his mother and his wife, (as the real atrocious deed is never show on stage). *Id.* at 61 (then, the blind Oedipus enters the stage).

194. *Id.* at 10. (For the chorus as a bridge between spectator and stage); Aristotle declares that this use is the right practice, "The Chorus too should be regarded as one of the actors; it should be an integral part of the whole, and share in the action, in the manner not of Euripides but of Sophocles." ARISTOTLE, *supra* note 184, at XVIII.

195. SOPHOCLES, *supra* note 193, at 11.

own tragedy.<sup>196</sup> The audience already knows this Agon outcome: once Oedipus solves the riddle of Laius' murder (his father), he will blind himself.<sup>197</sup> Therefore, the audience in the auditorium knows more than its ambassador.<sup>198</sup> Each sentence in Oedipus/Tiresias Agon is ample both in irony and the inevitable rush towards Catharsis (pity and fear), once the mystery is unfolded.<sup>199</sup> Aristotle regarded the Catharsis as the quintessence of Greek tragedy, which he contended rendered it superior to Epic poetry.<sup>200</sup> Three textual exchanges taken from this Agon bring forth the enormous power of dramatic irony, approaching horrors and a purifying catharsis to follow. The first chosen exchange is Tiresias' verdict to Oedipus, after the latter ruthlessly harassed the former to reveal the truth, accused him of conspiracy against him and mocked his blindness:

T: Then hear this: upon your head  
Is the ban your lips have uttered – from this day forth  
Never to speak to me or any here.  
*You* are the cursed polluter of this land.<sup>201</sup>

The second example is after Oedipus forces Tiresias to repeat his verdict, against his former declaration:

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196. SOPHOCLES, *King Oedipus*, in THE THEBAN PLAYS 34-38 (E.F. Watling trans., 1974).

197. *Id.* at 59–61.

198. SOPHOCLES, *supra* note 193, at 11-12.

199. ARISTOTLE, *supra* note 184, at XIV (On catharsis as the proper measure to Tragedy: “Fear and pity may be aroused by spectacular means; but they may also result from the inner structure of the piece, which is the better way, and indicates a superior poet. For the plot ought to be so constructed that, even without the aid of the eye, he who hears the tale told will thrill with horror and melt to pity at what takes place. This is the impression we should receive from hearing the story of the Oedipus. But to produce this effect by the mere spectacle is a less artistic method, and dependent on extraneous aids. Those who employ spectacular means to create a sense not of the terrible but only of the monstrous, are strangers to the purpose of Tragedy; for we must not demand of Tragedy any and every kind of pleasure, but only that which is proper to it. And since the pleasure which the poet should afford is that which comes from pity and fear through imitation, it is evident that this quality must be impressed upon the incidents.”).

200. *Id.* at XXVI.

201. SOPHOCLES, *supra* note 196, at 35.



T: I say the killer you are seeking is yourself.<sup>202</sup>

The third example is Tiresias' final verdict before his ordered exit by Oedipus, terminates their Agon, but achieves the opposite effect he wished for.<sup>203</sup> Instead of ending Oedipus' fatal and ruthless inquiry, he initiates it, being no exception to the course of the gods' will, but their mere vehicle:

T: The man for whom you have ordered hue and cry,  
 The killer of Laius – that man is *here*;  
 Passing for an alien, a sojourner here among us;  
 But, as presently shall appear, a Theban born,  
 To his cost. He that came seeing, blind shall he go;  
 Rich now, then a beggar; stick-in-hand, groping his way  
 To a land of exile; brother, as it shall be shown,  
 And father at once, to the children he cherishes; son,  
 And husband' to the woman who bore him; father-killer,  
 And father- supplanter.  
 Go in, and think on this.  
 When you can prove me wrong, then call me blind.<sup>204</sup>

To imply Barthes' distinction between the "readerly" text and the "writerly" text, not only the Greek audience is a far cry from a passive public left to a mere "readerly" text, but quite the contrary.<sup>205</sup> It is the creative and daring "writerly" text that renders the Greek audience superior both to his ruler's hubris and to his prophet's rage.<sup>206</sup> In *S/Z* the hidden taboo around which all five codes rotated was *Z*'s gender. How many potential hidden codes can the audience produce here? We can easily add a religious code, a political code, a taboo code, a semiotic code, an ironic code, and so on, on top of what Barthes already proposed in *S/Z*.<sup>207</sup> Applying Derrida's "trace", not only we keep looking for the missing origin for meaning, but the idea of

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202. *Id.* at 36.

203. *Id.* at 37–38.

204. *Id.* at 38.

205. BARTHES, *supra* note 169, at 4, 156.

206. *Id.* at 156, 213.

207. *See generally id.* at 7–10.

authorship transforms from unique to participatory, as already inherent in the ancient origins of our culture and myth.<sup>208</sup> If we attempt to locate the “trace” of Postmodernism itself, then Bakhtin’s Carnavalesque should be examined versus Shakespearean Theater, which boasts a whole gallery of fools: from the original ones to the tragic heroes who evolved into this role, by applying the “Cultural Dominant.”

*D. The “Cultural Dominant” in the Shakespearean Theatre: The Shakespearean Fool and Bakhtin’s Carnavalesque*

The medium’s architecture as a dominant factor in its essence, namely, how it conveys knowledge and how this knowledge is coded/encoded/trans-coded by its audience, is manifested in the case of the Shakespearean stage as well, as this chapter demonstrates. First, the playhouse was unroofed.<sup>209</sup> Secondly, the design responded to a mixture of styles, out of which, the most important was its circular shape, that reflected “... the gatherings of crowds in a circle around the actors in town marketplaces, where all the players of 1576 got their training”.<sup>210</sup> Consequently, the audience surrounded the stage on all sides. Such spaces were not intimate but were rather gargantuan theaters that could accommodate up to three-thousand people.<sup>211</sup> As Howard Bay & Clive Barker comment, the importance of this type of theater was its flexibility. “The Elizabethan theatre ... had a main platform, an inner stage, and an upper stage level that made movement possible in all directions instead of simply along the length of a narrow stage.”<sup>212</sup> The audience was heterogeneous - those who could afford it sat on benches in the galleries around the

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208. See DERRIDA, *supra* note 115, at xvii.

209. See HARTNOLL, *supra* note 185, at 74 (referring mainly to the Globe theater, in which most of Shakespeare’s plays were produced until it was destroyed by fire in 1612 and for the evolution of the Elizabethan stage).

210. Andrew Gurr, *Globe Theatre*, *ENCYCLOPÆDIA BRITANNICA* 4, <https://www.britannica.com/topic/Globe-Theatre> [<https://perma.cc/BS5X-BEDY>].

211. *Id.*

212. See Clive Barker & Howard Bay, *The Elizabethan stage*, *ENCYCLOPÆDIA BRITANNICA* 2 (Dec. 3, 2020), <https://www.britannica.com/art/theater-building/The-Elizabethan-stage> [<https://perma.cc/N2SB-V9YP>] (noting that the typical Elizabethan stage was as large as 40 feet square (more than 12 meters on each side)).

walls or even hired a private box.<sup>213</sup> Others would stand in the pit.<sup>214</sup> The purpose of such an arrangement was that Shakespeare had to appeal to all the parties involved. As no scenery was used, the most important tool to pacify the audience was the use of its imagination and creativity. Hence the term “Wooden O” coined by Shakespeare to describe the essence of his theater, quoted from Play “Henry V”, Act 1, prologue:

But pardon, gentles all, the flat unraised spirits that hath dared  
 On this unworthy scaffold to bring forth so great an object.  
 Can this cockpit hold the vasty fields of France?  
 Or may we cram Within this wooden O the very casques that did  
 affright the air at Agincourt?<sup>215</sup>

In addition, we should bear in mind that in such a theater, in which the audience is an active partner, the soliloquy, as a constant component of Shakespearean theater, is often mistaken for a monologue, whereas it is a constant multi-dialogue between the actor and his audience, long before “the dialogical approach” was coined by Postmodernism thinking.<sup>216</sup> Bakhtin, who theorized the Carnavalesque as a mode that enables an eternal and polyphonic dialogue, regards rogues, clowns and fools as islands of a special Chronotope (time-space matrix) of their own, freed from the monologic world surrounding them.<sup>217</sup> Although Bakhtin classifies the fool and the clown in different categories, as this chapter argues, their mutual task is best demonstrated by the Shakespearean Fool.<sup>218</sup> Only the Fool combines in him

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213. *Id.*

214. *See id.*

215. *No Fear Shakespeare: Henry V: Act 1 Prologue*, SPARKNOTES, <https://www.sparknotes.com/nofear/shakespeare/henryv/act-1-prologue/> [<https://perma.cc/YJ93-YA2Y>].

216. *Who Were These People? Audiences in Shakespeare’s Day*, SEATTLE SHAKESPEARE, <https://www.seattleshakespeare.org/who-were-these-people/> [<https://perma.cc/Z3XZ-5HPG>].

217. Caryl Emerson, *Mikhail Bakhtin (1895-1975)*, in *FILOSOFIA: AN ENCYCLOPEDIA OF RUSS. THOUGHT* (Apr. 2019), <https://filosofia.dickinson.edu/encyclopedia/bakhtin-mikhail/> [<https://perma.cc/T835-EUJP>]; *see generally* MIKHAIL M. BAKHTIN, *THE DIALOGIC IMAGINATION: FOUR ESSAYS* 119-293 (Michael Holquist, ed., Caryl Emerson and Michael Holquist, trans., 1981).

218. *See* JAN KOTT, *SHAKESPEARE, OUR CONTEMPORARY* 162-67 (Boleslaw Taborski trans., 1974).

the immunity of the outcast that allows him not only to speak the unspeakable and to uncover “the writerly” text, in contrast to the compromise inherent in the “readerly” text, but to bridge the gap between the protagonist and his audience as the Chorus would in a Greek tragedy.<sup>219</sup> *King Lear* boasts of three fools: the original fool, the king who became a fool, and Edgar, who pretends to be a fool, disguised as Poor Tom, all reflecting the outcome of the king’s hubris.<sup>220</sup> Thus, the lonely Bakhtin’s chronotopes of the fool takes over, as the chaos they create, led by Lear’s madness, makes the real fool redundant - his services are not needed any more, as the king replaces him.<sup>221</sup> In short, Bakhtin’s vision is enacted in front of an audience surrounding the stage, with whom the actors share their soliloquies.<sup>222</sup> The theatrical action is shared by an active, participating community, as both the medium’s architecture and its correlative text demonstrate. Hence, our inquiry continues: was the audience evaluation an idiosyncratic phenomenon reserved to the theater or was her active participation relevant to other “Cultural Dominant” such as literature?

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219. *Id.* at 166–67: The Fool does not follow any ideology. He rejects all appearances, of law, justice, moral order. He sees brute force, cruelty and lust. He has no illusions and does not seek consolation in the existence of natural or supernatural order, which provides for the punishment of evil and the reward of good. Lear, insisting on his fictitious majesty, seems ridiculous to him. All the more ridiculous because he does not see how ridiculous he is. But the Fool does not desert his ridiculous, degraded king, and accompanies him on his way to madness. The Fool knows that the only true madness is to recognize this world as rational.

220. See WILLIAM SHAKESPEARE, *KING LEAR*, Act 3, scene 6 (depicting three fools gathered for a mock trial in which Regan and Goneril are arraigned, and Lear, losing his wits and stripped from all his previous pretensions, is finally coming to terms with bare humanity).

221. *Id.* at Act 1, scene 4 and scene 5 and Act 3, scene 6 (starting in a perfect Carnavalesque manner when Lear is at the peak of his hubris in Act 1, by, literally, calling his king a fool: “I am better than thou art now; I am a fool, thou art nothing”, followed by “thou wouldst make a good fool, “ and ends uttering his last line in Act 3: “And I’ll go to bed at noon”, after which he is never seen again).

222. KRISTEVA, *supra* note 116, at 78 sums this experience in regard to the Carnavalesque: It is a spectacle, but without a stage; a game, but also a daily undertaking; a signifier, but also a signified. That is, two texts meet, contradict, and relativize each other. A carnival participant is both actor and spectator; he loses his sense of individuality, passes through a zero point of carnivalesque activity and splits into a subject of the spectacle and an object of the game. Within the carnival, the subject is reduced to nothingness, while the structure of the author emerges as anonymity that creates and sees itself created as self and other, as man and mask.

*E. The “Cultural Dominant” in Dickens: The Author and His Shadow Writing Audience*

Understanding the medium as dictating how knowledge is conveyed and received is clearly demonstrated by Dickens and his Shadow Writing Audience. Namely, an audience whose active involvement constantly interfered with Dickens’ work, thus causing the great author to rewrite plots and characters anew.<sup>223</sup> As Edward Dudley Hume Johnson’s research describes, Dickens’ fiction was disseminated, in the nearest version to what is known today as “the serials” of our times.<sup>224</sup> Thus:

All of Dickens’ novels made their first appearance in serial form. Nine came out in monthly installments: *Pickwick Papers*, *Nicholas Nickleby*, *Martin Chuzzlewit*, *Dombey and Son*, *David Copperfield*, *Bleak House*, *Little Dorrit*, *Our Mutual Friend*, and *The Mystery of Edwin Drood*. Five were composed for weekly serialization: *The Old Curiosity Shop* and *Barnaby Rudge* in *Master Humphrey’s Clock*; *Hard Times* in *Household Words*; and *A Tale of Two Cities* and *Great Expectations* in *All the Year Round*.<sup>225</sup>

This system did not produce heterogeneous pricing. Quite the contrary, as the most serious novels were sold as costly volumes, but, in parallel, a cheap market thrived as well, in which the less privileged could obtain a number for a shilling.<sup>226</sup> Dickens understood that, paraphrasing Monroe, if he was a star – the people made him a star.<sup>227</sup> Hence, as he wrote in his preface to the inexpensive edition, the authorship “was dedicated (it) to the English people, in whose approval, if the books be true in spirit, they will live, and out of whose memory, if they be false, they will very soon die.”<sup>228</sup>

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223. E. D. H. JOHNSON, *CHARLES DICKENS: AN INTRODUCTION TO HIS NOVELS* 69, 70 (1969).

224. *Id.*

225. *Id.* at 66.

226. *Id.* at 66–67.

227. Dean MacCannell, *Marilyn Monroe Was Not a Man*, 17 *DIACRITICS* 114, 115 (Summer 1987).

228. JOHNSON, *supra*, at note 223, at 73–74.

This manner of distribution influenced not only the design of plot and characters but their intensive connection with their audience who came to think of them as part of their lives, and to share their expectations or disappointments with their authors, accordingly.<sup>229</sup> As Johnson describes the textual dynamics:

The death of Nell in *Old Curiosity Shop*, it is well known, became the occasion for widespread mourning. Sensing in advance that she was to die, a hoard of correspondents pled with the author to spare his heroine.<sup>230</sup>

The audience involvement was not characterized solely by lamentation. In some cases, it caused Dickens to change his characters:

The novelist's tenderness for the sensibilities of his readers made him chary of causing gratuitous offense, even when some compromise of artistic purpose was required. The most notable example concerns the characterization of the dwarf Miss Mowcher, who is first presented in Chapter 22 of *David Copperfield* as a sinister procuress in Steerforth's employ. Dickens had modeled her on a deformed chiropodist, named Mrs. Hill; and when this person wrote in heartbroken protest against the apparent cruelty, Dickens altered his plan to show Miss Mowcher in a more sympathetic light. Similarly, he created the character of Riah in *Our Mutual Friend* in part to make amends for Fagin, after a Jewish acquaintance accused him of anti-Semitic bias.<sup>231</sup>

The most debated change that Dickens made concerns the two endings of *Great Expectations*; the original not-happy ending and a more conventional "towards happy ending", which suggests that Pip and Estella will marry, that was rewritten due to the objection made to the original version by Dickens' close friend, Wilkie Collins.<sup>232</sup> As demonstrated in this section,

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229. *Id.* at 66–67 (“In Dickens’ words “calling for “the large canvas and the big brushes”).

230. *Id.* at 70

231. *Id.* at 70–71.

232. See Charles Dickens, BROOKLYN COLLEGE (May 12, 2002), [http://academic.brooklyn.cuny.edu/english/melani/novel\\_19c/dickens/ending.html](http://academic.brooklyn.cuny.edu/english/melani/novel_19c/dickens/ending.html) [<https://perma.cc/VW4B-VD6B>] (regarding the arguments pro and contra each version in regard to the two ends' controversy. For example, George Bernard Shaw criticized the "happy ending": "The novel "is too serious a book

although Dickens is one of the greatest writers in history, he included his audience as shadow writers that influenced his writing. So, if the audience was ever active and artistically involved both in theater and literature, it remains to see the “Cultural Dominant” of our times; the Users Generated Content (UGC) as expressed through the Internet.<sup>233</sup>

*F. The “Cultural Dominant” of Our Times: The Users Generated Content (UGC)*

Scholars trace organized media fandom and fan fiction to the second season of Star Trek in 1967.<sup>234</sup> The connection between fandom and marginalized groups is not new to researchers.<sup>235</sup> However, the Internet and its infrastructure enhanced this phenomenon, although fans who are engaged in UGC are taking the risk of Copyright infringement lawsuits, for unauthorized derivative works.<sup>236</sup> The legal approach does not go hand in hand with the way Rosemary Coombe, Andrew Herman, and Lewis Kaye regard collaborative co-creation, coronating UGC challenge to traditional notions of

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to be a trivially happy one. Its beginning is unhappy; its middle is unhappy; and the conventional happy ending is an outrage on it.” On the other hand, Martin Price argues for the contrary, dwelling on the change that matured Pip and Estella: “Each is a fantasist who has grown into maturity; each is a fantasist that has dwindled into humanity.”).

233. See PAUL BOOTH, *PLAYING FANS: NEGOTIATING FANDOM AND MEDIA IN THE DIGITAL AGE*, 136–149 (2015) (describing the Internet phenomenon as the embodiment of the Carnavalesque).

234. Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 *LOY. L.A. ENT. L. REV.* 651, 655 (1997). See generally HENRY JENKINS, ‘*At Other Times, Like Females*’: *Gender and Star Trek Fan Fiction*, in *SCIENCE FICTION AUDIENCES: WATCHING DR. WHO AND STAR TREK* (John Tulloch & Henry Jenkins eds., 1995); Coombe, *supra* note 104.

235. See generally RICHARD DYER, *STARS* 7–8 (new ed. 1998); DYER, *supra* note 104 (illustrating how urban gays communities reworked Judy Garland’s image to fit their needs); HENRY JENKINS, ‘*Strangers No More, We Sing*’: *Filking and the Social Construction of the Science Fiction Fan Community*, in *THE ADORING AUDIENCE: FAN CULTURE AND POPULAR MEDIA* 208, 213 (Lisa A. Lewis ed., 1992).

236. Kayti Burt, *How Harry Potter Shaped Modern Internet Fandom*, *DEN OF GEEK*, (July 31, 2018) <https://www.denofgeek.com/books/how-harry-potter-shaped-modern-internet-fandom/> [<https://perma.cc/D9YZ-F36R>].

authorship, as “distributed agency”.<sup>237</sup> These contradictory approaches between Copyright protected work and UGC illegal expressions seem to be irreconcilable as summed up by Bitá Amani:

...if expression automatically equals work, then many authors continue to be dispossessed from their means of production, since the resources with which they labor and the expressive inputs into their meaning-making are tied up with state-sanctioned property rights.<sup>238</sup>

However, reality is more complex. As Eric von Hippel demonstrates, not only is the Internet mechanism enhancing an ever growing “user innovation” in a vast amount of fields, but “[t]oday, commercial publishers and popular authors are increasingly understanding that fan fiction is a commercially valuable free complement to their intellectual property, and so increasingly seek to support fan fiction rather than suppress it”.<sup>239</sup> Thus, the very doctrinal basis of Copyright Law, especially the dominant “incentive” is turned upside down by the field itself.

*Game of Thrones* (“GoT”), an American fantasy drama television series, proves von Hippel’s point. “In four years, this epic (and epically convoluted) tale of a kingdom torn apart by machinations, murder and mayhem has become the most talked about show on TV, critically acclaimed, widely watched and referenced on everything from *South Park* to *Parks and Recreation*.”<sup>240</sup> Although classified as a fantasy, the story feels more like historical fiction, focusing on eternal themes such as the battle between good and evil, through the questions of the corrupting nature of power, redemption and

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237. Andrew Herman, Rosemary J. Coombe & Lewis Kaye, *Your Second Life? Goodwill and the performativity of intellectual property in online digital gaming*, 20:2/3 CULTURAL STUDIES 184, 201 (2006).

238. Bitá Amani, *Copyright and Freedom of Expression: Fair Dealing between Work and Play*, in DYNAMIC FAIR DEALING CREATING CANADIAN CULTURE ONLINE 44 (Coombe Rosemary J., Wershler Darren & Zeilinger Martin eds., 2014).

239. ERIC VON HIPPEL, FREE INNOVATION 152 (2017).

240. Sarah Hughes, ‘Sopranos meets Middle-earth’: how *Game of Thrones* took over our world, THE GUARDIAN (Mar. 22, 2014), <https://www.theguardian.com/tv-and-radio/2014/mar/22/game-of-thrones-whats-not-to-love> last [https://perma.cc/9UWP-KJBJ]; see generally Arno Scharl et al., *Analyzing the Public Discourse on Works of Fiction – Detection and Visualization of Emotion in Online Coverage About HBO’s Game of Thrones*, 52 INFO. PROCESSING AND MGMT. 129 (2016) (analyzing GoT further aspects in relation to interdisciplinary research is beyond the scope of this article).



character change.<sup>241</sup> Some scholars claim that the GoT phenomenon owes its crystallization not only to its theme, artistic skills and provocations, but to the social media: “. . . timing also helped, coming just as social media became a vital part of TV viewing. Game of Thrones was indeed the program that launched a thousand internet memes.”<sup>242</sup>

GoT’s success proved to be double-faced, as along with GoT’s record-breaking 161 Emmy Award nominations, piracy flourished.<sup>243</sup> So, during the Game of Thrones’ heyday, Travis M. Andrews estimates that it “was pirated more than a billion times — far more than it was watched legally”.<sup>244</sup> Yet, the show’s director, David Petrarca claims that “these unauthorized downloads actually do more good than harm” as they create the “cultural buzz” the show needs for its survival.<sup>245</sup> Namely, the buzz would cause more people to subscribe to HBO.<sup>246</sup>

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241. Nick Gevers, *Sunsets of High Renown: An Interview with George R. R. Martin*, INFINITY PLUS (Feb. 3, 2001), <http://www.infinityplus.co.uk/nonfiction/intgrmm.htm> [<https://perma.cc/N5NT-RQK6>]; Hughes, *supra* note 240 (“Game of Thrones sits at a sweet spot between fun and serious,” says Alyssa Rosenberg, culture writer for the Washington Post. “It has dragons! Sword fights! But it’s also extremely clear-eyed about politics, gender and sexuality, and the vicious inequalities that produce some of its fun. That makes it highly enjoyable, but also gives the show a more substantive claim to the kind of political insight that so many prestige dramas claim.”).

242. AFP, *How Did ‘Game of Thrones’ Become Such a Phenomenon?*, GLOBAL TIMES (Apr. 11, 2021), <https://www.globaltimes.cn/page/202104/1220734.shtml> [<https://perma.cc/F9YP-GC4G>].

243. *Game of Thrones: Awards & Nominations*, EMMYS, <https://www.emmys.com/shows/game-thrones> [<https://perma.cc/U8QQ-9FLP>] (Game of Thrones received 160 Emmy Nominations and 59 Emmy Awards).

244. Travis M. Andrews, *‘Game of Thrones’ Was Pirated More Than a Billion Times — Far More Than It Was Watched Legally*, WASHINGTON POST (Aug. 9, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/09/08/game-of-thrones-was-pirated-more-than-a-billion-times-far-more-than-it-was-watched-legally/> [<https://perma.cc/DS7U-FHL5>] (detailing that full piracy numbers, as reported by the anti-piracy firm MUSO are: Episode one: 187,427,575, Episode two: 123,901,209, Episode three: 116,027,851, Episode four: 121,719,868, Episode five: 151,569,560, Episode six: 184,913,279, Episode seven: 143,393,804 and All Episode Bundles — Season 7: 834,522).

245. Ernesto Van der Sar, *Piracy Doesn’t Hurt Game of Thrones, Director Says*, TF (Feb. 27, 2013), <https://torrentfreak.com/piracy-doesnt-hurt-game-of-thrones-director-says-130227/> [<https://perma.cc/BH3M-45JL>].

246. *Id.* (describing what seems to be an innovative idea, namely, that piracy is good for business, was already argued by “Heroes” and “Lost” co-producer Jesse Alexander, half a decade ago.)

The recent case of *Bel-Air* (film) is enlightening. The trailer, created by Morgan Cooper, is based on the *The Fresh Prince of Bel-Air* sitcom.<sup>247</sup> The film envisioned the sitcom from a darker and more dramatic approach, rendering the complicated question of its essence either as a derivative unauthorized work or as a transformative work.<sup>248</sup> It was uploaded on YouTube on March 10, 2019 and went viral.<sup>249</sup> Will Smith, the original sitcom star, decided to produce the film as a full television show with Cooper as director, co-writer and executive producer.<sup>250</sup> Major streaming corporations, such as Peacock and HBO Max bid for the promising project, with the former winning the deal.<sup>251</sup> Not even three years had lapsed from Will Smith's buy-in to the premiere of the new TV show.<sup>252</sup> This phenomenon goes hand in hand with the premise of the Internet invention as summed up by its creator, Tim Berners-Lee:

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247. Caroline Framke, *Peacock's Intriguing 'Bel-Air' Flips 'Fresh Prince,' and Turns Low Expectations Upside-Down: TV Review*, VARIETY (Feb. 9, 2022), <https://variety.com/2022/tv/reviews/bel-air-fresh-prince-reboot-review-1235169374/> [<https://perma.cc/Y5A9-S7HU>].

248. *Id.*; See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 992 F.3d 99, 114–116 (2d. Cir. 2021) (describing the situation in which the foundation lost the case as his claim for transformative use was rejected, unlike similar cases during Andy Warhol's career).

249. Andy Greene, *Hilarious 'Bel Air' Trailer Reimagines 'The Fresh Prince' as a Dramatic Movie*, ROLLINGSTONE (March 13, 2019), <https://www.rollingstone.com/tv-movies/tv-movie-news/bel-air-trailer-fresh-prince-will-smith-807707/> [<https://perma.cc/D5XJ-RNWX>]; *Bel-Air (2019) Official Trailer*, YOUTUBE, <https://www.youtube.com/watch?v=WAFjpyBgcgA> [<https://perma.cc/8PLB-3NZP>].

250. Rivea Ruff, *Morgan Cooper Talks Securing Will Smith's Co-Sign And Keeping 'Bel-Air' Authentic*, ESSENCE (Feb. 18, 2022), <https://www.essence.com/entertainment/morgan-cooper-bel-air-interview/> [<https://perma.cc/A5H8-GE9Z>].

251. Lesley Goldberg, *'Fresh Prince of Bel-Air' Drama Reboot in the Works*, THE HOLLYWOOD REP. (Aug. 11, 2020), <https://www.hollywoodreporter.com/tv/tv-news/fresh-prince-bel-air-drama-reboot-works-1306799/> [<https://perma.cc/QJT7-2CGL>]; Erica Gonzales & Bianca Betancourt, *The Fresh Prince of Bel-Air Is Getting a Reboot, with a Twist*, BAZAAR (Jan. 20, 2022), <https://www.harpersbazaar.com/culture/film-tv/a33584285/fresh-prince-bel-air-news-cast-spoilers-date/> [<https://perma.cc/ZQ7T-ZLUM>].

252. Ryan Parker, *Will Smith Calls Dramatic Fan-Made 'Bel-Air' Trailer "Brilliant"*, THE HOLLYWOOD REP. (Apr. 26, 2019), <https://www.hollywoodreporter.com/lifestyle/lifestyle-news/will-smith-calls-fan-made-bel-air-trailer-brilliant-1205187/> [<https://perma.cc/R2FG-BJTG>]; Gonzales & Betancourt, *supra* note 251.

I have always imagined the information space as something to which everyone has immediate and intuitive access, and not just to browse, but to create.<sup>253</sup>

*G. Hemingway Six Words' Story: "For Sale, Baby Shoes, Never Worn"*

Hemingway's famous story "For Sale, Baby Shoes, Never Worn", is shorter than most of its critics' titles. Regardless of rumors about "For Sale, Baby Shoes, Never Worn inception", it is still vivid and immensely powerful.<sup>254</sup> Fitting in the Twitter age and turning the Audience's lack of time into the relevant "Cultural Dominant" factor, this story turns upside down Aristotle's hierarchy which attempts to analyze what makes a good tragedy.<sup>255</sup> Aristotle theorizes that plot is the most important principle, followed by character, thought, diction, song, and spectacle, in that order.<sup>256</sup>

One need not be an accomplished literary critic to realize that this story has no plot, no characters, no dialogue and no spectacle, and it is highly questionable if the text answers the "diction" or "song" according to Aristotle's definition.<sup>257</sup> What Hemingway's work does contain is the most important asset for creativity, namely the audience's imagination, which fills the gaps left by Aristotle's missing principles. Thus, it takes part in the eternal dialogue with the author. This little story conveys why the DMCA and

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253. TIM BERNERS-LEE, *WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR* 157 (HarperCollins 2000).

254. Josh Jones, *The (Urban) Legend of Ernest Hemingway's Six-Word Story: "For Sale, Baby Shoes, Never Worn."*, OPEN CULTURE (Mar. 24, 2015), <https://www.openculture.com/2015/03/the-urban-legend-of-ernest-hemingways-six-word-story.html> [<https://perma.cc/4KAJ-LEBA>] ("A piercingly dark piece of writing, taking the heart of a Dickens or Dostoevsky novel and carving away all the rest." It is easy to note that even in a blog-like column, the title is longer than the story).

255. ARISTOTLE, *supra* note 184, loc. VI.

256. *Id.* ("But most important of all is the structure of the incidents. For Tragedy is an imitation, not of men, but of an action and of life, and life consists in action, and its end is a mode of action, not a quality. Now character determines men's qualities, but it is by their actions that they are happy or the reverse. Dramatic action, therefore, is not with a view to the representation of character: character comes in as subsidiary to the actions. Hence the incidents and the plot are the end of a tragedy; and the end is the chief thing of all. Again, without action there cannot be a tragedy.")

257. *Id.* ("Fourth among the elements enumerated comes Diction; by which I mean, as has been already said, the expression of the meaning in words; and its essence is the same both in verse and prose." Song relates more to the embellishment of the text).

the DSM got it all wrong: without the Audience's active participation, which they suppress, their very existence loses ground, as they are based on authorship in its extreme Enlightenment vocabulary.<sup>258</sup> However, as discussed in regard to the audience evolution from the Greek theater into modern days, regardless of the "Cultural Dominant" media - authorship can do without many components that construe a creative work, but not without its audience that keeps recreating it.

#### IV. CONCLUSION

"Code is law" as a concept is a chameleon, which evolved into a far cry from both Lessig's and Barlow's visions. Legally, through the DMCA in the United States and the DSM in the EU, the code created a new law that bars access to two thirds of UGC with no Copyright Law justifications, while causing important Copyright Law paradigms such as the fixation doctrine, the "First Sale" doctrine and fair use implementation in reverse engineering to evaporate.<sup>259</sup> Unlike Barlow's vision proposing that we can sell wine, (information without the bottles), the "make-believe bottles" created a new "Law of the Horse" in this axis.

Nevertheless, UGC continues to flourish against all odds, thus negating the economic incentive approach embedded in Article I, Section 8 Clause 8 of the Constitution of the United States, as interpreted by the Supreme Court.<sup>260</sup> In addition, as seen through the evolution of the audience axis, neither the artist, nor the audience, needed an economic incentive in order to create and maintain their dialogue through the relevant "cultural dominant" media's design. The gist of the Utilitarian/Incentive approach, as summed up by Wendy J. Gordon & Robert. G. Bone "is to provide incentives for new production at fairly low transaction costs."<sup>261</sup> Hence, in reference to other

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258. See generally BOYLE, *supra* note 70, at 54–55 (describing a gist of Authorship as construed by the Enlightenment vocabulary).

259. See *supra* note 17 for a detailed discussion.

260. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); see *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (claiming that the immediate effect of copyright is to "secure a fair return for an 'author's' creative labor" and by creating this incentive "to stimulate artistic creativity for the general public good.").

261. See Gordon & Bone, *supra* note 86, at 189, 194 (outlining the doctrinal ground of the incentive approach. In their terminology, the term "costs" refers to Copyright generates costs, that fall into four categories: (1) monopoly pricing; (2) chilling of future creativity; (3) transaction costs of licensing; (4) costs of administration and enforcement).

aforementioned grounds for “if value/then right” in Copyright Law, they base the economic argument for copyright “on the idea that works of authorship are quasi-public goods plagued with the usual free-rider and monopoly problems associated with nonexcludability and inexhaustibility.”<sup>262</sup> Accordingly, Gordon & Bone interpret Copyright Law’s toolkit as a vehicle to enhance this approach.<sup>263</sup> Copyright Law’s constraints such as its limited duration, the ‘fair use’ doctrine and the idea/expression dichotomy, all serve “to reduce deadweight loss and other costs within a larger structure that creates incentives.”<sup>264</sup> However, as Von Hippel proves, financial gain is not the real incentive for creativity.<sup>265</sup> Likewise, ironically, as Joe Karaganis claims, the financial premise that was supposed to be the ground for the DRM/DMCA regime is not justified, practically.<sup>266</sup>

The failure of providing affordable access and the strategy of being as aggressive as possible towards any sign of international intellectual property alleged piracy, leads to the opposite outcome. Other approaches to Copyright Law such as the Lockean approach and the Personhood approach, do not supply enough grounds for rubbing the audience her fair share in the creative dialogue.<sup>267</sup>

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262. *Id.* at 191.

263. *Id.* at 189.

264. *Id.*; see generally Neil Weinstock Netanel, *Israeli Fair Use from an American Perspective*, CREATING RIGHTS: READINGS IN COPYRIGHT LAW 377 (2009) (discussing the implications of this approach on fair use doctrine, ending in diminishing it into a narrowly interpreted defense that fails to incorporate freedom of speech).

265. See generally VON HIPPEL, *supra* note 239.

266. See generally JOE KARAGANIS, MEDIA PIRACY IN EMERGING ECONOMIES, SOCIAL SCIENCE RESEARCH CENTER (Joe Karaganis, ed. 2011).

267. See generally ZEMER, *supra* note 86, at 12–13, 16; Pessach, *supra* note 86, at 316–368 (providing authorship justifications in copyright law); Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J. L. & PUB. POL’Y 891 (2006) (demonstrating how copyright labor/Lockean approach misunderstood and twisted Locke’s philosophy in regard to the author/ public domain (i.e.: the audience) balance); Radin, *supra* note 86 (discussing the personhood approach); Gordon & Bone, *supra* note 86 (categorizing the different approaches to Copyright Law into the moral approach, i.e.: the Lockean/labor approach and the personhood approach, and the instrumental approach, i.e.: the incentive approach, the moral approach laws recognize the special claims of creators to exclude others from their creations, either as a means of protecting their personhood or their financial and spiritual autonomy, or in recognition of their self-ownership, and the entitlement this gives them to exclude others from the things they labor to create); Jessica D. Litman, *The*

The current para – copyright law vocabulary proves that what seems to be an eternal truth is made so by those in power.<sup>268</sup> Ironically, *Bel-Air* could easily be grounded by the “notice and take down” mechanism of the DMCA or forced to prove non infringement.<sup>269</sup> Therefore, taking the risk of stepping into the blurry and never- ending dilemma: how to distinguish transformative use from actionable derivative use? It escaped this scenario because of Will Smith, whose power replaced the DMCA, in accordance with Berners-Lee’s vision, that code creates creators and not mere consumers.<sup>270</sup> Thus, the Internet’s architecture achieved literature’s real goal, namely, “to make the reader no longer a consumer, but a producer of the text.”<sup>271</sup> Barthes distinguishes between the “writerly text,” where the readers take place in Authorship and the “readerly text” in which the readers are restricted to just passive reading, “controlled by the principle of non-contradiction” and submitted to the current dogma.<sup>272</sup> Barthes’ distinction brings to mind Lessig’s dichotomy between the Read & Write culture, as advocated by Barthes, and the Read Only culture, which is favored by the current law.<sup>273</sup> As Barthes sums up: “by degrees, a text can come into contact with any other system: the intertext is subject to no law but the infinitude of its reprises.”<sup>274</sup> Hence, users’ undercurrent creativity is filling both Lessig’s “Code is Law” and Justice Easterbrook’s “Law of the Horse” with unpredictable new content. Young’s dilemma asks, “Born originals, how come it to pass that we die copies?” In answering this question, the transformation of Cassandra’s curse into Cassandra’s triumph will assure that we live as we are meant to be: originals

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*Public Domain*, 39 EMORY L. J. 965 (1990) (discussing their unsatisfactory grounds of leaving the public domain, i.e.: the audience out of Authorship’s scope albeit her contribution).

268. See *supra* note 68.

269. See Moldawer, *supra* note 84 (discussing the blurry distinction between transformative use and derivative work that will be held as infringing Copyright Law [claiming it depends on the artistic taste of the judiciary, although, prima facie, Copyright Law is supposed to be artistically neutral]).

270. See BERNERS-LEE, *supra* note 253, at 168–89.

271. BARTHES, *supra* note 169, at 4.

272. *Id.* at 156.

273. See generally LESSIG, *supra* note 90.

274. BARTHES, *supra* note 169, at 211.

with no fear of imaginary bottles, thus, recreating our creative code as our law of the horse.<sup>275</sup>

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275. EDWARD YOUNG, CONJECTURES ON ORIGINAL COMPOSITION, IN A LETTER TO THE AUTHOR OF SIR CHARLES GRANDISON 24 (ed.) (1759).