

# Copyright Law, the Production of Creative Works and Cultural Growth in the Digital Age

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# Copyright Law, the Production of Creative Works and Cultural Growth in the Digital Age

Alina Ng

## *Abstract*

*The Internet has affected information flow in copyrighted content in a profound manner. Authors and artists are enabled through the Internet to assert greater control over the flow of information in their works as these new technologies offer new and different distribution channels for content. These new technologies also allow consumers to use content in ways, which had not been anticipated by the copyright industries. This paper presents that copyright law was developed for a specific purpose, which was to encourage learning and growth. As new technologies emerge and as content industries experience changes in information flow in copyrighted works, copyright law had been used to maintain control over existing information flows. The law has a pivotal role to play as the industries assert greater control over the flow of information in content. The role of copyright law in this instance is not to maintain the existing status quo as the industries undergo changes and loss of control over information flow in copyrighted works. Rather, the law serves a more fundamental purpose of balancing information flow between private and public interests. As the law was designed to encourage authors and artists to produce creative works for the public purposes of education, socio-economic and cultural growth, copyright law in the global information society plays an even more important role in ensuring that society has access to information in copyrighted works.*

## **Introduction**

Attempts by the copyright industries to strengthen copyright protection may be seen to be an effort to retain control of creative works and resist the freedom of consumers to use creative works in new and innovative ways. In an unprecedented fashion, consumers of creative works are today enabled through digital technologies as well as the networked environment of cyberspace to share, exchange, modify and transform an original copyrighted work in a manner, which print and analog technologies did not permit before. Computing technologies have shifted the flow of creative production and affected the traditional flow of information from the publisher of creative content to the consumer. As the flow of information between publisher and consumer changes courses to connect consumer to consumer and artists or authors to consumer in a way that transcends jurisdictions and national boundaries, the copyright industries face deep-rooted challenges in maintaining traditional methods of controlling the uses of creative works. The profound changes brought about by enabling technologies present difficult challenges to the copyright industries seeking to retain control of creative works through an assertion of stronger copyrights because the emergence of an alternative distribution channel for creative works through cyberspace empowers artists and authors by directly connecting them with the consumers of their works and presenting producers of creative works an option of bypassing their publishers. Consumers are also empowered by digital technologies to use creative works for the production of other creative works through modification and transformative uses, which content publishers are not able to control.

This paper attempts to trace the traditional flow of content between publishers and consumers of creative works and identify the changes brought about by digital

technologies and the networked environment of cyberspace to the copyright industries. It is shown that print and analog technologies have allowed owners of creative works to retain control of the flow of information to the consumer because the very nature of print and analog technologies permit a consumer of creative works little or minimal modification and alteration to creative works. Digital technologies however, present opportunities to the consumer to change the flow of information by modifying and altering creative works and redistributing those works through the Internet to other consumers. This paper presents that digital technologies changes the flow of information in creative content toward the consumer and allow the consumer of creative content to use creative works in a manner, which previous technologies did not permit. As more consumers become empowered by the use of digital technologies, it is envisaged that the production of creative works for the progress of science and the useful arts will bring a deeper meaning as cultural growth occurs through new and creative uses of existing works. The paper proceeds to analyze the manner in which copyright law draws the balance between public and private interests to ensure that creative works are available to the public for developmental purposes as well as cultural growth and demonstrates how digital technologies cultivates cultural growth through the use of creative works for transformative purposes. This paper concludes by submitting that the doctrine of fair use plays an even more significant role in the digital age to ensure that the proper balance between public and private interests is achieved to encourage the production of creative works and at the same time protect the constitutional right of access to creative works for the progress of science and the useful arts.

### **Part 1: The Traditional Flow of Information in the Copyright Industries**

For most of copyright law's history, the law developed and grew around technologies, which were built on an analog platform, which allowed content owners to control the flow, dissemination and use of information in content. Analog platform technologies, while allowing works to be reproduced and distributed to a wide segment of the public, nonetheless allowed copyright owners to keep a better grasp on the reproduction and distribution of their works "with the relative ease of detecting unauthorized commercial-scale publication."<sup>1</sup> Analog technologies did not provide the much more "versatile, although more porous, platform for storing, distributing and reproducing works of authorship,"<sup>2</sup> which digital technologies today provide the content industries, offering new opportunities to commercialize creative works and build new markets through the Internet and at the same time changing the course of information flow between content owner and consumer. Traditionally, print and analog technologies had by their very nature vested control of the flow of information with the publisher or printer of content. The interests of the author and the consumer of creative works were

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<sup>1</sup> Analog platforms "'fix" works of authorship through some human or mechanical process of deforming a physical object (such as stone, paper, vinyl, film) in a manner that conveys an image (a letter, number, or graphic image) or signal varying in audio frequency (sound) or light or color intensity (film). The term "analog" is used to signify that the medium uses an "analogy" to represent the phenomenon." Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 104-105 (2002)

<sup>2</sup> *See id.* at 105

largely ancillary to the primary interests of copyright owners,<sup>3</sup> which were printers and publishers, who owned the right to publish a manuscript or a piece of work and recover profits from the printing and publishing of creative works. This monopoly over the right to publish had effectively allowed printers and publishers in traditional copyright industries to control the course of information flow in creative works.

The initial conception of copyright as a right of a publisher or printer to publish literary works<sup>4</sup> did not perceive of the right of the author in the work<sup>5</sup> nor of the public's right of access to the work. The right to retain control over creative works and as a result, the course of information flow from the printer or publisher to the consumer of literary works, began as a tool to regulate the conduct of trade within the print industry. Copyright, in the form of a publisher's right to make copies of books,<sup>6</sup> began in 16<sup>th</sup> century England<sup>7</sup> as a loose set of rules that were governed by guild ordinances and acts of censorship.<sup>8</sup> The right, largely a tool for trade regulation<sup>9</sup> had been developed by the earliest London publishers as a form of business practice and was granted by the publishers' guild, a medieval association of book publishers known as the Stationers'

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<sup>3</sup> Copyright, as was originally conceived, did not encompass the rights of authors or users of copyrighted works. It is said that the "[r]ight of copy was the stationer's [the printer or publisher] not the author's." BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 5 (Columbia University Press 1967)

<sup>4</sup> L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 20 (University of Georgia Press 1991)

<sup>5</sup> It is said that "any prevailing notions of piracy or plagiarism" ... "would have been viewed with printer's or publisher's not author's eyes. And while there was an idea of piracy of content which might reach beyond verbatim copying, we should not suppose that any abstruse or refined ideas of literary theft could have been entertained. Right of copy was the stationer's not the author's. Living authors furnished some of the materials for the printing mills, and increasingly these manuscripts had to be purchased in a business way (usually payment was made in a lump sum)." See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 5 (Columbia University Press 1967). Author's rights in literary works arose formally in the decision of *Millar v. Taylor*, 4 Burr. 2303; 98 Eng. Rep. 201 (1769), which is said to have "marked the great transition of legal thought to analyzing copyright as a right of the author" as the analysis in the case focused on whether the author had a property right in literary works arising from the very creation of the work. Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1153 (1983)

<sup>6</sup> Prior to the introduction of the printing press in England, publishers together with "scribes, booksellers and bookbinders" had already organized themselves within the book trade to form the Stationers' Company, which became a "closely knit, powerful cartel with a single object – maintaining order and profits in the publishing trade." Only members of the Stationers' Company were entitled to print books. PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 41 (Hill and Wang 1994)

<sup>7</sup> A royal printer was appointed in England in 1504 and the first printing privilege was issued in 1518 to his successor Richard Pynson. The first printing privilege was issued "in the form of a prohibition for two years of the printing by any other person of a certain speech to which this first English copyright notice was appended." It is also stated that "Bishop Fell, in his memoirs on the state of printing in the University of Oxford, states that this University had been granted certain exclusive privileges of transcribing and multiplying books by means of writing; and Lowndes in his early "Historical sketch of the law of copyright," published in 1840 and 1842, cites many early privileges, most commonly for seven years, granted after the invention of printing." RICHARD ROGERS BOWKER, COPYRIGHT, ITS HISTORY AND LAW 19 (Houghton Mifflin Company 1912)

<sup>8</sup> The "stationer's copyright" it is said, "existed for over a hundred and fifty years regulated not only by the common-law, but by guild ordinances and acts of censorship." LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 9 (Vanderbilt University Press 1968)

<sup>9</sup> See *id.* at 11

Company.<sup>10</sup> Primarily being a right to publish a work and nothing more,<sup>11</sup> the right was one that belonged to the London book publishers, which were members of the Stationers' Company, and any disputes about copyright ownership were resolved within the governing body of the Stationers' Company known as the Court of Assistance.<sup>12</sup> As copyright was introduced as a way to conduct the early book publishing business in London, copyright as it was conceived then is said to not have any theoretical justification or jurisprudential basis.<sup>13</sup>

The introduction of a new technology, the printing press, however, resulted in the formalization of copyright into a formal set of rules to protect literary works. Most academic literature earmark the introduction of the printing press as the impetus for formalizing copyright into an established set of rules<sup>14</sup> because the technology provided the "first realistic opportunity for authors to recognize the potential economic benefit from their work."<sup>15</sup> Copyright and technological developments are inextricably entwined. The development of a new technology in the form of the printing presses that allowed the making of copies of literary works resulted in the emergence of copyright as a tool for controlling the production of creative works.<sup>16</sup> The Supreme Court recognized this dynamic relationship between the law and technology in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>17</sup> when the Court commented that "from its beginning the law of copyright has developed as a response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment – the printing press – that gave rise to the original need for copyright protection."<sup>18</sup> When copies of literary works were made by hand writing a manuscript all over again before the introduction of

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<sup>10</sup> The rights assumed by the Stationers' Company "were not copyrights in the modern sense – the right to reproduce intangible intellectual creations – but rather rights in "copies," the physical product, regardless of whether the work of authorship was ancient or contemporary." WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 8 (The Bureau of National Affairs, Inc. 1994)

<sup>11</sup> It is said that "copyright was born of a very specific set of restrictions: It forbade others from reprinting a book" and "[i]t did not go beyond that very narrow right. It did not control any more generally how a work could be used." LAWRENCE LESSIG, FREE CULTURE 87 (The Penguin Press 2004)

<sup>12</sup> LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 9 (Vanderbilt University Press 1968)

<sup>13</sup> It is said that "[a]ny attempt to state the precise nature of the stationer's copyright calls for a word of caution. Since businessmen developed and shaped it to their own ends, there was little or no regard for underlying principles or a sound theoretical basis for copyright." *See id.* at 9

<sup>14</sup> It is said that "the printing presses, with its ability to make multiple copies of a work easily, is frequently cited as the impetus for efforts to secure a more formal type of protection for books." WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 4 (The Bureau of National Affairs, Inc. 1994)

<sup>15</sup> Russ VerSteege, *The Roman Law Roots of Copyright*, 59 MD. L. REV. 522, 525 (2000)

<sup>16</sup> The effect of copying a literary work without the permission of the author is aptly explained by Augustine Birrell, when he referring to the "art of printing," states that "[i]f the author had a private printing press he could publish an edition for himself, but, as this is unusual, he employs and pays a printer and a bookseller. The edition is circulated, and each buyer of a copy becomes the owner of a copy of a book which is his to read and to lend, to sell, or to leave to his heirs. But every copy supposes an original which subsists somewhere in splendid isolation, whatever may be the number of the copies, and were the purchaser of a single copy to reproduce other copies from it he would thereby wholly or in part destroy the value of the property still in the hands of the owner of the original. To do this would be a wrongful act, and is usually so regarded whilst the author lives." AUGUSTINE BIRRELL, THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 15-16 (Cassell and Company, Limited 1899)

<sup>17</sup> 464 U.S. 417 (1983)

<sup>18</sup> 464 U.S. at 430

the printing presses, piracy of literary works was not a perceived threat to authors of literary works as the reproduction of a manuscript by hand was a task that was both laborious and time consuming to scribes of the work.<sup>19</sup> As the making of another copy of a manuscript took such a long time, the distribution of copies of manuscripts did not reach very far and hence did not threaten the livelihood of an author of literary works. The introduction of a new technology that allowed for the reproduction of literary works on a massive scale, the printing press, by William Caxton in Westminster in 1476, changed this idyllic literary setting by allowing copies of literary works to be technologically reproduced.<sup>20</sup>

The Government of England received the printing press with mixed feelings.<sup>21</sup> The print technology gave rise to the print industry, which was a new industry to be encouraged. Yet print technology facilitated the reproduction and distribution of materials, which may have been detrimental to Government interests. As the British Crown took “an acute interest in this dangerous art”<sup>22</sup> of print technology as it was introduced<sup>23</sup> and began to “assert prerogative rights regarding it.”<sup>24</sup> The Crown did this by setting up a Royal Printer in 1485 and granting royal privileges and printing patents on the exclusive right to print particular books from 1518 onwards.<sup>25</sup> With the enactment of the Act of Supremacy, which declared Henry VIII to be the “Supreme Head of the Church of England,” in 1534, England became separated from the Roman Catholic Church and the “ferment occasioned by the separation”<sup>26</sup> resulted in “continual unrest in England,”<sup>27</sup> thus making “censorship and press control perennial policies of the Tudor

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<sup>19</sup> It is explained that “[i]n ancient times, writings were made on clay tablets, stone, metal plates, wood, papyrus, animal skins and parchment. Suitable materials were often expensive and scarce, and writing on these materials could be difficult and time consuming. Transporting and preserving these writings would also be difficult. Under these conditions, the logistics of copying writings served as barriers to large scale copying and distribution of writings.” Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 377-378 (2004)

<sup>20</sup> “The moveable type printing presses,” it is said, “facilitated efficient, mass duplication of a single manuscript. The importance of the printing press can hardly be overstated. With multiple copies and decreased costs associated with printing, literature became more accessible. Printing also doubtlessly saved many works from extinction. Printing not only made possible the mass production of books, but also assured their accuracy.” *See id.* at 378

<sup>21</sup> “The introduction of the printing press into England,” it has been said, “meant for the Government at first a new trade to be encouraged, and then an instrument to be controlled.” *See* LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 21 (Vanderbilt University Press 1968)

<sup>22</sup> BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 3 (Columbia University Press 1967)

<sup>23</sup> The introduction of the printing presses that allowed printers to produce large number of copies relatively quickly and inexpensively led to the development of a “potentially large, new market of readers” as well as the “need to protect authors and publishers/booksellers from pirates bent on stealing that new market.” WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 6 (The Bureau of National Affairs, Inc. 1994)

<sup>24</sup> BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 3 (Columbia University Press 1967)

<sup>25</sup> It is explained that “[t]he uncontrolled dissemination of literary works and political treatises could invite sedition; also, printing, along with other emerging industries, gave the Crown a new source of revenue and favors. By granting an exclusive right – a patent, it was called – to print particular literary or legal or educational works to a given bookseller, the English sovereigns were able to tap into a continuing stream of loyalty and income.” PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY* 40 (Hill and Wang 1994)

<sup>26</sup> LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 21 (Vanderbilt University Press 1968)

<sup>27</sup> *See id.* at 21

and Stuart sovereigns.”<sup>28</sup> Censorship and press control were achieved through the official licensing for the printing of books. In 1557, under the reign of Queen Mary, the Stationers’ Company was chartered to become the official guardian of royal censorship and was granted the exclusive right to print literary works. The “entire formative period of early copyright”<sup>29</sup> occurred in this period when censorship was regarded as a major policy of the English sovereign during a period of religious and political ferment. With the charter granted to the London stationers, printers and publishers obtained with the charter, a “national monopoly”<sup>30</sup> to print literary works and the freedom to create rights, which pertained to the ownership of copies of books that eventually developed into copyright. As a result of this, copyright is usually reckoned to be a publisher’s right in the first place.<sup>31</sup> By the grant of exclusive printing rights to the Stationers’ Company, the Company was allowed a great degree of monopolistic control over the English book publishing trade and had largely used copyright as a mechanism to further their economic interest in the industry.

As the Stationers’ Company asserted rights over the book trade, publishers and printers of literary works had in their possession, a very effective means of controlling information flow in literary works.<sup>32</sup> Copyright gave the Stationers’ Company an absolute right to print and publish books.<sup>33</sup> This right was a right that existed in perpetuity<sup>34</sup> and “passed on from one generation of printers to the next.”<sup>35</sup> Through this right, members of the Stationers’ Company controlled the flow of information by retaining exclusive control of the right to print and publish literary works. Authors of literary works were given little recognition in the book trade and as result, could not assert any rights over their works or control the flow of information.<sup>36</sup> An author’s manuscript was sold to

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<sup>28</sup> See *id.* at 21

<sup>29</sup> See *id.* at 21

<sup>30</sup> See *id.* at 21

<sup>31</sup> It is explained that “[t]he stationers were businessmen who manufactured and sold books, and to them press control was a means to their own ends – government protection of their market monopoly. As Edward Arber, commenting on “the virulence of their trade competition,” has said: “We must think of these printers and publishers as caring chiefly for their crowns, half-shillings and silver pennies. They bore the yoke of [governmental] licensing as best they could, but only as a means to hold themselves harmless from the political and ecclesiastical powers. Their business was to live and make money; and keen enough they were about it.” These were the men who created the stationer’s copyright – the first English copyright, and thus (by way of an indisputable series of casually related events) the direct antecedent of modern American copyright. That copyright in the beginning was a publisher’s right is hardly surprising; indeed, it is remarkable that later it somehow came to be known as an author’s right.” L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT* 20 (University of Georgia Press 1981)

<sup>32</sup> It has been said that “[i]n the sixteenth century, no agency for controlling property was more vigorous than the Stationers’ Company; and in practical effect on copyright, none was more powerful.” HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* 29 (University of Texas Press 1956)

<sup>33</sup> The Stationers’ Company was regarded to be the “immediate source of the authority to print, bind and sell books.” PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY* 41 (Hill and Wang 1994)

<sup>34</sup> The rights that the stationers had could be transferred by “sale, gift or inheritance.” It is further said that “these private copyrights were of unlimited duration.” Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 *SANTA CLARA L. REV.* 365, 397-398 (2004)

<sup>35</sup> PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY* 41 (Hill and Wang 1994)

<sup>36</sup> Until the Statute of Anne 1710, codifying copyright into law, “the author’s legal significance was not written into law” and the “social and psychological attitudes of authors toward the significance of their own

printers and publishers and with the sale of the manuscript, an author also sold the exclusive right to print and publish the book.<sup>37</sup> The Stationers' Company retained the status quo and control over the book trade through continuous lobbying for censorship laws<sup>38</sup> to support their continuous monopoly over the print business by arguing that censorship was necessary to maintain order within the book trade,<sup>39</sup> an argument, which found favor with the English Crown<sup>40</sup> at a time when the Government was concerned with press regulation to curb the publication of heresies and seditious materials and maintain social order.<sup>41</sup>

The Stationers' Company began to lose control over the book trade with the lapse and non renewal of the last censorship law, the Licensing Act 1662 in 1694.<sup>42</sup> As the

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work and toward the ownership of literary composition" were not entirely clear. Writers such as John Milton, whose eloquence in the *Areopagitica* called for the protection of literary works from unauthorized copying, defended the booksellers' copyright and not authors' rights. HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* 11 (University of Texas Press 1956)

<sup>37</sup> It is explained that "living authors furnished some of the material for the printing mills, and increasingly these manuscript had to be purchased in a business way (usually payment was made in a lump sum); but upon entry the author dropped away and it was the stationer who had the right of multiplication of copies against others of the Company, which is to say, speaking imprecisely, against all those eligible to print." BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 5 (Columbia University Press 1967)

<sup>38</sup> As the stationer's copyright existed together with censorship laws, in the 16<sup>th</sup> and early 17<sup>th</sup> centuries, the Company exercised its powers with the assistance of the Star Chamber Courts that were charged with the enforcement of censorship laws. Decrees from the Star Chamber courts enjoyed the force of law and by the Star Chamber decrees of 1586 and 1637, the Company's powers were affirmed and the registration of works in the Company's books before publication became a requirement for copyright protection. As a result, the Company, with the assistance of the Star Chamber courts, managed to assert control over the book trade and the Government with the help of the Company, censored the press and limited the dissemination of objectionable materials. Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 *SANTA CLARA L. REV.* 365, 398-399 (2004)

<sup>39</sup> It is stated that "[t]he stationers early perceived the value of censorship regulations to support their monopoly, and they never lost sight of that point. Indeed, their continual lobbying was such that the long-continued existence of censorship in England can be attributed in large measure to them, although they were not always successful in their efforts." LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 115 (Vanderbilt University Press 1968)

<sup>40</sup> In 1559, Queen Elizabeth confirmed the Company's charter. It is said that the Queen knew "that conditions of the Company's operation were ideally suited to growth and expansion, and useful for guarding interests of the Crown. Behind the Company was an old tradition; sustaining it was a strong monarchy; directing its fortunes were good businessmen. The press regulation conducted by the Stationers was naturally inseparable from copyright, for copyright was inseparable from the Company's interests." HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* 36-37 (University of Texas Press 1956)

<sup>40</sup> LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 114 (Vanderbilt University Press 1968)

<sup>41</sup> It is said that "[i]n considering the origins of copyright, two things must never be forgotten. First, the Church and her priesthood, frightened – and who dare say unreasonably frightened? – at the New Learning, and at the independence and lawlessness of mind and enthusiasm that accompanied the New Learning; and second, the guilds or trade unions; jealous of their privileges, ever at war one with another, and making their appeal to the Crown for protection against outside interference with their strictly defined domains of business." AUGUSTINE BIRRELL, *THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 49 (Cassell and Company, Limited 1899)

<sup>42</sup> Parliament's House of Commons rejected a renewal of the Licensing Act 1662 and provided its reasons in an elaborate argument that is believed to have been drafted by John Locke. According to the House of Commons, "the illegality of Stationers' monopolies, the lack of point and definiteness of the regulations



Stationers' Company began to lose control over the book trade, the assertion of author's property rights in literary works became a viable strategy that the stationers adopted to maintain their monopoly power. Although there were no statutory or judicial recognition of an author's property rights in literary works prior to the Statute of Anne 1710, authors such as Daniel Defoe, had set the stage upon which the stationers may present their arguments for authorship rights.<sup>43</sup> As the Government's policy for censorship and press control slowly dwindled, the stationers lost their primary tool for maintaining order within the book trade.<sup>44</sup> On February 26, 1706, the stationers submitted a new law to Parliament for a bill to secure property in books and did not base their arguments on the revival of licensing or censorship.<sup>45</sup> Rather, the stationers argued that the disorder in the book trade was a discouragement to authors from writing books that were of public benefit.<sup>46</sup> The resulting statute, The Statute of Anne 1710, embodied much of the arguments surrounding the passing of the bill and introduced two concepts that were not originally part of the stationer's copyright, but which are pivotal to the present copyright regime in the United States.

The Statute of Anne 1710 introduced first, a statutory limitation to the perpetual right of the booksellers to break the control that the booksellers had over the print industry.<sup>47</sup> This statutory limitation on the perpetual right to copy had the effect of limiting the power that the Stationers' Company held over the book trade<sup>48</sup> since its

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and the improbability of successful prosecution of breaches of printing restrictions in courts of common law," were sufficient reasons to reject the renewal of the Licensing Act. HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* 89 (University of Texas Press 1956)

<sup>43</sup> Defoe had opposed the institution of licensing and had acknowledged that the recognition of authorial property in literary works through an Act of Parliament would restrain the licentiousness of the press and put an end to piracy. MARK ROSE, *AUTHORS AND OWNERS* 34-35 (Harvard University Press 1993)

<sup>44</sup> It is said that after the expiration of the Licensing Act 1664, "[l]icensing, regulation of copy and other Parliamentary restriction of the press which had characterized the mid-seventeenth century were now things of the past. Attempts to establish a new press regulation act in 1698 failed, and from that time until 1710, no suggestion for regulation of trade was put into practical effect." HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* 89 (University of Texas Press 1956)

<sup>45</sup> LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 142 (Vanderbilt University Press 1968)

<sup>46</sup> The position taken by the stationers is aptly explained when it is stated that "[t]he stationers made the case that they could not produce the fragile commodities called books, and thus encourage learned men to write them, without protection against piracy; but no one, we can be sure, deliberated what strange results might follow if the same logic were applied to other fragile ventures outside the book field. It is hard to know how far the interests of authors were considered in distinction from those of publishers." BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 7-8 (Columbia University Press 1967)

<sup>47</sup> The Statute provided for the statutory limitation by making a distinction between old books and new books. For old books, the Statute provided authors, who had printed but not yet transferred their rights and booksellers and others who had purchased the copy of any book to print them, a twenty-one year term protection from April 10, 1710. For new books, the Statute provided authors with the exclusive right to print the book for a fourteen year period and if the author is still alive after the fourteen year period, they would have the same right for another fourteen year period. AUGUSTINE BIRRELL, *THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 94-95 (Cassell and Company, Limited 1899)

<sup>48</sup> It is said that the "Stationers' Company ended up getting far less than it had petitioned for because Parliament, instead of recognizing perpetual rights, passed a law limiting the exclusive right of publication to a set term of years and containing other provisions limiting power previously enjoyed by the Stationers." WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 11 (The Bureau of National Affairs, Inc. 1994)

formation in 1557.<sup>49</sup> After the expiration of the copyright, the work will fall into the public domain<sup>50</sup> to ultimately serve the public interest of learning, education and development.<sup>51</sup> In light of the history that led to the passing of the Statute, it does appear that Parliament had intended to transform the stationer's copyright, which was originally a device for censorship and an instrument to maintain the stationer's monopoly, into a law that may serve to destroy the booksellers' monopoly by providing for a limited copyright protection term, making copyright available to anyone and introducing price control provisions, which were created in response to the high prices that the booksellers had charged for the sales of their books.<sup>52</sup> As a curtailment on the stationer's perpetual monopoly over the book trade, the Statute of Anne had also introduced the public domain, in which copyrighted works were to eventually rest after their copyright had expired. Prior to the Statute of Anne, all literature belonged to the bookseller in perpetuity and could only be printed if the strict standards of censorship were met.<sup>53</sup> The exclusive implementation of the stationer's copyright had been outside the purview of the courts and was only subject to self-regulation within the Stationers' Company.<sup>54</sup> With the Statute of Anne, however, copyright was only granted to a new work, had a limited duration of protection to a maximum duration of 28 years (a 14 year term, which is renewable for another 14 years), and encompassed only the right to print, publish and vend, thus creating a public domain that was not within the exclusive control of the Stationers' Company.<sup>55</sup>

The Statute of Anne 1710 introduced second, the author as a legitimate right holder to break the monopoly, which the booksellers had over the print industry. The recognition of the author has today allowed creative content producers to assert very strong rights over the uses of their creative works as well as the flow of information in copyrighted works in the digital world. The control, which creative content producers

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<sup>49</sup> It is explained that “[e]ven before the printing press, craftsmen involved in the bookmaking and bookselling trades organized in England to protect their interests. In 1357, there was a craft guild for scribes (those who copied text) and limners (those who illustrated manuscripts) in London, referred to as the Brotherhood of Manuscript Producers. Later, in 1403, a guild for scribes, limners, bookbinders and booksellers was created. Those involved in the book trade, particularly printers and booksellers, became known as the “stationers,” and about 1510, a voluntary association, or “Brotherhood of the Stationers,” was formed. This Brotherhood of Stationers became officially recognized by a royal charter granted on May 4, 1557 and was known as the Stationers' Company or the Company of Stationers.” Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 391-392 (2004)

<sup>50</sup> LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 145 (Vanderbilt University Press 1968)

<sup>51</sup> It is said that the Statute of Anne 1710, “had as its foremost objective, the encouragement of learning – a general public interest – not the private economic interests of authors, printers or publishers. It did have a secondary interest for the economic security of authors and other proprietors of books and writings, but this secondary concern was driven by the impact that the void of regulation had upon the creation of “useful books.”” Craig W. Dallan, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 409 (2004)

<sup>52</sup> L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 29 (University of Georgia Press 1991)

<sup>53</sup> See *id.* at 30

<sup>54</sup> See *id.* at 30

<sup>55</sup> See *id.* at 30

have over copyrighted materials today, is one of the more significant driving forces shaping the role of copyright law in the digital age. This is so even though the inclusion of the author as a legitimate copyright holder under the Statute of Anne 1710<sup>56</sup> is said to be “more a matter of form than of substance”<sup>57</sup> because “the monopolies at which the statute was aimed were too long established to be attacked without some basis for change”<sup>58</sup> and “the most logical and natural basis for the changes was the author.”<sup>59</sup> It is noted that the benefit of the Statute to authors is really minimal and only protected authors in so far as they were being remunerated for their work since authors would have to assign their copyright to a stationer in order to be paid.<sup>60</sup> As the introduction of authors’ rights in the Statute of Anne 1710 was more of a solution to address the growing monopolistic control that the stationers had over the book trade rather than an overt statutory recognition of rights that authors ought to have in their creative works,<sup>61</sup> the Statute ought not to be regarded as settling “the theoretical questions behind the notion of literary property.”<sup>62</sup> The Statute, nonetheless, did “represent a significant moment in a process of cultural transformation.”<sup>63</sup> Following a period in which “censorship and copyright were deeply intertwined,”<sup>64</sup> it is said “the passage of the statute marked the divorce of copyright from censorship and the reestablishment of copyright under the rubric of property rather than regulation.”<sup>65</sup> It is through the provision of property rights in creative works, which allow authors to assert control over uses of their works for further developmental and transformative uses.

The Statute of Anne carries some important aspect of copyright law into the present. The Statute of Anne was the first law, which provided for a limited right over printed books for the encouragement of learning. By recognizing the potential for oppressive monopolies to emerge from the grant of a perpetual right in printed books,

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<sup>56</sup> It is said that the most significant part about the Statute of Anne 1710 is that “an “author” was the person initially entitled to copyright. Thus the seeds were sown for regarding copyright as the reward and protection of the author’s intellectual and creative effort.” Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1140 (1983)

<sup>57</sup> LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 147 (Hill and Wang 1994)

<sup>58</sup> *See id.* at 147

<sup>59</sup> *See id.* at 147

<sup>60</sup> L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 28 (University of Georgia Press 1991)

<sup>61</sup> It is said that “[i]t is hard to know how far the interests of authors were considered in distinction from those of publishers. There is an apparent tracing of rights to an ultimate source in the fact of authorship, but before attaching large importance to this, we have to note that if printing as a trade was not to be put back into the hands of a few as a subject of monopoly – if the statute was indeed to be a kind of “universal patent” – a draftsman would naturally be led to express himself in terms of rights in books and hence of initial rights in authors.” BENJAMIN KAPLAN, COPYRIGHT IN HISTORICAL PERSPECTIVE 8 (Columbia University Press 1967)

<sup>62</sup> MARK ROSE, AUTHORS AND OWNERS 48 (Harvard University Press 1968)

<sup>63</sup> The transformation occurred in the sixteenth and seventeenth centuries, where a “general feeling for the author’s personal interests ha[d] developed in England and elsewhere.” This feeling was “based more on ideas of honor and reputation than on property in the economic sense” and “had emerged in the context of a traditional patronage society.” *See id.* at 48

<sup>64</sup> *See id.* at 48

<sup>65</sup> *See id.* at 48

Parliament introduced a limitation to the copyright term to put a curb on the existence of the stationer's copyright in perpetuity.<sup>66</sup> The expiration of the copyright term would allow the work to fall into the public domain and enable the greater public to access the work, and hence to encourage learning, education and development. In its attempt to regulate the print business and restore order to the trade, the Statute of Anne had also recognized that authors had rights in their work, which although assignable to a printer, were nevertheless rights that belonged to authors, granting to authors a legal standing to pursue their rights in a court of law as proprietors of their rights. The introduction of the author into the book-publishing scene removed the law of copyright completely from the previous realm of censorship and licensing, which had given rise to the stationer's monopoly in the 16<sup>th</sup> century. In this sense, the notion of proprietary authorship put an end to the censorship and licensing regime that the English Parliament sought to end with the expiration of the Licensing Act 1662 in 1694.

The early control over the book publishing trade by the Stationers' Company had allowed booksellers in England to control the flow of information in literary works by limiting and keeping an account of printers and publishers, which were allowed to print and publish books.<sup>67</sup> By keeping the right to print and publish exclusively to members of the Stationers' Company, the Company was able to exert a monopolistic control over the book printing and publishing trade,<sup>68</sup> thereby preventing the unauthorized printing and publication of literary works and restraining the flow of information<sup>69</sup> towards individual readers, who purchase their books.<sup>70</sup> The passing of the Statute of Anne 1710 however, created a larger purpose for the grant of copyrights in books and acknowledged a more

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<sup>66</sup> By imposing a time limitation upon copyright, there would be an increase in competition within the book trade as valuable books would become available to any publisher for publication after the expiration of the copyright. In this way, Parliament, in passing the Statute of Anne 1710, was able to "spread the wealth of valuable books" within the English book trade. LAWRENCE LESSIG, *FREE CULTURE* 89 (The Penguin Press 2004)

<sup>67</sup> By entering the Company's register books, the bookseller, in whose name the entry was made becomes the owner or proprietor of the book or copy and is granted the exclusive right to print the work, "presumably forever." AUGUSTINE BIRRELL, *THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 73 (Cassell and Company, Limited 1899)

<sup>68</sup> The Company's charter provided that "No person within this our realm of England or the dominions of the same shall practise or exercise by himself, or by his ministers, his servants or by any other person the art or mystery of printing any book or any thing for sale or traffic within this our realm of England or the dominions of the same, unless the same person at the time of his foresaid mystery or art of Stationery of the foresaid City, or has therefore license of us or the heirs or successors of us the foresaid Queen by the letters patent of us or the heirs or successors of us the foresaid Queen." LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 32 (Vanderbilt University Press 1968)

<sup>69</sup> The charter that set the Stationers' Company up empowered the Company to establish "ordinances, provisions and statutes" to govern its members. The grant of a monopoly on printing through the charter and the power to control its members effectively allowed the company to set rules for printing and publication. With this authority, the Stationers' Company could establish internal rules that amounted to private copyrights. Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 *SANTA CLARA L. REV.* 365, 392-393 (2004)

<sup>70</sup> The Crown's policy for press control was severe and the Company, by virtue of its charter was given the power to search out, seize and destroy books printed in contravention of monopoly or against sound Catholic doctrine. The Stationers were to "take away, have burn, or convert to their own use whatever they should think was contrary to the form of any statute, act, or proclamation made or to be made." HARRY RANSOM, *THE FIRST COPYRIGHT STATUTE* 29 (University of Texas Press 1956)

fundamental reason for protecting literary works, which is to encourage learning and education. The recognition that literary works and creative products are important to generate a society's interest in learning, growth and development produces a freer flow of information towards the public domain or society in general, who have become the primary beneficiaries of the limitations to perpetual copyright under the Statute of Anne 1710.<sup>71</sup> As society became recognized as having a right to access creative works for learning and education, the flow of information in literary works became freer as works, which fell into the public domain were creatively used to reproduce new and different works of authorship.<sup>72</sup> The Disney cartoon stories, for example, are taken from the public domain works of the Grimm Brothers and other content, which existed in the culture at that time.<sup>73</sup> Indeed the monopolistic control of the Stationers' Company over the book trade, which led up to Parliament's enactment of the Statute of Anne 1710 to curb the stationer's monopolistic practices, gave Congress sufficient guidance in limiting the duration of copyright protection under the Constitution.<sup>74</sup>

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<sup>71</sup> The author of creative works is also an important beneficiary of copyright law as the exclusive rights granted under the law are intended to be incentives to encourage an author's creative production. The balance between the private and exclusive rights of the author under the law and the public interest in access to these works is a constant balance, which copyright law strives to achieve. It is said that the most significant part about the Statute of Anne 1710 is that "an "author" was the person initially entitled to copyright. Thus the seeds were sown for regarding copyright as the reward and protection of the author's intellectual and creative effort." Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1140 (1983)

<sup>72</sup> Professor Jessica Litman explains the idea more clearly, when she states that "[t]o say that every new work is in some sense based on the works that preceded it is such a truism that it has long been a cliché, invoked but not examined. But the very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects and sculptors all engage in the process of adapting, transforming and recombining what is already "out there" in some other form. This is not parasitism: it is the essence of authorship. And in the absence of a public domain, much of it would be illegal." Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966 (1990)

<sup>73</sup> Disney works, which have drawn upon existing cultural works include Snow White (1937), Fantasia (1940), Pinocchio (1940), Dumbo (1941), Bambi (1942), Song of the South (1946), Cinderella (1950), Alice in Wonderland (1951), Robin Hood (1952), Peter Pan (1953), Lady and the Tramp (1955), Mulan (1998), Sleeping Beauty (1959), 101 Dalmations (1961), The Sword in the Stone (1963), The Jungle Book (1967) and Treasure Planet (2003). See LAWRENCE LESSIG, FREE CULTURE 23-24 (The Penguin Press 2004)

<sup>74</sup> It is stated that "[t]o what extent the framers of the Constitution were conscious of the background of this checkered background of copyright in England for their purposes, we cannot know. We may assume, however, that the history of which copyright was an essential part was not unknown in eighteenth century England because of the importance attached to the freedom of press, speech, and religion as demonstrated by the adoption of the first amendment. The use of one amendment to ensure the three freedoms was not coincidental. The religious strife in England, precipitated by Henry VIII's break with the Roman Catholic Church, was a continual threat to the sovereign's crown, and was also the wellspring of censorship which led not only to laws of seditious libel, but also to copyright as an instrument of press control as well as monopoly. In any event, we are justified in assuming that the constitutional purpose of copyright – the promotion of learning – requires that copyright be a limited monopoly at most, and a device for censorship not at all, for both censorship and monopoly are antithetical to learning." L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 38 UCLA L. REV. 719, 785-786 (1989)

When the United States was founded as a new nation, copyright was rapidly adopted in the country and authors' rights became the basis for the American copyright system.<sup>75</sup> Early American copyright embodies four basic ideas, which are copyright as protecting the author's rights, promoting learning, providing order in the book trade as a government grant and preventing harmful monopolies.<sup>76</sup> These ideas have been embodied within the United States' copyright regime on several levels. The protection of author's rights, for example, is central to the state statutes. The Constitutional clause, as another example, embodies the idea that copyright law is to promote learning in the interest of the general public.<sup>77</sup> The development of early copyright in the United States differed from that in England in several ways. In the United States, authors and not the booksellers led the drive for copyright. As a result, no institution in the United States ever came close to having the monopolistic control that the Stationers' Company had over the book trade in England. The earliest controversy in the United States was one between national and local powers and not one "between London monopolists and provincial pirates."<sup>78</sup>

The primary purpose for federal copyright protection in the United States is stated in the Constitution. The Constitutional clause provides Congress with the power "to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>79</sup> Three policies for protecting creative works may be ascertained from the Constitutional clause, which are to promote learning, preserve the public domain and benefit the author, whose creative endeavors ought to be rewarded in order that the public has sufficient creative materials to learn from and build upon.<sup>80</sup> The first federal law passed under the Constitutional clause was the Copyright Act 1790, which was entitled "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." Section 1 of the Act provided for two forms of copyrights, which are copyrights for maps, charts and books already printed in the United States and for maps, books and charts to be printed or published. Section 2 protects printed works from piracy, which may be committed by printing, reprinting or publishing a copyrighted work, importing copies of copyrighted works or selling a work which infringed a copyright, with the knowledge that the work was an infringing copy. It is said that "the rights under copyright granted by the statute were not essentially different from those under the stationer's copyright, except of course, for the limited term."<sup>81</sup> Functionally, American

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<sup>75</sup> LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 179 (Vanderbilt University Press 1968)

<sup>76</sup> L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 181 (University of Georgia Press 1991)

<sup>77</sup> *See id.* at 181

<sup>78</sup> PAUL GOLDSTEIN, COPYRIGHT IN HISTORICAL PERSPECTIVE 51 (Hill and Wang 1994)

<sup>79</sup> U.S. CONST. art. I, § 8, cl. 8

<sup>80</sup> L. RAY PATTERSON & STANLEY W. LINDBERG, THE NATURE OF COPYRIGHT 49 (University of Georgia Press 1991)

<sup>81</sup> LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 201 (Vanderbilt University Press 1968)

copyright was thought to be “a right to which a given work was subject”<sup>82</sup> but because copyright was introduced as an author’s right in the United States and was granted by statute, the right became “the exclusive source of the author’s protection after publication.”<sup>83</sup>

The introduction of the author as a right holder in creative works and the public as the beneficiary of works produced under copyright law has changed the flow of information from the author of creative works towards the public in general. The flow of information between the publisher of creative works and the individual user, who purchases a copy of the work, still exists. However, as new technologies emerge, connecting authors to the users of their works, allowing new uses of creative works and encouraging public access to these works, the flow of information in creative works is radically altered. Information in creative works through digital technologies on the Internet flow from an author and reaches countless users. Through digital technologies on the Internet, users may also send creative works to each other thereby creating a stream of information flow among users. With the introduction of the author and the public domain as legitimate interest holders in the law of copyright, the traditional flow of information in copyrighted works between the publisher and the purchaser of the work extended to include flows of information between the producer of creative works and the general public, who are to benefit from the author’s creative endeavors. This flow of information in copyrighted works is further increased with the emergence of digital media technologies, which make the storage, reproduction and distribution of content easier. Part 2 of this paper explores these changes to information flow in copyrighted content as a result of digital technologies.

## **Part 2: Information Flow in the Copyright Industries in the Digital Age**

Technology has a unique way of changing the control that a copyright owner has over the work. “Digital technology” has “changed the marketplace”<sup>84</sup> by allowing ordinary users to make copies of creative works and distribute those works to the general public. It is indeed a “cliché that digital technology permits everyone to become a publisher”<sup>85</sup> but the effect of the Internet and digital technologies on the copyright industries is a profound one because basic distribution channels for creative works, which have worked well for a long time, change as the number of users, who are able to access works, increase on a global scale as a result of the Internet. The change in information flow and loss of control over the use of creative works has caused the industries to assert their ownership in copyrighted works. In *Universal City Studios, Inc. v. Reimerdes*,<sup>86</sup> the motion pictures industry sought to retain control over their copyrighted works by restraining the distribution of a computer program called the DeCSS<sup>87</sup> through the

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<sup>82</sup> See *id.* at 201

<sup>83</sup> See *id.* at 201

<sup>84</sup> JESSICA LITMAN, *DIGITAL COPYRIGHT* 19 (Prometheus Books 2001)

<sup>85</sup> See *id.* at 19

<sup>86</sup> 111 F. Supp. 2d 294 (S.D.N.Y. 2000)

<sup>87</sup> The DeCSS is a computer program that was developed by computer hackers to circumvent the CSS encryption protection system that the motion pictures industry use to protect their motion pictures, which are stored in Digital Versatile Discs (hereinafter “DVDs”) containing copies of motion pictures in digitized

Internet. The industry brought an action under the Digital Millennium Copyright Act<sup>88</sup> to prevent the Internet distribution of the program, which sole purpose is to allow users to decrypt the encryption code employed by the motion pictures industry in their DVDs. The United States District Court for the S.D. of New York decided that in this case, the Digital Millennium Copyright Act would apply to prevent the distribution of the DeCSS through the Internet.<sup>89</sup> The sound recording industry's reaction to the Napster service is also another example of the industry's assertion of greater control over their copyrights as the Internet and digital technologies allow music files to be shared through peer-to-peer networks and downloaded through the Internet. The millions of music copies, which were downloaded and distributed through the Internet, caused the industry to lose control over their music and the manner in which music had traditionally been sold to the consumer.<sup>90</sup> As new technologies emerge to allow copyrighted works to be used and distributed in a manner not anticipated by the industries, the industries have always relied on their copyrights to regain control over information flow in copyrighted works.

This relationship between copyright law and technology is a vibrant one and has existed throughout the history of copyright law.<sup>91</sup> The effect of technology on the flow of information in the copyright industries became apparent when copyright holders and technology developers realized that digital technologies running on the Internet allow for the reproduction and distribution of content in a manner that is not confined by the physical parameters that were previously set by analog technology.<sup>92</sup> As digital

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form. These DVDs may only be viewed on players and computer drives that are equipped with licensed technology that permits the devices to decrypt and play the films. *See id.* at 3003

<sup>88</sup> 17 U.S.C. § 1201 (2001)

<sup>89</sup> The Court's concluding statement illustrates the motion pictures industry's attempts to retain control over the existing industrial structure. The Court stated that "[p]laintiffs have invested huge sums over the years in producing motion pictures in reliance upon a legal framework that through the law of copyright has ensured that they would have the exclusive right to copy and distribute those motion pictures for economic gain. They contend that the advent of new technology should not alter this long established structure." 111 F. Supp. 2d at 346

<sup>90</sup> Professor Peter Menell explains that "Napster's peer-to-peer technology has had the most dramatic effects on the traditional music distribution marketplace, vastly expanding the public's access to and interest in MP3 encoded sound recordings. Within weeks of its public release, millions of copies were downloaded and hundreds of millions of copies of sound recordings had been exchanged. It is no exaggeration to say that Napster caused profound changes in consumer behavior, transforming within a matter of months how millions of consumers gained access to music and accelerating the transition to a digital music platform." Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 144 (2002)

<sup>91</sup> Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 163 (2002). Although the development of the Internet and digital technologies has made this relationship more evident today, this relationship between copyright law and technology has always existed. Throughout the history of copyright law, new technologies have to a large extent served the interests of the copyright holders by the creation of new markets for content. While tensions arose from time to time with these new technologies, with particular content niches suffering at times, from an overall perspective, both the content and technology sectors of the economy has generally benefited from new technologies in what Professor Peter Menell best describes as a "symbiotic relationship" between content owners and technology developers.

<sup>92</sup> There has been harmony in the relationship between content owners and technology developers primarily because there is an inherent limitation on analog technology platforms, which limit the unauthorized reproduction and distribution of works of authorship. The digital technology platform today does not have



technologies increase public access to creative works and as the industry loses control over the public's uses of these works, copyright law's role in ensuring continuous control over information flow is questioned.<sup>93</sup> The introduction of new technologies into the marketplace has the effect of causing industries to adapt and change as they respond to the new technology.<sup>94</sup> The advent of the Internet and related digital technologies, such as video streaming technologies,<sup>95</sup> peer-to-peer file sharing software<sup>96</sup> and portable digital audio technologies<sup>97</sup> have cumulatively caused an "industrial revolution"<sup>98</sup> within the copyright industries, in particular, the sound recording industry. These changes, which are brought about by new technologies, disrupt conventional business models and industrial structures that have allowed content to be successfully commercialized thus far.

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such constraints and, defined by its characteristic of allowing content to be "inexpensively, quickly and flawlessly reproduced and distributed widely with relatively little risk of detection," the digital platform allows users of copyrighted works to do what used to be impossible on prior technological platforms. *See id.* at 164

<sup>93</sup> It is said that "[n]otwithstanding the tremendous reach of copyright, the major content industries have come to believe that existing law may not be adequate to protect content in the digital age. The rapid rise of peer-to-peer networks and the success of hackers in cracking and disseminating means of decrypting the DVD Content Scrambling System (and other technological protection measures) demonstrate the vulnerability of the current network architecture to widespread unauthorized distribution and the limited capacity of existing legal protection to combat "digital piracy." Moreover, the intrusive and chilling effects of copyright's most recent protections against digital piracy have aroused concerns about the freedom of technology companies to innovate, the "rights" of consumers to engage in fair use of protected works, the ability of computer programmers to study encryption techniques, the privacy of Internet users, and competition in content creation and distribution. Just about everyone with a computer, an Internet connection, and a desire to access content has become aware of the raging debate over copyright's proper role." Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age? Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 66-67 (2002)

<sup>94</sup> It is said that "[t]he early industrial revolution can only be understood in terms of the interactions of a few basic technologies that provided the essential foundation for other technological changes in a series of ever-widening concentric circles, at the heart of which were a few major innovations in steam power, metallurgy (primarily iron), and the large -scale utilization of mineral fuels. One can identify similar kinds of clustering around electrification beginning in the late nineteenth century, the internal combustion engine in the early twentieth century, and plastics, electronics and the computer in more recent years. In each case a central innovation, or a small number of innovations, provided the basis around which a larger number of further cumulative improvements and complementary inventions were eventually positioned." NATHAN ROSENBERG, *INSIDE THE BLACK BOX: TECHNOLOGY AND ECONOMICS* 59 (Cambridge University Press 1999)

<sup>95</sup> Streaming technologies allow users of content to see a video or listen to an audio file on the Internet without having to download the file onto their computers. The file is streamed onto the user's computer from a remote server in several portions, which allows a user to have access to the file while it is still being downloaded. See Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845 (1997)

<sup>96</sup> Peer-to-peer file sharing software usually operates on a network that allows its users to communicate and share files with one another. A user of the Napster service, for example, had the option of sharing MP3 music files with other online Napster users. *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 905 (2000)

<sup>97</sup> A portable digital audio device that was built in 1988 by Diamond Multimedia Systems allowed users to download MP3 music files from a computer, store the files on a small device about the size of an audio cassette and listen to the music elsewhere. *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.*, 180 F. 3d 1072, 1073 (1999)

<sup>98</sup> NATHAN ROSENBERG, *INSIDE THE BLACK BOX: TECHNOLOGY AND ECONOMICS* 59 (Cambridge University Press 1999)

It appears a natural response for copyright industries to assert more control over business models that have been successful in the past.

The move to control new uses of existing content through copyright law has been successful in some cases. When the motion pictures industry began producing movies for the general public, there was a need for ideas to inspire the production of motion pictures. The industry began to produce motion pictures based on existing works without prior consent from copyright owners. In *Kalem Co. v. Harper Bros.*,<sup>99</sup> the Kalem Company hired a writer to read General Lew Wallace's novel, *Ben Hur*, and write a scenario for a motion picture, which it then produced without securing a copyright license<sup>100</sup> for the production of a motion picture. In this case, the Supreme Court had to decide if the public exhibition of the motion picture was a dramatization of *Ben Hur* and an infringement of copyright in the novel. Justice Holmes, in delivering the decision of the Court, held that moving pictures can be used to dramatize a novel and when that is done, as in this case, there is an infringement of the right, which the statute reserves.<sup>101</sup> Relying on the case of *Daly v. Palmer*,<sup>102</sup> wherein the Circuit Court S.D. New York held that an author's depiction of a "rail road" scene in a dramatic composition or play was protected by copyright law, Justice Holmes gave a broad construction<sup>103</sup> to the meaning of dramatization of a work under the Copyright Act 1891. With cognizance for the fact that the motion picture was an exploitation of the novel using a film technology that was new at that time, Justice Holmes acknowledged that the dramatization of a novel need not necessarily be done by speech and may be instead be achieved by action, when in his judgment he says, "[a]ction can tell a story, display the most vivid relations between men, and depict every kind of human emotion, without the aid of a word. It would be impossible to deny the title of drama to pantomime as played by masters of the art".<sup>104</sup>

The implication of the case of *Kalem Company v. Harper Brothers* is that theatrical exhibitions of film have now fallen under the purview of copyright law. Arguably, by bringing motion pictures within the scope of the Copyright Act as a form of

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<sup>99</sup> 222 U.S. 55 (1911)

<sup>100</sup> The publishing rights to *Ben Hur* were assigned to Harper and Brothers Publishing House and the dramatization rights were assigned to a stage production company called Klaw and Erlanger. There was a dramatization of the novel, by William Young, which was published and protected by copyright in 1899. The Kalem Company was unaware of the authorized dramatization of *Ben Hur* when its film based on the novel was produced. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS* 93-94 (New York University Press 2001)

<sup>101</sup> 222 U.S. 55, 62 (1911)

<sup>102</sup> 6 Blatchf. 256

<sup>103</sup> This is seen in light of the relatively narrow construction of Copyright Act 1831 in the case of *Stowe v. Thomas*, 23 Fed. Cas. 201, where the Circuit Court, E.D. Pennsylvania decided that an author's rights in a book consists only of the right to print, publish, import or vend copies of the book and another person, who translates the book cannot be liable for copyright infringement because the Copyright Act protected only the precise words that the author used to express his or her ideas. A translation of a work into another language would therefore not be protected under the Copyright Act. This decision was reversed by the Copyright Act 1870, when Congress, at the request of authors and publishers, recognized the rights of authors to translations and dramatic adaptations of their works. SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS* 48-50 (New York University Press 2001)

<sup>104</sup> 222 U.S. 55, 61 (1911)

expression that infringes upon an author's copyright, Justice Holmes had allowed a new technology, the motion pictures production technology, which allows for new forms of exploitation of an existing literary work, to fall within copyright's control. There may be justification for Justice Holmes's decision on the premise that an economically important medium had then emerged for the expression of creative works – the theatrical exhibition of films. Together with other factors such as a “narrow statutory phrase” under the copyright law, a “hesitant Congress” to react to the changing technological environment and Justice Holmes's intent on “building a bridge between copyright and popular culture,”<sup>105</sup> this case was decided in favor of the plaintiff for more extensive copyright protection. The copyright scope was also extended, when the Court decided that the producers of motion pictures were accomplices in the exhibition of the film.<sup>106</sup> Relying on Justice Holmes's reasoning that the performance of an act constituted a dramatization of a novel, it would have been the exhibitors and not the producers of the motion picture, who were liable for copyright infringement. Nonetheless, Justice Holmes expanded the scope of copyright further by applying the law to the party, who made the infringement possible in the first place and in this case, they were the producers of the film. By making the films available for exhibition, Justice Holmes was of the opinion that the “producers had effectively participated in the infringement and thus could be held as accomplices.”<sup>107</sup> This effectively extended copyright law to cover film production technology, which until the decision of *Kalem Company v. Harper Brothers*, was not under the purview of copyright law.

With *Kalem Company v. Harper Brothers*,<sup>108</sup> a copyright owner had control over the use of the work for film production and film producers and exhibitors would have to obtain the consent of the copyright owner before producing and exhibiting a movie based on an existing copyrighted work. With the production of motion pictures falling within the purview of copyright law, motion pictures itself as a form of creative art was soon protected as a copyrightable subject matter under the 1912 amendments to the Copyright Act.<sup>109</sup> Motion pictures was protected as a photograph under the Copyright Act 1870,<sup>110</sup> and the ruling in *Edison v. Lubin*,<sup>111</sup> indicated a willingness by the courts to

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<sup>105</sup> PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 63-64 (Hill and Wang 1994)

<sup>106</sup> 222 U.S. 55, 62-63 (1911)

<sup>107</sup> PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 64 (Hill and Wang 1994)

<sup>108</sup> 222 U.S. 555 (1911)

<sup>109</sup> The amendments were introduced when the motion pictures industry, faced the prospect of liability under the earlier copyright act, which was drafted without its interest in mind, prepared a bill to amend the Copyright Act 1909 to limit the industry's exposure in copyright infringement actions. JESSICA LITMAN, DIGITAL COPYRIGHT 41 (Prometheus Books 2001)

<sup>110</sup> *Edison v. Lubin*, 122 Fed. Rep. 240 (1903). Here, the Third Circuit Court of Appeals had to decide on whether a film, showing Kaiser Wilhelm's yacht, “Meteor”, being christened and launched, was eligible for copyright protection against an exact reproduction of the film, which was then used for theatrical exhibition. The court held that a film was in effect a photograph of many exposures and was therefore to be protected as a photograph under the Copyright Act 1870 as a work of fine art. What was interesting though, was the willingness of the court to recognize technological development in the production of creative works. According to District Judge Buffington, Congress in amending the Copyright Act 1831 in 1865 to extend copyright protection to a photograph or a negative, “...must have recognized there would be change and advance in making photographs, just as there has been in making books, printing chromos, and other

extend copyright protection to creative works, which were produced by newer technologies. These works that were produced by new technologies were protected within existing categories of copyrightable subject matter under the Copyright Act. The shift in copyright law towards the protection of motion pictures reflected a more general cultural change, where “reverence for originality and a scorn for imitation” was prevalent.<sup>112</sup> There may be however a subtle recognition for the huge investments made in the production of films by production companies, which justified a copyright monopoly over motion pictures. When copyright protection was given to motion pictures in the Copyright Act 1912,<sup>113</sup> it was because “the money invested therein is so great and the property rights so valuable.”<sup>114</sup>

In some cases however, the courts have been more cautious in extending copyright protection to new uses of copyrighted works, allowing a freer flow of information in content towards the general public. The major technological change within the U.S. motion pictures industry occurred with the introduction of the video cassette recorder (hereinafter “VCR”), which allowed a home user to record televised motion pictures off a television set and play them back later or to “time shift” the broadcast of a motion picture on a television set from its broadcast time to a later time.<sup>115</sup> The Supreme Court addressed the new technology by considering consumer choice as to how new technology was used in their home to be the most important in the Court’s analysis of whether copyright in televised motion pictures is infringed by consumer use of VCRs. The consumer had responded well to the introduction of the VCR in the market place<sup>116</sup> and had used the VCR primarily for “time-shifting.” Time-shifting enabled viewers to see programs they would otherwise miss because they were not at home, were occupied with other tasks, or were viewing a program on another station at the time of a broadcast that they desired to watch.<sup>117</sup> The District Court in this case inclined towards protecting the private consumption of copyrighted materials. According to the District Court, non-commercial home use recording of materials broadcasted over the public airways was a fair use of copyrighted works and did not constitute copyright infringement. The Court

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subjects of copyright protection. While such advance has resulted in a different type of photograph, yet it is nonetheless a photograph – a picture produced by photographic process.” 122 Fed. Rep. 240, 242 (1903)

<sup>111</sup> 122 Fed. Rep.240 (1903)

<sup>112</sup> JAMES LARDNER, FAST FORWARD 112 (Pierce Law 2002)

<sup>113</sup> ch. 356, 37 Stat. 488 (1912). Under Section 4 of the Copyright Act 1909, it is stated that “the works for which copyright may be secured under this act shall include all the writings of an author.” Under the 1912 amendment, two categories of writing were added: (1) motion picture photoplays; and (2) motion pictures other than photoplays. Karen L. Gulick, *Creative Control, Attribution and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 61 (1994)

<sup>114</sup> JAMES LARDNER, FAST FORWARD 112-113 (Pierce Law 2002)

<sup>115</sup> JAMES LARDNER, FAST FORWARD 83 (Pierce Law 2002)

<sup>116</sup> The District Court provided the statistics of VCR use by the private home user as follows:

“According to plaintiffs’ survey, 75.4% used their VCR to record for time shifting purposes half or most of the time. Defendant survey showed that 96% of the Betamax owners had used the machine to record programs they otherwise would have missed.”

“When Plaintiff asked interviewees how many cassettes were in their library, 55.8% said there were 10 or fewer. In defendants’ survey, of the total programs viewed by interviewees in the past month, 70.4% had been viewed only that one time and for 59.9%, there were no plans for further viewing.” 480 F. Supp. 429, 439 (1979)

<sup>117</sup> *Sony Corporation of America Et Al. v. Universal City Studios, Inc., Et Al.*, 464 U.S. 417, 424 (1984)

emphasized the fact that the materials were broadcasted free to the public at large, the noncommercial character of the use, and the private character of the activity conducted entirely within the home. The Court also recognized that the purpose of this use served the public interest by increasing access to television programming, an interest that “is consistent with the First Amendment policy of providing the fullest access to information through the public airwaves.”<sup>118</sup>

The Court of Appeals however, took a different view. The Court reversed the District Court’s decision and concluded that as a matter of law, the home use of a VCR could not be a fair use because it was not a “productive use.” The Court held that it was unnecessary for the plaintiffs to prove any harm to the potential market for the copyrighted works, but then observed that it seemed clear that the cumulative effect of mass reproduction made possible by the VCR would tend to diminish the potential market for the copyright owner’s work.<sup>119</sup> It appears from the Court of Appeals’ reasoning that the Court took a more expansive view of the role of copyright in protecting a creative work. The Court thought that where consumers of copyrighted materials attached economic value to the use of the work in a particular manner, the copyright owner ought to be given the opportunity to exploit that market.<sup>120</sup> The extension of the copyright owner’s right to markets wherein there is an economic value appears logical given the premise that copyright law is intended to allow the producer of creative works to capture some of the economic benefits that stem from investing and producing the creative work. By providing a producer of creative work with control over the work, the producer may prevent others from taking advantage of these economic benefits by exploiting the work because this undermines the very incentive for the producer to make these investments in the first place.<sup>121</sup>

The Supreme Court was more conservative in extending the copyright owner’s rights over VCR technology. According to the Court, the judiciary had always been reluctant to expand the protection afforded by copyright without explicit legislative guidance.<sup>122</sup> More importantly, the Court recognized the competing interests involved whenever a new technology enters any copyright industry and the importance of drawing

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<sup>118</sup> 464 U.S. 417, 425 (1984)

<sup>119</sup> According to the Court of Appeals, the District Court should have paid more attention to the cumulative effect of mass reproduction of copyrighted works made possible by video recorders. Without an inquiry, which takes into account the full scope of the infringing practice, copyright plaintiffs, in cases of this sort, would face insuperable obstacles to the protection of their rights. In this case, where one looks at the full scope of the activity in question, it seems clear that it tends to diminish the potential market for appellant’s works. 659 F. 2d. 963, 974 (1981)

<sup>120</sup> 659 F. 2d 963, 974 (1981)

<sup>121</sup> Edmund W. Kitch, *Taking Stock: The Law and Economics of Intellectual Property Rights*, 53 VAND. L. REV. 1727, 1727 (2000)

<sup>122</sup> According to the Court, “sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.” 464 U.S. 417, 431 (1984)

a balance amongst competing interests.<sup>123</sup> In this case, the Supreme Court regarded the private uses by the consumer to be an important factor that ought to be considered in deciding whether the use of the VCR technology was an infringement of the copyright owner's exclusive rights. The inclusion of the private consumer of creative works and their freedom to enjoy the benefits of a new technology in the privacy of their homes in the Court's analysis was a step, which the Court took to assess the fair value of a new technology introduced into the market and whether use of it should be considered unauthorized on the basis that the copyright owner objects to the uses to which the new technology puts its works. *Sony v. Universal City Studio*<sup>124</sup> illustrates the Supreme Court's regard for the consumer's private uses of a creative work to be outside the reach of the copyright owner even when there appears to be a threat posed by a new technology to the copyright owner's rights. Indeed, a consumer may choose to skip a commercial, fast forward the program to favored scenes<sup>125</sup> or simply record televised programs for the purposes of building a library,<sup>126</sup> and this does not differ from a purchaser of a novel reading only specific parts of the novel, skipping parts of the novel or making copies of the novel for a private home library. It would be difficult to imagine with the introduction of the photocopier machine, a new technology introduced in 1960,<sup>127</sup> that a novelist would have control over his novel to the extent that a purchaser of the novel may be prohibited from making copies of the novel on a private home photocopier. Even the making of photocopies of medical journals by the National Institutes of Health and the National Library of Medicine for physicians and medical researchers for use in their professional work was thought to be outside the control of the publisher, who was the owner of the copyright over the medical journals.<sup>128</sup> The point to be made is that the control of a copyright owner over his work does not necessarily stretch to every new use of the work with a new technology.

The Supreme Court in *Sony v. Universal City Studios*,<sup>129</sup> dealt with a novel and new technology by considering largely the general societal benefits, which the new technology brought and regarded that these benefits far outweighed a more nebulous claim by the copyright owner that the use of the VCR crosses "invisible boundaries" of

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<sup>123</sup> The Court held itself to be guided by Justice Stewart's exposition of the correct approach to ambiguities in the law of copyright in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). According to Justice Stewart, "the limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music and the other arts. The immediate effect of our copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interests of the United States and the primary object in conferring the monopoly," this court has said, "lie in the general benefits derived by the public from the labors of the authors."... When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." 464 U.S. 417, 431-432 (1984)

<sup>124</sup> 464 U.S. 417 (1984)

<sup>125</sup> 464 U.S. 417, 423 (1984)

<sup>126</sup> 480 F. Supp. 429, 439 (1979)

<sup>127</sup> PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* 79 (Hill and Wang 1994)

<sup>128</sup> *Williams & Wilkins v. The United States*, 487 F.2d 1345 (1973)

<sup>129</sup> 464 U.S. 417 (1984)

control that a copyright owner has over his programs.<sup>130</sup> Regarding the use of the VCR for home time-shifting purposes to be a fair use of a copyright owner's content, the Supreme Court emphasized the requirement that the copyright owner demonstrate some likelihood of harm before a private act of time-shifting is to be condemned as a violation of federal law.<sup>131</sup> The Supreme Court, referring to the Court of Appeal's analysis that the use of content may be regarded to be fair use only when such use is productive, regarded the lower court's reasoning to be erroneous. According to the Supreme Court, Congress has plainly instructed the courts that a fair use analysis calls for a sensitive balancing of interests and whilst the distinction between "productive" and "unproductive uses" may be helpful in calibrating the balance, it cannot be wholly determinative.<sup>132</sup> More importantly, according to the Supreme Court, the statutory provision requires a consideration of the economic consequences of copying.<sup>133</sup> As it was demonstrated that a substantial number of copyright holders would not object to having their broadcasts time-shifted by private viewers<sup>134</sup> and as it could not be shown that time-shifting would cause any likelihood of non-minimal harm to the potential market for, or the value of, the copyrighted works, the Supreme Court decided that the VCR was capable of substantial non-infringing uses and the sale of the VCR to the general public did not constitute contributory infringement of the copyright.<sup>135</sup>

The significance of the *Sony v. Universal City Studios*<sup>136</sup> case is that the Court had cognizance of the fact that new technologies offer the general public new and novel uses of copyrighted materials. Where these technologies pose a threat to the control, which copyright owners have over the manner which works are used, the Court recognized its limited role and ability in extending the scope of copyright protection without Congress explicitly legislating on the matter. This is a clear shift away from the decision of *Kalem Company v. Harper Brothers*,<sup>137</sup> where the Supreme Court was keener then to include a new technology and a growing industry within the scope of the Copyright Act, primarily because of the economic potential and profits, which the motion pictures industry will make from the theatrical exhibitions of films.<sup>138</sup> The VCR technology in *Sony v. Universal City Studios*<sup>139</sup> on the other hand, was a technology that allowed its consumers

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<sup>130</sup> While nuances, perceptions and points of philosophy are understandable, the District Court did not think them to be always logical and certainly do not justify an injunction against the use of the VCR. The District Court felt that harm from time-shifting is speculative and minimal. 480 F. Supp. 429, 467 (1979)

<sup>131</sup> 464 U.S. 417, 454 (1984)

<sup>132</sup> For instance, using a VCR in a hospital setting to enable a patient to see programs he or she would otherwise miss has no productive purpose other than contributing to the psychological well-being of the patient. Virtually any time-shifting that increases viewer access to television programming may result in a comparable benefit. 464 U.S. 417, 455 (1984)

<sup>133</sup> 464 U.S. 417, 455 (1984)

<sup>134</sup> The District Court made findings that the VCR could be used to record non-copyrighted materials or materials where its owners consent to the copying. The Supreme Court drew particular reference to testimonies that authorize some or all of their content to be copied. 464 U.S. 417, 445 (1984)

<sup>135</sup> 464 U.S. 417, 456 (1984)

<sup>136</sup> 464 U.S. 417 (1984)

<sup>137</sup> 222 U.S. 555 (1911)

<sup>138</sup> PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 63-64 (Hill and Wang 1994)

<sup>139</sup> 464 U.S. 417 (1984)

to copy a copyrighted work and was not a technology that allowed the reproduction of the work in a different manner of expression.<sup>140</sup> Adopting this line of reasoning, it may also be said that a dramatization of a novel in the form of a motion picture is an act that encroaches upon a separate market, which a novelist may wish to later explore and should therefore be unauthorized. The motion pictures production technology in *Kalem Company v. Harper Bros.*<sup>141</sup> provided the opportunity for motion pictures producers to exploit a dramatization right that Congress intended for the copyright holder and the Supreme Court in that case recognized the opportunities, which the new technology provided a growing and thriving motion pictures industry.

Time-shifting of televised motion pictures for private consumption, on the other hand, was not a use of a technology that encroached upon a right, which Congress had intended for the copyright holder. Although it is possible to easily concede with Justice Blackmun in his dissenting opinion in *Sony v. Universal City Studios*,<sup>142</sup> that the VCR technology allows home television users to infringe copyright by recording off-the-air, which is not only the foreseeable use of the VCR but also its intended use, and that Sony, the producer of the VCR ought to be liable for inducing and materially contributing to the infringing conduct of VCR owners,<sup>143</sup> this line of reasoning is premised on the assumption that Congress had intended to provide a content owner control over the very right that Justice Blackmun speaks about – the right to time-shift televised motion pictures in the privacy of a consumer’s home. Justice Stevens in delivering the majority opinion of the Supreme Court however recognized that this may be a right that Congress did not intend for the copyright owner to have.<sup>144</sup> Justice Stevens exercised caution by letting Congress take the lead in looking at the new technology as Congress had examined other innovations in the past. It was not the job of the courts, Justice Stevens reasoned, to apply laws that have not been written.<sup>145</sup>

In deference to Congress’ role to pass laws to extend copyright where new technologies emerge, the Supreme Court took a stance that the courts’ role in extending

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<sup>140</sup> The Supreme Court in *Sony v. Universal City Studios*, 464 U.S. 417 (1984) distinguished *Kalem Company v. Harper Brothers*, 222 U.S. 555 (1911) on the basis that the producer in *Kalem* did not merely provide the “means” to accomplish an infringing activity; the producer supplied the work itself, albeit in a new medium of expression. *Sony* in the instant case does not supply VCR consumers with copyrighted works; the copyright owners do. *Sony* supplies a piece of equipment that is generally capable of copying the entire range of programs that may be televised: those that are copyrighted, those that are copyrighted but may be copied without objection from the copyright holder, and those that the copyright holder would prefer not to have copied. The VCR can be used to make authorized and unauthorized uses of copyrighted works, but the range of its potential use is much broader than the particular infringing use of the film *Ben Hur* involved in *Kalem*. 464 U.S. 417, 436-437 (1984)

<sup>141</sup> 222 U.S. 555 (1911)

<sup>142</sup> 464 U.S. 417, 457 (1984)

<sup>143</sup> 464 U.S. 417, 490 (1984)

<sup>144</sup> According to Justice Stevens, “One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.” 464 U.S. 417, 456 (1984)

<sup>145</sup> 464 U.S. 417, 456 (1984)



the rights of a copyright holder is limited, even when new technologies pose a threat to the right a copyright holder had in the work. The courts, in deciding the proper treatment to give technological advances, are always reluctant to extend copyright protection over new uses of content when a new technology is introduced, especially where the new technology allow home users the flexibility of using the content in the way they choose. In deciding whether community antenna television (CATV) systems, which receive, amplify and modulate signals from television stations and retransmit them to their subscriber television sets, infringed upon the performance right of a copyright owner, the Supreme Court had to once again address the implications a new technology posed to the existing industry.<sup>146</sup> The Supreme Court felt that only broadcasters, such as television stations, were “performers” of a copyright owner’s content and falling within the purview of the copyright act, would be liable for unauthorized broadcasts of the work. Cable companies however, were mere viewers of content because such companies merely enhance other viewer’s ability to receive a broadcaster’s signals and therefore did not infringe upon the performance right of a copyright owner. Declining to allow copyright owners to control the flow of information in copyrighted works through new communications technology, the Supreme Court once again left it to Congress to legislate on the matter.<sup>147</sup>

The industries do have recourse to Congress to enact more specific rights in response to technological changes in the industry and obvious efforts have been made to lobby for stronger and longer copyright monopolies to control information flow in content.<sup>148</sup> While Congress has responded to the changes brought about by sometimes enacting laws to allow for increasing control over copyrighted content,<sup>149</sup> Congress may in effect enact laws, which prevent the free flow of information in copyrighted works and affect economic growth in the long-run.<sup>150</sup> Furthermore, if copyright law is necessary to provide an incentive for the production of creative content,<sup>151</sup> the enactment of stronger copyright laws really permit the industry to “leverage its control from an old world into the new” and provide the industries with a right to control technological development in a

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<sup>146</sup> *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390

<sup>147</sup> 392 U.S. 390, 402

<sup>148</sup> Conglomerates such as Disney Co. had lobbied extensively for the passing of the Copyright Term Extension Act. Ten out of thirteen sponsors in the House received contribution from Disney and eight of the twelve sponsors in the Senate were given money by Disney’s political action committee. Disney also made a donation of \$20,000 to the National Republican Senatorial Committee two weeks after Senate Majority Leader Trent Lott signed the bill. See Christina N. Gifford, *The Sony Bono Copyright Extension Act*, 30 U. MEM. L. REV. 363, 386 (2000)

<sup>149</sup> It is said that “[t]he U.S. Congress sometimes greets the invention of a new technology as an occasion to fill up the cup of copyright with yet another legal right. Other times, it declines to bring a new market within the laws embrace.” PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY 37* (Hill and Wang 1994)

<sup>150</sup> Professor Joseph Schumpeter argues that economic growth is a result of technological change or innovation. Joseph Schumpeter, *The Instability of Capitalism*, in *THE ECONOMICS OF TECHNOLOGICAL CHANGE* (Nathan Rosenberg ed., Penguin Books, Ltd. 1971). See also, JOSEPH SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT, AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST AND THE BUSINESS CYCLE* 63-69 (Redvers Opie trans., Harvard University Press 1961)

<sup>151</sup> It has been said that “[c]onventional wisdom tells us that, without the incentives provided by copyright, entrepreneurs will refuse to invest in new media. History tells us that they do invest without paying attention to conventional wisdom.” JESSICA LITMAN, *DIGITAL COPYRIGHT* 173 (Prometheus Books 2001)

new industry.<sup>152</sup> More importantly however, is that as the pace of technological change quickens, Congress has become less and less able and willing to adjust copyright laws to these changes, especially where a “proposed imposition of copyright liability disrupts entrenched consumer habits.”<sup>153</sup> The point made here is that, like the courts, Congress has a limited role to play in developing copyright laws to accommodate technological change.

In *A.M. Records, Inc. v. Napster, Inc.*,<sup>154</sup> the United States District Court for the Northern District of California took a remarkably different approach from the Supreme Court in the *Sony v. Universal City Studios* case. In this case, A.M. Records and seventeen other record companies filed a complaint for contributory and vicarious copyright infringement and unfair competition against Napster, Inc., an Internet start-up, which allowed its users to download MP3 music files for free. The Napster software technology featured a browser interface, search engine and chat functions and operated in conjunction with Napster’s online network of servers that allowed its users to compile and store lists of other account holders’ user names.<sup>155</sup> The Napster software may also be used to play and categorize audio files, which users can store in specific file directories on their hard drives. These directories, which allow users to share files on Napster, constitute the “user library” and while some users store their files in these libraries, others do not.<sup>156</sup> The peer-to-peer file sharing network connected millions of computers worldwide and allowed its software users to search for MP3 files containing digital music over the Internet,<sup>157</sup> file share their music without having to go through a centralized server<sup>158</sup> and find and chat with other MP3 users while using online Internet Relay Chat (hereinafter “IRC”).<sup>159</sup> With the Napster code made freely available for download on the Internet, millions of Internet users began to share and trade music through the Internet. This caused alarm within the industry because the technology facilitated the distribution of copyrighted works in an unprecedented manner.

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<sup>152</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 200 (Random House, Inc. 2001)

<sup>153</sup> PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY* 33 (Hill and Wang 1994)

<sup>154</sup> 114 F. Supp. 2d 896 (2000)

<sup>155</sup> *See id.* at 905

<sup>156</sup> 114 F. Supp. 2d 896, 905 (2000)

<sup>157</sup> Users wishing to search for a song or artist may do so by entering the name of the song or artist in the search fields of the client software and then clicking the “find it” button. When the search form is transmitted to the Napster network, the Napster servers send the requesting user a list of files that include the same terms entered on the search form. *See id.* at 906

<sup>158</sup> Napster Inc. maintained a cluster of servers that compose its network or system. Account holders, who access the Napster network may communicate, share files, and learn of designated hotlist names (the Napster software contained a “hotlist” tool that allowed users to compile and store lists of other account holders’ user names) only within the cluster to which they are assigned. Users can access the networks free of charge. *See id.* at 905

<sup>159</sup> Aside from communicating with specific online users logged on to the same clusters of servers, the chat service allowed users to communicate in groups. Napster organized within “channels” or “chat rooms” named after particular musical genres. *See id.* at 907

In defense to the claim of copyright infringement,<sup>160</sup> Napster raised the defense of fair use. Napster also argued that the use of the Napster technology was of a substantial non-infringing use, as argued by the Supreme Court in *Sony v. Universal City Studios*.<sup>161</sup> Going through the four pronged test for the finding of fair use, the Court decided that the use of Napster was for private use,<sup>162</sup> that copyrighted musical compositions and sound recordings were creative in nature,<sup>163</sup> that the downloading or uploading of the copyrighted work constituted a copying of the entire work<sup>164</sup> and that the market for copyrighted works owned by the copyright owners was harmed by the use of Napster.<sup>165</sup> The Court further dismissed any claims made by Napster, Inc. of potential fair uses of the Napster service – sampling of music, space-shifting of music and the authorized distribution of new artist’s work. According to the Court, the Napster service allowed its users to obtain permanent copies of songs that they would have otherwise had to purchase and carried with it the potential for “viral distribution to millions of people.”<sup>166</sup> It is interesting to note that the Court distinguished *Sony v. Universal City Studios*<sup>167</sup> from the present case on the basis that time-shifting of televised broadcasts in *Sony* allowed its viewers to watch a work that the copyright owner had made available to the home viewer free of charge, while the recording companies in the Napster case almost always charged consumers for the use of their music. The court reasoned that this is an infringement of the copyright for Napster to make music available in such a manner to its users.<sup>168</sup>

The Court’s decision to stretch copyright law to prevent the use of copyrighted works by users of Napster brings copyright law into a new dimension, where the law is now used to prevent the development of new markets,<sup>169</sup> limit consumer choice as to the

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<sup>160</sup> A case for copyright infringement was established by showing that virtually all Napster users engaged in unauthorized downloading and uploading of copyrighted music; as much as eighty-seven percent of files available on Napster may have been copyrighted and more than seventy percent may have been owned and administered by the plaintiffs in the case. *See id.* at 911

<sup>161</sup> 464 U.S. 417 (1984)

<sup>162</sup> The Court held that although the use of Napster was not for commercial purposes, the vast scale of Napster use amongst anonymous individuals in the downloading and uploading of MP3 files using Napster, showed that the uses were not private. A host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester. Moreover, the fact that Napster users got for free what they would have otherwise paid for suggests that they reap economic benefit from Napster use. 114 F. Supp. 2d 896, 912 (2000)

<sup>163</sup> As these works are creative in nature, they constitute entertainment, which cuts against a finding of fair use. *See id.* at 913

<sup>164</sup> *See id.* at 913

<sup>165</sup> This happens by reducing sales among college students and raises barriers to the copyright owner’s entry into the market for digital downloading of music. 114 F. Supp. 2d 896, 913 (2000)

<sup>166</sup> *See id.* at 913

<sup>167</sup> 464 U.S. 417 (1984)

<sup>168</sup> 114 F. Supp. 2d 896, 913 (2000)

<sup>169</sup> The plaintiffs in this case demonstrated by a substantial likelihood that it would adversely affect the potential market for their copyrighted works if the use of the Napster service became widespread. The plaintiffs claim three general types of harm – a decrease in retail sales, especially among college students; an obstacle to the plaintiff’s future entry into the digital downloading market; and a social devaluing of music stemming from its free distribution. 114 F. Supp. 2d 896, 914 (2000)

use of the work<sup>170</sup> and prevent the displacement of sales<sup>171</sup> in the present industry by the introduction of a new technology that changes the existing mechanism and workings of the industry.<sup>172</sup> The process of technological change that is vital to the development and growth to any industry was therefore curtailed by the decision in *A.M. Records, Inc. v. Napster, Inc.*<sup>173</sup> Judge Patel, in delivering the decision of the Court to grant an injunction against Napster to discontinue its services, was of the opinion that “the business interests of an infringer does not trump a right holder’s entitlement to copyright protection.” In dismissing the fact that the decision would destroy Napster’s user base and make its service technologically infeasible, the Court had effectively tilted the direction of technological development backward. Being of the opinion that the destruction of Napster, Inc. by the injunction was speculative compared to the massive damage caused by the unauthorized downloading and uploading of the plaintiff’s copyrighted works, Judge Patel had allowed the industry to control the course of information flow at the expense of cultural, technological and industrial development. The decision of the Court in Napster illustrates the control, which copyright owners have over the flow in copyrighted content through copyright law.

The sound recording industry faces different challenges from other content industries, such as the motion pictures industry. Music files are more easily compressed and distributed because they are significantly smaller than motion pictures files.<sup>174</sup> Users are also able to participate in the distribution of music content by “ripping”<sup>175</sup> a song from a CD and posting it on the Internet.<sup>176</sup> These are two salient reasons that make the

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<sup>170</sup> It was shown in the case that Napster users and not the record companies control the music selection and the amount and timing of the sampling activity. The users of Napster may also keep many songs after deciding not to purchase the entire CD. *See id.* at 914

<sup>171</sup> The Court rejected Napster’s report that said that space-shifting like time-shifting, leaves the value of the copyright unscathed because it does not displace sales. Instead, the Court accepted statistics provided by the copyright owners that use of Napster does indeed displace sales of music. The copyright owner’s report stated that approximately forty-nine percent of college-student survey respondents previously owned less than ten percent of the songs they downloaded and about sixty-nine percent owned less than a quarter. *See id.* at 916

<sup>172</sup> The creation of a new distribution channel for consumer’s use of music had effectively created a gray market for music recording. It is said that gray markets are “the predicted outcome of any intellectual property system.” Here, in the Napster case, this point is clearly illustrated. See Shubha Ghosh, *Turning Gray into Green: Some Comments on Napster*, 23 HASTINGS COMM. & ENT. L.J. 563, 566 (2001)

<sup>173</sup> 114 F. Supp. 2d 896 (2000)

<sup>174</sup> With the MP3 file format, a music file can now be compressed into one-twelfths the amount of space as that of an uncompressed music file. Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA ENT. L. REV. 57, 62 (1999)

<sup>175</sup> Encoder or “ripper” software allows its users to “rip” songs out of CDs they own, upload the songs from the CD onto their computer’s hard drive, where the songs may then be encoded into MP3 file format and distributed through the Internet. Ripper software can be obtained for free or at very small cost. The Music Match’s Jukebox software product is available on the company’s website for \$30.00 and this is an encoder, which is eight times faster than other encoders. There are other slower encoders that can be downloaded for free at various Internet website. *See id.* at 64

<sup>176</sup> The posting of digital music on the Internet results from the diminishing cost of reproduction and distribution of music by the consumer’s ability to “rip” music out from a CD, make copies of the music and distribute it over the Internet. It is said that when the cost of reproducing a material approaches zero, consumers will begin to invest in the distribution of the material directly. In the case of Napster for

control of music distribution over the Internet a challenge for the sound recording industry. Digital media technology and the Internet have begun to empower recording artists and musicians by allowing them to produce and distribute their works. This paper addresses two aspects of the sound recording industry, which will affect the flow of information between the recording studio and the consuming public. The sound recording contract and the opportunities to connect directly with listeners of music on the Internet are two significant factors, which are causing independent sound recording artists and musicians to produce and distribute music to listeners without a sound recording studio.

### Artists Recording Contracts and the Sound Recordings Industry

One of the more fundamental aspects of the sound recording industry is the relationship between the recording studio and the artist. This relationship is significantly altered by the Internet and digital technologies, which offer artists an alternative from what is deemed to be an onerous relationship against artists' interests. Traditional artists recording contracts are considered to be onerous especially when the contract is signed at the beginning of the artist's career.<sup>177</sup> The onerous terms in the contract are often justified on the premise that the recording company is taking a substantial risk with an artist that is yet unknown for there is no certainty if the recording company is going to recover the expenses spent on making a new artist popular or widely-known.<sup>178</sup> Artists have been known to file for bankruptcy to escape the contractual provisions of the recording contract<sup>179</sup> simply because the artist is not capable of meeting the terms of the recording contract despite increasing popularity.<sup>180</sup> With the Internet and digital technologies

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example, the consuming public funded and created the distribution channel for digital music by the purchase of "computers, modems, storage media and Internet service." Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L. J. 539, 565-566 (2003)

<sup>177</sup> This is because record companies know that the bargaining position of an artist is weakest at the beginning of the artist's career. The bargaining power however shifts to the artist when the artist begins to sell platinum albums. Lynn Morrow, *The Recording Artist Agreement: Does it Empower or Enslave?*, 3 VAND. J. ENT. L. & PRAC. 40, 43 (2001)

<sup>178</sup> Nicholas Baumgartner, *The Balance Between Recording Artists and Record Companies: A Tip in Favor of the Artists?*, 5 VAND. J. ENT. L. & PRAC. 73, 76 (2003) (arguing that since late 2000, recording contracts may be tipping in favor of the recording artist by two changes in the law. The first is the removal of sound recordings from the category of "works made for hire," which would allow an artist to be the owner of the copyright as an employee of the recording company and not as an independent contractor, contracted by the recording company to perform the sound recording. Second is the exception to California's seven year statute that allows artist recording contracts to be enforced after seven years and the lobbying efforts to change the law to allow an artist, who is negotiating a contract for the first time to be bound to the contract for a maximum period of seven years, regardless of the terms of the contract)

<sup>179</sup> Rita C. Letowsky, *Broke or Exploited: The Real Reason behind Artists Bankruptcies*, 20 CARDOZO ARTS & ENT. L. J. 625. According to Letowsky, record companies advance funds to artists in order to produce an album and permit the artist to maintain a particular lifestyle. These advancements, which range from \$175,000 to \$350,000, with advancements to superstars exceeding one million dollars, must be repaid to the recording company by the artist despite the fact that the cost of producing an album is so excessive that the artist retains very little or no money from royalty income on the sale of a record for personal use.

<sup>180</sup> An artist's financial difficulties are attributed to the lack of business savvy and foresight when signing the recording contract and receiving advancements from the recording companies, personal overspending, high taxes on 40% of their income and the payment of a portion of their income to lawyers, managers, producers and booking agents. The compensation package for the artist requiring the artist to repay the recording company for "recording expenses, packaging costs, promotional copies of records for radio

however, artists do have greater leverage power in negotiating these recording contracts, as artists may now be able to sign on with independent record labels.<sup>181</sup> Independent record labels are not affiliated with a major record company and use the Internet and digital technologies as a primary marketing, promotion and distribution channel for the new artist. The signing of a record deal with a major recording company may no longer be “crucial” to developing an artist’s potential and to reaping the rewards that fame may bring.<sup>182</sup> The possibilities of marketing, promotion and distribution through channels opened up by the Internet and new technologies require the sound recordings industry to rethink contractual provisions that may no longer be relevant to an artist, who is looking at the Internet and digital technologies as an alternative path to audience popularity and musical success. The Eagles, one of the most successful rock bands in American music history,<sup>183</sup> for example, has released their new single, “Hole in the World” under their own Eagles Recording Company IT Label and will release their new studio album themselves despite offers from a few major record labels.<sup>184</sup> Folk singer Natalie Merchant has also started her own record label, Mythic America, and has released her new solo album, “The House Carpenter’s Daughter” through her website and selected retailers, after obtaining release from Elektra Records, a division of AOL-Time Warner.<sup>185</sup> The rock band Pearl Jam has also freed itself from a decade-long contract with Epic Records, a division of Sony Music, to build an “Internet-based-direct-distribution arrangement that allow fans to buy recordings of live performances following each show.”<sup>186</sup>

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stations and retail stores, records given to distributors as an incentive to purchase, portions of marketing and radio promotions and anticipated returned copies” as well as cross-collateralization of proceeds from a subsequent successful album to recoup any losses the record label experienced on the artist’s earlier albums, contribute to the artist’s difficulties in making enough from the royalty income to repay the recording company for the advancement made to them. David C. Norrell, *The Strong Get Stronger: Record Labels Benefit from Proposed Changes to the Bankruptcy Code*, 19 LOY. L.A. ENT. L. REV. 445, 454-456 (1999)

<sup>181</sup> Independent record labels distribute their records through independent distributors, which are distributors that are not affiliated with a major. Independent record labels promote more “specialized” genres of music such as street music and folk music because of the relatively smaller size of these markets that do not get the major record companies’ attention and the connection that these independent record companies have with smaller retailers, who cater to more specialized music genres. DONALD PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 85-86 (Simon & Schuster 2000) (1991)

<sup>182</sup> Lynn Morrow, *The Recording Artist Agreement: Does it Empower or Enslave?* 3 VAND. J. ENT. L. & PRAC. 40, 40-41 (2001)

<sup>183</sup> The band has a worldwide album sale of 120 million and their first greatest-hits set is the biggest selling album of all times, with more than 28 million copies sold in the United States alone. *Artists Turn Tables on the Major Labels by Going Indie*, DENV. POST, Jul. 13, 2003, at F01, available at 2003 WL 5517257

<sup>184</sup> *Artists Turn Tables on the Major Labels by Going Indie*, DENV. POST, Jul. 13, 2003, at F01, available at 2003 WL 5517257

<sup>185</sup> See *id.*

<sup>186</sup> Pearl Jam guitarist Stone Gossard had said, “If you like the show, you can get a pretty high quality recording ... We spent a lot of time working out the details of how we could do it quickly. It’s so easy and cheap to record now because of the digital technology that’s available. Because of DSL lines, we can send shows back to Seattle for mastering and then to the manufacturing plant in a 24-hour period. We have boxes of CDs a week later. It’s amazing.” See *id.*

There are several terms of the recording contract, which may not be applicable where music is sold independently through the Internet.<sup>187</sup> The packaging charge or packaging deduction clause<sup>188</sup> has no application on the Internet as digital downloads of music content will not have to be packaged in the manner as it is conventionally understood in the artist recording contract.<sup>189</sup> Free goods provisions in the recording contract that allow the recording company to give away free copies of the record<sup>190</sup> should be revised to accommodate the distribution of music content through the Internet.<sup>191</sup> Promotional copies of records given away by the recording company for promotion, such as radio-station copies for air-play and record stores copies for in-store listening,<sup>192</sup> are likely to have no application to digitally distributed music content on the Internet.<sup>193</sup> The distribution of music content through the Internet may also render

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<sup>187</sup> Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA ENT. L. REV. 57, 112-118 (1999).

<sup>188</sup> DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 90-91 (Simon & Schuster 2000). According to Passman, "In theory, this is the cost of the "package," and it's deducted because the artist should get a royalty only on the record, not the package. In reality it's a charge of much more than any package actually costs, and is thus an artificial way to reduce the artist's royalty."

<sup>189</sup> Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA ENT. L. REV. 57, 113 (1999). According to Henriquez, "the packaging charge already represents an inflated representation of what the packaging actually costs the record company. In addition, the packaging charge will be reduced to zero with digital downloads, as the download does not require packaging, it is simply transmitted to a paying online consumer's hard drive. Artists should recognize this discrepancy and ensure that the royalty base for digital download is not artificially diminished by the "packaging charge," which has no application in the realm of digitally downloaded albums."

<sup>190</sup> Free goods provisions in recording contracts allowed a recording company to give away free records and are a mechanism used by the record company to lessen royalty dues owed to the artist. A record company could sell one hundred records for \$0.85 each or eighty-five records for \$1.00 each and giving the retailer 15 free records for every hundred that is purchased. In both scenarios, the recording company gets paid \$85.00 for the sale of 100 record copies to the retailer. However, the recording artist is paid royalties only on the copies of the records sold and would therefore be paid royalties only on eighty-five copies of the record. Furthermore, the artist is paid royalties on an approximation of the price received by the retailer (the retail price) and not the wholesale price received by the recording company, thus not being entitled to any inflation on the wholesale price. DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 90-92 (Simon & Schuster 2000)

<sup>191</sup> Where music content is distributed digitally through the Internet, "record companies can provide online megastores and other online retailers with a single template file from which to copy and transmit requested songs" and "by negotiating the removal of this outmoded contractual provision with regards to digital downloads, artists can further guarantee their royalties accurately reflect the precise number of albums that are actually sold." Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA ENT. L. REV. 57, 114 (1999)

<sup>192</sup> Promotional copies are marked "not for sale" but are sometimes sold in record stores for a lesser price. DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 94-95 (Simon & Schuster 2000)

<sup>193</sup> With digital distribution of music content, promotional copies of records may be issued by the record companies but "without accruing costs to the artists that must be recouped." Artists will "be able to ensure costs associated with producing and distributing the promotional copies will not be used to balloon their unrecovered account with the record company." Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 UCLA ENT. L. REV. 57, 114-115 (1999)

“reserves against returns” clauses that allow a record company to withhold royalty payments to the artist until it is certain that the sale to the retailer is final<sup>194</sup> and “breakage” clauses that reduce an artist’s royalty by any losses incurred due to a breakage of records during shipment,<sup>195</sup> obsolete and no longer applicable for Internet and digital sale of music content. A revision of the recording contract is important because it defines the relationship between the recording artist and the recording company. If the “sole purpose of a record company is to sell records,” and the recording artist is the “record company’s most valuable asset,”<sup>196</sup> the opportunities presented by the Internet and digital media technologies enable the artist to create another flow of content from the artists to the user of music by independently producing and distributing music without a sound recording company.

While it used to be that the recording company chooses the artist it wishes to bring to stardom, artists today have a greater leverage against the recording company, which they did not use to have until they reached immense popularity with music fans. It may be argued that “without the money, marketing and distribution of an established record company, it is extremely unlikely that an artist will break through the cluttered market and reach the level of success necessary to sustain a career, much less to become a superstar”<sup>197</sup> and it is indeed acceptable that the recording company is still an integral component to an artist’s path to stardom. However, it is submitted in this paper that the practices of the recording companies are sufficiently onerous on the artist that an artist

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<sup>194</sup> The company sells records on a 100% return privilege. This allows the retailer to return unsold records back to the recording company. Record companies are often uncertain about the number of records a retailer will successfully sell, especially with a new artist, and would include a provision in the recording contract to withhold a portion of royalty payment to the artist until it is certain that the sale to the retailer is final. DONALD PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 95-96 (Simon & Schuster 2000). Sales of music content to consumers online reduces the chance for a return of digital downloads and the license of a digital template to an online music distributor that allows copies of digital music content to be made for each purchase by a consumer eliminates the need for a “reserves against returns” clause. Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 *UCLA ENT. L. REV.* 57, 115 (1999)

<sup>195</sup> Breakage clauses arose when records were made of vinyl and shellac and were highly breakable. Recording companies developed breakage clauses to pay an artist only 90% of the shipment and withhold 10% to cover their breakage. This practice of paying only 90% of net sales is retained even though “records haven’t been made of shellac for the last sixty years.” DONALD PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 97 (Simon & Schuster 2000). It would be difficult to make this clause applicable for music content that is distributed digitally because “digital downloads are not “shipped” in a fashion that could result in breakage, they are digitally transmitted through modems and wires.” Where a digital distribution fails, “the download can simply be recopied and sent from the template, without incurring any cost for breakage.” Ryan S. Henriquez, *Facing the Music on the Internet: Identifying Divergent Strategies for Different Segments of the Music Industry in Approaching Digital Distribution*, 7 *UCLA ENT. L. REV.* 57, 116 (1999)

<sup>196</sup> Lynn Morrow, *The Recording Artist Agreement, Does it Empower or Enslave?*, 3 *VAND. J. ENT. L. & PRAC.* 40, 41 (2001). Morrow argues that “despite new technology which allows the artist to go directly to the consumer and eliminate the major record company as a middleman, a record deal with a major label remains the best way to maximize the impact of the artist’s music and is still the cornerstone of an artist’s career. From this cornerstone, an artist can generate further income from sources such as live performances, television appearances, books merchandise and if the artist is also a songwriter, increased publishing royalties.”

<sup>197</sup> *See id.* at 51.



seeking an alternative path to success or whose perception of success involves the distribution of his or her own creative music without a recording company's constraints, would inevitably see the Internet and digital technologies as an opportune channel for creative musical expression. With the ability of music to create a culture in itself, it is submitted that the Internet and digital technologies presents the perfect environment for the creation of new genres of music that breaks away from mainstream popular music. Today, the possibility of recording artists collectively boycotting recording contracts with major record labels and distributing their content through the Internet digitally is not inconceivable if sound recordings companies are not willing to change the balance of the recording company-recording artist contractual relationship.<sup>198</sup>

The recording companies are taking steps in this direction to rebalance the contractual relationship with recording artists. BMG, one of the largest music publishing companies,<sup>199</sup> is the first recording company to break away from conventional recording contracts by removing deduction clauses from the contract and agreeing to pay artists a standard rate for music content sold in any format,<sup>200</sup> paying royalty for net income from licenses of music content to third parties<sup>201</sup> and limiting new contracts to the production and sale of one album with the option of extending the contract to three more albums.<sup>202</sup> The new contract also has more equitable terms with the introduction of a fixed level of studio recording costs for each album for which artists will not be charged for and the decision to pay advances to artists on a monthly basis throughout the duration of the contract ensures that recording artists become more responsible for their financial budgets.<sup>203</sup> At the same time, Universal Music Group, a leading music company, whose global operations encompass the development, manufacture, marketing, sales and distribution of recorded music,<sup>204</sup> and Warner Brothers Records<sup>205</sup> are considering

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<sup>198</sup> Artists have started to show their anger for recording companies by changing their stage name (Prince, a popular recording artist, changed his name to an unpronounceable signed and performed with the word "slave" written on his face as an act of revenge against Warner Brothers Records), bringing their recording company to court (George Michael, brought Sony Records to court in 1994 for making him a "pop slave" although he has signed another recording contract with Sony since November 2003) and lobbying for better rights for artist through the Recording Artists Coalition. Steve Hemsley, *A Burst of Harmony: A New Style of Contract May Signal the End of Mistrust between Artists and their Record Labels*, FIN. TIMES, Jan 20, 2004, at 14, available at 2004 WL 56799797

<sup>199</sup> For more information about BMG, refer to the company's official website at [www.bmg.com](http://www.bmg.com)

<sup>200</sup> The standard royalty rate for new BMG recording contracts is 15% of the local dealer price received by the company in any country. See Steve Hemsley, *A Burst of Harmony: A New Style of Contract May Signal the End of Mistrust between Artists and their Record Labels*, FIN. TIMES, Jan 20, 2004, at 14, available at 2004 WL 56799797

<sup>201</sup> The royalty rate is 50% of the net income generated from the license of music content to third parties such as for compilations and films and advertising synchronization work. See *id.*

<sup>202</sup> Major record companies usually demand for the production of five to six albums. BMG's new contract allows artists to renegotiate their contracts much earlier than before. See *id.*

<sup>203</sup> The new contract also provide for additional advances to retain the copyright in an artist's master recording (the original tape recording made in the recording studio) for the duration of the contract and for five years after the contract ends. After that the recording company must pay the artist another advance based on recent sales performance or release the masters. See *id.*

<sup>204</sup> For more information about Universal Music Group, refer to the company's official website at <http://new.umusic.com/flash.aspx>

<sup>205</sup> For more information about Warner Brothers Records, refer to the company's official website at <http://www.warnerbrosrecords.com/>

offering better royalty rates to their artists for digital downloads.<sup>206</sup> It is submitted that the revision of contractual terms in the standard recording contract by recording companies is appropriate especially where the traditional methods of commercializing music content are undergoing transformation due to the opportunities that the Internet and digital technologies offer artists today. Nonetheless, it is difficult to believe that in the long run, traditional artist-recording company relationships will persist to exist as it does now. Popular Internet sites such as Garage Band<sup>207</sup> and CD Baby<sup>208</sup> offer independent artists the ability to sell their music content independently and have found considerable and notable successes, giving artists a very real and tangible option to market, promote and sell their music content directly to the consumer without reliance on a record label. Furthermore, these Internet sites extend their services to the music consumer that go beyond the distribution of a packaged set of music that the recording company believes to be the kind of music the consumer would want to receive.

The purchase of individual singles through digital downloads without being bundled is becoming more common after recording companies realized their consumers' value for autonomy in their consumption of music and announced to the media that they no longer want the lack of content to drive consumer usage of peer-to-peer networks.<sup>209</sup> With hindsight after peer-to-peer file sharing of music content through the Internet took unprecedented heights when Napster's popularity was at its peak, it appears that recording companies are reconsidering their manner of music content distribution over the Internet. The five major record labels – Sony Music Entertainment, EMI Recorded Music, Warner Music Group, BMG and Universal Music Group – have begun to provide better services, which music fans are willing to pay for. This includes allowing music content to be downloaded through the Internet from online music services such as Apple's iTunes,<sup>210</sup> which feature tracks from all five major record labels.<sup>211</sup> Some recording artists are reluctant to license their recordings for digital download through the Internet because of concerns with the piracy of music content, the low rate of current

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<sup>206</sup> See Steve Hemsley, *A Burst of Harmony: A New Style of Contract May Signal the End of Mistrust between Artists and their Record Labels*, FIN. TIMES, Jan 20, 2004, at 14, available at 2004 WL 56799797

<sup>207</sup> Garage Band's mission is to "empower musicians and to discover the best independent music." The site is intended to be "the best place for rising musicians to get feedback and exposure, exchange ideas, find new fans and further their careers." The site also has long term ambitions to change the way music is discovered and promoted and intends to bring music to consumers at lower costs and allow musicians to retain more control of their careers. For more information about the site, refer to <http://www.garageband.com>

<sup>208</sup> CD Baby is an online record store that sells CDs by independent musicians. The company has been in business and has been thriving since March 1998 and is the largest seller of independent CDs on the web. The site has sold over \$10 million in independent CDs from 1998 to February 2004. For more information about CD Baby, refer to <http://www.cdbaby.com/>

<sup>209</sup> Brian Garrity, *Digital Singles Market Quietly Taking Shape*, BILLBOARD, Vol.115, Issue 16, Apr. 19, 2003, available at 2003 WL10158268

<sup>210</sup> Apple's iTunes is an online music store that stores hundreds of thousands of songs and allows its users to browse, search, preview, buy and download music. With 25 million AOL members, who can now enjoy instant one-click access to the iTunes Music Store for Windows and Mac, iTunes is said to be "the world's best digital jukebox." For more information on iTunes, see <http://www.apple.com/itunes/overview.html>

<sup>211</sup> Philip Smith, *Big Music Labels Take Digital Route*, REVOLUTION, Jun. 11, 2003, available at 2003 WL 65249923

licensing fees or to protect their catalogue by holding it back until demand is higher.<sup>212</sup> Although the Internet and digital technologies do not present a Utopia for the online marketing, promotion and distribution of music content, these technologies have permeated the industry and its consumer base to such an extent that the structure of the industry is permanently altered. The values of music consumers, the very relationship between technology and copyright law and the nature of music itself are compelling factors that are impelling a changing trend within the industry. An increasing number of artists are turning to the Internet and digital technologies to market, promote and distribute their music and it may be argued that a completely new music culture is in the process of formation with the way the Internet and digital technologies have affected and are affecting the consumer's experience of music. This paper addresses this point next.

### The Recording Artist and New Technologies

An increasing number of recording artists are turning to the Internet and digital technologies to market, promote and distribute their music content and it may be seen that these new technologies are providing the artist with a certain degree of autonomy for the creative expression of their individual music style. New artists have now begun to rely on the Internet and digital technologies as well as their own talent to provide them with the public exposure to ensure that their music is heard and sold.<sup>213</sup> The evolution of music production, promotion and distribution from being record label centric to the more diffused technological environment of the Internet has a profound impact on the traditional method of commercializing music content whereby a single successful artist compensates for all other investments a record company makes in producing, promoting and distributing the music of other artists.<sup>214</sup> This business model, which has been aggressively used to justify the imposition of high CD prices, the enactment of stronger copyright laws and the strict enforcement of copyright laws against pirates by the sound recordings industry,<sup>215</sup> may now become peripheral as new artists embrace the possibilities that the Internet offer by producing, marketing, promoting and distributing their own music without depending on a traditional record label to create the necessary public exposure for the successful commercialization of their creative work.

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<sup>212</sup> J.D. Considine, *All That You Leave Behind: Online Stores and Downloading May Be The Future of Music Retailing, But Don't Throw Away that CD Player Yet*, THE GLOBE AND MAIL (TORONTO, CAN.), Feb. 16, 2004, at R3 (arguing that there are plenty of loopholes in the online distribution and retail model, especially for Canadians, and a lot of music that is still unavailable for legal downloading)

<sup>213</sup> M. Corey Goldman, *A Digital-Free Agent*, THE TORONTO STAR, Mar. 1, 2004, at D04

<sup>214</sup> As in Hollywood, where a few stars make multimillions while the average actor barely makes out a living, the record business has increasingly become a "winner-takes-all" industry. Out of 30,000 artists, who released albums in 2002, only 57 hit the million-sale platinum mark and only an additional 71 reached gold mark of selling 500,000 albums, which is the minimum level whereby most artists can expect to breakeven after paying of the expenses of producing and promoting their record. See Issac Guzman, *New York Daily News, For the Record, A Tough Biz Old Model Fails As Profits Elude All But Top Acts*, Feb. 20, 2003, at 41, available at 2003 WL 4065880

<sup>215</sup> The RIAA has increased its efforts to curtail the unauthorized downloading of music content by bringing legal action against a 12-year-old for downloading 1,000 songs from the Internet and imposing a fine of \$2000 on a mother for the alleged unauthorized downloading of music content by one of her children. See Timothy W. Maier, *Arresting Kids for Downloading Music*, INSIGHT ON NEWS, Feb. 17, 2004, at 29, available at 2004 WL 62824947

The proliferation of Internet sites promoting independent artists and providing a channel for the artist to reach out to a large consumer base is creating a new genre of music, which appeals to consumers and listeners of music. Structurally, the Internet is poised to deliver music content to a sufficiently large number of music listeners that there may be a shift in consumer preference for particular genres of music that were conventionally not carried by record labels. In the 1940s, radio listeners developed a taste for less contemporary music when radio broadcasters started broadcasting music from Broadcast Music, Inc.'s (BMI) catalogue of music as their signal of rejection of the higher licensing fees that were being imposed by the American Society of Composers, Authors and Publishers (ASCAP). As a result of the radio stations' refusal to broadcast the more contemporary sound recordings licensed by ASCAP and their opting to broadcast "hillbilly" and "race" music on BMI's catalogue instead, country music and black music, which originated from music that was regarded less esteemed than the music of George Gershwin, Jerome Kern, Cole Porter, Rodgers and Hart and all of the most popular music from Hollywood films and Broadway plays that were on ASCAP's music catalogue, are today popular music genres in their own right.<sup>216</sup> The same occurrence may be seen to be happening today as an increasing number of artists turn to the Internet and digital technologies to promote their music and distribute their own music without the backing of a major record label. This movement of recording artists away from a major record label's more conventional packaging of their image towards a more personal delivery of an authentic and creative expression of individual music may pave the way for the consumer's appreciation for a new genre of music that major record labels had previously dismissed. Independent recording artists utilizing the Internet to market, promote and distribute their work have the freedom to create their own music, develop their own talent and deliver their authentic individual music style to the consumer and this has appealed to many consumers of music. Clay Aiken and Ruben Studdard, who were winners of the hit television series "American Idol,"<sup>217</sup> have developed successful music recordings without the backing of a major record label, primarily because their individual music style had appealed to a general music audience.<sup>218</sup>

The major record labels have been in a position to exert a great degree of control over the sound recording industry, its recording artists and its consumers through its various business models and industrial structures. This has been done through various

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<sup>216</sup> JOHN RYAN, *THE PRODUCTION OF CULTURE IN THE MUSIC INDUSTRY 1* (University Press of America, Inc. 1985)

<sup>217</sup> "American Idol" is a television talent search contest that mimics the British television show contest "Pop Idol." Initial auditions throughout the United States will determine which of 100 performers will be selected for a second round of auditions to decide the 30 contestants to appear in the first five episodes of the show. Viewers will vote each week to decide two performers to advance to the next round. The winners will then perform new routines on a bigger stage. There will be judges, who will assess each act before viewers vote two performers off the show each week until only two remain for a final competition to determine the winner. See <http://www.sirlinksalot.net/americanidol.html> for information about the show. For more information, see the show's official website at <http://idolonfox.com/home.htm>

<sup>218</sup> Timothy W. Maier, *Arresting Kids for Downloading Music*, INSIGHT ON NEWS, Feb. 17, 2004. at 29, available at 2004 WL 62824947

methods, such as the onerous terms of the artists recording contract, the sale of music in a bundle, requiring the consumer to purchase an entire CD to obtain a single track, the production of music that appeals to general contemporary tastes and the strict enforcement of copyright laws against technology developers and consumers. These controls, exerted by the industry have alienated major record labels within the music industry<sup>219</sup> and may be said to be akin to the controls that ASCAP exerted over the public performance of popular music in hotels, restaurants, motion picture and commercial radio broadcasts through their licensing agreements<sup>220</sup> from the period between 1914, when ASCAP was established, to the end of 1939, when BMI was established.<sup>221</sup> Creative artists, such as music publishers, composers and writers, had also begun to rely on ASCAP to help them make a living as social and economic circumstances changed by making ASCAP membership a necessary condition for success within the industry.<sup>222</sup> ASCAP then went on to develop internal membership structures to control their members<sup>223</sup> as well as maintain certain membership policies, which excluded artists within particular genres of music,<sup>224</sup> in ways that are not very different from the practices

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<sup>219</sup> *Music Companies May Soon Be Able to Stop Worrying About Piracy on the Internet. Instead, They Will Need to Start Worrying About What They Are For*, THE ECONOMIST (U.S. EDITION), May 8, 1999. This article states that, “In this new era, the record companies have a further disadvantage: everybody dislikes them. Artists dislike them because they think the record companies rip them off. Consumers dislike them because the artists dislike them. Because Internet businesses are increasingly about building a community of loyal users, record companies must learn to be loved if they are to flourish like booksellers rather than go the way of the circulating library.” (The booksellers in London had feared that circulating libraries, which specialized in books-for-hire, will diminish the sales of books when these libraries first opened in England in the 1720s. With the Internet however, bookselling still thrives and flourishes online whereas circulating libraries are now “gone”)

<sup>220</sup> To ensure that its business would be successful, ASCAP issued four blanket licenses, which required its licensees to take out a license on the entire music catalogue and not only for the music that were actually used. The four blanket licenses issued by the society were licenses for theaters, general licenses, licenses for radio stations not owned by newspapers and licenses for radio stations in which newspaper companies owned at least 51% of the stock. JOHN RYAN, *THE PRODUCTION OF CULTURE IN THE MUSIC INDUSTRY* 37 (University Press of America, Inc. 1985)

<sup>221</sup> BMI, which was established as a new performing rights organization, received its corporate charter from the state of New York on October 14, 1939. *See id.* at 83

<sup>222</sup> ASCAP controlled its membership by requiring that a publisher be in business “for at least one year,” that a writer have “at least five regularly published works” and that the works be “in vogue” or sufficiently popular to bring income to the Society. At the same time, it was critical for artists to have membership with ASCAP because media access, publicity and performance-rights income was dependent on this membership with the Society. *See id.* at 53

<sup>223</sup> Members, for example, had to grant ASCAP the exclusive right to license their non-dramatic works for public performance and this applied to existing and future copyrights. This ensured that ASCAP members will not be lured away by a rival organization. As the ASCAP membership contract could last up to 25 years, the Society effectively prevented its market by being penetrated by a rival organization. There are also ranking systems within the Society to maintain the prominence of older and more established publishers and writers within the organization. *See id.* at 55

<sup>224</sup> Ferdinand “Jelly Roll” Morton, the composer of classical works such as “King Porter Stomp,” “Wolverine Blues” and “Milenburg Joys” and described as “one of the great originals of jazz,” who produced work, which is unclassifiable and, which combined “elements of rag-time, blues, opera, New Orleans Brass Band, Spanish and folk-song” as well as Gene Autry, who was a popular writer, singer and movie star and, who achieved success as a “hillbilly” singer in the late 1920s and early 1930s were denied ASCAP membership and excluded from the Society’s catalogue primarily because of the music market segmentation in the 1940s into three parts – the “white, literate, largely urban middle and upper class at whom the Tin-Pan-Alley product was primarily aimed,” “the white, rural working class, with some urban

of the present major record labels towards recording artists, who sign a recording contract with them as well as recording artists, whose music is dismissed or ignored by the major record labels for belonging to a less contemporary genre of music.

This is particularly relevant in thinking about the commercialization of music content with the use of the Internet and digital technologies today because the willingness of major record labels to sign recording contracts with certain types of artists while excluding certain other music genres, such as “garage band” music, from their record labels, has the effect of segregating the music market. This creates an environment whereby independent record labels or artists bearing their own record label are driven to market, promote and distribute their music through different business models and with the far reaching effects of the structure of the Internet and digital technologies, it is not very difficult to imagine the growth of a consumer base for non-mainstream music that is conventionally marketed, promoted and distributed by major labels. It may also be envisaged that independent record or artist labels carrying new genres of music may reach a far wider audience through their more flexible business models<sup>225</sup> to create greater product diversity within the music industry by competing with major record labels in a way that parallels BMI’s entry into the music industry in the 1940s in competition with ASCAP and the resulting increase in the number of music publishers and writers in the music market place with access to performance rights income as well as the greater diversity in popular music. If the period from 1938 to 1941 is regarded as “one of the most critical in the history of the music industry” because this was when “forces within the industry, which had been building for years, finally resulted in intense conflict between ASCAP and the broadcasting industry,”<sup>226</sup> this part of the paper presents that the music industry is at present at another critical point, where independent music is likely to proliferate through the Internet to penetrate the music consumer base, which major record labels had been in control of from as early as 1985<sup>227</sup> and whilst radio broadcasting technology was the propelling force in the 1940s to produce a breakaway from ASCAP’s control of the music industry, Internet and digital media technologies are the propelling force in today’s music industry.

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and rural blacks,” for whom “hillbilly” music was intended and “the larger body of rural and urban blacks – the market for blues, gospel and “authentic” jazz – the so called “race” music.” ASCAP’s policies both reflected and promoted this market segmentation which was segregated in terms of types of music, performers, radio stations, record labels and retail outlets. *See id.* at 56-71

<sup>225</sup> One of the more flexible approaches to the commercialization of music through the Internet and digital technologies is to give artists 50% of the purchase price of each album instead of 6-12%, which is the standard royalty rate usually given by major record labels and to give away long clips of songs or whole songs instead of a typical half a minute sample given by mainstream services. Heather Green, *Downloads: The Next Generation; Music Merchants Are Trying New Ways To Make An Honest Buck Off The Internet*, BUSINESSWEEK, Feb. 16, 2004, at 64, available at, 2004 WL 63100983

<sup>226</sup> JOHN RYAN, THE PRODUCTION OF CULTURE IN THE MUSIC INDUSTRY 100 (University Press of America, Inc. 1985)

<sup>227</sup> Chris Taylor, *Burn, Baby, Burn; Sales of Music on CD Are Plummeting. Home Made Discs Are More Popular Than Ever. What Can the Big Record Labels Do?*, TIME MAGAZINE, May 20, 2002, at B8, available at 2002 WL 8386395. This article states that, “The last time the sound recording industry fell into a slump...The year was 1985, and although shipments of recorded music were down 4%, the worst the industry had to worry about ... was that some listeners liked to mix their own cassette tapes with favorite tunes from the latest Phil Collins or Duran Duran albums.”

The emergence of various Internet sites such as MusicDistribution.com<sup>228</sup> to assist independent recording artists to obtain exposure with consumers of music, provide independent artists with artistic control over their own creative work and allow artists to generate income from their music through the promotion, distribution and sale of their music over the Internet by the provision of online music distribution services. CD Baby,<sup>229</sup> which was started in 1997 by Derek Sivers, an independent musician himself, is an online record store that has emerged as the second largest seller of independent CDs over the Internet after Amazon.com.<sup>230</sup> CD Baby has sold 826,289 CDs over the Internet and has paid \$6,662,797 to independent artists, who have sold their CDs on CD Baby. As many as 57,120 artists sell their music over the Internet through CD Baby. CD Baby also assists independent artists distribute their music through digital downloading services provided by Apple's iTunes and Listen.com's Rhapsody<sup>231</sup> services by digitally encoding music from an independent artist's CD at the artist's request and submitting it to the iTunes and Rhapsody online stores.

GarageBand provides another channel for an aspiring artist to make his or her work known to an online music community by offering exposure to unsigned or amateur musicians through the posting of their music on their website to obtain feedback from other musicians while allowing new artists the opportunity to listen to music of other independent artists. GarageBand provides artists, who post their music on their website "a chance to discover what others are doing with their studio time."<sup>232</sup> More importantly however, GarageBand has entered several partnerships with radio stations and webcasters to play music of artists who have posted music on their site and gotten high listener reviews. Many radio stations recognize GarageBand as the best source for new songs for emerging artists and agreeing to add music from the site to their playlists. With the site's massive database of songs, it is able to offer each radio station and webcaster music, which is tailored to the individual radio station's or webcaster's criteria. This provides artists a new venue for the promotion of their music, offers radio stations and webcasters

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<sup>228</sup> MusicDistribution.com is an Internet site that is designed for independent record labels and artists, who intend to utilize the Internet to market, promote and distribute their music. The site offers an online music distribution channel for "family friendly" music through their FaveStreet online record store service that "handles all content management, stocking, fulfillment, accounting and reporting." An artist merely has to promote the store to the artist's fans or client base. For more information on MusicDistribution.com, refer to <http://www.musicdistribution.com/> and to look at a sample FaveStreet online record store, refer to <http://music.favestreet.com/storemain.cgi>

<sup>229</sup> For more information about CD Baby and the music they sell, refer to the site <http://www.cdbaby.com/home>

<sup>230</sup> Amazon.com has services for the distribution of independent music online through their "Advantage" service, which allows independent artists to sell their own CDs together with mainstream music carried by the major labels on Amazon.com's online catalogue. For more information about Amazon.com's service, refer to a review by MusicDistribution.com about the service at <http://www.musicdistribution.com/reviews/amazon.htm>

<sup>231</sup> Listen.com's Rhapsody service provides digital downloading subscription services with more than 20,000 albums online. For more information about the service, refer to Listen.com's official website at <http://www.listen.com/listenhome.jsp>

<sup>232</sup> Wilson Rothman, *In a Battle of the Bands, Musicians Are the Judges*, N.Y. TIMES, May 22, 2003, at G1

music free from public performance and digital performance royalties and gives music consumers more diversity in their range of music.<sup>233</sup>

The commercialization of music through the Internet and digital technologies by independent artists has produced a new culture in the public consumption of music as well as in the commercialization of music. As black and country artists began to receive public performance royalties from the radio broadcasts of their work after the establishment of BMI in the music market, independent artists today are able to obtain royalties from the digital download of their music through the Internet and through the newer business models that independent record labels have developed for online marketing, promotion and distribution of music content. It is foreseeable that independent music carried by independent labels through the Internet today will produce a diversified music market that caters to a wide array of music preferences. Creative musical expression will be permanently changed as more independent artists reach out to the consumer of music through the Internet. While the consumer culture that developed a preference for black and country music grew as a result of the competition between ASCAP and BMI for scarce resources of music for radio broadcasts,<sup>234</sup> the present culture for other forms of music that reflect an artist's individual music style is a result of an abundance of creative talents that have had no channels for expression and distribution with the prior business models adopted by the major record labels.

With Internet and digital technologies, the commercialization of sound recordings is unlikely to return to the way it was before. Family-values music, for example, may develop as a new genre with MusicDistribution.com's FaveStreet service and GarageBand's artists may find greater satisfaction with a site that allows direct interaction with other musicians and music listeners, who may appreciate and honestly comment on their music than sign a recording contract with a major record label, which may restrict their creative artistic style.<sup>235</sup> As with the impact of BMI's entry into the music market, which was not immediately evident,<sup>236</sup> it is submitted that the collective impact of recording artists utilizing Internet and digital media technologies to market,

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<sup>233</sup> For a list of radio stations and webcasters, which have formed partnership with GarageBand, refer to a press release dated November 19, 2002 at <http://www.garageband.com/htdb/feed/partners.html>

<sup>234</sup> As opposed to the present scenario, where there is indeed consumer dissatisfaction with the manner in which music content is marketed, promoted, distributed and sold, there was no such dissatisfaction with radio listeners when BMI was established. Rather, the radio broadcasters were "searching for an available but unexploited supply of popular music (resources) in the face of monopolization of these resources by one organization, ASCAP." JOHN RYAN, *THE PRODUCTION OF CULTURE IN THE MUSIC INDUSTRY* 117 (University Press of America, Inc. 1985)

<sup>235</sup> It is nonetheless noteworthy that 13 bands have signed recording contracts with major labels. See <http://www.garageband.com/htdb/companyinfo/testimonials.html>

<sup>236</sup> BMI's long lasting effects on the music industry, which was evident much later is that writers and publishers in the country-music and black-music genres had begun to have access to performance rights royalties. BMI also provided seed money to start publishing houses across the United States and it was not until later that the effect of this was evident. The number of music writers and publishers increased tremendously with the provision of seed money. There were approximately 1,100 writers and 137 publishers who shared performance rights royalties in 1939 and 6,000 writers and 3,500 publishers sharing performing rights royalties twenty-five years later. There were publishers located in only nine states in 1939 and in 1958, there were music publishers in forty-six states in the United States. JOHN RYAN, *THE PRODUCTION OF CULTURE IN THE MUSIC INDUSTRY* 118-119 (University Press of America, Inc. 1985)



promote and distribute their work, independent record labels channeling new music through the radio stations and webcasters and the general consumer receptiveness for new forms of music will have a profound impact on the sound recording industry. Although this is not evident now, the impact of recording artists utilizing new technologies to commercialize music content will emerge eventually as deep-rooted changes to the present state of the sound recording industry. As information flow in copyrighted content is enhanced by the Internet and digital media technologies and as more users become aware of their ability to affect the flow of information in content through the use of such technologies, there will be a need to draw a clear balance between the rights of the author to control the use of works and the rights of the public to have access to the works for developmental and transformative purposes. Several mechanisms in copyright law serve this purpose and these mechanisms are addressed in Part 3 of this paper.

### **Part 3: The Private Interest – Public Interest Balance**

In the United States, copyright laws are enacted under the Copyright Clause of the United States Constitution, which grants Congress the power to “promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.”<sup>237</sup> Under the United States copyright regime, the author is placed as the primary recipient of copyright protection for literary and creative works. In order that a creative work be protected under copyright law, the requirement that the work be an original expression of authorship must be met. In *Burrow-Giles Lithographic Co. v. Sarony*,<sup>238</sup> an action was brought for the infringement of copyright in a photograph. It was argued that a photograph was not a writing nor the production of the author and was therefore not eligible for copyright protection under the constitutional clause. The Supreme Court decided that the terms “writings” and “authors” are “susceptible to a more enlarged definition”<sup>239</sup> than an author and a written book. An author, according to the Supreme Court, is “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature.”<sup>240</sup> An author therefore is a person to whom a creative work owes its existence. The Supreme Court in *Goldstein v. California*<sup>241</sup> further elaborated that the terms “writings” and “authors” in the constitutional clause have not been construed narrowly in their literal sense but rather with the “reach necessary to reflect the broad scope of constitutional principles.”<sup>242</sup> The Supreme Court went on to state that “while an “author” may be viewed as an individual who writes an original composition, the term in its constitutional sense have been construed to mean an “originator,” “he to whom everything owes its origins.”<sup>243</sup> It may be seen that central to the concept of an author is the notion that there is not only the production of a creative work but also the element of originality. The

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<sup>237</sup> U.S. CONST. art. I, § 8, cl. 8

<sup>238</sup> 111 U.S. 53 (1884)

<sup>239</sup> 111 U.S. at 57

<sup>240</sup> 111 U.S. at 58

<sup>241</sup> 412 U.S. 546 (1973)

<sup>242</sup> 412 U.S. at 561

<sup>243</sup> 412 U.S. at 561

Supreme Court in *Feist Publications Inc. v. Rural Telephone Service Co.*<sup>244</sup> elaborates this point more clearly when it decided that factual compilations, such as a telephone directory consisting of white pages did not qualify for copyright protection because compilation of facts failed to meet the originality requirement of the constitutional clause. The Court stated, “the originality requirement . . . remains the touchstone of copyright protection today”<sup>245</sup> and based its decision on this “bedrock principle of copyright”<sup>246</sup> that “no one may claim originality as to facts”<sup>247</sup> because “facts do not owe their origin to an act of authorship.”<sup>248</sup>

The emphasis on originality as a qualification for copyright protection creates a division between the private rights of an author as the originator of the creative work and the general public interest to have access to the work.<sup>249</sup> The balance that copyright law seeks to achieve is fundamentally a balance between private property rights of authors and rights of the public within the public domain. There are difficulties in drawing a fair balance between both interests and the difficulties become evident in the judiciary’s application of the various copyright doctrines. The idea-expression dichotomy for example, exists to ensure that only creative expressions of authors are protected under the law, leaving ideas, “the building blocks of creativity”<sup>250</sup> freely available for the public’s use.<sup>251</sup> The demarcation is however not an easy one to draw and Judge Hand in *Peter Pan Fabrics Inc. v. Martin Weiner Corp.*<sup>252</sup> alluded to this difficulty by stating that “obviously no principle can be stated as to when an imitator has gone beyond copying the ‘idea,’ and has borrowed the ‘expression.’ Decisions must inevitably be ad hoc.”<sup>253</sup> Judge Hand elaborates the point further in *Nichols v. Universal Pictures Corp.*,<sup>254</sup> where the District Court for the Southern District of New York had to decide if a subsequent motion picture with the same underlying story line infringed an earlier play.<sup>255</sup> The other copyright

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<sup>244</sup> 499 U.S. 340 (1990)

<sup>245</sup> 499 U.S. at 347

<sup>246</sup> 499 U.S. at 347

<sup>247</sup> 499 U.S. at 347

<sup>248</sup> 499 U.S. at 347

<sup>249</sup> It is said that “the realm protected by copyright is privately owned; the unprotected realm is the public domain. What we rely on in place of physical borders, to divide the privately-owned from the commons and to draw lines among the various parcels in private ownership is copyright law’s concept of originality.” Jessica Litman, *The Public Domain*, 39 EMORY L. J. 1000 (1990)

<sup>250</sup> PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT, PRINCIPLES, LAW AND PRACTICE*, at vii (Oxford University Press 2001)

<sup>251</sup> It is said that “[t]he idea-expression dichotomy also safeguards the internal balances of the copyright scheme by ensuring that the constitutional goal of “Promoting the Progress of Science” is achieved. This goal is accomplished by balancing at least two interests. First, in order to encourage authors to devote their time and talents to the creation of works of authorship, protection against unauthorized appropriation of the authors’ expression must be provided. At the same time, ideas, facts, research, discoveries and the like, even when revealed for the first time in an author’s work, must remain free for subsequent authors to build upon. Too great a scope of protection for the initial author would discourage subsequent authors from offering their own insights.” WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 319 (The Bureau of National Affairs, Inc., 1994)

<sup>252</sup> 274 F. 2d 487 (1960)

<sup>253</sup> 274 F. 2d at 489

<sup>254</sup> 45 F.2d 119 (1930)

<sup>255</sup> Judge Hand stated that “[u]pon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps

doctrine that attempts to draw a fair balance between private property rights and the public interests is the fair use doctrine that allows the use of copyrighted materials “if it is done for a salutary purpose,”<sup>256</sup> such as “news reporting, teaching, criticism.”<sup>257</sup> In *Time, Inc. v. Bernard Geis Associates*,<sup>258</sup> the use of copyrighted photographs of President John F. Kennedy’s assassination in a book written about the assassination was held to be a fair use of the copyrighted material. Although photographs were protected under the copyright act as a copyrightable subject matter, the District Court for the S.D. New York held that the “public interest in having the fullest information available on the murder of President Kennedy”<sup>259</sup> prevailed over the private property rights of the copyright owner in the photographs.

The balance to be drawn between private property rights and the public interest is the central issue in current copyright debates that pertain to the development of new technologies in the market place that shift the traditional boundaries between private property and public interests set by the analog world. Where “the principal content industries – publishing, sound recording, film and television industries – formed, developed and thrived around analog technology platforms in part because they inherently impeded unauthorized reproduction and distribution of works of authorship,”<sup>260</sup> the content industries today are faced with the prospect of commercializing their content in a digitized environment that “has afforded consumers unprecedented power to access, store, manipulate, reproduce and distribute entertainment content,”<sup>261</sup> which as a result has caused the industries to undergo a loss of control over their content. This balance between private property interests and the public interest is not an easy one to draw and the “law’s divide between private property and the public domain”<sup>262</sup> constantly “shifts not only with the views of particular judges but also with national boundaries and with cultural attitudes.”<sup>263</sup>

The difficulty in drawing a fair balance between both the private and public interests is that American copyright jurisprudence is based on two separate and distinct ideologies about the protection that is due to the author of creative works. The school of thought that is based on principles of natural justice argues that authors should be given their dues for the production of creative works and that copyright protection should be extended where and when an author would be entitled to reap the rewards from the production of a creative work. The other school of thought is based on an incentive theory, which is that an author should only be given rights to the extent that it provides an

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be no more than the most general statement of what the play is about, and at times may consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his “ideas,” to which, apart from their expression, his property is never extended.” 45 F. 2d at 121

<sup>256</sup> PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY 20* (Hill and Wang 1994)

<sup>257</sup> *See id.* at 20

<sup>258</sup> 293 F. Supp. 130 (1968)

<sup>259</sup> 293 F. Supp. at 146

<sup>260</sup> Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 105 (2002)

<sup>261</sup> *See id.* at 118

<sup>262</sup> PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY 14* (Hill and Wang 1994)

<sup>263</sup> *See id.* at 14

author with the economic incentive to produce creative works and any grant of rights that exceed the incentive of an author to create would be regarded as “an encroachment on the general freedom of everyone to write and say what they please.”<sup>264</sup> The different schools of thought have been labeled differently in the academic literature to illustrate the same point. The natural rights school of thought has been labeled “a theory of moral deserts,”<sup>265</sup> “the copyright optimists”<sup>266</sup> or “the neoclassicist approach”<sup>267</sup> and the other school of thought as “expressed in terms of economic incentives,”<sup>268</sup> the “copyright pessimists”<sup>269</sup> or “the minimalist position.”<sup>270</sup> Although both these school of thoughts differ as to the scope to which copyright protection should be granted to authors of creative works, both do agree that there is a necessity for there to be enough protection to encourage authors to produce creative works.<sup>271</sup> Arguments to strengthen copyright protection today as new technologies emerge and as content is increasingly distributed through the Internet, whether based on natural justice or on the economic incentive theory, have asserted greater property rights against the public domain.<sup>272</sup>

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<sup>264</sup> PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 15 (Hill and Wang 1994)

<sup>265</sup> Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 965 (1990)

<sup>266</sup> PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 15 (Hill and Wang 1994)

<sup>267</sup> It is explained that the “neoclassicist” approach posits that, far from simply inducing the creation and dissemination of new expression, copyright serves as a vehicle for directing investment in existing works. Neoclassicists would accordingly treat literary and artistic works as “vendible commodities,” best made subject to broad proprietary rights that extend to every conceivable valued use. In this manner, neoclassicists contend, market pricing can direct resource allocation for the marketing and development of existing creative expression in an optimally efficient manner.” Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 286-287 (1996)

<sup>268</sup> Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 965-966 (1990)

<sup>269</sup> PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 15 (Hill and Wang 1994)

<sup>270</sup> The minimalist position argues for a reduction in the existing levels of copyright protection. This position is explained more clearly as follows, “Some minimalist critics follow the same criterion of allocative efficiency as the neoclassicists, but reach diametrically opposed conclusions. They insist that the production of original expression is not inherently more valuable than any other potential use of society’s resources, and thus that copyright protection must be set at a level that accounts not just for public access to expression, but also the social cost of drawing resources away from other potential uses. Other critics phrase copyright’s incentive rationale in minimalist terms. They recognize that author’s expression may have unique social value, but question whether the copyright incentive is truly necessary to induce its production and dissemination at an optimum amount and cost. Some minimalist tout the notion that copyright is an outdated impediment to “truth and exploration” in the digital universe. They argue that whatever copyright’s value in the hard copy world, it simply has no place on the Internet. Others eschew such utopianism, but insist nevertheless that longstanding, predigital limitations to copyright owner prerogatives must be maintained even as digital network technologies radically alter traditional copyright markets. Although these critics generally purport to seek the retention of existing levels of protection, their proposed adherence to predigital “free use zones” would significantly undermine copyright’s support for the autonomous creation and dissemination of expression in the digital environment.” Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 287-288 (1996)

<sup>271</sup> PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 22 (Hill and Wang 1994)

<sup>272</sup> The term “public domain” is a real property concept that is used to describe lands owned by the Federal Government intended for sale, lease or grant to members of the public. It is said that “in the intellectual property context, the term describes a true commons comprising elements of intellectual property that are ineligible for private ownership. The contents of the public domain may be mined by members of the public.” Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 975 (1990)

In recent years, there has been increasing attention paid to the public domain as the pool of common resources that is freely available to the general public for use. The focus on the public domain stems primarily from proponents of lesser protection under the copyright regime on the basis that content can only be developed when there is a large amount of free resources to draw from.<sup>273</sup> It has been argued that a larger public domain is necessary for authorship to thrive and that the grant of extensive property rights in creative works prevents new authors from creating works built upon existing materials.<sup>274</sup> Indeed, a rich and diverse public domain is vital to the growth of the creative content industries for authors require a large amount of resources to develop and create new works. After all, “the public domain is the law’s primary safeguard of the raw material that makes authorship possible.”<sup>275</sup> Nonetheless, there are opposing view points contrary to this low protectionist point of view on a general theory of the public domain.<sup>276</sup> It has been argued that there really is no general theory of the public domain and that “the public domain is simply what remains after all methods of protection are taken into account.”<sup>277</sup> While authorship thrives on a rich and diverse public domain and a creative work is “necessarily a recombination or transformation of what has gone before,”<sup>278</sup> the grant of property rights to authors for their creative works does not necessarily have an adverse impact on “the enterprise of authorship”<sup>279</sup> because the recognition of a property

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<sup>273</sup> It has been argued that the development of new creative content “depends fundamentally upon a rich and diverse public domain.” Freely available content is “crucial to building and supporting new content.” LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 50 (Random House 2001)

<sup>274</sup> It is said that “the very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds they have heard before, playwrights base their character on bits and pieces drawn from real human beings and other playwrights characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming and recombining what is already “out there” in some other form. This is not parasitism: it is the essence of authorship. And, in the absence of a vigorous public domain, much of it would be illegal.” Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967

<sup>275</sup> See *id.* at 967

<sup>276</sup> In opposition to the low protectionist view point, it has been stated that it is “society’s duty to go as far as it can possibly go in nurturing the atmosphere in which authors and other creative artists can flourish. I agree that the copyright law should encourage widespread dissemination of works of the mind. But it seems to me that, in the long pull, it is more important for a particular generation to produce a handful of great creative works than to shower its school children with unauthorized photocopies or to hold the cost of a jukebox play down to a dime, if that is what it is these days.” BARBARA RINGER, *THE DEMONOLOGY OF COPYRIGHT*, BOWKER MEMORIAL LECTURE (1974), *reprinted in* MODERN COPYRIGHT FUNDAMENTALS 24-25 (Ben H. Weil & Barbara Friedman Polansky eds., 1985)

<sup>277</sup> The introduction to a paper by Edward Samuels states the pertinent question of the status of the public domain by asking “Is the public domain simply whatever is left over after various tests of legal protection have been applied? Is it the mere “background,” the “negative” of whatever may be protected? Or is there something about the public domain, some compelling public policy or legal principle, that gives it a life of its own, that would tend to attribute positive aspects to it, that would make it something of the form instead of just the background?” The paper proceeds to state that “several authors have suggested a “theory of the public domain” even though they may have been unable to articulate exactly what its parameters might be. As opposed to a theory of the public domain, one could also conclude ... that there is no such animal: the public domain is simply whatever remains after all methods of protection are taken into account.” Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPR. SOC’Y, 137, 137-138 (1993)

<sup>278</sup> See *id.* at 140

<sup>279</sup> Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 969 (1990)

right in creative works is only “in those elements of the work, small as they may be, that the author has contributed.”<sup>280</sup> In fact, it is argued that authorship thrives where authors are ensured of a market in which their works may be commercialized and that there is indeed a necessity for the law to provide copyright protection in authors’ works so that authors may be able to establish these necessary markets for the commercialization of their works. The argument for more extensive rights have been premised on the protection of authors in the digital age by extending rights “into every corner where consumers derive value from literary and artistic works”<sup>281</sup> as this would be the most appropriate way to connect authors with their audiences “free from interference by political sovereigns or the will of patrons.”<sup>282</sup>

As new technologies develop in the market place, the extension of rights under the copyright regime ought to be done with a great degree of caution. The growth of the content industries, as well as the general growth of society, technology and culture depends on the building and use of existing creative materials that are easily accessible. The extension of rights to protect authors may indeed be feasible, considering the increasing number of authors, who make their works available through the Internet and digital technologies. The empowerment independent sound recording artists have as a result of the new distribution channels that the Internet has opened up for the distribution of their sound recordings may also require an extension of authors’ rights. Indeed, authors must have their rights in their works protected to ensure that rewards due to the author for the production of creative works are fairly given.<sup>283</sup> However, there is a general necessity for creative works of authorship to be made available for the general public’s use as the imposition of strong property rights against certain uses of the work has the general effect of stifling societal, cultural and technological growth. More importantly though, is that the extension of property rights in the creative content industries has the effect of preventing new content markets from emerging as property rights are enforced to maintain existing business models and industrial structures. Industrial growth in the long-run will be restricted by the over-extension of copyright protection in creative works and that an inclination towards lesser property rights within the copyright regime will allow the content industries to develop as they experience changes in their technological environment.

The common pool of available resources that is not within the control of the copyright owner is also necessary for the general development of culture and society. Today, the Internet and digital technologies offer consumers of creative works a choice as to the manner in which creative works are consumed and a general culture of mixing-and-matching bits of works and information appears to be a growing consumer culture over

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<sup>280</sup> Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPR. SOC’Y, 137, 140 (1993)

<sup>281</sup> PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY* 236 (Hill and Wang 1994)

<sup>282</sup> *See id.* at 236

<sup>283</sup> It is stated that “copyright tends also to serve the material expectations and psychological cravings of the individual creative worker: it gives him an opportunity (though by no means the certainty) of reward for his efforts; conventional recognition for the feat of creating a work; a means (though not a very good one) of preserving the artistic integrity of the work through controlling its exploitation.” BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 75 (Columbia University Press 1967)

the Internet. Indeed, the “most striking power provided by emerging technologies”<sup>284</sup> is “the growing power of consumers to filter what they see.”<sup>285</sup> Above that however, consumers of creative works are likely to be exposed “to a life where one can individually and collectively participate in making something new,”<sup>286</sup> which will build a culture that creates new works and shares those works with others.<sup>287</sup> It is submitted that the growth of culture and society as a whole stems from the generation of new works of creative art by consumers of creative works coupled with the sharing and dissemination of ideas and art with other consumers. The passive reception of creative works by consumers has built a market for copyrighted works as authors, with the incentives provided under copyright law, produce “consumable works”<sup>288</sup> for consumers to consume.<sup>289</sup> However, the public interest functionality of copyright law to ensure that there are sufficient materials for the public to use “for the progress of science and the useful arts” will only be fulfilled when creative works are available to the consumer for transformative uses as the growth of culture and society as a whole stems from a vibrant and healthy interchange of creative materials within a public arena.<sup>290</sup> The production of new creative works really depends on the availability of raw materials that may be rendered inaccessible by excessive protection of copyright owner’s properties. It has been said that “when copyright has gone wrong in recent times, it has been by taking itself too seriously, by foolish assumptions about the amount of originality open to man as an artificer, by sanctimonious pretensions about the iniquities of imitation.”<sup>291</sup> If the public domain operates to provide artists with the resources to inspire new works of creation,<sup>292</sup>

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<sup>284</sup> CASS SUNSTEIN, *REPUBLIC.COM* 8 (Princeton University Press 2001)

<sup>285</sup> *See id.* at 8

<sup>286</sup> LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 9 (Random House 2001)

<sup>287</sup> It is said that “technology could enable a whole generation to create – remixed films, new forms of music, digital art, a new kind of story telling, writing, a new technology for poetry, criticism, political activism – and then, through the infrastructure of the Internet, share that creativity with others. This is the art through which free culture is built.” *See id.* at 9

<sup>288</sup> Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C.L. REV. 397, 402 (2003)

<sup>289</sup> Copyright law responds to the passive consumer “primarily by ensuring that conditions exist for a functioning market in copyrighted works, i.e. by making sure there are works for them to consume. It does this by solving the basic goods problem i.e., by giving entitlements to authors, so that authors will have adequate incentives to produce consumable works, and then permit the market to direct investment so as to satisfy consumer preferences. Rights against unauthorized reproduction, public distribution, and public performance thus permit producers to exploit these copyright markets without fear that initial investments will be undercut. Once the law sets entitlements, competition among goods will serve consumer interests, because they are, under this view, rather minimal.” *See id.* at 402-403

<sup>290</sup> The understanding of culture in modern anthropology is a “shared, collectively generated constellation of meaning; its most salient dimensions were realized socially, generally in publicly performed and politically effectual signifying practices.” The recognition of property rights in creative works however, removes cultural forms and makes it private commodities. It is said that “in consumer societies, ... many of the most accessible, widely known, and compelling of cultural forms around which meanings are forged are not shared in a singular collectivity but are the private properties of corporations with economic interests in preserving their exclusivity. This tense intersection between culture’s public space and the commodity’s private place ... challenges conventional Anglo-American legal categories still oriented around social divisions and distinctions characteristic of modern understandings of civil society.” ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* 250 (Duke University Press 1988)

<sup>291</sup> BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 78 (Columbia University Press 1967)

<sup>292</sup> It has been argued that the public domain provides artists with the sensory stimuli necessary to generate creative works. Professor A. Samuel Oddi relies on Emmanuel Kant’s *Critique of Pure Reason* to explain

the extension of overly broad property rights under the copyright regime will have an adverse impact on the very act of artistic creation as it would deny “full access to the stimulus value of the protected creation.”<sup>293</sup>

The fair use doctrine, it is said, is a “safety valve”<sup>294</sup> within copyright law to ensure that property rights in creative works are not enforced over-extensively to deny users of creative works the ability to use the works for “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research.”<sup>295</sup> The fair use doctrine operates as a mechanism within copyright law to strike the delicate balance between an author’s property interest in the copyrighted work and the public’s interest in being able to access the work. The use of creative content for the further development of art and literary works is to a very large extent facilitated by the doctrine, which allows users of content to use the work for the purposes of educational, societal or cultural growth without seeking prior authorization from the copyright owner. The fair use doctrine had been said to be a response of the courts to circumstances where transaction costs for obtaining permission to use the work is too high as a result of market failure, where “the possibility of consensual bargain has broken down in some way.”<sup>296</sup> The advent of the Internet and digital technologies however, may reduce the transaction costs for obtaining permission to use the work to virtually zero and if this becomes a reality, then the fair use doctrine, justified as a solution to market failures, will be rendered obsolete.<sup>297</sup> As it is predicted that “fair use will recede as a mechanism for resolving market failures arising from transaction costs”<sup>298</sup> and as copyright owners are able to impose fees upon users for every use of their works, it is submitted that these property rights that are given to copyright owners of creative works ought not to be too extensive as the need for creative materials in the public domain increases in order that

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the two forms of cognition, which is used as a foundation to elaborate the process of producing a creative work. The first cognitive process is based on external perception of sensations, which Kant calls “empirical or a posteriori cognition.” The other form of cognition is internal and within an individual’s mental process, which Kant calls “pure or a priori cognition.” The cognitive process involves a sensation of an external stimulus, the perception of the sensation and its ordering to space and time. This perception may be then further processed cognitively to generate an idea. In order for the creative process to continue, there must be a “transformation from the intangible idea conception to a tangible implementation” or a “creation.” This external perception of an ordinary event may to “creative individuals be a stimulus toward a fundamental scientific discovery, a magnificent work of art or an invention of great societal value.” A. Samuel Oddi, *The Tragicomedy of the Public Domain in Intellectual Property Law*, 25 HASTINGS COMM. & ENT. L. J. 1, 13-20 (2002)

<sup>293</sup> See *id.* at 60

<sup>294</sup> PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY 20* (Hill and Wang 1994)

<sup>295</sup> 17 U.S.C. § 107

<sup>296</sup> Wendy Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)

<sup>297</sup> It is said that the celestial jukebox, the metaphor used to depict the technological infrastructure that allows users to be connected to content creators and to subscribe to vast amount of creative content, “may reduce the transaction costs of negotiating licenses.” New technologies today “enable owners to charge users differently according to the value of each element used” and “the capacity of the celestial jukebox to post a charge for access and to shut off service if a subscriber does not pay his bills, should substantially reduce the specter of transaction costs.” As transaction costs are reduced, the fair use doctrine will have a lesser role to play in facilitating non-consensual transfer of creative works from the content creator to the content user. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY 224* (Hill and Wang 1994)

<sup>298</sup> Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPR. SOC’Y 133, 135 (2003)



new creative works may be produced. If new authors and artists are required to pay for their every single use of creative content as a result of over extensive property rights, then the very act of producing creative works for the general public will be adversely affected in the long term. The next portion of this chapter addresses the fair use doctrine and the effect of its lessening role on the general endeavor of creativity and authorship.

Two principles of copyright law are important in achieving a balance between uses of creative works by the public and protection of the property rights of the copyright owner. The notion that creative works must be original to qualify for copyright protection<sup>299</sup> and the protection of original expressions and not mere ideas allow the courts to draw boundaries as to which works ought to be protected as a matter of law and which works ought to be within the public domain for general public use. Both the notions of originality and the idea-expression dichotomy determine the boundaries between the private and exclusive property rights of authors and artists in their works and the general public interest of society to obtain access to creative works and whether particular uses of the work by members of society infringe the rights of the copyright owner. The law's rationale for the notion of originality and the idea-expression dichotomy is that the recognition of exclusive property rights over the work that would prevent others from having access and making use of it would only be justified if the author or artist has produced a work of original expression that contributes generally to society.<sup>300</sup> New authors are thereby encouraged by the idea-expression dichotomy to "convey the ideas and facts expressed in the copyright holder's work – and for that matter also to express their own ideas – so long as they do so in words, graphics, or other expressive components that are not "substantially similar" to those that comprise the copyright holder's work."<sup>301</sup>

In *Sheldon v. Metro-Goldwyn Pictures Corp.*,<sup>302</sup> the Circuit Court of Appeals for the Second Circuit addressed the standard for originality when it had to decide if a subsequent motion picture infringed copyright in an earlier play when "the similarities between the two are too specific and detailed to have resulted from chance."<sup>303</sup> Judge Hand in delivering the opinion of the Court recognized that the broader plot or outline of a play can never be copyrighted. Nonetheless, Judge Hand felt that in the case before him, there were significantly dramatic scenes between both the play and the motion

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<sup>299</sup> The Copyright Act states that copyright protection subsists in "original works of authorship" fixed in any tangible medium of expression. 17 U.S.C. § 102 (2001)

<sup>300</sup> It is said that "copyright serves fundamentally to underwrite a democratic culture: by according creators of original expression a set of exclusive rights to market their literary and artistic works, copyright fosters the dissemination of knowledge, supports a non-state communications media and highlights the value of individual contributions to public discourse. In this view, copyright's constitutive democratic purpose is both a primary rationale for according authors proprietary rights in original expression and the proper standard for delimiting those rights. Copyright holder rights should be sufficiently robust to support copyright's democracy enhancing functions but not so broad and unbending as to chill expressive diversity and hinder the exchange of information and ideas." Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 220 (1998)

<sup>301</sup> Neil Weinstock Netanel, *Locating Copyright within the First Amendment Skein*, 54 STAN. L. REV. 1, 13-14 (2001)

<sup>302</sup> 81 F.2d 49 (1936)

<sup>303</sup> 81 F.2d at 49

picture that were almost identical and whilst much of the picture may not be attributable to the play as some parts were drawn from a novel, that did not preclude the Court's finding of a copyright infringement of the original play. According to Judge Hand, it was sufficient to show that substantial parts of the play were taken and included in the subsequent motion picture in order for the Court to decide that the subsequent work was an infringement of copyright, for, according to Judge Hand, "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."<sup>304</sup>

Justice Holmes in *Bleistein v. Donaldson Lithographing Co.*<sup>305</sup> had, through his judgment, made it clear that a work need not necessarily have to be a work of fine art in order to qualify for copyright protection. Chromolithographs that are used to advertise a circus would qualify for copyright protection despite the fact its "pictorial quality attracts the crowd and therefore gives them a real use – if use means to increase trade and to help make money."<sup>306</sup> To Justice Holmes, "a picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus."<sup>307</sup> More importantly however, Justice Holmes felt that the Court had a very limited role to play in deciding questions of originality because "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."<sup>308</sup> In its essence, Justice Holmes' judgment affords copyright protection "for any work exhibiting a human reaction, however simple and whatever the source of the creator's inspiration."<sup>309</sup>

One of the more difficult aspects of determining the question of originality is where works from the public domain are used to produce a new work and the courts must then assess the "quantity and quality of original effort that has gone into producing a variation of a public domain work."<sup>310</sup> In *Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc.*,<sup>311</sup> the Court of Appeals for the Second Circuit had the task of deciding if mezzotint engraving of paintings that were taken from old masters in the public domain were eligible for copyright protection. The argument that the engravings could not qualify for copyright protection because they were reproductions of works in the public domain was rejected by the Court, which reasoned that while copyright was not available for works

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<sup>304</sup> 81 F.2d at 56

<sup>305</sup> 188 U.S. 239 (1903)

<sup>306</sup> 188 U.S. at 251

<sup>307</sup> 188 U.S. at 251

<sup>308</sup> Justice Holmes elaborated on his point by stating "at the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value – it would be bold to say that they have not an aesthetic and educational value – and the taste of any public is not to be treated with contempt." 188 U.S. at 251-252

<sup>309</sup> Dale P. Olson, *Copyright Originality*, 48 MO. L. REV. 29, 41 (1983)

<sup>310</sup> *See id.* at 50

<sup>311</sup> 191 F.2d 99 (1951)

already in the public domain, translations or other versions of works in the public domain would be eligible for copyright protection and the mezzotints in this case were such versions of works in the public domain.<sup>312</sup> The Court had felt that any variation to works already in the public domain may be inadvertent but this would not affect the recognition of copyright in the subsequent work. To the Court, “a copyist’s bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon such a variation unintentionally, the author may adopt it as his and copyright it.”<sup>313</sup> This approach provides a clear guideline as to when a work that builds upon works in the public domain may satisfy the originality requirement and qualify for copyright protection. Where a subsequent work builds upon a work in a public domain and is a variation of the work, the court will be inclined to recognize copyright in the subsequent work. The approach rewards an author for the production of the subsequent work while retaining the original work in the public domain for the general use of the public.<sup>314</sup>

The protection of creative expression under copyright law works in tandem with the requirement for originality to ensure that only the essence of products of authorship are recognized as being eligible for copyright protection. In this way, the Courts ensure that the general public is not denied access to the underlying theme and ideas of the work. The Copyright Act 1976 expressly provides that ideas are ineligible for copyright protection<sup>315</sup> and the Courts have consistently affirmed the freedom of the public to use ideas of underlying works to produce new and creative works.<sup>316</sup> In *Baker v. Selden*,<sup>317</sup> a

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<sup>312</sup> The mezzotint engraving process is an intricate one. The process is explained as follows, “the first step in creating a mezzotint requires preparation of a copper engraving plate by creating a roughened surface, a process which is performed by hand. The outline of the original old master is then transferred to the plate by a tracing process. Working within the outline, the engraver “scrapes with a hand tool the picture upon the plate, obtaining light and shade effects by the depth of the scraping of the roughened plate or ground.” Trial prints are pulled from a completed plate which may be modified to suit the engraver. Before printing the copper plate is treated with a steel coating to preserve the printing surface. Before each print is made, the color is applied by hand to the plate, usually by a printer following a guide prepared by the engraver. This cumbersome method produces a print which, unlike photographic reproductions, preserves the “softness of line which is characteristic of the oil painting. However, the process does not create a duplicate of the old master but rather an interpretation. As described by the District Court: The work of the engraver upon the plate requires the individual conception, judgment and execution by the engraver on the depth and shape of the depressions in the plate to be made by the scraping process in order to produce in this other medium the engraver’s concept of the effect of the oil painting. No two engravers can produce identical interpretations of the same oil painting.” Dale P. Olson, *Copyright Originality*, 48 MO. L. REV. 29, 50-51 (1983)

<sup>313</sup> 191 F.2d at 105

<sup>314</sup> Dale P. Olson, *Copyright Originality*, 48 MO. L. REV. 29, 51 (1983)

<sup>315</sup> The Copyright Act 1976 states that “in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b)

<sup>316</sup> In *Mazer v. Stein*, for example, the Supreme Court decided that copyright existed in statuettes but not in the idea of using the statuettes as a base for a table lamp. 347 U.S. 201, 217 (1954). In *Baker v. Selden*, the Supreme Court decided that copyright protected an author’s explanation for a book-keeping method but not the method itself. 101 U.S. 99, 104 (1879). In *Nichols v. Universal Pictures Corp.*, the Court of Appeals for the Second Circuit decided that a copyright in a play did not extend to the underlying ideas and themes of the play. 45 F.2d 119, 122 (1930)

system of ruled lines and headings were used to illustrate a method of book-keeping and the Supreme Court had grappled with the question of whether copyright existed in the system of book-keeping via the recognition of copyright in the book itself. While it was clear to the Court that the book “conveying information on the subject of book-keeping and containing detailed explanations of the art”<sup>318</sup> would be eligible for copyright protection, it was more evident to the Court that there was “a clear distinction between the book, as such, and the art which it is intended to illustrate.”<sup>319</sup> Novelty in the art expressed in the book was a matter for patent protection and not copyright, the Court had felt, and to the Court, “to give to the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public.”<sup>320</sup> Unless a patent was obtained for the art contained within the book, the public would be able to have access to the ideas contained in the book. The Court held that copyright existed in the book and the ideas expressed therein and while the public is enjoined from printing and publishing the book or any material in it, the system of book-keeping expressed therein was an art that the public may use and practice.<sup>321</sup>

The decision of Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*,<sup>322</sup> reflected a more definitive approach to the question of originality and had denied copyright protection to compilations of facts unless the compilation, by their selection and arrangement, displayed the requisite originality necessary to protect the compilation under copyright laws. In this case, the Court had to decide if copyright protection could exist for the publication of a typical telephone directory that consisted of white pages and yellow pages. The Court held that while there is copyright in the directory as a whole because it contains some forward text and some original material in the yellow pages, the white pages were not protected under copyright because it did not meet the prerequisite of originality required for protection. Rejecting the “sweat of the brow” theory that copyright was a reward for the hard work that accompanied the compilation of facts, the Court held that the grant of copyright in factual compilations is possible in situations where the facts are selected, coordinated and arranged in such a manner that they satisfied the originality requirement. To the Court, “originality requires only that the author make the selection or arrangement independently (i.e. without copying that arrangement or selection from another work), and that it display some minimal level of creativity.”<sup>323</sup> The selection of names, towns and telephone numbers to fill up the white pages in this case was to the Court, “devoid of even the slightest trace of creativity” and was therefore unable to qualify for copyright protection. Whilst there was sufficient effort exerted to render the white pages directory useful, the Court felt that there was insufficient creativity expressed to make the directory original. The Court went on to make it clear that “copyright rewards originality, not effort.”<sup>324</sup>

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<sup>317</sup> 101 U.S. 99 (1879)

<sup>318</sup> 101 U.S. 102

<sup>319</sup> 101 U.S. 102

<sup>320</sup> 101 U.S. 102

<sup>321</sup> 101 U.S. 104

<sup>322</sup> 499 U.S. 340 (1990)

<sup>323</sup> 499 U.S. at 358

<sup>324</sup> 499 U.S. at 364

It is submitted that the notion of originality and the idea-expression dichotomy will arise more frequently before the Courts in disputes pertaining to copyright law as users are now exposed to the many different ways of using copyrighted content as well as works from the public domain to generate new and creative works of their own. As new authors as well as private home users of copyrighted content, made available over the Internet by authors themselves, become increasingly aware of the ability of the Internet and digital technologies to make modifications and alterations to existing works as well as compile and gather pieces of separate works to form a composite whole, the law will be required to address the extent to which an author's property rights end and the public's interests begin when new authors and users begin exploring these new ways of creative expression. If author's rights are extended to every segment of the market where consumers derive value and the fair use doctrine is rendered obsolete as the Internet lowers transaction costs to a bare minimum, then there is a reason to delineate the boundaries of private property clearly as users of creative works become increasingly able to produce and create works of their own from existing works. Websites, for example, may comprise compilations of different pieces of works that are digitally put together<sup>325</sup> and "image, text, movie, and sound files are much easier to alter, transform, and incorporate into other works."<sup>326</sup> As an increasing amount of creative works are generated by new authors and ordinary users through the technologies and capabilities of the Internet, copyright law's principle that a work must be an original expression of authorship to qualify for protection will become a bedrock guide to deciding the limits of copyright protection in existing works and in recognizing property rights in new works.

As digital technologies introduce fundamental changes to content industries and as copyright law struggles to keep up with the changing technological environment to extend rights where necessary and to ensure that the public has sufficient access to materials upon which new materials may be produced, it has been suggested that copyright law be recast as a right to commercial exploitation.<sup>327</sup> A commercial exploitation right<sup>328</sup> may present a solution to the challenges faced by copyright law in accommodating technological change through its various doctrines and principles in the digital age and would allow authors to extend rights into every corner where commercial value from creative works may be derived. It is suggested that the commercial exploitation right may be introduced to replace the copyright regime, where the reproduction right is central to any question of infringement.<sup>329</sup> It is however argued that

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<sup>325</sup> "Creating a website," it is said, "is as easy as taking components found elsewhere and copying them onto a personal server." Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C.L. REV. 397, 418 (2003)

<sup>326</sup> *See id.* at 418

<sup>327</sup> JESSICA LITMAN, *DIGITAL COPYRIGHT 180* (Prometheus Books 2001)

<sup>328</sup> The right prohibits the commercialization or "making money (or trying to) from someone else's work without permission." The right would also prohibit the "large-scale interference with the copyright holders' opportunities" to commercialize their works. It is further explained that, "we would get rid of our current bundle-of-rights way of thinking about copyright infringement. We would stop asking whether somebody's action resulted in a creation of a "material object ... in which a work is fixed by any method now known or later developed" and ask instead what effect those actions had on the copyright holder's opportunities for commercial exploitation." JESSICA LITMAN, *DIGITAL COPYRIGHT 180* (Prometheus Books 2001)

<sup>329</sup> *See id.* at 176

today, the “making of digital reproductions is an unavoidable incident of reading, viewing, listening to, learning from, sharing, improving, and reusing works embodied in digital media.”<sup>330</sup> As the making of copies is unavoidable for uses of digital works, “reproduction is no longer an appropriate way to measure infringement”<sup>331</sup> because of the “the centrality of copying to use of digital technology.”<sup>332</sup> If the reproduction right, which is “the fundamental copyright right”<sup>333</sup> is no longer an appropriate benchmark to determine questions of infringement, it is suggested that a commercial exploitation right be introduced in its place because the public already understands that “making money using other people’s works is copyright infringement, while non commercial uses are all okay.”<sup>334</sup>

Replacing the reproduction right with the commercial exploitation right may therefore mold the law more closely to popular expectations and would ease enforcement efforts and make the mass education of the public more appealing.<sup>335</sup> It has also been suggested that the “affirmative right should include a limited privilege to circumvent any technological access controls”<sup>336</sup> to “gain access to, extract, use, and reuse the ideas, facts, information, and other public domain material embodied in protected works.”<sup>337</sup> The commercial exploitation right should also provide “a privilege to reproduce, adapt, transmit, perform, or display so much of the protected expression as is required in order to gain access to the unprotected elements”<sup>338</sup> so as to make “the public’s right to the public domain explicit.”<sup>339</sup> The notion that copyright law is intended to protect creative authorship to provide authors with the necessary incentives to create works for the general public is a very noble one. However, it cannot be denied that copyright law is really about the commercialization of creative content in a vibrant market place. At the end of the day, the more fundamental purpose of the law is to balance the tension between private property rights and public interest to ensure that the ultimate aim of the constitutional clause is met and that society as a whole benefits from the creative efforts of authors. A commercial exploitation right may serve this purpose.

Setting limitations upon the private property rights of copyright owners may also provide the public with greater access to creative works. These limitations upon private property rights may take several forms. Law makers may set limitations upon the duration for copyright protection by introducing a limited term of protection for the exclusive rights provided under the law. At present, the copyright protection term is for a period that extends from the creation of the work for the life time of the author plus

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<sup>330</sup> *See id.* at 178

<sup>331</sup> *See id.* at 178

<sup>332</sup> *See id.* at 178

<sup>333</sup> *See id.* at 176

<sup>334</sup> *See id.* at 180

<sup>335</sup> *See id.* at 182

<sup>336</sup> *See id.* at 184

<sup>337</sup> *See id.* at 184

<sup>338</sup> *See id.* at 184

<sup>339</sup> *See id.* at 184

seventy years<sup>340</sup> after the author's death.<sup>341</sup> Limiting the term of copyright protection to provide the public with access to the work within a shorter period requires Congress to consider various important policy questions. The limitations upon the duration for copyright protection imposed by the Statute of Anne 1710, for example, were premised on Parliament's policy to break up the monopoly that the English booksellers had over the book trade. Imposing a limitation upon present copyright protection may be premised on a public welfare policy to provide greater public access to creative works for transformative and developmental uses.<sup>342</sup> It is however, important to note that the Berne Convention for the protection of Literary and Artistic Works (Paris Act 1971) sets a minimum standard for copyright protection.<sup>343</sup> Under Article 7(1), the minimum term of protection is the life of the author and fifty years after his or her death.

Limitations may also be imposed on the property rights of copyright owners through the requirement that the copyright owner satisfies certain formalities to entitle him or her to copyright protection in creative works. The decision of the Supreme Court in *Wheaton v. Peters*<sup>344</sup> made it clear that copyright was a statutory creation in the United States and an author seeking copyright protection will have to comply with the formalities imposed by the Copyright Act.<sup>345</sup> Upon adherence to the Berne Convention however, formalities compliance in the United States has ceased to be a prerequisite for copyright protection.<sup>346</sup> Although formalities are no longer a prerequisite to copyright protection, the imposition of certain formal requirements may provide a limitation to the property rights of copyright owners so that the public may have increased access to creative works. A short term for copyright protection with an option for renewal may provide the balance that the law seeks to achieve between private and public interests. The Statute of Anne 1710, for example, provided authors with two successive copyright protection terms of 14 years each, with the requirement that the author renews the copyright in the work after the first 14 years lapses. The implementation of such a provision today however, will be prohibited by Article 7 (1) of the Berne Convention,

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<sup>340</sup> The Copyright Term Extension Act increased the duration of copyright protection from life of the author plus fifty years to life of the author plus seventy years. Pub. L. No. 105-298.

<sup>341</sup> 17 U.S.C. § 302 (a) (2001)

<sup>342</sup> Providing greater public access to creative works decentralizes power within the creative content industries. It has been argued that an overly extensive copyright duration will centralize power within the copyright industries at the expense of authors, the main beneficiaries of copyright protection under the law. Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655, 659 (1996)

<sup>343</sup> The United States adhered to the Berne Convention on March 1, 1989 and the Copyright Act 1976 was amended to give effect to the provisions of the Convention. WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 453 (The Bureau of National Affairs, Inc. 1994)

<sup>344</sup> 33 U.S. (8 Pet.) 591 (1834)

<sup>345</sup> The Berne Convention for the Protection of Literary and Artistic Works expressly stipulates in Article 5(2) that "[t]he enjoyment and the exercise of [copyrights] shall not be subject to any formality" and until the United States adhered to the Berne Convention on March 1, 1989, authors seeking copyright protection for their works were subject to the strict requirement that they comply with the formalities under the law. WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 404 (The Bureau of National Affairs, Inc. 1994)

<sup>346</sup> Compliance with statutory formalities however, is a prerequisite to certain remedies under the law. For example, under 17 U.S.C. § 412, copyright registration is required for an award of statutory damages and attorney fees. *See id.* at 405

which mandates that the minimum term for copyright protection is for the life of the author plus fifty years after his or her death.

The law may also provide for greater public access to works by introducing a compulsory licensing scheme into the present copyright regime. Subjecting creative content to compulsory licensing would allow the public to use the work with the payment of a fixed statutory royalty. Non dramatic musical works are presently subject to compulsory licensing under § 115 of the Copyright Act 1976 and any person, who wishes to obtain a compulsory license to make and distribute phonorecords is required to serve a notice of that intention to the copyright owner.<sup>347</sup> A compulsory licensing scheme such as that under § 115 will provide the public with access to creative works<sup>348</sup> and allow copyright owners to receive fair compensation for public uses of their works.<sup>349</sup> The determination of reasonable royalty rates for the public's uses of creative works may be set by copyright arbitration royalty panels that are appointed and convened by the Librarian of Congress under § 801. A compulsory licensing regime will to a large extent remove many of the present restrictions that copyright owners impose upon uses of their works and ensure that the public is able to use these works for transformative, developmental and creative purposes. Compulsory licenses have been said to be "antithesis of the [copyright owner's] exclusive rights"<sup>350</sup> and it is important to note that the Berne Convention restricts the application of compulsory licenses in several ways.<sup>351</sup>

The final limitation upon the right of the copyright owner to ensure that the public may make use of creative works recognizes that certain derivative uses of content may be allowed under the fair use doctrine. The production of parodies, for example, will be allowed as a fair use of a work, especially where the parody is transformative of the original work and confers a benefit upon society. The Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*,<sup>352</sup> for example, was of the opinion that parodies, like "less ostensibly humorous forms of criticism," may provide social benefit by "shedding light on an earlier work, and, in that process, creating a new one."<sup>353</sup> To the Court, "there is no protectible derivative market for criticism"<sup>354</sup> in which copyright owners may assert property rights. By recognizing that certain derivative works are criticisms or parodies of

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<sup>347</sup> 17 U.S.C. § 115(b) (2001)

<sup>348</sup> 17 U.S.C. § 801(b)(1)(A)

<sup>349</sup> 17 U.S.C. § 801(b)(1)(B)

<sup>350</sup> The General Counsel of ASCAP, Nathan Burkan, made this comment in response to the proposal to introduce compulsory licenses in 1909. WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 178 (The Bureau of National Affairs, Inc. 1994)

<sup>351</sup> Article 11bis(2) states that a country may set conditions upon the exercise of certain rights in public broadcasts. These conditions apply only within the country where they have been prescribed. Article 13(1) allows a country to impose reservations and conditions upon the exclusive rights in musical works. Such reservations and conditions only apply in the country that imposes them and shall not affect the author's rights to equitable remuneration. *See id.* at 178. It has also been argued that the Berne Convention does not allow compulsory licensing of the public performance right by domestic legislation. Scott M. Martin, *The Berne Convention and the U.S. Compulsory License for Jukeboxes: Why the Song Could Not Remain the Same*, 37 J. COPYRIGHT SOC'Y U.S.A. 262, 301 (1990)

<sup>352</sup> 510 U.S. 569 (1994)

<sup>353</sup> 510 U.S. at 579

<sup>354</sup> 510 U.S. at 592



original works and that copyright owners are not likely to “license at any price, derivative works that criticize their original creation,”<sup>355</sup> law makers may set limits upon the rights provided under § 106 of the Copyright Act 1976.

These limitations upon private property rights ensure that the public is able to gain access to creative works for uses that facilitate the growth and development of society, education and culture. By restricting private property rights, the law may allow the growth of a richer and more diverse public domain from which the public may draw upon to develop, create and produce new forms of art, knowledge and creative works. It has been said that “creativity is impossible without a rich public domain” and that “[n]othing today, likely nothing since we tamed fire, is genuinely new: [c]ulture, like science and technology grows by accretion, each new creator building on the works of those who came before.”<sup>356</sup> Copyright was historically statutorily codified to ensure that creative works were not made inaccessible through the control that the English booksellers had over the book trade and that the public had access to these works so that learning could take place within society. Education, cultural development and societal growth today require the same accessibility to creative works. Providing the public with access to creative works will allow general growth and development to occur within society. The delicate balance between private rights of creative content providers and public interest in access to creative content can only be attained through copyright law.

#### **Part 4: The Fair Use Doctrine**

The fair use doctrine was originally developed by the judiciary in the late-eighteenth and early-nineteenth centuries as the English law and equity courts construed the Statute of Anne 1710.<sup>357</sup> The courts in the United States adopted the fair use defense in 1839<sup>358</sup> and it remained a doctrine of the judiciary until it was statutorily codified in 1978 in the Copyright Act.<sup>359</sup> It has been said that “the doctrine of fair use, originally created and articulated in case law, permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>360</sup> The judiciary has not found the application of the doctrine to be an easy one and has referred to it as the “most troublesome in the whole law of copyright,”<sup>361</sup> noting that the “doctrine is entirely equitable and is so flexible as virtually to defy definition.”<sup>362</sup> Section 107 of the Copyright Act offers some guidelines to assist the courts in determining the issues of fair use and the courts have regarded the four statutory factors under section 107 as being equally important in the court’s analysis of

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<sup>355</sup> Nels Jacobson, *Faith, Hope & Parody: Campbell v. Acuff-Rose, ‘Oh, Pretty Woman,’ and Parodists’ Rights*, 31 HOUS. L. REV. 955, 1013 (1994)

<sup>356</sup> *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512, 1513 (1993)

<sup>357</sup> WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 718 (The Bureau of National Affairs, Inc., 1994)

<sup>358</sup> *See id.* at 718

<sup>359</sup> 17 U.S.C. § 107 (2001)

<sup>360</sup> Chief Judge Irving R. Kaufman in *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57, 60 (1980)

<sup>361</sup> *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (1939)

<sup>362</sup> *Time Incorporated v. Bernard Geis Associates*, 293 F. Supp. 130, 144 (1968)

fair use, “notwithstanding the oft-quoted assertion of the paramount importance of the fourth factor.”<sup>363</sup> Each case before the courts on the fair use doctrine is decided on a case-by-case basis and this “task is not to be simplified with bright-line rules.”<sup>364</sup>

The first consideration under section 107 requires an analysis of “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”<sup>365</sup> As subsequent authors build upon works of previous authors, the nature of the use of the work by a subsequent author becomes important in deciding whether the use of the work is a fair use. In *Campbell v. Acuff-Rose Music, Inc.*,<sup>366</sup> the Supreme Court stated that when a new work “adds something new, with a further purpose or different character, altering the first with new expression, meaning or message,” the court ought to ask “whether and to what extent the new work is “transformative.””<sup>367</sup> The Supreme Court felt that “although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”<sup>368</sup> The point that a subsequent use of a creative work will be more likely to be regarded as a fair use if the work is transformative of the first is further made in *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*,<sup>369</sup> where the Court of Appeals for the Second Circuit stated that “if the secondary use adds value to the original – if copyrightable expression in the original work is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society. In short, the goal of copyright to promote science and the arts is generally furthered by the creation of transformative works.”<sup>370</sup> The finding that the use of a subsequent work is fair use is also dependent on whether the use of the subsequent work is for commercial purposes. Using a subsequent work for commercial purposes creates a presumption against the finding of a fair use,<sup>371</sup> although the presumption may be rebutted, such as when commercial uses of the work is minimal or when the public benefits from the subsequent work. In *Sega Enterprises Ltd. v. Accolade, Inc.*,<sup>372</sup> for example, the Court of Appeals for the Ninth Circuit noted that the courts were “free to consider the public benefit resulting from a particular use notwithstanding the fact that

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<sup>363</sup> *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp. 1, 21 (1992)

<sup>364</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994)

<sup>365</sup> 17 U.S.C. § 107(1)

<sup>366</sup> 510 U.S. 569 (1994)

<sup>367</sup> 510 U.S. at 579

<sup>368</sup> 510 U.S. at 579

<sup>369</sup> 150 F.3d 132 (1998)

<sup>370</sup> 150 F.3d at 142

<sup>371</sup> In *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), the Supreme Court stated that “every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright.” 464 U.S. at 451

<sup>372</sup> 977 F.2d 1510 (1992)

the alleged infringer may gain commercially”<sup>373</sup> and decided that the disassembly of a copyrighted computer program to gain access to the ideas and functional elements embodied in it was “a fair use of the copyrighted work as a matter of law.”<sup>374</sup> The defendant’s reliance on the fair use doctrine must also be equitable and where the defendant’s use of the work is for profit-making and where the defendant’s use of the work usurps a significant portion of the copyright holder’s market, the application of the fair use doctrine will be precluded, even though the subsequent work contains materials of possible public importance.<sup>375</sup>

The second consideration for the courts in a fair use analysis under section 107 is the “nature of the copyrighted work.”<sup>376</sup> Under this consideration, the courts would consider a highly creative work to have more protection from unauthorized copying and would subject more informational and functional works to the doctrine of fair use. The Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*,<sup>377</sup> mentioned that “this factor calls for the recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied”<sup>378</sup> and provided examples in cases where different types of works were contrasted to illustrate the point. In *Stewart v. Abend*,<sup>379</sup> the Supreme Court regarded that “in general, fair use is more likely to be found in factual works than in fictional works.”<sup>380</sup> The Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises*<sup>381</sup> thought that the fair use doctrine had a narrower application for unpublished materials as it explained that “while even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the public or disseminated to the press, the author’s right to control the first public appearance of his expression weighs against such use of the work before its release.”<sup>382</sup> The Supreme Court had also thought that the copying of a news broadcast

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<sup>373</sup> The Court goes on to state that “[p]ublic benefit may not be direct or tangible, but may arise because the challenged use serves a public interest. In the case before us, Accolade’s identification of the functional requirements for Genesis compatibility has led to an increase in the number of independently designed video games programs offered for use with the Genesis console. It is precisely this growth in creative expression, based on the dissemination of other creative works and the unprotected ideas contained in those works that the Copyright Act was intended to promote. The fact that Genesis compatible video games are not scholarly works, but works offered for sale on the market, does not alter our judgment in this regard. We conclude that given the purpose and character of Accolade’s use of Sega’s video game programs, the presumption of unfairness has been overcome and the first statutory factor weighs in favor of Accolade.” 977 F.2d at 1523

<sup>374</sup> 977 F.2d at 1527-1528

<sup>375</sup> In *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57 (1980), for example, the defendants copied and broadcasted portions of a student produced film without the authorization of the copyright holder. The broadcast of the copyrighted work without the authorization of the copyright holder was held to be a usurpation of the copyright owner’s rights to exploit that commercial market and did not justify the application of the fair use doctrine on equitable grounds.

<sup>376</sup> 17 U.S.C. § 107(2) (2001)

<sup>377</sup> 510 U.S. 569 (1994)

<sup>378</sup> 510 U.S. at 586

<sup>379</sup> 495 U.S. 207 (1990)

<sup>380</sup> 495 U.S. at 237

<sup>381</sup> 471 U.S. 539 (1985)

<sup>382</sup> 471 U.S. at 564

may have a stronger claim for fair use than the copying of a motion picture, as was stated in *Sony Corporation of America v. Universal City Studios*.<sup>383</sup>

The third consideration for the courts in an analysis of the fair use doctrine is “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>384</sup> This inquiry extends beyond the examination of the subsequent work as being quantitatively substantial to the original work to whether the use of the subsequent work of the first is qualitatively substantial. In *Harper & Row Publishers, Inc. v. Nation Enterprises*,<sup>385</sup> the Supreme Court thought that the subsequent work had only quoted an insubstantial portion of the original work. Nonetheless, the insubstantial portion that was taken was “essentially the heart”<sup>386</sup> of the original work as well as the “most interesting and moving parts of the entire manuscript”<sup>387</sup> and would thereby weigh against the finding of fair use. The Court also felt that “a taking may not be excused merely because it is insubstantial with respect to the infringing work”<sup>388</sup> and “conversely, the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else’s copyrighted expression.”<sup>389</sup>

The fourth consideration for the courts in the fair use analysis is “the effect of the use upon the potential market for or value of the copyrighted work.”<sup>390</sup> In *MCA, Inc. v. Wilson*,<sup>391</sup> the Court of Appeals for the Second Circuit explained the fourth fair use factor by stating that “where a claim of fair use is made, a balance must sometimes be struck between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied. The less adverse effect that an alleged infringing use has on the copyright owner’s expectation of gain, the less public benefit needs to be shown to justify the use.”<sup>392</sup> The Supreme Court in *Sony Corporation of America v. Universal City Studios, Inc.*<sup>393</sup> addressed this factor by stating that a subsequent use of a copyright owner’s work should not deprive the copyright owner of the incentives that Congress intended the copyright owner to have by the provision of rights that may be exploited in a commercial market. According to the Supreme Court, “the purpose of copyright is to create incentives for creative effort. Even copying for non commercial purposes may impair the copyright holder’s ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the incentive to create. The prohibition of such noncommercial uses would

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<sup>383</sup> 464 U.S. 417, 455 (1984), n. 40

<sup>384</sup> 17 U.S.C. § 107(3) (2001)

<sup>385</sup> 471 U.S. 539 (1985)

<sup>386</sup> 471 U.S. at 564

<sup>387</sup> 471 U.S. at 565

<sup>388</sup> 471 U.S. at 565

<sup>389</sup> 471 U.S. at 565

<sup>390</sup> 17 U.S.C. § 107(4)

<sup>391</sup> 677 F.2d 180 (1981)

<sup>392</sup> 677 F.2d at 183

<sup>393</sup> 464 U.S. 417 (1984)

merely inhibit access to ideas without any countervailing benefit.”<sup>394</sup> In considering the potential market in which a copyright owner is entitled to exploit the work, the Court of Appeals for the Second Circuit in *Salinger v. Random House, Inc.*<sup>395</sup> thought that the potential market was the mere opportunity opened to the copyright owner to sell the copyrighted work<sup>396</sup> and in *Harper & Row Publishers, Inc. v. Nation Enterprises*,<sup>397</sup> the Supreme Court stated that this analysis should take into account not only the harm to the market for the original work but also harm to the market for any derivative works.<sup>398</sup>

The fair use doctrine is said to have been employed to “permit uncompensated transfers that are socially desirable but not capable of effectuation through the market.”<sup>399</sup> This view is based on the market system that is regarded as a system where consensual exchanges of goods take place. Where markets do not function effectively to allocate resources between individuals in the market, such as when “the markets fail to generate economically desirable outcomes”<sup>400</sup> or “when using the market process would threaten other social goals,”<sup>401</sup> other modes of resource control will be employed by the legal, economic or social system to reallocate resources. The fair use doctrine is said to be the “judicial response to market failure in the copyright context”<sup>402</sup> and serves to allocate resources in copyrighted content between the copyright owner and users who desire accessibility to the work, where the circumstances of the market place make it impossible for users to obtain authorization from copyright owners for the use the work. Three conditions must be satisfied in order that perfect competition may exist within a market place to ensure that individual market transactions result in a maximization of value.<sup>403</sup>

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<sup>394</sup> 464 U.S. 450-451

<sup>395</sup> 811 F.2d 90 (1987)

<sup>396</sup> The Court had to address whether the publication of a biography containing the copyright owner’s unpublished letters was a fair use of the unpublished letters. In considering the fourth factor of the fair use defense, the Court thought that the assessment of the impact of the subsequent work on the potential market for the copyright owner’s work ought not to be lessened by the fact that the “author has disavowed any intention to publish them during his lifetime.” The Court also felt that the copyright owner always had the “right to change his mind” and is always “entitled to protect his opportunity to sell” his works. 811 F. 2d at 99

<sup>397</sup> 471 U.S. 539 (1985)

<sup>398</sup> 471 U.S. at 568

<sup>399</sup> Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982)

<sup>400</sup> *See id.* at 1605

<sup>401</sup> *See id.* at 1605

<sup>402</sup> *See id.* at 1605

<sup>403</sup> It is explained that economists defend society’s primary dependence on the market “by arguing that individual transactions in the marketplace serve both social needs and the needs of the individual persons participating. Among other contentions, they suggest that the monetary value a person places on a resource will reflect the value that the person’s use of the resource will bring to society, so that voluntary transfers between individuals will create a socially desirable pattern of resource allocation.” In the purchase of rights to produce a motion picture from a best-selling novel, for example, economists would argue that the motion picture producer, who is able to use the book in the best way to satisfy consumer tastes will be in the position to offer the highest bid for rights to the book and on the same token, the author of the book will only sell rights to make a motion picture of the book only if he expects that the motion picture producer’s bid will exceed “the revenues he could anticipate by exploiting the work himself.” As a result, “the person in whose hands the resource can best be used to satisfy consumer desires” will control the resources through consensual transfer in the market place. In this case, there will be a maximization of value, which

The first is that all costs and benefits to the transactions that generate them must be internal,<sup>404</sup> the second is that there must be perfect knowledge<sup>405</sup> and the third is that there must be an absence of transaction costs.<sup>406</sup> These three conditions must be present in order that it may be appropriate to rely on consensual bargains to achieve socially desirable results. The law of copyright facilitates the functioning of the consensual market by creating property rights, lowering transaction costs, providing valuable information and containing mechanisms for the enforcement of rights.<sup>407</sup> In most cases, users of copyrighted content would proceed through the market and obtain the copyright owner's authorization for the use of the work although at times, copyright markets will not always function adequately, such as when "bargaining may be exceedingly expensive, or it may be impractical to obtain enforcement against non purchasers, or other market flaws might preclude achievement of desirable consensual exchanges"<sup>408</sup> and in these cases, the market has failed and is not able to mediate between the public interest to have access to the work and the copyright owner's interest to receive compensation for the use of the work. Where the market has failed, the courts apply the fair use doctrine "when they approve a user's departure from the market."<sup>409</sup>

New technologies are said to pose a market barrier that prevents users of copyrighted content from obtaining authorization for the use of the content from the copyright owner. This is because high transaction costs are involved with seeking authorization to use the work as a new technology would not have established the necessary market channels upon which users may rely to obtain authorization from copyright owners, which would make the "purchase of permission"<sup>410</sup> from copyright owners "cumbersome and expensive."<sup>411</sup> The correspondingly low anticipated profits from use of the work would also discourage users from seeking authorization from the copyright owner because of the high transaction costs involved.

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is defined as "human satisfaction as measured by aggregate consumer willingness to pay for goods and services." *See id.* at 1605-1606

<sup>404</sup> It is explained that "the cost or benefit must be borne by persons with decision-making power in a given transaction and not by persons external to it. For example, if a resource user is in a field where much of the social benefit produced by his activities does not translate into compensation to him, then he may generate "external benefits" not reflected in his income. In such a case, his willingness to pay for the resource might understate his ability to use it in a way that serves social needs." *See id.* at 1607

<sup>405</sup> Perfect knowledge requires that consumers know "the qualities and characteristics of all available products as well as the prices and locations of the various sellers." Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1607 (1982)

<sup>406</sup> It is stated that "if all desirable transfers are to occur, it must be costless to obtain knowledge, costless to locate all persons affected by a transaction, costless to dicker with them over prices and terms, and costless to maintain an enforcement mechanism to ensure that the bargain is adhered to. This condition of perfect competition, like the others, is never fully present; some transaction costs are inevitable. When the transaction costs outweigh the net benefits that the parties would otherwise anticipate from a transfer, then the presence of the transaction costs may block an otherwise desirable shift in resource use." *See id.* at 1608

<sup>407</sup> *See id.* at 1612-1613

<sup>408</sup> *See id.* at 1613

<sup>409</sup> *See id.* at 1614

<sup>410</sup> *See id.* at 1629

<sup>411</sup> *See id.* at 1629

The introduction of a new technology into the market impacts existing business structures within the copyright industries to a very large extent because users have new ways to gain access to copyrighted content. Music file sharing technology and online distribution of music content, for example, have brought profound changes to the sound recording industry. The very existing business model and industrial structure of the sound recording industry are threatened as artists have direct contact with their listeners and the industry faces loss of jobs as their role as the intermediary between recording artists and music listeners lessen with online music distribution.<sup>412</sup> With as many as 2.6 billion music files being downloaded and shared without authorization each month and as many as approximately 600,000 movies being downloaded from the Internet without authorization daily through out the world,<sup>413</sup> the Internet has certainly offered users of copyrighted content unprecedented access to files containing sound recordings and motion pictures that were unavailable to users before. The fair use doctrine was raised as an affirmative defense for the unauthorized uses of music files over peer-to-peer networks on the file-sharing technology in the Napster case in three specific instances, which were sampling, where users make temporary copies of a work before deciding to purchase it, space-shifting, where users are allowed to access a sound recording through the Napster system that they already own in audio CD format and the permissive distribution of sound recordings by new and established artists.<sup>414</sup> The Court of Appeals for the Ninth Circuit affirmed the District Court for N.D. of California's decision that the use of sound recordings files over the Napster technology was not a fair use for several reasons under Section 107.<sup>415</sup> According to the Court of Appeals, the use of the sound recording files over the network was non transformative and was of a commercial nature;<sup>416</sup> the "musical compositions and sound recordings are creative in nature ... which cuts against a finding of fair use under the second factor;"<sup>417</sup> that "Napster users engage in "wholesale copying" of copyrighted work because file transfer necessarily "involves copying the entirety of the copyrighted work;"<sup>418</sup> and that the District Court's finding that the downloading of music files from the Internet harms the market of the copyright owner by reducing CD sales amongst college students and raises barriers to the copyright owner's entry into the market for the digital downloading of music was a "correct application of the fair use doctrine."<sup>419</sup>

Arguably, the Court could have also proceeded to analyze the fair use doctrine in the Napster case using the market failure theory. The first part of the test to determine if

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<sup>412</sup> Peter K. Yu, *Music Industry Needs to Embrace Digital Revolution*, DET. NEWS, Feb. 8, 2004 at 13, available at 2004 WL 57348504

<sup>413</sup> Timothy W. Maier, *Arresting Kids for Downloading Music*, INSIGHT ON NEWS, Feb. 17, 2004 at 29, available at 2004 WL 62824947

<sup>414</sup> A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (2001)

<sup>415</sup> 17 U.S.C. § 107

<sup>416</sup> According to the Court, "Direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use ... In the record before us, commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies." 239 F.3d 1004 at 1015

<sup>417</sup> 239 F.3d 1004 at 1016

<sup>418</sup> 114 F. Supp. 2d at 913

<sup>419</sup> 239 F. 3d 1004 at 1017

the fair use doctrine will apply in any given case of copyright infringement is whether there is a market failure, where the possibility of consensual bargain between the copyright owner and the user becomes impossible.<sup>420</sup> In the Napster case, it would appear that the market for digital download of music was fully functional because the copyright owner had already entered the digital music download market or had planned to enter the market within a relatively short period.<sup>421</sup> The presence of the copyright owner within the market would allow consensual bargains to take place between the copyright owner and the user for the download of music, which would prevent the application of the fair use doctrine in the Napster case. Even if there was a market failure, the availability of music files over the Internet for downloading for \$0.99 a song over the present Napster downloading service<sup>422</sup> would indicate that the price that the copyright owner is asking for the digital download of a music file is small and hence lower than what the user would offer. This being the case, social value is increased wherever there is a voluntary transaction between the copyright owner and the user.<sup>423</sup> The third element of the market failure test concerns the economic welfare of the copyright owner and where the copyright owner would suffer no harm or disincentive by allowing users free use of the work, the fair use doctrine ought to apply to allow users to use the copyrighted work.<sup>424</sup> In the Napster case, the copyright owner would inevitably suffer harm or disincentive from entering the digital download market if the uses of music files over the Napster network were regarded to be a fair use. Indeed, the District Court in Napster conceded that the “defendant has contributed to a new attitude that digitally-downloaded songs ought to be free – an attitude that creates formidable hurdles for the establishment of a commercial downloading market.”<sup>425</sup> Using the market failure analysis, therefore the Court would have arrived at the same conclusion that the use of the music files over the Napster network was not a fair use.

Indeed, with the far-reaching effects of the Internet and the connectivity authors and artists have with users of their works because of digital technologies that facilitate the distribution and dissemination of copyrighted works, the question of how relevant the fair use doctrine is today becomes an important one. If the doctrine is a response to market failure where it is impossible for the copyright owner and the user to reach a consensual bargain for the transfer of the copyrighted work, the Internet and digital technologies will render the doctrine virtually inapplicable in today’s copyright markets because digital rights management that sets systems of fee collection and revenue distribution will allow consensual bargains to take place between copyright owners and users for the use of the work.<sup>426</sup> Where consensual bargains between copyright owner and users become possible

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<sup>420</sup> Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)

<sup>421</sup> 114 F. Supp. 2d at 910

<sup>422</sup> See <http://www.napster.com/>

<sup>423</sup> Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)

<sup>424</sup> See *id.* at 1617

<sup>425</sup> 114 F. Supp. 2d at 910-911

<sup>426</sup> It is said that “in the foreseeable future, when a great number of copyrighted works are available instantaneously online – not only informational works and scientific papers but music, art and literature – transaction costs can be expected virtually to disappear as digital rights management systems set fees and



through on-line facilities over the Internet, users of copyrighted works will have to seek authorization from copyright owners for the use of the work and “consumers can be expected to pay for what previously they copied free.”<sup>427</sup> This being the case, in the Internet age, copyright law would have extended into “every corner where consumers derive value from literary and artistic works”<sup>428</sup> and copyright owners can be ensured of the protection of their incentives under copyright law as works become increasingly available through the Internet and as users will no longer be able to justify an unauthorized use of a copyrighted work based on the impossibility of reaching a consensual bargain with the copyright owner.

As copyright protection of works of authorship grows, there will be inevitable concerns about the extent to which copyright protection ought to reach into the public’s interests in accessing the work, especially by second authors seeking to borrow from the original work to produce new materials. The use of copyrighted content for transformative purposes lies at the heart of present debates between proponents for stronger copyright protection and their opponents, who argue that the expansion of rights has the effect of stifling transformative uses of copyrighted works “that parallels, but is far more systematic than the problem of private censorship.”<sup>429</sup> It has been said that “to the extent that copyright in an author’s potential source material requires payment for the quotation, reformulation, adaptation, or parody of that material, some such transformative uses will never transpire”<sup>430</sup> and it is indeed difficult to disagree with the probability that general cultural, societal and technological growth as a whole will be adversely affected by the enforcement of rights that are too extensive.<sup>431</sup> The moderation of copyright protection is a sensible stance to take in light of the extensive enforcement efforts that the sound recording industry has undertaken against users who download music files from the Internet. Although it is given that copyright owners have entitlements and property rights in their works to provide them with the necessary incentives to produce new works, it is indeed true that the production of creative works that copyright law seeks to foster by the provision of incentives ought not to be an end in itself because “publication without easy access to the product would defeat the social purpose of copyright already mentioned as primary.”<sup>432</sup>

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collect and distribute revenues. Taping movies off the air, or downloading them off the Internet, photocopying journal articles, even copying out cookbook recipes, could be pay as you go in a digital environment in which search and negotiation will cost little more than the price of electricity and bills will be paid monthly or charged to the user’s account.” Paul Goldstein, *Fair Use in a Changing World*, 50 J. COPR. SOC’Y U.S.A. 133, 136-137 (2003)

<sup>427</sup> See *id.* at 137

<sup>428</sup> PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY* 236 (Hill and Wang 1994)

<sup>429</sup> Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 296 (1996)

<sup>430</sup> See *id.* at 296

<sup>431</sup> It is argued that citizens of a democratic society “benefit from the ability of secondary authors to reformulate and challenge the social meaning of cultural icons, to expose corrupt or racist practices of powerful institutions, and to publish biographical material about public figures” and that “given the interest of a democratic society in an educated citizenry and an inclusive, national culture, when some persons are unable to acquire access to expressive works, the harm is arguable not just to ... individuals, but to society as a whole.” See *id.* at 296-297

<sup>432</sup> BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 75-76 (Columbia University Press 1967)

With authors becoming increasingly empowered to distribute and disseminate their works independently over the Internet and with digital technologies, the call for greater copyright protection of creative works will very likely shift from intermediaries, such as sound recording companies and motion pictures studios to authors or creative artists. The assertion and enforcement of greater property rights will most likely come from authors and artists and it will be difficult for law and policy makers to ignore the call for more extensive rights as an incentive to create from the creators of creative works themselves. As the role of the publisher or intermediary in bringing a copyrighted work to the public changes and authors and artists take a more central role in marketing, distributing and disseminating their works, a proliferation of “unedited communications”<sup>433</sup> such as “poetic musings, home movies and basement band recordings”<sup>434</sup> will spawn over the Internet to provide new and original materials that the public may have access to. This is particularly so within the sound recording industry as independent recording artists make their works available over the Internet to their listeners. It is submitted that as an increasing number of independent artists and authors begin to make their works available to the public through the Internet, users will begin to use these works in ways that may not be anticipated nor authorized by the artist or author. The principles within copyright law will be instrumental in achieving a fair balance between protecting artists and authors as well as allowing users to use the work for personal or transformative purposes.

### **Conclusion**

This paper had attempted to shed some light on the present copyright debates that surround the advent of the Internet and the effect that these new technologies have on the flow of information within the creative content industries. Sound recordings are particularly susceptible to the mass reproduction and distribution that Internet technologies facilitate, simply because there is a wide consumer market for these creative products. Content owners have sought to retain control of their creative materials as consumers use these works in ways that were not envisaged let alone authorized by copyright owners. The Internet and digital technologies have caused fundamental changes to the way content industries had traditionally been able to commercialize their works and as these technologies provide consumers unprecedented access to creative materials, many of the industries’ existing business models and industrial structures have undergone some basic changes. The sound recording industry’s conventional distribution channels for music, for example, have changed drastically as independent music artists explore new ways to establish direct contact with listeners of their music without going through a sound recording company. The opportunities that the Internet present independent music artists strike at the heart of the sound recording industry and music artist relationships that had been at the core of the sound recording industry for decades.

Indeed, the opportunities that the Internet brings with it are exciting. Authors and artists being able to establish direct relationships with their audiences and the ability of the Internet to connect millions of content users provide an environment in which culture

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<sup>433</sup> PAUL GOLDSTEIN, COPYRIGHT’S HIGHWAY 235 (Hill and Wang 1994)

<sup>434</sup> *See id.* at 235

may thrive and grow through the mutual exchange of creative thoughts and ideas. Nonetheless, with all the excitement that it brings, the Internet does pose a serious challenge to the content industries that have so far relied on copyright protection to commercialize their works. The grant of property rights in creative works through copyright law has served a utilitarian purpose up to this time, for authors have been encouraged to produce creative works for the public with the expectation that the successful commercialization of the work will reap rewards that will make their effort in producing the work worthwhile. The Internet and digital technologies however, have altered this expectation and authors or artists, who are unable to foresee some form of reward for their efforts in producing creative works, expecting these works to be rapidly reproduced and disseminated to the public without being able to recover their cost of production for the work, may cease the production of creative works at the general public's expense.

While the Internet and digital technologies may have introduced fundamental changes to the industries' business models and industrial structures, the industries' responses to the opportunities presented by the Internet and digital technologies largely determine whether content may be successfully commercialized through the Internet today. This paper submits that the industries' call for more extensive rights under the copyright regime may have a detrimental effect on the development and growth of the industries as the assertion of greater control over information flow in copyrighted works keeps the industries functioning within the exiting business models and industrial structures that have worked well for the industries thus far. The call for more extensive copyright laws effectively prevents the industries from exploring other new ways of commercializing content and has the long term effect of stifling industrial growth and development. Preventing the use of the VCR by home users as an infringement of copyright law, for example, would have prevented the growth of a home video market for the motion pictures industry. The development of new business models for commercializing motion pictures and sound recordings over the Internet ensures that the industries continue to grow and develop in tandem with the introduction of technologies into the market place.

The successful commercialization of motion pictures and sound recordings through the Internet today ultimately depends on the industries' responses to the expectations of the consumer of their works. With the Internet presenting consumers of creative works opportunities to use these works in new and unprecedented ways, such as sharing the work with others through peer-to-peer networks or modifying the work for transformative purposes using digital technologies, the role of the content industries will evolve from being content providers to being service providers to consumers, who access creative materials through the Internet. As consumers are more actively involved in choosing the manner in which they use content today, content providers are also more likely to be able to successfully segregate their markets to meet these different needs and expectations of the consumer. Through industrial practices, such as price discrimination, the industries may commercialize their content in accordance to the different expectations and needs of their consumers and generate revenues to reap the rewards of their creative efforts through the segregation of different consumer markets over the Internet. The

commercialization of creative works over the Internet also allows the industries to develop a market for a particular genre of content that more conventional publishing and distribution channels do not carry. Independent music that represents a mix of different styles of musical expression, for example, may not be carried by record labels but may successfully find its place among independent music lovers over the Internet.

The technological change brought about by the Internet and digital media technologies has also caused a fundamental shift in the industrial structure of the content industries as artists and authors find their own place in the commercialization of content through the Internet. Online exhibition of independent motion pictures is a real possibility today and independent music artists have started to distribute music through the Internet without a sound recording company to provide the support that it traditionally provided sound recording artists. Authors and artists are finding new ways to market and distribute their content through the Internet and traditional intermediaries, such as motion picture studios and sound recording companies, which had played a central role within the industries commercialization of creative works in bringing these works to the consumer, have a lesser role in providing the channel between content production and content distribution. As more authors and artists make their works available through the Internet, users will have greater access to creative works for transformative and creative uses. It is likely that there will be persistent calls for stronger copyright protection although it will be authors and artists, rather than the industries, who will seek greater copyright protection. As content users use works for transformative purposes, especially with digital technologies that make modifications and alterations of existing works as simple as a few clicks of a button on a computer, there will very likely be calls for moral rights protection to protect the integrity of authors and their works of authorship. While the United States have yet to recognize moral rights as that recognized in civil law countries, such as France and Germany, American law makers may be faced with calls for the recognition of moral rights of authors to protect their integrity as their works of authorship are being modified and altered over the Internet.

The issue at the heart of the debates that surround copyright law in the digital age is really the extent of private rights against the public domain, for while property rights in creative works ensure that copyright owners have the exclusive rights in the work for its successful commercialization, these rights also entitle copyright owners to deny the public uses of the work. Claims to exclusivity of content by copyright owners in an age where information and creative works flow freely through the Internet have caused public interest groups, defending the rights of the public to creative content for general societal and cultural growth, to arise. There have been movements to limit property rights of content owners to ensure that creative works fall within the public domain, such as the constitutional challenge made to the 1998 Copyright Term Extension Act's extension of the period of copyright protection for new and existing works by twenty years in *Eldred v. Ashcroft*.<sup>435</sup> These movements have brought an increased awareness of the need for copyright law to address the balance between property rights and public interests that the Internet has indeed affected in a profound manner. Technologies such as file sharing software and peer-to-peer networks, allowing the easy transfer of content between users

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<sup>435</sup> 123 S. Ct. 769 (2003)

over the Internet, have allowed content users to participate fully in the distribution of content to the general public, shifting the onus of content distribution from content owners to users. As the cost of reproduction of content approaches near zero, users of content will inevitably begin to invest in reproduction, modification and alteration of content, heightening the urgency for greater and stronger copyright protection for content owners. The call for greater copyright protection by the industries however, expands the law into aspects of commerce that the law was neither intended nor drafted to address. Changing industrial trends brought about by new technologies ought to be addressed through new industrial and business practices. While the law may provide a comforting solution to the changes brought about the Internet through the protection of existing business models and industrial practices, the law is not equipped to provide the industries with a panacea for the fundamental changes that a technology as permeating as the Internet has introduced to the content market place.

Copyright law was formally enacted in 1710 in the Statute of Anne to serve a noble purpose, which was to encourage learning by providing a temporary property right in creative works to the author so that authors may be encouraged to produce creative works for the public. The United States Constitution echoes the same purpose for copyright protection, which is to grant authors an exclusive right in their works for the ultimate intention of promoting the progress of science and the useful arts. Copyright owners have sought to extend these rights as and when technological change occurs and the law has stretched itself to cover new uses of works through new technologies until the advent of the Internet and accompanying digital technologies, when it has slowly become apparent that the role of the law in addressing changing industrial and business trends is a limited one. Indeed, the law may recognize a property right in creative works to provide authors with incentives to produce new works. It is however, erroneous to build industrial practices and business models upon a law that developed as a result of a new technology and which is uniquely entwined with technological development throughout its history. Technological development will always have an impact on copyright law and the subject matter of its protection, creative works, causing a shift in the balance that the law has always sought to draw between private rights and public interest. As the Internet causes fundamental changes within the industries, the law's response to these changes would be to identify a new balance between private property rights and the rights of the public to access these works. The law is perfectly poised at this point to identify a fair balance to ensure that creative works are made accessible to the public by the grant of a limited property right in the work.

At the end of the day, the most important question that copyright law may provide an answer to is whether the public as a whole will develop and grow through the grant of temporary property rights to authors in creative works. As use of the Internet grows, the central role for copyright law would be to ensure that a market for copyrighted materials exists through the grant of property rights to authors to enable them to commercialize their works. The law bears a responsibility to recognize that a thriving content market is built upon the ability of consumers to use creative works for the purposes they were intended for, which is learning, development, education and cultural growth. The enforcement of strict property rights will defeat the very purpose of generating creative

works. There is a need for the law to achieve a balance between private rights of the authors and the public interest by setting a clear demarcation as to where private rights ought to end and where public rights to access begin. Upon achieving this balance, copyright law today may then be said to have fulfilled the historical and constitutional purpose for which it was enacted.