

Who Owns ‘The First Rough Draft of History’?

Reconsidering Copyright in News

Eric B. Easton

Abstract

Who Owns the ‘First Rough Draft of History’? suggests the withdrawal of copyright protection from hard-news journalism as a mechanism for “rescuing” the news from the inexorable downward spiral in quality and diversity caused by excessive media concentration. Although copyright represents just one of the factors contributing to the “commodification” of news today, it is a significant factor, and one with a long, unsavory relationship with censorship and monopoly.

The article asserts that newspapers’ quest for copyright protection was an early step onto a slippery slope toward a property-based, rather than service-based ethos, and that removing protection may mark a first and at least symbolic step back from the abyss. It argues that copyright protection should be replaced by a highly circumscribed variant of the misappropriation tort, coupled with authorial rights of attribution and integrity.

It is doubtful that any of these proposed changes would prompt the media conglomerates to jettison otherwise profitable news operations, but, where they do, the resultant spin-offs may be more strongly committed to quality journalism. Fine-tuning the copyright law with respect to news might also restore among executives and working journalists alike some sense of public service obligation. And diluting the industry’s news-as-property attitude might even make a favorable impression on the increasingly disillusioned audience.

Perhaps, someday, the public will come to own what former *Washington Post* publisher Philip Graham called the “first rough draft of history.”

Who Owns ‘The First Rough Draft of History’?

Reconsidering Copyright in News

Eric B. Easton*

The copyright system, though constitutional, is broken. It effectively and perpetually protects nearly all material that anyone would want to cite or use. That’s not what the framers envisioned, and it’s not in the public interest.

Editorial, *Free Mickey Mouse*, Wash. Post A16 (Feb. 21, 2003).

19. What Defendants gain by appropriating Plaintiffs’ copyrighted material diminishes the value of Plaintiffs’ newspapers, websites, and their advertising opportunities. For example, Defendants are usurping the funds that Plaintiffs are entitled to receive from licensing these articles through their Permissions Desks, through their sale of reprints, and otherwise. These articles are Plaintiffs’ stock in trade.

20. By copying Plaintiffs’ copyrighted articles verbatim and posting them on a site other than Plaintiffs’ websites, Defendants are also diverting readers that would otherwise read Plaintiffs’ newspapers and access Plaintiffs’ websites. This usurps Plaintiffs’ circulation figures, which, in turn, has damaged and will damage Plaintiffs’ ability to attract advertisers.

Complaint at 11-12, *L. A. Times & Wash. Post v. Free Republic*, No. 98-7840 (C.D. Cal. Sept. 28, 1998).

Although *The Washington Post* doubtless stands behind both of the quotations above, one suspects it stands considerably further behind the first than the second. After all, as Judge Kozinski has said, “The simple fact is that the written word is a commodity;

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information is a commodity; truth is a commodity; fiction is a commodity. There are no clear-cut lines between them.”¹ This article is dedicated to the proposition that Judge Kozinski is wrong... or rather should be wrong.

When the Federal Communications Commission calls “The Howard Stern Show” news,² when Fox News calls the phrase “fair and balanced” property, the time has come to redraw those lines.³

As news has become a smaller and smaller part of the business of corporate media enterprises,⁴ journalism has become a smaller and smaller part of “the news.”⁵ Journalism as public service is inexorably being replaced by “infotainment” as commodity. Among other consequences, the public has lost what respect it may have had for newspapers and broadcast news, which are now lumped together with talk radio and reality television to become simply “the media.” And while highly specialized forms of journalism can still find their niche markets, which some find independently problematic,⁶ the audience for mass circulation newspapers and mass audience broadcast journalism is in a steady decline.

¹ Alex Kozinski, *How I Stopped Worrying and Learned to Love the Press*, 3 *Commun. L. & Policy* 163, 172 (1998).

² *In re Request of Infinity Broadcasting Operations Inc. for Declaratory Ruling*, FCC Declaratory Ruling (Sept. 9, 2003) http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-03-2865A1.doc (accessed Nov. 13, 2003).

³ Compl., *Fox News Network, LLC v. Penguin Group (USA) Inc.*, No. 601514 (N.Y. Sup. Ct. Aug. 7, 2003) <http://news.findlaw.com/hdocs/docs/ip/foxpenguin80703cmp.pdf> (accessed Nov. 13, 2003).

⁴ Bill Kovach & Tom Rosenstiel, *The Elements of Journalism* 32 (Three Rivers Press 2001) [hereinafter, Kovach & Rosenstiel].

⁵ Ken Auletta, *Backstory: Inside the Business of News* xiv (Penguin Press 2003) (“[A]s media companies get bigger, the role of the journalist within them is diminished. Inside a behemoth like Disney, Time Warner, Viacom, or Clear Channel, news rarely matches the profit margins of other divisions, such as cable or programming, and thus loses internal clout.”) [hereinafter Auletta].

Copyright law is not to blame for the commercialization of news. Indeed, the evidence suggests that commercialization stimulated a demand for copyright protection where none had existed before. Copyright law protected newspapers from the mid-19th Century, not to mention all of 20th Century broadcast news. Copyright law may well have facilitated the growth of substantial news-oriented enterprises that could and did invest substantial sums into news gathering, production and distribution. That said, the time may have come to reconsider whether a copyright regime that supports the conviction that news is just another commodity for sale best serves the public interest.

This article asserts that the newspapers' quest for copyright protection was an early step onto a slippery slope toward a property-based, rather than service-based ethos, and removing protection may mark a first and at least symbolic step back from the abyss. Extending copyright protection to newspapers was always unnecessary and probably unwise, even when qualified by the so-called fact/expression dichotomy and first sale and fair use doctrines. Today, even these inadequate safeguards of the public domain are being threatened by legally sanctioned access restrictions and rights management regimes. Worldwide, copyright protection for journalism is far less rigorous than in the U.S., and there may be some lessons to learn from abroad.

Copyright protection for journalism should be replaced by a highly circumscribed variant of the much-criticized misappropriation tort, coupled with authorial rights of attribution and integrity that supersede the American work-made-for-hire doctrine. Transformative uses of journalism work product, i.e., new products in the same market, or the same product in different markets, should be encouraged – the better to serve the

⁶ See, e.g., Cass Sunstein, *republic.com* 3-5 (Princeton Univ. Press 2001) [hereinafter Sunstein]. Sunstein posits a scenario in which everyone has access to “The Daily Me,” containing only the information that

framers' objective to promote knowledge – and the duration of any protection at all should be severely limited.

It is doubtful that any of the changes proposed here would prompt the media conglomerates to jettison otherwise profitable news operations, but, where they do, the resultant spin-offs may be more strongly committed to quality journalism. Fine-tuning the copyright law with respect to news might restore among executives and working journalists alike some sense of public service obligation. And diluting the industry's news-as-property attitude might even make a favorable impression on the increasingly disillusioned audience.

Part I examines the state of contemporary journalism, particularly with respect to the propertization of news. After inadequately summarizing a theoretical foundation laid out by C. Edwin Baker, it concludes that whatever benefits news-as-property may have brought to the public in the past, the time has come for the public to reclaim the news from the media conglomerates. Part II traces the history of copyright protection for news, from its origins in censorship to the American copyright regime today, with emphasis on the run up to the 1909 amendments that first codified protection for newspapers. It concludes that neither the fact-expression dichotomy, nor the fair use doctrine, adequately protects the public interest in news.

Part III advocates the removal of copyright protection for all printed and broadcast news, imposing only a 24-hour embargo on republication or rebroadcasting and the moral rights of attribution and integrity. It also deals with real or imagined problems with this approach and suggests ways of dealing with them, including defining news, curtailing free riders, and preserving quality journalism.

suits each consumer – at the expense of the shared experiences that he sees as vital to our democracy.

Part I Where are we now?

A. Who owns the news?

Under both American copyright law⁷ and international copyright agreements,⁸ the “news of the day” belongs to the public. Once that “news” is communicated, however, American law provides that copyright subsists in the expression which embodies the news.⁹ That copyright is owned by the author,¹⁰ which, for most of the news that concerns us here, is defined as the publisher or broadcasting company.¹¹

So, who owns the publishers and broadcasting companies? When we examine ownership patterns of newspapers, magazines, broadcasters, cable operators, and other media

⁷ The U.S. Copyright Act, provides 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). News, in the abstract, is repeatedly held to be encompassed by this provision. *See, e.g., Harper & Row v. The Nation Enters.*, 471 U.S. 539, 557 (1985) (“The Second Circuit noted, correctly, that copyright’s idea/expression dichotomy ‘strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’”)

⁸ *Berne Convention for the Protection of Literary and Artistic Works*, art. 2(8) (July 24, 1971), 1986 U.S.T. LEXIS 160 [hereinafter *Berne Convention*], explicitly excludes from the scope of protection “news of the day” and “miscellaneous facts having the character of mere items of press information.”

⁹ 17 U.S.C. § 102(a). Technically, the information must be “fixed in a tangible medium of expression”; typically, the requisite fixation occurs when the news is published or when the first copy of a broadcast is made. *See Ga. TV Co. v. TV News Clips, Inc.*, 718 F. Supp. 939, 946 (N.D. Ga. Atlanta Div. 1989) (“copyright protection attaches to the broadcast feature only when the first copy of the transmission is made”).

¹⁰ 17 U.S.C. § 201(a).

¹¹ 17 U.S.C. § 201(b) provides that, “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” A “work made for hire” is a work prepared by an employee within the scope of his or her employment or commissioned work upon mutual written agreement. 17 U.S.C. § 101. After *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), freelance contracts now typically include a “work made for hire” clause or other provisions granting publishers the right to use purchased freelance articles without meaningful restriction or further compensation. *See, e.g., Marx v. Globe Newspaper Co.*, 2002 Mass. Super. LEXIS 455 (2002) (finding that *The Boston Globe* newspaper was entitled to impose such license terms on its freelancers).

companies for whom news represents more than a *de minimis* percentage of content, we find an unmistakable and well-documented trend toward concentration.

Consider first the newspaper industry and the rise of group ownership. In 1923, 31 newspaper groups owned a total 153 newspapers – about 7% of all daily newspapers.¹² “By 1996, 126 groups published an aggregate of 1,151 newspapers, accounting for 76% of the total number of dailies and 82% of daily circulation.”¹³ At the same time, competition among newspapers within cities declined dramatically. In 1923, 502 cities had two or more directly competing newspapers; by 1996, only 19 cities or 1.3% of all cities and towns with daily newspapers had direct competition among daily newspapers.¹⁴

Magazine publishing is marginally less concentrated than newspaper publishing, and the trend is toward even more dispersion.¹⁵ Of the 50 largest-circulation titles in 1997, however, only three are oriented toward a general news market: *Time* (14th), *Newsweek* (19th), *U.S. News and World Report* (29th).¹⁶ Of those three, only *U.S. News* is independently owned.¹⁷ *Time* is owned by one of the largest media conglomerates in the world, AOL Time Warner, with annual revenues exceeding \$40 billion;¹⁸ *Newsweek*

¹² Benjamin M. Compaine & Douglas Gomery, *Who Owns the Media: Competition and Concentration in the Mass Media Industry* 8 (Lawrence Erlbaum Assoc. 3d ed. 2000)[hereinafter Compaine & Gomery].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 161.

¹⁶ *Id.* at 164.

¹⁷ *Id.*

is owned by the Washington Post Corp., which is relying less and less on news for its total revenue each year.¹⁹

Commercial broadcast television is dominated large multimedia conglomerates: Walt Disney Corp., which owns ABC; General Electric, which owns NBC; Viacom, which owns CBS and UPN; News Corp., which owns Fox; and the aforementioned Time Warner, which owns the WB network.²⁰ The PAX network was launched in 1998 by Paxon Communications, which owned 50 local television stations at the time.²¹

Although television networking, by itself, is a roughly breakeven financial proposition, station ownership enjoys high profit margins.²² Television stations, like daily newspapers, are increasingly owned in media groups – especially after the Telecommunications Act of 1996 eliminated the cap on the number of stations that any one company could own and permitted any company to own stations covering up to 35% of TV households.²³ As of April 1998, the top 25 groups, whose members owned or

¹⁸ Press Release from AOL Time Warner, *AOL Time Warner Reports Results for 2002 Full Year and Fourth Quarter* (Jan. 29, 2003), http://www.aoltimewarner.com/investors/quarterly_earnings/2002_4q/release.adp (accessed Nov. 22, 2003).

¹⁹ Michael Scherer, *The Post Company's New Profile*, 2002 *Col. Journ. Rev.* 44 (Sept./Oct.) (reporting that newspaper and magazine divisions' contribution to revenues declined from 68 percent of the total in 1993 to 51 percent in 2002).

²⁰ Jonathan Levy, Marcelino Ford-Livene & Anne Levine, *Broadcast Television: Survivor in a Sea of Competition* 27-28 (Fed. Commun. Commn. Off. Plans & Policies Working Paper No. 37 Sept. 2002) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A22.doc) [hereinafter FCC 37].

²¹ Compaine & Gomery, *supra* n. 12, at 208.

²² FCC 37, *supra* n. 20, at 39.

²³ Compaine & Gomery, *supra* n. 12, at 222.

controlled 432 or 36% of the 1,202 commercial television stations in the country, up from 33% in 1997 and 25% in 1996.²⁴

At this writing, it remained to be seen how the FCC's order of June 2, 2003, lifting the ban on cross-ownership of newspapers and television stations and relaxing other ownership rules will alter this picture,²⁵ but the early speculation had "mighty" growing mightier, "while smaller competitors fall by the wayside."²⁶ Opponents mounted challenges to the FCC order in both the courts and Congress, and the Third Circuit stayed its effect.²⁷

Although television stations had always been required to dedicate some air time to public affairs under the FCC's Fairness Doctrine,²⁸ TV news only became a profit center in the 1990s.²⁹ Those profits flowed not from better hard news coverage, but from highly profitable news magazine shows like CBS's *60 Minutes* and *48 Hours*, NBC's *Dateline*, and ABC's *20/20* and *Prime Time Live*.³⁰ By the late 1990s, these programs accounted for more than 10 hours per week in prime time in the three largest networks.³¹

²⁴ *Id.*

²⁵ FCC Press Release, *FCC Sets Limits on Media Concentration* (June 2, 2003) (describing Report and Order, FCC 03-127 (June 2, 2003), and Notice of Proposed Rulemaking).

²⁶ Alec Klein & David A. Vise, *Media Giants Hint That They Might Be Expanding*, 126 Wash. Post A6 (June 3, 2003). See also Mark Fitzgerald & Lucia Moses, *Putting it Together*, 135 Editor & Publisher 10 (Feb. 18, 2002) (offers an early look at expected newspaper-broadcast cross-ownership mergers).

²⁷ *Prometheus Radio Project v. FCC*, 2003 U.S. App. LEXIS 18390 (3d Cir. Sept. 3, 2003). Earlier, the House of Representatives approved legislation that to roll back much of the FCC's action by a vote of 400 to 21. H.R. 2799, 108th Cong., 149 Cong. Rec. H7369 (daily ed. July 23, 2003). The Senate subsequently approved 55-40 a joint resolution to disapprove the FCC's proposal. Sen. Jt. Res. 17, 108th Cong., 149 Cong. Rec. S11519 (daily ed. Sept. 16, 2003).

²⁸ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 377 (1969) (upholding FCC Fairness Doctrine that "broadcasters must give adequate coverage to public issues ... and coverage must be fair in that it accurately reflects the opposing views").

²⁹ Compaine & Gomery, *supra* n.1 2, at 215.

Most Americans actually receive their televised news programming over a coaxial cable, rather than over the air, regardless of its source.³² Locally, cable operators are almost always monopolies;³³ nationally, they too are increasingly concentrated in large media groups (including both multiple system operators and networks).³⁴ Parent companies of the top cable television operations are household names: Time Warner, which owns the CNN family of stations; Walt Disney, which owns the ESPN sports channels; News Corp., which owns the Fox news networks; and General Electric, which controls MSNBC and CNBC.³⁵ At this writing, News Corp. was making a strong bid to control the primary alternative to cable, direct satellite broadcasting (DBS).³⁶

Radio offers yet another source of news to the public, although original news gathering is relatively rare on radio today. Stations typically carry network or syndicated news programming, often with a few local headlines culled from wire services or local newspapers.³⁷ Only news/talk and all-news formatted stations hire their own reporters,³⁸

³⁰ *Id.* at 215-16.

³¹ *Id.* at 216.

³² *Id.* at 247.

³³ *Id.*

³⁴ *Id.* at 250.

³⁵ *Id.* at 252.

³⁶ On Dec. 19, 2003, the FCC gave conditional approval to the sale of Hughes Electronics Corp.'s DirecTV, the nation's largest DBS system. *In the Matter of General Motors Corp. and Hughes Electronics Corp., Transferors, and The News Corp. Ltd., Transferee, For Authority to Transfer Control*, MB Docket No. 03-124 (Dec. 19, 2003) [hereinafter *In re General Motors*].

³⁷ Compaine & Gomery, *supra* n. 12, at 293.

³⁸ *Id.* at 293.

and the latter represents less than 1% of the radio market.³⁹ News/talk stations represent a larger share of the market, about 12%-13% of the market,⁴⁰ but in most cases the news presented by those stations seems to be drowned out by the overwhelming volume of talk.

Thus, most people receive most of their news from a local monopoly (newspaper or cable company) owned or controlled by a large media company. And, overall, the trend toward concentration seems inexorable. So what? Conventional wisdom says that monopolization of news sources locally and concentration of ownership nationally diminishes the number and diversity of voices that reach the public. Intuitively, at least, the marketplace of ideas would seem to become poorer.

But the evidence is at least mixed. Benjamin M. Compaine writes:

The overwhelming weight of the research has shown that, with snapshots taken over several decades, corporately owned newspapers and “monopoly” newspapers are, overall, either indistinguishable from family-owned papers or, by some accounts, superior.

There is little empirical evidence that either chain-owned newspapers or newspapers in single-firm cities as a group provide poorer service to readers or advertisers than independent or competing newspapers.⁴¹

And while it might be difficult to find much difference among network and local affiliate news broadcasts, most Americans have access to National Public Radio, the Public Broadcasting System, and C-SPAN, whose journalism – mediated and unmediated

³⁹ *Id.* at 295.

⁴⁰ *Id.*

⁴¹ Compaine & Gomery, *supra* n. 12, at 54.

– is as good as any, anywhere. CNN, Fox News, and MSNBC might be more alike than different, but they set the standard for coverage and delivery of breaking news.

Washington Post veterans Leonard Downie and Robert Kaiser point out that the “best news products [have] continued to thrive in the marketplace.

The *New York Times*, National Public Radio, the *Wall Street Journal*, the *Washington Post* – all have done well journalistically and financially, though the advertising recession of 2000-2001 hurt them all. The best metropolitan papers also thrived, including the *St. Petersburg Times*, the *Dallas Morning News*, the *Sacramento Bee* and the *Portland Oregonian*. Those newspapers and television news broadcasts that declined in quality – the *Miami Herald*, the *St. Louis Post-Dispatch*, CBS News – lost more of their audience than the best news media.⁴²

Then, too, we have the Internet, which arguably raises the number of publishers and broadcasters to infinity. Even so strident a media critic as Robert McChesney writes that, “For activists of all political stripes, the Web increasingly plays a central role in organizing and educational activities.”⁴³ That may not be journalism in the conventional sense, but it provides determined and discriminating consumers with all of the facts and opinions they need to make the decisions that a democratic society expects of them.

So, what’s wrong? Good journalism continues to exist and even thrive, notwithstanding the occasional lapse by America’s finest.⁴⁴ Arguably, there is more good journalism available than ever before; unarguably, there is more information available than ever before.

⁴² Leonard Downie Jr. & Robert G. Kaiser, *The News About the News: American Journalism in Peril* 29 (Vintage Books 2003) [hereinafter Downie & Kaiser].

⁴³ Robert W. McChesney, *Rich Media, Poor Democracy: Communicating Politics in Dubious Times* 183 (The New Press 2000) [hereinafter McChesney].

⁴⁴ The widespread *schadenfreude* prompted by the recent Jayson Blair episode is itself the best evidence of the *New York Times*’s overall quality. For a sampling, see Journalism.org at <http://www.journalism.org/resources/briefing/archive/blair.asp#blair> (accessed Feb. 1, 2004).

What's wrong is that most of us don't read the *New York Times* or watch *Nightline* or listen to NPR or scour the Web for contrasting views on the important issues of the day. Instead, we watch the six o'clock news on television (sometimes), read the local chain newspaper (maybe), and see (or click past) AOL's choice of headlines on the Internet. And it's dreadful. Whatever news value these media may offer is drowned out by commercialism, sensationalism and junk.⁴⁵

Downie and Kaiser point out that, where news makes a relatively small contribution to overall profits, the news hole is increasingly sacrificed to higher value entertainment. Straight news broadcasts are often used to promote entertainment programming, while so-called broadcast newsmagazines feature so many crime and celebrity stories that they compete for prime-time ratings with dramas and sitcoms.⁴⁶

Where news still contributes substantially to an owner's bottom line, "[n]ewspaper editors and television news directors... have been held more accountable for controlling costs and increasing profits than for improving the quality of their journalism."⁴⁷

One way to increase profits, says Herbert Gans, is to add " 'style' and other 'soft' news sections in the hope of attracting, or at least maintaining, more readers or viewers and advertisers."⁴⁸ Often that means increasing reliance on the soft news output of

⁴⁵ See, e.g., Matthew C. Ehrlich, *The Journalism of Outrageousness: Tabloid Television News vs. Investigative News*, 155 *Journalism & Mass Comm. Monographs* (Feb. 1996). I use the term "junk" advisedly. To paraphrase Neil Postman, I'm not concerned about the undisguised junk one finds in the media, but rather the junk that publishers and broadcasters pass off as news. See Neil Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business* 16 (Penguin Books 1985).

⁴⁶ Downie & Kaiser, *supra* n. 42, at 25.

⁴⁷ *Id.* See also Geneva Overholser, *Editor, Inc.*, 20 *Amer. Journalism Rev.* 58 (Dec. 1998).

⁴⁸ Herbert J. Gans, *Democracy and the News* 23 (Oxford Univ. Press 2003) [hereinafter Gans].

national syndicates at the expense of local hard news reporting and, most notably, foreign news.⁴⁹ On the latter point, Gans was speaking primarily about the television networks. But even the revered *New York Times* has experienced a decline in international news coverage, relying more and more on “borrowed” news, that is, news first disseminated by and attributed to another news organization.⁵⁰

But these are merely symptoms of a much deeper malady that pervades today’s mass media: the absence of a public service ethos in what passes as journalism. I say “what passes,” because public service is a defining element of journalism. Indeed, that notion runs throughout the literature of contemporary journalism criticism. McChesney writes:

The clear trajectory of our media and communication world tends toward ever-greater corporate concentration, media conglomeration, and hypercommercialism. The notion of public service – that there should be some motive for media other than profit – is in rapid retreat if not total collapse. The public is regarded not as a democratic polity, but simply as a mass of consumers.⁵¹

It is not necessary to subscribe to McChesney’s leftist, anti-corporate philosophy to see that he’s right on this point. Downie and Kaiser also lament the loss of a public service orientation in today’s media. The great newspaper families “drew pleasure from their roles as purveyors of a public service – good journalism” – even when profitability was meager. Even the first owners of the television networks were “willing to sacrifice some profit for public service.”⁵²

⁴⁹ *Id.*

⁵⁰ Daniel Riffe et al., *International News and Borrowed News in the New York Times: An Update*, 70 *Journalism Q.* 638 (1993).

⁵¹ McChesney, *supra* n. 43, at 76-77.

Kovach and Rosenstiel put public service, which they characterize as “loyalty to citizens,” as the second element of journalism, subordinate only a commitment to the truth.⁵³ James Fallows writes that journalism exists for reasons other than satisfying the desire of publishers and broadcasters to make money, but to satisfy the public’s desire for meaningful information.⁵⁴ Even Jack Fuller, a journalist’s journalist, but also president of the Tribune Publishing Co., defends success in the marketplace as necessary to ensure the independence required to fulfill newspapers’ social purpose of providing the information people need.⁵⁵

To Fuller, “the question is not whether a newspaper should serve the public interest or the financial interests of its owners. The question is how it can best square the two.”⁵⁶ As one might expect, most of the solutions proposed in the literature depend on reform within the media corporations, led by the professional journalists. Fuller emphasizes the “church and state” metaphor coined by *Time Magazine* to refer to the separation between business and editorial departments within media corporations.⁵⁷ Fallows sees the trend called “public journalism” as a good starting point.⁵⁸ And Gans

⁵² Downie & Kaiser, *supra* n. 42, at 26.

⁵³ Kovach & Rosenstiel, *supra* n. 4, at 51.

⁵⁴ James Fallows, *Breaking the News: How the Media Undermine American Democracy* 129 (Vintage Books 1997) [hereinafter Fallows].

⁵⁵ Jack Fuller, *News Values: Ideas for an Information Age* 198 (Univ. of Chi. Press 1997).

⁵⁶ *Id.* at 199.

⁵⁷ *Id.*

⁵⁸ Fallows, *supra* n. 54 at 247. I will not get into the “public journalism” or “civic journalism” debate in this article, except to say that I tend to reject the concept that journalists ought to practice their craft in a manner calculated to improve civic life, rather than see civic life improved by practicing their craft in a manner consistent with high journalistic values. For more on the movement, visit The Pew Center for Civic Journalism at <http://www.pewcenter.org>, The Civic Journalism Initiative at http://access.mpr.org/civic_j, Public Journalism Bibliography on Poynter Online at

offers a number of suggestions, including “user-friendly” news, localizing national and international news, explanatory journalism, and more.⁵⁹

Understandably, media critics are generally uncomfortable looking to the law for solutions to this problem. If the First Amendment means anything, it means that government ought not be telling journalists how to do their jobs.⁶⁰ The exception has been broadcasting, where regulation has been held constitutionally permissible,⁶¹ and there was no dearth of media critics calling upon the Federal Communications Commission to refrain from lifting the ownership caps on radio and television stations last summer.⁶² Antitrust laws undoubtedly apply to media companies,⁶³ but neither the

http://poynteronline.org/content/content_view.asp?id=1223, Public Journalism Network at <http://www.pjnet.org> (accessed Feb. 1, 2004).

⁵⁹ Gans, *supra* n. 48, at 91-112.

⁶⁰ See *Miami Herald v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”)

⁶¹ *Red Lion Broad. Co.*, 395 U.S. at 390 (“Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”)

⁶² See notes 24-27 and accompanying text. See, e.g., Neil Hickey, *FCC: Ready, Set, Consolidate*, 42 *Colum. Journalism Rev.* 5 (July/Aug. 2003):

The oddest of bedfellows joined forces to fight the proposed changes. On the right: the National Rifle Association, Family Research Council, Parents Television Council; on the left: Common Cause, Consumers Union, NOW. (“A dark day for democracy,” said Common Cause’s president.) Legislators, from Mississippi’s Trent Lott to North Carolina’s Ernest Hollings, demanded that the rules be left in place. More than 750,000 messages from angry citizens and groups clogged the FCC’s mailroom and e-mail servers.”

⁶³ *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) (“The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. ... Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.”) See also Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 *U. Pitt. L. Rev.* 503, 517-18 (2001) (“[M]edia mergers should be carefully scrutinized for loss of non-price competition along the dimension of diversity in programming.”).

FCC nor the Justice Department has shown much inclination to stop or slow concentration in the media industry.⁶⁴

This article suggests that withdrawing copyright protection from print and broadcast journalism may represent a modest, perhaps largely symbolic step toward reducing the sense among media companies that news is just a commodity and restoring a sense of public service in the practice of journalism. This thesis presupposes that copyright law is at least a modest contributor to the problem, and we find theoretical support for that proposition in the work of Professor Baker.

B. The Baker Analysis

Baker points out that media content, once produced, is a “public good”; that is, its consumption in no way reduces its availability to others.⁶⁵ Ideally, then, the public would derive maximum value from media content as its cost approached zero. But a zero-cost regime would provide no incentive for producing media content, so copyright law is imposed to create a private property interest that encourages the content production. “Exceptions” to that regime – such as the fact-expression dichotomy and fair use doctrine – permit free use of the content “whenever free use adds more value than it ‘costs’” in reduced incentives to produce more content.⁶⁶

Baker suggests, however, that the incentive value of copyright law is of little importance with respect to noncommercial political or cultural communications and may

⁶⁴ See, e.g., *In re General Motors*, *supra* n. 36, and accompanying text. *Columbia Journalism Review* maintains a list of more than 40 media companies and the properties they own. See “Who Owns What” at <http://archives.cjr.org/owners/> (visited Feb. 1, 2004).

⁶⁵ C. Edwin Baker, *Media, Markets and Democracy* 15 (Cambridge Univ. Press 2002) [hereinafter Baker].

⁶⁶ *Id.*

even be exaggerated with respect to some commercial speech.⁶⁷ As we will explore further in Part III, news would appear to be one of those categories that benefits least from the incentive to produce afforded by copyright protection. In any event, Baker points out that copyright protection “not only favors commercialization, but also tilts production toward particular types of content.”⁶⁸

Since copyright does not protect the purely factual elements of news, its effectiveness in creating incentives to gather and disseminate news is questionable. More likely, copyright favors more investment in “unique entertainment content” and “flashy presentation” and less investment in hard news ... “especially news that is expensive to obtain. ... Anchorperson personalities and their expressive delivery, not facts and ideas that other stations can freely appropriate, are the [broadcast] station’s unique goods.”⁶⁹

Competitive, profit-oriented pressures could lead media entities to abandon expensive, investigative journalism and replace it with cheaper, routine beat reporting, or even cheaper “press-release” or wire service journalism. The market could tilt journalism toward stories that are the easiest (i.e., cheapest) to uncover and, even more troubling, the easiest to explain or the most titillating.⁷⁰

Baker acknowledges that, “[t]o the extent that a broad [copy]right increases the commercial rewards of writing and of journalism, it provides greater incentives for

⁶⁷ *Id.* at 16.

⁶⁸ *Id.*

⁶⁹ *Id.* at 17-18.

⁷⁰ *Id.* at 196.

undertaking that work.”⁷¹ On the other hand, he says, copyright might be the one form of structural media regulation that would benefit audiences more by its absence.⁷²

Since copyright is a “legal mechanism for restricting the content of other people’s expression,”⁷³ ratcheting back on the scope of copyright for journalism should face no serious constitutional obstacle.⁷⁴ The case can be further strengthened by exploring the historical relationship between journalism and copyright law and inadequacies of copyright “exceptions” to protect the public’s interest in news.

Part II – How did we get here?

A. Copyright’s Precursors and Censorship

The connection between early copyright law and royal censorship is hardly a compelling reason for journalists to shun today’s intellectual property protection. Ray Patterson notes that “[c]ensorship in England began without any reference to copyright, and there is little doubt that copyright would have developed without it.”⁷⁵ But Patterson and others have chronicled a relationship between the two that, if nothing else, ought to suggest that journalism and copyright may not be the most compatible partners.

⁷¹ *Id.* at 210.

⁷² *Id.* at 102.

⁷³ *Id.* at 305.

⁷⁴ Indeed, Baker believes that the First Amendment at least permits “government structural interventions to promote journalists’ and editors’ freedom the scope of copyright protection and protect that freedom from private threats.” *Id.* at 281. I am not ready to go that far, but I do agree with Baker that the scope of copyright protection should be “subject to a rigorous First Amendment test of heightened scrutiny.” *Id.* at 305.

⁷⁵ Lyman Ray Patterson, *Copyright in Historical Perspective* 114 (Vand. Univ. Press 1968) [hereinafter Patterson].

Mitchell Stephens writes, “When they were not exploiting the printing presses themselves, monarchs and their ministers busied themselves monitoring the presses – which were ostensibly in private hands – and making sure the news others printed on them was not, as a British jurist was to put it some years later, ‘possessing the people with an ill opinion of the government.’”⁷⁶ If the negative instruments of Tudor censorship regimes – treason and seditious libel laws – were more colorful, the positive instruments – licensing and monopolies – were more effective and long lived.

“Privileges” to print certain types of information were distributed to certain printers as early as 1467 in Berne,⁷⁷ but Henry, Mary, and Elizabeth of England raised the practice to a high art. On Christmas Day, 1534, Henry, who had earlier banned heretical and blasphemous books, issued a proclamation requiring all printers to obtain a royal license.⁷⁸ Not coincidentally, that was the same year the Act of Succession prohibited any “slander” of Henry’s marriage to Anne Boleyn, on penalty of death. Four years later, by royal proclamation, Henry would establish a licensing system for all books, requiring any manuscript intended for publication to be submitted to royal censors, empowered to excise seditious opinions and other objectionable materials or deny license to print altogether.⁷⁹

⁷⁶ Mitchell Stephens, *A History of News* 90-91 (Penguin Books 1989) (quoting Chief Justice Holt of the Court of King’s Bench, 1704, cited in Fred S. Siebert, *Four Theories of the Press* 24 (Illini Books 1963)) [hereinafter Stephens].

⁷⁷ Stephens, *supra* n. 76, at 90-91.

⁷⁸ Michael Emery & Edwin Emery, *The Press and America: An Interpretive History of the Mass Media* 8 (Prentice-Hall 1988) [hereinafter Emery].

⁷⁹ See Leonard W. Levy, *Emergence of a Free Press* 6 (Oxford Univ. Press 1985).

Henry's daughter Mary built on that foundation in 1557 by issuing a royal charter giving the ancient guild of scribes, limners, printers, publishers, and dealers known as the Stationers' Company the exclusive rights, other than the crown, to operate and enforce the licensing regime. As Siva Vaidhyanathan points out,

Only members of the company could legally produce books. The only books they would print were approved by the Crown. The company was authorized to confiscate unsanctioned books. It was a sweet deal for the publishers. They got exclusivity – monopoly power to print and distribute specific works – the functional foundation to copyright. The only price they paid was relinquishing the freedom to print disagreeable or dissenting texts.⁸⁰

During the reign of Mary's successor, Elizabeth I, the relationship between censorship and the Stationers' monopoly grew even closer. Patterson demonstrates that the Stationers saw the increasing need for censorship as a lever they could use to enhance and perpetuate the economic prosperity that monopoly brought.⁸¹ The Stationers' lobbying played an important, although not decisive role, in the promulgation of the Star Chamber Decree of 1586, the major regulatory achievement of the Elizabethan period.⁸² This comprehensive prescription for controlling the presses was expressly intended to deal with "contentyous and disorderlye persons professinge the arte or mysterye of Pryntinge or sellinge of bookes."⁸³

The political chaos that marked the Stuart dynasty gave rise to both the first prototypes of the modern newspaper and the use of monopoly power to suppress them.

⁸⁰ Siva Vaidhyanathan, *Copyrights and Copywrongs* 37 (NYU Press 2001) [hereinafter Vaidhyanathan].

⁸¹ Patterson, *supra* n. 75, at 115.

⁸² *Id.* at 116.

Emery points out that neither the balladeers nor pamphleteers of the time were up to the demand for news about the various religious and political struggles of the early 17th Century. The commercial news-letters were better, but not generally affordable.⁸⁴ The corantos that emerged around 1620 only covered foreign news, but that did not stop James I from using the Stationers to arrest and imprison coranto printer Thomas Archer for “great liberty of discourse concerning matters of state.”⁸⁵

Domestic news coverage was even more controversial, but, with the king and Parliament in stalemate, diurnalls carrying local news surfaced in the 1640s. The Stationers had succeeded in promoting a more draconian Star Chamber Decree in 1637, but the Long Parliament abolished the Star Chamber itself in 1641 and relaxed many of the restrictions on the press. The Stationers continued to press for controls, as shown by their second petition to Parliament in 1643.

Acknowledging the importance of printing, the petition reminds Parliament that “it is not mere Printing, but well ordered Printing that merits so much favour and respect, since in things precious and excellent, the abuse (if not prevented) is commonly as dangerous, as the use is advantageous.”⁸⁶ Components of “well ordered” printing included censorship, monopoly over the printing presses, and copyright, all of which were included in the Ordinance of 1643. Its emphasis on the latter, the “propriety of

⁸³ *Id.*

⁸⁴ Emery, *supra* n. 78, at 9.

⁸⁵ *Id.*

⁸⁶ Patterson, *supra* n. 75, at 128.

Copies,” brought us closer to modern copyright law,⁸⁷ but the link with censorship was to continue for some years yet.

Indeed, the proliferation of newspaper prototypes – the curanto, diurnall, mercury and intelligencer – was largely responsible for the Ordinance of 1647, styled “An Ordinance against unlicensed or scandalous Pamphlets, and for the better Regulating of Printing.”⁸⁸ Patterson points out that this was the first act of censorship directed as much to authors as to printers, providing

[t]hat what person soever shall Make, Write, Print, Publish, Sell or Utter... any Book, Pamphlet, Treatise, Ballad, Libel, Sheet or Sheets, the Author, Printer and Licenser thereunto prefixed) shall for every such Offence, suffer, pay and incur the Punishment, Fine and Penalty hereafter mentioned....⁸⁹

Two years later, those penalties were increased by the Ordinance of 1649, aimed at “the mischiefs arising from weekly pamphlets.”⁹⁰ Under that act, the Clerk of Parliament was designated to license the pesky newsbooks,⁹¹ which had flourished in the civil war period.⁹²

According to Emery, “the press again fell upon evil days” with the advent of Oliver Cromwell’s dictatorship,⁹³ although Patterson indicates that the Puritans ultimately

⁸⁷ *Id.* at 129.

⁸⁸ *Id.* at 131-32.

⁸⁹ *Id.* at 132.

⁹⁰ *Id.*

⁹¹ *Id.* at 133.

⁹² Emery, *supra* n. 78, at 11.

⁹³ *Id.*

failed in their efforts at controlling the press.⁹⁴ After the Restoration, the Stationers lobbied for the restoration of their old power. The Licensing Act of 1662 was similar to the Ordinances of 1647 and 1649, but the Company lost its role in press censorship to the Surveyor of the Press. The Licensing Act was allowed to lapse in 1679, and, although the Stationers tried to renew their monopoly through a censorship law as late as 1703,⁹⁵ the link between copyright and censorship was finally severed. Copyright law, beginning with the Statute of Anne in 1709, had lost its censorship function.⁹⁶

Or has it? Patterson ends his study with a prescient warning that today's copyright law typically grants publishers complete control of the work – the expression of ideas for profit. “A vestige of the heritage of censorship in the law of copyright remains in the interest of profit.”⁹⁷ Be that as it may, it is not the core of this argument, so we turn to the treatment of news media under historical and contemporary copyright law.

B. Subject Matter of Copyright Before 1909

There is no textual evidence that the copyright laws of the 18th and 19th Centuries ever contemplated newspapers as covered subject matter. The Statute of Anne,⁹⁸ generally considered the first British copyright statute,⁹⁹ covered books and parts

⁹⁴ Patterson, *supra* n. 75, at 134.

⁹⁵ *Id.* at 141.

⁹⁶ Paul Edward Geller, *Copyright History and the Future: What's Culture Got To Do With It?*, 47 J. Copy. Soc. of the USA 209, 219 (2000).

⁹⁷ Patterson, *supra* n. 75, at 228.

⁹⁸ 8 Anne, c. 19 (1709).

of books, although the ambiguous phrase “other writings” was included in the parliamentary findings of frequent copying.¹⁰⁰

By the time of the American constitutional convention, 12 of the 13 states already had copyright laws.¹⁰¹ Most of the early American state statutes also covered only books, or books and writings,¹⁰² or books, maps and charts.¹⁰³ Statutes of Connecticut (1783), Georgia (1786) and New York (1786) governed “any book or pamphlet... or... any map or chart.”¹⁰⁴

To harmonize the various state copyright statutes,¹⁰⁵ the framers authorized Congress “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.”¹⁰⁶ But while the constitutional provision speaks only of “writings,” the

⁹⁹ *But see* Patterson, *supra* n. 75 at 143 (“Earlier English copyright acts, the Star Chamber Decrees of 1586 and 1637, the Ordinances of 1643 and 1647, and the Licensing Act of 1662, were fundamentally censorship laws, which may explain why their relevance to the so-called first copyright act was ignored.”)

¹⁰⁰ Justice Thompson, in *Clayton v. Stone*, 5 F. Cas. 999 (S.D.N.Y. 1829), suggested that the phrase was not significant. “[T]he body of the act speaks only of books... and a learned commentator upon American law (2 Kent, Comm. 311) seems to think the English decisions on this subject (Cowp. 623; 11 East, 244, note) have been given upon the body of the statute of Anne, without laying any stress upon the words [“other writings[”] in the preamble.” 5 F. Cas. at 1001-1003.

¹⁰¹ Patterson, *supra* n. 75, at 194.

¹⁰² *See, e.g.*, Maryland Statute of April 21, 1783, quoted in Patterson, *supra* n. 75, at 184; also U.S. Copyright Office, *Copyright Laws of the United States of America 1783-1862* (1962) at 5 [hereinafter *Copyright Laws*].

¹⁰³ *See, e.g.*, North Carolina Statute of Nov. 19, 1785, in Patterson, *supra* n. 75, at 185, *Copyright Laws* at 15.

¹⁰⁴ Patterson, *supra* n. 75, at 186.

¹⁰⁵ Vaidhyanathan, *supra* n. 80, at 54.

¹⁰⁶ U.S. Const. art. I, § 8.

Federal Copyright Act of 1790 specified “maps, charts, and books,” including unpublished manuscripts.¹⁰⁷

Any thought that newspapers might be subsumed by the inherent ambiguity of “writings” is quickly laid to rest with a look at the government-subsidized practice of newspaper exchanges. At least until the availability of low-cost telegraphy became widespread,¹⁰⁸ newspaper articles were more or less freely exchanged among publishers, with frontier newspapers often gleaning a substantial proportion of their news from Eastern city papers.

The practice of exchanging newspapers goes back to colonial times. Andrew Bradford, publisher of the *American Weekly Mercury*, launched in 1719 as Philadelphia’s first newspaper, gathered non-local news through the exchange of letters and the cultivation of correspondents around the world.

Perhaps most important as a means of news gathering, Bradford and other publishers liberally copied one another’s papers. Bradford borrowed from several dozen British publications and later, with the establishment of more papers in the colonies and improvements in transportation, he began helping himself to newspaper accounts published along the Atlantic Coast. Stories from other papers were typically printed verbatim and, in the *Mercury*’s first years of publication, sources were not regularly credited. Identification became more common later, however, and the *Mercury*’s sources multiplied, relating to both European and American news.¹⁰⁹

¹⁰⁷ 1 Stat. 124, § 6. The Amendment of 1802 added prints, 7th Cong. 1st Sess., ch. 36. See David Rabinowitz, *Everything You Ever Wanted to Know about the Copyright Act before 1909, but Couldn’t be Bothered to Look Up*, 49 J. Copyr. Soc. U.S.A. 649 (Winter 2001.)

¹⁰⁸ Barbara Cloud, *News: Public Service or Profitable Property*, 13 Am. Journalism 141, 141 (1996) [hereinafter Cloud].

¹⁰⁹ Richard B. Kielbowicz, *News in the Mail: The Press, Post Office and Public Information, 1700-1860s*, 15 (Greenwood Press 1989) [hereinafter Kielbowicz].

Indeed, the very first policy regarding the carriage of newspapers by the colonial Post Office in 1758 recognized the practice of exchanging papers among printers and exempted those papers from any postage fees.¹¹⁰ That policy remained virtually unchanged until the 1870s.¹¹¹ The importance of the exchanges is illustrated by evidence that postmaster-publishers occasionally punished rivals by delaying their exchange papers.¹¹² The practice also served commercial interests and, during and after the Revolutionary War period, political interests as well.¹¹³ Preferential postal rates for newspapers were almost universally endorsed in the early days of the Republic, and the practice of exchanging newspapers among printers was a matter of concern to President Washington himself.¹¹⁴

When Congress enacted the first postal law in 1782, no reference was made to newspaper exchanges among printers, and the matter was left to the discretion of the

¹¹⁰ *Id.* at 17.

¹¹¹ *Id.* at 18.

¹¹² *Id.* at 19.

¹¹³ *Id.* at 20-21. On the latter point, see especially Jeffrey L. Pasley, “*The Tyranny of Printers*”: *Newspaper Politics in the Early American Republic* 173 (Univ. Press of Va. 2001) [hereinafter Pasley]:

Free exchanges were initially a nationalizing force, as the colonial custom of free exchanges had been an imperializing one, binding together distant parts of the nation and world through information. With the rise of political divisions in the 1790s, that force began to work very differently, binding together like-minded partisans across space and fostering the growth of partisan newspaper networks. Each editor began to focus on selecting materials that expressed his own views and helped promote his own political goals, arranging the newspapers he received along a political spectrum into which he could also insert himself. Having identified some journals as political opponents, editors looked through them for outrageous remarks to score points against, arguments to answer, and misinformation to correct. An especially powerful political essay or paragraph could spread through the country in a matter of weeks, and an especially well-executed newspaper could gain national, targeted exposure far beyond its own direct circulation.

¹¹⁴ Kielbowicz, *supra* n. 109 at 35.

Postmaster General.¹¹⁵ Ten years later, however, Congress expressly provided for printers' exchanges: "That every printer of newspapers may send one paper to each and every other printer of newspapers within the United States, free of postage, under such regulations as the Postmaster General shall provide."¹¹⁶ Exchanges were so attractive that, by 1812, frontier newspapers were borrowing seven times more news than they gathered locally.¹¹⁷ In fact, regular, active news gathering did not begin until the 1830s.¹¹⁸

Congressional support for the printers' exchanges was so strong that the practice weathered any number of proposals by budget-conscious Postmasters General to curtail or end the practice during the early 19th Century.¹¹⁹ Occasionally, editors would append a notice to their stories and advertisements instructing distant editors to copy them, thereby extending the range of their influence.¹²⁰ It is obvious from contemporary descriptions of how those exchanges were used that notions of copyright infringement were entirely alien to the process:

We seated ourselves at the... table, on which were scissors, paste-dish, pen and ink, the indispensable implements of our profession, to commence our ordinary labour. At first, to prepare the subject matter of the next day's daily *Journal*. Having cast our eye over Mr. Lang's *New York Gazette*, and Mr. Dwight's *Daily Advertiser*, (our invariable standards of news from that city, notwithstanding the high repute of Mr. Stone's *Commercial*) and clipped out a few paragraphs, the Washington papers

¹¹⁵ *Id.* at 143.

¹¹⁶ 1 Stat. 238 (1792), cited in Kielbowicz, *supra* n. 109, at 145.

¹¹⁷ *Id.* at 145.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 146-47.

¹²⁰ *Id.* at 148.

were next put in requisition. An article in the *National Journal*, or the *National Intelligencer*, we undertook to remanufacture (giving the *Journal*, or the *Intelligencer* credit for the new material).¹²¹

But if copyright protection was not an issue, editors felt strongly about receiving credit for their efforts. Editorials regularly denounced the use of stories without proper attribution, and regular offenders might be struck from exchange lists.¹²² One early news magazine publisher lamented, “I have an article before me that I myself made, that was published at Boston as original, copied into a Baltimore paper without credit, and inserted in an Albany paper as belonging to the newspaper last noted.”¹²³ A New Jersey editor acknowledged that news items were “common property,” but insisted that to “transplant original matter... unacknowledged, is neither honest nor honorable; ... pillaging a paper is equal to picking a pocket.”¹²⁴

Ultimately, the telegraph would erode the importance of postal exchanges, but exchanges remained “indispensable” to remote newspapers for 20 or more years after the telegraph was invented.¹²⁵ At first, the telegraph was enlisted merely to help editors cover part of the distance between originating and consuming newspapers. Increasingly, however, the economies of the telegraph dictated that news items be summarized, leaving to exchanges the distribution of more complex, opinionated, or narrowly focused

¹²¹ *Id.* at 147 (quoting the *New England Galaxy* as reprinted in the *Nashville Republican*, Nov. 20, 1824).

¹²² Kielbowicz, *supra* n. 109, at 147.

¹²³ *Id.* at 149.

¹²⁴ Pasley, *supra* n. 113, at 9 (quoting an item entitled *Credit to Whom Credit is Due* from the *Trenton True American*, Jan. 5, 1802).

¹²⁵ Kielbowicz, *supra* n. 109, at 151.

stories.¹²⁶ Even after the rise of cooperative news agencies and the evolution of the modern, hard-news story form, exchanges were used to circulate features and political commentary.¹²⁷ In 1851, Post Office extended the free exchange privilege to include magazines.¹²⁸

During the period 1847-1860, some 30 percent of the stories carried in daily and other newspapers were clipped from other papers, presumably received on exchange, but the free ride was coming to an end. Bowing to pressure from Postmaster General Montgomery Blair, Congress eliminated the practice of free exchanges in 1873.¹²⁹

Other evidence that news was not considered a proper subject for copyright protection in what little case law we have from those days. In the early case of *Clayton v. Stone*, Circuit Justice Thompson cited both the text of the copyright law and the burden that copyright would impose on would-be registrants to hold that a price-current, an early form of commercial newspaper or newsletter, could not be the proper subject of copyright.¹³⁰ Plaintiffs had argued that their publication qualified for copyright protection as a book, but the court rejected that view based on the “subject-matter of the work” in question.¹³¹ In an explanation later quoted extensively with approval by the Supreme Court in *Baker v. Selden*,¹³² Justice Thompson said the Copyright Act

¹²⁶ *Id.* at 153.

¹²⁷ *Id.* at 154.

¹²⁸ *Id.* (citing 2 *U.S. Postal Guide and Official Advertiser* 40 (Aug. 1851)).

¹²⁹ Kielbowicz, *supra* n. 109, at 155 (citing Act of Mar. 3, 1873, 17 Stat. 559 (1873)).

¹³⁰ 5 F. Cas. 999 (S.D.N.Y. 1829).

¹³¹ *Id.* at 1001.

¹³² 101 U.S. 841, 844 (1880).

was passed in execution of the power here given, and the object, therefore was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent and durable character. The term science cannot, with any propriety, be applied to a work of so fluctuating and fugitive form as that of a newspaper or pricecurrent, the subject-matter of which is daily changing, and is of more temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper, yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public and not as a work of science. The title of the act of congress is for the encouragement of learning (citation omitted), and was not intended for the encouragement of mere industry, unconnected with learning and the sciences.¹³³

The court proceeded to recount the burdensome steps required at that time to secure a copyright, finding they could not “reasonably be applied to a work of so ephemeral a character as that of a newspaper.”¹³⁴ Since the copyright had to be secured for every edition, rather than for an entire series, the court said,

it is so improbable that any publisher of a newspaper would go through this form for every paper, it cannot reasonably be presumed that congress intended to include newspapers under the term book. That no such pretence has ever before been set up, either in England or in this country, affords a pretty strong argument that such publications were never considered as falling under the protection of the copyright laws.¹³⁵

If that interpretation of the Copyright Act was still good law in 1880, when *Baker v. Selden* was decided, it was no longer so by 1886, when the very same court that decided *Clayton v. Stone* considered a copyright granted to *Harper's Weekly*, described

¹³³ 5 F. Cas. at 1003.

¹³⁴ *Id.*

¹³⁵ *Id.*

as an “illustrated newspaper.”¹³⁶ In *Harper v. Shoppell*, the court held that the “copyright of the plaintiff’s newspaper was a copyright of a book, within the meaning of the copyright laws.”¹³⁷ Although the court ultimately held for the defendant on other grounds, the decision in no way questioned the validity of *Harper’s* copyright. What had changed?

C. Propertization of News in 19th Century

The mid-19th Century saw continued expansion in the scope of copyright, both legislatively and administratively. In the 1831 general revision of the Act, copyright protection was extended to musical compositions and cuts and engravings.¹³⁸ Photographs were added in 1865.¹³⁹ And in 1870, Congress added paintings, drawings, chromos, statues, statuary, and “models or designs intended to be perfected as works of the fine arts.”¹⁴⁰ Following the 1870 revision, the Copyright Office began accepting registrations as books from some weekly newspaper publishers.¹⁴¹

The 1870s have been singled out as a critical decade in the transition of American newspapers from an elite press, dependent for support upon political parties, to a

¹³⁶ *Harper v. Shoppell*, 26 F. 519 (S.D.N.Y. 1886).

¹³⁷ *Id.* at 519.

¹³⁸ 21st Cong., 2d Sess., ch. 16.

¹³⁹ 38th Cong., 2d Sess., ch. 126.

¹⁴⁰ 41st Cong., 2d Sess., ch. 230 sec. 85 et seq. See generally, David Rabinowitz, *Everything You Ever Wanted to Know about the Copyright Act before 1909, but Couldn’t be Bothered to Look Up*, 49 J. Copyr. Soc. U.S.A. 649 (Winter 2001).

¹⁴¹ Cloud, *supra* n. 108, at 145 (citing *N.Y. Times*, 20 Nov. 1870, 1).

politically independent, mass market business.¹⁴² During that decade, the number and size of newspapers nearly doubled, subscription prices declined, and independents came to outnumber partisan papers.¹⁴³ These dramatic changes have been variously attributed to economic growth in the West and recovery in the South, rising literacy throughout the country, and vastly improved communication and transportation infrastructure.¹⁴⁴ Above all, newspapers were making money.¹⁴⁵

Newspapers were still not explicitly covered by the copyright statute, but the practice of registering newspapers as books enabled the *Harper* court to stand Justice Thompson's analysis on its head. In *Clayton*, Thompson had pointed out that, in England, literary productions need not be books "in the common and ordinary acceptance of the word" in order to enjoy copyright protection.¹⁴⁶ "It may be printed on one sheet," he wrote, to support the point that protection was "not to be determined by the size, form or shape in which it makes its appearance, but by the subject-matter of the work."¹⁴⁷

The *Harper* court omitted the final clause of that sentence, which lay at the very heart of *Clayton*, and all other reference to subject matter. Instead, it used language from *Clayton* to support the proposition that "a book... may consist of a single sheet, as well as

¹⁴² Jeffrey B. Ruenbeck, *Newspaper Trends in the 1870s: Proliferation, Popularization, and Political Independence*, 72 *Journalism & Mass Commun. Q.* 361, 361 (1995).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 369.

¹⁴⁵ *Id.*

¹⁴⁶ *Clayton*, 5 F. Cas. at 1000.

¹⁴⁷ *Id.* (emphasis added).

a number of sheets bound together,”¹⁴⁸ like *Harper’s* illustrated newspaper. To be sure, the *Harper* court could have distinguished the content of *Harper’s Weekly* from that of the price-current at issue in *Clayton*, but it did not. Fine content distinctions played no part in the *Harper* decision.

Metropolitan newspaper publishers had also begun to lobby Congress for copyright protection by the time *Harper* was decided, although their first efforts were half-hearted and, for more than twenty years, unsuccessful.¹⁴⁹ As a consequence of the growing commercial value of news,¹⁵⁰ major publishers developed extensive newsgathering networks and telegraphic wire services, then sought to protect their investment through copyright.¹⁵¹

By 1879, James W. Simonton, general agent for the Associated Press, would claim a “property in news... created by the fact of our collecting and concentrating it.”¹⁵² At the AP’s behest, Henry Watterson, editor of the *Louisville Courier-Journal*, was sent in 1884 on what he described as a “fool’s errand” to persuade Congress to provide explicit copyright protection for newspapers.¹⁵³ Barbara Cloud discusses in some detail the four bills relating to news copyright that were introduced during the First Session of the 48th Congress.

¹⁴⁸ *Harper v. Shoppell*, 26 F. at 519.

¹⁴⁹ Cloud, *supra* n. 108, at 144.

¹⁵⁰ *Id.* at 141 (citing Gerald J. Baldasty, *The Commercialization of News in the Nineteenth Century* (U. Wis. Press 1992)).

¹⁵¹ Cloud, *supra* n. 108, at 142.

¹⁵² *Id.* at 149 (citing Daniel J. Czitrom, *Media and the American Mind: From Morse to McLuhan* 26 (U. N.C. Press 1982)).

¹⁵³ Cloud, *supra* n. 108, at 144 (citing Henry Watterson, *Marse Henry: An Autobiography* 104 (George H. Doran Co. 1919)).

One bill¹⁵⁴ allowed a periodical writer to copyright already published work after giving notice six times in publications; that bill and another¹⁵⁵ would have granted copyright to newspaper “titles,” assumed to mean stories.¹⁵⁶ More important were S.1728¹⁵⁷ and its companion, H.R.5850,¹⁵⁸ which gave newspapers the “sole right to print, issue and sell for a term of eight hours, dating from the hour of going to press,” the stories in the newspaper that exceeded 100 words.¹⁵⁹ The eight-hour period was apparently reduced from twenty-four hours, which was also provided in H.R.4160, in order to mollify legislators who feared that the bill would solely benefit the Associated Press at the expense of country weeklies.¹⁶⁰

Watterson insisted that the proposed law would not interfere with the weeklies’ practice of reprinting stories; they would be free to continue copying “anything that pleases them,” after 7 a.m., but the legislation ultimately failed.¹⁶¹ The weekly press,

¹⁵⁴ H.R.62, 48th Cong. (Dec. 10, 1883).

¹⁵⁵ H.R.4160, 48th Cong. (Jan. 29, 1884).

¹⁵⁶ Cloud, *supra* n. 108, at 145 n. 17.

¹⁵⁷ 48th Cong. (March 4, 1884).

¹⁵⁸ 48th Cong. (March 10, 1884).

¹⁵⁹ Cloud, *supra* n. 108, at 145. Section 2 of the bill would provided further

That for any infringement of the copyright granted by the first section of this act the party injured may sue in any court of competent jurisdiction and recover in any proper action the damages sustained by him from the person making such infringement, together with the costs of the suit.

Intl. News Serv. v. Assoc. Press, 248 U.S. 215, 265 n. 16 (Brandeis, J., dissenting) [hereinafter *INS v. AP*].

¹⁶⁰ Cloud, *supra* n. 108, at 146.

¹⁶¹ Justice Brandeis recounted that the bill “was reported on April 18, 1884, by the Committee on the Library, without amendment, and that it ought not to pass. Journal of the Senate, 48th Congress, First Session, p. 548. No further action was apparently taken on the bill.” *INS v. AP*, 248 U.S. at 265 n. 16 (Brandeis, J., dissenting).

which benefited from the practice of newspaper exchange, organized a substantial lobbying campaign, including letter-writing and petitioning.¹⁶² Other critics of the legislation found too little “original intellectual effort” in newsgathering to merit copyright protection.¹⁶³ Whether the *Harper* court was aware of the legislative failure of the newspaper copyright is not apparent from the decision, but as long as newspapers could be protected as “books,” it may not have mattered one way or the other.

That was certainly the view of Richard Rogers Bowker, head of *Publisher’s Weekly* and the Publishers’ Copyright League.¹⁶⁴ Writing in 1886, the same year *Harper* was decided, Bowker acknowledged that “[a] specific act to protect news for twenty-four hours has been proposed in Congress, but never passed.”¹⁶⁵ But Bowker expressed confidence, probably based more on Copyright Office practice than any legal grounds, that “periodicals and books published in parts... come under the general designation of books.”

Each issue of a magazine or other periodical must therefore be separately entered as though a separate book, although the title may be registered as a trade-mark once for all. All copyrightable matter contained in the issue would then be copyrighted.... It seems probable that even a daily newspaper could thus be copyrighted day by day at a cost of \$365 per year, so as to protect all its original material of substantial literary value. A daily *Price-List* of the New York Cotton Exchange was so entered day by day for some time, but the question of maintaining such a copyright

¹⁶² *Id.* at 150.

¹⁶³ *Id.* (citing *Stealing the News*, 38 *Nation* 159 (Feb. 21, 1884)).

¹⁶⁴ Vaidhyanathan, *supra* n. 80, at 54.

¹⁶⁵ R.R. Bowker, *Copyright: Its Law and Its Literature* 13 (The Publishers’ Weekly 1886, reprinted Fred B. Rothman & Co. 1996) [hereinafter Bowker].

seems never to have been tested in court. The *New York Sun* copyrights its Sunday cable letter separately.¹⁶⁶

Bowker did discuss some foreign precedents that supported his argument, notwithstanding the fact that “the word ‘newspaper’ does not occur in the definitions of the Act.”

When the *London Times*'s memoir of Beaconsfield was reprinted as a penny pamphlet, the Times brought suit as a matter of common-law right, but the judge held that a newspaper was copyrightable under the statute, and therefore a common-law suit could not hold. It was held by Mr. Justice Molesworth, in Melbourne, Australia, that a newspaper proprietor had copyright in special news telegrams, and another paper was enjoined from using them.¹⁶⁷

In any event, one further attempt to secure legislative recognition of the newspaper copyright failed in 1899, and Cloud indicates it was even less successful than Watterson's 1884 campaign.¹⁶⁸ Newspapers would not be explicitly mentioned in the copyright statute until the 1909 revision, and then only in the most matter-of-fact way. By then, however, the transformation of journalism from a public service to the manufacture of product had been largely completed; Congress was merely acknowledging a *fait accompli*: the propertization of news.

D. The 1909 Copyright Act

Before 1909, the only statutory provision in force that could have been construed as relating to the copyright of newspapers was Sec. 11 of the Act of March 3, 1891, which provided:

¹⁶⁶ *Id. But see Tribune Co. v. Associated Press*, 116 F. 126 (N.D. Ill. 1900) (“It is at least questionable whether a copyright can [by registration and deposit] be secured for a newspaper.”)

¹⁶⁷ Bowker, *supra* n. 165, at 13.

That for the purpose of this act each volume of a book in two or more volumes, when such volumes are published separately and the first one shall not have been issued before this act shall take effect, and each number of a periodical shall be considered an independent publication, subject to the form of copyright as above.¹⁶⁹

The word “newspaper” first appears in Sec. 5 of the 1909 revision of the copyright act:

“Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

* * *

“b. Periodicals, including newspapers[.]”¹⁷⁰

The House Report¹⁷¹ accompanying the new legislation saw no particular significance in adding the term “newspapers.” Section 5, it said, “refers solely to a classification made for the convenience of the copyright office and those applying for copyrights.”¹⁷² Even more striking is the fact that the report of the Copyright Committee of the American Newspaper Publishers Association does not even mention it.¹⁷³

¹⁶⁸ Cloud, *supra* n. 108, at 155.

¹⁶⁹ Act of March 3, 1891, 26 Stat. 1106, § 11 (noted in S. Rpt. 59-6187 at 11 (Feb. 5, 1907)).

¹⁷⁰ Act of March 4, 1909, 35 Stat. 1076, § 5.

¹⁷¹ H.Rpt. 60-2222 (Feb. 22, 1909).

¹⁷² *Id.* at 10.

¹⁷³ *Statement of A.N.P.A. Copyright Committee Regarding Photographic Copyright Legislation Enacted by the Sixtieth Congress*, American Newspaper Publishers Association [hereinafter ANPA] Bulletin No. 1969, “B” Special (March 20, 1909) (pp.205-207 of 1909 bound volume).

The ANPA's Copyright Committee was appointed in February 1905 "to act for the Association in consideration of the copyright laws and the newspaper publishers [sic] interest in them."

There will probably be a general convention within the next few months on copyrights and trade marks, and it is the purpose of the Association to be represented in that convention by members of that committee. In the meantime, we ask any member who has any suggestion to make in reference to changes or additions to the copyright law to forward such suggestions to the New York office of the Association.¹⁷⁴

The committee was chaired by Theodore W. Noyes of the *Washington Star* and included Louis M. Duvall of the *Baltimore News* and John Stewart Bryan of the *Richmond Times-Dispatch*.¹⁷⁵ Neither Noyes nor Duvall were able to attend the "general convention," which was held in New York on May 31, so Bryan and XXXX Seitz of the *New York World* represented ANPA.¹⁷⁶ The committee's report is sketchy, to say the least, but it appears that ANPA put in another futile word for protecting telegraphic news items for some brief term of days or hours.¹⁷⁷ Nor was any such provision to be considered by the Library of Congress Copyright conference that convened in March 1906,¹⁷⁸ and none was ever enacted into law.

¹⁷⁴ ANPA Bulletin No. 1282, § B, at 2, May 5, 1905 (p. 148 of 1905 bound volume). The annual meeting at which the committee was appointed was held February 21-23, 1905, at the Waldorf-Astoria Hotel in New York City. ANPA Bulletin 1251, § B, at 1, Jan. 26, 1905 (p. 23 of 1905 bound volume).

¹⁷⁵ ANPA Bulletin No. 1282, § B, at 2, May 5, 1905 (p. 148 of 1905 bound volume).

¹⁷⁶ *Copyright Conference*, ANPA Bulletin No. 1296, § B, at 1, June 3, 1905 (p. 213 of 1905 bound volume).

¹⁷⁷ *Id.* ("Mr. Bryan called attention to the provision protecting special telegrams in Australia and South Africa and a request was made that some such provision be incorporated in the forthcoming codification of the Copyright laws.")

¹⁷⁸ *Legislative History of the 1909 Copyright Act* vol.5, M17 (E. Fulton Brylawski and Abe Goldman eds., Fred B. Rothman & Co. 1976).

But the primary focus of the ANPA representatives was protecting their membership from what they viewed as excessive penalties for newspapers' violations of photographers' copyrights.¹⁷⁹ That issue would preoccupy the Copyright Committee throughout the runup to the 1909 act. In 1907, for example, ANPA explained that the committee "was appointed as a result of dissatisfaction with the existing law and apprehension of new and more objectionable legislation in respect to the reproduction by newspapers of copyrighted photographs."¹⁸⁰

The object of ANPA's attention was a provision of the existing 1895 Copyright Act that established heavy penalties for infringement of photographic copyrights, including both injunctive relief and damages plus fines up to \$10,000¹⁸¹ and a proposal to add criminal penalties for willful infringement.¹⁸² In its *Bulletin*, ANPA published the committee's legal and practical arguments against such harsh treatment, urging language to provide "that the reproduction of a photograph in any newspaper by the process known as stereotyping shall not be construed as an infringement of the copyright of such photograph."¹⁸³ At the very least, the committee argued, the penalties for such infringement should be reduced to an amount commensurate with lost royalties, rather than a punitive assessment per copy made.¹⁸⁴ The committee also urged the adoption of a

¹⁷⁹ *Id.* ("Mr. Seitz protested against any change in the Photographic Copyright law which was amended in the interest of the A.N.P.A. some years ago. There was a disposition on the part of the Photographers to do this and restore old conditions.")

¹⁸⁰ ANPA Bulletin No. 1581, § "B" Special, at 1 (Feb. 20, 1907) (p. 85 of the 1907 bound volume).

¹⁸¹ R.S. § 4965 as amended by the Act of March 2, 1895. [see if you can get a better cite]

¹⁸² ANPA Bulletin No. 1581, § "B" Special, at 2 (Feb. 20, 1907) (p. 86 of the 1907 bound volume).

¹⁸³ *Id.* at 4 (p. 88 of the 1907 bound volume).

¹⁸⁴ *Id.* at 5 (p. 89 of the 1907 bound volume).

conspicuous copyright notice requirement for photographs¹⁸⁵ and exemption from or elimination of criminal penalties for infringement.¹⁸⁶

In making its case, the ANPA referred to photographs in language reminiscent of that used by Justice Thompson in rejecting copyright protection for newspapers,¹⁸⁷ including “purely mechanical” and “unintellectual.”¹⁸⁸ It also argued that reproduction of photographs in newspapers actually increased their value to photographers¹⁸⁹ – an argument that would be rejected again many years later by courts reviewing the copyright implications of music file sharing.¹⁹⁰

In the end, Congress largely obliged the newspapers. “As a result of the efforts of this committee, legislation affecting copyrights enacted in the closing hours of the sixtieth Congress assumed a form on this point which eliminated or modified the new legislative propositions most menacing to the newspaper publishing interests, and in important respects distinctly improved the existing law.”¹⁹¹ After 1909, newspapers were

¹⁸⁵ *Id.* at 6 (p. 90 of the 1907 bound volume).

¹⁸⁶ *Id.* at 7 (p. 91 of the 1907 bound volume).

¹⁸⁷ *See infra* n. 146 and accompanying text.

¹⁸⁸ ANPA Bulletin No. 1581, § “B” Special, at 7 (Feb. 20, 1907) (p. 91 of the 1907 bound volume).

¹⁸⁹ *Id.* at 5 (p. 89 of the 1907 bound volume).

¹⁹⁰ *See A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001) (endorsing trial court’s rejection of expert testimony that “Napster is beneficial to the music industry because MP3 music file-sharing stimulates more audio CD sales than it displaces.”), and *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (rejecting defendant’s argument that its “activities can only enhance plaintiffs’ sales, since subscribers cannot gain access to particular recordings made available by MP3.com unless they have already “purchased” (actually or purportedly), or agreed to purchase, their own CD copies of those recordings.”)

¹⁹¹ *Statement of A.N.P.A. Copyright Committee Regarding Photographic Copyright Legislation Enacted by the Sixtieth Congress*, American Newspaper Publishers Association [hereinafter ANPA] Bulletin No. 1969, “B” Special, at 1 (March 20, 1909) (pp.205-207 of 1909 bound volume).

not only explicitly protected by the federal copyright statute,¹⁹² their publishers had become successful players in the game, that is, the inter-industry negotiation process that has accompanied all major 20th Century revisions to the Copyright Act, through which copyright winners and losers are chosen.¹⁹³

E. Copyright Doctrine Today

Most published journalism is treated like any other literary property under contemporary copyright doctrine, that is, fully protected for the life of the author plus 70 years (or 95 years in the case of corporate authors).¹⁹⁴ In theory at least, the “news of the day” lies outside the scope of copyright protection under the so-called fact-expression dichotomy,¹⁹⁵ and, just as theoretically, news gets more sympathetic treatment under the fair use doctrine.¹⁹⁶ This section will examine today’s copyright doctrine with respect to journalism and the news, both in the United States and abroad.

1. Fact-Expression Dichotomy

By the 1880s, most courts had recognized that individual newspaper articles and illustrations generally qualified for copyright protection as literary works,¹⁹⁷ although the

¹⁹² Notwithstanding the 1909 act’s minimizing the importance of “including newspapers” language in Section 5b, *see infra* n. 170, the U.S. Supreme Court took particular notice of that language in distinguishing the 1909 act from the acts of 1790 and 1802. *INS v. AP*, 248 U.S. 215, 234 (1918).

¹⁹³ For a general description of the “game,” see Jessica Litman, *Digital Copyright* 35-69 (Prometheus Books 2001).

¹⁹⁴ 17 U.S.C. § 302 (2003).

¹⁹⁵ *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

¹⁹⁶ 17 U.S.C. § 107 (2003).

¹⁹⁷ *See, e.g., Sarony v. Burrow-Giles Lithographic Co.*, 17 F. 591, 592 (S.D. N.Y. 1883) (upholding the constitutionality of legislation extending copyright protection to photographs), and *Harper v. Shoppell*, 26

scope of protection in those early cases typically excluded advertisements.¹⁹⁸ But the news contained in the newspaper articles has always remained outside copyright protection. The invention in 1881 of a telegraphic “ticker,” which printed out news on a paper tape, gave rise to some of the earlier cases.¹⁹⁹ Although many were essentially appropriation cases,²⁰⁰ the copyright issue was discussed at length in *National Telegraph News Co. v. Western Union Telegraph Co.*²⁰¹

Although this, too, is fundamentally an appropriation case, the defendant National Telegraph argued that the news carried on Western Union’s ticker – including stock prices, sports scores, and other information – was unprotected against appropriation unless protected by copyright law.²⁰² If it were the proper subject matter for statutory copyright (which Western Union had not sought), Western Union’s failure to meet the deposit requirement would eviscerate any such protection. And if protectable under the common law, the appearance of the printed tape would constitute publication and effectively dedicate the news to the public.²⁰³

F. 519, 519-20 (S.D. N.Y. 1886) (“The plaintiffs might have copyrighted the cut as an independent subject of copyright. ... So, also, they could have copyrighted each poem or song or editorial composition of their newspaper.”)

¹⁹⁸ See, e.g., *Mutual Advertising Co. v. Refo*, 76 F. 961, 963 (D. S.C. 1896), and *Mott Iron Works v. Clow*, 82 F. 316, 321 (7th Cir. 1897).

¹⁹⁹ *Natl. Tel. News Co. v. W. Union Tel. Co.*, 119 F. 294, 295 (7th Cir. 1902).

²⁰⁰ See, e.g., *Bd. of Trade of City of Chi. V. Christie Grain & Stock Co.*, 198 U.S. 236, 250 (holding that commodity price quotations were property, akin to trade secrets, entitled to protection from theft); *accord Hunt v. N.Y. Cotton Exch.*, 205 U.S. 322 (1907).

²⁰¹ See *infra* n. 199.

²⁰² *Natl. Tel.*, 119 F. at 296.

²⁰³ *Id.* at 295-96.

The court ultimately concluded that National Telegraph had been properly enjoined from appropriating Western Union's property, but it rejected any notion that the ticker reports were protected by copyright law.²⁰⁴ "We are of the opinion that the printed tape would not be copyrightable," the court said, "even if the practical difficulties were out of the way."²⁰⁵ Acknowledging that the scope of copyright protection had expanded as new conditions arose, so that nothing is excluded that evinces "the mind of a creator or originator," the court nevertheless drew the line "at the point where authorship proper ends, and mere annals begin."²⁰⁶

It would be both inequitable and impracticable to give copyright to every printed article. Much of current publication – in fact the greater portion – is nothing beyond the mere notation of events transpiring, which, if transpiring at all, are accessible by all. It is inconceivable that the copyright grant of the constitution, and the statutes in pursuance thereof, were meant to give a monopoly of narrative to him, who, putting the bare recital of events in print, went through the routine formulae of the copyright statute.²⁰⁷

The court conceded that the results of a race could be narrated with "creative imagination" and that market results could form the basis of a useful book or original article. "But the printed tape under consideration ... is nothing more or less than the transmission by electricity, over long distances, of what a spectator of the event, occupying a fortunate position to see or hear, would have communicated by word of

²⁰⁴ *Id.* at 301.

²⁰⁵ *Id.* at 296.

²⁰⁶ *Id.* at 297.

²⁰⁷ *Id.*

mouth, to his less fortunate neighbor. It is an exchange merely, over wider area, of ordinary sightseeing.”²⁰⁸

Finally, the court said, whatever value the tape might have “lasts literally for an hour, and is in the wastebasket when the hour has passed.”²⁰⁹ It is not the inherent value of the news that matters to the patron, but the fact that the news reached the patron more quickly than it would by other means. It is this service that gives the tape its commercial value, “not Authorship, nor the work of the Publisher.”²¹⁰

Oh, but what a service! After thoroughly denigrating the value of news as literature, the court waxes positively poetic about what we take for granted as the fundamental purpose, value and conceit of today’s electronic journalism:

...that modern enterprise – one of the distinctive achievements of our day – which, combining the genius and the accumulations of men, with the forces of electricity, combs the earth’s surface, each day, for what the day has brought forth, that whatever befalls the sons of men shall come, almost instantaneously, into the consciousness of mankind. Thus, a gun thunders in a harbor on the other side of the earth; before its reverberations have ceased, the moral sequence of the event has taken root in every civilized quarter of the earth. Famine arises in India to begin its grim march; it has gotten but little under way until a counter army – the unfailing benevolence of human kind – has been mustered from America to Russia. On an isolated island, and without premonition, a mountain claps its black hands upon the population of a city; almost before a ship in the harbor, with tidings of the catastrophe, could have set sail, relief ships from the harbors of Christendom are under way. By such agencies as these, the world is made to face itself unceasingly in the glass, and is put to those tests that bring increasing helpfulness and beauty into the heart of our race.²¹¹

²⁰⁸ *Id.* at 298.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 298-99.

²¹¹ *Id.* at 300.

Lest such a service be “outlawed” by denying it the protection of the courts against the “inroads of the parasite,” the court went on to affirm the lower court’s injunction against National Telegraph.²¹² Without such protection, the court said, “but one result could follow – the gathering and distributing of news, as a business enterprise, would cease altogether. ... The parasite that killed, would itself be killed, and the public would be left without any service at any price.”²¹³

The reasoning of *National Telegraph* was adopted by the U.S. Supreme Court sixteen years later in *International News Service v. Associated Press*,²¹⁴ albeit without the rhetorical flourishes. As in the earlier case, the question before the court was whether the defendant below could lawfully appropriate for resale news from bulletins issued by AP or published in AP member newspapers. As in the earlier case, the news was not protected by copyright, although the product more closely resembled today’s finished news stories than the ticker tape produced by Western Union.

For tactical reasons, both parties insisted that AP’s material was not subject to copyright. AP argued that securing copyright for its dispatches was impractical and, anyway, those dispatches were beyond the scope of the copyright act. Its property interest lay exclusively in protecting its business from free-riders.²¹⁵ INS agreed that AP’s news lacked copyright protection, and like National Telegraph before it, argued that absent compliance with the formalities of copyright, publication extinguished any property right in the material. The holding below, that AP and its members retain a

²¹² *Id.* at 301.

²¹³ *Id.* at 296.

²¹⁴ 248 U.S. 215, 237 (1918).

²¹⁵ Br. of Resp., *INS v. AP*, 248 U.S. 215, 1918 U.S. LEXIS 1664.

property right in the news until published by each member, is a “mere conclusion, unsupported by reason.”²¹⁶

The Court, however, was not taken in by these tactical positions. It recognized that the Copyright Act was now much broader after 1909 than it was when *Clayton v. Stone*²¹⁷ was decided.

[The act] provides that the works for which copyright may be secured shall include “all the writings of an author,” and specifically mentions “periodicals, including newspapers.” [citations omitted] Evidently this admits to copyright a contribution to a newspaper, notwithstanding that it may also convey news; and such is the practice of the copyright office, as the newspapers of the day bear witness.²¹⁸

Even so, the Court said, the “news element – the information respecting current events contained in the literary production – is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.”²¹⁹ The framers, in empowering Congress to enact copyright laws, could not have intended “to confer upon one who might happen to be the first to report a historic even the exclusive right for any period to spread the knowledge of it.”²²⁰

That would remain the definitive statement of the fact/expression dichotomy as it relates to news to this day,²²¹ although the rest of the Court’s tortured reasoning –

²¹⁶ Br. of Pet., *INS v. AP*, 248 U.S. 215, 1918 U.S. LEXIS 1664.

²¹⁷ 5 F. Cas. 999 (S.D. N.Y. 1829).

²¹⁸ *INS v. AP*, 248 U.S. at 234.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ According to Nimmer, “the current Act has codified the rule precluding copyright in facts by providing that its protection does not extend to any ‘discovery.’” Melville B.

separating AP’s property interest in the news from its commercial interest in making the news “known to the world” before its competitors, and holding that INS had appropriated the latter – has been the subject of intense criticism.²²² The criticism began implicitly in the concurring opinion of Justice Holmes²²³ and explicitly in the dissent of Justice Brandeis²²⁴ – both of which will inform our analysis below. We proceed first to examine the second copyright doctrine that purports to protect the public interest in news from monopolization by the media: fair use.

2. Fair Use

The application of fair use doctrine to newspapers goes at least as far back as *Harper v. Shoppell*²²⁵ where the court pointed out that the copyright in a book – here, the

Nimmer, *Nimmer on Copyright* vol. 1 § 2.11 (David Nimmer, rev. author, Matthew Bender 2003) [hereinafter *Nimmer on Copyright*]. Specifically, the 1976 Act reads:

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).

²²² See, e.g., Gary Myers, *The Restatement’s Rejection of the Misappropriation Tort: A Victory for the Public Domain*, 47 S.C. L. Rev. 673 (1996) (“the tort of misappropriation threatens the existence of a well defined ‘public domain’ of information to which the public can freely obtain access”) [hereinafter Myers], and Leo J. Raskind, *The Misappropriation Doctrine as a Competitive Norm of Intellectual Property Law*, 75 Minn. L. Rev. 875 (1991) (application of the misappropriation doctrine should be limited to “the relatively rare instances when traditional intellectual property principles lead to perverse and unacceptable outcomes”). But see Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. Chi. L. Rev. 411 (1983) (“the doctrine has flourished in the state courts without impeding the flow of information”).

²²³ 248 U.S. at 246-48.

²²⁴ *Id.* at 248-67.

²²⁵ 26 F. at 520.

“book” in question was *Harper’s Illustrated Newspaper* – is “not always invaded by reproducing a part of the work.”

Where portions are extracted and published in a book or newspaper by another, the question whether there has been piracy depends upon the extent and character of his use of them. Thus it is not piracy for a reviewer or commentator to make use of portions of a copyrighted work for the purposes of fair exposition or reasonable criticism. ... A test frequently applied is whether the extracts, as used, are likely to injure the sales of the original work. [citations omitted]²²⁶

But for some of the language omitted here concerning the “appropriation substantially of the labors of the original author,”²²⁷ this 1886 exposition of the fair use doctrine might well have been used a century later when the Supreme Court, in another *Harper* case, gave the fair use doctrine its definitive interpretation. In so doing, the Court exposed the inadequacy of both the fact-expression dichotomy and the fair use doctrine in protecting the public’s interest in news from the media companies that generate it.

In *Harper & Row, Publishers, Inc. v. Nation Enterprises, Inc.*,²²⁸ the Supreme Court denied the protection of the fair use doctrine to a 2,250-word magazine article concerning President Gerald Ford’s pardon of President Richard Nixon.²²⁹ The article was based on Ford’s still-unpublished memoirs, which had been “leaked” to *The Nation* magazine,²³⁰ and included 300 to 400 words taken verbatim from the manuscript.²³¹ *The*

²²⁶ *Id.*

²²⁷ *Id.* The notion that the original author’s “sweat of the brow” had a bearing on the degree of protection afforded was definitively quashed in *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991).

²²⁸ 471 U.S. 539 (1985).

²²⁹ *Id.* at 543.

²³⁰ *Id.*

²³¹ *Id.* at 548.

Nation's article “scooped” a 7,500-word excerpt that *Time Magazine* was to publish under license from Ford’s publisher, Harper & Row, and Time reneged on \$12,500 of the \$25,000 license fee.²³²

Unquestionably, the public had an extraordinary interest in the “facts” embodied in Ford’s memoirs. Had *The Nation* refrained from using Ford’s actual expression, Harper would have had no recourse to copyright law for redress.²³³ Other causes of action might have been invoked, such as tortious interference with contract, although that might well have been trumped by the public interest in the information.²³⁴

But *The Nation* argued that the public also had a legitimate interest in Ford’s actual expression, and, apparently in *The Nation’s* view, 300-400 words from a book-length manuscript were necessary to vindicate that interest. In particular, *The Nation* argued that the public’s interest in hearing Ford’s reasons for pardoning Nixon – in Ford’s own words – outweighed Ford’s right to control first publication of his memoirs. “[T]he precise manner in which [Ford] expressed himself [were] as newsworthy as what he had to say.”²³⁵

The Court acknowledged that some of Ford’s expression was “so integral to the idea expressed as to be inseparable from it,” but found that *The Nation* used more

²³² *Id.* at 543.

²³³ *Id.* at 557 (paraphrasing *Iowa St. U. Research Found. v. Am. Broad Cos.*, 621 F.2d 57, 61 (1980): “[Respondent] possessed an unfettered right to use any factual information revealed in [the memoirs] for the purpose of enlightening its audience....”).

²³⁴ See *Restatement (Second) of Torts*, § 767(d) cmt. f (1979).

²³⁵ 471 U.S. at 556.

expression than necessary to convey those ideas.²³⁶ More importantly, the Court declined to find what it described as a “public figure exception” to copyright. “Whether verbatim copying from a public figure’s manuscript in a given case is or is not fair use must be judged according to the traditional equities of fair use.”²³⁷ Accordingly, the Court stepped through the four prongs of the fair use doctrine.

On the first, “Purpose of the Use,” the Court acknowledged that the article was “news reporting,” however that might be defined, but found the “crux” of the matter in whether the magazine stood to profit from the exploiting the copyrighted material without paying the customary price.²³⁸ The Court seemed particularly incensed by the magazine’s use of a “purloined manuscript” with the intent to “scoop” a competitor who fairly bid for the rights.²³⁹ If “news reporting” is a favored purpose under fair use analysis, it seemed to weigh very lightly against *The Nation*’s perceived commercial interests in publication.

On the second prong, “Nature of the Copyrighted Work,” the Court again conceded that the memoirs fell into a fair use-favored category, historical narrative or autobiography.²⁴⁰ But whatever advantage that might have bestowed was quickly negated. The Court found the fact that a work is unpublished “is a critical element of its ‘nature’” and the “scope of fair use is narrower with respect to unpublished works.”²⁴¹

²³⁶ *Id.* at 563.

²³⁷ *Id.* at 560.

²³⁸ *Id.* at 562.

²³⁹ *Id.* at 562-63.

²⁴⁰ *Id.* at 563.

²⁴¹ *Id.* at 564.

The Court added that *The Nation's* “clandestine publication... was hastily patched together and contained ‘a number of inaccuracies,’”²⁴² but did not say what that had to do with the nature of the original work.

On the third prong, “Amount and Substantiality of the Portion Used,” the Court was far less concerned with the math than with the “qualitative value of the copied material.”²⁴³ “In view of the expressive value of the excerpts and their key role in the infringing work, we cannot agree with the Second Circuit that the ‘magazine took a meager, indeed an infinitesimal amount of Ford’s original language.’”²⁴⁴

Finally, the Court said the fourth prong of the fair use analysis, “Effect on the Market,” was “undoubtedly the single most important element of fair use.”²⁴⁵ *Time's* refusal to pay the remaining \$12,500 under its license agreement gave Harper & Row a slam dunk. “Rarely will a case of copyright infringement present such clear-cut evidence of actual damage,” the Court said.²⁴⁶ Even if the economic damage were not so obvious, “to negate fair use, one need only show that if the challenged use ‘should become widespread, it would adversely affect the *potential* market for the copyrighted work.’”²⁴⁷

In *Harper & Row*, the Supreme Court denied a bona fide news magazine the latitude to use 300 or 400 words written by a President of the United States on a story of surpassing public importance. One gets the sense that the step-by-step fair use analysis

²⁴² *Id.*

²⁴³ *Id.* at 566.

²⁴⁴ *Id.* (quoting *Harper & Row Publ. Co.*, 723 F.2d at 209).

²⁴⁵ 471 U.S. at 566.

²⁴⁶ *Id.* at 567.

was merely an afterthought, that the case was largely decided on the ground that Ford was deprived of first publication rights, influenced by the unsavory aspects of “leaks” and “scoops,” and perhaps by the justices’ thoughts about their own memoirs. More charitably, Justice Brennan, writing in dissent, sees the majority succumbing to the “temptation to find copyright violation based on a minimal use of literary form in order to provide compensation for the appropriation of information from a work of history.”²⁴⁸

Joined by Justices White and Marshall, Brennan’s dissent answers the majority analysis prong for prong and concludes that “the Court’s exceedingly narrow approach to fair use permits *Harper & Row* to monopolize information.”²⁴⁹ Quoting Justice Brandeis’s dissent in *INS v. AP*, which warned of an “an important extension of property rights and a corresponding curtailment in the free use of knowledge and of ideas,”²⁵⁰ Brennan went on to offer what he believed to be the essential justification for finding fair use in this case:

The Court has perhaps advanced the ability of the historian – or at least the public official who has recently left office – to capture the full economic value of information in his or her possession. But the Court does so only by risking the robust debate of public issues that is the ‘essence of self-government.’ *The Nation* was providing the grist for that robust debate. The Court imposes liability upon *The Nation* for no other reason than that *The Nation* succeeded in being the first to provide certain information to the public.²⁵¹

²⁴⁷ *Id.* at 568 (quoting *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 451 (1984)).

²⁴⁸ 471 U.S. at 590 (Brennan, J., dissenting).

²⁴⁹ *Id.* at 605.

²⁵⁰ *Id.* (quoting *INS v. AP*, 248 U.S. at 263, Brandeis, J., dissenting).

²⁵¹ 471 U.S. at 605.

That Brennan’s view did not prevail in this case demonstrates the inadequacy of both the fact-expression dichotomy and fair use, even in combination, to protect the public’s interest in news. Few litigated examples better represent the “wedding of expression and idea” than the Ford memoirs,²⁵² and *The Nation’s* “use” of that expression was as much a journalistic imperative as a commercial coup. If Brennan’s argument did not make the case for fair use, then it provides a succinct rationale for removing news from the stifling embrace of the copyright regime.

Part III –Where shall we go?

In some ways, *Harper & Row* is the hard case that makes bad law. First publication rights have a moral foundation beyond the economic underpinnings of American copyright law.²⁵³ President Ford arguably deserved the opportunity to revise his manuscript or reconsider its release altogether, although nothing of that sort appeared to be a factor in the case.²⁵⁴ As suggested above, the unpublished nature of the Ford memoir may well have been the dispositive factor in this case.

Yet, 16 years later, the Supreme Court held that a reporter who broadcast, in violation of federal law, purloined speech that was never meant to be published was

²⁵² See *Nimmer on Copyright*, *supra* n. 221, vol. 1, § 1.10[c][2].

²⁵³ The moral right of publication (*droit de divulgation*) includes both the right of the author to decide whether and when the work is to be published and the right to withdraw the work after publication. Stephen M. Stewart, *International Copyright and Neighboring Rights* § 4.40, 73 (2d ed., Butterworths 1989) [hereinafter Stewart]. Unlike the other three French moral rights, the right of publication was not incorporated into the Berne convention. *Id.* See also *Harper & Row*, 471 U.S. at 551, nn. 4-5.)

²⁵⁴ 471 U.S. at 554 (“We also find unpersuasive respondents’ argument that fair use may be made of a soon-to-be-published manuscript on the ground that the author has demonstrated he has no interest in nonpublication.”).

fully protected by the First Amendment because the speech was publicly important. In *Bartnicki v. Vopper*,²⁵⁵ the speech in question had little or no commercial value; the federal statute in question sought to protect a privacy interest, rather than an economic interest. Otherwise, there is no principled difference between the two cases.²⁵⁶ If *Harper & Row* is still good law, then commercial interests outweigh not only the public's interest in newsworthy information, but also the personal privacy interests of the speaker.

I have argued elsewhere that the public's right to newsworthy information ought to outweigh copyright and suggested any number of mechanisms that might have freed the Ford memoir.²⁵⁷ In this piece, however, I am not really concerned about information of such surpassing public importance. Nor am I interested in exploring further the peculiar case of unpublished news. Here, my concern is the so-called "ownership" of published or broadcast news stories – original works of authorship that relate the "news of the day" to the public.

In my view, such works should be removed entirely from the realm of copyright protection, and their authors' interest in them protected by mechanisms that better safeguard the public's interest in the widest possible dissemination. Specifically, I would permit the republication or rebroadcast, by any third party, of any published or broadcast work commonly understood to be a news story or identified as such by its author after an embargo of twenty-four hours or, if the regular frequency of the original publication is

²⁵⁵ 532 U.S. 514 (2001).

²⁵⁶ One could make the case that, in *Bartnicki*, the information in question would never have been made public but for the violation, whereas, in *Harper & Row*, the public would have received the information soon enough. Of course, that's having one's cake and eating it, too. There is an obvious contradiction in arguing that one's first publication rights – including the right to withhold publication – are sacrosanct, unless one does not intend to publish.

greater than twenty-four hours, after the next regular issue is published. As noted above, such an embargo period was contemplated as part of early copyright law.²⁵⁸

Where the subsequent use is not directly competitive, because the republished product serves a different purpose or market,²⁵⁹ the embargo period would be deemed waived. Such republication or rebroadcast would also be subject to the moral rights of attribution and integrity as defined herein.²⁶⁰ Publishers and broadcasters could bring an action for unfair competition if the embargo is broken, and reporters and producers could enforce their moral rights at any time.

By denying copyright protection for news, such a regime would reduce the incentive for major media companies to treat news stories as commodities valued only for their propensity to attract readers and viewers who, in turn, can be packaged and sold to advertisers. The race to the bottom would end. At the same time, this proposal would protect all of the important interests involved in the news-producing process, including the public's right to know, the reporter's professional reputation, and most of the publisher's or broadcaster's return on investment.

²⁵⁷ Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 *Cardozo Arts & Ent. L.J.* 139, 184-192 (2003).

²⁵⁸ See *supra* nn. 157-161 and accompanying text.

²⁵⁹ This exception to the embargo recognizes positive value of what has been called a “transformative use” in the context of fair use analysis. As Judge Leval has said,

To the extent the secondary work merely exhibits the primary copyrighted work, it is powerfully disfavored by [the “purpose and character of the use”] factor [in fair use analysis]. To the extent, however, that the quoted passages are a raw material utilized for a new intellectual creation of the fair users – to the extent this is a creative or productive use – it is the type of activity intended to benefit from the fair use doctrine for the intellectual enrichment of society.

Pierre Leval, *Fair Use or Foul? The 19th Donald C. Brace Memorial Lecture*, 36 *J. Copy. Socy.* 168, [need pinpoint cite] (1989).

²⁶⁰ See *infra* nn. 263-70 and accompanying text.

Moreover, the proposed rule fully comports with international standards. Legislation embodying the central principles of this proposal is authorized by Article 10^{bis} of the Berne Convention. Specifically, the contemplated acts would allow the “reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character”²⁶¹ unless expressly forbidden by the author. Indeed, the 1948 Brussels text provided for the free use of news stories unless prohibited by national legislation.²⁶²

As in this proposal, the Berne Convention provides that the source must always be clearly indicated whenever news is reproduced in this way.²⁶³ This, Stephen M. Stewart says, emphasizes the continuing respect for the author’s moral rights (*droit moral*) even when economic rights are limited.²⁶⁴ Moral rights may be a largely alien concept in this country, but this right of attribution (*droit de paternité*) seemed perfectly appropriate to Justice Holmes as the solution to International News Service’s appropriation of Associated Press stories.²⁶⁵ Moreover, it seems entirely compatible with the regard in which American bylines are held.²⁶⁶

²⁶¹ *Berne Convention, supra n. 8, art. 10^{bis}.*

²⁶² Stewart, *supra n. 253*, § 5.60(a), 137 (citing the Brussels Act of 1948, art. 9(2)).

²⁶³ *Berne Convention, supra n. 8, art. 10^{bis}.*

²⁶⁴ Stewart, *supra n. 253*, § 5.60(e), 137.

²⁶⁵ 248 U.S. at 248 (Holmes, J., concurring).

²⁶⁶ Stewart defines the right of paternity as including “(i) the right to demand that the author’s name appears in an appropriate place on all copies of the work and to claim authorship of it at all times; (ii) conversely, the right to prevent all others from claiming authorship of the work; (iii) the right to prevent the use of his name by someone else in connection with that other person’s work.” Stewart, *supra n. 253*, § 4.41, 73.

The byline is something more than merely an acknowledgement of authorship; it is (or should be) a personal guarantee of good faith from reporter to reader. Byline “strikes,” where reporters withhold their bylines in protest, often arise during contract negotiations,²⁶⁷ but may also be used to publicly protest editorial policies or practices with which the reporters disagree.²⁶⁸

In a section entitled “Employee Integrity,” the Newspaper Guild’s Model Contract provides that “An employee’s byline or credit line shall not be used over the employee’s protest.”²⁶⁹ If reporters hope to win such recognition from their own publishers, surely no less should be expected from other publishers who use the reporters’ work for free. Under my proposal, use of another news outlet’s story would require attribution to both the reporter or producer and the publisher or broadcaster.

This provision of the Guild model contract also implicates the moral right of integrity (*droit de respect de l’oeuvre*) by requiring that substantive changes in material submitted shall be brought to the employee’s attention before publication. Additionally, reporters operating under such a contract may “not be required to write, process or prepare anything for publication in such a way as to distort any facts or to create an

²⁶⁷ See, e.g., A Sun Staff Writer, *In Union Action, Baltimore Sun Journalists Withhold Bylines*, Balt. Sun (June 16, 2003) (available in LEXIS, News library, News, All file); Frank Ahrens, *'Byline Strike' Begins at Post; Guild Calls for 5-Day Action as Contract Talks Hit Standstill Over Union-Membership Rules*, Wash. Post E1 (Oct. 1, 2002); From Staff and News Services, *Byline Strike Begins Today at Portland Papers*, Portland Press Herald 6D (July 14, 2001).

²⁶⁸ See, e.g., Antonia Zerbisias, *Bylines More Than Just a Name*, Toronto Star C6 (Oct. 28, 2002); Lori Robinson, *No One’s Laughing*, Am. Journ. R. 8 (April 2000) (discussing byline strike protesting suspension of *Toledo Blade* reporter for parody cartoon); *TNG Canada Condemns CanWest Global for Latest Censorship Incident*, Can. NewsWire (Oct. 7, 2002) (describing byline strike called to protest “watering down” of story covering speech critical of newspaper’s parent publishing company).

²⁶⁹ The Newspaper Guild, *U.S. Model Contract*, <http://www.newsguild.org/barg/display.php?storyID=146> (accessed Oct. 27, 2003).

impression which the employee knows to be false.”²⁷⁰ Again, I would impose similar limitations on any subsequent use of the original story.

Three serious concerns with this proposal remain to be discussed: defining “news,” curtailing “free riders,” and preserving the incentive to produce quality journalism. We consider each of these in turn.

A. Defining the News

Obviously, the feasibility of this proposal requires a workable definition of “news.” Resolving that question legislatively comes dangerously close to licensing and raises unnecessary constitutional issues. Fortunately, “news” is usually defined as such by those who gather and disseminate it, and when a dispute does occur, the judicial inquiry need be no more challenging than the fair use analysis judges undertake now.²⁷¹

The problem of defining news was recently cited by the Federal Communications Commission in adopting an anti-piracy mechanism for digital broadcast television.²⁷² The FCC’s order requires consumer electronics manufacturers to limit the copies that can be made of any digital television programming in which broadcasters have inserted some identifying computer code called a “flag.” The hardware manufacturers and various other commenters had urged FCC to prohibit use of the flag for news and public interest

²⁷⁰ *Id.*

²⁷¹ Although the *Harper & Row* Court endorsed the view that “courts should be chary of deciding what is and what is not news,” 471 U.S. at 561 (citing *Harper & Row Publ. Co. v. Nation Enters.*, 723 F.2d 195, 215 (2^d Cir. 1983) (Meskill, J., dissenting)), it did not contradict the Second Circuit’s confident assertion that *The Nation*’s article “must be characterized as the reporting either of news or of recent history.” 723 F.2d at 206-7.

²⁷² *In re Digital Broadcast Content Protection*, Rpt. & Order & Further NPRM, MB Docket 02-230 ¶ 38 (F.C.C. Nov. 4, 2003).

programming.²⁷³ The FCC agreed instead with the broadcasting and motion picture industries, which had argued, in part, that the prohibition would implicate FCC overview of content.²⁷⁴ Although I believe the implication is exaggerated, I am more comfortable

²⁷³ *Id.*

²⁷⁴ *Id.* Of course, I disagree with the content providers' other arguments against prohibiting use of the flag with news and public interest programming, namely, that such programming "merits the same level of protection afforded to entertainment programming" and "to do otherwise could discourage its creation." *Id.* Rather, I more closely, although not entirely, agree with the dissenting opinions in that case:

I dissent in part, first, because the Commission does not preclude the use of the flag for news or for content that is already in the public domain. This means that even broadcasts of government meetings could be locked behind the flag. Broadcasters are given the right to use the public's airwaves in return for serving their communities. The widest possible dissemination of news and information serves the best interests of the community. We should therefore be promoting the widest possible dissemination of news and information consistent, of course, with the copyright laws. And neither the FCC nor the broadcast flag should interfere with the free flow of non-copyrightable material. As discussed above, this Order attempts to strike a balance between preserving consumers' reasonable and flexible uses and permitting content providers a technological means to protect their copyright. But on the scale of the public interest, we must accord great weight to enabling lawful consumer and educational use of content when we are talking about something that goes to the core of America's public discourse and its civic dialogue. I understand the arguments of those who caution that precluding the flag for news and information could entail some difficult and sensitive decisions about what constitutes news and public information and what does not. Even if we are confronted with some difficult decisions, I would rather attempt the difficult than deny the free flow of news and information the widest possible dissemination.

Id. (Statement of Commissioner Michael J. Copps, Approving in Part, Dissenting in Part).

Nor do I take lightly a government-required protection regime that could restrict the free flow of news or public affairs programming which is at the heart of public discourse in our society. Our country has a long history of promoting widespread public access to broadcast television. In return for the free use of the spectrum, broadcasters are expected to serve their local communities. Consistent with copyright law, the wider the dissemination of news and public affairs programming, the better our communities and our democracy are served. The lawful consumer and educational use of content for scholarship, commentary, criticism, teaching, research, or other socially beneficial purposes should not be hindered. I see little threat to content creators from a parent e-mailing to family members and friends a local television news clip of a son or daughter

leaving that determination to the courts on a case by case basis than to the legislative or regulatory process.

Certainly, the international copyright regime seems confident that news can be identified by the courts without too much difficulty. Article 2(8) of the Berne Convention states that copyright protection “shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.”²⁷⁵ Nimmer suggests out that this language does not *prohibit* application of copyright protection to news stories,²⁷⁶ and American copyright law now protects such stories within the limits allowed by the fact-expression dichotomy.²⁷⁷ Stewart notes that, under the Berne Convention, the line between unprotected news and “works” of journalism is to be drawn by the national courts.²⁷⁸

The problem of defining news may not be as significant as it first appears. Since the proposed regime would still protect the most important rights associated with true journalism, a rational media company would only litigate the issue in the unusual case

receiving a community service award, or a teacher choosing to show his or her classroom a rebroadcast of a space shuttle launch using an Internet connection.

Id. (Statement of Commissioner Jonathan S. Adelstein, *Approving in Part, Dissenting in Part*).

²⁷⁵ *Berne Convention*, *supra* n. 8, art. 2(8).

²⁷⁶ *Nimmer on Copyright*, *supra* n. 221, § 2.11[B].

²⁷⁷ *See Ga. TV Co. v. TV News Clips of Atlanta, Inc.*, 718 F. Supp. 939, 947-48 (N.D. Ga. 1989).

²⁷⁸ Stewart, *supra* n. 253, § 5.55, 135.

The guideline for the courts is the general principle underlying the Convention that to constitute a work there must be a certain amount of creativity. It is left to the national courts to decide in each case whether the news item in issue is “merely relating the facts in a dry and impersonal manner or constitutes a story related with a degree of originality.” The degree of originality required may vary from country to country. Where standards of originality are high, e.g., in France, the laws of unfair competition may give a remedy where copyright does not, e.g., one press agency taking its reports from another one.

where a work has substantial economic value over an extended period of time. Such a work is not likely to be news anyway.

Still, I am prepared to leave the definition largely in the hands of the media itself.²⁷⁹ That programming that a publisher or broadcaster promotes as news will be unprotected except as described herein; programming for which traditional copyright is desired may not be described as news.²⁸⁰ At the very least, a modicum of “truth in packaging” ought to emerge from this scheme.²⁸¹

B. Curtailing Free Riders

The notion that “free riding” on someone else’s effort for economic gain is wrong clearly predates *INS v. AP*,²⁸² but that case is a good place to begin reexamining the contention that misappropriation is a significant problem in the news business that requires control through copyright law. I believe it does not.

Id.

²⁷⁹ I note with interest that Professor Baker has also suggested giving legal weight to media decisions regarding their own publication choices. In a discussion of confidentiality agreements between reporters and sources, Baker hypothesizes that common law doctrine could evolve to make such “contracts” unenforceable where they restrict disclosure of information needed to serve the public interest. “To avoid content evaluation of the press’s publication decisions, its publication of the information could be taken as conclusive of whether the public is served.” Baker, *supra* n. 65 at 60.

²⁸⁰ And, in the case of broadcast programs involving political candidates, may not qualify as an exception under Section 315 of the Federal Communications Act, 42 U.S.C. 315(a) (2000). Thus, a broadcaster would have the option of enforcing copyright for its political programming or providing equal on-air opportunities to opposing candidates. Either way, the public would benefit.

²⁸¹ I do not think this approach requires a return to the copyright notice abandoned by the 1976 act in conformance with Berne requirements. I am content to let the courts adjudicate the adequacy of notice through context one case at a time. There may be some difficulty at the margins, but hard news should be readily identifiable for the most part.

²⁸² Judge Grosscup’s colorful opinion in *Natl. Tel. News Co. v. Western Union Tel. Co.*, 119 F. 294, 296 (7th Cir. 1902), compares the act of appropriating and reselling another’s wire service reports to that of a parasite ultimately destroying its host and leaving the public without any news service at all.

Let us first consider what appears to be the principal rationale of *INS v. AP*: free riding constitutes unjust enrichment of the pirate at the expense of the entrepreneur.

[T]his defendant... admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown....²⁸³

Enrichment, yes. But unjust? We all derive some cost-free benefit from the labor, skill, and money of others. Sir Isaac Newton famously stood “on the shoulders of giants” to see the scientific truths he discovered,²⁸⁴ and I got 23 free minutes at a parking meter today on someone else’s quarter. We react viscerally against anyone (else) getting “something for nothing,” yet we have declined to protect facts, or even compilations of facts that required labor, skill, and money to produce, from appropriation.²⁸⁵ To be sure, copyright law protects original expression from appropriation, but not to prevent unjust enrichment. If that were the motive behind copyright law, the Supreme Court would not have rejected the “sweat of the brow” doctrine.²⁸⁶

So, if free riding is a problem, it must be a function of unfair competition. That is, the problem exists when – and only when – the republisher’s use of the original expression hurts the original publisher’s business out of all proportion to the republisher’s

²⁸³ 248 U.S. at 239.

²⁸⁴ Generally attributed to Newton’s letter to Robert Hooke, dated Feb. 5, 1676, based on an aphorism from Robert Burton’s *The Anatomy of Melancholy*: “Pygmies placed on the shoulders of giants see more than the giants themselves.” Burton’s source is said to be the 12th Century scholastic Bernard de Chartres, who reportedly wrote: “In comparison with the ancients we stand like dwarfs on the shoulders on giants.” Cosmic Baseball Association, <http://www.cosmicbaseball.com/newton8.html> (updated Nov. 24, 2003). See also Myers, *supra* n. 222, at 681.

²⁸⁵ *Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

²⁸⁶ *Id.* at 359-60.

investment or risk or creativity. Put another way, where the republisher's use has no adverse effect on the publisher's business – as when the uses are not directly competitive – free riding should not be an issue. One example might be websites that post copies of newspaper articles and solicits comments from their members.²⁸⁷ Even where there is an adverse effect, it may be justified by the value added by republication. Examples of such uses might include the video monitoring or “clipping” services that tape and may sell copies of broadcast news stories that feature their clients,²⁸⁸ or websites containing searchable databases of news stories from across the globe.²⁸⁹

The only realistic adverse effect of these examples might be an unfair competitive advantage for the republisher if, but only if, the original producer wanted to enter the same business. Copyright law now recognizes the holder's proprietary interest in prospective markets for her copyright material,²⁹⁰ but one may question whether that

²⁸⁷ *L. A. Times & Wash. Post v. Free Republic*, No. 98-7840 (C.D. Cal. Sept. 28, 1998).

²⁸⁸ *See, e.g., CNN v. Video Monitoring Serv., Inc.*, 940 F.2d 1471 (11th Cir. 1991), *vacated*, 949 F.2d 378 (11th Cir. 1991), *appeal dismissed*, 959 F.2d 188 (11th Cir. 1992) (en banc) (per curiam); *Pacific & Southern Co. v. Carol Duncan*, 744 F.2d 1490 (11th Cir. 1984), *on remand*, 618 F. Supp. 469 (N.D. Ga. 1985), *aff'd* 792 F.2d 1013 (11th Cir. 1986).

²⁸⁹ Such databases exist now, of course, but accessibility is limited by cost or purpose. Both Lexis, <http://www.lexis.com>, and Westlaw, <http://www.westlaw.com>, maintain fee-for-access databases of licensed news stories from various print sources, while Vanderbilt University hosts a television news archive for educational uses, <http://tvnews.vanderbilt.edu/>, with fees ranging from \$25 to \$100 per half hour. Internet search engines are constrained by the availability of self-archived stories; Google's new “news” search engine focuses only on current news, <http://news.google.com> (all accessed Feb. 7, 2004).

²⁹⁰ *See, e.g., Campbell v. Acuff-Rose Music*, 510 U.S. 569(1994):

The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the original. The enquiry "must take account not only of harm to the original but also of harm to the market for derivative works." (citations omitted)

recognition is appropriate for news. As long as sufficient incentive remains to ensure that the news is gathered in the first place, there is no reason to reduce competition in the dissemination of news and every reason to encourage it. We return to the question of incentive shortly.

Before that, however, we must consider the case where the competition is direct and potentially damaging to the original producer, such as the cost-free, risk-free republication of wire service stories without attribution or added value that actually occurred in *INS v. AP*.²⁹¹ The result, of course, was the Supreme Court's endorsement of the misappropriation tort in such circumstances. While the immediate application of the tort may have been reasonable, it was certainly poor public policy.

Criticism of the misappropriation tort abounds,²⁹² and it has effectively been eliminated from the Restatement (Third) of Unfair Competition.²⁹³ Perhaps the most telling came from Justice Brandeis's dissent in *INS v. AP* itself:

²⁹¹ This characterization of the situation in *INS v. AP* reflects the majority view in that case and, perhaps because that view prevailed, the conventional wisdom today. In retrospect, Justice Brandeis, not surprisingly, may have had the clearer view. Brandeis found nothing anticompetitive in *INS's* taking:

The acts here complained of were not done for the purpose of injuring the business of the Associated Press. Their purpose was not even to divert its trade, or to put it at a disadvantage by lessening defendant's necessary expenses. The purpose was merely to supply subscribers of the International news Service promptly with all available news. ... Furthermore, the protection to these Associated Press members [afforded by the injunction] consists merely in denying to other papers the right to use, as news, information which, by authority of all concerned, had theretofore been given to the public by some of those who joined in gathering it; and to which the law denies the attributes of property.

248 U.S. at 261 (Brandeis, J., dissenting).

²⁹² See *supra*, n. 222.

²⁹³ See *Restatement (Third) of Unfair Competition: Appropriation of Trade Values* § 38 & cmts. c & d (1995); see also Myers, *supra* n. 222.

The general rule of law is, that the noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions, the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.²⁹⁴

And that determination, Brandeis believed, should only be made through legislation.²⁹⁵ Of course, bringing news stories under copyright law would have solved that problem, whatever Brandeis’s views on its propriety. Now, however, copyright and related laws have become nearly as restrictive as misappropriation. In particular, the unholy combination of the Digital Millennium Copyright Act²⁹⁶ and the Supreme Court’s decision in *Eldred v. Ashcroft*²⁹⁷ now allows copyright owners to seal works away from the public utterly and forever.²⁹⁸

As noted above, this proposal would remove news stories from copyright protection, but would not restore an unbounded misappropriation tort. Rather, the

²⁹⁴ 248 U.S. at 250.

²⁹⁵ *Id.* at 267.

²⁹⁶ 17 U.S.C. §§ 1201 et seq.

²⁹⁷ 537 U.S. 186, 204 (2003) (upholding a 20-year extension of the copyright term and reaffirming Congress’s authority to set the duration of copyrights).

²⁹⁸ The DMCA effectively destroys the first-sale doctrine for all digital media as well. Under the first-sale doctrine, the first purchaser of a newspaper, for example, can legally sell, rent or give it away to another prospective reader without running afoul of the copyright laws. 17 U.S.C. 109(a). Rights management tools safeguarded by the DMCA could prevent the first reader from downloading, printing or forwarding the articles that appear only in digital format. *See, e.g., Comments of the Library Associations, Before the Library of Congress, the U.S. Copyright Office, and the Department of Commerce, National Telecommunications and Information Administration, Inquiry Regarding Sections 109 and 117*, Docket No. 000522150-0150-01 (Aug. 4, 2000), <http://www.copyright.gov/reports/studies/dmca/comments/Init018.pdf> (visited Feb. 9, 2004), at 4. *But see* U.S. Copyright Office, DMCA Section 104 Report (Aug. 2001) at http://www.copyright.gov/reports/studies/dmca/dmca_study.html (visited Feb. 9, 2004).

proposal would permit a sharply curtailed tort claim only where the republisher directly competes with the original producer – that is, non-transformative uses – and temporary embargos are broken. Tort claims would also be available for violating the moral right of attribution – as Justice Holmes advocated in his concurring opinion in *INS v. AP*²⁹⁹ – or the moral right of integrity.³⁰⁰ The remaining question is whether these very limited legal rights are sufficient to preserve the incentive to produce high quality journalism.

C. Preserving Quality Journalism

Underlying all copyright law is the idea of incentive. The constitutional language authorizing Congress to grant this limited monopoly to authors in their writings declares that its purpose is to “To promote the Progress of Science,”³⁰¹ i.e., knowledge, and the Supreme Court has emphasized the importance of the profit motive to the overall copyright scheme.³⁰² It is certainly appropriate to ask what incentive news organizations will have to gather and disseminate news in the absence of copyright protection.

Of course, as soon as the question is asked, the answer becomes obvious. News stories have only been subject to copyright for the last century or so, but news has been gathered and disseminated for millennia. Mitchell Stephens tells us our “urge to tell” the

²⁹⁹ 248 U.S. at 248 (Holmes, J., concurring) (“But as, in my view, the only ground of complaint that can be recognized without legislation is the implied misstatement [as to the news gatherer], it can be corrected by stating the truth; and a suitable acknowledgment of the source is all that the plaintiff can require.”)

³⁰⁰ Limited rights of attribution and integrity are already incorporated in American copyright law for visual artists. 17 U.S.C. § 106A.

³⁰¹ U.S. Const., art. 8, sec. 8.

³⁰² See, e.g., *Eldred*, 537 U.S. at 212 n. 18 (Justice Stevens’ characterization of reward to the author as “a secondary consideration” of copyright law ... understates the relationship between such rewards and the “Progress of Science.”)

news is deeply engrained in our collective psyche.³⁰³ “[M]ost of the world’s peoples have given away the news they have stumbled upon without charge. ... Even where news dissemination becomes a profession, those professionals have found that they can obtain their raw material – fresh information – from their sources without financial charge.”³⁰⁴

Unlike food, shelter or clothing, most news has value only in the telling; it is worthless when wrapped in silence. And news spoils too quickly to allow it to be squirreled away for future use....

Not that we bother to calculate the perishability or economic utility of some choice bit of news before we share it or wait for a nudge from social pressure to spread the news we have collected. We give news as we receive it – eagerly. We are, most of us, free and enthusiastic news-tellers.³⁰⁵

Stephens goes on to explain that the “act of telling news brings with it a series of ego gratifications: the opportunity to appear well informed, knowledgeable, current...; the chance to capture attention, to perform and win appreciation; and the privilege of branding events with one’s own conclusions.”³⁰⁶ He finds that news-tellers’ own perceptions and experiences are enhanced by sharing them, which bestows the power to invest those events witnessed or experienced with validity and importance, “events with the stature of news.”³⁰⁷

News, then, is both pulled and pushed through our society...: the uninformed anxious to obtain news, the informed eager to give it away.

³⁰³ Stephens, *supra* n. 76, at 18.

³⁰⁴ *Id.* at 19

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 20.

³⁰⁷ *Id.*

Even without benefit of sophisticated information technologies, the news, driven by these complementary desires, can obtain impressive speeds.”³⁰⁸

But the argument can be made that this natural inclination to gather and disseminate news will have little impact in the modern world, where a significant amount of capital is required to reach a mass audience – even through the Internet – and the absence of copyright protection and, therefore, the prospect of future returns, is hardly conducive to investment. One could imagine the General Electrics and Disneys pulling out of the news business altogether, leaving us to rely on Internet “blogs” or even more primitive equivalents for our news.

This rather bleak view is predicated at least two questionable assumptions. First, that all major media corporations place the bottom line ahead of their civic responsibilities as journalists. While that might be true of a General Electric or Disney, it is much harder to imagine the *New York Times* or Associated Press “pulling out of the news business” under any conceivable copyright or non-copyright regime. Whatever revenues the print media may receive from their copyrights, or whatever losses might be incurred by the absence of copyright, surely constitute a tiny fraction of their overall revenue and an even smaller portion of their incentive to publish.

The second assumption is that the departure of these media giants from the news business would mean a corresponding loss of quality journalism. As discussed in Part I, one might well take issue with the proposition that we’re getting quality journalism now from their involvement. As Baker points out, media firms “cannot adequately capture

³⁰⁸ *Id.*

the positive benefits of investigative journalism” and will therefore “disproportionately underproduce the most valuable investigative material.”³⁰⁹

Baker uses the example of evening news programs to suggest that the public may receive “only marginally more benefits from a number of virtually identical products” produced at a great expense than it does from a single product produced far more cheaply.³¹⁰ “For example, both NBC and ABC evening news might cost roughly the same to produce, but if the programs are sufficiently similar, the public might receive virtually the same value, an evening news program, whether or not the second exists.”³¹¹

In short, any concern that depriving the media industry of copyright protection for hard news will deprive the public of quality journalism is probably unfounded, or at least, exaggerated. Indeed, I believe this proposal would result in a reinvigorated journalism, one that features a much greater role for the independent journalist, and a somewhat lesser role for the profit-motivated media company.

Incorporation of Guild contract language into my proposal reflects my view that strengthening the bond between reporter and audience, even at the expense of the employer-employee relationship, is a healthy step in the right direction.³¹² I am not prepared to advocate Baker’s most radical suggestion, the enactment of a law permitting journalists to elect their own editors, thus insulating them from owners’ profit-motivated

³⁰⁹ Baker, *supra* n. 68, at 50.

³¹⁰ *Id.* at 31.

³¹¹ *Id.*

³¹² See Eric B. Easton, *Annotating the News: Mitigating the Effects of Media Convergence and Consolidation*, 23 U.A.L.R. L. Rev. 143, 165-66 (2000).

interference,³¹³ but I am sympathetic to the development of a cadre of reporters and editors whose first allegiance is to their professional standards, rather than the bottom-line orientation of ownership.³¹⁴

In the final analysis, the production of quality journalism will depend on individual reporters and editors. The law, especially copyright law, can only nudge the media industry in one direction or another. I am under no illusion that this modest proposal will ever be adopted by Congress. But someday, somewhere, some enlightened newspaper publisher just might dedicate all news stories to the public and challenge other publishers to do the same. Then, and only then, will the public really own what Philip Graham called the “first rough draft of history.”³¹⁵

³¹³ Baker, *supra* n. 68, at 171-72.

³¹⁴ *Id.* at 189, citing James Curran, *Mass Media and Democracy Revisited*, in *Mass Media and Society* 81, 105-6 (James Curran & Michael Gurevitch, eds., 2d ed., St. Martin’s Press 1996).

³¹⁵ Jeffrey Frank, *Washington Mystery: Why is it so hard to write about our nation’s capital?*, *The New Yorker* 99 (Nov. 18, 2002).