
**COPYRIGHT HISTORY AND THE FUTURE:
WHAT'S CULTURE GOT TO DO WITH IT?**

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*Civilization, as a whole, moves on; culture comes and goes.*¹

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¹ Edward Sapir, *Culture, Genuine and Spurious*, in *SELECTED WRITINGS IN LANGUAGE, CULTURE, AND PERSONALITY* 308, 317 (David G. Mandelbaum ed., 1985).

We become Janus-faced at the turn of every century and, more so, at the turn of each millennium. Facing both backward and forward, we are tempted to interpret history to anticipate or to influence the future. This temptation is now strong in the field of copyright where rapid media changes seem to be compounding uncertainties.

For this very reason, it would be foolhardy to indulge in prophecy. Rather this Article, written as the third millennium opens, seeks to prompt thought about future copyright lawmaking. Its first part will draw some working hypotheses about copyright functions from a selective overview of history. In the light of these hypotheses, its second part will frame a few issues for the near future of copyright. Its third part will ask how, in resolving these issues, to achieve copyright aims.

I. HYPOTHESES FROM HISTORY

A pair of seminal enactments punctuate copyright history: the Statute of Anne in 1710 and the Berne Convention in 1886. We shall then survey the following three phases: pre-copyright regimes up to 1710; the classic copyright regime through 1886; and the global copyright regime to the present. How do we propose to cover so much time in so few pages? By flying high over a wealth of subtle cultural trends, noting only a few of these in passing, and by following the grand lines of media and market trends.

A. Pre-Copyright: The Risk Threshold

Let us start by reaching back millennia before our modern era. We propose to compare and contrast overall functions of pre-copyright regimes with functions that became critical only as copyright later emerged. This overview of history will prompt the following initial hypothesis: *Only when media technology and market conditions made piracy profitable could copyright arise.* However, once that risk threshold was reached, initial legal responses were state-enforced monopoly and censorship schemes, not yet copyright. One function, but not the only function, which the law tried to fulfill at this threshold was protection against piracy.

1. From Oral to Literate Culture

It is tempting to trace continuous progress from early analogs to copyright law through to its present form. However, the notion of “progress” does not apply easily to cultural creativity that forms the conventionally cited object of copyright protection.² Indeed, from the mists of time, human cultures have been proliferating and interacting with such exuberance, and in such a wealth of heterogeneous forms, that it seems arbitrary

² For critical analysis, see *infra* text accompanying notes 252-77.

to order them into any linear progression.³ Within the variety of cultural forms that have appeared, however, it is nonetheless possible to bring some provisional order by imposing the distinction between oral and literate cultures.⁴

In oral cultures, bards and musicians improvise in live performances,⁵ and artisans recraft models in making everything from everyday utensils to ritual objects.⁶ Oral law, including property-like notions, can vary flexibly in response to an open-ended range of social variables; by contrast, writing tends to crystallize law in categorical terms.⁷ It is therefore misleading to analogize between, on the one hand, open-textured law that controls the transmission of culture in oral communities and, on the other, specialized regimes of intellectual property in literate societies.⁸ Furthermore, creators retain mastery over what they input into oral cultures on the spot: bards and musicians capture audiences with their performances in inimitable, often charismatic styles; artisans fashion artifacts that their special skills often invest with magical effects.⁹ Creators can keep such know-how secret to maintain their status, while law and custom guide how textual

³ For this position, see CLAUDE LÉVI-STRAUSS, *RACE AND HISTORY* (1952).

⁴ For further analysis, see HAROLD A. INNIS, *EMPIRE AND COMMUNICATIONS* (David Godfrey ed., Press Porcépic 1986) (1950); JACK GOODY, *THE LOGIC OF WRITING AND THE ORGANIZATION OF SOCIETY* (1986).

⁵ See, e.g., ERIC A. HAVELOCK, *PREFACE TO PLATO* 93-94 (1963) (distinguishing oral improvisation in pre-Classical Greece and in later peasant societies).

⁶ See, e.g., ALFRED GELL, *ART AND AGENCY: AN ANTHROPOLOGICAL THEORY* 219 (1998) ("Marquesan style is only the sedimented product of an infinite number of tiny social initiatives taken by Marquesan artists over a long period of historical development.").

⁷ See generally KATHERINE S. NEWMAN, *LAW AND ECONOMIC ORGANIZATION: A COMPARATIVE STUDY OF PREINDUSTRIAL SOCIETIES*, esp. 205-06 (1983) (analyzing property-like notions in largely oral cultures); GOODY, *supra* note 4, ch. 4 (distinguishing how oral and written laws develop).

⁸ See generally Peter Sutton, *Dreamings*, in *DREAMINGS: THE ART OF ABORIGINAL AUSTRALIA* 13, 22 (Peter Sutton ed., 1988); Eric Michaels, *Aboriginal Content: Who's Got It? Who Needs It?*, in *BAD ABORIGINAL ART: TRADITION, MEDIA, AND TECHNOLOGICAL HORIZONS* 21, 31-32 (1994) (both touching on variables, such as status, knowledge, kinship, locality, etc., that bear on complex Aboriginal law on point). See, e.g., *Bulun Bulun v. R. & T. Textiles Pty. Ltd.*, 41 I.P.R. 513 (1998) (Federal Court, Australia) (while finding analogs in Aboriginal law to copyright, declining to enforce those analogs by recourse to Australian copyright law, but rather fashioning remedies for them by reference to principles of equity).

⁹ See, e.g., John von Sturmer, *Aboriginal Singing and Notions of Power*, in *SONGS OF ABORIGINAL AUSTRALIA* 63 (Margaret Clunies Ross et al., eds., 1987) (explaining how bards control tribal songs by specialization, allowing them to vary and accentuate the charismatic impact of performances); Alfred Gell, *The Technology of Enchantment and the Enchantment of Technology*, in *ANTHROPOLOGY, ART, AND AESTHETICS* 40 (Jeremy Coote &

forms and artistic techniques are passed on through kinship or like groups.¹⁰

Another example, closer to home, should disabuse us of the illusion of linear progress toward copyright.¹¹ The Classical Greeks, foreshadowing most Occidental ideas, did conceive of intellectual property, but only exceptionally. Among the myriad Greek city-states, only one left us with a recorded instance of a law clearly instituting such property.¹² The Greek city-states went through the transition from oral to literate culture in the middle of the first millennium before our era.¹³ During this time, rhapsodes and authors recited texts to public gatherings, and only gradually did writings begin to be available to private parties.¹⁴ In this intensely creative period, rather than rely on property notions to promote culture, city-states like Athens typically sponsored the visual arts and drama. For example, city-states organized contests at religious festivals, at which new

Anthony Shelton eds., 1992) (how artisans control tribal art as technical virtuosos instilling artifacts with magical influences).

¹⁰ See, e.g., Peter Sutton, *Mystery and Change*, in *SONGS OF ABORIGINAL AUSTRALIA*, *supra* note 9, at 77 (exploring who is entitled to sing songs); HOWARD MORPHY, *ABORIGINAL ART* 158 (1998) (how artistic forms are transmitted “on the basis of kinship and ritual links”); ROBERT BRAIN, *ART AND SOCIETY IN AFRICA* 262-67 (1980) (how artistic know-how in Africa is passed on through kinship, corporate, and other groups); JUDITH PERANI & NORMA H. WOLFF, *CLOTH, DRESS AND ART PATRONAGE IN AFRICA*, ch. 3 (1999) (how artists are supported).

¹¹ As an example of this illusion, consider what some consider to be “history’s first copyright case.” The monk Columba, in the middle of the first millennium of this era, reportedly transcribed the abbot Finnian’s manuscript of the Psalms, only to have the Celtic King Diarmait rule: “To every cow her calf; to every book its copy.” But this report only appeared in uncorroborated sources compiled a millennium later, and the legal bases of the decision are at best susceptible of only speculative reconstruction. See J.A.L. STERLING, *WORLD COPYRIGHT LAW* 1027-28 (1998). Indeed, most reports of old Irish law have been largely filtered through Christian sources, whose perspective was not sympathetic to preexisting, pagan Celtic culture. See D.A. Binchey, *Introductory Matter*, in *CORPUS IURIS HIBERNICI*, ix-xii (1978).

¹² See 5 ATHENAEUS, *THE DEIPNOSOPHISTS* 349 (Charles Burton Gulick trans., Loeb Classics 1963) (recounting that the Sybarites, in Magna Graecia, accorded cooks a statutory monopoly, limited in time, in their new dishes). Cf. Mario Fabiani, *Diritto di autore gastronomico*, 58 *DIRITTO DI AUTORE* 116 (1987) (explaining that such protection could conceivably apply, in patent-like fashion, to the actual technique of preparing a dish or, in copyright-like fashion, to the text of a recipe or, arguably, to the resulting taste: the “proof of the pudding”).

¹³ See INNIS, *supra* note 4, at 59-61, 78-81; HAVELOCK, *supra* note 5, at 291-94.

¹⁴ See FREDERIC G. KENYON, *BOOKS AND READERS IN ANCIENT GREECE AND ROME* 8-26 (2d ed. 1951).

dramatic pieces were performed and winning authors honored.¹⁵ Once premiered, these texts were freely performed again and again throughout Classical Greco-Roman times.¹⁶

2. *The Roman and Chinese Book Trades*

Of course, each Greek city-state constituted a relatively compact society.¹⁷ What about territorially far-flung and culturally pluralistic societies comparable to our own? A pair of striking examples come to mind, both with significant book trades: imperial Rome and imperial China.¹⁸ Many commentators have attempted to explain the absence of copyright law in the one society or the other by referring to rather amorphous, cultural biases.¹⁹ No doubt, such explanations shed light on some of the diverse and kaleidoscopically changing factors that can account for historical trends. Without discounting such factors, our focus will veer toward related media and market trends.²⁰

At the start of the first millennium of this era, there was a flourishing book trade in the Roman Empire.²¹ In workshops, literate slaves, expensive to buy and maintain, transcribed texts onto papyrus sheets and collated and corrected the written sheets. Other slaves assembled these sheets into scrolls and books that were marketed by publishers in Rome and by corresponding bookshops around the Mediterranean. Legal doctrine became increasingly sophisticated in the Roman Empire, so that no great theoretical obstacles would have stopped the Romans from instituting copyright-like entitlements to protect the return on investments that publishers made in introducing works into the book trade.²² The practical

¹⁵ See H.C. BALDRY, *THE GREEK TRAGIC THEATRE*, ch. 4 *passim* (1971).

¹⁶ See *id.* at 131-32.

¹⁷ *Id.* at 15.

¹⁸ These empires have the advantage for us of having been relatively isolated from each other, so that the issue of mutual influence is largely mooted. See 1 JOSEPH NEEDHAM, *SCIENCE AND CIVILISATION IN CHINA*, ch. 7 (1954).

¹⁹ See, e.g., WALTER BAPPERT, *WEGE ZUM URHEBERRECHT* 26-39 *passim* (1962) (positing that the classic Greeks and Romans, with pagan theories of inspiration by the muses, could not conceive of rights based on individual authorship); WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION*, ch. 2 (1995) (invoking the classic Chinese practice of copying old masters, coupled with the use of law for censorship purposes, to explain the absence of copyright even after the Chinese invented the printing press).

²⁰ For methodological options, see RAYMOND WILLIAMS, *THE SOCIOLOGY OF CULTURE*, esp. ch. 1 (Univ. of Chicago Press, 1991) (1981).

²¹ See MARIE-CLAUDE DOCK, *ÉTUDE SUR LE DROIT D'AUTEUR*, 12-15 (1963); BAPPERT, *supra* note 19, at 48-50.

²² Compare DOCK, *supra* note 21, at 12-15 (seeing no such obstacle to extending Roman property notions to intangibles such as texts), with BAPPERT, *supra*

reason they did not, it is submitted, was that any pirate would have had to pay as much as other publishers to buy and maintain skilled slaves to recopy texts marketed in this trade. Thus pirates were discouraged, among other reasons, because they could not obtain the high returns on low investments that better copying media would allow, as we see in our next example.²³

The Chinese invented paper during the first millennium of this era and the printing press toward the end of that millennium.²⁴ With these inventions, copying was made easier and cheaper in China, and imperial authorities did respond by prohibiting and policing the copying of specific works. Private parties also asserted claims to stop such copying by registering works with imperial authorities and marking their claims on copies that they made.²⁵ In China, these measures were arguably reinforced by a complicity between imperial authorities, seeking to censor publishing, and printers and booksellers, seeking to reinforce market positions.²⁶ It would lead us far afield, however, to try to understand the functions which these measures might have served in the complex Chinese cultural and economic circumstances that evolved over the last millennium.²⁷ In any event, these schemes foreshadowed those with which sixteenth-century Europe began to respond to the advent of printing, albeit in different market conditions.²⁸ Let us then move forward to this juncture in history.

note 19, at 46-47 (doubting that Roman legal doctrine could admit economic worth in an intangible). *See also supra* text accompanying note 12 (pointing out that one Greek city-state in Italy had already experimented with legislating intellectual property in culinary dishes).

²³ Cf. BAPPERT, *supra* note 19, at 48-49 (also giving other reasons why so few of the same texts were manufactured and marketed by different Roman publishers).

²⁴ *See* LUCIEN FEBVRE & HENRI-JEAN MARTIN, *THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450-1800*, 72-76 (Geoffrey Nowell-Smith & David Wootton eds., David Gerard trans., 1976).

²⁵ *See* Zheng Chengsi, *Printing and Publishing in China and Foreign Countries and the Evolution of the Concept of Copyright*, [1987] 4 CHINA PATENTS & TRADEMARKS 41 (Part I), [1988] 1 CHINA PATENTS & TRADEMARKS 47 (Part II).

²⁶ *See* ALFORD, *supra* note 19, at 13-17.

²⁷ *See generally* William Alford, *On the Limits of "Grand Theory" in Comparative Law*, 61 WASH. L. REV. 945 (1986) (critiquing culturalist theories of Chinese legal trends).

²⁸ Cf. Zheng Chengsi, *Further on Copyright Protection in Ancient China*, [1996] 4 CHINA PATENTS & TRADEMARKS 62 (noting this parallel and critiquing Alford's culturalist theory of imperial Chinese regulation of the book trade).

3. European Mercantilist Printing Regimes

The printing press was introduced into a fifteenth-century Europe in which elites from medieval times still had traditional prerogatives. For example, the Church, universities, and learned professions acted as censors, and guilds controlled manufacturing and trade. However, as sovereigns tried to form and control nation-states, they cultivated a mercantilist vision that considered society like a giant marionette whose limbs they would manipulate at will.²⁹ The surviving medieval elites reached complex legal compromises with mercantilist sovereigns in the next few centuries: notably, they sought to elaborate on their privileged positions in society, over which these sovereigns exerted increasing power. For example, on the premise of attracting new technologies and investment, nation-states assured enterprises of monopolies in specific fields.³⁰

The printing press gave rise to a burgeoning book trade, which was embroiled in these trends. Printers and book sellers, while multiplying, organized in guild-like groups to avoid competition.³¹ Sovereigns tried to crystallize national consensus with censorship schemes to buttress positions taken in religious struggles and to stop political dissent. We shall focus on three common features of the resulting pre-copyright regime, as England and France elaborated it from the sixteenth to the eighteenth century.³² First, the royal executive came to assert exclusive, centralized jurisdiction over the media, although at times it partially delegated powers to trade groups. Second, *ad hoc* rules governed diverse entitlements, such as patents and privileges, by which the rising nation-state authorized publishers to market books and theaters to stage dramas. Third, such rules were enforced in police measures, subject to courts of the executive or trade groups. These media monopolies reinforced censorship schemes and purported to protect publishers against piracy.

²⁹ For analyses of the transition from medieval to modern conditions, see DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 79-89 (1973); LUCIANO PELLICANI, *THE GENESIS OF CAPITALISM AND THE ORIGINS OF MODERNITY*, chs. 4-7 *passim* (1994).

³⁰ See, e.g., MARJORIE PLANT, *THE ENGLISH BOOK TRADE: AN ECONOMIC HISTORY OF THE MAKING AND SALE OF BOOKS* 102-03 (3rd ed. 1974) (explaining process in the English book trade); NORTH & THOMAS, *supra* note 29, at 98-100 (also noting that these monopolies were often sold to fill state coffers).

³¹ See FEBVRE & MARTIN, *supra* note 24, at 140-42; BAPPERT, *supra* note 19, at 178-216 *passim*.

³² The pre-copyright and copyright regimes analyzed here may be called “paradigms” in the broad sense of the term. For an account of this sense, see THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 174-91 (2d ed. 1970).

First, consider centralization. In England, the Crown, without full powers to tax, could not maintain a powerful bureaucracy.³³ Nonetheless, in the sixteenth century, the English Crown already asserted its prerogatives to control the media.³⁴ Most importantly, it delegated police powers to the Stationers' Company of London in a charter focused on "suppressing prohibited books."³⁵ Only presses otherwise authorized by the Crown fell outside the Stationers' purview, notably the university presses at Oxford and Cambridge and presses with royally granted "patents" to print specific books.³⁶ The Stationers were charged with preventing the printing and distribution of writings that had not been "licensed" by official censors or, at times, the Company's agents.³⁷ By contrast, the French Crown only progressively centralized jurisdiction over the media, more and more taking over medieval elites' diverse prerogatives in the field.³⁸ For example, in the mid-sixteenth century, Francois I authorized Rabelais' *Tiers Livre*, which the Sorbonne, asserting its traditional role as censor, had forbidden.³⁹ In the seventeenth century, the royal executive, rather than the Church, established and oversaw theaters, such as the *Comédie Française*.⁴⁰ With the complicity of the Paris Book Guild, it also increasingly policed the book trade.⁴¹

Second, work-specific rules evolved to govern the media monopolies that executive powers most often granted to trade associations or media

³³ See CHRISTOPHER HILL, *THE CENTURY OF REVOLUTION, 1603-1714*, 30-31 (1961).

³⁴ See Sheila Lambert, *State Control of the Press in Theory and Practice: the Role of the Stationers' Company before 1640*, in *CENSORSHIP AND THE CONTROL OF PRINT IN ENGLAND AND FRANCE 1600-1910*, 1 (Robin Myers & Michael Harris eds., 1992).

³⁵ LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 29 (1968).

³⁶ See PLANT, *supra* note 30, at 100-04; JOHN FEATHER, *PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN*, chs. 1-2 *passim* (1994).

³⁷ See PATTERSON, *supra* note 35, at 36-41, chs. 5-6 *passim*.

³⁸ Cf. AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 53 (Rothman Reprints 1971) (1899) (contrasting English and French historical developments).

³⁹ See FEBVRE & MARTIN, *supra* note 24, at 307; also 1 AUGUSTIN-CHARLES RENOUARD, *TRAITÉ DES DROITS D'AUTEURS* 32-34 (1838) (recounting how, in 1518, the Sorbonne put up posters asserting its jurisdiction to stop the publication of the Concordat of Francois I and Leon X, only to have the Crown deny this jurisdiction and empower the Parliament in Paris to authorize "some good and diligent printers" to publish the document).

⁴⁰ See DOCK, *supra* note 21, at 88-97.

⁴¹ See FEBVRE & MARTIN, *supra* note 24, at 239-47; DOCK, *supra* note 21, at 66-75, 96-97; ROBERT DARNTON, *THE LITERARY UNDERGROUND OF THE OLD REGIME 185-90* (1982).

enterprises.⁴² In England, the regulations of the Stationers' Company entitled any member first registering a work to have the Company stop others from publishing copies.⁴³ Thus the so-called Stationers' copyright came into being, not as a right generally available at common or statutory law, but rather by virtue of the "trade recognition of 'the right of copy.'"⁴⁴ This interest was assignable between Stationers, and it reverted to the Company upon a member's death or his widow's remarriage outside the Company, leaving it without a fixed term.⁴⁵ Furthermore, the holders of royally granted book patents and of Stationers' copyrights developed complex schemes for apportioning shares in the so-called English stock of books.⁴⁶ Over time, the Company's Register became the main source for learning the complex web of rules that governed resulting claims to publish specific books in England.⁴⁷ The French Crown typically granted specific publishers "privileges" to print and sell designated books for limited terms, and it authorized theatrical performances.⁴⁸ For the most part, such publication monopolies benefited printers and booksellers in the Paris Book Guild, which also purported to regulate the book trade.⁴⁹ In any event, in France, royal and trade regulations proliferated into "a vast mass of often conflicting legislation."⁵⁰

It is critical to note the legal status of these media monopolies before considering enforcement. Arising from the Crowns' public powers, Stationers' copyrights, printing patents, and privileges were not strictly private rights in works. Of course, authors have always sold manuscripts as hand-made products with value for the labor invested in writing them.⁵¹

⁴² The Italians were the pioneers in these developments. See, e.g., Paul F. Grendler, *The Roman Inquisition and the Venetian Press 1540-1605*, 1975 J. MODERN HISTORY 47, 48 (explaining that Venice was the first major European publishing center, where more than eight million books were printed in the second half of the sixteenth century); STERLING, *supra* note 11, at 995-96 (setting out texts and translations of early Venetian printing privileges).

⁴³ See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 5 (1967); PATTERSON, *supra* note 35, at 46-64.

⁴⁴ 1 STEPHAN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 15 (1938).

⁴⁵ See PATTERSON, *supra* note 35, at 47-49.

⁴⁶ See FEATHER, *supra* note 36, at 24-30.

⁴⁷ See ADRIAN JOHNS, THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING 213-35, 246, 263 (1998).

⁴⁸ See 1 RENOARD, *supra* note 39, at 62-225 *passim*; DOCK, *supra* note 21, at 65-75.

⁴⁹ See DARNTON, *supra* note 41, at 185-88.

⁵⁰ FEBVRE & MARTIN, *supra* note 24, at 241.

⁵¹ See PLANT, *supra* note 30, at 98-99, 114 (noting trade in manuscripts in medieval times). Cf. DOCK, *supra* note 21, at 56-61 (indicating common ownership of manuscripts generated in monasteries).

But, through the seventeenth century, authors were rarely themselves legally empowered to control the printing and sale of copies of their manuscripts.⁵² For example, in the mid-seventeenth century, when a copy of his *Précieuses Ridicules* fell into the hands of publishers, Molière protested: “It’s a strange thing that one publishes people against their will. . . . Nonetheless, I could not prevent it, and I have suffered the misfortune of having a copy, filched from my room, fall into the hands of booksellers, who by surprise have obtained the privilege of publishing it.”⁵³ Indeed, only gradually did writers’ contracts with publishers begin to mix language that merely sold their manuscripts with language that alienated any entitlements of “copy.”⁵⁴ Playwrights had varying arrangements with theatrical companies, exceptionally sharing ownership of the companies and more often taking shares of ticket sales.⁵⁵

Third, and finally, work-specific rules were enforced by the executive, trade groups, and police measures. Note that, throughout this period, European legal cultures were working out deep-running tensions. For example, local courts, representing the common law in England, and especially the high courts called *Parlements* in France, struggled with national execu-

⁵² The Renaissance Italians were precocious in granting authors entitlements in their works. See, e.g., 2 GEORGE HAVEN PUTNAM, *BOOKS AND THEIR MAKERS DURING THE MIDDLE AGES* 363 (1896-97) (noting the Venetian decree of 1544-5 which required author’s consent before publishing a work). See also PLANT, *supra* note 30, at 109 (giving examples of rare English book patents granted to authors); DOCK, *supra* note 21, at 82-83 (rare French privileges granted to authors).

⁵³ Quoted in 1 PAUL OLAGNIER, *LE DROIT D’AUTEUR* 85 (1934). Molière himself had tumultuous relations even with print publishers with whom he contracted. See RAMON FERNANDEZ, *MOLIÈRE, THE MAN SEEN THROUGH THE PLAYS* 62-68 (Wilson Follett trans., 1958). The relations between staging and publishing plays were also muddled in England from the fifteenth to the eighteenth century. See DAVID SAUNDERS, *AUTHORSHIP AND COPYRIGHT* 41-45 (1992).

⁵⁴ In an example often cited, Milton contracted for the publication of *Paradise Lost* in 1667, granting both the “Manuscript” and the “Booke Copy” of the work, while warranting quiet title. This example is all the more interesting because Milton, in his *Areopagitica*, was developing notions of modern authorship. See MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 27-30 (1993); Peter Lindenbaum, *Milton’s Contract*, 10 *CARDZO ARTS & ENT. L.J.* 439 (1992).

⁵⁵ See, e.g., FEATHER, *supra* note 36, at 30 (explaining arrangements between playwrights and Elizabethan theaters); PAULINA KEWES, *AUTHORSHIP AND APPROPRIATION: WRITING FOR THE STAGE IN ENGLAND, 1660-1710*, ch. 1 (1998) (such arrangements after the Restoration); DOCK, *supra* note 21, at 98-110 (arrangements in French theater).

tives that, ruling by fiat, tried to centralize governance.⁵⁶ Until dissolved in 1641 at the start of the English Civil Wars, the Star Chamber generally had jurisdiction over the book trade, subject to which the Stationers' Court could sanction illicit copies of unregistered works, stop unauthorized publication by breaking up presses and seizing copies, and resolve disputes with regard to copies.⁵⁷ In France, the King's Council had final say over the decisions of the Paris Book Guild and of other decision-making instances, and the royal executive most often exercised police powers, notably by seizing copies distributed without the stamp of either the censor or privilege.⁵⁸

B. *Classic Copyright: Unleashing the Media*

In the seventeenth and eighteenth centuries, mercantilist regimes gave way to *laissez-faire* approaches to the marketplace. Centralized states, which had confirmed old privileges and created new ones, began to relent in their regulatory efforts. Rather, in civil societies, individuals became increasingly free to think, work, and trade as they saw fit, subject to neutral principles of law. Our second historical hypothesis highlights the corresponding shift in media control: *In recognizing authors' private rights in works of the mind, copyright laws tended to decentralize power over the dissemination of creative content through more powerful media such as print.* Although pre-copyright schemes had censorship functions, copyright law lost such functions. While facilitating the control of piracy, this law took on still other functions.

1. *The Market as Communication System*

To understand these trends, it is useful to consider how markets operate as increasingly interconnected communication systems.⁵⁹ In a village market, buyers examine goods on sale from stand to stand, and sellers haggle with them about prices face to face. From there, markets expand in size thanks both to better media for communicating information about

⁵⁶ For further analysis, see THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW*, chs. 7-10 (5th ed. 1956); JOHN A. CAREY, *JUDICIAL REFORM IN FRANCE BEFORE THE REVOLUTION OF 1789*, chs. 1-3 (1981).

⁵⁷ See BIRRELL, *supra* note 38, at 58-64; PATTERSON, *supra* note 35, 46-64; JOHNS, *supra* note 47, at 221-27. *But cf.* FEATHER, *supra* note 36, at 44 (indicating that, in the 1662 Printing Act, Parliament began to extend the jurisdiction of common-law courts in the field).

⁵⁸ See CARLA HESSE, *PUBLISHING AND CULTURAL POLITICS IN REVOLUTIONARY PARIS, 1789-1810*, 10-15 (1991).

⁵⁹ See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. LAW & ECON. 1 (1969).

goods, services, and prices and better means for delivering goods.⁶⁰ Local markets in medieval times gave way to the global marketplace that started to reach out from Europe in modern times, thanks to improved postal systems, periodically printed newsletters, systematic accounting methods, and financial clearing houses. For example, in the seventeenth century, Amsterdam became the European commercial center, as the Dutch rode the crest of such trends.⁶¹

In the seventeenth and eighteenth centuries, the so-called Republic of Letters set literary trends in Europe. Through correspondence, periodicals, bookshops, coffee houses, salons, and clubs, the literate public kept current on what to read.⁶² Printers in the Netherlands and some Swiss municipalities, flourishing free of censorship, produced books that were in turn smuggled into more regulated European countries.⁶³ In England, unauthorized books, whether shipped in from abroad or printed at home, sometimes by Stationers themselves, often competed with those licitly published pursuant to royal patents or Stationers' copyrights.⁶⁴ France, with porous borders and a large land-mass hard to police, found its provincial book markets well supplied by smugglers, renegade printers, and peddlers. These enterprising traffickers offered banned writings along with pirated texts that undercut the monopolies of Parisian publishers.⁶⁵

Like other commodities, books thus tended to move throughout an ever-larger marketplace. Stationers' copyrights and royal patents or privileges did not succeed in fully sealing off local markets from each other. Furthermore, there was increasing resistance to such state-enforced monopoly schemes: most notably, the English Parliament enacted the Statute of Monopolies in 1624 to limit them, although not initially in the field of

⁶⁰ For an overview of this development across world history, see FERNAND BRAUDEL, *AFTERTHOUGHTS ON MATERIAL CIVILIZATION AND CAPITALISM*, chs. 1-3 *passim* (1985).

⁶¹ See INNIS, *supra* note 4, at 148-49, 154; NORTH & THOMAS, *supra* note 29, at 135-42; IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM II: MERCANTILISM AND THE CONSOLIDATION OF THE EUROPEAN WORLD-ECONOMY* 55-59 (1980).

⁶² See ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE: COMMUNICATIONS AND CULTURAL TRANSFORMATIONS IN EARLY-MODERN EUROPE* 136-42 (one vol. ed. 1980); JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 29-43 (Thomas Burger trans., 1989); JOHNS, *supra* note 47, at 111-26.

⁶³ See EISENSTEIN, *supra* note 62, at 143-45, 416-20, 646-47; DARNTON, *supra* note 41, chs. 4-5 *passim*.

⁶⁴ See PLANT, *supra* note 30, at 116-17, 261-62; FEATHER, *supra* note 36, at 21-23; JOHNS, *supra* note 47, at 128-36, 160-74.

⁶⁵ See FEBVRE & MARTIN, *supra* note 24, at 196-97, 237-39, 299-304; DARNTON, *supra* note 41, at 122, 183-85; HESSE, *supra* note 58, at 17-19.

publishing.⁶⁶ Over time, abandoning their faith in such monopolies to build industry, lawmakers had to face the challenge of fashioning a new regime in response to piracy in dynamic media markets.⁶⁷ At the end of the seventeenth century, the Stationers' monopoly lapsed in England; at the start of the eighteenth, the Act of Union brought Scotland and England together. Parliament then had to make law to govern the book trade in the greater British marketplace.⁶⁸

French privileges were subject to legal challenges as well. Early on, pleadings in one French case claimed that "the author of a book is altogether its master and as such may freely dispose of it."⁶⁹ In a *cause célèbre* in the eighteenth century, privileges in La Fontaine's works, notably his *Fables*, had lapsed, and his granddaughters obtained the King's authorization to republish his works, only to have the Paris Book Guild refuse to register their entitlement. The granddaughters convinced the King's Council to overturn this refusal, ostensibly on the premise that La Fontaine, not his prior Parisian publishers, had originally held rights in his own works, rights his granddaughters inherited.⁷⁰ The Crown tried to patch up the old regime: for example, its Edict of 1723 confirmed the power of the Paris Book Guild to exercise self-help remedies, and its Edicts of 1777 and 1778 finally entitled authors generally to hold privileges.⁷¹

2. Individual Creators and the Reading Public

European nation-states, especially the most centralized among them, had instituted monopolies for favored enterprises or trade groups.⁷² The

⁶⁶ See HILL, *supra* note 33, at 262-64, 267 (explaining how royal monopolies ended in England); also HESSE, *supra* note 58, at 41 (explaining that most industrial and commercial monopolies ended before those of the book trade in France). Cf. BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911*, 208-10 (1999) (noting the incremental role of the Statute of Monopolies in the evolution of British intellectual property).

⁶⁷ In Germany, not yet politically centralized, publishers from different regions, coming together in book fairs, themselves developed trade regulations to discourage pirating from region to region. See Martin Vogel, *Deutsche Urheber- und Verlagsrechtsgeschichte zwischen 1450 und 1850*, 19 ARCHIV FÜR GESCHICHTE DES BUCHWESENS 2 (1978).

⁶⁸ See Peter Prescott, *The Origins of Copyright: A Debunking View*, [1989] 12 EUR. INTELL. PROP. REV. 453.

⁶⁹ Pleadings by the counsel Marion in the *Muret* case before the *Parlement* of Paris, March 15, 1586, *quoted in* DOCK, *supra* note 21, at 78-79.

⁷⁰ See OLAGNIER, *supra* note 53, at 95; DOCK, *supra* note 21, at 118-21.

⁷¹ See OLAGNIER, *supra* note 53, at 90-95, 105-10; DARNTON, *supra* note 41, at 186-90; HESSE, *supra* note 58, at 41-44.

⁷² See *supra* text accompanying note 30.

general response, when such mercantilist schemes proved inadequate, was to decentralize decision-making by according general property rights to individual entrepreneurs, without favoring any one group over others. Logically, in the book trade, the next step in this direction would have been to vest publishers with private rights to control the printing and marketing of the writings over which they had obtained control as a matter of fact or law.⁷³ But, instead, we shall see the law go to the furthest extreme by reallocating such rights all the way out to the originators of the works themselves, the authors. The law would also allow the rights to be contractually reallocated, notably to media enterprises that would cater to the public at large.

Why this dramatic shift? The traditional position has stressed that, with the Renaissance, the individual creator began somehow to obtain a privileged status in European culture.⁷⁴ A more current position posits that only in the move from the Renaissance to the Enlightenment did the notion of individual authorship become critical to understanding how works arise.⁷⁵ Different historians highlight different trends: some stress how books prompted the inward cast of mind that we now associate with individual creators working in isolation; others point out how print allowed authors to promote themselves as heroic, individual creators.⁷⁶ Still others find the advent of copyright law itself to be a key catalyst for the tendency to give prominence to individual authors, if only to legitimate

⁷³ Cf. FEATHER, *supra* note 36, at 56 (“the whole public debate had revolved around censorship . . . and the property rights of publishers”).

⁷⁴ See generally JACOB BURCKHARDT, *THE CIVILIZATION OF THE RENAISSANCE IN ITALY* 81-93 (Phaidon 1945) (S.G.C. Middlemore trans., 2d ed. 1878) (giving examples of individual artists, such as Alberti and Da Vinci, whom the Renaissance glorified for their creativity).

⁷⁵ Cf. Michel Foucault, *What Is an Author?*, in *TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM* 141 (Josué V. Harari ed., 1979) (raising the question of when and how, in modern times, the notion of the individual “author” began to be invoked to explain the tenor of texts).

⁷⁶ See MARSHALL McLUHAN, *THE GUTENBERG GALAXY* 130-37 (1962); EISENSTEIN, *supra* note 62, at 132-36, 228-37. *But cf.* PELLICANI, *supra* note 29, at 179-80 (stressing opening up of marketplace as forcing individuals back onto their own inner resources); HABERMAS, *supra* note 62, at 43-51 (pointing to changes in family arrangements, coupled with reading patterns, in the rise of private, individual self-consciousness); JOHNS, *supra* note 47, ch. 6 (tracing out ambivalent modern responses to individual casts of mind prompted by reading).

such law itself.⁷⁷ Rather than decide between these positions, we shall ask how the trends that they highlight effectively fed off each other.⁷⁸

In medieval times, painters and sculptors, for example, were treated as artisans subject to guild rules. But, in the Renaissance, many artists freed themselves of such group ties, instead acquiring individual privileges and titles as members of aristocrats' retinues. In this context, they gradually won the freedom to create outside the terms of their patrons' commissions, and their works started to be priced freely as unique commodities on the marketplace.⁷⁹ An anecdote illustrates how visual artists acquired great prestige in the Renaissance, leading the way to the new status that individual creators generally began to acquire in modern times. Michelangelo, commissioned to make a grandiose tomb for Pope Julius II, lost his temper over difficulties funding the project and his treatment by underlings, and he left Rome in a huff for Florence. Michelangelo then found himself, a mere handworker, entreated by the Pope, one of the most powerful men of Europe, to return to Rome to resume work.⁸⁰

Especially in cultivated city-states like Venice, some Renaissance authors in Italy obtained privileges to publish their own works, and a few became wealthy.⁸¹ In the rest of Europe, however, most writers remained for centuries subject to patrons' whims and, even when eventually vested with copyright, to publishers' greed.⁸² Through the eighteenth century,

⁷⁷ See EISENSTEIN, *supra* note 62, at 239-40; ROSE, *supra* note 54, ch. 7 (1993); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUDIES 425 (1984).

⁷⁸ Cf. KEWES, *supra* note 55, at 128-29 ("I suggest that to accord priority to developments originating in positive law is to limit our understanding of the process by which social and critical conceptions of authorship were formed.").

⁷⁹ See MARTIN WARNKE, *THE COURT ARTIST: ON THE ANCESTRY OF THE MODERN ARTIST* 143-55 (David McLintock trans., 1993); also BRAM KEMPERS, *PAINTING, POWER, AND PATRONAGE: THE RISE OF THE PROFESSIONAL ARTIST IN THE ITALIAN RENAISSANCE* (Beverly Jackson trans., 1992) (laying out Italian trends, on the one hand, from commissions by religious orders and then urban centers to positions with aristocrats and, on the other, from guild governance to professional independence).

⁸⁰ See GEORGIO VASARI, *LIVES OF THE ARTISTS* 263-67 (Simon & Schuster, Betty Buitrougus ed., 1946) (J. Foster trans., 1850) (1568); 1 JOHN ADDINGTON SYMONDS, *THE LIFE OF MICHELANGELO BUONARROTI* 152-59, 176-87, 198-99 (2d. ed. 1893).

⁸¹ See, e.g., 2 PUTNAM, *supra* note 52, at 370 (indicating direct Venetian grants entitling Ariosto, Aretino, and Tasso to publish their own works).

⁸² See, e.g., FEATHER, *supra* note 36, at 40 (indicating that English law started to require authors' consent to publication in 1642, but only to identify authors of unacceptable books); Harold A. Innis, *The English Publishing Trade in the Eighteenth Century*, in *THE BIAS OF COMMUNICATION* 142, 149-50

musicians were in a worse position, mostly working the streets or as servants: for example, “Haydn had to submit almost all his life to the old conditions of a musical retainer; Mozart broke free from the feudal order of things only to come to grief economically.”⁸³ *Literati* such as Defoe did enter into the debate about instituting copyright in England at the start of the eighteenth century, but as much to side with political positions as to favor the cause of authors.⁸⁴ Only when Beaumarchais organized Parisian dramatists on the eve of the French Revolution did writers clearly appear as a pressure group with which to be reckoned as supporting authors’ interests.⁸⁵

Nonetheless, the book trade itself generated support for authors from their readers. The rising, literate middle-classes wanted to buy books freely on an open marketplace. Their ideologues protested against the censors and monopolies of the old regime that left them with limited and expensive access to books.⁸⁶ Such protests fed the great debate on literary property which raged in England and on the Continent in the eighteenth

(Univ. of Toronto Press, 2d ed. 1995) (1951) (explaining that eighteenth-century English writers were still “at the mercy” of monopolistic London publishers); EISENSTEIN, *supra* note 62, at 145-48 (describing the ambivalent position of French “men of letters” in early-modern French and European society).

⁸³ ALFRED EINSTEIN, *A SHORT HISTORY OF MUSIC* 142 (4th ed. 1954). *See, e.g.*, Richard Petzoldt, *The Economic Conditions of the 18th-Century Musician*, in *THE SOCIAL STATUS OF THE PROFESSIONAL MUSICIAN FROM THE MIDDLE AGES TO THE 19TH CENTURY* 159 (Walter Salmen ed., Herbert Kaufman & Barbara Reisner trans., 1983) (detailing the economic insecurities and indignities suffered by court musicians); JACQUES ATTALI, *BRUITS: ESSAI SUR L'ÉCONOMIE POLITIQUE DE LA MUSIQUE* 28-34, 81-127 *passim* (1977) (surveying changes in the status of musicians from early modern times to the present).

⁸⁴ *See, e.g.*, FEATHER, *supra* note 36, at 55, 67 (minimizing the influence of authors on the 1710 legislation, while quoting Defoe as opposing the renewal of licensing the Stationers to avoid making the press “a slave to party”). *But cf.* ROSE, *supra* note 54, at 34-41 (stressing Defoe’s and Addison’s introduction of the property metaphor).

⁸⁵ *See* DOCK, *supra* note 21, at 143-54; HESSE, *supra* note 58, at 115-17.

⁸⁶ *See, e.g.*, John Locke, *Memorandum* (written *circa* 1694), *reprinted in* LORD PETER KING, *THE LIFE AND LETTERS OF JOHN LOCKE* 202-09 (Bell & Daldy, new ed. 1864) (critiquing old Stationers’ regime as both subject to capricious interpretation and resulting in poorly printed, inaccurate, and costly books, while pointing out that Dutch publishers, under a more liberal regime, outcompeted the English); DENIS DIDEROT, *SUR LA LIBERTÉ DE LA PRESSE* 50, 67 (Jacques Proust ed., Éditions sociales 1964), *first published as* *LETTRE SUR LE COMMERCE DE LA LIBRAIRIE* (1861) (critiquing censorship while arguing for publisher’s copyright).

century, airing positions for and against narrow and broad copyright.⁸⁷ Whatever the details of this debate, the basic premise slowly became unassailable in the minds of the new reading audience: authors had natural rights to control the communication of their thoughts to the public and to profit from the fruits of their own mental labors. Goldsmith touched on their emerging new status, stating that authors “no longer depend on the Great for subsistence, they have no other patrons but the public, and the public, collectively considered, is a good and generous master.”⁸⁸

3. *Copyright Decentralizes Rights Over Works*

Three shifts characterized the advent of copyright law in the eighteenth century, and once again the experiences of England and France are illustrative. First, power over the dissemination of works was decentralized away from the royal executive and its agents when the law granted copyrights to individual authors. Second, instead of complex bodies of *ad hoc* regulations that censored some works and effectuated monopolies in others, statutes set out simple and uniform rules to allocate out general rights to govern publication and performance, irrespective of the work at issue. Third, rather than depending on enforcement in largely police measures, claimants could bring their own actions against infringers in civil courts. Accordingly, not the nation-state, but authors and media enterprises that were scattered throughout the marketplace decided what works reached the public.

In the first shift, media power was decentralized. During the English Civil Wars of the mid-seventeenth century, Parliament asserted the power to “license” the Stationers.⁸⁹ Parliament did not renew its last licensing act at the end of that century, thus severing “the historical link between censorship and copyright.”⁹⁰ With the Stationers’ regime suddenly put into suspense, some law was needed to avoid “[a]narchical publication” on an open media marketplace.⁹¹ In 1710, the Parliament enacted the Statute of Anne, which instituted the right to prevent the copying of newly authored books for fourteen years from publication.⁹² This copyright clearly

⁸⁷ For an overview of the debate in England, France, and Germany, with further references to original and secondary sources, see SAUNDERS, *supra* note 53, chs. 2-4.

⁸⁸ OLIVER GOLDSMITH, *THE CITIZEN OF THE WORLD AND THE BEE* 233 (Austin Dobson, ed., Everyman’s Library 1934) (1762).

⁸⁹ For the history of this shift in power, see FEATHER, *supra* note 36, ch. 2.

⁹⁰ Raymond Astbury, *The Renewal of the Licensing Act in 1693 and its Lapse in 1695*, 33 *LIBRARY* 296, 311 (1978).

⁹¹ KAPLAN, *supra* note 43, at 6.

⁹² 8 Anne, ch. 19 (1710). Prior owners of “copies” of already published books, most often Stationers, obtained protection for twenty-one years from enactment. Enforcement was subject to registration with the Stationers “in such

vested in “authors” who, if living at the lapse of the first term, could have rights renewed for a second term of fourteen years. Extending the model of Stationers’ interests assignable within the Company, the law recognized that copyright may be transferred to “assigns” generally.⁹³ The complex Stationers’ scheme accordingly gave way to a more straightforward law granting rights to authors that could be contractually transferred on the open market.⁹⁴ But the Statute of Anne, covering only printed matter, left many questions in suspense.⁹⁵ For example, other laws had to be enacted for artistic works and theatrical performances.⁹⁶

Second, copyright laws corresponded to the overall shift toward private rights. At this time, Europe saw the rise of civil law that generally assured private parties of stable property rights, on which they could freely trade in the marketplace.⁹⁷ With regard to the book trade, the British Statute of Anne of 1710 was followed, for example, in Denmark and the North American colonies by comparable legislation and, in Prussia, by similar provisions in a general code.⁹⁸ This regime crystallized for all media when, after freedom of the press took hold at the start of the French Revolution, the National Assembly passed the Laws of January 13, 1791, and of July 19, 1793.⁹⁹ This pair of statutes subjected all exploitation of works, both in immaterial media like live performances and material media like print, to authors’ rights that were formulated in categorical terms covering all classes of works. The Law of 1791, enacted after intense lobbying by the playwrights’ trade association, recognized the freedom to operate public theaters as well as authors’ rights to control the public staging

manner as hath been usual.” For the statutory text, see STERLING, *supra* note 11, at 996-99.

⁹³ See *supra* text accompanying note 45.

⁹⁴ See PLANT, *supra* note 30, at 118-19; FEATHER, *supra* note 36, at 67, 80.

⁹⁵ See, e.g., *Bach v. Longman* (1777) 2 Cowper 623 (extending Statute of Anne to printed sheet music).

⁹⁶ For example, the Engraving Copyright Act was passed in 1734 after pressure from artists, including William Hogarth, the Sculpture Copyright Act in 1798, and the Dramatic Copyright Act in 1833. Cf. SHERMAN & BENTLY, *supra* note 66, at 135 (quoting a nineteenth-century comment that cumulating British copyright statutes had left the “glorious muddle” of “eighteen acts of Parliament” before codification in 1911).

⁹⁷ See HABERMAS, *supra* note 62, at 75-78.

⁹⁸ See, e.g., STERLING, *supra* note 11, at 999 (setting out the Danish law); Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1171-74 (1983) (reviewing North American colonial laws); MICHAEL BÜLOW, BUCHMARKT UND AUTORENEIGENTUM: DIE ENTSTEHUNG DES URHEBERGEDANKENS IN 18. JAHRHUNDERT 51-54 (1990) (quoting publishing law in the general Prussian code).

⁹⁹ For the freeing of the French press, see HESSE, *supra* note 58, at 27-32.

of their works.¹⁰⁰ The Law of 1793 extended protection to “any . . . production of the mind or genius belonging to the fine arts [*beaux-arts*].” It granted authors rights to control the copying of their works and the distribution and sale of copies.¹⁰¹

Third, such private rights were enforceable, not by the police at the whim of the sovereign or trade associations, but more predictably before courts of ordinary jurisdiction. Such courts had to confront issues left unresolved by statute, of which the first and most critical was: Who, if anyone, had rights in a work upon the lapse of entitlements under the statute? Ever protective of their position in the trade, London booksellers brought suit against Scottish publishers who were undercutting their prices after the term of their copyrights under the Statute of Anne had lapsed.¹⁰² The London booksellers asserted a copyright at common law that purportedly continued beyond the term granted under the Statute of Anne, although no clear precedents supported this claim, only scattered decisions in equity.¹⁰³ The Scottish publishers in turn argued that, beyond that statutory term, there was only the public domain; otherwise, perpetual copyright would eclipse the public domain from which, as some judges recognized, authorship inevitably drew raw materials.¹⁰⁴ In 1774, the House of Lords heard the case of *Donaldson v. Beckett*, in which the judges came to a mixed decision, but after which the position restricting copyright to express statutory periods of protection prevailed in Anglo-American jurisdictions.¹⁰⁵

The French Laws of 1791 and 1793 settled this question by unambiguously dropping works into the public domain after copyright lapsed.¹⁰⁶ These laws, formulated in conceptual terms, each on less than a page of text, remained the dispositive French copyright statutes for the next century and a half. They foreshadowed the French Civil Code completed in 1804, whose drafters sought to formulate simple and concise rules in terms

¹⁰⁰ See *supra* text accompanying note 85. For details on this entire legislative history, see 1 RENOARD, *supra* note 39, at 299-331.

¹⁰¹ For the statutory texts, see STERLING, *supra* note 11, at 1002-07.

¹⁰² See FEATHER, *supra* note 36, at 81-94.

¹⁰³ See ABRAMS, *supra* note 98, at 1142-56. *But cf.* PATTERSON, *supra* note 35, at 160-62 (indicating that injunctions were granted without references to the Statute of Anne, leaving open the argument *a contrario* that they were based on common law).

¹⁰⁴ See generally SHERMAN & BENTLY, *supra* note 66, at 28-30, 39-40 (touching on the appeal of this argument at the time).

¹⁰⁵ (1774) 2 Brown's Prerogative Cases. For critical accounts, see ABRAMS, *supra* note 98, at 1156-71; ROSE, *supra* note 54, ch. 6 and Appendix B.

¹⁰⁶ Thus a key point in the French debate on literary property was resolved: Diderot had argued for perpetual property in works, while Condorcet argued against it, fearing that such copyright might restrict free inquiry. See HESSE, *supra* note 58, at 100-05.

of abstract “principles fertile in consequences” for judges.¹⁰⁷ They also allowed for developing more effective remedies against continuing piracy, such as procedures leading to the rapid seizure of allegedly infringing materials.¹⁰⁸ Other countries followed these laws as models for further legislation, and their courts could refer to comparable statutory language as open-ended bases for flexible case law.¹⁰⁹ The marketplace opened up: new publishing houses and projects began to proliferate, and the law was ready for more far-reaching changes in the media.¹¹⁰ For example, up to the last decade of the eighteenth century, “the works of the most famous French writers were read throughout Europe in editions published outside France.”¹¹¹ In the nineteenth century, French writers published in Paris.¹¹²

C. *Global Copyright: Expanding the Regime*

In the nineteenth century, industries grew to serve new markets. Artisanal workshops were replaced by ever-more rationalized and highly capitalized enterprises that operated on increasingly global scales. Hence our third historical hypothesis: *In response to industrialization, copyright was augmented both with new economic and moral rights, while it was transplanted worldwide.* New economic rights allowed culture industries to undertake greater risks in producing more capital-intensive works and

¹⁰⁷ Portalis, *Discours préliminaire prononcé lors de la présentation du projet de la commission du gouvernement (1^{er} pluviôse, an IX, vol. I, 463-523)*, in NAISSANCE DU CODE CIVIL 41-42 (P.A. Fenet & François Ewald eds., 1989).

¹⁰⁸ Compare HESSE, *supra* note 58, at 214-22 (noting that, right after the passage of the Laws of 1791 and 1793, piracy became rampant), with 2 RENOARD, *supra* note 39, at 390-439 *passim* (tracing the development of provisional civil and criminal remedies in France through the first quarter of the nineteenth century).

¹⁰⁹ See generally ALAIN STROWEL, *DROIT D'AUTEUR ET COPYRIGHT: DIVERGENCES ET CONVERGENCES* 145-46 (1993) (observing that such open codification allows judges flexibility in solving problems). See, e.g., SHERMAN & BENTLY, *supra* note 66, at 121 (“With France acting yet again as a role model, there was a demand for the [British copyright] law to be made as simple, uniform and precise as possible.”).

¹¹⁰ Competition from new publishers did meet concerted resistance from established publishing houses. Compare PLANT, *supra* note 30, at 118-21, 222-24; FEATHER, *supra* note 36, at 65, 81 (noting new editions on British market, many from Scotland, but monopolistic “congers” of London publishers in the eighteenth century), with HESSE, *supra* note 58, at 17, 31-32, chs. 5-6 *passim* (noting new publishing projects but vicissitudes of the book trade during French Revolution).

¹¹¹ FEBVRE & MARTIN, *supra* note 24, at 197.

¹¹² Cf. HESSE, *supra* note 58, at 240-248 (indicating starting point for Parisian publishing in the nineteenth century).

disseminating them in mass markets. Moral rights allayed authors' fears regarding just such industries and markets.

1. *The Rise of the Culture Industries*

In the nineteenth century, the industrial revolution increased the production of hard goods. Better transport, starting with the railway and steam ships, enabled these goods to be distributed across longer distances.¹¹³ From the nineteenth to the twentieth century, media technology improved in great leaps forward that allowed cultural goods to be made in more easily reproduced forms and to be marketed more broadly and quickly. Culture industries arose to exploit these goods, but they had to secure returns on their investments to continue production cycles. At the same time, the very power of new media increased risks of piracy. Authors in turn had new concerns for their reputations on the mass market.¹¹⁴

To start, more capital had to be sunk into improved printing presses that increased outputs for larger markets at lower costs.¹¹⁵ Then, in accelerating waves of technological innovation, came photography, the cinema, sound recording, radio, and television, each medium with its own needs for investment and all helping to address markets on continental and finally global scales. Directors like D.W. Griffith and Abel Gance pioneered epic motion pictures, with sets, costumes, and casts at unheard-of costs, contributing to the very "aura" with which new works captured the popular imagination. Highly paid stars, like Valentino in the film industry and Caruso in the recording industry, brought name recognition, comparable to that focused by trademarks, to crystallize and stabilize mass demand for cultural goods.¹¹⁶

¹¹³ For further analysis, see JAMES R. BENIGER, *THE CONTROL REVOLUTION*, esp. chs. 6-9 (1986).

¹¹⁴ Cf. II:1 STIG STROMHOLM, *LE DROIT MORAL DE L'AUTEUR* 76-80 (1966) (analyzing how the industrialized production and mass marketing of works impacts on authors' interests calling for protection by moral rights).

¹¹⁵ See Harold A. Innis, *Technology and Public Opinion in the United States*, in *THE BIAS OF COMMUNICATION*, *supra* note 82, at 156, 159-62; PLANT, *supra* note 30, ch. 13.

¹¹⁶ See generally Max Horkheimer & Theodor W. Adorno, *The Culture Industry*, in *DIALECTIC OF ENLIGHTENMENT* 120 (J. Cumming trans., 1987) (analyzing the rise of culture industries). *But cf.* Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *ILLUMINATIONS: ESSAYS AND REFLECTIONS* 217 (Hannah Arendt ed., Harry Zohn trans., new ed. 1972) (predicting the liquidation of the "aura" of works once these are captured by modern mass media).

Thus culture industries have had needs for constant capitalization and for securing reliable markets that matched their mass scale.¹¹⁷ Furthermore, investment risks have increased as technology has made copying media more widespread, putting these media not only into pirates' hands, but ultimately into users' homes. In the twentieth century, copyright has therefore been looked to as a means for securing and protecting income streams, and it has been expanded accordingly. For example, neighboring rights have been accorded to media producers, along with royalties from an increasing range of sources, such as the sale of blank tapes for home recording.¹¹⁸

2. *Rights Extended to New Media*

Copyright has been repeatedly pushed into new, previously marginal markets for public performances. In the nineteenth century, three French authors went to a café where they heard a popular song written by one of them and saw a stage number based on the work of the others. They refused to pay for their refreshments, stating to the café owners: "You use our work without paying us; there's no reason for us to pay your bill." Litigation ensued, the authors' claims were vindicated, and they went on to associate with their publishers to collect royalties for public performances of music.¹¹⁹ Ultimately, such associations came to collect royalties for manifold uses, most notably for publicly broadcasting works, especially music, into private businesses and homes. At the same time, copyright was contractually allocated out into diverse entitlements that allowed the same works to be exploited in diversified forms and media.¹²⁰

English courts, before and under the Statute of Anne, had dealt with translations, compendiums and abridgments of prior works, but the courts had shied away from imposing liability absent close copying.¹²¹ French courts, under the Laws of 1791 and 1793, were initially reluctant to find infringement in what leading French commentary then called "[t]he trans-

¹¹⁷ See generally CELIA LURY, *CULTURAL RIGHTS: TECHNOLOGY, LEGALITY AND PERSONALITY* 39-51, 67-92 (1993) (analyzing strategies for producing works to capture market segments).

¹¹⁸ See BERNARD EDELMAN, *LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE* 90-102 (3d ed. 1999).

¹¹⁹ See ATTALI, *supra* note 83, at 128.

¹²⁰ See, e.g., SAUNDERS, *supra* note 53, at 140-44 (detailing contractual approaches to marketing literary materials in the nineteenth century, such as magazine serialization and syndication).

¹²¹ See JOHNS, *supra* note 47, at 226-27; KAPLAN, *supra* note 43, at 9-12, 16-17; also FEATHER, *supra* note 36, at 95-96 (noting that, at the end of eighteenth century, piracy only meant textual copying).

mutation of form that the translator causes the original to undergo.”¹²² But in the course of the nineteenth century, as trade in books became increasingly globalized, authors and publishers started to claim rights to stop translations in foreign markets. Ultimately, the right of translation was subsumed under the more general right to control the making and exploitation of derivative works.¹²³ It was no longer merely a matter of protecting a work against being replaced by literal or close copies in the market that the work initially targeted. Rather, copyright reached new markets in new media: for example, it allowed controlling whether literary works were adapted to the stage or film.

It is, however, difficult to delimit this right to control deriving new works from prior works. When do new authors pass from taking the “substance” of prior works to merely drawing “inspiration” for their new works from old ones? If no clear line is drawn, rights of translation, adaptation, etc., could be asserted to stop virtually all new authors from elaborating on prior works and from releasing still newer works to the world. In response, courts devised limiting doctrines in cases of derivative works, most notably ruling that copyright does not protect “ideas,” “themes,” “facts,” etc., but rather only “expression” or “forms.”¹²⁴ At much the same time, courts also came to ask whether plaintiff’s work is copied in defendant’s “substantially” similar work or whether “essential” or “characteristic traits” of one work are taken in the other. Where, in transforming plaintiff’s work, defendant left little of significance in its expressive texture recognizable in a new work, no infringement would be found. The very wealth of the case law on point testifies to how acute the tension has remained between copyright, as expanded to derivative works, and such limiting doctrines.¹²⁵

¹²² 2 RENOARD, *supra* note 39, at 37. See also BIRRELL, *supra* note 38, ch. 6 (comparing the development of British with European law concerning derivative works, quotation, etc., in the nineteenth century).

¹²³ See Paul Goldstein, *Adaptation Rights and Moral Rights in the United Kingdom, the United States and the Federal Republic of Germany*, 14 INT’L REV. INDUS. PROP. & COPR. LAW [I.I.C.] 43 (1983); Lionel Bently, *Copyright and Translations in the English Speaking World*, 12 TRANSLATIO: FIT NEWSLETTER 491, 496-99 (1993); Martin Vogel, *Die Entfaltung des Übersetzungsrecht im deutschen Urheberrecht des 19. Jahrhunderts*, 1991 GRUR 16.

¹²⁴ For analysis of the development of such doctrines in Anglo-American law, see KAPLAN, *supra* note 43, at 18-74; for a comparative analysis, see IVAN CHERPILLOD, L’OBJET DU DROIT D’AUTEUR, part 1 *passim* (1985).

¹²⁵ See Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHL.-KENT L. REV. 701 (1993); Paul Edward Geller, *Hiroshige v. Van Gogh: Resolving the Dilemma of Copyright Scope in Remediating Infringement*, 46 J. COPR. SOC’Y 39 (1998) [hereinafter Geller, *Hiroshige v. Van Gogh*].

Furthermore, the ideal of “art for art’s sake” was invoked in the nineteenth century to legitimate aesthetic indifference to profit and popularity.¹²⁶ Authors became concerned with violations of more intimate interests, for example, the misattribution of their authorship or the alteration of their works, notably as these reached the mass market. French judges were pioneers in recognizing and protecting such interests: “confronted with the facts, they found equitable solutions” in the case law, out of which grew the moral rights to control the disclosure of works, to obtain the attribution of authorship, and to maintain the integrity of works.¹²⁷ For example, in a seminal case, a French court vindicated the American artist Whistler’s right to withhold disclosure of a portrait which he had been commissioned and paid to make and deliver, although it ordered the artist to return the payment received on the commission.¹²⁸ In subsequent cases, the courts initially referred to creators’ interests in protecting their “reputations,” and ultimately to their “moral rights” as such, in ordering that credit be given to them as authors or that their works not be altered against their wishes.¹²⁹

Through the eighteenth century, artisans made furnishings and equipment for the wealthy, endowing these things with their personal styles and craft. Starting in the nineteenth century, industrialization increasingly put such products, as well as new mechanical devices, into the hands of broader sections of the public in mass-produced forms. Industrial design then developed as the art of creating products and devices both attractive to the senses and comfortable to wear or use in everyday life, and this art was increasingly deployed to captivate and satisfy the mass market.¹³⁰ But industrial design already implicitly raised the question: How to protect

¹²⁶ See generally PIERRE BOURDIEU, *THE RULES OF ART: GENESIS AND STRUCTURE OF THE LITERARY FIELD* 47-112 *passim* (Susan Emanuel trans., 1996) (tracing the social origins of this ideal in nineteenth-century France). *But cf.* SAUNDERS, *supra* note 53, 123-26, 164 (singling out Matthew Arnold as one of few who, in Anglo-American culture, voiced misgivings about mass-marketing culture).

¹²⁷ I:1 STROMHOLM, *supra* note 114, at 196. See also EDELMAN, *supra* note 118, at 36-53 (explaining conceptual and jurisprudential roots of French moral rights); Martin Vogel, *Urheberpersönlichkeitsrecht und Verlagsrecht im letzten Drittel des 19. Jahrhunderts*, 1994 GRUR 587 (tracing the origins of German moral rights from philosophical theory through contractual practice in the publishing field).

¹²⁸ William Eden c. Whistler, Cour de Cassation [Cass.] (Supreme Court), March 14, 1900, Dalloz, 1900, I, 63.

¹²⁹ See generally STROWEL, *supra* note 109, 481-537 (surveying French, Belgian, and German developments).

¹³⁰ For details of this history, see JOHN HESKETT, *INDUSTRIAL DESIGN*, chs. 1-5 (1980); EDWARD LUCIE-SMITH, *A HISTORY OF INDUSTRIAL DESIGN*, pt. 1 (1983). For further social background, including interfaces with copyright

both the “look and feel” of works of applied art, normally a copyright matter, and their functions, normally a patent matter? British lawmakers tried to separate out legal regimes for the fine arts and industrial designs, while the French allowed such regimes to apply cumulatively to the same cases.¹³¹ Thus the way was opened for expanding copyright from the market for aesthetic works into the market for functional products.¹³²

3. *Rights Transplanted Globally*

During the nineteenth century, media markets expanded rapidly.¹³³ English novels quickly crossed the Atlantic by steamship to be pirated in cheaper editions on the mass market in the United States, thanks to improved printing and the refusal to recognize copyright in foreign works.¹³⁴ At the same time, France was already a major publishing center, while Belgium was a center for pirates copying French books, and the French government threatened Belgium with trade reprisals until it concluded a treaty and made law to assure copyright protection for French works.¹³⁵ European countries then began to form a complicated web of such bilateral treaties to protect works across borders.¹³⁶

However, authors, publishers, and lawyers soon began to ask how to make more uniform law to govern the growing international market for works. Some visionaries proposed imposing the same “law of copyright . . . [in] a single code, binding throughout the world.”¹³⁷ A more modest proposal prevailed: simply conclude one copyright treaty, binding as many countries as possible, to compel the same choice of laws in cases of foreign

law, see ADRIAN FORTY, *OBJECTS OF DESIRE: DESIGN AND SOCIETY SINCE 1750*, esp. 48-49, 59-60 (1986).

¹³¹ Compare SHERMAN & BENTLY, *supra* note 66, at 63-94 *passim*, 163-66 (tracing the development of the British approach), with CAROLINE CARREAU, *MÉRITE ET DROIT D'AUTEUR* 191-230 *passim* (1981) (development of the French approach).

¹³² See generally J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2448-64 (1994) [hereinafter Reichman, *Legal Hybrids*] (distinguishing markets for aesthetic works and functional products, as well as corresponding copyright and patent paradigms).

¹³³ See Harold A. Innis, *The Bias of Communication*, in *THE BIAS OF COMMUNICATION*, *supra* note 82, at 33, 58-59.

¹³⁴ See *id.*; also WILLIAM BRIGGS, *THE LAW OF INTERNATIONAL COPYRIGHT* 40-41 (1906) (recounting how the text of a book, within days of initial British publication, was cabled to U.S. and put on sale there).

¹³⁵ See 1 LADAS, *supra* note 44, at 25-26. Cf. PLANT, *supra* note 30, at 432-41 (surveying piratical competition and the start of treaty process).

¹³⁶ See, e.g., SAM RICKETSON, *THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986*, 38 (1987) (including a chart of mid-19th century arrangements).

¹³⁷ BRIGGS, *supra* note 134, at 162.

works. After years of negotiation culminating in 1886, a handful of countries concluded the Berne Convention.¹³⁸ Most were European, and some had vast overseas empires to bring into the Berne Union, making it a global institution. From the start, the Berne Convention imposed the principle of national treatment. Each country protected qualifying works as if authored by its own nationals. That is, it applied national law to protect these foreign works on its territory.¹³⁹

It was no accident that Great Britain and France, both moving forces in international copyright in the nineteenth century, were then major exporters of literature. By contrast, “[u]nlike the British and the French, the American book industry was not linked to an international cultural project or ethos of world ascendancy in literature and the arts.”¹⁴⁰ Through most of the nineteenth century, publishers in the United States were largely content with a home market on a continental scale, and most of them prompted their legislators to refuse copyright in foreign works.¹⁴¹ As a result, national authors were placed at a disadvantage relative to foreign authors on whose works no royalties had to be paid: either national authors had to settle for lower royalties, or their publishers had to price their books above the market to recoup their royalties.¹⁴² Starting in 1891, the United States began to protect the copyrights of foreign authors through bilateral arrangements, and U.S. publishers had to pay royalties on works of foreign authors, enabling U.S. authors to compete on an even footing with them. Before that date, most of the books published in the United States were by foreign authors; afterwards, most were by U.S. authors.¹⁴³

The Berne Union became the global forum where competing industries, media, and other groups reached compromises in revisions every few decades. Over the twentieth century, the Berne Convention came to in-

¹³⁸ For further history, see JEAN CAVALLI, *LA GENÈSE DE LA CONVENTION DE BERNE POUR LA PROTECTION DES OEUVRES LITTÉRAIRES ET ARTISTIQUES DU 9 SEPTEMBRE 1886*, pts. 2-3 (1986).

¹³⁹ At first, authors who were nationals of other Berne countries obtained national treatment only for their unpublished works or for works first published in another Berne country; only later did such authors obtain national treatment for all their works, irrespective of the place of publication. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, arts. 3-4, 828 U.N.T.S. 221 [hereinafter Berne Convention].

¹⁴⁰ SAUNDERS, *supra* note 53, at 165.

¹⁴¹ See George Haven Putnam, *Preface to the First Edition*, in *THE QUESTION OF COPYRIGHT*, xviii-xix (George Haven Putnam ed., 2d ed. 1896).

¹⁴² For further details, see AUBERT J. CLARK, *THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA*, chs. 3-4 (1960). Only rarely did U.S. publishers accord royalties to foreign authors as a matter of “courtesy copyright.” See FEATHER, *supra* note 36, at 153-54.

¹⁴³ See SAUNDERS, *supra* note 53, at 165.

clude a growing panoply of minimum rights that covered increasingly diverse works. The original Berne Act of 1886 included the right to control translations, and later Berne Acts confirmed rights to control new media such as the cinema, broadcasting, and reprography.¹⁴⁴ Most often, treaty countries incorporate minimum rights into domestic legislation; however, where they do not, the courts in most countries may grant these rights to Berne claimants above and beyond national treatment.¹⁴⁵ For example, when a French film was televised in Germany and retransmitted by cable into Belgium, suit was successfully brought in Belgium on the basis of article 11*bis* of the Berne Convention itself, which sets out the minimum right prohibiting such retransmission.¹⁴⁶ The Rome Convention has accorded minimum rights in live performances, sound recordings, and broadcasts, and the TRIPs Agreement applies almost all Berne and most Rome rights in all W.T.O. countries.¹⁴⁷ Thus minimum rights have served to transplant copyright and related rights worldwide.¹⁴⁸

II. ISSUES FOR THE NEAR FUTURE

The eighteenth century had its great debate on literary property.¹⁴⁹ Now at the turn of the millennium, we have ours on the future of copyright. Cyber-legalists contemplate elaborating more stringent, even more repressive law to protect copyright against digital free-riding. Cyber-anar-

¹⁴⁴ See, e.g., BIRRELL, *supra* note 38, at 32 (stating in 1899: "Practically the value of the Convention turns upon its provisions as to translations."); Paul Edward Geller, *New Dynamics in International Copyright*, 16 COLUM.-VLA J. LAW & ARTS 461 (1992) (tracing out the Berne revision process in the context of media changes).

¹⁴⁵ See generally WILHELM NORDEMANN, ET AL., INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS LAW: COMMENTARY WITH SPECIAL EMPHASIS ON THE EUROPEAN COMMUNITY 15-19, 20-23, 27-29 (R. Livingston trans., 1990) (analyzing overall relations of Berne and other treaty provisions to national laws).

¹⁴⁶ *Ciné Vog Films c. CODITEL*, Tribunal de 1re instance (Trial Court), 2e ch., Brussels, June 19, 1975, 86 REV. INT'LE DU DROIT D'AUTEUR [RIDA] 124 (1975). See also the *Ludis tonalis* decision, Oberster Gerichtshof (Supreme Court, Austria), Jan. 31, 1995, 1995 GRUR INT. 729, note Wm. Dillenz (applying the minimum Berne right against the copying of sheet music for educational purposes that Austrian copyright law would have allowed).

¹⁴⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods, April 15, 1994, arts. 9-14 [hereinafter TRIPs Agreement], in Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81 (1994).

¹⁴⁸ For further analysis, see Paul Edward Geller, *Legal Transplants in International Copyright: Some Questions of Method*, 13 UCLA PAC. BASIN L. J. 199 (1994) [hereinafter Geller, *Transplants*].

¹⁴⁹ See *supra* text accompanying note 87.

chists argue that such law might stifle the feed-back of insights and information on global networks.¹⁵⁰ Lawmakers, if judicious, will wend their way between such extreme positions. Some of the issues they might face in the near future are broached below.

A. *New Media: New Risks and Promises*

We just invoked the notions of *free-riding* and *feed-back*. In core cases of free-riding, namely piracy, close copies are made of works and marketed without the consent of the creators. In more complex cases that the law has addressed only over time, prior works are adapted into new works, for example, translations, and exploited without consent.¹⁵¹ Such cases become problematic when prior works are creatively recast into new works, and it becomes difficult to disentangle what is taken from what is created.¹⁵² In simple cases of feed-back, works are disseminated without change; in more complex cases, they are reworked and then input back into culture.

1. *From Patchwork to Network*

As new media communicate copyright materials more rapidly and broadly, new legal issues arise. However, to the extent that ongoing media changes are not fully predictable in their outcomes, we face a serious question in the field of copyright: What factual premises can we assume before analyzing pertinent legal issues in the near future? Indeed, a decade ago most of us would have failed to foresee the recent explosion of the World Wide Web and resulting legal issues. Now, still without prophetic gifts, we can only speculate about future technology, marketing realities, and legal consequences. With that caveat in mind, consider some provisional factual guesses about the near future.¹⁵³

The media are shifting from a patchwork to a network model.¹⁵⁴ A patchwork consists of differentiated units separated by clear-cut borders. Until recently, the media tended to disseminate works within a patchwork

¹⁵⁰ See John Perry Barlow, *The Economy of Ideas: A Framework for Rethinking Patents and Copyrights*, WIRED, Mar. 1994, at 84, reprinted in THE FUTURE OF COPYRIGHT 169 (P. Bernt Hugenholtz ed., 1996).

¹⁵¹ See *supra* text accompanying notes 121-25.

¹⁵² See generally EUGEN ULMER, URHEBER- UND VERLAGSRECHT 275-78 (3rd ed. 1980) (noting that, in such cases, defendant so transforms plaintiff's protected materials that these "fade away" [*verblassen*] in defendant's work); Geller, *Hiroshige v. Van Gogh*, *supra* note 125, at 53-59 (tracing a spectrum from piratical copying to innovatively recasting prior works).

¹⁵³ For further analysis, see NATIONAL RESEARCH COUNCIL, THE UNPREDICTABLE CERTAINTY, esp. chs. 4-5 (1996).

¹⁵⁴ See generally Paul Edward Geller, *From Patchwork to Network: Strategies for International Intellectual Property in Flux*, 31 VAND. J. TRANSNAT'L L. 553

of territories. From centers such as Paris, London, New York, and Hollywood, culture industries marketed works to passive audiences in national or linguistic territories. A patchwork falls short of a network for lack of interactivity and interconnectivity: each patch has one or a few nodes from which messages are emitted, while other nodes largely receive without feeding messages back into the communications system. By contrast, a network consists of nodes interactively communicating with each other, and separate networks themselves tend to interconnect with each other globally, with the Internet as the result.¹⁵⁵

In the shift from patchwork to network, creation and dissemination are being increasingly liberated from the constraints of geographical space. For example, with computers, writers prepare text for publishing, composers synthesize music, and designers shape products, all at their desk tops. At the same time, through global networks, teams of creators from the four corners of the earth can collaborate instantaneously with each other.¹⁵⁶ With these media, creation and dissemination can interact more closely: users can download, exchange, and rework materials among themselves, and resulting derivative works can be fed back into niche markets. For example, in the case of *Duke Nuke'm*, a computer game was sold to users who, in turn, became authors in creating variations on the game that they reposted on the manufacturer's website.¹⁵⁷

These media shifts "will take time, because cultural expectations and technical capacities interact in delicate chemistry."¹⁵⁸ We shall assume that the media will form variegated mixes in the near future, just as personal cars and mass transport do from region to region. For example, the media will make available hard copies, live performances, broadcasting and cable-casting as well as online transmissions on demand, websites fully open to the public or only to groups, person-to-group or person-to-person electronic mailings, etc. While most users might most often go through

(1998) and 9 DUKE J. INT'L & COMP. L. 69 (1998) [hereinafter Geller, *From Patchwork to Network*] (drawing and illustrating this distinction).

¹⁵⁵ See W. RUSSELL NEUMAN, *THE FUTURE OF THE MASS AUDIENCE* 48-74 *passim* (1991); NATIONAL RESEARCH COUNCIL, *supra* note 153, at 11-22.

¹⁵⁶ See, e.g., Peggy M. Irish & Randall H. Trigg, *Supporting Collaboration in Hypermedia: Issues and Experiences*, in *THE SOCIETY OF TEXT: HYPERTEXT, HYPERMEDIA, AND THE SOCIAL CONSTRUCTION OF INFORMATION* 90 (Edward Barrett ed., 1989) (analyzing existing technologies); Carl Tollander, *Collaborative Engines for Multiparticipant Cyberspaces*, in *CYBERSPACE: FIRST STEPS* 303 (Michael Benedikt ed., 1992) (anticipating future systems).

¹⁵⁷ Suit was brought when a pirate copied and resold the users' variations on the game, which the court held to be derivative works relative to the original game, so that the manufacturer could sue the pirate directly. *Micro Star v. FormGen Inc.*, 154 F.3d 1107 (9th Cir. 1998).

¹⁵⁸ NEUMAN, *supra* note 155, at 174.

dominant portals before fanning out to specific sites on the World Wide Web, increasing numbers will communicate as self-standing Internet nodes.¹⁵⁹

2. *Different Stakes for Different Players*

In a patchwork world, free-riding and feed-back occur in geographic spaces with more or less limited access. Copies circulate, for example, in schools, offices, local markets, etc., and performances are made in classrooms, cafés or restaurants, theaters, etc. In global networks, the problem of free-riding is raised with new acuity, just as feed-back is promised in greater volume and diversity. Fences that channel data flows in cyberspace can fail in ways that range from the subtle to the obvious. Works might leak within an intranet; they might hemorrhage from a well-trafficked website. Eventually, redissemination will tend to be global.¹⁶⁰

Such risks threaten different players' interests differently. To start, consider an example economically, but not necessarily culturally, modest. Suppose that a little-known poet, publishing her work in an esoteric print review, found her texts scanned into a computer and posted on a website without her consent. The poet, interested initially in wide dissemination but not necessarily profits, might not mind as long as her texts were not modified and her authorship conspicuously recognized. But changes in the text and misattribution of authorship would not only rankle the author's sensibilities but distort her contribution to culture. Suppose, further, that a star singer adapts the poem into the lyrics of a popular song exploited at great profit, in live performances, sound recordings, and online. The poet may then assert her copyright and author's rights to obtain royalties and respect for her authorship and work.¹⁶¹

With that example in mind, imagine works along a wide spectrum with many dimensions. One dimension represents the capital needed to produce any given work: our hypothetical poem would fall on the low end;

¹⁵⁹ It remains to be seen whether such nodes will be capable of anonymously inputting into the Internet or whether each user will be identifiable by biometric or software coding. See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE*, ch. 4 (1999).

¹⁶⁰ See generally Dan L. Burk, *Virtual Exit in the Global Information Economy*, 73 CHI.-KENT L. REV. 943, 948-61 (1998) (contrasting "physical" barriers tending "to keep the effect of piracy localized" in geographical space with "porous" borders in cyberspace).

¹⁶¹ It is profitable piracy that makes suing most feasible. In cases where a judgment-proof pirate takes another's work for non-commercial purposes, an infringement action becomes less economically viable. See, e.g., NEAL BOWERS, *WORDS FOR THE TAKING: THE HUNT FOR A PLAGIARIST* (1997) (telling the frustrating tale of seeking remedy for the taking of poetry for petty, personal reasons).

an epic motion picture or a computer-operating system, toward the high end. Another dimension is pricing: while works marketed in hard copies, like other industrial products, tended to be priced uniformly, works marketed on the Internet can be priced differentially.¹⁶² For example, our hypothetical poet might well be interested in making her texts available gratuitously on their own, but not as lyrics of someone else's song, while the producer of an epic motion picture might set a high price for accessing this work upon its initial release, gradually decreasing this price as the market is saturated. A further dimension represents the different market elasticities of aesthetic and functional works: a videogame enthusiast might collect a number of games for their varying challenges and aesthetic appeals, but even an editor normally needs but a couple of word-processors, since all of them function more or less in similar fashions.¹⁶³

Within this framework, preventing piracy, finding it, and stopping it call for various solutions. Non-copyright methods, for example, maintaining ongoing, but controlled service relations, might be tried to finesse such tasks.¹⁶⁴ To return to our examples, the poet could digitally watermark her text if she put it online herself, or the producer could encrypt and market the epic motion picture online through a contractually and technologically controlled delivery system.¹⁶⁵ Unfortunately, not only can technological safeguards be disabled with enough time and effort, but once protected materials are released into cyberspace, they tend to migrate uncontrollably across that space. For glory, a wild-cat hacker might decrypt a work, perhaps alter it, exchange it in chat rooms, or post it for the public;¹⁶⁶ by contrast, to maximize profits, a commercial pirate will be drawn into the open marketplace. Recall how the royal police in the seventeenth and eighteenth centuries could not stop smugglers of pirated editions who crossed long French land borders and peddlers of such materials who

¹⁶² See Egbert J. Dommering, *Copyright Being Washed Away through the Electronic Sieve: Some Thoughts on the Impending Copyright Crisis*, in *THE FUTURE OF COPYRIGHT*, *supra* note 150, at 1, 10.

¹⁶³ See *supra* text accompanying notes 130-32.

¹⁶⁴ See generally CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY*, chs. 3-4 (1998) (exploring various options).

¹⁶⁵ See, e.g., Charles Clark, *The Answer to the Machine is in the Machine*, in *THE FUTURE OF COPYRIGHT*, *supra* note 150, at 139; Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us to Rethink Digital Publishing*, 12 *BERKELEY TECH. L.J.* 137 (1997) (both explaining different models of such delivery systems).

¹⁶⁶ Cf. Declan McCullagh, *DVD Lawyers Make Secret Public*, *WIRED NEWS*, Jan. 26, 2000, at <<http://www.wired.com/news/politics/0,1283,33922,00.html>> (visited Jan. 27, 2000) (reporting on suit against the public posting of the present D.V.D. decryption code).

roamed French provinces.¹⁶⁷ Similarly, it might prove more difficult to stop hackers striking from the obscure corners of cyberspace, as well as users sharing works on intranets, than pirates who deal on the Internet openly. In any event, trade organizations and special services are developing new tools for surveying cyberspace and new forms of self-help to deal with network piracy.¹⁶⁸

Digitally networked media are bringing far-reaching changes in the marketplace. Previously, media enterprises produced and distributed works on hard copies, or they staged, screened, or broadcast works to passive audiences. Now, authors at their own computers, as well as media enterprises, can deliver works on the Internet on demand and in forms that users can interactively vary. The risks of free-riding, whether they arise from wild-cat hacking or commercial Internet piracy, represent just one of the many sets of factors that will enter into such market changes. For example, we may ask whether such risks might not chill investment in highly capitalized works, such as epic motion pictures, or restrict initial releases to channels, such as theatrical showings, less vulnerable to piracy.¹⁶⁹ Copyright law will still have a role to play if it can facilitate greater feed-back of cultural materials on the Internet by securing it as a reliable media marketplace, reasonably free of piracy. Let us look at some of the issues that lawmakers will accordingly face.

B. What Rights are Optimal for Mixed Media?

Copyright arose in response to print media. It was expanded to adapt to a patchwork of markets worldwide as the media became more powerful.¹⁷⁰ How might copyright lawmaking now best respond to digitally networked media? This question raises issues that cannot be answered without also reconsidering which decision-makers should resolve the issues and how. New players, such as Internet system-operators and users, now add their voices to those of traditional lawmakers, such as legislators and treaty-makers as well as judges.¹⁷¹ We shall here consider, under the successive headings of copyright contracts, harmonization, and scope,

¹⁶⁷ See *supra* text accompanying note 65.

¹⁶⁸ See, e.g., Chris Oakes, *Stamping Out Pirated Tunes*, WIRED NEWS, Jan. 29, 2000, at <<http://www.wired.com/news/technology/0,1282,33940,00.html>> (visited Jan. 31, 2000) (reporting on a service which tracks the Internet and negotiates the take-down of infringing materials with service providers).

¹⁶⁹ Cf. Schuyler M. Moore, *Internet Distribution of Films Presents Problems and Possibilities*, AFMA INDEPENDENT, Nov./Dec. 1999, at 1, 6 (predicting that theatrical release will continue as the first phase of film exploitation even after Internet exploitation cannibalizes video and pay-TV windows).

¹⁷⁰ See *supra* text accompanying notes 119-148.

¹⁷¹ See Joel Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, in BORDERS IN CYBERSPACE: INFORMATION POLICY AND THE GLOBAL INFOR-

some of the copyright issues that system-operators and users, legislators and treaty-makers, and judges might respectively face in the near future.

1. *Bootstrapping Copyright with Contract*

Copyright decentralized power over creative contents. Individual authors could then contractually convey their rights to media enterprises that catered to the public.¹⁷² But neither authors nor media enterprises typically had contractual relations directly with their publics, beyond the sale of hard copies or of tickets to performances. It remains to be seen to what extent the shift from patchwork to network takes decentralization a step further in allowing authors and media enterprises to contract more directly and elaborately with users. Risks of increased free-riding on creative contents available on the Internet seem to call for ingenuity in devising contractual and technological “fences” for such contents.¹⁷³ At the same time, promises of increased feed-back of such contents, enhancing culture and creativity, might be frustrated by just such fences. Hence the issue: *To what extent should online contracting with users complement or supersede copyright to control the ultimate uses of works?*

To understand online contracting, we need to draw a pair of distinctions that cut across each other. Distinguish, to start, between legal and program rules and, then, between surface and background rules.¹⁷⁴ Suppose, for example, that you want to hear music marketed online in encrypted form and to pay by credit card for access in decrypted form. Legal rules arise out of the contract that governs delivery of the music, notably imposing a debt on you to pay for access, while program rules encrypt and decrypt data, verify your credit-card number, etc. Surface rules are those of which you are normally aware, for example, the legal rule that manifesting assent to the deal creates a debt and the program rule that single or double clicking triggers a software step. Background rules are those of which non-expert users are not normally aware, for example, the underlying contract law that may give effect to the standard form or the algorithms that govern encryption. These rules interact with each other, as well as with other factors, such as market constraints, to generate ultimate results.¹⁷⁵

MATION INFRASTRUCTURE 84, 96-100 (Brian Kahin & Charles Nesson eds., 1997) [hereinafter BORDERS IN CYBERSPACE].

¹⁷² See *supra* text accompanying notes 97-112.

¹⁷³ See Ejan Mackaay, *The Economics of Emergent Property Regimes on the Internet*, in THE FUTURE OF COPYRIGHT, *supra* note 150, at 13.

¹⁷⁴ For further analysis, see Geller, *From Patchwork to Network*, *supra* note 154, 31 VAND. J. TRANSNAT'L L. at 561-63 and 9 DUKE J. INT'L & COMP. L. at 76-78.

¹⁷⁵ For further analysis of this interaction, see LESSIG, *supra* note 159, ch. 7.

Online contracting raises key issues of standard forms. Most users do not often fully read contracts proposed to them on the World Wide Web, but they quickly click on “Yes, I agree” or like buttons to download works they seek. It might well seem a futile gesture to the users to struggle through contract language which, in tandem with underlying law,¹⁷⁶ is so technical that they could not knowingly assent to it without hiring expensive legal counsel. Further, on its face, this language might not fully explain to users how the legal rules it sets out will have effects against the background of program rules that run the computer-driven systems delivering works to them. Moreover, different enterprises will propose different standard terms, thus burdening the public with a plethora of legal rules and further obscuring the overall relation of the law to program rules.¹⁷⁷ Finally, users might have no reasonable alternatives to such standard terms, for example, when updating an almost universally used operating system. The purported contract might then be challenged as adhesive, that is, without fully informed and freely negotiated assent. Rather than not enforce contractual terms without effective assent, courts best reconstrue them in the light of public policy.¹⁷⁸

The U.S. Supreme Court has ruled that contractual rules may not be allowed to frustrate the policies behind the constitutional mandate for copyright and patent laws.¹⁷⁹ In scrutinizing copyright contracts, it then becomes necessary to assess the extent to which enforcing their terms might impair copyright policies at stake in given cases. For example, the U.S. defense of fair use excuses a miscellany of copyright uses that range

¹⁷⁶ Once enacted, the pending Uniform Computer Information Transaction Act (UCITA), previously the U.C.C. Article 2B, would form one such underlying law. For different perspectives and further references, see <<http://www.2bguide.com>> (visited Feb. 5, 2000); <<http://www.4cite.org>> (visited Feb. 5, 2000); <<http://www.nccusl.org/pressrel/UCITAQA.HTM>> (visited Feb. 5, 2000).

¹⁷⁷ Cf. Niva Elkin-Koren, *Copyrights in Cyberspace — Rights without Laws*, 73 CHI.-KENT L. REV. 1155, 1195-97 (1998) (critiquing reliance on contractual processes as generating a “multiplicity of horizontal rights with no clear hierarchy between them”).

¹⁷⁸ See W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW* 65-67, 90-103 (1996).

¹⁷⁹ See generally *Lear, Inc. v. Adkins*, 395 U.S. 653, 673 (1969). In this case, the Supreme Court reversed a California contract ruling which threatened to restrict the public domain. Contractual terms can limit Internet access to public-domain works, just as they do now for hard copies. For example, contractual terms, eminently reasonable in tenor, controlled the copying of museum-quality transparencies of public-domain works in the exhibits of *Hiroshige v. Van Gogh*, *supra* note 125. It remains to be seen whether anti-trust or copyright analysis best responds to overreaching restrictions on Internet access to public-domain materials.

from parody to private copying, while other copyright laws exempt more specifically defined uses.¹⁸⁰ It only obfuscates matters to ask whether or not, generally, the defense of fair use may be contractually waived, since the diverse uses excused by this defense are based on policy grounds of widely varying force. On the one hand, the case seems strong for disallowing the contractual waiver of such fair use or related defenses as permit users to transform works creatively, for example, into parodies. Not only are such uses supported by copyright policies of encouraging creativity, but they may be privileged on the basis of constitutional assurances of free expression.¹⁸¹ On the other hand, it is harder to argue against the contractual waiver of such exemptions, notably for private copying, as minimize transactions costs. Policy reasons for excusing such uses become weaker where online contracting itself reduces transactions costs.¹⁸²

Accordingly, analysis has to consider both contractual or related defects and copyright or related policies.¹⁸³ To the extent that such defects vitiate assent to given contractual terms, a clash between these terms and weaker policies may justify reconstruing the terms in question. Even absent such defects, any clash between the contractual terms and stronger, constitutionally mandated policies may suffice to compel reconstruing the terms. But, here, we need to ask just how online contracts can be enforced: suppose, for example, that the contractual language at issue forbids

¹⁸⁰ Compare 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05, at 13-150 (Rel. 48, 1999) (emphasizing the “malleability of fair use”), with 2 PAUL GOLDSTEIN, COPYRIGHT § 10.1.3, at 10:9 (2d ed. 2000) (seeking to unify analysis in terms of “transactions costs”). For comparisons of U.S. fair use with European approaches, see ALAI STUDY DAYS, CAMBRIDGE 1998: THE BOUNDARIES OF COPYRIGHT: ITS PROPER LIMITATIONS AND EXCEPTIONS (Libby Baulch et al. eds, 1999).

¹⁸¹ Compare *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that parody may be excused as fair use even upon showing of economic harm), and the *Alcolix* decision, Bundesgerichtshof (Supreme Court, Germany), March 11, 1993, 1994 GRUR 206, translated in 25 I.I.C. 605, 609 (1994) (excusing parody as free utilization while referring to constitutionally mandated “freedom of art”).

¹⁸² See Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 581-96 (1998). For analysis of European developments, see Thomas Heide, *Access Control and Innovation under the EU Electronic Commerce Framework*, in 2000 MOLENGRAFICA EUROPEES PRIVAATRECHT 65 (K. Boele-Woelki & F.W. Grosheide eds.).

¹⁸³ For distinct frameworks of analysis, see Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827 (1998); J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PENN. L. REV. 875 (1999).

users in the mass market from making copies of downloaded material for intimate friends or colleagues. It might prove possible to so calibrate legal and program rules, specifically contractual provisions and delivery systems, that such uses are disabled or at least monitored by electronic self-help measures.¹⁸⁴ Nonetheless, the basic structure of the issues remains unchanged: Has the user validly assented to such far-reaching controls? The contractual question might well turn on the level at which technological controls are exercised. It is up to the party transmitting a work or other data to decide whether to put it in a copy-protected packet. It is quite another matter to control or monitor uses or copying at the level of the users' terminal. There, privacy issues might be raised.¹⁸⁵

There is another realm in which rules may be made. Entire systems of legal and program rules come into play in any given online service. System-operators propose rules, while users dispose, voting with their fingers, in clicking onto a service or not. One argument would give system-operators great discretion here, relying on users to choose which sets of rules are best for their purposes and allowing the rules most-often chosen to dominate on the marketplace.¹⁸⁶ A recent incident illustrates the possible give and take between system-operators and users: Yahoo incorporated terms into its standard contract of service that, *inter alia*, purported to appropriate the copyrights that its users held in websites they had created, only to encounter and give in to the users' protests against such terms.¹⁸⁷ Thus, at a minimum, assuming rough parity of bargaining power between systems and users, the interaction between system-operators and users might help to settle some of the issues already raised with regard to contract and copyright. Nonetheless, for users to choose systems meaningfully and without adhesion, they need to have adequate notice of each system's pro-

¹⁸⁴ See *supra* text accompanying note 165. Copyright and contract remedies generally differ, most notably with regard to injunctive relief. On how the scope of copyright turns on such remedies, see *infra* text accompanying notes 238-49. Thus it may be asked whether contract terms and law allow for appropriate remedies, whether at the level of self-help or in court, relative to copyright remedies. For diverse analyses, see Kenneth W. Dam, *Self-Help in the Digital Jungle*, 28 J. LEGAL STUD. 393, 403-10 (1999); Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089 (1998).

¹⁸⁵ See, e.g., Michel Marriott, *It's Not Big Brother, It's Customer Service*, N.Y. TIMES, Jan. 27, 2000, at D1, at <<http://www.nytimes.com/library/tech/00/01/circuits/articles/27serv.html>> (visited Jan. 27, 2000) (asking when tracking users on Web violates privacy). For further analysis, see Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125 (2000).

¹⁸⁶ See David Johnson & David Post, *The Rise of Law on the Global Network*, in BORDERS IN CYBERSPACE, *supra* note 171, at 3.

¹⁸⁷ For further information, see <<http://come.to/boycottyahoo>> (visited Feb. 5, 2000).

posed rules and reasonable alternatives that to some extent compete with each other for their assent.¹⁸⁸

In another type of case, system-operators will have to make hard, but instructive choices for network rule-making. Most Internet services, straddling a patchwork of borders, will be arguably subject to the laws of a number of jurisdictions. The attempt to enact uniform contract law for information licensing online in the United States has indeed been haunted by the prospect that contract laws abroad would not follow suit.¹⁸⁹ The proposed E.C. directive on electronic commerce certainly contemplates a more skeletal framework for online contracting, at least at the level of mass-market transactions.¹⁹⁰ Pending global harmonization, there is the option of trying to impose choice-of-law clauses on such transactions, but home courts for users may reject that ploy. More securely, contract forms could be drafted to satisfy the underlying contract principles of multiple jurisdictions addressed online.¹⁹¹

2. Harmonizing and Simplifying Rules

Complex, centralized systems of rules and police measures applied to the book trade before copyright, but they ultimately proved anachronistic for governing print.¹⁹² National legislators replaced these mercantilist regimes with simple, decentralized private rights, namely classic copyright accorded to authors, but legislation has since become progressively more complex in the field.¹⁹³ With some lag in time, international treaties, starting with the Berne Convention, have harmonized copyright laws in simple

¹⁸⁸ See *supra* text accompanying note 178.

¹⁸⁹ See generally Raymond T. Nimmer, *Licensing on the Global Information Infrastructure: Disharmony in Cyberspace*, 16 Nw. J. INT'L L. & BUS. 224, 235-47 (1995) (noting conflicts of laws, as well as varying standards for consumer and commercial contracts, in the electronic licensing of intellectual property). For European points of view, see F.W. Grosheide, *Mass-Market Exploitation of Digital Information by the Use of Shrink-Wrap and Click-Wrap Licenses: A Dutch Perspective on Article 2B UCC*, 1998 MOLENGRAFICA EUROPEES PRIVAATRECHT 263 (K. Boele-Woelki & F.W. Grosheide eds); François Dessemontet, *Contracting and Licensing on the Net*, in FESTKRIFT TILL GUNNAR KARNELL 111 (Lars Gorton et al. eds., 1999).

¹⁹⁰ See Amended proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the Internal Market (Doc. 599PC0427, Sept. 6, 1999), arts. 9-11 [hereinafter Proposal for European Directive on electronic commerce], at <http://europa.eu.int/eur-lex/en/com/dat/1999/en_599PC0427.html> (visited Feb. 5, 2000).

¹⁹¹ For further analysis, see Geller, *From Patchwork to Network*, *supra* note 154, 31 VAND. J. TRANSNAT'L L. at 573-74 and 9 DUKE J. INT'L & COMP. L. at 88-89.

¹⁹² See *supra* text accompanying notes 63-71.

¹⁹³ See *supra* text accompanying notes 89-109.

terms that obligate all treaty countries to grant minimum rights, for example, to control reproducing and broadcasting works.¹⁹⁴ Nonetheless, the patchwork of national laws, even as partially harmonized by treaty over the last century, now seems anachronistic for governing copyright in global networks. This shift from patchwork to network raises the issue: *How much further, and with regard to which issues, should copyright be harmonized and, perhaps, simplified?*

Consider how harmonization might impact on Internet participants, from authors and media enterprises to individual users. For this purpose, return to the distinctions both between legal and program rules and between surface and background rules.¹⁹⁵ Harmonization need not make all such rules globally uniform at all Internet levels; rather, it need only optimize the coherence of these rules among themselves, as well as with overriding policies. Such coherence would assure that participants, once engaged in network transactions, not face unpleasant surprises down the line in the form of unfair or counter-productive complications. In particular, the harmonization of copyright and related laws now becomes important for Internet participants whose network transactions can easily have legal effects worldwide.¹⁹⁶ Such harmonization would assure that some basic set of copyright rules normally leads to reasonably expected consequences for participants throughout global networks. The legally and technologically complex background of the Internet would then only trouble such participants in rare, unavoidably hard cases.

This aim runs counter to trends in modern lawmaking. Lawmakers tend to make increasingly complex rules in increasingly technical terms. These rules often represent complicated compromises between divergent demands of different groups in pluralistic societies.¹⁹⁷ Furthermore, nation-states typically legislate to solve locally defined problems: for example, in the field of copyright, they accommodate local authors, media, and users. National legislators tend to overload international legal structures with endemically differentiated domestic laws that make it difficult to operate in global networks simply and sensibly. Copyright is no exception, as the overwrought and technical drafting of the most recent U.S. legislation, the Digital Millennium Copyright Act, so richly and regrettably illus-

¹⁹⁴ See *supra* text accompanying notes 144-48.

¹⁹⁵ See *supra* text accompanying notes 174-75.

¹⁹⁶ See *supra* text accompanying notes 154-60.

¹⁹⁷ See HABERMAS, *supra* note 62, at 229-33; also JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 334-59 (William Rehg trans., 1996) (critiquing theory that finds resulting hyperregulation to be inevitable).

trates.¹⁹⁸ Unfortunately, the more complicated the machine, the more likely it is to break down, and the Digital Millennium Copyright Act threatens to call for judicial fixes at manifold points.¹⁹⁹ Nor does implementing the WIPO Treaties, as this act did, necessarily call for such complexity: other countries have succeeded in drafting simpler provisions for this purpose.²⁰⁰ It is also not clear how provisions of this act applicable to online transactions, usually global in extent, are to have effect outside U.S. territory.²⁰¹

Another source of legal complexity, prompting harmonization, lies in conflicts of laws. Laws have been assumed to be the creatures of sovereign states, effective on their respective territories, but laws enter into conflicts when transactions they govern cross borders.²⁰² To the present, in most cases arising inside a patchwork of jurisdictions, courts easily localized infringing hard copies or live performances within local markets, and they then simply applied the laws of their own home jurisdictions to the infringement at hand. Now, transactions cross many borders almost simultaneously in a global network; however, applying the law of any one of the many jurisdictions encompassed by the network risks imposing the local policies behind that law on all these other jurisdictions, even though they might have quite different policies at stake in the choice of laws at issue.²⁰³ Furthermore, approaches to resolving conflicts of laws differ considerably between courts in the United States, that functionally resolve conflicts according to multi-factor policy analyses, and courts in Continental Europe that apply categorical choice-of-law rules.²⁰⁴ All these uncertainties espe-

¹⁹⁸ Pub. L. 105-304, 112 Stat. 2860. Cf. A. Michael Froomkin, *2B as Legal Software for Electronic Contracting — Operating System or Trojan Horse?*, 13 BERKELEY TECH. L.J. 1023, 1024 (1998) (comparing drafts of U.C.C. Article 2B to test versions of complex software).

¹⁹⁹ For examples, see David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPR. SOC'Y 401 (1999).

²⁰⁰ See, e.g., Otto B. Licks, *Brazil* § 8[1][a][ii], in 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE at BRA-46 (Paul Edward Geller ed., 1999) [hereinafter INT'L COPR. LAW & PRACTICE] (glossing Brazilian statute which concisely provides for remedies against both circumventing copy-protection systems and tampering with rights-management information).

²⁰¹ See, e.g., 17 U.S.C. § 512(j)(1)(B)(ii) (Supp. IV 1998) (empowering U.S. courts to block access to off-shore servers, but without stating whether U.S. access must be shown to obtain an injunction).

²⁰² Note that courts, confronted by infringement, cannot finesse conflicts of laws as can private parties who, in contracting, may stipulate to having a given law apply to their transactions. See *supra* text accompanying notes 191.

²⁰³ For a framework of analysis in a global context, see Paul Edward Geller, *International Copyright: An Introduction* § 3[1][b], in 1 INT'L COPR. LAW & PRACTICE, *supra* note 200, at INT-46 to INT-59.

²⁰⁴ For overviews, see 1 AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) OF CONFLICT OF LAWS, ch. 7, topic 1, Introductory Note, 412-13 (1971); Paul

cially affect enterprises whose assets and transactions fall into many jurisdictions at once, potentially exposing them to different choices of law depending on where they are sued.²⁰⁵

Nation-states end up generating an increasingly complex patchwork of laws that do not apply reliably in global networks. In the face of resulting hyperregulation, further aggravated by conflicts of laws, there are understandable calls for “simple rules for a complex world.”²⁰⁶ Now, to the extent that harmonization results in similar laws worldwide, it will lead courts to rule the same ways in similar cases, thus mooted conflicts of laws.²⁰⁷ The Berne Convention and related treaties have already developed an approach to moving toward that end in the field of copyright, namely by imposing minimum rights. In the cauldron of diplomatic conferences, treaty language is forged that overlays national hyperregulation with concise international rules governing minimum rights that are intended to be comprehensible to diverse legal cultures.²⁰⁸ Berne and related treaty language has also remained relatively open-ended, leaving to treaty countries the lawmaking or adjudicatory discretion that may come into play in hard cases: accordingly, results remain relatively predictable, even with some room for local differentiation in hard cases.²⁰⁹ Most notably, minimum rights are formulated with fair precision, but limitations may vary: for example, the Berne Convention confirms a right of reproduction “in any manner or form,” while limitations and exceptions to the right are subject to flexible criteria of “normal exploitation” and “legitimate interests.”²¹⁰

Arguments could be raised against harmonization. The nineteenth century gave rise to the Romantic premise that copyright laws, varying

Edward Geller, *Conflicts of Laws in Cyberspace: Rethinking International Copyright*, 20 COLUM.-VLA J. LAW & ARTS 571, 574-78 (1996), in more concise versions in THE FUTURE OF COPYRIGHT, *supra* note 150, at 29-32; 44 J. COPR. SOC'Y 103, 104-07 (1996).

²⁰⁵ See Peter P. Swire, *Of Elephants, Mice, and Privacy: International Choice of Law and the Internet*, 32 INT'L LAW. 991, 1019-25 (1998).

²⁰⁶ For this goal, see RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD, ch. 1 (1995).

²⁰⁷ Cf. Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1230-31 (1998) (contemplating a variety of legal and self-help regimes in cyberspace, but admitting that these “techniques will not resolve all conflict of laws in cyberspace” without harmonization).

²⁰⁸ See *supra* text accompanying notes 144-48.

²⁰⁹ See generally WILLY HOFFMANN, DIE BERNER UEBEREINKUNFT ZUM SCHUTZE VON WERKEN DER LITERATUR UND KUNST 12-14 (1935) (distinguishing different degrees to which minimum rights are open-ended).

²¹⁰ See Berne Convention, *supra* note 139, art. 9; also TRIPs Agreement, *supra* note 147, art. 13 (extending these criteria to all copyright limitations and exceptions).

from country to country, might better nurture different home cultures.²¹¹ To the extent that this premise is correct, it is possible to argue that, in harmonizing copyright laws, we would lose nation-states as so many test-beds for experimenting with copyright laws. Another pluralistic argument stresses that, in a patchwork of lawmaking jurisdictions, all may serve as so many test-beds for novel legislation, and the majority may adopt rules that initially prove optimal in a minority of jurisdictions.²¹² Both test-bed arguments in theory presuppose that significant experimentation in fact goes on locally; however, in practice, national revisions of copyright laws often display little more than institutional inertia, eccentric compromises between local interests, and the ingrown biases of provincial cultures. Admittedly, in the course of this century, some national enactments have clearly been international trend-setters, for example, the Italian copyright statute of 1941 and German legislative developments from the 1960s through the 1980s.²¹³ But such innovations responded to issues that the conventions had not yet clearly addressed, either because treaty language lagged behind media progress or, as just mentioned, because it was open-ended.²¹⁴

It is now possible to experiment with new rules on other test-beds, notably in network systems. Consider the proposed European directive now pending to harmonize laws concerning electronic commerce. It contemplates broad parameters in which private parties would be prompted to set up their own systems of online contracting, self-regulation, etc., effectively network-system rules.²¹⁵ This prospect recalls issues which have already been discussed in the context of online contracting, where media enterprises might impose such system rules in contracting with users.²¹⁶

²¹¹ See SHERMAN & BENTLY, *supra* note 66, at 214-15.

²¹² See David G. Post & David R. Johnson, "Chaos Prevailing on Every Continent": Towards a New Theory of Decentralized Decision-Making in Complex Systems, 73 CHI.-KENT L. REV. 1055, 1078-93 (1998); also Dan L. Burk, *supra* note 160, at 972-95 (favoring mix of local experimentation and global harmonization).

²¹³ Compare Mario Fabiani, *Italy* § 1[1], in 2 INT'L COPR. LAW & PRACTICE, *supra* note 200, at ITA-6 ("The Copyright Act, from its initial enactment in 1941, was a pioneer in granting others besides authors, most notably performers and media producers, what the Act called 'connected rights' [*diritti connessi*] but are now internationally called 'neighboring rights'."), and Adolf Dietz, *Germany* § 1[1], in 2 INT'L COPR. LAW & PRACTICE, *supra* note 200, at GER-18 to GER-19 ("The German legislators, complementing the usual remedies and sanctions for direct copyright infringement, have indeed developed new mechanisms for remunerating rights-holders for subtle, but widespread uses of works and other media productions.").

²¹⁴ See *supra* text accompanying notes 209-10.

²¹⁵ See Proposal for European Directive on electronic commerce, *supra* note 190, Recitals 6, 12-14, and 16-17.

²¹⁶ See *supra* text accompanying notes 186-91.

For example, to respond to Internet piracy, European system-operators may voluntarily set up notice-and-takedown procedures like those which statute establishes in the United States.²¹⁷ Such procedures allow a copyright claimant to notify a system-operator to have access blocked to allegedly infringing material, after which the user posting the material may give a counter-notification to contest the claim of infringement, thus possibly throwing the matter into court.²¹⁸ It is, however, important that any such scheme not appear as a hypertechnical piece of legal machinery to lay users: if afraid of being caught in its procedural gears, such users might not readily challenge the takedown of non-piratical materials they post.²¹⁹

Problems also arise in connection with coordinating legal and program rules globally. For example, international arrangements that are not treaties, but rather initiatives taken by private industry and by public entities, such as the I.T.U., set technical standards for network systems.²²⁰ A private-public initiative has given birth to the ICANN, which administers the registration of domain names worldwide and for which WIPO runs dispute-settlement procedures.²²¹ Consider, hypothetically, a private-public initiative to organize notice-and-takedown procedures for copyright worldwide: it would encounter the claims of users who, posting copyright

²¹⁷ See generally Kamiel Koelman & Bernt Hugenholtz, *Online Service Provider Liability for Copyright Infringement*, WIPO Doc. OSP/LIA/1 Rev. 1 (Nov. 22, 1999), in Workshop on Service Provider Liability, Dec. 9-10, 1999, at <<http://www.wipo.int/eng/meetings/1999/osp/index.htm>> (visited Feb. 5, 2000) [hereinafter WIPO Workshop on Liability] (comparing European and U.S. approaches at doctrinal and legislative levels). See, e.g., Nils Bortloff & Janet Henderson, *Notice and Take-Down Agreements in Practice in Europe — Views from the Internet Service Provider and Telecommunications Industries and the Recording Industry*, OSP/LIA/3 (Dec. 1, 1999), in WIPO Workshop on Liability, *supra* note 217 (explaining how voluntary European arrangements are working in practice).

²¹⁸ See generally Batur Oktay & Greg Wrenn, *A Look Back at the Notice-Takedown Provisions of the U.S. Digital Millennium Copyright Act One Year After Enactment*, OSP/LIA/2 (Dec. 1, 1999) in WIPO Workshop on Liability, *supra* note 217 (explaining U.S. legislative scheme and how it is working in practice).

²¹⁹ See, e.g., Bortloff & Henderson, in WIPO Workshop on Liability, *supra* note 217, at 32; Oktay & Wrenn, in WIPO Workshop on Liability, *supra* note 217, at 17 (both indicating that users tend to be reluctant to challenge the take-down of even defensible postings, especially when their legal resources do not match those of claimants).

²²⁰ Cf. SHAPIRO & VARIAN, *supra* note 164, at 237-38 (contrasting formal standard-setting arrangements with practices).

²²¹ For an overview, see WIPO, *Final Report of the WIPO Internet Domain Name Process*, April 30, 1999, WIPO Publication No. 92-805-0779-6, at <<http://ecommerce.wipo.int/domains/process/eng/processhome.html>> (visited Feb. 5, 2000).

materials on the World Wide Web, arguably benefit from widely varying limitations and exceptions to use works under different laws. For example, should a user posting such materials from a terminal or via a server in the United States, but accessible worldwide, be able to invoke the U.S. defense of fair use, which is broader than copyright limitations and exceptions elsewhere?²²² More generally, since all such private-public initiatives are mutant creatures in the international regime, it remains unclear how best to interface them with the time-tested legislative and treaty components of this regime.²²³

3. *Limiting Scope through Remedies*

In the last two centuries, copyright has grown in scope. In particular, new economic rights and moral rights have been recognized.²²⁴ This expansion of scope has helped culture industries respond to risks to their investments in mass markets, and authors to risks to their reputations and creative control in such markets. In the shift from patchwork to network, conditions of production and exploitation are once again changing rapidly and profoundly, as computers facilitate, for example, desk-top creation, self-publishing, niche marketing, etc.²²⁵ The scope of rights, often defined in terms of theoretical distinctions, for example, between private and public communication, idea and expression, aesthetic form and technological function, etc., can be assessed by looking to remedies that, in practice, judges have to provide for rights. Indeed, precisely in delimiting such scope, judges reach the outer limits of harmonization, since they have to vary the construction and enforcement of minimum rights according to fact-intensive considerations.²²⁶ Thus, with far-reaching changes in the media, the perennial issue arises anew: *How to refashion the scope of copyright, not only in redefining either rights or limitations, but ultimately in recrafting corresponding remedies?*

The scope of copyright tends to expand to the margins of the public marketplace. We noted the seminal example of French authors who, in the nineteenth century, organized to obtain royalties for the gratuitous

²²² See *supra* text accompanying note 180.

²²³ For further analysis, see Paul Edward Geller, *From Patchwork to Network*, *supra* note 154, 31 VAND. J. TRANSNAT'L L. at 570-72 and 9 DUKE J. INT'L & COMP. L. at 86-88.

²²⁴ See *supra* text accompanying notes 123-32.

²²⁵ See *supra* text accompanying notes 154-59.

²²⁶ See generally Geller, *Transplants*, *supra* note 148, at 219-29 (distinguishing between rules best developed and applied with judicial discretion and rules best harmonized in treaties and legislation). See, e.g., Berne Convention, *supra* note 139, art. 6bis(3) (declaring that the "means of redress for safeguarding" minimum moral rights are up to the discretion of the protecting country).

performance of their works live in public places like restaurants and cafés.²²⁷ In the twentieth century, rights have been extended to the broadcasting and retransmission of works to the public, and now the WIPO Treaties confirm the right of public communication, which further extends to “the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”²²⁸ It may be clear that this right precludes communicating a work to a public made up of thousands of people at different times and places, but it remains unclear as to how small a group it precludes access.²²⁹ The right would not seem applicable to attaching a work to electronic mail sent to one person. But what about addressing the file to a hundred members of a closed list-service? Circulating it within a confidential intranet accessible only to employees of a firm? Displaying it on a website open only to users armed with passwords? The WIPO Treaties do not draw lines between private and public here. They rather leave the matter to national legislation or judge-made law.²³⁰

These questions implicate distinctions between reproduction rights and performance rights.²³¹ Legal doctrine has traditionally contrasted making and distributing fixed “material” copies with communicating volatile “immaterial” forms of works. But these metaphysical terms only obfuscate what copyright owners put at stake in the marketplace in exercising rights relative to such hard or virtual copies. Previously, possessing a reproduction enabled users to access a work from that copy repeatedly, but a performance was a one-time affair: you could miss it if you were late to the show. To make this point, one commentator aptly evoked the first lines of the song *Alexander’s Rag Time Band*: “Please, honey, don’t be late, I want to be there when the band starts playing.”²³² However, this distinction has broken down: for example, publicly selling a video recording of a film might have much the same market impact as

²²⁷ See *supra* text accompanying note 119.

²²⁸ WIPO Copyright Treaty, art. 8; 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, arts. 10, 14, 36 I.L.M. 76 (1997), both reprinted in 44 J. COPR. SOC’Y 118 (1996).

²²⁹ See generally ANDRÉ LUCAS, DROIT D’AUTEUR ET NUMÉRIQUE 191 (1998) (noting that the “border” between public and private gets “scrambled” by new media and analyzing copyright limitations in that light).

²³⁰ See Mario Fabiani, *The Geneva Diplomatic Conference on Copyright and the Rights of Performers and Phonogram Producers*, [1997] 3 ENT. L. REV. 98, 102.

²³¹ See Dommering, *supra* note 162, at 1-7.

²³² Jaap H. Spoor, *The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right*, in THE FUTURE OF COPYRIGHT, *supra* note 150, at 67, 76.

broadcasting the work into homes, where it can be privately recorded: either way the work can be repeatedly re-accessed.²³³ As long as neither doctrine nor legislation clarifies these matters, it is left to judges to respond to the hard questions: In particular, does disseminating a work inside an organization, thus repeating access to many users, sufficiently usurp copyright owners' markets to infringe their rights, even though such dissemination is neither clearly private nor public?²³⁴

In the nineteenth century, while lawmakers were expanding the scope of copyright, judges developed the idea-expression distinction and infringement criteria to limit this scope.²³⁵ These doctrinal devices were intended to leave authors some freedom to express themselves by transforming prior works creatively into newer works that, once input into the marketplace, would enrich cultural life. The World Wide Web now serves as an increasingly universal archive of data, including copyright-protected materials, that digital information-processing tools allow users to find, download, and transform, ultimately into new works to recommunicate to the world.²³⁶ On the one hand, such technologies implicate both economic rights to control deriving new works from prior ones and moral rights to preserve the integrity of works; on the other hand, they promise to accelerate the creation and dissemination of new works. For example, in a case foreshadowing this future, a classic *film noir*, *The Asphalt Jungle*, was colorized using digital technology, only to meet claims, successful in France, that the film creators' rights of integrity were violated.²³⁷ Furthermore, also starting in the nineteenth century, copyright coverage was extended, albeit ambivalently, to industrial designs and, in the twentieth century, to other largely functional products such as computer programs.²³⁸ To what extent, then, should copyright scope be re-fashioned to take account of these developments?

²³³ See Paul Edward Geller, *Reprography and Other Processes of Mass Use*, 38 J. Copr. Soc'y 21, 22 (1990), and in 153 RIDA 3, 7-9 (1992).

²³⁴ Compare *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994), *cert. denied*, 516 U.S. 1005 (1995) (holding that giving access to copies throughout the same company, notably to hundreds of research scientists, is infringing, especially in the light of market impact), with Tribunal de grande instance [T.G.I.] Paris, réf. (Superior Court, Injunctions Judge, France), June 10, 1997, J.C.P. 1997, II, 22974, note Olivier (refusing to enjoin unauthorized access through an intranet at the French National Center for Scientific Research).

²³⁵ See *supra* text accompanying notes 123-25.

²³⁶ See *supra* text accompanying notes 154-59.

²³⁷ *Huston c. Turner Entertainment, CA* (Court of Appeals) Versailles, ch. réunies, Dec. 19, 1994, 164 RIDA 389 (1995), *on remand from Cass. 1e civ.*, May 28, 1991, 149 RIDA 197 (1991), translated in 23 I.I.C. 702 (1992).

²³⁸ See *supra* text accompanying notes 129-32.

Copyright scope is ultimately determined at the level of remedies. Thus questions such as those just raised concerning copyright scope are more likely to arise initially for judges than for legislators. To start, consider the right to control the communication of works to the public: it effectively extends as far as relief is available to control communication at the margins of the public marketplace. In theory, it is not clear how far this right of communication extends into closed list-services, intranets, etc.; in practice its extent might turn on whether judges may provide remedies in such penumbral Internet circuits without intruding on users' privacy.²³⁹ For example, a court might order a hosting institution to take down pirated works from its large but closed intranet, but without subjecting individual participants in the intranet to the order and without monitoring their specific messages. Furthermore, copyright scope is likely to be more frequently put into question as works are increasingly downloaded from the Internet and as computerized tools help user-authors to manipulate materials taken from these works. Judges will then have to construe abstract criteria such as the distinction between "idea" and "expression" and criteria of "substantial taking" in concrete cases of alleged derivative works.²⁴⁰ Their task is to resolve tensions between minimizing risks of free-riding and leaving available cultural options for transforming works, that is, for optimizing feed-back. The writer of this Article has argued elsewhere that, to that end, judges should always enjoin clear-cut piracy, but not necessarily creative transformations of prior works.²⁴¹

Such issues change in tenor, but not structure, when moral rights are asserted. How to find works in cyberspace? How to be sure who authored these works? How to be sure that what you see and hear is the work which the author created? New entitlements to protect copyright-management information online in part respond to just such concerns for the authenticity of works, to which moral rights traditionally addressed themselves.²⁴² Other remedies might help to reach Solomonic solutions to the tension that opposes prior authors' moral rights to maintain the integrity of their works and new authors' freedoms both to transform works

²³⁹ See *supra* text accompanying notes 228-34.

²⁴⁰ See generally Geller, *Transplants*, *supra* note 148, at 211-13, 221-23.

²⁴¹ See Geller, *Hiroshige v. Van Gogh*, *supra* note 125, at 59-70; also Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (arguing that overriding rights of free expression may preclude preliminary injunctions in copyright cases).

²⁴² See WIPO Copyright Treaty, *supra* note 228, art. 12; WIPO Performances and Phonograms Treaty, *supra* note 228, art. 19. See generally Adolf Dietz, *General Report: Authenticity of Authorship and Work*, in ALAI STUDY DAYS, AMSTERDAM 1996: COPYRIGHT IN CYBERSPACE 165, 176 (Marcel Dellebeke ed., 1997) (contemplating producers' as well as authors' rights to assure the authenticity of digitized works, subject to some "balancing of interests").

creatively and to communicate their creations. Suppose, for example, that a prior author challenged a transformed version of her work posted on the World Wide Web as violating both her rights to integrity and to attribution of authorship: the judge could require that the prior version of the work be both hyperlinked from the site where the new version of the work is posted and be attributed to the prior author at that site.²⁴³ Thus both the prior work and new version would be accessible, one cross-referenced by the other, much as the video recordings of “directors’ cuts” of films are now marketed alongside colorized or otherwise edited versions. The prior author’s version would not be eclipsed, but users referred back to it could themselves more easily assess its aesthetic fate in any new version. The writer of this Article has explained elsewhere how traditional moral rights could thus evolve into an Internet moral right to reference.²⁴⁴

There remains the problem raised by industrial designs. It has proven impossible to maintain the distinction between protecting aesthetic works with copyright and functional products with industrial property.²⁴⁵ Judges have responded to this difficulty by applying laws from either side of this distinction to the same works, designs, or products, most notably doubling copyright with patent protection for computer programs.²⁴⁶ Legislators have responded to this difficulty by developing new rights to fill penumbral areas between the fields of copyright and industrial property, for example, supplementing copyright in databases with *sui generis* rights in database contents.²⁴⁷ Judges will in turn have to refine criteria of infringement appropriate either to copyright or to any such related right: for example, for European data rights, the criterion is whether “the whole or a substantial part, evaluated qualitatively and/or quantitatively, of the contents of [the] database” at issue is taken.²⁴⁸ However, the criteria of “substantial” takings, as developed in copyright law, have traditionally dealt with works displaying overall aesthetic structures, such as literary plots, musical or pictorial compositions, etc.; such criteria are not likely to be well suited to rights protecting database contents that are just highly gran-

²⁴³ Cf. David Sanjek, “Don’t Have to DJ No More”: *Sampling and the “Autonomous” Creator*, 10 *CARDOZO ARTS & ENT. L.J.* 607, 622-23 (1992) (indicating how more scrupulous artists who sample and reconfigure the works of others systematically acknowledge the authors of these works).

²⁴⁴ See Paul Edward Geller, *The Universal Electronic Archive: Issues in International Copyright*, 25 *I.I.C.* 54, 63-66 (1994).

²⁴⁵ See Reichman, *Legal Hybrids*, *supra* note 132, at 2500-04.

²⁴⁶ See, e.g., *State St. Bank & Trust Co. v. Signature Fin. Group*, 149 F.3d 1369, 1372-76 (Fed. Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999) (holding that computer programs are patentable subject matter).

²⁴⁷ See Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases, 1996 O.J. (L 077) 20, 23-27.

²⁴⁸ *Id.*, art. 7.1.

ular sets of discrete items. Judges will have to determine where copyright leaves off and such related rights begin in the cases where such diverse rights are asserted: in particular, they will have to differentiate infringement criteria, along with corresponding remedies, respectively appropriate to the diverse rights.²⁴⁹

III. WHAT'S CULTURE GOT TO DO WITH IT?

How to resolve the new copyright issues that are arising in the shift from patchwork to network? As we have seen at numerous points, the novelty of some issues makes it hard to draw responses out of traditional doctrines.²⁵⁰ Rather, starting from new fact situations, lawmakers will have to refer to the overriding rationales of copyright for guidance in fashioning new solutions. Since the reach of the new media is global, and international harmonization a consideration, these rationales have to be studied from a comparative point of view. Let us look then at the rationales that have been offered for both copyright and author's rights.²⁵¹

A. Arguments about Copyright and Culture

The British Statute of Anne, enacted at the start of the eighteenth century, gave "the encouragement of learning" as its purpose.²⁵² The Constitution of the United States, concluded toward the end of that century, mandated Congress to secure copyrights "to promote the progress of science."²⁵³ The legislative record for the revolutionary French copyright laws, enacted at much the same time, set out this phrase which European doctrine has since often cited: "[T]he most sacred, the most legitimate, the most unassailable, and, if I may say so, the most personal of all the properties is the work, fruit of the thought of the writer."²⁵⁴ At the time, in the

²⁴⁹ See, e.g., *EMAP Business Comms. Ltd v. Planit Media AB*, Hovrätt Skåne & Blekinge (Court of Appeal, Sweden), Aug. 2, 1999, [2000] 2 EURO. COPR. & DESIGN RPTS. 93 (dismissing appeal of trial court's refusal to enjoin use of plaintiff's data in defendant's Internet database because the categorizations of the data sets at issue, to the extent similar, were not original and the sets themselves differed in many items).

²⁵⁰ See *supra* text accompanying notes 202-04, 215-23, and 231-49.

²⁵¹ For the bases of this analysis, see Paul Edward Geller, *Must Copyright Be For Ever Caught Between Marketplace and Authorship Norms?*, in *OF AUTHORS AND ORIGINS: ESSAYS IN COPYRIGHT LAW*, 159 (Brad Sherman & Alain Strowel eds., 1994); Paul Edward Geller, *Toward an Overriding Norm in Copyright: Sign Wealth*, 159 RIDA 3 (1994).

²⁵² 8 Anne, ch. 19 (1710).

²⁵³ U.S. CONST., art. I, § 8, cl. 8.

²⁵⁴ *Le Moniteur Universel*, Jan. 15, 1791, set out in alternative versions and translated in STERLING, *supra* note 11, at 1002-05. See also HESSE, *supra* note 58, at 91 (citing case predating the Laws of 1791 and 1793 in which the French court invoked the "sacred right of property" as a basis for enforcing copy-

Enlightenment, such notions as “learning” or “science” were broadly understood to mean culture, including literature and the fine arts that might make us more conscious of the world as well as delight us.²⁵⁵ This reading corresponds to our sense that copyright and culture have much to do with each other, but it raises a troubling question: How can as crude an instrument of social control as the law enhance something as subtle as culture?

Start with the most common response in Anglo-American copyright thinking. At the end of the seventeenth century, Locke contemplated legally securing property interests to prompt private parties to husband scarce resources, and to market resulting products, free of fears of being “constantly exposed to the invasion of others.”²⁵⁶ Economic arguments are now sharpened for intellectual property in terms of the distinction between private and public goods: to the extent private, goods cannot be shared without spreading them thin; to the extent public, goods can benefit different parties one after another, but they remain available to all. For example, once I eat food, it is gone for others; by contrast, we can each take information, insight, or pleasure from a work of the mind, and only the lack of access to the work precludes future readers, listeners, or viewers from doing so as well.²⁵⁷ We have seen that progress in the media transforms cultural goods into increasingly public goods on the marketplace, which in turn may be considered as a communication system. That is, copying works more easily and disseminating them more widely in that system, we better access them ourselves while enabling others to re-access them as well. Economic arguments invoke the fact that, with better media, free-riders can exploit works at ever-smaller fractions of authors’ and media enterprises’ original investments. They then conclude that copyright is needed to minimize free-riding and, accordingly, to assure incentives for such investments.²⁵⁸ The greater the investment, it is argued, the

right); STROWEL, *supra* note 109, at 90-91 (noting, critically, the original context for this slogan).

²⁵⁵ See, e.g., JEAN LE ROND D’ALEMBERT, DISCOURS PRÉLIMINAIRE DE L’ENCYCLOPÉDIE 49-51 (Éditions Gonthier 1965) (1763) (considering the fine arts, literature, and music as kinds of knowledge [*connaissances*]).

²⁵⁶ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 66 (§ 123) (C.B. Macpherson ed., Hackett Publ. Co. 1980) (1690).

²⁵⁷ For the elaboration of this insight historically in the field of copyright, see Gillian K. Hadfield, *The Economics of Copyright: An Historical Perspective*, in 38 ASCAP COPYRIGHT LAW SYMPOSIUM 1 (1992).

²⁵⁸ See generally Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 HARV. J. L. & PUB. POL’Y 867 (1990) (arguing that free-riders need to be controlled to provide incentives for creation and dissemination); Michael Lehmann, *The Theory of Property Rights and the Protection of Intellectual and Industrial Property*, 16 I.I.C. 525 (1985) (arguing that free-riding must be restricted “in order to promote competition” in a stable marketplace).

greater the chances for creating and disseminating new works. That, in turn, is supposed to move “learning” or “science” forward.²⁵⁹

A question of motivation casts a shadow over this economic argument: How do we know what prompts cultural creativity in any given instance, much less generally?²⁶⁰ It is hard to imagine that the prospects of copyright-secured gain motivated Emily Dickinson to write her poetry or Van Gogh to paint.²⁶¹ Admittedly, the writer of this Article would not update his legal treatise from year to year without his royalty cut, which copyright hopefully protects somewhat by reducing the frequency with which readers consult illicit copies. But such contrasting examples as true creators and this mere scrivener only illustrate poles at opposing ends of the range of variegated motives for creativity, in which copyright-royalty shares occupy the bargain basement. Unfortunately, simplistic economic arguments for copyright blithely ignore the incommensurability of the great variety of motives for creators, assimilating them all to the narrower range of profit-seeking incentives for media enterprises.²⁶² More sophisticated economic analyses rather focus on the risks that such enterprises undertake in supporting creative projects, for example, in advancing royalties to writers or in financing capital-intensive projects such as epic motion pictures. Such analyses include the imponderable character of the non-economic motives of creativity within the general universe of risks they recognize: for example, whether an author submits a work on time is just one of a great variety of such risks. Nonetheless, it remains difficult to specify in the abstract how much copyright protection would reduce external risks of free-riding enough to prompt enterprises to take on risks intrinsic to producing and marketing works.²⁶³

²⁵⁹ See *supra* text accompanying notes 252-53.

²⁶⁰ See generally WILLIAM KINGSTON, *INNOVATION: THE CREATIVE IMPULSE IN HUMAN PROGRESS*, ch. 3 (1977) (questioning whether economic incentives are always indispensable for creation).

²⁶¹ For background, see Thomas Wentworth Higginson, *Emily Dickinson*, in *EMILY DICKINSON, SELECTED POEMS AND LETTERS 5-24* (Robert N. Linscott ed., 1959); VINCENT VAN GOGH, *THE LETTERS OF VINCENT VAN GOGH* (Ronald de Leeuw ed., Arnold Pomerans trans., 1996).

²⁶² See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 327 (1989) (“To simplify the analysis, we ignore any distinction between the costs incurred by authors and by publishers, and therefore use the term ‘author’ (or ‘creator’) to mean both author and publisher.”).

²⁶³ See, e.g., JACQUELINE SEIGNETTE, *CHALLENGES TO THE CREATOR DOCTRINE*, ch. 4 (1994) (analyzing the impacts of copyright provisions on the risks that media enterprises run in bringing works into the public marketplace); Paul Goldstein, *Copyright: The Donald C. Brace Memorial Lecture*, 38 J. COPR. SOC’Y 109, 113 (1991) (pointing out that “a robust copyright” will give

Turn to Continental European doctrines that typically conceptualize authors' rights as natural rights. In the eighteenth century, Kant unpacked a key argument for such rights: to protect the autonomy of self-expression, authors alone may authorize when, to whom, and in what forms their works are communicated to the public.²⁶⁴ But self-expression is just as variable in tenor as the motives that drive authors to create diverse works: maps, dictionaries, and computer programs hardly betray any such expressivity, while avant-garde works such as Duchamp's ready-mades, the Dadaists' automatic writing, or Warhol's soup cans do so only obliquely.²⁶⁵ This argument, based on the natural right to autonomous self-expression, then applies with varying force from case to case, and European doctrine has advanced other arguments to reinforce and complete it, of which the main pair can only be broached here. At the start of the nineteenth century, leading French commentary argued that "natural equity" entitles authors to be compensated with "a fair price for the services" that their works render society.²⁶⁶ No doubt, economic rights help to assure many authors of compensation, but neither the marketplace nor legislators are in position to calibrate what authors receive with what they contribute to culture. Moral rights are also invoked to protect authors' "honor and reputation," but this goal is quite distinct from preserving the autonomy of self-expression or even the integrity of cultural landmarks.²⁶⁷ Natural-rights doctrines thus only partially and unevenly illuminate the Revolutionary slogan assimilating authors' works to "the most sacred" and "the most personal of all the properties."²⁶⁸

Arguments for copyright and authors' rights also tend to stumble over a simple truth. We have already touched on cases in which free-riding

"publishers, if not quite a lottery, then at least a portfolio that will promote investment and sustain a wider variety of authorship").

²⁶⁴ See Immanuel Kant, *Von der Unrechtmässigkeit des Büchernachdrucks*, [1785] 5 BERLINISCHE MONATSSCHRIFT 403, reprinted in 1987 ARCHIV FÜR URHEBER- FILM- FUNK- UND THEATERRECHT 137, 142-43. For a gloss on Kant, see STERLING, *supra* note 11, at 1026-27.

²⁶⁵ For such examples, see PETER BÜRGER, *THEORY OF THE AVANT-GARDE* 51-53 (Michael Shaw trans., 1984).

²⁶⁶ 1 RENOARD, *supra* note 39, at 434-35, 457-60 (1838). E.C. case law has consecrated this aim of compensation as the "specific object" or "essential function" of copyright. See, e.g., Case 62/79, *CODITEL v. Ciné Vog Films S.A.*, E.C. Court of Justice, March 18, 1980, 1980 E.C.R. 881, [1981] 2 C.M.L.R. 362, 399-400 (deciding not to restrict copyright, in order not to undercut compensation).

²⁶⁷ See generally ADOLF DIETZ, *DAS DROIT MORAL DES URHEBERS IM NEUEN FRANZÖSISCHEN UND DEUTSCHEN URHEBERRECHT*, pt. 3 (1968) (distinguishing roles of moral rights and discussing seminal cases and commentary on point).

²⁶⁸ See *supra* text accompanying note 254.

shades into creatively transforming prior works.²⁶⁹ The simple truth is that such cases generate the very feed-back of new works that most saliently enriches culture. Classical Greco-Roman works, as well as Renaissance European works, were raided by Elizabethan playwrights, notably Shakespeare.²⁷⁰ Japanese prints of the “floating world,” imported into Europe, furnished new points of departure for the experiments of post-Impressionist painters.²⁷¹ As copyright and authors’ rights have expanded in scope, notably as economic and moral rights have entitled earlier authors to stop later authors from creating newer works from prior ones, such rights have become more likely to inhibit just such feed-back.²⁷² For example, one French commentator reasoned that Bizet’s opera *Carmen* ought not have its integrity violated by showing the motion picture *Carmen Jones*, where black actors acted out the story-line of the tragic opera in an American setting.²⁷³ By parity of reasoning, Prosper Merimée who wrote the story inspiring Bizet, or arguably even Merimée’s heirs or representatives, could have prohibited Bizet from making and showing the opera *Carmen*. Followed out to its furthest conclusion, this reasoning would preclude elaborating any prior work into a new one or even interpreting it in new versions. For example, invoking the right to integrity, playwrights could effectively censor different stagings of their works.²⁷⁴

The arguments just canvassed are correct, but only partially and vaguely so. These arguments are correct that *some* protection is needed to minimize risks of free-riding and to assure respect for autonomous self-expression. However, they are partial and vague in that neither argument tells us *how much* protection would suffice for its respective purposes, nor when *too much* protection would stifle cultural feedback.²⁷⁵ Consider, for

²⁶⁹ See *supra* text accompanying notes 151-52.

²⁷⁰ See ROSE, *supra* note 54, at 25 (1993). For background, see GEOFFREY BULLOUGH, *NARRATIVE AND DRAMATIC SOURCES OF SHAKESPEARE* (8 vols., 1957-75).

²⁷¹ See generally KLAUS BERGER, *JAPONISME IN WESTERN PAINTING FROM WHISTLER TO MATISSE* (1992) (detailing the historical roles of Japanese art forms in modern European art).

²⁷² See *supra* text accompanying notes 123-29.

²⁷³ See Roger-Ferdinand, *L'affaire “Carmen Jones,”* 8 RIDA 3, 21 (1955).

²⁷⁴ Compare T.G.I. Paris, 3e ch., Oct. 15, 1992, 155 RIDA 225 (1993) (enjoining the casting of women in *Waiting for Godot* on the application of Beckett, the playwright), with Rb. Haarlem, Pres. (District Court, Injunctions Judge, Netherlands), April 29, 1988, [1988] 4 INFORMATIERECHT/AMI 83, note Cohen Jehoram (refusing to enjoin a new version of *Waiting for Godot*, even though Beckett challenged it as a travesty). For further critical analysis, see Fintan O’Toole, *Game Without End*, N.Y. REV. BOOKS, Jan. 20, 2000, at 43.

²⁷⁵ See Demsetz, *supra* note 59, at 20; Horacio M. Spector, *An Outline of a Theory Justifying Intellectual and Industrial Property Rights*, [1989] 8 EUR. INTELL. PROP. REV. 270.

example, the debate on the duration of economic rights: neither side, whether proponents or opponents of longer terms, offers hard evidence that so many years more or less would or would not stimulate creativity or broaden dissemination or be counter-productive.²⁷⁶ Nor is it clear how to avoid acquiescing in authors' subjective whims in granting them relief for their moral rights, especially if the law makes them the sole judges of the integrity of their own works. The arguments in question leave us with the sense that the diversity of copyright laws represents just so many *ad hoc* attempts to resolve basic tensions. Or, perhaps, diverse copyright laws just march in tune with different cultural pipers.²⁷⁷

B. *Mediating Between Copyright and Culture*

There is a basic difficulty of method here. The categorical terms of the law do not easily translate into the terms of constantly mutating cultural discourse. Indeed, both case law and statutory law enshrine the principle that whether or not a work is protected by copyright should not turn on findings of cultural or aesthetic worth.²⁷⁸ This principle of neutrality should also make us wary of assessing copyright lawmaking itself by searching for the purported effects that proposed provisions or rulings would have on culture. Of course, it would facilitate analysis if we lived in the best of all possible worlds, in which the invisible hand of the marketplace, or philosopher-kings serving as legislators, would best promote the culturally most significant creations. In reality, there is a complex universe of ever-changing motives that stands between the letter of the law and cultural creativity, and it is perilous to bridge this universe with nothing more than the bare insights of the dismal science of economics or the cryptic insights of natural-rights doctrines. Our historical hypotheses provide some elements for complementing these insights and perhaps for further elaborating the analytic framework in which to assess copyright lawmaking. Start with the following, rather obvious observation: *The law can gov-*

²⁷⁶ Compare Hank Brown & David Miller, *Copyright Term Extension: Sapping American Creativity*, 44 J. COPR. SOC'Y 94, 98-99 (1996) (protesting lack of evidence), with Arthur Miller, *Copyright Term Extension: Boon for American Creators and the American Economy*, 45 J. COPR. SOC'Y 319, 323-24 (1998) (responding with anecdotal evidence).

²⁷⁷ See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX*, ch. 5 (1994); EDELMAN, *supra* note 118, at 26-38, pt. 2 *passim*.

²⁷⁸ Compare *Bleistein v. Donaldson Lithography Co.*, 188 U.S. 239, 250 (1903) (Holmes, J.) ("It would be a dangerous undertaking for persons trained only in the law to constitute themselves judges of the worth of" a work at issue), and France, Intellectual Property Code, Art. 112-1 (making protection independent "of the kind, form of expression, merit or intended use" of a work).

ern the media that in turn feed culture. The potential impacts that the law might have on the media may then be pertinent for the copyright lawmaker.²⁷⁹

We can here only summarily reconsider our historical hypotheses in this light. First, in the sixteenth and seventeenth centuries, national legislators failed in their initially centralized and complex schemes that, to combat piracy and to censor public discourse, restricted the variety of works that could reach the public.²⁸⁰ Second, superseding these schemes from the start of the eighteenth century, copyright laws allocated rights out to authors and, then, through the marketplace, to media enterprises responsive to the public, thus decentralizing decision-making about producing and marketing works.²⁸¹ Third, moving from the nineteenth to the twentieth century, these rights were expanded to secure income streams for media enterprises, allowing them to forge new channels for releasing more works into an increasingly global marketplace.²⁸² An over-arching hypothesis could be ventured: *The chances for creativity seem to increase as the media multiply channels for bringing together a variety of cultural materials and provide outlets for a variety of new creative syntheses.* For example, in Paris of the nineteenth and early twentieth centuries, the full panoply of diverse European cultural trends mixed with each other, as well as with multicultural achievements brought back to Europe by worldwide trade.²⁸³ Resulting creations were released through a diversified publishing industry, performance venues ranging from formal theaters to cabarets, and expositions by academic and by renegade artists.²⁸⁴

Does our historical inquiry dovetail with economic and natural-rights approaches? As to economic analysis, we have considered the marketplace as a communication system.²⁸⁵ From that point of view, copyright law may be evaluated by asking how it impacts on communicating cultural goods through the marketplace. For example, in moving from tangible property in art objects and manuscripts to intangible property in works, copyright law allowed authors to forge new contractual channels of communication with the media enterprises that brought cultural goods to the public. As to natural rights, we have seen authors' rights conceptualized

²⁷⁹ For another, comparable framework of analysis, see Egbert J. Dommering, *An Introduction to Information Law: Works of Fact at the Crossroads of Freedom and Protection*, in *PROTECTING WORKS OF FACTS: COPYRIGHT, FREEDOM OF EXPRESSION AND INFORMATION LAW 1* (Egbert J. Dommering & P. Bernt Hugenholtz eds., 1991).

²⁸⁰ See *supra* text accompanying notes 33-67.

²⁸¹ See *supra* text accompanying notes 85-112.

²⁸² See *supra* text accompanying notes 115-48.

²⁸³ See ROGER SHATTUCK, *THE BANQUET YEARS*, ch. 1 (rev. ed. 1968).

²⁸⁴ See BOURDIEU, *supra* note 126, at 113-40 *passim*.

²⁸⁵ See *supra* text accompanying notes 59-61 and 257-58.

as basic entitlements to control the communication of initially private self-expression to the public.²⁸⁶ From that point of view, these rights may be evaluated by asking how, in the aggregate, they impact on different authors' respective powers over such communication. For example, it has to be asked whether an older author's right is not abusively exercised when it constricts a younger author's options for making and releasing works. In outlining issues for the future, we have tried to consider how to elaborate copyright law that would optimize access to cultural goods on global networks.²⁸⁷

The shift from patchwork to network, however, calls for a deep change in the law. We have posited that law is harmonized to the extent that participants subject to the law can rely on easily understood rules with minimal risks of encountering unfair or counter-productive consequences.²⁸⁸ Previously, authors fed works into markets through media enterprises such as publishers and performance impresarios that insulated them from ultimate users, and hard-copy and live-performance media fed works back into general culture over time. Now, communication circuits are being so compounded and interconnected, and feed-back loops so tightened, that users are increasingly becoming authors who reprocess and recommunicate cultural goods, self-publishing themselves on global networks. Such Internet participants have increasing stakes, as both users and authors, in harmonizing copyright law, so that they are rarely caught in hard cases with untoward results. To the extent that, in cyberspace, they take and input materials on a global scale, their interests should lie in harmonizing copyright law, not nationally, but internationally.²⁸⁹

It is, however, painfully obvious that our world remains not only culturally, but bureaucratically, politically, and legally fragmented, no matter how fast the Internet is pulling communication and data together. Furthermore, copyright law is but one field out of many that faces a deep problem of method: How do you inform, with common values, rules that are obfuscated to citizens because they are, for example, hidden in esoteric regulatory codes or, worse, in the bowels of computers? For this reason, the harmonization of copyright, along with its simplification, represents a formidable task that will have to be undertaken, not merely at the level of harmonizing rules in legislation or any overriding treaty, but at the level of global network systems and enforcement schemes.

²⁸⁶ See *supra* text accompanying notes 87-88 and 264.

²⁸⁷ See *supra* text accompanying notes 149-249.

²⁸⁸ See *supra* text accompanying notes 195-96.

²⁸⁹ See *supra* text accompanying notes 154-60, 196, and 205.

IV. CONCLUSION: OVER THE HORIZON

Media progress facilitates both free-riding and feed-back. With the advent of print, the law was called upon to respond to piracy. At the same time, the burgeoning book trade acted as a catalyst for the burst of cultural creativity that opened modern times. With the Internet, the risks of free-riding have surged higher, along with the chances of enhancing the feed-back on which culture thrives. Thus the challenges for copyright lawmaking become all the more acute.

What lies beyond the horizon of the near future? Imagine an Internet in which each user, armed with a cheap and portable server, communicates as a self-standing node. While it would have its great institutions, such as interconnected databases that users visit as universal cyber-libraries, this serve-yourself, nomadic Internet would also host ever-proliferating links and individual and group sites. On the one hand, it would become all the easier to circulate copies on this Internet outside any public marketplace, making it all the more difficult to control the leakage, even the hemorrhaging, of copyright materials. On the other, with ever-more channels and outlets, this Internet would nourish and unleash the creative processes that generate such materials. It would exemplify the goal implicit in our over-arching hypothesis: optimizing media channels and outlets.²⁹⁰

Whatever media future is overtaking us, it understandably troubles copyright owners and authors. Just as the printing press copied existing texts more easily, the newly emerging Internet universe is one in which already created works, whatever their forms, might even more easily slip out of their claimants' control. However, the initial measures with which print was regulated through the seventeenth century, freighted as they were with medieval and mercantilist ambitions to exercise overreaching social control, were singularly counter-productive. It took the eighteenth and nineteenth centuries to pare these measures down to the classic copyright regime which, moving into the twentieth century, could in turn be globalized in response to ever-more powerful media.

Unfortunately, the present trend of the law to degenerate into hyper-regulation only seems to confirm our wishful reliance on ever-more complex schemes for policing copyright. This writer submits that such temptations may be checked in the light of questions such as the following: Would such schemes be legally extended on the same global scale as the networks they impact? Would these schemes constrict or open up new channels and outlets to feed creativity on that scale? Would they make sense to individual users, ultimate creators, worldwide?

²⁹⁰ See *supra* text accompanying notes 282-84.