

CHAPTER TEN
**Introduction to Copyright:
Theory & History**



Imagine that you have to craft a scheme of intellectual property from scratch. Your subject matter is books. And later music and film. But initially books. What do you do? What material should the right cover? What material should the right leave free? What exceptions and limitations should there be? Again we have a resource that—once we get to a certain technological level—is non-rivalrous and non-excludable. True, the *degree* of rivalrousness and excludability will change over time. It is harder to typeset an illicit edition of *Bleak House* on a Victorian printing press than to download an epub of *Fifty Shades of Grey* from a “warez” site. But you wish to encourage authors (and publishers) to produce these wonderful objects, and yet make sure they can be read by your fellow citizens and even built upon by future authors. How do you do so?

Copyright starts with a remarkable and dramatic choice. It does not cover ideas or unoriginal compilations of fact. When I publish my book, the ideas and facts within it go immediately into the public domain—no need to wait for my lifetime plus another seventy years to get them. Copyright covers only the *original expression*.

When I report on a momentous assassination of a politician, reveal the assassin’s name and offer the prediction that this may lead to the death of a peace process, copyright gives me no rights over the facts of the death, or the assassin’s name or the idea that this may set off national and regional conflict with tragic consequences for those who had hoped peace was within their grasp. My copyright covers only the way in which those ideas and facts are expressed.

In the readings that follow, you will find first that neither this idea/expression dichotomy, nor the drawing of a limited legal right around its contours, seemed obvious or normal when first introduced. Yet you will also find that it was subsequently woven into an edifice of remarkable rhetorical force and power.

Copyright and the Invention of Authorship

Excerpt from
***James Boyle, Shamans, Software and Spleens: Law
and the Construction of the Information Society***
*(Harvard University Press, 1997)*¹



In personal or real property, . . . one can point to a pair of sneakers or a house, say “I own that,” and have some sense of confidence that the statement means something. As the *LeRoy Fibre* case [you probably read the *Leroy Fibre* case as a 1L—the Supreme Court held that “the rights of one man in the use of his property cannot be limited by the wrongs of another”] shows, of course, it is not at all clear that such confidence is justified, but at least

¹ Footnotes omitted.

property presents itself as an apparently coherent feature of social reality, and this is a fact of considerable ideological and political significance. In intellectual property, the response to the claim “I own that” might be “what do you mean?”

As Martha Woodmansee discovered, this point was made with startling clarity in the debates over copyright in Germany in the eighteenth century. Encouraged by an enormous reading public, several apocryphal tales of writers who were household names, yet still living in poverty, and a new, more romantic vision of authorship, writers began to demand greater economic returns from their labors. One obvious strategy was to lobby for some kind of legal right in the text—the right that we would call copyright. To many participants in the debate, the idea was ludicrous. Christian Sigmund Krause, writing in 1783, expressed the point pungently.

“But the ideas, the content! that which actually constitutes a book! which only the author can sell or communicate!”—Once expressed, it is impossible for it to remain the author’s property . . . It is precisely for the purpose of *using* the ideas that most people buy books—pepper dealers, fishwives, and the like and literary pirates excepted . . . Over and over again it comes back to the same question: I can read the contents of a book, learn, abridge, expand, teach, and translate it, write about it, laugh over it, find fault with it, deride it, use it poorly or well—in short, do with it whatever I will. But the one thing I should be prohibited from doing is copying or reprinting it? . . . A published book is a secret divulged. With what justification would a preacher forbid the printing of his homilies, since he cannot prevent any of his listeners from transcribing his sermons? Would it not be just as ludicrous for a professor to demand that his students refrain from using some new proposition he had taught them as for him to demand the same of book dealers with regard to a new book? *No, no it is too obvious that the concept of intellectual property is useless. My property must be exclusively mine; I must be able to dispose of it and retrieve it unconditionally.* Let someone explain to me how that is possible in the present case. Just let someone try taking back the ideas he has originated once they have been communicated so that they are, as before, nowhere to be found. All the money in the world could not make that possible.

Along with this problem go two other, more fundamental ones. The first is the recurrent question of how we can give property rights in intellectual products and yet still have the inventiveness and free flow of information which liberal social theory demands. I shall return to this question in a moment. The second problem is the more fundamental one. On what grounds should we give the author this kind of unprecedented property right at all, even if the conceptual problems could be overcome? We do not think it is necessary to give car workers residual property rights in the cars that they produce—wage labor is thought to work perfectly well. Surely, an author is merely taking public goods—language, ideas, culture, humor, genre—and converting them to his or her own use? Where is the moral or utilitarian justification for the existence of this property right in the first place? The most obvious answer is that authors are special, but why? And since when?

Even the most cursory historical study reveals that our notion of “authorship” is a concept of relatively recent provenance. Medieval church writers actively disapproved of the elements of originality and creativeness which we think of as an essential component of authorship: “They valued extant old books more highly than any recent elucubrations and they put the work of the scribe and copyist above that of the authors. The real task of the scholar was not the vain excogitation of novelties but a discovery of

great old books, their multiplication and the placing of copies where they would be accessible to future generations of readers.”

Martha Woodmansee quotes a wonderful definition of “Book” from a mid-eighteenth-century dictionary that merely lists the writer as one mouth among many—“the scholar, . . . the paper-maker, the type-founder and setter, the proof-reader, the publisher and book-binder, sometimes even the gilder and brass worker”—all of whom are “fed by this branch of manufacture.” Other studies show that authors seen as craftsmen—an appellation which Shakespeare might not have rejected—or at their most exalted, as the crossroads where learned tradition met external divine inspiration. But since the tradition was mere craft and the glory of the divine inspiration should be offered to God rather than to the vessel he had chosen, where was the justification for preferential treatment in the creation of property rights? As authors ceased to think of themselves as either craftsmen, gentlemen, or amanuenses for the Divine spirit, a recognizably different, more romantic vision of authorship began to emerge. At first, it was found mainly in self-serving tracts, but little by little it spread through the culture so that by the middle of the eighteenth century it had come to be seen as a “universal truth about art.”

Woodmansee explains how the decline of the craft-inspiration model of writing and the elevation of the romantic author both presented and seemed to solve the question of property rights in intellectual products: “Eighteenth-century theorists departed from this compound model of writing in two significant ways. They minimized the element of craftsmanship (in some instances they simply discarded it) in favor of the element of inspiration, and they internalized the source of that inspiration. That is, inspiration came to be regarded as emanating not from outside or above, but from within the writer himself. ‘Inspiration’ came to be explicated in terms of original genius with the consequence that the inspired work was made peculiarly and distinctively the product—and the property—of the writer.”

In this vision, the author was not the journeyman who learned a craft and then hoped to be well paid for it. The romantic author was defined not by the mastery of a prior set of rules, but instead by the transformation of genre, the revision of form. Originality became the watchword of artistry and the warrant for property rights. To see how complete a revision this is, one need only examine Shakespeare’s wholesale lifting of plot, scene, and language from other writers, both ancient and contemporary. To an Elizabethan playwright, the phrase “imitation is the sincerest form of flattery” might have seemed entirely without irony. “Not only were Englishmen from 1500 to 1625 without any feeling analogous to the modern attitude toward plagiarism; they even lacked the *word* until the very end of that period.” To the theorists and polemicists of romantic authorship, however, the reproduction of orthodoxy would have been proof they were not the unique and transcendent spirits they imagined themselves to be.

It is the *originality* of the author, the novelty which he or she adds to the raw materials provided by culture and the common pool, which “justifies” the property right and at the same time offers a strategy for resolving the basic conceptual problem pointed out by Krause—what concept of property would allow the author to retain some property rights in the work but not others? In the German debates, the best answer was provided by the great idealist Fichte. In a manner that is now familiar to lawyers trained in legal realism and Hohfeldian analysis, but that must have seemed remarkable at the time, Fichte disaggregated the concept of property in books. The buyer gets the physical thing and the ideas contained in it. Precisely because the originality of his spirit was converted into an originality of form, the author retains the right to the form in which those ideas were expressed: “Each writer must give his own thoughts a certain form, and he can give them no other form than his own because he has no other. But neither can he be willing to hand over this form in making his

thoughts public, for no one can appropriate his thoughts without thereby altering their form. This latter thus remains forever his exclusive property.”

A similar theme is struck in American copyright law. In the famous case of *Bleistein v. Donaldson Lithographing Company*, concerning the copyrightability of a circus poster, Oliver Wendell Holmes was still determined to claim that the work could become the subject of an intellectual property right because it was the original creation of a unique individual spirit. Holmes’s opinion shows us both the advantages and the disadvantages of a rhetoric which bases property rights on “originality.” As a hook on which to hang a property right, “originality” seems to have at least a promise of formal realizability. It connects nicely to the romantic vision of authorship which I described earlier and to which I will return. It also seems to limit a potentially expansive principle, the principle that those who create may be entitled to retain some legally protected interest in the objects they make—even after those objects have been conveyed through the marketplace. But while the idea that an original spirit conveys its uniqueness to worked matter seems intuitively plausible when applied to Shakespeare or Dante, it has less obvious relevance to a more humdrum act of creation by a less credibly romantic creator—a commercial artist in a shopping mall, say. The tension between the rhetoric of Wordsworth and the reality of suburban corporate capitalism is one that continues to bedevil intellectual property discourse today. In *Bleistein*, this particular original spirit had only managed to rough out a picture of energetic-looking individuals performing unlikely acts on bicycles, but to Holmes the principle was the same. “The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone. That something he may copyright.”

This quality of “uniqueness,” recognized first in great spirits, then in creative spirits, and finally in advertising executives, expresses itself in originality of form, of expression. Earlier I quoted a passage from Jessica Litman which bears repeating here: “Why is it that copyright does not protect ideas? Some writers have echoed the justification for failing to protect facts by suggesting that ideas have their origin in the public domain. Others have implied that ‘mere ideas’ may not be worthy of the status of private property. Some authors have suggested that ideas are not protected because of the strictures imposed on copyright by the first amendment. The task of distinguishing ideas from expression in order to explain why private ownership is inappropriate for one but desirable for the other, however, remains elusive.”

I would say that we find the answer to this question in the romantic vision of authorship, of the genius whose style forever expresses a single unique persona. The rise of this powerful (and historically contingent) stereotype provided the necessary raw material to fashion some convincing mediation of the tension between the imagery of “public” and “private” in information production.

To sum up, then, if our starting place is the romantic idea of authorship, then the idea/expression division which has so fascinated and puzzled copyright scholars apparently manages, at a stroke, to do four things:

- First, it provides a conceptual basis for partial, limited property rights, without completely collapsing the notion of property into the idea of a temporary, limited, utilitarian state grant, revocable at will. The property right still seems to be based on something real—on a distinction which sounds formally realizable, even if, on closer analysis, it turns out to be impossible to maintain.
- Second, this division provides a moral and philosophical justification for fencing in the commons, giving the author property in something built from the resources

of the public domain—language, culture, genre, scientific community, or what have you. If one makes originality of spirit the assumed feature of authorship and the touchstone for property rights, one can see the author as creating something entirely new—not recombining the resources of the commons. Thus we reassure ourselves both that the grant to the author is justifiable and that it will not have the effect of diminishing the commons for future creators. After all, if a work of authorship is original—by definition—we believe that it only adds to our cultural supply. With originality first defended and then routinely assumed, intellectual property no longer looks like a zero sum game. There is always “enough and as good” left over—by definition. The distinguished intellectual property scholar Paul Goldstein captures both the power and the inevitable limitations of this view very well. “Copyright, in a word, is about authorship. Copyright is about sustaining the conditions of creativity that enable an individual to craft out of thin air an *Appalachian Spring*, a *The Sun Also Rises*, a *Citizen Kane*.” But of course, even these—remarkable and “original”—works are not crafted out of thin air. As Northrop Frye put it in 1957, when Michel Foucault’s work on authorship was only a gleam in the eye of the episteme, “Poetry can only be made out of other poems; novels out of other novels. All of this was much clearer before the assimilation of literature to private enterprise.”

- Third, the idea/expression division circumscribes the ambit of a labor theory of property. At times, it seems that the argument is almost like Locke’s labor theory; one gains property by mixing one’s labor with an object. But where Locke’s theory, if applied to a modern economy, might have a disturbingly socialist ring to it, Fichte’s theory bases the property right on the originality of every spirit as expressed through words. Every author gets the right—the writer of the roman à clef as well as Goethe—but because of the concentration on originality of expression, the residual property right is only for the workers of the word and the image, not the workers of the world. Even after that right is extended by analogy to sculpture and painting, software and music, it will still have an attractively circumscribed domain.
- Fourth, the idea/expression division resolves (or at least conceals) the tension between public and private. In the double life which Marx described, information is both the life blood of the noble disinterested citizens of the public world and a commodity in the private sphere to which we must attach property rights if we wish our self-interested producers to continue to produce. By disaggregating the book into “idea” and “expression,” we can give the idea (and the facts on which it is based) to the public world and the expression to the writer, thus apparently mediating the contradiction between public good and private need (or greed).

Thus the combination of the romantic vision of authorship and the distinction between idea and expression appeared to provide a conceptual basis and a moral justification for intellectual property, to do so in a way which did not threaten to spread dangerous notions of entitlement to other kinds of workers, and to mediate the tension between the halves of the liberal world view. Small wonder that it was a success.

Questions:

1.) Reread the indented quote from Krause. What does he assume that the property right in a book would have to cover? And what does he assume about the “reach” of the right? How absolute or total does he assume that property right would have to be in order to be

coherent? Why does he say such a right would be impossible?

2.) What does he mean when he says “It is precisely for the purpose of using the ideas that most people buy books—*pepper dealers, fishwives, and the like and literary pirates excepted*”?

3.) Boyle sets up a checklist of functions that any theory of copyright has to fulfill: The two most important are to explain how the author gets to own something she drew in part from the public domain, and to explain how this particular property right balances property with freedom of expression (think of the framings we discussed in Chapter 1). How does the idea of a limited property right drawn around the idea-expression dichotomy fulfill those tasks?

4.) Do current artists and critics believe that the mark of an artist, the measurement of her worth, is above all her originality? Does the public? Compare our view of soap operas, formula action movies and high culture novels or movies. Would Shakespeare have agreed with our implicit aesthetic criteria?

Three Views of Copyright (and the *droits d’auteur*)

One approach to the background theory of copyright is to give you excerpts from the writings of philosophers or property theorists. We would be the last people to deprecate such an approach: one of us has just engaged in it. But we have taken a different tack here. In the excerpts that follow we have tried to give you a snapshot of *the actual political debates over copyright*. This was a battle of ideas, make no mistake about that. But it was a battle of ideas that had to be changed into the coin of the day, that had to be cashed out in language that legislators and citizens could understand and appreciate. We have taken a series of snippets drawn from writers with very different views—Macaulay (whom you have already encountered), Victor Hugo, and Samuel Clemens (Mark Twain.) The topics they are discussing will be familiar to you—free expression, term extension, access to culture—but we want you to focus more on their premises. What is copyright *for*? How should it be judged? What balance—if any—should it strike between authors, readers and future creators? How does its split between idea and expression play in that discussion? When is access to the idea not sufficient, so that one needs access to the actual expression?

Thomas Babington Macaulay,
First Speech to the House of Commons on Copyright
February 5, 1841



It is painful to me to take a course which may possibly be misunderstood or misrepresented as unfriendly to the interests of literature and literary men. It is painful to me, I will add, to oppose my honorable and learned friend on a question which he has taken up from the purest motives, and which he regards with a parental interest. These feelings have hitherto kept me silent when the law of copyright has been under discussion. But as I am, on full consideration, satisfied that the measure before us will, if adopted, inflict grievous injury on the public, without conferring any compensating advantage on men of letters, I think it my duty to avow that opinion and to defend it.

The first thing to be done, Sir, is to settle on what principles the question is to be argued. Are we free to legislate for the public good, or are we not? Is this a question of expediency, or is it a question of right? Many of those who have written and petitioned against the existing state of things treat the question as one of right. The law of nature, according to them, gives to every man a sacred and indefeasible property in his own ideas, in the fruits of his own reason and imagination. The legislature has indeed the power to take away this property, just as it has the power to pass an act of attainder for cutting off an innocent man's head without a trial. But, as such an act of attainder would be legal murder, so would an act invading the right of an author to his copy be, according to these gentlemen, legal robbery.

Now, Sir, if this be so, let justice be done, cost what it may. I am not prepared, like my honorable and learned friend, to agree to a compromise between right and expediency, and to commit an injustice for the public convenience. But I must say, that his theory soars far beyond the reach of my faculties. It is not necessary to go, on the present occasion, into a metaphysical inquiry about the origin of the right of property; and certainly nothing but the strongest necessity would lead me to discuss a subject so likely to be distasteful to the House. I agree, I own, with Paley in thinking that property is the creature of the law, and that the law which creates property can be defended only on this ground, that it is a law beneficial to mankind. But it is unnecessary to debate that point. For, even if I believed in a natural right of property, independent of utility and anterior to legislation, I should still deny that this right could survive the original proprietor. . . . Surely, Sir, even those who hold that there is a natural right of property must admit that rules prescribing the manner in which the effects of deceased persons shall be distributed are purely arbitrary, and originate altogether in the will of the legislature. If so, Sir, there is no controversy between my honorable and learned friend and myself as to the principles on which this question is to be argued. For the existing law gives an author copyright during his natural life; nor do I propose to invade that privilege, which I should, on the contrary, be prepared to defend strenuously against any assailant. The only point in issue between us is, how long after an author's death the state shall recognize a copyright in his representatives and assigns; and it can, I think, hardly be disputed by any rational man that this is a point which the legislature is free to determine in the way which may appear to be most conducive to the general good.

We may now, therefore, I think, descend from these high regions, where we are in danger of being lost in the clouds, to firm ground and clear light. Let us look at this question like legislators, and after fairly balancing conveniences and inconveniences, pronounce between the existing law of copyright, and the law now proposed to us. The question of copyright, Sir, like most questions of civil prudence, is neither black nor white, but gray. The system of copyright has great advantages and great disadvantages; and it is our business to ascertain what these are, and then to make an arrangement under which the advantages may be as far as possible secured, and the disadvantages as far as possible excluded. The charge which I bring against my honorable and learned friend's bill is this, that it leaves the advantages nearly what they are at present, and increases the disadvantages at least fourfold.

The advantages arising from a system of copyright are obvious. It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated: and the least objectionable way of remunerating them is by means of copyright. You cannot depend for literary instruction and amusement on the leisure of men occupied in the pursuits of active life. Such men may occasionally produce compositions of great merit. But you must not look to such men for works which require deep meditation and long research. Works of that kind you can expect only from persons who make literature the business of their lives. Of these persons few will be found among

the rich and the noble. The rich and the noble are not impelled to intellectual exertion by necessity. They may be impelled to intellectual exertion by the desire of distinguishing themselves, or by the desire of benefiting the community. But it is generally within these walls that they seek to signalize themselves and to serve their fellow-creatures. Both their ambition and their public spirit, in a country like this, naturally take a political turn. It is then on men whose profession is literature, and whose private means are not ample, that you must rely for a supply of valuable books. Such men must be remunerated for their literary labor. And there are only two ways in which they can be remunerated. One of those ways is patronage; the other is copyright.

There have been times in which men of letters looked, not to the public, but to the government, or to a few great men, for the reward of their exertions. It was thus in the time of Mæcenas and Pollio at Rome, of the Medici at Florence, of Louis the Fourteenth in France, of Lord Halifax and Lord Oxford in this country. Now, Sir, I well know that there are cases in which it is fit and graceful, nay, in which it is a sacred duty to reward the merits or to relieve the distresses of men of genius by the exercise of this species of liberality. But these cases are exceptions. I can conceive no system more fatal to the integrity and independence of literary men than one under which they should be taught to look for their daily bread to the favor of ministers and nobles. I can conceive no system more certain to turn those minds which are formed by nature to be the blessings and ornaments of our species into public scandals and pests.

We have, then, only one resource left. We must betake ourselves to copyright, be the inconveniences of copyright what they may. Those inconveniences, in truth, are neither few nor small. Copyright is monopoly, and produces all the effects which the general voice of mankind attributes to monopoly. My honorable and learned friend talks very contemptuously of those who are led away by the theory that monopoly makes things dear. That monopoly makes things dear is certainly a theory, as all the great truths which have been established by the experience of all ages and nations, and which are taken for granted in all reasonings, may be said to be theories. It is a theory in the same sense in which it is a theory that day and night follow each other, that lead is heavier than water, that bread nourishes, that arsenic poisons, that alcohol intoxicates.

If, as my honorable and learned friend seems to think, the whole world is in the wrong on this point, if the real effect of monopoly is to make articles good and cheap, why does he stop short in his career of change? Why does he limit the operation of so salutary a principle to sixty years? Why does he consent to anything short of a perpetuity? He told us that in consenting to anything short of a perpetuity he was making a compromise between extreme right and expediency. But if his opinion about monopoly be correct, extreme right and expediency would coincide. Or rather, why should we not restore the monopoly of the East India trade to the East India Company? Why should we not revive all those old monopolies which, in Elizabeth's reign, galled our fathers so severely that, maddened by intolerable wrong, they opposed to their sovereign a resistance before which her haughty spirit quailed for the first and for the last time? Was it the cheapness and excellence of commodities that then so violently stirred the indignation of the English people? I believe, Sir, that I may safely take it for granted that the effect of monopoly generally is to make articles scarce, to make them dear, and to make them bad. And I may with equal safety challenge my honorable friend to find out any distinction between copyright and other privileges of the same kind; any reason why a monopoly of books should produce an effect directly the reverse of that which was produced by the East India Company's monopoly of tea, or by Lord Essex's monopoly of sweet wines. Thus, then, stands the case. It is good that authors should be remunerated; and the least

exceptionable way of remunerating them is by a monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

Now, I will not affirm that the existing law is perfect, that it exactly hits the point at which the monopoly ought to cease; but this I confidently say, that the existing law is very much nearer that point than the law proposed by my honorable and learned friend. For consider this; the evil effects of the monopoly are proportioned to the length of its duration. But the good effects for the sake of which we bear with the evil effects are by no means proportioned to the length of its duration. A monopoly of sixty years produces twice as much evil as a monopoly of thirty years, and thrice as much evil as a monopoly of twenty years. But it is by no means the fact that a posthumous monopoly of sixty years gives to an author thrice as much pleasure and thrice as strong a motive as a posthumous monopoly of twenty years. On the contrary, the difference is so small as to be hardly perceptible. We all know how faintly we are affected by the prospect of very distant advantages, even when they are advantages which we may reasonably hope that we shall ourselves enjoy. But an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action. It is very probable that in the course of some generations land in the unexplored and unmapped heart of the Australasian continent will be very valuable. But there is none of us who would lay down five pounds for a whole province in the heart of the Australasian continent. We know, that neither we, nor anybody for whom we care, will ever receive a farthing of rent from such a province. And a man is very little moved by the thought that in the year 2000 or 2100, somebody who claims through him will employ more shepherds than Prince Esterhazy, and will have the finest house and gallery of pictures at Victoria or Sydney. Now, this is the sort of boon which my honorable and learned friend holds out to authors. Considered as a boon to them, it is a mere nullity; but considered as an impost on the public, it is no nullity, but a very serious and pernicious reality.

The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures. I admit, however, the necessity of giving a bounty to genius and learning. In order to give such a bounty, I willingly submit even to this severe and burdensome tax. Nay, I am ready to increase the tax, if it can be shown that by so doing I should proportionally increase the bounty. My complaint is, that my honorable and learned friend doubles, triples, quadruples, the tax, and makes scarcely any perceptible addition to the bounty. Why, Sir, what is the additional amount of taxation which would have been levied on the public for Dr. Johnson's works alone, if my honorable and learned friend's bill had been the law of the land? I have not data sufficient to form an opinion. But I am confident that the taxation on his dictionary alone would have amounted to many thousands of pounds. In reckoning the whole additional sum which the holders of his copyrights would have taken out of the pockets of the public during the last half century at twenty thousand pounds, I feel satisfied that I very greatly underrate it. Now, I again say that I think it but fair that we should pay twenty thousand pounds in consideration of twenty thousand pounds' worth of pleasure and encouragement received by Dr. Johnson. But I think it very hard that we should pay twenty thousand pounds for what he would not have valued at five shillings. . . .

But this is not all. I think it right, Sir, to call the attention of the House to an evil, which is perhaps more to be apprehended when an author's copyright remains in the hands of his family, than when it is transferred to booksellers. I seriously fear that, if such a

measure as this should be adopted, many valuable works will be either totally suppressed or grievously mutilated. I can prove that this danger is not chimerical; and I am quite certain that, if the danger be real, the safeguards which my honorable and learned friend has devised are altogether nugatory. That the danger is not chimerical may easily be shown. Most of us, I am sure, have known persons who, very erroneously as I think, but from the best motives, would not choose to reprint Fielding's novels or Gibbon's "History of the Decline and Fall of the Roman Empire." Some gentlemen may perhaps be of opinion that it would be as well if "Tom Jones" and Gibbon's "History" were never reprinted. I will not, then, dwell on these or similar cases. I will take cases respecting which it is not likely that there will be any difference of opinion here; cases, too, in which the danger of which I now speak is not matter of supposition, but matter of fact.

Take Richardson's novels. Whatever I may, on the present occasion, think of my honorable and learned friend's judgment as a legislator, I must always respect his judgment as a critic. He will, I am sure, say that Richardson's novels are among the most valuable, among the most original, works in our language. No writings have done more to raise the fame of English genius in foreign countries. No writings are more deeply pathetic. No writings, those of Shakespeare excepted, show more profound knowledge of the human heart. . . . Sir, it is my firm belief, that if the law had been what my honorable and learned friend proposes to make it, they would have been suppressed.

I remember Richardson's grandson well; he was a clergyman in the city of London; he was a most upright and excellent man; but he had conceived a strong prejudice against works of fiction. He thought all novel-reading not only frivolous but sinful. He said,—this I state on the authority of one of his clerical brethren who is now a bishop,—he said that he had never thought it right to read one of his grandfather's books. Suppose, Sir, that the law had been what my honorable and learned friend would make it. Suppose that the copyright of Richardson's novels had descended, as might well have been the case, to this gentleman. I firmly believe that he would have thought it sinful to give them a wide circulation. I firmly believe that he would not for a hundred thousand pounds have deliberately done what he thought sinful. He would not have reprinted them.

And what protection does my honorable and learned friend give to the public in such a case? Why, Sir, what he proposes is this: if a book is not reprinted during five years, any person who wishes to reprint it may give notice in the London Gazette: the advertisement must be repeated three times: a year must elapse; and then, if the proprietor of the copyright does not put forth a new edition, he loses his exclusive privilege. Now, what protection is this to the public? What is a new edition? Does the law define the number of copies that make an edition? Does it limit the price of a copy? Are twelve copies on large paper, charged at thirty guineas each, an edition? It has been usual, when monopolies have been granted, to prescribe numbers and to limit prices. But I do not find that my honorable and learned friend proposes to do so in the present case. And, without some such provision, the security which he offers is manifestly illusory. It is my conviction that, under such a system as that which he recommends to us, a copy of "Clarissa" would have been as rare as an Aldus or a Caxton.

I will give another instance. One of the most instructive, interesting, and delightful books in our language is Boswell's "Life of Johnson." Now it is well known that Boswell's eldest son considered this book, considered the whole relation of Boswell to Johnson, as a blot in the escutcheon of the family. He thought, not perhaps altogether without reason, that his father had exhibited himself in a ludicrous and degrading light. And thus he became so sore and irritable that at last he could not bear to hear the "Life of Johnson" mentioned. Suppose that the law had been what my honorable and learned

friend wishes to make it. Suppose that the copyright of Boswells "Life of Johnson" had belonged, as it well might, during sixty years, to Boswell's eldest son. What would have been the consequence? An unadulterated copy of the finest biographical work in the world would have been as scarce as the first edition of Camden's "Britannia."

. . . Sir, of the kindness with which the House has listened to me, that I will not detain you longer. I will only say this, that if the measure before us should pass, and should produce one tenth part of the evil which it is calculated to produce, and which I fully expect it to produce, there will soon be a remedy, though of a very objectionable kind. Just as the absurd Acts which prohibited the sale of game were virtually repealed by the poacher, just as many absurd revenue Acts have been virtually repealed by the smuggler, so will this law be virtually repealed by piratical booksellers.

At present the holder of copyright has the public feeling on his side. Those who invade copyright are regarded as knaves who take the bread out of the mouths of deserving men. Everybody is well pleased to see them restrained by the law, and compelled to refund their ill-gotten gains. No tradesman of good repute will have anything to do with such disgraceful transactions. Pass this law: and that feeling is at an end. Men very different from the present race of piratical booksellers will soon infringe this intolerable monopoly. Great masses of capital will be constantly employed in the violation of the law. Every art will be employed to evade legal pursuit; and the whole nation will be in the plot. On which side indeed should the public sympathy be when the question is whether some book as popular as "Robinson Crusoe" or the "Pilgrim's Progress" shall be in every cottage, or whether it shall be confined to the libraries of the rich for the advantage of the great-grandson of a bookseller who, a hundred years before, drove a hard bargain for the copyright with the author when in great distress? Remember too that, when once it ceases to be considered as wrong and discreditable to invade literary property, no person can say where the invasion will stop. The public seldom makes nice distinctions. The wholesome copyright which now exists will share in the disgrace and danger of the new copyright which you are about to create. And you will find that, in attempting to impose unreasonable restraints on the reprinting of the works of the dead, you have, to a great extent, annulled those restraints which now prevent men from pillaging and defrauding the living.

Questions:

- 1.) How does Macaulay link possible private censorship and *inherited* interests in copyright? Why do these same concerns not arise with the author's original private right to control reproduction?
- 2.) Is copyright a matter of right or a matter of utility for Macaulay?
- 3.) Why does he think copyright superior to patronage as a method of encouraging literary production? What would he think of crowdsourcing sites such as Kickstarter?
- 4.) What would he think of our current copyright system?
- 5.) The Bill he was discussing dealt with the possibility that publishers might "sit on their rights" and that works would become commercially unavailable, subverting copyright's goal of access. What mechanism did the Bill have to avoid that danger? Would it be a good idea for us to have such a mechanism today?
- 6.) Ever read Richardson's novels? Hmm.

*Victor Hugo, Speech to the Congress of
Literary, Industrial and Artistic Property
Paris, 1878²*



Literary property is of *general* utility.

All the old monarchical laws denied and still deny literary property. For what purpose? For the purpose of *control*. The writer-owner is a free writer. To take his property, is to take away his independence. One wishes that it were not so. [That is the danger in] the remarkable fallacy, which would be childish if it were not so perfidious, “thought belongs to everyone, so it cannot be property, so literary property does not exist.” What a strange confusion! First, to confuse the ability to think, which is general, with the thought, which is individual; my thought is *me*. Then, to confuse thought, an abstract thing, with the book, a material thing. The thought of the writer, as thought, evades the grasping hand. It flies from soul to soul; it has this gift and this force—*virum volitare per ora*—that it is everywhere on the lips of men. But the book is distinct from thought; as a book, it is “seizable,” so much so that it is sometimes “seized.” [illicitly copied, but also impounded, censored.] (Laughter.)

The book, a product of printing, belongs to industry and is the foundation, in all its forms, of a large commercial enterprise. It is bought and sold; it is a form of property, a value created, uncompensated, riches added by the writer to the national wealth. Indeed all must agree, this is the most *compelling* form of property.

Despotic governments violate this property right; they confiscate the book, hoping thus to confiscate the writer. Hence the system of royal pensions. [Pensions for writers, in the place of author’s rights.] Take away everything and give back a pittance! This is the attempt to dispossess and to subjugate the writer. One steals, and *then* one buys back a fragment of what one has stolen. It is a wasted effort, however. The writer always escapes. We became poor, he remains free. (Applause.) Who could buy these great minds, Rabelais, Molière, Pascal? But the attempt is nonetheless made, and the result is dismal. Monarchic patronage drains the vital forces of the nation. Historians give Kings the title the “father of the nation” and “fathers of letters”; . . . the result? These two sinister facts: the people without bread, Corneille [the great French author] without shoes. (Long applause).

Gentlemen, let us return to the basic principle: respect for property. Create a system of literary property, but at the same time, create the public domain! Let us go further. Let us expand the idea. The law could give to all publishers the right to publish any book after the death of the author, the only requirement would be to pay the direct heirs a very low fee, which in no case would exceed five or ten percent of the net profit. This simple system, which combines the unquestionable property of the writer with the equally incontestable right of the public domain was suggested by the 1836 commission [on the rights of authors]; and you can find this solution, with all its details, in the minutes of the board, then published by the Ministry of the Interior.

The principle is twofold, do not forget. The book, as a book, is owned by the author, but as a thought, it is owned, it *belongs*—the word is not too extreme—to the human

² This is our own translation and it is a free one—one that tries to convey the impact that Hugo’s powerful, soaring rhetoric would have had to a contemporary French audience, rather than translating literally, word for word. French has its own rhythms and stylistic flourishes; a mixture of passion and formality that can seem odd to the English ear—we have tried to give a sense of those, and probably failed. All the emphases in the text are ours. His are not recorded.

race. All intelligences, all minds, are eligible, all own it. If one of these two rights, the right of the writer and the right of the human mind, were to be sacrificed, it would certainly be the right of the writer, because the public interest is our only concern, and that must take precedence in anything that comes before us. [Numerous sounds of approval.] But, as I just said, this sacrifice is not necessary.



Notes

Hugo was a fabulous—inspiring, passionate—proponent of the rights of authors, and the connection of those rights to free expression and free ideas. He went beyond giving speeches to play a serious role in setting up the current international copyright system. He is held out today as the ultimate proponent of the *droits d'auteur*—the person who said (and he did) that the author's right was the most sacred form of property: unlike other property rights it impoverished no one, because it was over something that was entirely new. (Think of Locke and his point that all property took from the common store. Not so with copyright, said Hugo.) But Hugo was a more subtle thinker than that, as this passage shows.

Questions:

- 1.) Could Hugo and Macaulay come to agreement?
- 2.) Hugo calls on the delegates to the Conference (who were to offer suggestions on a new Copyright Bill) to create, or found, a system of literary property but at the same time to create the public domain. How?
- 3.) Does Hugo think that the public's interest in access is satisfied by the free availability of ideas alone, or does he also want the public to have access to the expression?
- 4.) In *Golan* Justice Ginsburg said:

As petitioners put it in this Court, Congress impermissibly revoked their right to exploit foreign works that “belonged to them” once the works were in the public domain. To copyright lawyers, the “vested rights” formulation might sound exactly backwards: Rights typically vest at the *outset* of copyright protection, in an author or rightholder. See, *e.g.*, 17 U.S.C. § 201(a) (“Copyright in a work protected . . . vests initially in the author. . .”). Once the term of protection ends, the works do not revest in any rightholder. Instead, the works simply lapse into the public domain. See, *e.g.*, Berne, Art. 18(1), 828 U.N.T.S., at 251 (“This Convention shall apply to all works which . . . have not yet fallen into the public domain. . .”). Anyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works.

Would Hugo agree?

***Samuel L. Clemens [Mark Twain], Statement before
the Committee of Patents of the Senate and House
to discuss amending the Copyright Act***

June 1906



Mr. Clemens. I have read the bill. At least I have read such portions of it as I could understand; and indeed I think no one but a practiced legislator can read the bill and thoroughly understand it, and I am not a practiced legislator. I have had no practice at all in unraveling confused propositions or bills. Not that this is more confused than any other bill. I suppose they are all confused. It is natural that they should be, in a legal paper of that kind, as I understand it. Nobody can understand a legal paper, merely on account of the language that is in it. It is on account of the language that is in it that no one can understand it except an expert.

Necessarily I am interested particularly and especially in the part of the bill which concerns my trade. I like that bill, and I like that extension from the present limit of copyright life of forty-two years to the author's life and fifty years after. I think that will satisfy any reasonable author, because it will take care of his children. Let the grandchildren take care of themselves. "Sufficient unto the day." That would satisfy me very well. That would take care of my daughters, and after that I am not particular. I shall then long have been out of this struggle and independent of it. Indeed, I like the whole bill. It is not objectionable to me. Like all the trades and occupations of the United States, ours is represented and protected in that bill. I like it. I want them to be represented and protected and encouraged. They are all worthy, all important, and if we can take them under our wing by copyright, I would like to see it done. I should like to have you encourage oyster culture and anything else. I have no illiberal feeling toward the bill. I like it. I think it is just. I think it is righteous, and I hope it will pass without reduction or amendment of any kind.

I understand, I am aware, that copyright must have a term, must have a limit, because that is required by the Constitution of the United States, which sets aside the earlier constitution, which we call the Decalogue. The Decalogue says that you shall not take away from any man his property. I do not like to use the harsher term, "Thou shalt not steal."

But the laws of England and America do take away property from the owner. They select out the people who create the literature of the land. Always talk handsomely about the literature of the land. Always say what a fine, a great monumental thing a great literature is. In the midst of their enthusiasm they turn around and do what they can to crush it, discourage it, and put it out of existence. I know that we must have that limit. But forty-two years is too much of a limit. I do not know why there should be a limit at all. I am quite unable to guess why there should be a limit to the possession of the product of a man's labor. There is no limit to real estate. As Doctor Hale has just suggested, you might just as well, after you had discovered a coal mine and worked it twenty-eight years, have the Government step in and take it away—under what pretext?

The excuse for a limited copyright in the United States is that an author who has produced a book and has had the benefit of it for that term has had the profit of it long enough, and therefore the Government takes the property, which does not belong to it, and generously gives it to the eighty-eight millions. That is the idea. If it did that, that would be one thing. But it does not do anything of the kind. It merely takes the author's property, merely takes from his children the bread and profit of that book, and gives the publisher double profit. The publisher, and some of his confederates who are in the conspiracy, rear families in affluence, and they continue the enjoyment of these ill-gotten

gains generation after generation. They live forever, the publishers do.

As I say, this limit is quite satisfactory to me—for the author's life, and fifty years after. In a few weeks, or months, or years I shall be out of it. I hope to get a monument. I hope I shall not be entirely forgotten. I shall subscribe to the monument myself. But I shall not be caring what happens if there is fifty years' life of my copyright. My copyrights produce to me annually a good deal more money than I have any use for. But those children of mine have use for that. I can take care of myself as long as I live. I know half a dozen trades, and I can invent a half a dozen more. I can get along. But I like the fifty years' extension, because that benefits my two daughters, who are not as competent to earn a living as I am, because I have carefully raised them as young ladies, who don't know anything and can't do anything. So I hope Congress will extend to them that charity which they have failed to get from me.

Why, if a man who is mad—not mad, but merely strenuous—about race suicide should come to me and try to get me to use my large political or ecclesiastical influence for the passage of a bill by this Congress limiting families to 22 children by one mother, I should try to calm him down. I should reason with him. I should say to him, “That is the very parallel to the copyright limitation by statute. Leave it alone. Leave it alone and it will take care of itself.” There is only one couple in the United States that can reach that limit. Now, if they reach that limit let them go on. Make the limit a thousand years. Let them have all the liberty they want. You are not going to hurt anybody in that way. Don't cripple that family and restrict it to 22 children. In doing so you are merely offering this opportunity for activity to one family per year in a nation of eighty millions. It is not worth the while at all.

The very same with copyright. One author per year produces a book which can outlive the forty-two year limit, and that is all. This nation can not produce two authors per year who can create a book that will outlast forty-two years. The thing is demonstrably impossible. It can not be done. To limit copyright is to take the bread out of the mouths of the children of that one author per year, decade, century in and century out. That is all you get out of limiting copyright.

I made an estimate once when I was to be called before the copyright committee of the House of Lords, as to the output of books, and by my estimate we had issued and published in this country since the Declaration of Independence 220,000 books. What was the use of protecting those books by copyright? They are all gone. They had all perished before they were 10 years old. There is only about one book in a thousand that can outlive forty-two years of copyright. Therefore why put a limit at all? You might just as well limit a family to 22. It will take care of itself. If you try to recall to your minds the number of men in the nineteenth century who wrote books in America which books lived forty-two years you will begin with Fennimore Cooper, follow that with Washington Irving, Harriet Beecher Stowe, and Edgar A. Poe, and you will not go far until you begin to find that the list is limited.

You come to Whittier and Holmes and Emerson, and you find Howells and Thomas Bailey Aldrich, and then the list gets pretty thin and you question if you can find 20 persons in the United States in a whole century who have produced books that could outlive or did outlive the forty-two year limit. You can take all the authors in the United States whose books have outlived the forty-two year limit and you can seat them on one bench there. Allow three children to each of them, and you certainly can put the result down at 100 persons. Add two or three more benches. You have plenty of room left. That is the limit of the insignificant number whose bread and butter are to be taken away. For what purpose? For what profit to anybody? Nobody can tell what that profit is. It is only those books that will outlast the forty-two-year limit that have any value after ten or fifteen

years. The rest are all dead. Then you turn those few books into the hands of the pirate—into the hands of the legitimate publisher—and they go on, and they get the profit that properly should have gone to wife and children. I do not think that is quite right. I told you what the idea was in this country for a limited copyright.

The English idea of copyright, as I found, was different, when I was before the committee of the House of Lords, composed of seven members I should say. The spokesman was a very able man, Lord Thring, a man of great reputation, but he didn't know anything about copyright and publishing. Naturally he didn't, because he hadn't been brought up to this trade. It is only people who have had intimate personal experience with the triumphs and griefs of an occupation who know how to treat it and get what is justly due.

Now that gentleman had no purpose or desire in the world to rob anybody or anything, but this was the proposition—fifty years' extension—and he asked me what I thought the limit of copyright ought to be.

“Well,” I said, “perpetuity.” I thought it ought to last forever.

Well, he didn't like that idea very much. I could see some resentment in his manner, and he went on to say that the idea of a perpetual copyright was illogical, and so forth, and so on. And here was his reason—for the reason that it has long ago been decided that ideas are not property, that there can be no such thing as property in ideas. . . . That there could be no such thing as property in an intangible idea. He said, “What is a book? A book is just built from base to roof with ideas, and there can be no property in them.” I said I wished he could mention any kind of property existing on this planet, property that had a pecuniary value, which was not derived from an idea or ideas.

“Well,” he said, “landed estate—real estate.”

“Why,” I said, “Take an assumed case, of a dozen Englishmen traveling through the South—Africa—they camp out; eleven of them see nothing at all; they are mentally blind. But there is one in the party who knows what that harbor means, what this lay of the land means; to “him it means that some day—you can not tell when—a railway will come through here, and there on that harbor a great city will spring up. That is his idea. And he has another idea, which is to get a trade, and so, perhaps, he sacrifices his last bottle of Scotch whisky and gives a horse blanket to the principal chief of that region and buys a piece of land the size of Pennsylvania. There is the value of an idea applied to real estate. That day will come, as it was to come when the Cape-to-Cairo Railway should pierce Africa and cities should be built, though there was some smart person who bought the land from the chief and received his everlasting gratitude, just as was the case with William Penn, who bought for \$40 worth of stuff the area of Pennsylvania. He did a righteous thing. We have to be enthusiastic over it, because that was a thing that never happened before probably. There was the application of an idea to real estate. Every improvement that is put upon real estate is the result of an idea in somebody's head. A skyscraper is another idea. The railway was another idea. The telephone and all those things are merely symbols which represent ideas. The washtub was the result of an idea. The thing hadn't existed before. There is no property on this earth that does not derive pecuniary value from ideas and association of ideas applied and applied and applied again and again and again, as in the case of the steam engine. You have several hundred people contributing their ideas to the improvement and the final perfection of that great thing, whatever it is—telephone, telegraph, and all.”

So if I could have convinced that gentleman that a book which does consist solely of ideas, from the base to the summit, then that would have been the best argument in the world that it is property, like any other property, and should not be put under the ban of

any restriction, but that it should be the property of that man and his heirs forever and ever, just as a butcher shop would be, or—I don't care—anything, I don't care what it is. It all has the same basis. The law should recognize the right of perpetuity in this and every other kind of property. But for this property I do not ask that at all. Fifty years from now I shall not be here. I am sorry, but I shall not be here. Still, I should like to see it.

Of course we have to move by slow stages. When a great event happens in this world, like that of 1714, [sic] under Queen Anne, it stops everything, but still, all the world imagines there was an element of justice in that act. They do not know why they imagine it, but it is because somebody else has said so. And that process must continue until our day, and keep constantly progressing on and on. First twenty-eight years was added, and then a renewal for fourteen years; and then you encountered Lord Macaulay, who made a speech on copyright when it was going to achieve a life of sixty years which reduced it to forty years—a speech that was read all over the world by everybody who does not know that Lord Macaulay did not know what he was talking about. So he inflicted this disaster upon his successors in the authorship of books. It has to undergo regular and slow development—evolution.

Here is this bill, one instance of it. Make the limit the author's life and fifty years after, and, as I say, fifty years from now they will see that that has not convulsed the world at all. It has not destroyed any San Francisco. No earthquakes concealed in it anywhere. It has changed nobody. It has merely fed some starving author's children. Mrs. Stowe's [Harriet Becher Stowe, author of *Uncle Tom's Cabin*] two daughters were close neighbors of mine, and—well, they had their living very much limited. . . .

I say again, as I said in the beginning, I have no enmities, no animosities toward this bill. This bill is plenty righteous enough for me. I like to see all these industries and arts propagated and encouraged by this bill. This bill will do that, and I do hope that it will pass and have no deleterious effect. I do seem to have an extraordinary interest in a whole lot of arts and things. The bill is full of those that I have nothing to do with. But that is in line with my generous, liberal nature. I can't help it. I feel toward those same people the same sort of charity of the man who arrived at home at 2 o'clock in the morning from the club. He was feeling perfect satisfaction with life—was happy, was comfortable. There was his house weaving and weaving and weaving around. So he watched his chance, and by and by when the steps got in his neighborhood he made a jump and he climbed up on the portico. The house went on weaving. He watched his door, and when it came around his way he climbed through it. He got to the stairs, went up on all fours. The house was so unsteady he could hardly make his way, but at last he got up and put his foot down on the top step, but his toe hitched on that step, and of course he crumpled all down and rolled all the way down the stairs and fetched up at the bottom with his arm around the newel post, and he said, "God pity a poor sailor out at sea on a night like this."

The committee adjourned until 10 o'clock a.m. tomorrow.

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Notes

Samuel Clemens gives a robust argument for perpetual copyright—for the idea that the book is the author's, not by utilitarian privilege but by *right*—and he neatly flips today's assumptions about term extension on their heads. But he is also hilariously cynical, perhaps mindful of the fact that the legislators to whom his words are addressed might be familiar with his prior pronouncements about both them and the law they were considering. "It could probably be shown by facts and figures that there is no distinctly

native American criminal class except Congress.” “Whenever a copyright law is to be made or altered, then the idiots assemble.” “Only one thing is impossible for God: to find any sense in any copyright law on the planet.” He is particularly pointed in attacking the compromises with which any copyright bill is loaded—the special provisions that gave American printers special rights to print the books (and thus the unions a strong barrier against foreign competition), that gave libraries certain privileges, indeed that allowed the expiration of copyright at all. All these compromises, from his point of view, are simply takings from authors for the benefit of activities that have little or nothing to do with their art. He even waxes a little absurdist about it. “Like all the trades and occupations of the United States, ours [that of the actual author] is represented and protected in that bill. I like it. I want them to be represented and protected and encouraged. They are all worthy, all important, and if we can take them under our wing by copyright, I would like to see it done. I should like to have you encourage oyster culture and anything else. . . . I do seem to have an extraordinary interest in a whole lot of arts and things. The bill is full of those that I have nothing to do with. But that is in line with my generous, liberal nature.” The committee members, eager to shower other celebrities such as John Philip Sousa with questions, offered none after his remarks. Clemens was an old lion—he speaks of his own awareness of mortality in his remarks, and he in fact had only four more years to live—but he still had teeth and a savaging by him might have ended up on the front page of *The New York Times*. And so after his remarks . . . the committee quietly adjourned.

Questions:

- 1.) Clemens has obviously read Macaulay. On what do they disagree?
- 2.) He argues that taking away his copyright is as unjust as the government taking away his mine after a certain period of time, saying he had already reaped enough benefit from it. Do you agree? What differences do you see? How would Jefferson and Macaulay respond? Would Hugo agree?
- 3.) Clemens argues that there would be no real negative effects of term extension because he notes (correctly) that very, very few works retain any commercial value after 42 years. Thus the public loses little, because there are very few works still available for it to buy for which it will now pay higher prices. He was arguing in this testimony for a “life plus fifty” system, which did not in fact get enacted until 1976. We now have a “life plus seventy” system. Is he right that there have been no negative consequences?

Excerpt from

***Jennifer Jenkins, In Ambiguous Battle: The
Promise (and Pathos) of Public Domain Day, 2014***

12 DUKE L. & TECH. REV. 1 (December 31, 2013)



INTRODUCTION: WHAT STREAMS FEED THE PUBLIC DOMAIN?

In Europe, January 1st, 2014 will be the day when the works of Fats Waller, Nikola Tesla, Sergei Rachmaninoff, Elinor Glyn, and hundreds of other authors emerge into the

public domain. In Canada, where the copyright term is shorter, a wealth of material—including works from W.E.B. Du Bois, Robert Frost, Aldous Huxley, C.S. Lewis, and Sylvia Plath—will join the realm of free culture.

What is entering the public domain in the United States on January 1? Not a single published work. Why? In 1998, Congress added twenty years to the copyright term. But this term extension was not only granted to future works; it was retroactively applied to existing works. For works created after 1977, the term was extended to life plus 70 years for natural authors, and to 95 years after publication for works of corporate authorship. For works published between 1923 and 1977 that were still in copyright, the terms were extended to 95 years from publication, keeping them out of the public domain for an additional 20 years. The public domain was frozen in time, and artifacts from 1923 won't enter it until 2019.

The Supreme Court rejected a challenge to this retroactive term extension in 2003. Deferring substantially to Congress, the Court held that the law did not violate the constitutional requirement that copyrights last for “limited Times.” In addition, the Court declined to apply heightened First Amendment scrutiny, rejecting the petitioners' argument that term extension unconstitutionally restricted the public's ability to make speech-related uses of older works. Then, in 2012, the Court went a step further, and ruled that Congress may constitutionally *remove* works from the public domain, even though citizens—including orchestra conductors, educators, librarians, and film archivists—were already legally using them. According to the majority opinion, while copyright owners had legally protected rights during the copyright term, the public had no First Amendment rights to use material in the public domain: “Anyone has free access to the public domain, but no one, after the copyright term has expired, acquires ownership rights in the once-protected works.” The dissenting Justices' disagreement was forceful: “By removing material from the public domain, the statute, in literal terms, ‘abridges’ a preexisting freedom to speak.”

This impoverishment of the public domain stands in stark contrast to the original purpose and history of our copyright laws. As Justice Story explained, the Constitutional purpose of copyright is to “promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint.” Accordingly, the original copyright term lasted for 14 years, with the option to renew for another 14 years. Until 1978, the maximum copyright term was 56 years: 28 years from the date of publication, renewable for another 28 years.

Under that relatively recent term, works published in 1957 would enter the public domain on January 1, 2014. These include books ranging from Jack Kerouac's *On The Road* to Ayn Rand's *Atlas Shrugged* to Dr. Seuss's *The Cat in the Hat*. (A variety of constituencies would have cause for celebration.) Joining those books would be the classic films *The Bridge on the River Kwai*, *Funny Face*, and *A Farewell to Arms*, as well as the first episodes of *Leave It to Beaver*. Under current law, they will remain under copyright until 2053. And famous creations like these are only the beginning. Most works from 1957 are out of circulation—a Congressional Research Service study suggested that only 2 percent of works between 55 and 75 years old continue to retain commercial value.

Those who wish to use such works legally face a series of potential roadblocks. Finding the rights holders of commercially unavailable works can be especially difficult, as the relevant documentation is often lost or buried. These challenges are compounded by the abandonment of “formalities,” which coincided with the term extension. Until 1978, the law required copyright owners either to affix a simple notice to their works showing their name and the year of publication, or to register unpublished works with the Copyright Office, in order to receive copyright protection. To maintain copyright, they needed to renew claims with the Copyright Office after an initial term. These requirements produced an evidentiary

trail that, in practice, provided the public with basic information about copyright ownership and status—a predicate to efficiently obtaining permission or a license. Without this information, the initial “search costs” can themselves be insurmountable—those who wish to negotiate terms of use cannot find the rights holders in the first place—giving rise to “orphan works.” Productive uses are foregone, and forgotten works remain off limits. This legal gridlock entrenches the dividing line between copyright and the public domain, but its costs fall on both sides of that line; in the absence of information *neither* works under copyright, nor those in the public domain, will be efficiently used.

The removal of the renewal requirement further diminished the public domain, by creating copyrights that persisted over works that had exhausted their commercial potential. With renewal, if works were still valuable at the end of their first term, that would provide the incentive to renew; but if not, then the work could pass into the public domain, where it might prove valuable to others. A 1961 study showed that 85 percent of all copyrights were not renewed, and some 93 percent of copyrights in books were not renewed. All of those works went immediately into the public domain. Under current law, however, for the majority of older works, no one is reaping the benefits from continued protection, yet they remain presumptively copyrighted.

The general elimination of formalities had an additional effect. It meant that for the first time the realm of “informal culture”—diaries, home movies, personal photographs—entered the realm of copyright, whether the creators wished it or not. These amateur works, invaluable in detailing our cultural history, are even more likely to be “orphan works” and thus, barring assertions of fair use, effectively off limits to those who would digitize them or use them to chronicle our past. Because these works, too, were subject to the twenty-year term extension, a large swath of informal history became practically unavailable.

These costs in terms of speech and accessibility are high, but what about the countervailing benefits? Copyright’s central economic rationale is that exclusive rights spur creativity. However, the incentive effect from prospective term extension is negligible, and from *retrospective* term extension, nonexistent. The 1998 law lengthened the term from life plus 50 to life plus 70 years for natural authors, and from 75 years to 95 years after publication for corporate “works made for hire.” Could this extra 20 years of protection, decades in the future, provide additional incentives to authors? The economic evidence suggests that the answer is *no*. Only a minuscule percentage of works retain commercial value by this time. For the term extension to stimulate new creation, authors would have to be incentivized by the remote possibility that their heirs or successors-in-interest would continue to receive revenue beyond the previous terms of life plus 50 years or 75 years after publication. A team of eminent economists estimated that “a 1% likelihood of earning \$100 annually for 20 years, starting *75 years into the future*, is worth less than seven cents today”—hardly a compelling economic incentive. And, of course, lengthening the term for works that have already been produced provides no new incentives at all.

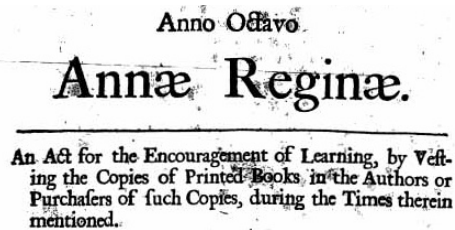
Incentives aside, another purported benefit of term extension was that the additional twenty years would encourage rights holders to restore and redistribute their older works. Empirical studies show otherwise: it is not rights holders who wish to digitize and redistribute their older catalogues. It is non-owners who are waiting to do so. When books fall out of copyright, they are more likely to be in print, and available in more editions and formats. Preservationists, not copyright holders, are digitizing deteriorating films and sound recordings, and term extension is inhibiting their efforts. Therefore, keeping older works under copyright frequently frustrates, rather than promotes, their maintenance and dissemination. In the end, while reasonable minds can disagree about the constitutionality of retrospective term extension, it is difficult to argue that the

benefits outweigh the costs. The available evidence strongly suggests otherwise.

So, one answer to “What will enter the public domain in 2014?” is simple, and distressing: “Nothing.”

Copyright's History

If a page of history is worth a chapter of theory, you are in luck. We now turn to the actual history of copyright and in particular, to the way that copyright has expanded over the years. US copyright law has its roots in England's first copyright law: the Statute of



Anne, enacted in 1710. The Statute of Anne marked a significant departure from previous laws in England that had granted an effective monopoly to the Stationers' Company—a printers' guild—by giving its members exclusive privileges to print and distribute books. These privileges were perpetual, as long as a book remained in print. Not only did this system enable a monopoly, it also gave the government a powerful censorship tool, as rights were conferred in exchange for the guild's refusal to print materials that were considered seditious or heretical. The Statute of Anne changed the law by vesting printing rights in authors, rather than printers (although authors often had to transfer their rights to printers in order to make a living). The term of protection was no longer perpetual—it lasted 14 years for new books, plus another 14 years if the author was still living at the end of the first term; books already in print received a single 21 year term. And the new law expressly stated a utilitarian purpose: it was an “Act for the Encouragement of Learning.”

The first US Copyright law was passed in 1790, pursuant to the power granted to Congress under the Intellectual Property Clause to “promote the progress . . . by securing for limited times to authors . . . the exclusive rights to their . . . writings.” Like the English law, the US law was “an act for the encouragement of learning”; and the initial term of protection was 14 years, with the option to renew for another 14 years if the author was still alive. The scope of copyright was limited: it only covered the “printing, reprinting, publishing and vending” of “maps, charts, and books.”

Over the next decades, copyright grew to cover additional subject matter such as music (1831), photographs (1865), and paintings, drawings, and other works of fine art (1870). While musical compositions became eligible for copyright protection in 1831, it wasn't until 1897 that music copyright holders gained the exclusive right to publicly perform their compositions for profit. Until then, they could prevent others from printing and vending their compositions, but not from performing them.

The next major copyright act was enacted in 1909. Under this new law, the copyright term was extended to 28 years from publication, with the option to renew for another 28 years. Copyright holders also gained additional exclusive rights, most notably

the right to make an array of derivative works including translations, dramatizations, and adaptations. (An 1870 law had given authors more limited rights to control translations and dramatizations, but those rights were part of an opt-in system.) Before derivative work rights were reserved to authors, you needed permission to print or “vend”—we would now say “distribute”—a copyrighted work, but it was perfectly legal to translate, adapt, or otherwise build upon those works, because the policy behind copyright favored such follow-on creativity.

Perhaps the most striking difference between the 1909 Act and current copyright law (see below) was that copyright protection was conditioned upon “formalities”: namely, 1) *publication* of a work with 2) a copyright *notice*—e.g. Copyright 2014, John Smith. To maintain copyright after the first 28-year term, authors had to *renew* their rights. Works published without proper notice went into the public domain, as did works whose subsisting copyrights were not renewed. At the time, *unpublished* works were generally subject to state common law copyright rather than the federal scheme. (Note that “publication” under the 1909 Act had a specific legal meaning that can make the determination of whether or not a work was published less than obvious.)

While 1909 may seem somewhat distant, the 1909 Act is still relevant in many circumstances because some of its key provisions govern works that were created up until 1978. For example, its formalities requirements may affect the copyright status of certain pre-1978 works. Successive extensions of the copyright term (see below) mean that only works published almost a century ago are conclusively in the public domain. Works published before 1978 go into the public domain on January 1st the year after a 95-year copyright term—so works published in 1930 go into the public domain on 1/1/2026 (1930+95+1). However, because of the 1909 Act’s notice and renewal requirements, works from before 1978 published without notice, as well as works from before 1964 that were published with notice but whose copyrights were not renewed, are also in the public domain. Before you make plans to use these works, however, note that tracking down publication, notice, and renewal information for older works can be prohibitively difficult.

The 1976 Copyright Act

The basic framework of today’s copyright law is provided by the 1976 Copyright Act, which has been amended many times. It took effect on January 1, 1978, and has been amended numerous times. Unlike the 1909 Act, the 1976 Act covers both published and unpublished works, and preempts state common law. 17 U.S.C. § 301. Its provisions will be the subject of the bulk of the readings in this book. Here is a brief summary of its key features; you will be learning more about them in the coming weeks.

In terms of subject matter, current copyright law has expanded over time to include motion pictures, choreographic works, architectural works, computer programs, and more. Within those categories, copyright protection only subsists in “original” works that are “fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). “Original” does not mean novel, it merely means that the work was independently created, and not copied from other works. (If we both write exactly the same love song without copying one another, we are both entitled to a copyright.) In addition, copyright only covers creative “expression,” and never extends to “any idea, procedure, process, system, method of operation, concept, principle, or discovery.” 17 U.S.C. § 102(b). Some subject matter, such as sound recordings, semiconductor chips, and boat hulls, are subject to their own special rules under the Copyright Act.

In terms of rights, copyright holders now enjoy the exclusive rights of 1)

reproduction, 2) making derivative works, 3) distribution, 4) public performance, 5) and public display. 17 U.S.C. § 106. Outside of the scope of these rights, the copyright owner is not entitled to control other uses of her work, such as private performance. In addition, the exclusive rights themselves are subject to limitations and exceptions, such as fair use and first sale. 17 U.S.C. §§ 107, 109. When an exclusive right is infringed, however, innocent intent is not a defense, because copyright is a strict liability system. (Innocent infringement can limit remedies, for example by reducing the damage award.)

While copyrights initially vest in the “author,” this does not necessarily mean that they are owned by the individual who created the work. In the case of “works made for hire,” the corporation or employer is considered the author. When multiple parties contribute to a work, the copyright can be owned by “joint authors.” Copyrights are transferrable, and are often transferred numerous times during the course of their (now very long) lifespan. The complex rules about copyright ownership and transfer are in 17 U.S.C. §§ 201–05 of the Copyright Act.

Regarding duration, the 1976 Copyright Act initially expanded the copyright term from a possible total of 56 years under the 1909 Act (28 years plus the optional 28-year renewal term) to a single term of life plus 50 years for natural authors, and 75 years after publication for corporate works. In 1998, the term was further expanded to life of the author plus 70 years, and 95 years from publication for works of corporate authorship. This 20-year term extension did not just apply to new works, but also retrospectively to works already in existence, meaning that no published works entered the public domain until 2019. The rules governing copyright duration can be found at 17 U.S.C. §§ 302–04.

Current copyright law has also eliminated the “formalities” required by the 1909 Act. Copyright now automatically attaches to an eligible work the moment it is fixed in a tangible medium of expression. There is no need to include a copyright notice or renew the copyright after a specified period of time. There is also no need to register the work with the Copyright Office. That said, registration does become necessary if a copyright holder wants to bring an action for infringement. 17 U.S.C. § 411(a). (If the Copyright Office refuses registration, a plaintiff can still sue as long as she notifies the Register of Copyrights, who then has the option of intervening on the issue of registrability.) Registration also confers a number of benefits in the event of a lawsuit: registration within 3 months of publication (or within 1 month of learning about the infringement, if that is earlier) is a prerequisite for statutory damages and attorneys’ fees, and registration within five years of publication provides *prima facie* evidence of copyright validity. 17 U.S.C. §§ 412, 410(c).

One reason that the US removed formalities was to comply with the Berne Convention for the Protection of Literary and Artistic Works, a major international copyright treaty. The US began relaxing formalities with passage of the 1976 Act, and then eliminated them on March 1, 1989 when it officially joined the Berne Convention, which requires that rights “shall not be subject to any formality.” (Like many international IP treaties, the Berne Convention provides for both minimum standards and “national treatment,” meaning that signatories must grant nationals from other participating countries the same rights as they give to their own nationals. Whether the US is currently in compliance with all aspects of the Berne Convention is the subject of continuing debate, and something you may explore in courses on international intellectual property.) Aside from adhering with Berne, another reason that the US removed formalities involved practical and policy concerns. Authors who were unfamiliar or unable to comply with formalities might unwittingly forfeit protection; automatic copyright ensured that this would not happen.

In 1998, Congress amended the Copyright Act by passing the Digital Millennium

Copyright Act (“DMCA”). Among its key features are new legal protections for “technological measures” that control access to copyrighted works, and safe harbors for providers of a variety of online services, including internet access, hosting, and linking. The DMCA will be explored in more detail in subsequent chapters.

In 2020, Congress passed the “Copyright Alternative in Small-Claims Enforcement Act of 2019” (“CASE Act”), as part of a COVID-19 relief bill. (No, copyright enforcement has nothing to do with COVID relief; this was an irrelevant provision inserted into the omnibus bill.) The CASE Act establishes an administrative tribunal called the Copyright Claims Board (“CCB”) within the US Copyright Office that will decide copyright claims of \$30,000 or less. Determinations are rendered by three attorneys serving as Copyright Claims Officers, two having “substantial experience” with copyright claims, and one with alternative dispute resolution expertise. A defendant wishing to proceed in court rather than the CCB can opt out within 60 days after notification of the claim. If the defendant fails to opt out and receives an adverse determination, there are limited grounds for appeal: the decision can be challenged on the basis of fraud, corruption, misrepresentation, or misconduct, but not substantive error. Proponents of the CASE Act argue that it will help rightsholders keep up with the frequency of infringement online by giving them a cheaper, more efficient enforcement mechanism for small claims. Opponents argue that, in practice, the process will be used by large copyright holders and “copyright trolls” to extract payments from less savvy defendants who may not know how to opt out or successfully defend against a claim. (Copyright trolls were defined by a judge as those who bring copyright claims “as a profit-making scheme rather than as a deterrent.”) Copyright is complex, and these streamlined proceedings may be ill-suited to handle nuanced issues like “fair use” (covered in Chapter 13), making it difficult for respondents to avail themselves of such defenses.

Copyright Expansions and Policy

Take a moment to review the copyright history briefly sketched above, and consider the way that copyright has expanded over time in response to technological and market developments. The original copyright act from 1790 only governed the printing, publishing, and vending of books, maps, and charts. In 1850, even though musical compositions had recently been added to this list, your school orchestra could freely perform any composition because public performances were not reserved to the copyright holder. Nor were any derivative works rights—as a follow-on creator, you could translate books into other languages, or adapt them for theater, or build upon them in your own work.

The term of protection has lengthened markedly in recent years. Until 1978, it lasted for a possible total of 56 years—28 years from the date of publication, plus the option to renew for another 28 years—with the majority of works entering the public domain after the first 28-year term (studies put the rate of non-renewal for all works at 85%, and for books alone at 93%). Now the term is 70 years after the death of the author, and 95 years after publication for corporate works. Because this span outlasts the economic viability of most works, only a small percentage of copyrighted works benefits from this longer term; a Congressional study suggested that only 2 percent of works between 55 and 75 years old continue to retain commercial value. As time goes on, an increasing amount of material is out of print, but still in copyright. Many libraries, creators, and others are prevented from using this material because the expanded term, along with the elimination of formalities, has made it especially difficult to find the rights holders. The result is a growing corpus of “orphan works”—those whose authors cannot

be identified or located, keeping them off limits to users who are seeking permission. As the Copyright Office has explained: “For good faith users, orphan works are a frustration, a liability risk, and a major cause of gridlock in the digital marketplace. . . . This outcome is difficult if not impossible to reconcile with the objectives of the copyright system and may unduly restrict access to millions of works that might otherwise be available to the public.” This is the flip-side of the argument Samuel Clemens made in 1906. He assumed that there would be no loss to the public, because—while the term was extended—the demand for the book would not be. Thus no one would lose. Do you agree after reading the excerpt from Jenkins’ article? Of course in 1906, the idea of scanning and digitizing the world’s cultural heritage would have seemed like a fever-dream.

To address the orphan works problem, there is currently a push toward reform. In addition, the Register of Copyrights has suggested that, toward the end of the term, continued copyright should be conditioned upon registration with the Copyright Office, so that older works are not unnecessarily kept from the public, while successful works can still register and maintain protection.

As you have read elsewhere in these materials, the primary purpose of US copyright law is to benefit the public. (Hugo, interestingly, accepts this formulation. Clemens does so only with great irony.) It does so by granting limited exclusive rights to authors, in order to provide an economic incentive to create and distribute creative material. But the ultimate goal is to ensure that the public will benefit from the diffusion of knowledge and culture. In the words of the Supreme Court, “The immediate effect of our copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp. v. Aiken* (1975). Copyright law is, at its core, “[a]n act for the encouragement of learning.” Its ability to achieve this objective depends upon a continually recalibrated balance between that which is subject to private control, and that which is free for the public to use and build upon.

As you read through the upcoming materials, consider the following questions. Is copyright in its current form fulfilling its purpose? How have its scope, duration, and impact changed? How about countervailing limitations and exceptions? How do the challenges posed by new technologies inflect your analysis?

Copyright Office

As part of your introduction to copyright, please spend some time exploring the Copyright Office website at <http://www.copyright.gov>. You can find out how to register copyright, search the Copyright Office’s records, and read their explanatory Circulars and Brochures. In general, registering a copyright is more straightforward (and much cheaper) than registering a trademark. If you are a creator, consider registering your work *via* the Copyright Office website as an introductory exercise.

Note: A Copyright Flow Chart

On the next page you will find a copyright flow chart which parallels the trademark law flow chart you may already have encountered. The chart explains what we will be covering in each chapter and how the legal questions discussed will play a role in a copyright analysis. Second, you can refer to the chart to help you with the Problems in this section. Use it to remind yourself of the structure of the analysis and to make sure you are not missing an issue.

COPYRIGHT FLOW CHART

(This is a (highly) simplified preview of what you will learn and a tool to use in the problems. Refer to it often.)

Does the plaintiff own a valid copyright? (Chapter 11)

