

Copyright's Knowledge Principle

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ABSTRACT

This Article argues that copyright jurisprudence has lost sight of the knowledge principle at the heart of the constitutional justification for copyright. The Framers envisioned the objective of copyright as promoting the advancement of knowledge for a democratic society by increasing access to published works. Under what is best termed the “knowledge principle,” access to existing knowledge is a necessary condition for the creation of new knowledge. Copyright jurisprudence has largely protected the interests of producers—from early booksellers to modern Hollywood film companies—failing to notice the central role of access to works as a necessary pre-condition to the creation of new works. The realities of the digital era further hinder the functioning of this mechanism. Ownership of copies of texts has morphed into a limited right of possession of digital files. Public libraries can no longer fulfill their mission of maximizing the circulation of materials in order to spread available knowledge among citizens. This Article proposes an alternative model to the conventional copyright theories, focusing on the critical role that access to knowledge resources plays in the dynamic processes at work in the production of knowledge and the creation of new works. In this model, public libraries would exercise non-waivable “fair access” rights on behalf of the public for the purposes of learning and education. These “fair access” rights serve to realign copyright with its constitutional justification, and more importantly serve to support the knowledge creation process for the future of our democratic society.

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I. INTRODUCTION

DATELINE: New York City, December 12, 2050.

Visitors can now see how information used to be published and circulated to the public at large by viewing the “New York Public Library Museum” exhibit, which opened today. Public libraries disappeared after the Great Recession of 2008–2018, as the explosion in the use of e-readers, like the now antiquated Kindle or Nook, made sustaining buildings and staff financially untenable in the face of reduced demand. The project of digitizing all extant print materials was completed shortly afterwards. In contrast to today’s OogleWorks-managed, cloud-based licensing operation, which rents

time-limited access to digitized works for reading (formerly books), viewing (movies), or listening (music), the exhibit harkens back to a time when there was free access to information by members of the public regardless of means, and when the public itself could own, share, and circulate information.

This vision of the near future is becoming a reality.¹ Copyright jurisprudence has lost sight of what is best termed the “knowledge principle,” which lies at the heart of the constitutional justification for copyright.² The Framers envisioned the objective of copyright as promoting the advancement of knowledge for a democratic society by increasing access to published works.³ The meaning of “advancement of knowledge” in this context is of critical importance to a thriving democratic society and is examined in this Article through the lens of copyright’s knowledge principle. In so doing, this Article reframes

1. See Celeste Bruno, *With Demand Growing, Libraries Face Fiscal Pressure*, 27 MUN. ADVOC. 15 (2012), available at http://www.mma.org/resources-mainmenu-182/doc_view/769-with-demand-growing-libraries-face-fiscal-pressure; Stacey von Winckelmann, *The American Public Library System: A Case Study of Public Libraries in the Twenty-First Century* (July 20, 2011) (unpublished M.A. thesis, Leiden University), available at http://www.academia.edu/4802581/The_American_Public_Library_System_A_Case_Study_of_Public_Libraries_in_the_21st_Century; Mike Shatzkin, *It Will Be Hard To Find A Public Library 15 Years From Now*, THE SHATZKIN FILES BLOG (Apr. 8, 2011, 5:53 PM), <http://www.idealogue.com/blog/it-will-be-hard-to-find-a-public-library-15-years-from-now/>; *The State of America’s Libraries: Long-Term Pain Persists, with Minimal Relief*, AM. LIBR. ASS’N, <http://www.ala.org/news/mediapresscenter/americaslibraries/libraryfunding> (last visited Dec. 13, 2014). Professor John Tehranian claims that “[d]igital fences have begun to dot the online landscape, bringing a new enclosure movement to our cyber commons every bit as significant as the eighteenth-century edition.” John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, UTAH L. REV. 537, 539 (2007); see also James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 34–37, 40–41 (2003).

2. The copyright power reads, “[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings” U.S. CONST. art. I, § 8, cl. 8. “Science” in colonial times referred to knowledge. JANICE M. MUELLER, *PATENT LAW* 32 (3d ed. 2009). In the colonial era, the term “Science” was associated with knowledge, whereas “the Arts” referred to innovation and patents. *Id.*; see also Edward Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 763, 781 (2001). The first US copyright statute of 1790 referred to the “encouragement of learning,” following the title of the world’s first copyright statute, the Statute of Anne in Britain in 1710. *See Act of May 31, 1790*, ch. 15, 1 Stat. 124 (codified as amended at 17 U.S.C. §§101-1332 (2010)); *Statute of Anne, 1710*, 8 Ann., c. 19 (Gr. Brit.); see also WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* xvi–xvii (2009) (referring to Lord Macaulay’s speech about public good being the “bounty of genius and learning” and further characterizing copyright monopoly as a tax on society whose rate should be justified by an increase in the bounty of genius and learning); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 42, 44 (1993) (discussing the priority given to encouragement and learning and Locke’s memo advocating limited terms from monopoly of printing); Isabella Alexander, *All Change for the Digital Economy: Copyright and Business Models in the Early Eighteenth Century*, 25 BERKELEY TECH. L.J. 1351, 1373 (2010) (discussing Samuel Johnson arguing for abridgements as not prohibited by the Statute of Anne because they benefit learning and knowledge); Jessica Litman, *Readers’ Copyright*, 58 J. COPYRIGHT SOC’Y U.S.A. 325, 335 (2011).

3. See *supra* note 2 and accompanying text.

copyright theory and jurisprudence to focus on society's interests rather than producers' interests.⁴

The knowledge principle holds that access to existing knowledge is a necessary condition for the creation of new knowledge.⁵ Even more simply, knowledge must be acquired first before it can be advanced. For example, a scientist must access the existing knowledge in her field before she can carry out research to create new knowledge. The knowledge principle is the fundamental mechanism by which knowledge is created, produced, and disseminated in society. Knowledge is held by private and public universities, corporations, and public libraries.⁶ Public libraries' mission of promoting access to knowledge regardless of wealth or status is uniquely aligned with the values of a democratic society, and thus is the institutional focus of this inquiry.

Copyright in the digital era diminishes the ability of public libraries to provide public access to knowledge resources.⁷ Ownership of digital copies of texts, still referred to as books, has morphed into limited rights of possession. This is a sea change from our traditional conception of information as something which, once acquired in its published format, can be enjoyed, transferred, or shared.⁸ Under the first sale doctrine of copyright, the publisher may not insist upon permission for further sale or transfer of a book.⁹ For example, you might give your purchased copy of the popular novel *The Help* to your sister to read after you finish it. A few weeks later, she includes it with some other books in a neighborhood garage sale. In this example, at least three persons will have enjoyed the opportunity to read the novel. Over time, this number could increase many times

4. The Framers saw the creation and dissemination of copyrighted material as the method to accomplish copyright's end—the “advancement of knowledge” for society, not for authors or publishers. Jessica Litman notes, “Congress, for its part, once took some care to paint its copyright laws as designed to benefit the public rather than the authors and publishers who would enjoy the profits flowing from the temporary copyright monopoly.” Litman, *supra* note 2, at 327; *see also infra* Part IV.A.

5. ZOHAR EFRONI, ACCESS-RIGHT: THE FUTURE OF DIGITAL COPYRIGHT LAW 7 (2011) (“We acquire knowledge through experiencing and experimenting as well as by observing and learning from others.”).

6. *See* FRITZ MACHLUP, THE PRODUCTION AND DISTRIBUTION OF KNOWLEDGE IN THE UNITED STATES (1962).

7. This refers to the embodiment of copyrighted material in digital rather than print form. *See* David Vinjamuri, *Why Public Libraries Matter: And How They Can Do More*, FORBES (Jan. 16, 2013, 3:26 AM), <http://www.forbes.com/sites/davidvinjamuri/2013/01/16/why-public-libraries-matter-and-how-they-can-do-more/2/> (describing the current “technology trap” in which publishers require libraries to purchase a “license made to resemble a book purchase,” the restrictions on which threaten to limit the abilities of libraries to provide for future patrons).

8. The owner of a copy of a print book is free to use it as they wish. *See* *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

9. *See id.*

over, limited only by the inevitable decay of the material comprising the book. Through public libraries, many people have the use of the same physical book.

Digital copies of the same book are treated differently. First, you need an e-reader, like a Nook or a Kindle, to be able to purchase a digital copy of *The Help*. Then, an end-user license agreement contains certain restrictions on that purchase so that you do not have the same access privileges that you have with the print version.¹⁰ For example, you may only read the digital copy on your e-reader, and you generally cannot transfer the copy to anyone else.¹¹ If you want to sell the Nook to another person, you may not transfer your collection of books to that person; rather, they must purchase their own collection of books from Barnes and Noble.¹² In the digital era, the first sale doctrine has disappeared.¹³

Why is this scenario a problem for society? The social value of copyright is the promise of the advancement of knowledge and the encouragement of learning in order to support a thriving democratic society.¹⁴ Copyright's original rationale was—and continues to be—aligned with the values of a democratic society, namely social mobility, civic participation, and economic productivity, all of which rely on vibrant, robust knowledge systems.¹⁵ In the near future,

10. See *Amazon Kindle Terms of Use*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=hp_left_sib/178-4801626-6304458?ie=UTF8&nodeId=200506200 (last updated Sept. 17, 2014); *Nook Terms of Service*, BARNES & NOBLE, <http://www.barnesandnoble.com/u/Terms-of-Service-NOOK-Simple-Touch/379003279/> (last visited Dec. 13, 2014).

11. *Amazon Kindle Terms of Use*, *supra* note 10; *Nook Terms of Service*, *supra* note 10.

12. *Nook Terms of Service*, *supra* note 10. There have been reports that Barnes & Noble may sell its business, raising other questions about the digital rights in the books purchased by its customers. See Julie Bosman, *Fork in the Road for Barnes & Noble*, N.Y. TIMES (July 9, 2013), http://www.nytimes.com/2013/07/10/business/fork-in-the-road-for-a-bookseller.html?_r=0.

13. HarperCollins informed its library customers that they no longer had the right to unlimited checkouts for the digital text. Josh Hadro, *HarperCollins Puts 26 Loan Cap on Ebook Circulation*, LIBR. J. (Feb. 25, 2011), <http://lj.libraryjournal.com/2011/02/technology/ebooks/harpercollins-puts-26-loan-cap-on-ebook-circulations/>. Each purchase would be limited to twenty-six checkouts, then expire. See *id.*; see also SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 175 (2001).

14. BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 74–76 (1967).

15. See, e.g., Malla Pollack, *What is Congress Supposed to Promote?: Defining “Progress” in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754, 785 (2001); Martin Dewhurst, Bryan Hancock & Diana Ellsworth, *Redesigning Knowledge Work*, HARV. BUS. REV. (Jan. 2013), available at <http://hbr.org/2013/01/redesigning-knowledge-work/ar/1> (noting that in the modern knowledge economy, “competitive advantage is increasingly coming from the particular, hard-to-duplicate know-how of a company’s most skilled people” and observing that some firms are investing in training and apprenticeship programs, while others are redefining jobs to spread tasks from

digital content will be, by and large, the only kind of content available.¹⁶ If current doctrinal trends continue, the restrictions on access to digital content will result in less accessibility to knowledge resources than in the print era. The disappearance of the first sale doctrine in the digital era greatly impacts the mission of public libraries to maximize the circulation of materials in order to spread the availability of knowledge among citizens.¹⁷

Publishers may impose downstream limitations on usage of digital copies of text.¹⁸ Publishers are not required to license digital content to public libraries, and a large percentage of publishers have refused to do so.¹⁹ Moreover, publishers have begun to attach “checkout restrictions” on digital material.²⁰ Once patrons check out a copy of a digital book a limited number of times, the library must then

experts to other employees); Marco R. della Cava, *Retrain Your Brain from “Left” to “Right” to Fit into New Economy*, USA TODAY (July 14, 2009, 10:35 PM), http://usatoday30.usatoday.com/life/lifestyle/2009-07-13-right-vs-left-brains_n.htm (observing that economic recovery is contingent on “right brain” innovations and creativity); Jeanne Meister, *Job Hopping Is the “New Normal” for Millennials: Three Ways to Prevent a Human Resource Nightmare*, FORBES (Aug. 14, 2012, 8:58 AM), <http://www.forbes.com/sites/jeannemeister/2012/08/14/job-hopping-is-the-new-normal-for-millennials-three-ways-to-prevent-a-human-resource-nightmare/> (noting that millennials can expect to have fifteen to twenty jobs over the course of their working lives and addressing challenges for employers investing in job-hopping employees).

16. There is significant information available on the internet for “free” (as long as you have an internet connection). Much of the information freely available is marketing material intended to induce purchases of goods and services, as well as opinion-related information for advocacy purposes. This information is useful for markets and free speech but does not advance learning or promote progress as defined in this Article. The value of that information is proven by the fact that it is protected by copyright, and often found on the internet behind pay walls. As further evidence that the valuable information is not freely available on the Internet, Google spent millions of dollars to digitize information on the Internet. Finally, libraries would not have spent time and resources battling for more access to information if it was freely available on the Internet. *See infra* notes 323, 372. It is also important to remember that librarians serve an important role as curators of that information.

17. AM. LIBRARY ASS’N, E-CONTENT: THE DIGITAL DIALOGUE (2012); *Mission & Priorities*, AM. LIBR. ASS’N, www.ala.org/aboutala/missionpriorities (last visited Dec. 13, 2014) (stating that the mission of the American Library Association is “to enhance learning and ensure access to information for all”). ALA President Molly Raphael notes that as more content is delivered digitally, fair and reasonable access to digital information is threatened by the publishers’ practices of locking down books and locking out readers. *Mission & Priorities*, AM. LIBR. ASS’N, www.ala.org/aboutala/missionpriorities (last visited Dec. 13, 2014).

18. The digital copy will be accompanied by digital locks, licensing restrictions, and the force of the anti-circumvention provisions of the Digital Millennium Copyright Act of 1998 (DMCA). Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

19. Barbara Stripling et al., *ALA, Future of Libraries, Digital Content, and Ebooks*, AM. LIBRS. MAG. (June 12, 2013, 9:59 AM), <http://www.americanlibrariesmagazine.org/article/ala-future-libraries-digital-content-and-ebooks>; *Message from the Director: Digital Demand Drives Change at Your Library*, CINCINNATI LIBR., http://www.cincinnati.library.org/news/2013/directormessage_winter.html (last visited Dec. 13, 2014).

20. Hadro, *supra* note 13.

purchase another digital copy.²¹ It is not difficult to see that the volume of material that a library can afford to purchase (if even made available by publishers) will decrease in the digital era.

Copyright commentary has failed to notice the central importance of access to works—*all* works—as a necessary pre-condition to the creation of new works.²² The scholarly literature has discussed at great length authorship and the production of copyrighted works.²³ There has been no serious discussion, however, about the specific processes necessary to produce knowledge.²⁴ Copyright jurisprudence has conflated the creation function with the distribution function, and has neglected to understand the knowledge principle of copyright entirely.²⁵ In so doing, it lost sight of its original justification, confusing means (authors' and publishers' interests) with ends (society's interest in the advancement of knowledge).

This Article also reframes the conventional copyright debate from one of rights versus utilitarian theory, to one of pro-expansion versus pro-restraint of copyright's distribution right. Copyright jurisprudence and modern copyright theory are best understood as rationalizing the competing economic interests of expansion versus

21. Art Brodsky, *The Abomination of Ebooks: They Price People Out of Reading*, WIRE, (Oct. 2, 2013, 9:30 AM), <http://www.wired.com/2013/10/how-ebook-pricing-hurts-us-in-more-ways-than-you-think/>; Adam Vaccaro, *Why It's Difficult for Your Library to Lend Ebooks*, BOSTON.COM (June 27, 2014, 10:26 AM), <http://www.boston.com/business/technology/2014/06/27/why-difficult-for-your-library-stock-ebooks/rr1464TPxDaYmDnJewOmzH/story.html>.

22. The scholarly commentary focuses on the fair use doctrine; however, fair use does not provide access to *all* of the work. It is a doctrine developed in the nineteenth century to provide some space for follow-on producers to distribute content that reused some portion of an earlier published work. See *infra* notes 350–56 and accompanying text. Michael Madison notes that fair use jurisprudence has evolved in a way that makes it even more challenging for purposes of education and learning: “[C]ourts perform legal contortions to persuade themselves that verbatim reproductions of copyrighted works are transformative.” Michael Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH. L. 817, 830 (2010).

23. Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of Authorship*, 2 DUKE L.J. 455 (1991).

24. A few scholars have questioned the lack of inquiry into the creative processes associated with copyright. This Article, however, focuses not on creativity as the process underlying copyright, but knowledge production. See, e.g., Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1152–54 (2007); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity*, 86 NOTRE DAME L. REV. 1999 (2011); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and “Work-Makes-Work,” Two Stages in the Creative Processes of Artists and Innovators*, 86 NOTRE DAME L. REV. 2091 (2011); Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319 (2008).

25. The Supreme Court in *Eldred v. Ashcroft* assumed the linkage between “the incentive to profit from the exploitation of copyrights” and the “public benefit . . . resulting in the proliferation of knowledge.” 537 U.S. 186, 269 n. 18 (2003) (internal citation omitted). Litman notes that there is little legal scholarship about how the works created and distributed in the copyright ecosystem are used by the public. Litman, *supra* note 2, at 339.

restraint in the distribution of copyrighted works.²⁶ Both of the dominant doctrinal camps—pro-restraint and pro-expansion—neglect the critical role that access to existing knowledge plays in the creation of new knowledge, and most importantly, to the advancement of knowledge in society.²⁷

Pro-restraint scholars have criticized the expansion of copyright for the past two decades.²⁸ They have argued that the fair use doctrine needs to be retrofitted for the digital era.²⁹ Fair use means that a portion of a work may be reused without authorization of the copyright holder. By definition, fair use is not consistent with the knowledge principle, which requires access to *all* of the relevant material.³⁰ Also, there is no *ex ante* certainty for the user. Each case is decided on its particular facts, so a great deal of litigation is necessary to rely on the doctrine.³¹ For example, licensing restrictions prohibit a library from making digital materials available for its users after a fixed number of checkouts.³² Fair use would not shield a library that violated those restrictions in order to make a digital copy of a college preparatory manual available to an economically disadvantaged urban high school student.

Pro-expansion scholars contend that the idea-expression doctrine in copyright adequately protects the value of new creation.³³ The idea-expression doctrine means that a subsequent creator can use

26. See *infra* notes 324–26 and accompanying text.

27. See *infra* Part IV.A. This Article reframes the dominant narrative of copyright, as grounded in either rights or utilitarian theory. The theoretical bases debated in contemporary copyright are not found at the time of the creation of copyright in late seventeenth and early eighteenth century England. The historical context of copyright reveals the underlying rationale for copyright as one of restraint on concentration of economic power—the struggle between London booksellers and the British Parliament in the late seventeenth century. This restraint-expansion tension continues through the history of copyright jurisprudence.

28. See Glynn S. Lunney, *The Death of Copyright*, 87 VA. L. REV. 813 (2001); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 486–87 (2004); Edward C. Walterscheid, *Musing on the Copyright Power: A Critique of Eldred v. Ashcroft*, 14 ALB. L.J. SCI. & TECH. 309 (2004).

29. See Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 82–83 (2001); PATRY, *supra* note 2, at xxiv, v xv, 125–28; Jaszi, *supra* note 23, at 455; Litman, *supra* note 2, at 343–44.

30. Parody represents the exception to the partial amount rule. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 596 (1994); Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 983 (2006).

31. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 185, 187 (Penguin 2004). Lawrence Lessig famously said that “fair use in America simply means the right to hire a lawyer to defend your right to create.” *Id.* at 187; see also Steven J. Horowitz, *Copyright’s Asymmetric Uncertainty*, 79 U. CHI. L. REV. 331, 350–52 (2012) (explaining why the fair use doctrine is plagued with uncertainty).

32. Hadro, *supra* note 13.

33. PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 14–15 (Stanford Univ. Press rev. ed. 2003).

the ideas in the copyrighted material, just not the particular expression of the ideas contained in the material.³⁴ The methodological problem with this doctrine is that no one knows what is on the “idea” side (unprotected) versus the “expression” side (protected) until there has been litigation. More importantly, this doctrine does not address the importance of access to the work in the first place (both the ideas and the expression). As discussed below, the Digital Millennium Copyright Act (DMCA), passed in 1998,³⁵ empowers content producers to enforce digital locks that they install on their content.³⁶ Under current law, users cannot break those locks, even for purposes of the fair use doctrine or the idea-expression doctrine.³⁷ Both doctrinal camps neglect the critical role of access to existing knowledge as a pre-condition to the creation of new knowledge.

This Article proposes an alternative model to the conventional copyright theories, focusing on the critical role that access to knowledge resources plays in the dynamic processes at work in the production of knowledge and the creation of new works. In this model, public libraries would exercise non-waivable “fair access” rights on behalf of the public for the purposes of learning and education. This Article will show that these “fair access” rights foster a healthy, vibrant knowledge creation process, thus promoting the democratic values underlying copyright’s justification.³⁸ Access to knowledge is not only consistent with democratic values, it underlies copyright’s constitutional justification, namely the “progress,” or advancement, of its citizens.

Part II of this Article claims that copyright is justified by society’s interest in the advancement of knowledge and learning. The historical context of copyright, its birth story in Britain, then its adoption by the fledgling United States, demonstrate the

34. 1-2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03 (2014).

35. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

36. See *infra* notes 317–21 and accompanying text. Siva Vaidhyanathan notes that the Clinton Administration’s report titled *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, referred to as the “White Paper,” published in 1995, which served as the blueprint for the DMCA, referred to fair use as a “tax” on owners of copyrighted material. See VAIDHYANATHAN, *supra* note 13, at 159.

37. See Digital Millennium Copyright Act of 1998, 17 U.S.C. § 1201 (2012) (generally referred to as the “anti-circumvention provisions” of the Act).

38. A recent article about rising inequality in the United States, especially compared with other industrialized countries, notes that “[i]n a globalized, high-tech world in which education has become the central determinant of economic success, it is hardly surprising that the prosperity of American children is more dependent on the prosperity of their parents than that of children in most other advanced countries.” See Eduardo Porter, *Inequality in America: The Data is Sobering*, N.Y. TIMES, July 30, 2013, http://www.nytimes.com/2013/07/31/business/economy/in-us-an-inequality-gap-of-sobering-breadth.html?_r=0.

policymakers' concern with the societal effects stemming from the monopoly privilege exercised by the book publishers in the distribution of books, referred to at the time as "monopolies of knowledge."³⁹ Those policymakers created a private means to incentivize the distribution of books in order to achieve the public good—namely, the advancement of knowledge and learning.

Part III explains how copyright jurisprudence—print to digital—is best understood as rationalizing the competing economic interests associated with the distribution of copyrighted works. As copyright became associated with the goal of maximizing the dollar value of the commodities benefiting from its protection, it became disconnected from its original justification—the advancement of knowledge—as judges and commentators alike confused the means of copyright with its end.

Part IV begins with the conventional accounts of copyright, which fail to sufficiently understand the critical role that access to knowledge resources plays in the creation function of copyright. The semantic expansion of copyright from book production to cultural production, and the concomitant emphasis on the dollar value of copyrighted commodities, has distracted scholars from the focus of copyright's effect on the advancement of knowledge in society.⁴⁰ Finally, a theory is suggested that recognizes the dynamic character of the knowledge production process, incorporating the principle that the creation of new knowledge relies on access to existing knowledge. In this model, public libraries would exercise non-waivable "fair access" rights on behalf of the public for the purposes of learning and education.

II. KNOWLEDGE

The birth story of copyright in England and the republic of the United States share an important attribute—struggle against concentration of power by the British Crown.⁴¹ In 1695, the British Lords eliminated the Crown's monopoly in publishing as "injurious to learning," and in 1709 established the world's first copyright act with the objective of "the encouragement of learning."⁴² Nearly one

39. ROSE, *supra* note 2, at 32.

40. *Cf.* Madison, *supra* note 22, at 828–29.

41. Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L. J. 1505, 1506–08 (2013). In democracies, knowledge flourishes; in authoritarian regimes, it is constrained. *Id.* In the late 1600s, the British House of Lords was struggling with the Crown for sharing of political power; the US forefathers had fought a war for independence from the British Crown. *Id.*

42. ROSE, *supra* note 2, at 33, 36, 46.

hundred years later, the US colonies fought for independence and the right to establish an independent republic founded on democratic values.⁴³ For their time it was progressive, if not radical, to propose greater liberty and participation for (some of) its citizens in their social, political, and economic lives.⁴⁴

The right to participate in the realms of the social, political, and economic life of society is meaningless without access to knowledge.⁴⁵ In the print era, the constraint on society's access to knowledge has been the distribution of books. As the British Lords recognized in their seventeenth-century struggle with the Crown, publishers needed an incentive to invest in the uncertain market of books.⁴⁶ In the early days of the US republic, advancement of knowledge was recognized as the means for fostering political and economic participation of the individual citizen, and at the same time furthering the prosperity of the nation. Our modern democratic society has been defined by its ability to offer citizens the opportunity for social mobility, civic participation, and economic productivity, all of which rely on robust knowledge systems.⁴⁷

A. Copyright's Public Good

This Article asserts that the advancement of knowledge in our democratic society is the public good that justifies copyright.⁴⁸ The original US copyright statute limited the subject matter to maps, charts, and books, all of which supported the goals of education and

43. See Richard Schneirov & Gaston A. Fernandez, *DEMOCRACY AS A WAY OF LIFE IN AMERICA: A HISTORY* 13 (Routledge 2014).

44. See *id.* at 11.

45. See, e.g., JEFFREY H. MATSUURA, *JEFFERSON VS. THE PATENT TROLLS: A POPULIST VISION OF INTELLECTUAL PROPERTY RIGHTS* 37 (Univ. of Virginia Press 2008) ("For Jefferson, a cornerstone of an effective democracy was the ability to disseminate knowledge and information widely among its citizens.").

46. See LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 46 (Vanderbilt Univ. Press 1968) ("[T]he basic essential to publishing was the stationer's copyright, which protected the publisher in getting a return on his capital investment. Without this, any arrangement for publishing would have been too risky a venture.").

47. Stephen Colbran & Anthony Gilding, *MOOC's and the Rise of Online Legal Education*, 63 *J. LEGAL EDUC.* 405, 405 (2014) ("[T]he capacity to create and apply knowledge defines the post-industrial digital economy. . . . [S]ustainable prosperity depends on a society's capacity to create and apply knowledge to solve problems.").

48. See, e.g., MUELLER, *supra* note 2, at 32; EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 125–26 (2002); Litman, *supra* note 2, at 328 (citing *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 485 (2d Cir. 2004) (mentioning the "benefits derived by the public from the labors of authors," but failing to specify what those benefits are); Samuelson, *supra* note 41).

advancement of knowledge.⁴⁹ As discussed below, copyright jurisprudence, as well as Congressional action, has broadened both the scope of the right and the subject matter of copyright to include photography, music, film, and even software.⁵⁰ By the twentieth century, copyright policy had become characterized by a concern for cultural production reflecting the broader scope of protection afforded to copyrighted goods in the private market.⁵¹

Copyright accounts generally begin with the uncritical (unchallenged) assumption of the linkage between copyright policy on the one hand, and creativity and cultural production on the other.⁵² Scholars often assert that copyright's purpose is to promote creativity and production of cultural goods, without looking closely at the constitutional language at work.⁵³ A closer examination of the Copyright Clause, however, reveals the intent to promote the progress of knowledge (in colonial times, "science" meant "knowledge").⁵⁴ There is no reference to the broader scope of culture or creativity. It has been imputed.⁵⁵ Books are associated with learning; the expansion of subject matter of copyright over the past two hundred years to include film, music, visual arts, and more, led courts and scholars to uncritically broaden the term.⁵⁶ Scholars have largely neglected to

49. See Act of May 31, 1790, ch. 15, 1 Stat 124, 124 (codified as amended at 17 U.S.C. §§101-1332 (2010)). See generally L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND L. REV. 1, 7 (1987).

50. See *infra* Part III.

51. See Litman, *supra* note 2, at 325 (stating that copyright "confer[s] strong, enforceable, assignable rights on creators and the entities that make investments in their work."). Supreme Court jurisprudence has reiterated the public interest served by the granting of certain private rights in the writings of authors. *Id.* at 336; see also Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 215-16 (1983).

52. See Cohen, *supra* note 24, at 1151 ("Creativity is universally agreed to be a good that copyright law should seek to promote . . ."). Cohen refers to the "cultural production of knowledge," but her article does not focus on knowledge as an input or output of the copyright system, but rather the broader inquiry of cultural production encompassing all of the subject matter of contemporary copyright. *Id.* at 1164. Cf. Madison, *supra* note 22, at 824 (arguing that the "concept of knowledge should be rehabilitated as an anchor for copyright" rather than creativity).

53. See, e.g., Madison, *supra* note 22, at 824, 827; Samuelson, *supra* note 41, at 1506-08.

54. See sources cited *supra* notes 2, 53.

55. See Madison, *supra* note 22, at 824. In response to a question of how did copyright become a law of creativity, Madison responded, "[A]n ideology of creative authorship that developed among nineteenth-century critics who advocated for expanded legal protection for authors." *Id.* at 828-29. Cf. Jack M. Balkin, *The First Amendment is an Information Policy*, 41 HOFSTRA L. REV. 1 (2012).

56. See *IP Myths v. Facts*, GLOBAL INTELLECTUAL PROP. CENTER (Jan. 5, 2010), <http://www.theglobalipcenter.com/ip-myths-v-facts>. In the report, the Global Intellectual Property Center, a part of the US Chamber of Commerce, claims that stronger intellectual

analyze the implications of this semantic expansion for the societal objectives of copyright.⁵⁷

This Article focuses its inquiry narrowly on books—also referred to herein as “works of knowledge”—and the dynamic processes at work between copyright and its original intent: encouragement of learning and the advancement of knowledge. This Article contends that this process is dynamic and contingent, rather than static and transcendent.⁵⁸ These dynamic processes comprise “the knowledge production process,” which is a cyclical process.⁵⁹ Knowledge resources (existing knowledge) form the inputs of the processes of learning and the creation of new knowledge.⁶⁰ New knowledge constitutes an output of the knowledge-production process, then an input back into the processes of learning and creation of new knowledge, and so on.⁶¹ Those who become educated by the knowledge production process are able to then contribute to the same process.⁶² They are learners and creators. Just like the education of our children, or the proof of a scientific method, access to knowledge supports the pursuit of education and knowledge, as well as the knowledge production process itself. The progress of knowledge occurs through the discovery and sharing of existing knowledge, referred to herein as “knowledge resources.” The pool of knowledge resources accessible to all citizens, regardless of wealth or status, for the purposes of learning and education is referred to herein as the “intellectual commons” of the knowledge ecosystem.

A healthy knowledge ecosystem supports the creation and dissemination of knowledge necessary for the progress of further knowledge. It includes the knowledge infrastructure, but also refers

property rights promote innovation and creativity whereas weaker rights will threaten the same. *Id.* No empirical support is provided. *Id.*; see also Madison, *supra* note 22, at 828–29.

57. Scholars have focused on the creativity narrative, which maps to the expansion of copyright’s subject matter from books and learning to music, plays, film, and even software. See, e.g., Cohen, *supra* note 24, at 1151 (“Creativity is universally agreed to be a good that copyright law should seek to promote . . .”); Horowitz, *supra* note 31, at 333 (claiming that the goal of copyright is to promote expressive works).

58. See Niva Elkin-Koren, *Cyberlaw & Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 243 (1996); *infra* Part IV.B; see also Cohen, *supra* note 24, at 1179.

59. See *infra* Part IV.B.

60. In the education system, this is represented by textbooks and other sources of knowledge that are used to teach students about existing knowledge. The open access movement is predicated on the notion that access to knowledge is necessary to become educated and contribute to new knowledge. In 2003, the Berlin Declaration on Open Access to Knowledge in Sciences and Humanities was signed. As of 2013, 451 organizations have signed the statement. *Berlin Conference*, OPEN ACCESS, <http://openaccess.mpg.de/Berlin-Declaration> (last visited Dec. 13, 2014).

61. *Id.*

62. See Cohen, *supra* note 24, at 1166–67.

to the dynamic processes of knowledge production. Knowledge production processes occur as knowledge resources are created and distributed in the spatial context of the individuals within the knowledge institutions.⁶³ Creation of knowledge occurs through learning first, creation second.⁶⁴ Knowledge production relies on the feedback loop of creation and distribution of works of knowledge. Copyright theory has treated the production function as exogenous, or in the words of one scholar, “transcendent and absolute.”⁶⁵ In contrast, this Article claims that the knowledge production process is tangible and concrete. If society thought the process of educating our children was beyond comprehension, or extending beyond the limits of ordinary experience,⁶⁶ society would not invest enormous sums in resources, such as teachers and books.⁶⁷ Common sense dictates that if you want a child to learn, you need to give him or her access to materials that will aid the education process.

The scientific method illustrates the relationship between the scientist and knowledge.⁶⁸ A scientist does not assume a principle works unless it has been tested and supported by empirical data. For example, a scientist working at a university research center accesses the knowledge resources contained in the knowledge ecosystem by interactions with his or her colleagues at the center, as well as the myriad of other institutions that the university collaborates with. When the scientist learns about a colleague’s discovery at another institution, then goes back to her laboratory and begins a new experiment, which leads to her own discovery, the knowledge production process is functioning. The knowledge principle represents

63. See *id.* at 1176–77.

64. As part of the effort to make knowledge universally available, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has spearheaded an effort to encourage institutions of higher education to make their courses available online. See, e.g., *Open Educational Resources*, UNESCO, <http://www.unesco.org/new/en/communication-and-information/access-to-knowledge/open-educational-resources/> (last visited Dec. 13, 2014). MIT has done so since 2001. See *MIT To Make Nearly All Course Materials Available Free on the World Wide Web*, MIT NEWS (Apr. 4, 2001), <http://newsoffice.mit.edu/2001/ocw>.

65. Cohen, *supra* note 24, at 1165; see also Jessica Litman, *Public Domain*, 39 EMORY L.J. 965, 1023 (1990) (“The vision of authorship on which it is based—portraying authorship as ineffable creation from nothing—is both flawed and misleading, disserving the authors it seeks to extol.”).

66. The Merriam-Webster dictionary definition of “transcendent” is “exceeding usual limits; extending or lying beyond the limits of ordinary experience; being beyond comprehension.” MERRIAM-WEBSTER’S DICTIONARY (11th ed. 2009).

67. In 2008–2009, total spending by school districts was approximately \$610.1 billion. See NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEPT. OF EDUC., NCES, 2012-001, DIGEST OF EDUCATION STATISTICS, tbl. 191, ch. 2.

68. JACOB BROWNSKI, THE ASCENT OF MAN 202 (1973). Galileo was the creator of the modern scientific method. *Id.* He designed experiments to test his hypothesis, then published the results so that his colleagues could test and attempt to refute the results. *Id.*

this process as it maximizes access to knowledge resources. Scholars have not examined or explained the effect of copyright jurisprudence on this process. This blind spot carries over to copyright jurisprudence, where doctrines developed without an understanding of how they affected the learning and creation function of copyright. As discussed below, these doctrines, properly understood, really concern the distribution function of copyright.

“Access” as used herein has a very expansive meaning. It is concerned with the quality and quantity of access as a three dimensional subject. Access is about control over the work by the user. Here, the focus is not on the alienation of the work, but what the possessor of the work can do with it while the work is in her possession. In the case of a book, it is about the control over decisions regarding the time and place to read the book. That control allows the reader the freedom to choose the optimal conditions for absorbing and understanding the contents of the book that will fulfill her personal objectives in obtaining the book in the first place. In the case of education and research, it is easy to understand why more freedom in the selection of time and place for the reader (as student or researcher) will positively affect that reader’s ability to succeed as a student or scholar.⁶⁹ The reader may want to benefit from reading the book aloud to other students or researchers to benefit from their reactions and understanding of the material. They may need additional time to take notes on the material to aid in the understanding of the material.

In society, knowledge is held by institutions, including universities (public and private), corporations (for profit and nonprofit), and public libraries.⁷⁰ Collectively, these institutions are referred to as the “knowledge infrastructure.”⁷¹ These institutions can be distinguished for purposes of the knowledge production process by varying incentive structures and general missions of purpose toward the sharing of knowledge.⁷² Public libraries represent the single

69. See Cohen, *supra* note 24, at 1180, 1194. Cohen critiques contemporary theory that presumes access to extant cultural resources regardless of their location in space and time. *Id.* She emphasizes assessing copyright to the extent that it renders inputs to the creative process available to creators. *Id.*

70. Although individuals also hold knowledge, knowledge is most concentrated (and circulated) within institutions. See FRITZ MACHLUP, *THE PRODUCTION AND DISTRIBUTION OF KNOWLEDGE IN THE UNITED STATES* (1962).

71. This is the author’s definition.

72. On two ends of the spectrum are the public libraries and corporations; the former existing solely for the spread of knowledge in society, and the latter focused on the interests of its shareholders or board. For the profit-making corporation, there will likely be an inverse relationship between the sharing of its proprietary knowledge and its profit-making goals. In between those two institutions lie academic institutions. Traditionally their mission has been the

institution dedicated to the sharing of knowledge without regard to affiliation or economic means.⁷³

Public libraries have warned that trends in copyright would reduce access to information and increase the digital divide among income classes.⁷⁴ Libraries understood the implications of this trend toward limited rights of possession on access to knowledge, particularly for the less advantaged members of society.⁷⁵ Libraries focused on the objectives of copyright to encourage learning and their mission to provide access to knowledge as widely as possible.⁷⁶ For public libraries, access is about the broad circulation of materials among patrons, including the right to lend materials to other libraries (increasing circulation) and to archive materials (protecting access for posterity). Libraries attempted to counter the shift toward reduced access by compelling producers to permit more use of the digital works, on par with pre-digital use.⁷⁷ However, they failed.⁷⁸ They did not have the right model or strategy.⁷⁹ Their solution had little hope

advancement of knowledge, but this may be in conflict with a trend toward monetizing its research.

73. Universities require special affiliation to access their knowledge resources, for example, credentials as a professor or a student at the particular institution. There are network effects of this affiliation, as typically universities have agreements where resources may be shared between them. Corporations are even less transparent. Their competitiveness often relies on the secrecy of their knowledge resources. They are unlikely to enter into sharing agreements or make their resources available to the public. Public libraries, on the contrary, have had the mission to make knowledge resources available as widely as possible.

74. See, e.g., *New ALA Report Explores Challenges of Equitable Access to Digital Content*, AM. LIBR. ASS'N (May 23, 2012), <http://www.ala.org/news/press-releases/2012/05/new-ala-report-explores-challenges-equitable-access-digital-content>; Nancy Kranich, President, Am. Library Ass'n, Midwinter Meeting Address: The Digital Divide & Information Equity: Challenges & Opportunities for Libraries in the Twenty-First Century, available at <http://www.ala.org/aboutala/governance/officers/past/kranich/mw2001>.

75. See Kranich, *supra* note 74.

76. See, e.g., ANNE K. BEAUBIEN, ARL WHITE PAPER ON INTERLIBRARY LOAN (2007), available at http://www.arl.org/storage/documents/publications/arl_white_paper_ill_june07.pdf; *Strategic Plan: 2011-2015*, AM. LIBR. ASS'N, http://www.ala.org/aboutala/sites/ala.org/aboutala/files/content/missionhistory/plan/strategic%20plan%202015%20documents/strategic_plan_2.pdf (last visited Dec. 13, 2014).

77. See *infra* note 323 (discussing the Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies).

78. See *id.*

79. Libraries have relied on the traditional arguments that a liberal fair use doctrine will solve the problems of access in the digital era. As discussed in Part IV.A, the fair use doctrine and public domain concept do not support access to *all* the material, and have the methodological problem of being decided after the use has occurred. See, e.g., *Principles & Strategies for the Reform of Scholarly Communication 1*, ASS'N C. & RES. LIBRS., <http://www.ala.org/acrl/publications/whitepapers/principlesstrategies> (last visited Dec. 13, 2014) (observing in 2003 that “powerful commercial interests have successfully supported—and are continuing to advocate—changes in copyright law that limit the public domain and significantly reduce principles of fair use, particularly for information in digital form”).

of adoption. They failed to understand that copyright jurisprudence was misaligned with those objectives. They relied on conventional copyright theory where creation of the copyrighted work has not been a central concern; and thus, access to copyrighted works is poorly understood as a mechanism in the creation function of copyrighted works.⁸⁰ As a result, society faces the prospect of a significant decline in the availability of knowledge resources as the shift from print to digital dissemination of copyrighted content is completed.⁸¹

To understand how this misalignment occurred, it is necessary to travel back in time to the pre-copyright era of seventeenth-century England. The birth story of copyright in England, and subsequently the United States, explains the lack of attention to the creation function of copyright. Copyright first appeared in 1710 as the Statute of Anne in Britain.⁸² Its aim was never to solve a creation problem—i.e., the writing of books—or in modern copyright terms, the “authorship of works.”⁸³ Statutory copyright was a political compromise for the British book publishers (mostly London booksellers) that had enjoyed an absolute monopoly on the publishing and distribution of books for nearly 150 years.⁸⁴ This monopoly had derived not from parliamentary power, but royal power.⁸⁵ The political regime of the Licensing Act and the economic regime of statutory copyright were about the question of copying and distributing books.⁸⁶

B. Anglo-American Copyright’s Birth Story

Britain’s Statute of Anne established the world’s first copyright statute in 1710.⁸⁷ The statute proclaimed its objective in its title: “An

80. Cf. Carol C. Henderson, *Libraries as Creatures of Copyright*, AM. LIBR. ASS’N, <http://www.ala.org/advocacy/copyright/copyrightarticle/librariescreatures> (last visited Aug. 21, 2013) (“What librarians seek as copyright law and related rules are being reshaped for the digital age is to maintain for users, and for libraries and educational institutions acting on their behalf, their rights to at least the same extent as they have enjoyed them in the analog environment.”).

81. See Vinjamuri, *supra* note 7.

82. Statute of Anne, 1710, 8 Ann., c. 19 (Gr. Brit.).

83. Craig Joyce, *L. Ray Patterson: Copyright (and Its Master) in Historical Perspective*, 10 J. INTELL. PROP. L. 239, 244 (2003) (citing L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 607 (1987)); KAPLAN, *supra* note 14, at 75.

84. ROSE, *supra* note 2, at 43, 47.

85. *Id.* at 12. Starting with Henry VIII the royals were concerned with the adverse effects of rogue, dissenting publications and worked with a special club of booksellers (publishers) to censure texts. *Id.*

86. Joyce, *supra* note 83, at 242, 244.

87. Statute of Anne, 1710, 8 Ann., c. 19 (Gr. Brit.).

Act for the Encouragement of Learning.”⁸⁸ The United States followed the British model, adopting a nearly mirror-image statute in 1790.⁸⁹ US copyright, however, is also derived from a direct constitutional power found in Article I, Section 8.⁹⁰

By the late 1600s, the House of Lords was pressing the Crown to share political and economic power.⁹¹ The Crown had established a large number of economic monopolies as a method of revenue collection.⁹² A growing faction of the House of Lords became concerned about the anti-competitive effects of these monopolies, including the printing of books.⁹³ A special club of printers belonging to the Stationers’ Guild had enjoyed the exclusive right to print books.⁹⁴ They had enjoyed this privilege (in one form or another) for nearly 150 years.⁹⁵ The Guild had perpetual rights in the books they published.⁹⁶ Authors had neither statutory nor common-law rights.⁹⁷ They were usually paid a one-time fee, like any other commodity, and then the publisher enjoyed a perpetual monopoly on the publishing rights of the manuscript.⁹⁸

During this period, Parliament began wresting control of these monopolies from the Crown.⁹⁹ Initially, Parliament had agreed to maintain the printing monopoly through a renewable Licensing Act.¹⁰⁰ The printers had to return to Parliament periodically for its renewal, but they essentially continued to have perpetual rights in the books they published and could exclude any non-member of the Guild from publishing any book.¹⁰¹ John Locke had campaigned against renewal

88. *Id.*

89. Act of May 31, 1790, ch. 15, 1 Stat. 124 (codified as amended at 17 U.S.C. §§101–1332 (2012)).

90. U.S. CONST. art. I, § 8.

91. PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY 34–35 (2002).

92. *Id.*

93. ROSE, *supra* note 2, at 32; Joyce, *supra* note 83, at 242–43.

94. ROSE, *supra* note 2, at 31–32.

95. *Id.* at 43. The printing press dates back to the Gutenberg press in 1440. *Id.* It arrived in Britain shortly thereafter. *Id.* Across Europe and England, royal authorities and papal authorities became concerned about the potential (and real) threat of an uncontrolled press as the voice of dissent. *Id.* So, they moved to control its use first by imposing censure regulations, then in England, the Crown found it more efficient to censure through the economic monopoly of the Stationers’ Guild. *Id.*

96. *Id.* at 24.

97. *Id.*

98. *Id.* at 44.

99. *Id.* at 33–34.

100. *Id.* at 32.

101. *Id.*

of the Licensing Act in the late 1600s.¹⁰² Writing to his friend and Member of Parliament, Edward Clarke, Locke expressed his concern over the monopoly power exercised by the Stationers' Guild over the ancient author, and argued that it was "very unreasonable and injurious to learning."¹⁰³

In 1695, the House of Lords blocked renewal of the Licensing Act.¹⁰⁴ They reported that it "subjects all Learning and true Information to the arbitrary Will and Pleasure of a mercenary and perhaps ignorant licenser; destroys the Properties of Authors in their Copies; and sets up many Monopolies."¹⁰⁵ This fear of "monopolies of knowledge" as injurious to the public interest in learning is significant and noteworthy. It mirrors the same concern of the US constitutional framers in the next century.¹⁰⁶ The printers belonging to the Guild were furious, but stymied in their efforts to continue their monopoly.¹⁰⁷

For the period from 1695–1710, there was no Licensing Act and no special protection for book publishers.¹⁰⁸ Anyone could publish freely. During that fifteen-year period, the printers belonging to the Stationers' Guild realized they were not going to be able to convince Parliament to renew their special monopoly. The House of Lords decision in 1695 to not renew the Licensing Act was to London book publishers what the *Sony v. Universal* decision of the Supreme Court in 1984 was to the Hollywood film producers.¹⁰⁹ The Guild needed a new strategy. Prominent authors, including Wordsworth and Defoe, had championed greater rights for authors.¹¹⁰ As long as book publishers could secure rights from authors, it was a clever strategy to support their efforts. Authors became the "cover"—literally and philosophically—to advance the publishers' interests.

After several failed efforts, the publishers presented Parliament with a new act that included the granting of rights to authors.¹¹¹ Parliament made two significant changes. The publishers' plan for "perpetual" rights in each book, similar to their past practice,

102. *Id.*

103. *Id.* at 33.

104. *Id.*

105. *Id.* at 32.

106. Litman, *supra* note 2, at 335.

107. ROSE, *supra* note 2, at 34.

108. *Id.* at 33–34.

109. Content producers feared that the courts would expand *Sony* to a personal use exemption to copyright. *See infra* Part III.C.

110. ROSE, *supra* note 2, at 34–41, 110.

111. *Id.* at 43.

was reduced drastically to a fourteen-year term.¹¹² Also, the references to “property” and “rightful owners” in the title of the act were removed, but the reference to “encouragement of learning” was retained.¹¹³ The title changed from “A Bill for Encouragement of Learning and for Securing Property of Copies of Books to Rightful Owners thereof” to “A Bill for Encouragement of Learning by Vesting the Copies of Printed Books in Authors or Purchasers of Such Copies during Times Then Mentioned.”¹¹⁴

This political compromise meant that publishers would be able to resume the special protection they had enjoyed under the Licensing Act, with two modifications. First, this special protection would be limited to a short period of fourteen years, rather than an indefinite period under the Licensing Act.¹¹⁵ Second, publishers were now required by law to contractually obtain rights from the author.¹¹⁶ In 1710, the British Parliament adopted the Statute of Anne.¹¹⁷

The book publishers did not concede defeat. Between 1710 and 1774, they attempted to convince the courts to recognize a “perpetual” right in literary property based on a common law right rooted in principles of natural justice.¹¹⁸ It was a colorful battle engaging some of the greatest minds of the day, including the “father” of Anglo-American jurisprudence, William Blackstone. The series of decisions became known as the “Battle of the Booksellers.”¹¹⁹ Blackstone argued *Millar v. Taylor* on behalf of London publishers arguing for perpetual common law right.¹²⁰ He is rightfully attributed with being a primary author of the book publishers’ “natural rights” based argument for a perpetual right to literary property.¹²¹ Chief Justice Mansfield of the King’s Bench held in favor of the plaintiffs, finding that there was a common law perpetual right in literary property.¹²² In *Donaldson v. Beckett*,¹²³ the London book publishers sued a rogue Scottish publisher who refused to recognize *Millar*.¹²⁴

112. *Id.* at 45.

113. *Id.* at 46.

114. *Id.*

115. *Id.* at 47.

116. *Id.* at 46–47.

117. Statute of Anne, 1710, 8 Ann., c. 19 (Gr. Brit.).

118. ROSE, *supra* note 2, at 67–69.

119. *Id.*

120. *See* *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.).

121. ROSE, *supra* note 2, at 90–91.

122. *Id.* at 69.

123. *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.).

124. Four years following *Millar*, The Scottish Court of Session ruled that there was no common law right in literary property in its opinion *Hinton v. Donaldson*. *See* ROSE, *supra* note 2, at 67.

Judge Blackstone now sat on the King's Bench, and also found for a common law right in literary property.¹²⁵ This decision was appealed to the highest court, which in 1774 was the House of Lords (comparable to the US Supreme Court in that period).¹²⁶ The House of Lords reversed the King's Bench decision, placing Judge Blackstone on the losing side.¹²⁷

Contemporary scholars, especially legal scholars, have misreported what happened (and what did not happen) in the *Donaldson* decision.¹²⁸ There was no reported opinion typical of the times.¹²⁹ As scholar Mark Rose has pointed out, a great deal of confusion occurred in the aftermath of that decision.¹³⁰ Some modern commentators have overstated what occurred, hailing the decision as a promulgation that the utilitarian approach (i.e., limited copyright) prevailed over the natural rights approach (i.e., unlimited copyright) to copyright.¹³¹ There is no direct evidence to support that contention. Rather, as Professor Rose notes, it was simply a political act where the House of Lords affirmed the same judgment that it had held eighty years earlier when blocking the renewal of the Licensing Act in the late 1600s.¹³² The power of the book publishers was too great, and did not serve the public interest. The House of Lords recognized that the public interest, namely the encouragement of learning, was served by the production and dissemination of books.¹³³ It also recognized that the capital investment required for such activities, and the uncertainty associated with the marketing of books (compared to other "necessary" commodities), required the state to support some measure of monopoly.¹³⁴ That measure of monopoly necessary to incentivize the production of books, namely the printing, marketing, and distribution of books, would be difficult to estimate with precision. It is clear, however, that in the judgment of those Lords acting in 1709 (during the negotiation and passage of the Statute of Anne), and of

125. ROSE, *supra* note 2, at 98.

126. *Id.* at 102–03.

127. *Id.*

128. See JOHN TEHRANIAN, *INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU* 470 (Oxford Univ. Press 2011); ROSE, *supra* note 2, at 102–03.

129. ROSE, *supra* note 2, at 102.

130. *Id.* at 98–99.

131. *Id.* at 108.

132. *Id.*

133. This is the author's analysis based on the actions of the House of Lords to retain the title "encouragement of learning" and drastically reducing the scope of the monopoly to the publishers. See Statute of Anne, 1710, 8 Ann., c. 19 (Gr. Brit.).

134. ROSE, *supra* note 2, at 43; KAPLAN, *supra* note 14, at 6–7.

those Lords who decided *Donaldson* in 1774, the amount of monopoly should be much smaller than the publishers desired.¹³⁵

The US framers adopted a similar view as the House of Lords in Britain—that copyright was the solution to the problem of distribution of works of knowledge, rather than creation of those works.¹³⁶ It was the London publishers or “book sellers” that had enjoyed absolute rights to the distribution of their commodities—books—for nearly two hundred years.¹³⁷ Authors had few, if any rights during that period.¹³⁸ Nevertheless, they wrote books and sought out publishers to distribute them. The political solution called for limiting the absolute right to the publisher by emphasizing the ultimate purpose of the creation and distribution of works of knowledge in society—the encouragement of learning—or as used herein, “the advancement of knowledge.”¹³⁹ In the same fashion as their British cousins, the Framers crafted a private right of action to achieve a public good, not a private right of action to bestow a private benefit.

Part III surveys the development of modern copyright jurisprudence through the lens of copyright’s original justification—the advancement of knowledge. The interests associated with copyright industries have largely persuaded courts and the legislature to see the dollar value of copyrighted commodities as the measure of copyright’s value to society.¹⁴⁰ This misalignment of means and ends has created the fallacy that more protection means more social value. Part IV examines the implications of this fallacy for the interests of society.

III. DOCTRINE

The explanatory thread that connects the birth of copyright to its present stage is the story of the interests associated with the distribution function of copyright.¹⁴¹ Copyright industries—first publishers, then film, music, and software as well—expanded the initially narrow, brief right of protection into a broader right, which in the digital era approaches a perpetual right in their “property.” Modern copyright theory developed in the later stages of the jurisprudential timeline of copyright, when intellectual property

135. ROSE, *supra* note 2, at 47.

136. Joyce, *supra* note 83, at 244.

137. ROSE, *supra* note 2, at 12.

138. *Id.* at 12, 18, 22; PATTERSON, *supra* note 46, at 5.

139. ROSE, *supra* note 2, at 45–47.

140. *See infra* Part III.

141. *See Joyce, supra* note 83, at 244.

generally became more significant to the US economy.¹⁴² This paralleled the technological revolution of the latter part of the twentieth century.¹⁴³

As we cross into the digital era of the twenty-first century, copyright has reached an inflection point paralleling the British contest over concentration of economic power in 1690 and 1774.¹⁴⁴ In contemporary US copyright, the landmark 1984 case of *Sony Corporation of America v. Universal City Studios, Inc.*¹⁴⁵ in the US Supreme Court can be viewed as a similar exercise of restraint against concentration of economic power. By the late twentieth century, the economic interests included not only book publishers, but also a host of other “content” producers including film, music, and software industries. These industries rallied to reestablish their influence in the decades following that decision.¹⁴⁶ These efforts paralleled that of the London publishers in the late seventeenth to late eighteenth century in England. Just as the London publishers attempted to reassert their economic power in the courts following their defeat in the House of Lords, the contemporary content industries in the United States strove to reassert their perceived loss of economic power through the courts and legislature.

In the wake of copyright’s birth, book publishers began to push for an expansion of the narrow, limited right granted by the Statute of Anne. This initial effort attempted to circumvent the statute by recognizing a pre-statutory right in literary property grounded in natural rights theory. As discussed above, the series of decisions referred to as the Battle of the Booksellers culminated in a final decision that the only rights that existed were in the statute.¹⁴⁷ Interests associated with expansion of the right were left with two possible strategies: (1) convince the legislature to expand the statute; or (2) persuade the courts to interpret the statute expansively. They pursued both.

Copyright jurisprudence is best rationalized on an axis between restraint and expansion. The first century of American jurisprudence—1790 through the early 1900s—followed two doctrinally divergent paths: the traditional approach of restraint that

142. Litman, *supra* note 2, at 340.

143. *See infra* Part III.C.

144. *See* ROSE, *supra* note 2, at 34, 93; Joyce, *supra* note 83, at 242–43. The House of Lords’ decision not to renew the Licensing Act in 1690, and its 1774 *Donaldson* decision ruling against a perpetual right of copyright weighed against economic concentration. *See* ROSE, *supra* note 2, at 34, 93; Joyce, *supra* note 83, at 242–43.

145. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

146. JESSICA LITMAN, *DIGITAL COPYRIGHT* (2001).

147. *See* ROSE, *supra* note 2, at 102–03.

followed the British sensitivity toward copyright's public interest in expanding the works of knowledge to the public, and the pro-expansion approach sympathetic to those commercial interests who sought to protect their investment.¹⁴⁸

Early copyright shifted the analytical focus of follow-on works from contributing to the public good of copyright to a concern with incentives for investment in the first-mover investor work. In the 1868 decision of *Daly v. Palmer*, a dispute between two competing theatre productions presaged the twentieth century move from literal to non-literal protection of copyright—a significant leap for the interests of the first-mover investor.¹⁴⁹ Feeling no constraint by literal infringement, the judge found infringement where the only similarity between the plays was the theme of a railroad rescue scene—even the details of the scenes varied.¹⁵⁰ The New York judge transparently supported the commercial interests of the first-mover investor.¹⁵¹

Modern copyright sanctified the doctrinal expansion from literal to non-literal protection of copyrighted material. As seen in the next Section, the fledgling film industry of the early twentieth century faced hold-up problems when playwrights began to apply the *Daly* reasoning.¹⁵² Judge Hand reacted to this overreaching with the development of categories of reasoning and analysis—categories that appealed to legal minds, but intensified the indeterminacy problem for the creation function of copyright.¹⁵³

In the digital-transition era, the transformation of copyrighted material from print to digital format raised the commercial stakes. Personal reproduction (and distribution) of copyrighted material became feasible. The Supreme Court's decision in *Sony*, approving unauthorized reproduction of television programming by consumers under the fair use doctrine, alarmed the industry.¹⁵⁴ In the wake of the Internet revolution, the content industries worked to reform digital copyright to protect their interests.¹⁵⁵ Content producers achieved greater control in the downstream distribution of digital content; however, the tension between copyright and its public good objective—encouragement of learning and advancement of knowledge—had increased.

148. See *infra* note 184 and accompanying text.

149. See *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

150. *Id.* at 1137.

151. *Id.*

152. See *infra* notes 272–75 and accompanying text.

153. See *infra* Part III.B.3.

154. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

155. See LITMAN, *supra* note 146.

A. Early Copyright Jurisprudence: Literal Copyright

1. British Pro-Restraint Approach

Copyright jurisprudence in Britain from 1710 to 1790 pre-dated US copyright by nearly a century. Early British decisions on translations and abridgements demonstrated a favorable attitude toward reuse of earlier copyrighted material as supplying the public with more useful works of knowledge.¹⁵⁶ Analytically, the British considered the translation or abridgement as a new work capable of independent copyright, thus not infringing the earlier work.¹⁵⁷ Such activity was looked on favorably, and even lauded.¹⁵⁸ These British decisions showed a sensitivity and appreciation for the contribution of later works to the education and learning of society—consistent with the stated objective of the establishment of copyright in the Statute of Anne.¹⁵⁹

From its inception, copyright jurisprudence was concerned with the distribution function of copyright. Early British cases rationalized their liberal or indulgent approach toward reuse of copyrighted works as aligning the distribution function of copyright with its objectives of advancement of knowledge and encouragement of learning.¹⁶⁰ A common scenario giving rise to disputes between publishers involved abridgements. In the classic abridgement case *Gyles v. Wilcox*,¹⁶¹ decided in 1740, the publisher of Sir Matthew Hale’s Pleas of the Crown had pursued an infringement action against the publisher of an abridged version called *Modern Crown Law*.¹⁶² In finding no infringement, Lord Chancellor Hardwicke said, “abridgements may with great propriety be called a new book, because not only the paper and print, but the invention, learning and the judgment of the author is shown in them.”¹⁶³ As Professor Kaplan noted, Lord Mansfield, in the 1785 map case of *Sayre v. Moore*, stated his concern with supporting the endeavors of follow-on creators whose improvements

156. See *infra* Part III.A.1.

157. KAPLAN, *supra* note 14, at 16–17; ROSE, *supra* note 2, at 133.

158. KAPLAN, *supra* note 14, at 22; Samuelson, *supra* note 41, at 1506–08.

159. KAPLAN, *supra* note 14, at 10–11.

160. *Id.* at 17 (quoting Lord Mansfield in his famous decision *Sayre v. Moore* (1785), 102 Eng. Rep. 139 (K.B.), where the court favored the follow-on work so that “the world may not be deprived of improvements, nor the progress of the arts be retarded”).

161. (1740) 26 Eng. Rep. 489 (Ch.).

162. KAPLAN, *supra* note 14, at 10–11; ROSE, *supra* note 2, at 51.

163. KAPLAN, *supra* note 14, at 10–11.

on earlier works benefit society.¹⁶⁴ This sentiment supported the general rule of finding no infringement with abridgements.

2. American Pro-Expansion Framework

In a trio of cases—*Gray v. Russell*, *Emerson v. Davies*, and *Folsom v. Marsh*—Justice Story laid the groundwork for a reversal of the earlier British approach.¹⁶⁵ He set an alternate direction for copyright jurisprudence, which contrasted with those decisions of his period that followed the eighteenth century British jurisprudence.¹⁶⁶ Justice Story selectively relied on British precedent that allowed him to fashion a different rule that also yielded a different outcome—one that favored first-mover investors and the commercial interests invested in the first publication of material.¹⁶⁷

In a fact pattern very similar to the British abridgement cases, Justice Story in *Folsom* found an abridgement of George Washington’s biography infringing.¹⁶⁸ Justice Story did not buy the “new book” rationale, and was not sensitive to the “contribution to the benefit of society” rationale.¹⁶⁹ Rather, he was sympathetic to the “taking” rationale of the first-mover investor.¹⁷⁰ He developed an alternate framework supportive of the commercial interests associated with first-mover investors in the exploitation of copyrighted assets.¹⁷¹ His analytical move was to view the follow-on work as a “taking,” rather than a “new work.”¹⁷² This significant philosophical difference reflects the growing importance and influence of the commercial interests associated with the first-mover investor in copyright—the content producer claiming the earlier copyright. In Justice Story’s time, these interests were those of book publishers, who had invested in the printing and distribution of the earlier work, and believed an unlawful taking had occurred when the follow-on work reused some of its content.¹⁷³

164. *Id.* at 11, 16–17 (additionally discussing two other British abridgement opinions where the court found no infringement); Samuelson, *supra* note 41, at 1506–08.

165. KAPLAN, *supra* note 14, at 27–29.

166. *Id.*

167. *Id.* at 27–28. Professor Kaplan notes that Justice Story was a “chief American expositor and reinterpreter of English copyright doctrine.” *Id.* at 27.

168. *Id.* at 28.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 27–28.

173. *Id.* at 22. Professor Kaplan notes that British doctrine had begun to question the “indulgent attitude toward using other people’s works [as] increasingly out of keeping with the realities of the market.” *Id.*

Justice Story is famous for being the father of the “fair use” doctrine of copyright. In his famous opinion cited for that doctrine, *Folsom*, Justice Story did not use the term “fair use.”¹⁷⁴ He merely articulated a factor test for determining if reuse is infringing or excused, but that factor test would later be coined as the “fair use” test.¹⁷⁵ *Folsom* is part of a trio of “Story decisions” that articulated a departure in infringement analysis from the earlier British approach.¹⁷⁶ Instead of an indulgent, liberal approach toward reuse of material as benefiting society, Justice Story viewed the reuse in commercial terms, and he analyzed how it impacted the investment decisions of those investing in the early distribution of copyrighted works.¹⁷⁷ As Professor Kaplan noted, there was a “reshuffling of doctrine” in the nineteenth century—the shift in the indulgent attitude toward reuse of material associated with eighteenth century copyright jurisprudence.¹⁷⁸

Folsom concerned the abridgement of George Washington’s biography.¹⁷⁹ Instead of applying the classic abridgement rule favoring follow-on works, Justice Story took the opportunity to fashion a new rule, really a new standard or test.¹⁸⁰ He relied most heavily on brief dicta by Lord Cottenham in his *Bramwell v. Halcomb* opinion about the appropriate approach to reuse of prior work.¹⁸¹ Justice Story relied on Lord Cottenham’s musing about whether the question of legitimate reuse was not a matter of the quantity taken, but the value of the earlier work.¹⁸² Justice Story did not focus on the contribution

174. See *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901).

175. These uses are determined on a fact-specific basis by weighing four factors: (1) the purpose and character of the “fair use”; (2) the nature of the copyrighted work; (3) the impact of the use on the market of the rights holder; and (4) the amount and substantiality of the portion of the work used. It is a standard, not a rule that must be applied by the court subsequent to the “use” of the work by the party claiming the privilege. *Id.* In his opinion, *Lawrence v. Dana*, Judge Clifford, relying particularly on *Folsom v. Marsh*, coined the term “fair use.” 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8,136). The fair use factor test has been codified in the 1976 Copyright Act. 17 U.S.C. § 107 (2012).

176. *Folsom*, 9 F. Cas. at 342.

177. John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 480–81 (2005).

178. KAPLAN, *supra* note 14, at 22.

179. *Folsom*, 9 F. Cas. at 345; KAPLAN, *supra* note 14, at 27–28.

180. *Folsom*, 9 F. Cas. at 348.

181. (1836) 40 Eng. Rep. at 1110; In dicta, Lord Cottenham mused about the appropriate test for infringement, saying, “[w]hen it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another’s book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to.” *Id.* The plaintiff passed away shortly after, and the case was not pursued. *Id.*

182. See *Folsom*, 9 F. Cas. at 348. Justice Story finds that:

of the follow-on work to the public good because his property approach of looking at reuse of material as a “taking” meant that the market impact on earlier work was the priority.¹⁸³

Although the fair use doctrine in the twentieth century became the touchstone for pro-restraint forces, it is more properly viewed in its historical context as moving copyright from pro-restraint to pro-expansion.¹⁸⁴ As discussed below, its methodological approach does not support the knowledge production processes, which require ex ante certainty with respect to access to the knowledge resources of the intellectual commons.¹⁸⁵ Justice Story’s balancing test relied on each judge subjectively determining how much weight to allocate to any particular factor.¹⁸⁶

Justice Story’s pro-expansion approach to copyright was still limited to the literal elements of copyright. Even if the whole of the book was not reused, it was the text or literal elements of the text that were reused. The next move in the expansion of the protection right included non-literal elements in the “taking” analysis, which evolved into the modern “substantial similarity” doctrine.¹⁸⁷ The 1868 district court decision *Daly v. Palmer*¹⁸⁸ signaled the shift in doctrinal development. Modern fair use doctrine evolved as the scope of copyright expanded from literal to non-literal elements of the work, developing into a doctrine that can be seen as a brake on overreaching by first-mover investor.

3. Emergence of Non-Literal Protection

Justice Story’s jurisprudence represented a pro-expansion shift away from the US line of cases following the British approach of pro-restraint.¹⁸⁹ His decisions, however, still involved copying of the

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits . . . of the original work.

Id.

183. See *Folsom*, 9 F. Cas. 342.

184. Tehranian, *supra* note 128.

185. See *infra* Part IV.B.2.

186. *Id.*

187. See *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

188. *Id.*

189. In *Wheaton v. Peters*, the Supreme Court followed the British precedent of *Donaldson v. Beckett*, holding that there was no independent common law right in literary property. 33 U.S. 591, 686 (1834). In *Stowe v. Thomas*, Judge Grier, followed British precedent that a translation was not infringing. 23 F. Cas. 201, 208 (C.C.E.D. Pa. 1853) (No. 13,514). It was a case of first impression in the United States regarding the rights of a copyright owner (Harriet Beecher Stowe) in a translation of its work (German translation of *Uncle Tom’s Cabin*). *Id.* at

literal elements of the copyrighted material. The next pro-expansion move in copyright was the protection of non-literal elements of the copyrighted work. By the early second half of the nineteenth century, the economic interests associated with copyright had evolved from exclusively books to include dramatization of written works, i.e., plays.¹⁹⁰

Only a short period after the Story decisions, New York district judge, Samuel Blatchford, took the pro-expansion path that Justice Story had charted even further. In 1868, one theatre producer sought to enjoin another theatre producer from producing a popular competing play in New York City.¹⁹¹ The two plays, called *Under the Gaslight* and *After Dark* involved different plots, dialogue, and characters.¹⁹² The similarity at issue was that both contained a “railroad rescue scene.”¹⁹³ The characterization of the railroad scene also differed—in one case it involved a woman being rescued, and the other, a man being rescued.¹⁹⁴ The location of the rescue varied as well.¹⁹⁵ Nevertheless, the judge who decided *Daly v. Palmer*¹⁹⁶ cited Justice Story’s opinions, as well as the British precedent, *D’Almaine*, and found infringement.¹⁹⁷

Reading the opinion, there is ample reference to the commercial success of the first play, and particularly to the audience’s enjoyment of the “railroad rescue scene.”¹⁹⁸ The court reasoned that if an element of the second work (e.g., railroad scene) elicits similar emotions or sensations as a similar (i.e., non-literal) element in an earlier work, then the second work can be infringing of the rights holder in the first work, and subject to injunctive relief.¹⁹⁹ Just like Justice Story, the court focused more on the “taking” than the value of the new work and its potential benefit to the public good.²⁰⁰ The scope of “copy” in the statute has become very broad, broader arguably than

201. Quoting William Blackstone, the plaintiff’s attorney argued that natural rights of the author should lead the court to enjoin the translation. *Id.* at 202 n.2.

190. KAPLAN, *supra* note 14, at 30–31.

191. *Daly*, 6 F. Cas. at 1133–34.

192. *Id.*

193. *Id.*

194. *Id.* at 1134.

195. *Id.* at 1133–34.

196. *Id.* at 1132.

197. *Id.* at 1136.

198. *Id.* at 1133.

199. *Id.* at 1138.

200. *Id.* at 1138–39.

even William Blackstone could have envisioned or hoped for one hundred years earlier.²⁰¹

The increasing economic stakes associated with copyright drove this shift in focus in infringement analysis. The earlier pro-restraint bias toward follow-on works as contributing to purposes of copyright was replaced by one favoring the first-mover investor in the copyrighted asset. As Kaplan noted:

An indulgent attitude toward using other people's works seemed out of keeping with the realities of the market. The business of publishing and distributing books had become bigger, more competitive, more impersonal; the stakes were higher, the risks more serious. In this atmosphere, there would be even greater anxiety about marking out the metes and bounds of literary ownership, and courts might be expected to respond to arguments about protection of investment.²⁰²

In the early twentieth century, Justice Holmes and Judge Hand would take copyright in the direction that Justice Story was headed, and that the *Daly* court had pushed even further toward favoring the protection of investment in first-mover investor's copyrighted assets. Judge Hand's jurisprudence reified this broader non-literal scope of copyright while moving to limit its reach with the fashioning of another doctrine, known in modern copyright jurisprudence as the idea-expression dichotomy. This represents the reconceptualization of copyright from the early British approach focused on the contributions to society's storehouse of knowledge to the modern US approach of the protection of the interests of investment.

B. Modern Copyright Jurisprudence—Print Era

Copyright jurisprudence was at an adolescent stage at the turn of the twentieth century. The expansion of copyright in the twentieth century occurred alongside the increasing commercialization of industries that benefited from and relied upon the protection that copyright afforded in the marketplace. By the end of the nineteenth century, not only were books, maps, and charts covered, but also music, dramatizations (theatre productions), and translations.²⁰³ Industries such as theatre and music, which had not been included in the copyright regime at its inception, were prime beneficiaries of the system at the turn of the twentieth century.

201. In 1869, T.W. Clarke wrote in the *American Law Review* an article criticizing the *Daly* decision for injecting a property approach into copyright jurisprudence. KAPLAN, *supra* note 14, at 32 ("Mr. T.W. Clarke lamented that this 'is the first decision which has established a property in incident.'").

202. KAPLAN, *supra* note 14, at 22.

203. 17 U.S.C. § 101 (2012).

The chief actor in the story of modern copyright jurisprudence is Judge Hand, but Justice Oliver Wendell Holmes' earlier influence on copyright generally, and on Judge Hand in particular, is significant.

Justice Holmes expanded the subject matter and commercial stakes of copyright. His decisions reified the concept of originality in copyright as a very low threshold, favorable to the first-mover investor in copyrighted material.²⁰⁴ Judge Hand constructed a personal framework for copyright which became the twentieth-century modern copyright jurisprudence standard.²⁰⁵ He is credited with the development of modern copyright's concepts of originality, substantial similarity, and idea-expression dichotomy.²⁰⁶ Judge Hand's colorful and poetic writing belies a keen awareness of the commercial stakes at issue in the contests that came before him. He could move in one direction, then cleverly pivot 180 degrees with the poetic cover of his opinions. In his early decisions as a district court judge, particularly in two music cases, Judge Hand moves copyright in a pro-expansion path, further reversing the earlier British approach of pro-restraint.²⁰⁷

In his next phase, while sitting on the Second Circuit, Judge Hand refined the substantial similarity analysis by creating the idea-expression doctrine to push back on the potentially infinite reach of the substantial similarity's elasticity.²⁰⁸ In his film cases, Judge Hand shifted direction by finding some limitations on the extensive scope of protection found in his music decisions, and by making new law on remedies.²⁰⁹

The result of the evolution of Hand's doctrines is indeterminacy, which has had adverse implications for the public good of copyright.²¹⁰ Each of these analytical categories shares a common methodological bias. They are applied with *ex post*, rather than *ex ante* reasoning to draw appropriate lines between competing economic interests. *Ex post* reasoning relies on subjective factor analysis of the

204. KAPLAN, *supra* note 14, at 41.

205. *Id.* Madison notes that Judge Hand's abstractions test for the idea-expression dichotomy is "the most famous (if still unclear) analytic tool in this area . . ." Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1689-90 (2004).

206. KAPLAN, *supra* note 14, at 41.

207. *See infra* Part III.B.2.

208. *See infra* Part III.B.3.

209. *Id.*

210. Indeterminacy refers to the lack of coherency in the doctrinal outcomes. Many copyright scholars have noted the indeterminacy problem in copyright doctrine. *See infra* Part III.B.

specific facts of the dispute.²¹¹ In contrast, *ex ante* reasoning relies on bright-line rules that can predict outcomes prior to an actual dispute.²¹² The methodological distinction between *ex ante* and *ex post* reasoning is significant because the *ex post* approach has led to an indeterminacy problem in copyright, as the outcome is less predictable. Scholars have largely neglected the effect of this methodological indeterminacy on the creation function of copyright.²¹³

1. The Romantic Movement and Its Influence On Copyright

A significant movement of the nineteenth century that would affect the later course of copyright jurisprudence was the Romantic Movement in literature and philosophy.²¹⁴ Oliver Wendell Holmes, Chief Justice of the Supreme Court in the late nineteenth and early twentieth century, was an avid adherent of the movement.²¹⁵ The main tenet carried over to the law from this movement was the notion that originality in art is represented by the individual's reaction to nature. It can also be referred to as the "sole genius" theory.²¹⁶ This Romantic genius philosophy informed three core constructs of modern copyright jurisprudence: originality, authorship, and substantial similarity doctrine of infringement.

Judge Hand, also an adherent of Romantic philosophy, reified Justice Holmes' idealization of Romanticism into his own personal conception of copyright's definition of originality. Romantic philosophy infused the concept of "author" and "authorship" with an

211. A posteriori reasoning functions by weighing various factors as they are applied to the specific facts of the case.

212. *Ex ante* reasoning operates by applying a general rule to behavior. For example, a criminal law that mandates anyone under the age of twenty-one is prohibited from drinking alcohol is predictable in its application. Once one's age is verified, the outcome is clear.

213. See JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (Yale Univ. Press 2008), available at <http://thepublicdomain.org/thepublicdomain1.pdf>; TARLETON GILLESPIE, *WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE* (MIT Press 2007); DEBORA J. HALBERT, *RESISTING INTELLECTUAL PROPERTY LAW* (2005); VAIDHYANATHAN, *supra* note 13; Elizabeth L. Mitchell, *Shamans, Software and Spleens: Law and the Construction of the Information Society* 10 HARV. J.L. & TECH. 377 (1997) (reviewing JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS* (Harvard Univ. Press 1996); Madhavi Sunder, *IP*², 59 STAN. L. REV. 257 (2006).

214. KAPLAN, *supra* note 14, at 34–35, 43, 117; Jaszi, *supra* note 23, at 459–60; see also Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"*, 17 EIGHTEENTH-CENTURY STUD. 425, 428–30 (1984) (detailing the Romantic conviction that the author-genius was someone who created something entirely new and unprecedented).

215. Justice Holmes draws from Romantic theory in his famous opinion, *Bleistein v. Donaldson Lithographing Co.*, where he states that "[t]he copy is the personal reaction of an individual upon nature. Personality always contains something unique." 188 U.S. 239, 250 (1903).

216. Jaszi, *supra* note 23, at 481–83.

unassailable character of ownership. Since Romantic philosophy assumed that the work reflects the unique perspective of the individual author, any similarity to preceding works is dismissed as irrelevant.²¹⁷ It corresponds with the expanding scope of protection that copyright affords in the marketplace. By the turn of the century, copyright applied not only to books, but dramatizations (plays), music, and would soon apply to film.²¹⁸ Investors in these industries wanted more certainty with respect to their copyrighted material (i.e., assets).²¹⁹ Certainty was increased if they could be assured that the title in their asset could not easily be challenged. If the originality of the work, or even the sole ownership of the work, could be challenged, then the return on their investment would be diluted. The jurisprudential trend toward unassailable originality and bias against the collective nature of creativity benefited their interests.²²⁰ Romantic theory aligned, if indirectly, with the interests of the first-mover investor who favored certainty in the title to their asset. Doctrinally, Judge Hand's jurisprudence sanctified copyright's shift from protection of the literal to non-literal elements of the prior work that began in the late nineteenth century with *Daly*.²²¹

The next Section examines several of Judge Hand's decisions that shaped modern copyright jurisprudence. In his early music decisions, Judge Hand moves copyright in a pro-expansion path, further reversing the earlier British approach of pro-restraint. However, in later cases involving film, Judge Hand reacts to possible overreaching by a first-mover investor by constructing new categories to be considered in the substantial similarity analysis, as well as remedies analysis to limit the liability of the follow-on investor.

217. See *infra* Part III.B.2.

218. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, 1075–1088 (repealed 1978).

219. Investors were happy for the courts to rely on Romantic theory to support a broad protection right in the non-literal aspects of the copyrighted works (i.e., assets). Both Justice Holmes and Judge Hand were influenced by the monetary stakes of copyrighted works. In his landmark decision *Bleistein v. Donaldson Lithograph Co.*, Justice Holmes commented that “[c]ertainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd and therefore gives them a real use—if the use means to increase trade and to help to make money.” 188 U.S. 239, 251 (1903). As scholar Siva Vaidhyanathan notes, Justice Holmes had experienced frustration failing to prevail in copyright cases of his own. See VAIDHYANATHAN, *supra* note 13, at 95. Vaidhyanathan also quotes Judge Hand, “While the public taste continues to give pecuniary value to a composition of no artistic excellence, the court must continue to recognize the value so created.” *Id.* at 105.

220. Investors had to be aware of other similar works in the marketplace. This explains Hollywood's extensive licensing system. See Horowitz, *supra* note 31 at 337 (“Above all, the copyright holder wants a reliably valid entitlement.”). Horowitz goes on to note how originality is a very “permissive” standard. *Id.*

221. *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552).

2. Originality and Substantial Similarity: The Music Cases

Judge Hand developed a personal vision of copyright that largely became the blueprint for copyright jurisprudence in the modern age of print copyright. One of the hallmarks of Judge Hand's jurisprudence is that the originality of the prior work was presumed, rather than proven.²²² The salient characteristic of Judge Hand's approach is malleability, by the court, but its strength is also its limitation—its subjectivity and indeterminacy.

In 1910, Judge Hand, then a district judge in New York, authored the opinion *Hein v. Harris*,²²³ which resolved a dispute between dueling music publishers. The earlier publisher's song was called "I Think I Hear a Woodpecker Knocking at My Family Tree," while the later publisher's song was called "The Arab Love Story."²²⁴ The major issue in the case was the question of the originality of the earlier song.²²⁵ The defendant pointed to several songs preceding the plaintiff's song that were very similar.²²⁶ Judge Hand dismissed this argument, on the basis that borrowing in general from another style is not enough.²²⁷ He noted that "the right of the author of a musical composition is not affected by the fact that he has borrowed in general from the style of his predecessors."²²⁸ He went on to say those notes borrowed "become[] his own, even though strongly suggestive of what has preceded"²²⁹

In *Hein*, Judge Hand developed his substantial similarity doctrine of infringement.²³⁰ Judge Hand cited no legal authority.²³¹ Rather, the opinion contains a detailed comparison of the elements of each song, which reads more like the work of a music critic than a district judge.²³² Between the two songs at bar, the words were different, and the musical composition was not identical.²³³ Judge Hand noted other differences, such as the keys, and the fact that not

222. See *infra* Part III.B.2.

223. 175 F. 875, 875 (C.C.S.D.N.Y. 1910), *aff'd*, 183 F. 107 (2d Cir. 1910).

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 877.

229. *Id.*

230. See *id.*

231. *Id.*

232. *Id.* at 876. For example, in the first paragraph of the opinion, Judge Hand speaks of the songs written in the "same measure, called 'common time' . . . in the minor mode." *Id.* He discusses all seventeen bars of the music noting similarities and differences. *Id.*

233. *Id.*

all notes were identical.²³⁴ However, certain notes of the melody were similar.²³⁵ Judge Hand noted, “The quantity of the notes is not precisely similar; but when they are played in succession it would take the ear of a person skilled in music to distinguish between them.”²³⁶ It was sufficient that in his opinion, the similarity between the songs was recognizable to “the ears of all.”²³⁷ Here, Justice Story’s analytical approach is at work, as well as *Daly*’s reliance on *D’Almaine*: is the similarity sufficient to uphold the plaintiff’s claim of a “taking?” The logic of the case is that the defendant’s song followed the plaintiff’s song in time, it was similar, and therefore it infringed.

Fourteen years after *Hein*, Judge Hand delivered another music publishing opinion, *Fisher v. Dillingham*,²³⁸ which also raised the originality question. Judge Hand did not dismiss originality out of hand; he just made it irrelevant because the test is so weak for the plaintiff to meet. *Fisher* involved the claim that a few notes used as an ostinato in both pieces infringed the earlier work’s copyright.²³⁹ The defendant argued that the plaintiff’s piece was not original, and presented several examples of how the plaintiff’s piece borrowed from the public domain.²⁴⁰ Judge Hand destroyed this argument with the simple assertion that even if the plaintiff’s work drew on works in the public domain, it was still possible that the plaintiff’s work was original because it was the “spontaneous, unsuggested result of the author’s imagination.”²⁴¹ This unprovable claim resonates with Romantic philosophy. Judge Hand supported the contention that the plaintiff’s work was original by relying on the theory that two similar works could coexist in copyright.²⁴² He spent the large majority of the opinion discussing two bases of support for this theory.²⁴³ After citing cases, he included lengthy academic discussion by treatise writers of the period.²⁴⁴ Hand concluded that even a minor variation on a public domain work is copyrightable.²⁴⁵ Judge Hand never considered that

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* Judge Hand wrote, “[i]t is true that the keys are different; but this is a distinction which is of no consequence to the ears of all but those especially skilled in music . . .”
Id.

238. 298 F. 145 (S.D.N.Y. 1924).

239. *Id.* at 147.

240. *Id.* at 148.

241. *Id.* at 149.

242. *Id.*

243. *Id.* at 149–52.

244. *Id.*

245. *Id.*

the defendant may have also been original in his creation.²⁴⁶ As seen in the infringement analysis below, Judge Hand did not apply the same reasoning to support the defendant's contention that he independently created the notes.

Once originality was met in *Fisher*, Judge Hand easily found enough similarity in the eight notes that comprised the ostinato to meet the infringement test.²⁴⁷ "The argument is a strong one. Not only is the figure in each piece exactly alike, but it is used in the same way; that is, as an 'ostinato' accompaniment . . ."²⁴⁸ Interestingly, Judge Hand spent significant space in the opinion disclaiming an inference that the defendant knowingly pirated the work from the plaintiff.²⁴⁹ This was Judge Hand's (in)famous statement about unconscious copying.²⁵⁰ The defendant claimed no knowledge of the earlier work (including the infringing notes), and the plaintiff did not prove access or actual copying.²⁵¹ Judge Hand did not challenge the defendant's intent, but rather comforted himself with the idea that the defendant unconsciously was aware of the infringing notes and reused them in his piece.²⁵² To assuage the defendant, he spoke highly of his reputation and accepted that he may have "unconsciously copied the figure."²⁵³ There would seem to be little limit to the inference of intent to copy as long as the judge found sufficient similarity and "value" between the follow-on work and the earlier work.²⁵⁴

A third opinion reflects the malleability of the jurisprudential framework in the hands of Judge Hand. In 1936, Judge Hand, sitting on the Second Circuit, authored the *Arnstein v. Edward B. Marks Music Corp.* opinion.²⁵⁵ In this case, originality was not disputed.²⁵⁶ Like Judge Hand's prior opinions, there was extensive discussion about the reputation of the composers and a dissection and comparison of the elements of the respective pieces of work.²⁵⁷ Judge Hand went out of his way to note that *Hein* does not apply because the court was incorrect to imply that independent creation was not a

246. *Id.* at 152.

247. *Id.*

248. *Id.* at 148.

249. *Id.* at 147.

250. *Id.* Judge Hand suggests defendant's mind may have played a trick on him. *See id.* Judge Hand cannot see "how else to account for a similarity, which amounts to identity." *Id.* He then has no problem finding plaintiff's piece original in spite of similar prior art. *Id.* at 148.

251. *Id.*

252. *Id.* at 147-48.

253. *Id.* at 147.

254. *Id.*

255. 82 F.2d 275, 275 (2d Cir.1936).

256. *Id.*

257. *Id.*

defense to infringement.²⁵⁸ Then what about *Fisher*? Certainly Fisher seemed to have a good argument that he independently created the work. Judge Hand was very sympathetic to the defendant in *Arnstein*. He carried out a very subjective (if not of questionable relevance) discussion of the reputations of the composers.²⁵⁹ The plaintiff argued that collaborators of the defendant had access to plaintiff's song.²⁶⁰ Judge Hand disposed of this argument with the statement that those collaborators had so little talent they could not have composed the song at issue.²⁶¹ Would that not support the opposite argument of stealing someone else's work? In the facts before him, Judge Hand decided to make some space for similar works where it favors the defendant.²⁶²

The consistency in Judge Hand's opinions is his overwhelming commitment to the unassailable nature of originality. In the music cases, Judge Hand developed the originality concept embedded with Romantic philosophy—a subjective response to nature and unique to the creator. Of course, the same credit is not given to the defendant's work. His work is judged by a different standard: similarity (in the mind of the judge) to the prior work.

Substantial similarity is the doctrinal cover for *Daly* reasoning. The first-mover is granted the presumption of originality.²⁶³ In Judge Hand's early decisions, substantial similarity has a broad, possibly infinite reach.²⁶⁴ Any recognizable similarity between the plaintiff's and defendant's expression is enough to find liability.²⁶⁵ It is clear that Judge Hand used a different standard for "originality" than for "copying."²⁶⁶ Analytically, Judge Hand had reversed the British approach, which saw follow-on works that reuse prior work as potentially benefiting the public good of advancing the knowledge and education of society.²⁶⁷ Judge Hand's approach is to analyze the

258. *Id.*

259. *Id.* at 276–77.

260. *Id.* at 275.

261. *Id.* at 276.

262. *Id.* at 277.

263. *Daly v. Palmer*, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3,552). The defendant attempted in vain to show that the "railroad rescue scene" had been used before the plaintiff's copyright. *Id.* at 1134.

264. This is the author's analysis based on the above discussion of Judge Hand's approach in *Hein* and *Fisher*.

265. See, for example, the discussion above of *Hein* and Judge Hand's remark that the similarities were "recognizable to the ears of all."

266. Judge Hand clearly applied a different standard to similarity of plaintiff's work to preceding works than similarity between plaintiff's work and defendant's work. *See supra* notes 229–53 and accompanying text.

267. *See supra* Part III.A.1.

commercial benefits and costs of his decisions, responding to the perceived interests of the litigants before him.

On the Second Circuit, Judge Hand moved in a different direction, developing doctrines to rein in the potentially infinite reach of substantial similarity. His entire analysis relied on ex post reasoning: the weighing of the facts to subjectively determine the outcome.²⁶⁸ The subjectivity in this methodological approach leads to a significant indeterminacy problem. As discussed below, the knowledge production process flourishes with ex ante rules that support predictability in the outcome.²⁶⁹

In the film cases, discussed below, the plaintiffs pushed to expand these flexible boundaries of protection. Judge Hand reacted against such “overreaching” by developing other devices, relying on ex post reasoning to resist such perceived “overreach”—the doctrines of idea-expression and remedies.²⁷⁰

3. Idea-Expression Doctrine: The Film Cases

Nichols v. Universal involved the plaintiff playwright Anne Nichols, claiming that her play, *Abie’s Irish Rose*, was infringed by the defendant, Universal Pictures Corp, in their production of the film *The Cohens and The Kellys*.²⁷¹ The plaintiff had prepared, in the words of the opinion, “an elaborate analysis of the two plays, showing a ‘quadrangle’ of the common characters, in which each is represented by the emotions which he discovers.”²⁷² Judge Hand viewed his objective as deciding whether the infringing portion of the follow-on work should be determined to be an “expression,” and thus protectable, or merely an “idea,” and not protectable.²⁷³

The playwright plaintiff relied on *Daly* to argue that the filmmakers infringed her copyright.²⁷⁴ The plaintiff’s case seemed to be as strong as Daly’s, but Judge Hand did not feel comfortable with

268. See *supra* notes 229–53 and accompanying text.

269. See *infra* Part IV.B.

270. In his 1939 opinion, *Sheldon v. MGM*, Judge Hand found liability on the part of the film producer although arguably the materials originated in the public domain. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939). Here Judge Hand limited the liability of the defendant, reducing significantly the damages, by creating new norms in copyright. In earlier copyright cases like *Daly v. Palmer*, the defendant was enjoined from distributing the work. Judge Hand drew lines between competing economic interests that arguably satisfied both parties. Professor Kaplan criticizes Judge Hand for not considering originality in the *Sheldon* case. See KAPLAN, *supra* note 14, at 1–2.

271. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 120 (2d Cir. 1930).

272. *Id.* at 122.

273. *Id.* at 121.

274. KAPLAN, *supra* note 14, at 47.

that outcome. Judge Hand probably sensed the implications for investment in follow-on works if the first-mover investor could push the boundaries of protection so far. He engaged in a detailed textual analysis of the play, delving deeply into the plot structure and character development, similar to Judge Samuel Blatchford in *Daly*.²⁷⁵ Rather than attack originality directly, Judge Hand developed a theory to support this outcome of no infringement.²⁷⁶ Certain elements of a story were so common and generic that they did not warrant protection.²⁷⁷ This theory makes economic sense, as it places a limit on the first investor such that a subsequent investor has room to develop its asset. Following Judge Hand's jurisprudence, Judge Yankwich coined the phrase "scenes a faire" to refer to stock elements that are so common and generic as to not warrant protection.²⁷⁸ These were tools for the jurist to fashion an outcome on the "idea" side of the idea-expression dichotomy without having to attack originality.

Judge Hand and Justice Holmes took copyright in a counter-intuitive direction with respect to originality or novelty. Originality was something presumed, rather than proven. The first-mover investor could assert prima facie evidence of originality by merely asserting the copyright. As any copyright lawyer knows, there is no process whereby the Copyright Office determines originality or, in the parlance of patent law, novelty. Judge Hand was transparent about the ambiguity of this line-drawing.²⁷⁹ In his famous, often-quoted statement, he says "[n]obody has ever been able to fix that boundary, and nobody ever can."²⁸⁰ Judge Hand replicates Justice Story's ex post approach to reuse of prior works in the line drawing analysis of substantial similarity and idea-expression.²⁸¹

Substantial similarity infringement analysis must do the work that originality simply cannot do. For copyright's implications for knowledge and education, it means there is no certainty of access to copyrighted material for the researcher or student. This indeterminacy problem can be rationalized if the main purpose of the jurisprudence is to navigate reasonable outcomes among competing economic interests on an ad hoc basis. If this is the doctrine that

275. See *Nichols*, 45 F.2d at 120–21.

276. See *id.*

277. See *id.* at 122. "There are but four characters common to both plays, the lovers and the fathers." *Id.* In response to detailed comparative analysis of the plays, Judge Hand said, "the adjectives employed are so general as to be quite useless." *Id.*

278. See *Cain v. Universal Pictures Co.*, 47 F. Supp. 1013, 1017 (S.D. Cal. 1942).

279. See *Nichols*, 45 F.2d at 121.

280. *Id.*

281. There are no ex ante "bright-line" rules for determining whether infringement has occurred.

society relies upon to ensure access to knowledge resources, namely copyrighted works of knowledge, then it poses serious problems. The result is indeterminacy, and adverse implications for the public good of copyright.

The next Section begins with the relatively famous modern Supreme Court case, *Sony v. Universal*.²⁸² The context of this case is important. The second half of the twentieth century saw the technological revolution of digital media. During the digital transition phase, physical copies of media products were delivered in digital format. These formats like floppy disks, CDs, and DVDs revolutionized the delivery method of entertainment products. The potential financial impact of the unauthorized reproduction of these digital products alarmed the content industry.²⁸³ This fear over potential financial losses drove their feisty battle with Sony to compel VCR manufacturers to integrate copy control measures in their machines.²⁸⁴ As discussed below, the close decision by the Supreme Court in favor of Sony represents the zenith of the fair use doctrine.²⁸⁵ In the wake of that decision, the industry worked vigorously to shape copyright law to protect their interests in the face of pure digital transmission of copyrighted materials, where the stakes would be even higher.²⁸⁶ In the view of copyright holders, especially those in the well-funded and powerful film and music industries, the limiting doctrine of “fair use” threatened to swallow up the whole.²⁸⁷ The content producers—led by the film and music industries, as well as publishing and later software—strove to reverse this trend. That effort resulted in the passage of the Section 1201 anti-circumvention

282. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

283. The International Federation of the Phonographic Industry (IFPI) claimed in its 2010 report that digital piracy caused the loss of one-third of its commercial value over seven years from 2004 through 2009. See INT’L FED’N OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 3 (2010), available at <http://www.ifpi.org/content/library/DMR2010.pdf>. The Recording Industry Association of America (RIAA) claims the loss of \$12.5 billion as a result of digital piracy. See *Who Music Theft Hurts*, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy_details_online (last visited Nov. 1, 2014).

284. See *Sony*, 464 U.S. at 420.

285. See *infra* Part III.C.

286. See *infra* Part III.C.

287. Testifying before Congress in support of the DMCA, Richard Parsons, CEO of TimeWarner argued that piracy on the Internet was “an assault on everything that constitutes cultural expression of our society.” He went on to claim that in the absence of the protections that the content industry requested, “culture will atrophy. . . . The country will end up in a sort of cultural Dark Ages.” GILLESPIE, *supra* note 213, at 108. Siva Vaidhyanathan notes that the Clinton Administration’s report titled *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, referred to as the *White Paper*, published in 1995, which served as the blueprint for the DMCA, referred to fair use as a “tax” on owners of copyrighted material. See VAIDHYANATHAN, *supra* note 13, at 159. Essentially the DMCA closed the “fair use” loophole. See *id.*

provisions of the Digital Millennium Copyright Act (DMCA).²⁸⁸ The threat of commercial piracy and the significance of the industries' interests to the economy convinced policymakers to pass the DMCA.²⁸⁹

The DMCA represented the industry's success in protecting their interests.²⁹⁰ Pro-restraint doctrines of the twentieth century of fair use and first sale are swallowed up by the statutory act.²⁹¹ Critics have railed against these effects since the passage of the Act, to little avail.²⁹² This Article argues against the approach of attempting to retrofit digital copyright (i.e., DMCA) with print-era fair use. Fair use is a doctrine concerned with the distribution of content, not its creation. A defendant raises the defense of fair use to claim that its distribution of copyrighted material should not be infringing (or alternatively, infringing but without liability because of the fair use defense).²⁹³ This defense only applies when the creation of the content has already occurred. To advance the public good of copyright, namely encouragement of learning and advancement of knowledge, then access to *all* material is required *ex ante* to the creation process, rather than a portion of it *ex post* to the creation process. A researcher, student, or scholar cannot rely on the fair use doctrine to determine if its use of the material for learning would be non-infringing. In fact, it probably will not be non-infringing, as it requires access to all the material, not some uncertain portion of the material. As discussed in Part IV, if the researcher, scholar, or student creates something from that use, then she will still be subject to the doctrines concerned with distribution.²⁹⁴ As discussed in more detail below, the focus of this inquiry is making space for copyright to advance knowledge and learning, rather than reforming the distribution function of copyright.

C. Back to the Future—Digital Transition and Pure Digital

Technological advancement in the latter half of the twentieth century posed some serious challenges to the business models of copyright industries, particularly film, music, and publishing. The

288. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.

289. See LITMAN, *supra* note 146.

290. See Litman, *supra* note 2, at 346.

291. See Tehranian, *supra* note 1, at 537–39.

292. See, e.g., Tushnet, *supra* note 30, at 1011–14 (noting that the effect of the DMCA provision on libraries is that “the value of making works widely available, for edification and enlightenment without overt transformation, is lost”). The effort by public libraries to persuade the Copyright Registrar to grant a broad fair use exception to the Section 1201 provisions of the DMCA failed. See *infra* note 322 and accompanying text.

293. Copyright Act of 1976, 17 U.S.C. § 107 (2012).

294. See discussion *infra* Part IV.B.2.

photocopier was viewed by the publishing industry as a giant infringement machine.²⁹⁵ The transformation of content to digital form, but still packaged as a physical, portable commodity is referred to herein as the “digital transition” period of copyright.²⁹⁶ Common contemporary examples include the CD format in music and the DVD format in film. Before CDs and DVDs, there were audio and videocassette tapes. Responding to market demand, the consumer electronic industry produced players and recorders to the consuming public. Unlike the print era where consumers relied on content producers to produce and distribute the content, the digital transition era meant that consumers could become producers and distributors of copyrighted material in their own right. Not surprisingly, the content industry became concerned that consumers could make multiple copies of content, thus depriving them of future sales. The pro-restraint camp of copyright saw this as legitimate fair use, whereas the pro-expansion adherents viewed this activity as illegal copying.

This technological shift forced the courts to address several issues: (1) what constitutes a copy for purposes of the Copyright Act; (2) to what extent would the terms of the license agreement drafted by the copyright owner trump copyright law; and (3) assuming a copy has been made, and infringement liability would follow, would the accused infringer be excused from copying for personal use under the fair use doctrine of copyright? The content industry favored the broadest interpretation of its protection right. For the film and music industries, that meant that unauthorized personal use copying constituted infringement, and for the software industry, any use of the computer program inconsistent with the license agreement should

295. See *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991); Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935*, 53 J. COPYRIGHT SOC'Y U.S.A. 545, 546 (2006). There were some early struggles between publishers and libraries over permitted use that would not be infringing. As the photocopier became available to corporations and to the consuming public, publishers began to fight back. Publishers resisted the libraries' call for some fair use guidelines until they feared a worse outcome by the courts. At the time, it was still the print era and libraries merely wanted assurance that they could print copies either for inter-library loan or for archival purposes. The 1976 Act for the first time codified fair use, and included some specific provisions benefiting libraries. See 17 U.S.C. § 108 (2012). With respect to the public, publishers were forced to accept a compromise whereby printing companies would post copyright notices, but not be liable for the potential infringement of their customers. See *Basic Books*, 758 F. Supp. at 1535.

296. “Digital transition” is the author's term for this transition period of distribution of copyrighted content that exists between traditional hard copy books and electronic transmission of content.

trigger liability and injunctive relief.²⁹⁷ Four decisions, two by the Supreme Court and two by circuit courts, defined the legal boundaries posed by these questions. The Supreme Court decisions, *Sony v. Universal*²⁹⁸ and *MGM Studios Inc. v. Grokster*,²⁹⁹ addressed the question of copying and fair use in the film and music context. The circuit court decisions, *ProCD v. Zeidenberg*³⁰⁰ and *MAI v. Peak*,³⁰¹ addressed the question of copying and the enforceability of license agreement restrictions in the software industry context. As discussed below, *Sony* appeared to signal an indulgent view toward personal use copying as permissible under fair use.³⁰² *Grokster* pushed back the pendulum toward a stricter view of permissible fair use even for personal copying.³⁰³ This perceived setback by *Sony* and possible uncertainty of *Grokster* for the industry was remedied by the passage of the DMCA in 1998.³⁰⁴ For the software industry, *MAI* and *ProCD* represented clear victories. *ProCD* held that license restrictions on use were enforceable.³⁰⁵ *MAI* held that the automatic copying of the software program by the computer represented copying for purposes of the Copyright Act (thus requiring authorization by the copyright holder).³⁰⁶ Although criticized by commentators, this judicial approach was reaffirmed by the recent Ninth Circuit decision *Vernor v. Autodesk*.³⁰⁷ Both questions—(1) does the automatic copying by a computer constitute copying, and (2) do the provisions of a license

297. The Business Software Alliance (BSA) testified to Congress that the first sale doctrine should not apply to software. See *Extending 'First-Sale' Doctrine to Software Would Harm Consumers, BSA Testifies*, BSA (June 2, 2104), <http://www.bsa.org/news-and-events/news/2014/june/us06022014firstsaletestimony>. Similar testimony was given by the Motion Picture Association of America (MPAA) and RIAA. See Mike Masnick, *If People Can Sell Foreign Purchased Content Without Paying Us Again, the US Economy May Collapse*, TECHDIRT (Sept. 20, 2012), <https://www.techdirt.com/articles/20120920/01565420443/mpaa-riaa-if-people-can-sell-foreign-purchased-content-without-paying-us-again-us-economy-may-collapse.shtml>.

298. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

299. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

300. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

301. *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).

302. See *Sony*, 464 U.S. at 442–56.

303. See *Grokster*, 545 U.S. at 945.

304. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860. In the pure digital stage of dissemination, the content industry can exercise full control of the dissemination of its content, allowing for no leakage by the fair use or first sale doctrines. See *infra* notes 320–323 and accompanying text.

305. See *ProCD*, 86 F.3d at 1455.

306. See *MAI*, 991 F.2d at 518–19.

307. See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1110 (9th Cir. 2010); Corynne McSherry, “*Magic Words*” *Trump User Rights: Ninth Circuit Ruling in Vernor v. Autodesk*, ELECTRONIC FRONTIER FOUND. (Sept.13, 2010), <https://www.eff.org/deeplinks/2010/09/magic-words-trump-user-rights-ninth-circuit-ruling>.

agreement trump copyright doctrine's doctrine of first sale—were answered by the courts in the copyright holders' favor.

In *Sony*, a close five-to-four decision, the Supreme Court found that the VCR manufacturers were not liable for contributory infringement on the theory that their machine had “substantially non-infringing uses.”³⁰⁸ Specifically, the Court found that time shifting by consumers to watch television programs was a “fair use.”³⁰⁹ The film industry was not happy with this decision. The content industry responded to their loss in *Sony* by working on two fronts, judicial and legislative, to regain control over the dissemination of their content.³¹⁰ The software industry led the charge on the former, and the film, music, and publishing industries on the latter.³¹¹ In the 1980s, the Internet had not become mainstream, but the content industries understood its potential to dwarf the adverse effects of the personal recording machines. Anticipating the inevitable transition to “pure digital,” content industries laid the groundwork, judicially and legislatively, for greater protection over the electronic dissemination of their content.³¹² The degree of control achieved was significantly greater than in the print era, and harkens back to the efforts of the London booksellers during the eighteenth century to reinstate their former control over distribution of copyrighted content.³¹³

The content industry developed a strategy to gain greater control over copyrighted content by convincing Congress that their interests were coextensive with society's interest in the copyright system. Beginning in the print era, copyright became increasingly

308. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984). *Sony* involved the innovative technology of the 1980s—the videocassette recorder—that allowed consumers to record television programs for later viewing. *See id.* at 417. Tapes of these programs (including films broadcast on television) could be duplicated and distributed. *Id.* As a result, the industry wanted the manufacturers to accept controls such that consumers would pay for their use. *See, e.g.*, Alexis C. Madrigal, *The Court Case That Almost Made It Illegal to Tape TV Shows*, ATLANTIC (Jan. 10, 2012, 8:35 AM), <http://www.theatlantic.com/technology/archive/2012/01/the-court-case-that-almost-made-it-illegal-to-tape-tv-shows/251107/>; Eduardo Porter, *In a Ruling, The Legacy of Betamax*, N.Y. TIMES, Mar. 27, 2013, <http://www.nytimes.com/2013/03/27/business/in-a-copyright-ruling-the-lingering-legacy-of-the-betamax.html?pagewanted=all>; *Retrospective – Betamax and Copyright Infringement*, IP IUSTITIA (July 3, 2013), <http://www.ipiustitia.com/2013/07/retrospective-betamax-and-copyright.html>. However, the consumer electronics industry resisted such demands. The result was litigation all the way to the Supreme Court. *See Sony*, 464 U.S. at 417. The VCR manufacturers were sued on the theory of contributory infringement, which rested on direct infringement by consumers. *Id.*

309. *Sony*, 464 U.S. at 455.

310. *See* GILLESPIE, *supra* note 213, at 168; LITMAN, *supra* note 146, at 96.

311. Brief for Amicus Curiae Software & Information Industry Ass'n in Support of Appellant & Reversal, *Vernor*, 621 F.3d 1102 (No. 09-35969), 2010 WL 894742, at *3; *see ProCD*, 86 F.3d at 1455; *MAI*, 991 F.2d. at 518–19.

312. *See* GILLESPIE, *supra* note 213, at 175–78; LITMAN, *supra* note 146, at 96.

313. *See* discussion *supra* Part II.B.

associated with the valuation of copyrighted commodities.³¹⁴ Copyright industries believed their interest in maximizing the dollar value of copyrighted commodities defined the goal of the copyright system. With the rise in fashion of the economic analysis of the law, scholars began to reflexively assume the connection.³¹⁵

Content industries, particularly the film industry, had a legitimate fear of digital commercial piracy. Digital commercial piracy refers to the reproduction of unauthorized copyright content for sale to the public (such as unauthorized DVDs).³¹⁶ Rather than focus narrowly on those perpetrators, the content industry found it much more effective (i.e., lucrative) to broaden the scope of their remedy to reach all unauthorized use, even the type of use sanctioned by *Sony*.³¹⁷ Thus, the challenge of technology became an opportunity to eliminate the leakage from copyright protection posed by the fair use and first sale doctrines. Content producers were never fans of the first sale doctrine, as it represented lost revenue. Working with the Clinton administration in the 1990s, a white paper was commissioned that ultimately supported industry efforts to amend copyright to regain control directly over content.³¹⁸ These recommendations evolved into the Section 1201 anti-circumvention provisions of the 1998 DMCA.³¹⁹ These provisions make the breaking of digital locks on digital content illegal for any purpose, including fair use, first sale, or to extract the “ideas” from the “expression.”³²⁰ In the “pure digital” era (content delivered electronically, i.e., “streaming content”), the positive law affords no exceptions for fair use or first sale for any purpose, including learning and education.³²¹

314. See BRUCE A. LEHMAN, INFO. INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 7 (1995), available at <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.txt>.

315. See Jaszi, *supra* note 23, at 458 n.10.

316. Tunay I. Tunca & Qiong Wu, *Fighting Fire with Fire: Commercial Piracy and the Role of File Sharing in Copyright Protection Policy for Digital Goods*, 24 INFO. SYS. RES. 436, 436 (2013).

317. See VAIDHYANATHAN, *supra* note 13, at 158–59.

318. See LEHMAN, *supra* note 314.

319. See 17 U.S.C. § 1201 (2012).

320. In response to cries from some quarters for a robust fair use exception at least comparable to print, a small concession was made in granting certain, limited powers to the Copyright Office. *Id.*

321. To understand the publishers’ actions and how they differ from the pre-digital world of a physical copy of a hardcover book, it is important to understand how the Section 1201 regime functions. The Section 1201 regime includes the Section 1201 provisions of the DMCA, as well as licensing restrictions based in contract and digital rights management technology to physically (and legally) lock up the content by the publisher (rights holder). Working together, the Section 1201 regime provides all the tools necessary for the publishers to impose a “pay for use” business model on libraries (and society). See Tushnet, *supra* note 30, at 982. The technology offers

In retrospect, *Sony* represents the nadir of the fair use doctrine and the modern pro-restraint movement of copyright. Over twenty-five years have passed since the *Sony* decision, and nearly fifteen years since the DMCA was enacted.³²² Fair use has disappeared with respect to pure digital content (i.e., the electronic dissemination of content).³²³ The pro-expansion forces have prevailed in the distribution function of copyright. Unfortunately, there has been little attention to the effect of this shift on the knowledge creation process.

All copyright jurisprudence is rooted in a distribution function analysis of competing content producers' interests.³²⁴ The Supreme Court created the first sale doctrine hailed by the pro-restraint camp because a reseller, the Macy's corporation, stood up to a publisher, Bobbs-Merrill, arguing that it had the right to decide the price of the book it sold.³²⁵ Fair use developed from the jurisprudence of Justice Story over whether a subsequent publisher of George Washington's biography could include material from another publisher's earlier publication.³²⁶ Judge Hand developed the idea-expression doctrine to prevent a playwright from claiming that a film producer's work copied the earlier play.³²⁷ As discussed earlier, Judge Hand preferred this

publishers the practical ability to begin implementing a more refined fee-based distribution system for its product, information resources. Just as HarperCollins declared that the library would no longer have unlimited expiration rights to a digital book, a digital publishing vendor could begin to offer different price points for digital books based on time or other measures of use. See Hadro, *supra* note 13. Publishers have begun to develop the tools and the market power to distribute digital books mainstream. Blockbuster and Netflix have begun to offer consumers choices of time restricted viewing, such as a twenty-four hour period, seven day period, or "purchase" option (meaning indefinite possession not freely transferable). See, e.g., *Most Economical Movie Rental Options for Your Family*, CBS BOSTON (Apr. 18, 2011, 7:17 PM), <http://boston.cbslocal.com/2011/04/18/most-economical-movie-rental-options-for-your-family/>; *Terms & Conditions*, BLOCKBUSTER ON DEMAND, <http://www.blockbusternow.com/terms> (last visited Aug. 21, 2013) (discussing time restrictions on viewing in Section 3). Each of these choices offers the "use" of the film or video at different price points.

322. The Supreme Court decision, *Sony Corp. of Am. v. Universal City Studios, Inc.*, was decided in 1984; the Digital Millennium Copyright Act was passed in 1998. See Pub. L. No. 105-304, 112 Stat. 2860 (1998); 464 U.S. 417 (1984).

323. Since the enactment of the DMCA in 1998, there have been five rulemaking exemptions granted by the Librarian of Congress (on the recommendation of the Copyright Registrar). None of the Section 1201 exemptions granted have included electronic disseminated content (e.g., streamed content). The electronic dissemination of content is referred to herein as the "pure digital" stage of copyright. There is no fair use or first sale exemptions to Section 1201 for electronic dissemination of content. For the five rulings, see Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 77 Fed. Reg. 65,260 (Oct. 26, 2012) (codified at 37 C.F.R. pt. 201); 75 Fed. Reg. 43,825 (July 27, 2010); 71 Fed. Reg. 68,472 (Nov. 27, 2006); 68 Fed. Reg. 62,011 (Oct. 31, 2003); 65 Fed. Reg. 64,556 (Oct. 27, 2000).

324. See *supra* notes 136–39 and accompanying text.

325. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350–51 (1908).

326. See *supra* Part II.A.

327. See *supra* Part III.B.3.

approach to addressing the messier question of the originality of the earlier work. To the extent that any of this jurisprudence has benefited the creation function of copyright, the production of new works, is conjecture. Courts are not charged with that inquiry, and Congress has failed to address it.

The next Section analyzes contemporary theoretical models according to their fidelity to the original objectives of copyright, namely encouragement of learning and the advancement of knowledge.³²⁸ The conventional copyright models account for access. However, their proxies for access functioned indeterminately in the print era, and their function for the digital era is quite dim.³²⁹ How would one of the British Lords of 1710 or one of the US constitutional framers react to the rationales presented for modern day copyright? The answer to that rhetorical question, as argued in this Article, is that they would have no idea what had happened. Copyright lost its bearings.³³⁰

IV. THEORY

A. Contemporary Copyright

Students, researchers, and especially libraries need rules that give them *ex ante* certainty for access to knowledge resources. The courts have focused on investor value in copyrighted works rather than copyright's effect on the advancement of knowledge in society.³³¹ This Section examines the deficiencies of the current models of copyright in the digital era for advancing copyright's interest in learning and education. Specifically, it assesses how the educational and learning needs of three hypothetical individuals, Juan, Sheila and Frank, would be treated under each model. All three share the lack of access to traditional sources of information—universities or corporations. The only knowledge infrastructure institution available to them is the public library.

328. See Peter Menell, *Knowledge Accessibility and Preservation Policy for the Digital Age*, 44 HOUS. L. REV. 1013, 1042 (2007).

329. See discussion *infra* Part IV.A.

330. How did a limited right of fourteen years for literal infringement of a work, i.e., a book, expand to a right of one hundred plus years that could be enforced well beyond the literal copying of the book, to some elastic definition of "substantial similarity"? (Not to speak of their surprise at seeing films, music, photographs, and software as part of the modern copyright regime.) See LIOR ZEMER, *THE IDEA OF AUTHORSHIP IN COPYRIGHT* 3 n.7 (2007); Litman, *supra* note 2, at 326 (noting that until the late twentieth century, copyright discourse focused on public's interest in access, citing a 1961 report by the Copyright Registrar).

331. See discussion *supra* note 219.

The two dominant camps hold divergent views on the ideal model for the copyright regime. Neither model addresses the knowledge principle whereby access to knowledge is a necessary pre-condition to the creation of new works. The pro-restraint camp largely relies on the “traditional incentives” approach, which characterizes copyright as balancing protection for authors to encourage production with access to the works for the benefit of society.³³² The pro-expansion camp is identified with a “property rights” approach that eschews the balance paradigm for greater (if not absolute) protection rights for the copyright holder.³³³ This model draws on both natural rights theory and a particular economy theory known as price discrimination.³³⁴ The “traditional incentives” model favors greater access to copyrighted goods for the creative benefit of consumers (also referred to as “users”).³³⁵ The “property rights” model treats access as endogenous to the market function; the market will allocate copyrighted goods most efficiently.³³⁶

The pro-restraint camp has largely focused on the fair use doctrine to remedy the adverse effects of the expanded protection right on the public interest of access to copyrighted works. They argue that a more liberal approach to fair use would expand the public domain of copyright, benefiting consumers and users.³³⁷ There is little inquiry, however, to the causal processes at work, and more importantly the more critical question of access to knowledge for learning. The knowledge creation process is missed altogether.³³⁸ Access to knowledge has been conflated with the concept of consumption of cultural goods.³³⁹ As discussed below, the retrofitting of digital copyright with the fair use doctrine is not consistent with the knowledge principle, and thus will not further the interests of copyright in the advancement of knowledge in society.³⁴⁰ Fair use is a

332. See Robert C. Denicola, *Access Controls, Rights Protection, and Circumvention: Interpreting the Digital Millennium Copyright Act to Preserve Noninfringing Use*, 31 COLUM. J.L. & ARTS 209, 211–12 (2008); Glynn S. Lunney, *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 578–79 (1996).

333. See discussion *infra* Part IV.A.2.

334. See discussion *infra* Part IV.A.2.

335. See discussion *infra* Part IV.A.1.

336. See discussion *infra* Part IV.A.2.

337. See, e.g., Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1123–28 (2007); Gideon Parchomovsky & Kevin A. Goldman, *Fair Use Harbors*, 93 VA. L. REV. 1483, 1510–18 (2007).

338. See, e.g., JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1997); BOYLE, *supra* note 213; GILLESPIE, *supra* note 213; HALBERT, *supra* note 213; VAIDHYANATHAN, *supra* note 13; Sunder, *supra* note 213.

339. See Cohen, *supra* note 24, at 1179.

340. See discussion *infra* Part IV.A.1.

doctrine that courts have invoked to solve competing interests in the distribution function of copyright.³⁴¹ The doctrine is not directly concerned with the creation function of copyright, and ignores completely the knowledge principle.³⁴² Access to all works is necessary for purposes of learning and education; fair use was never intended to further that purpose.

The pro-expansion camp relies on the idea-expression doctrine to justify the effects of the Section 1201 regime.³⁴³ As long as copyright protects expression but leaves ideas free for others to use, creativity will flourish by the creation of new copyrighted works.³⁴⁴ As discussed below, this argument suffers from serious flaws.³⁴⁵ First, there is the methodological problem of *ex post* uncertainty. There is no certainty that a subsequent author is free to use the ideas until a court has litigated the issue. Second, in the digital era, content producers are not required to give permission to new authors to access existing works to “learn” or “use” the ideas of such work.³⁴⁶ Third, the Section 1201 regime does not consider the effect of the market distribution effects on the knowledge production process. If inequality continues to grow in access to knowledge resources, society will suffer the consequences of declining knowledge production. Like fair use doctrine, idea-expression doctrine is not consistent with the knowledge principle.³⁴⁷ Judges developed these doctrines to address competing interests of distributors of copyrighted material, rather than creation of new knowledge.³⁴⁸

The following Section sketches a new theory to directly address society’s interest in the advancement of knowledge and learning as the public good of copyright. Public libraries need the ability to make knowledge resources available for individuals like Frank, Juan, and Sheila to meet their educational and learning goals. This Article

341. See Jaszi, *supra* note 23, at 458–59.

342. The knowledge principle requires access to *all* of the copyrighted work. The fair use doctrine by definition permits access to only a portion of the work. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–66 (1985) (finding that directly copying less than 10 percent of the original work was not protected by fair use). A very narrow exception to this partial use rule is for parody. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1984).

343. See GOLDSTEIN, *supra* note 33, at 14–15.

344. See *id.*

345. See discussion *infra* Part IV.A.2.

346. In print copyright, new authors can access the work at the library without payment. If they reuse protected expression, the copyright holder must initiate legal action. In digital copyright, new authors can only access the digital work if the copyright holder gives them permission *ex ante*.

347. The knowledge principle requires access to *all* of the work for purposes of learning and education. See *supra* note 342 and accompanying text.

348. See Jaszi, *supra* note 23, at 458–59.

proposes an alternate model to the conventional copyright theories, focusing on the critical role that access to knowledge resources plays in the dynamic processes at work in the production of knowledge and the creation of new works. In this model, public libraries would exercise non-waivable “fair access” rights on behalf of the public for purposes of learning and education.

1. Traditional Incentives Model and the Fair Use Doctrine

Pro-restraint scholars who follow the “traditional incentives” model refer to the “delicate balance” embodied in copyright law and policy between protecting the rights of the content producers on the one hand, and ensuring the access and availability of the works to the public on the other.³⁴⁹ This sounds like a very appealing proposition; however, a few points require attention. First, scholars generally ascribe this maxim to the constitutional underpinnings of copyright.³⁵⁰ They note the “utilitarian” rationale implicit in the language referring to “limited times” to “promote the progress of Science.”³⁵¹ Their translation is somewhat loose, as the constitutional clause never refers to “incentives to produce.”³⁵² This is the modern gloss on the language consistent with the rise of significant copyright industries in the twentieth century. Second, the term “to produce” is used loosely. There are two distinct functions associated with copyright: the creative function and the distribution function.³⁵³ Rarely does the literature focus on this distinction, or more importantly, its doctrinal and theoretical implications. Third, the second half of the paradigm associated with “access to copyrighted works” is treated as an abstract concept rather than a tangible, concrete reality by the traditional incentives model and its jurisprudence.³⁵⁴ Scholars and jurists have been satisfied with an abstract model rather than a tested theory.

This protection-access paradigm has been rationalized by traditional monopoly economic theory. This school of thought recommends setting the right level of protection at where the deadweight inefficiencies associated with monopoly power are

349. See Jenny Lynn Sheridan, *Does the Rise of Property Rights Theory Defeat Copyright's First Sale Doctrine?*, 52 SANTA CLARA L. REV. 297, 305–06 (2012) and accompanying citations.

350. See, e.g., Samuelson, *supra* note 41, at 1507–08.

351. See, e.g., *id.*

352. See *supra* notes 52–57 and accompanying text.

353. See discussion *supra* Part III.A.1.

354. See discussion *supra* Part III.A.1.

minimized.³⁵⁵ Access plays a role in reducing these inefficiencies, especially to lower-value users.³⁵⁶ Access to copyrighted works through secondary markets and fair use doctrine reduce these inefficiencies caused by the monopoly.

The weaknesses of this analysis are at the theoretical and empirical level. The extent to which the operation of these doctrines, namely first sale and fair use, have successfully minimized monopoly inefficiencies has not been tested. Even so, fair use is not sufficient to meet the needs of society to access knowledge in the knowledge production process. By its very definition, fair use (as well as the public domain concept) does not include access to *all* works—even at its broadest definition.³⁵⁷

Adherents to the traditional incentives model advocate a more liberal judicial approach to fair use in order to expand the public domain of works.³⁵⁸ They believe that this will result in more access to works, more creativity, and more cultural production.³⁵⁹ This claim is unproven; but more importantly, it misunderstands the heritage of the doctrine. Judges developed fair use to reverse the early British rule of an indulgent attitude toward use of existing material in the production of abridgements.³⁶⁰ These judges never intended fair use to advance the interests of copyright in learning and education, which would require access to *all* copyrighted work.³⁶¹ The fair use doctrine is limited by its methodology. Fair use is an *ex post* standard that is generally limited to a small portion of the copyrighted material.³⁶² There is no *ex ante* certainty that a judge would find any portion of a copyrighted work to be non-infringing.³⁶³ Certainty only comes when

355. See William A. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 352 (1989).

356. See *id.* at 326.

357. See *supra* notes 174–75 and accompanying text.

358. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 175 (2006); Madison, *supra* note 205, at 1535 (arguing for a more robust approach to the fair use analysis than the traditional four-factor test in the context of peer to peer file sharing); Pamela Samuelson, *The Copyright Grab*, WIRED, Jan. 1996, at 191.

359. See, e.g., Litman, *supra* note 65, 1019–22.

360. See discussion *supra* Part III.A.

361. See discussion *supra* Part III.A.

362. See Tushnet, *supra* note 30, at 992, 994. Courts still follow the four-factor test set out by Justice Story in 1841. Reproduction of the whole amount of the work is generally not permitted. See *id.* Parody represents the exception to the partial amount rule. It took a Supreme Court decision to uphold that limited exception to the exception. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994); Horowitz, *supra* note 31, at 348–50 (“Though these ‘fuzzball factors of fair use’ are meant to clarify the meaning of fairness . . . if anything they do the opposite . . .”).

363. See Horowitz, *supra* note 31, at 348–50.

a court finds that the reuse (i.e., after the use has occurred) is non-infringing under the fair use doctrine.

Another popular concept with the traditional incentives adherents is that of the “public domain.” The copyright statute does not define public domain law, and there is no consensus on a definition among scholars.³⁶⁴ The Copyright Office notes that “public domain is not a place.” Further, their definition only refers to works that are no longer under copyright protection. It does not include portions of copyrighted works available to the public under the doctrines of fair use or idea-expression.³⁶⁵ It is an abstract concept without tangible means of supporting the interests of learning and education. The chimera of the public domain lies in its abstractness. Julie Cohen has noted that public domain is a troublesome concept with a serious access problem itself.³⁶⁶ “The public domain is a metaphor for the public’s dominion, and dominion without access is a very odd sort of dominion indeed.”³⁶⁷ Public domain is viewed indirectly like a shadow. In a pure digital era, copyright holders have the legal and technical ability to lock content so that the public domain treatment of works becomes less possible.³⁶⁸ The availability of the public domain is disappearing like a shadow at high noon.³⁶⁹ The public domain is

364. See Cohen, *supra* note 24, at 1175 (“Surprisingly little scholarly effort has been devoted to determining where the public domain is. . . . [T]he public domain is a topological impossibility: a legally constructed space to which everyone is presumed to have access. Reification of this space enables copyright jurisprudence to avoid coming to grips with the need for affirmative rights of access to unowned expression within the spaces where people actually live.”); Ann Bartow, *Libraries in a Digital and Aggressively Copyrighted World: Retaining Patron Access Through Changing Technologies*, 62 OHIO ST. L.J. 821, 824 (2001). At a minimum, it means unprotected works. Prior to 1976, that definition included works whose term had expired, works that had not been renewed, or works where formalities had not been met. The 1976 and 1998 copyright statutes extended the copyright term, established a unitary term, and dispensed with the formalities requirement. These actions by definition decreased the public domain but empirical evidence is lacking to the magnitude. Some scholars believe that public domain should include “public domain” treatment of protected works, essentially encompassing not only unprotected works but also fair use and first sale treatment of protected works. For example, a book whose copyright has expired would be considered public domain under the minimum standard. The resale of a copyrighted book after the first sale or the use of excerpts of a copyrighted book for fair use purposes, such as commentary or teaching, represents “public domain” treatment of protected works. Even under the minimum definition there would be consensus that increasing copyright term and abolishing formalities of copyright registration has served to shrink the public domain (i.e., decreasing number of unprotected works in the public domain).

365. *Definitions*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/help/faq/faq-definitions.html> (last visited July 8, 2014).

366. See Cohen, *supra* note 24, at 1175.

367. *Id.*

368. See *Digital Rights Management (DRM) & Libraries*, AM. LIBR. ASS’N, <http://www.ala.org/advocacy/copyright/digitalrights> (last visited July 8, 2014).

369. See Litman, *supra* note 65, at 993.

often referred to as the “commons,” but in reverse manner to Blackstone’s analogy to real property.³⁷⁰ If it is challenging to determine the boundaries of an intangible copyright (compared to the metes and bounds of a real property space), it is even more challenging to find the access point to the public domain.

How would fair use work to solve the educational needs of Frank, Juan, or Sheila, who seek access to learning materials from their local public libraries? Several problems ensue. For Sheila, her library does not have a certain digital resource, and they would like to borrow a copy from another branch. In Frank’s case, his library has the resource, but can only make it available for a few hours because of budget cuts. This is not sufficient time for Frank to learn the material. In the print era, public libraries were free to borrow print materials from other libraries or make copies available without authorization from the publisher.

Suppose that the public library asks an attorney whether they can make the materials available under fair use. This would entail breaking the digital locks and violating the license agreements. The purpose is only for the learning and education needs of these individuals. Could the attorney comfortably give them an answer? In this case, yes, and that answer would be a resounding “no.”³⁷¹ Does the abstract concept of public domain help them meet the educational and learning goals of these individuals? Again, the answer is no. Public libraries attempted to convince the Copyright Registrar that a special fair use exemption to the DMCA Section 1201 provisions should be granted to them, but this attempt failed.³⁷²

2. Property Rights Model and the Idea-Expression Doctrine

The property rights model for the digital era of copyright is best described by Paul Goldstein in his treatise, *Copyright’s Highway: From Gutenberg to the Celestial Jukebox*, first published in 1994.³⁷³ Professor Goldstein stated that “[t]he logic of property rights dictates

370. See ROSE, *supra* note 2, at 88. Blackstone famously called for the “sole and despotic dominion” of the copyright holder’s right over his work to the “total exclusion of the right of any other individual in the universe.” He argued for a common law perpetual right for the copyright holder. *Id.*

371. See VAIDHYANTHAN, *supra* note 13, at 175.

372. See Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 Fed. Reg. 64,556 (Oct. 27, 2000) (codified at 37 C.F.R. pt. 201). The Copyright Registrar rejected the request by the American Library Association (in conjunction with four other major national library associations) for an exception to the “anti-circumvention” restrictions of Section 1201 of the DMCA. *Id.* Their final ruling was issued on October 27, 2000. *Id.*

373. See GOLDSTEIN, *supra* note 33, at 199–200.

their extension into every corner in which people derive enjoyment and value from literary and artistic works. To stop short of these ends would deprive producers of the signals of consumer preference that trigger and direct their investments.”³⁷⁴ In this treatise, the copyright model that Goldstein favored supported maximal control of the copyrighted work for the rights holder (or the corporate assignee).³⁷⁵ Professor Goldstein’s pluralist model relies on consequential and non-consequential theories as justification for strong property rights: (1) natural rights; and (2) price discrimination theory, a strand of economic theory associated with Harold Demetz.³⁷⁶ Why property rights adherents invoke these rationales may be debated. The implication for the doctrine, however, has had the effect of rationalizing the diminishment—if not elimination—of the print era “limitation” doctrines of fair use and first sale in the digital era of copyright.³⁷⁷

Adherents of the natural rights theory rationale for promoting strong protection rights for authors refer to John Locke’s seventeenth century theory of private property.³⁷⁸ Locke’s theory on private property did not directly address intellectual property, but real property.³⁷⁹ In fact, Locke had lobbied against booksellers’ efforts to renew the Licensing Act in the pre-copyright regime.³⁸⁰ As one commentator has noted, “[m]odern commentators who would venture so far beyond the boundaries of Locke’s thought, into the abstractions of intellectual property, thus ought to leave his name behind.”³⁸¹ Of course, invoking such an influential philosopher adds weight to their argument. Many will not look more closely. It is more likely that

374. *Id.*

375. *See id.* In his treatise, he celebrated the potential of the Internet to transform the dissemination of content through the direct dissemination of digital content to the consumer’s home. *See id.* at 163. In the early 1990s this was still a “plan” rather than a “reality.” In 1994, Goldstein was concerned that the *Sony* decision had drawn an invisible line of immunity around the private home; investment in the infrastructure to realize this transformative potential could be jeopardized if content owners did not believe they could recoup their investment. *See id.* at 139. Goldstein suggested the metaphor of the “celestial jukebox” to represent the virtual machine that would connect a user with digital content. *See id.* at 21–22.

376. *See id.* at 141–46. These two bases for the pro-expansion camp have significantly different philosophical roots. They make similar bedfellows as the Republican Party’s social and fiscal conservatives. Their interests are aligned with respect to certain outcomes.

377. *See id.* at 216 (calling, in his famous quote, for the extension of rights “into every corner where consumers derive value from literary and artistic works”).

378. *See ROSE, supra note 2, at 5; Robert P. Merges, One Hundred Years of Solicitude: Intellectual Property Law 1900–2000, 88 CAL. L. REV. 2187, 2239 (2000).*

379. *See ROSE, supra note 2, at 5.*

380. *See id.* at 32.

381. Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1, 3–4* (Adam Thierer & Clyde Wayne Crews eds., 2002).

John Locke would support greater access rights than the current paradigm provides.³⁸²

A more accurate spiritual forefather of the natural rights view of a stronger protection right would be William Blackstone, and his vigorous defense of a perpetual common law right in literary property.³⁸³ As discussed above, Blackstone's bookseller clients were attempting to circumvent the effect of the statutory copyright regime of limited terms enacted in 1710 with the Statute of Anne.³⁸⁴ Blackstone's lawyering efforts were briefly successful with the King's Bench decision of *Millar*, finding a perpetual common law right of literary property.³⁸⁵ The House of Lords, however, overturned that decision in the subsequent case of *Donaldson*.³⁸⁶

Natural rights theory can coherently justify the creation side of copyright, as compared to the economic theories, which justify the distribution function. The problem arises from the assumptions underlying the theory. If copyright is based on an analogy to real property, both of those theories implicitly recognize limitations on the protection right.³⁸⁷ If it is based on Romantic philosophy, however, there is a justification for granting the sole genius that created something out of thin air absolute dominion over that creation.³⁸⁸ If it were only so. If any author had to defend her work as exclusively independent, with no dependency on any prior work, let alone prove her genius, there would be very few works meriting such an honor. It has about as much foundation as the belief that romantic love survives indefinitely.

Conversely, natural rights theory could be invoked to reduce the protection right of the putative author. If the named author had to prove originality in her work similar to the novelty concept in patent law, she would be vulnerable to assertions that works in the public domain preceded her work.³⁸⁹ Paul Goldstein spoke wondrously

382. See *id.*

383. See ROSE, *supra* note 2, at 88–89.

384. Statute of Anne, 1710, 8 Ann., c. 19 (Gr. Brit.).

385. See *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.).

386. See *Donaldson v. Beckett*, (1774) 98 Eng. Rep. 257 (H.L.).

387. See Mark Lemley, *Property, Intellectual Property and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005).

388. See Jaszi, *supra* note 23, at 459–60; see also Woodmansee, *supra* note 214, at 428–30 (detailing the Romantic conviction that the author-genius was someone who created something entirely new and unprecedented).

389. See Litman, *supra* note 65, at 1011–12 (“Were we to take the legal concept of originality seriously, we would need to ensure that authors’ copyrights encompassed only those aspects of their works that were actually original. We could not draw the boundaries of an author’s property in the contents of her work until we had dissected her authorship process to pare the preexisting elements from her astigmatic recasting of them. I argued earlier that such a

of the imagination and creativity in the works *Appalachian Spring*, *The Sun Also Rises*, and *Citizen Kane*.³⁹⁰ Scholar Mark Rose humorously rebutted such an assertion of genius and creativity, noting the debt owed to others was not claimed in the formal authorship.³⁹¹ As Jessica Litman put it so well, “[T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea.”³⁹² Other works influence and inspire creativity. To what extent any work is novel or original is a matter of degree.

Pro-expansion adherents following the economic model of price discrimination found early support in Judge Easterbrook’s trend setting opinion, *ProCD, Inc. v. Zeidenberg*.³⁹³ Price discrimination theory argues that a monopolist will increase its output beyond the amount expected in the traditional monopoly model if it can discriminate between value preferences of users.³⁹⁴ Perfect price discrimination requires that the producer have perfect information of the value preferences of all customers and can enforce the price discrimination.³⁹⁵ The most persuasive critique of the price discrimination model is that even if it works on the drawing board, it does not work in the real world.³⁹⁶ Consumers do not have an

dissection would be impossible in practical terms. If it were possible, I am confident that authors would not welcome it.”)

390. See GOLDSTEIN, *supra* note 33, at 61.

391. See Mark Rose, *Mothers and Authors: Johnson v. Calvert and the New Children of Our Imagination*, 22 CRITICAL INQUIRY 613, 629, 631 (1996). William Patry discusses this discrepancy:

Here are a few salient facts about the works in question: (1) *Appalachian Spring* was composed by Aaron Copland. The work was a collaboration with ballet great Martha Graham, who wrote the narrative underpinning of the ballet—the story of a wedding in rural Pennsylvania. . . . (2) The novel, *A Sun Also Rises* [sic], written by Ernest Hemingway, was not only influenced by Hemingway’s prior reading of a manuscript version of F. Scott Fitzgerald’s *The Great Gatsby*, but Fitzgerald, a far more experienced writer, heavily edited Hemingway’s book before publication. (3) Describing *Citizen Kane*, Orson Welles’ classic motion picture as being created out of thin air is most shocking of all, given its nature as a roman a clef of the life of William Randolph Hearst and other figures.

PATRY, *supra* note 2, at 66.

392. Litman, *supra* 65, at 966.

393. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449–50 (7th Cir. 1996). Judge Easterbrook waxed poetically about the benefits of price discrimination to encourage a monopolist copyright producer to increase its production by the opportunity to price differentiate. Easterbrook enforced a software license agreement that charged a higher price for commercial use than personal use of the same program. See *id.*

394. See Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845, 869 (1997).

395. See *id.* at 870.

396. See *id.*

incentive to reveal their true valuations, diminishing the possibility of maximizing output as promised by the model.³⁹⁷

In our current environment, the infrastructure is in place for producers to practice imperfect price discrimination in the production and distribution of digital works.³⁹⁸ The promise of the model—optimal allocation of product—is not possible, even in theory.³⁹⁹ Imperfect price discrimination will exacerbate wealth distribution effects. Publishers' only rational choice for distinguishing price among users will be measurements like time and page use. Lower value users who might have accessed a work for free at the public library—or for significantly less through a secondary market—will find those options disappearing as the digital publication of works becomes more of a closed “pay for use” access model. While copyright industries have relied on the promise of perfect price discrimination to justify the diminishment, if not elimination of first sale and fair use in digital copyright, the reality of imperfect price discrimination results in the worst of both worlds.⁴⁰⁰

The property rights model treats access as either taken care of by the market or dismissed as not an important value of the system.⁴⁰¹ The former approach is generally more consistent with the price discrimination rationale, and natural rights more consistent with the latter view. Price discrimination economic theory is transparently concerned with the distribution function of copyright.⁴⁰² Its analysis is on post-creation of the work, and attempts to rationalize more protection and fewer limitations on the copyright holders' (i.e., producer, investor, distributor) ability to exploit the value of the work.⁴⁰³ The goals of learning and advancement of knowledge are strikingly absent from both branches of the property rights model.

Doctrinally, the property rights adherents would point to the idea-expression doctrine as providing sufficient protection for the circulation of ideas necessary to promote creativity.⁴⁰⁴ The basic tenet of the doctrine is that only “expression” is protected, and “ideas” are

397. See Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 639 (2007). Why would a wealthy person pay more for a digital book just because they can afford to? This is the classic problem identified by commentators. See *id.* Consumers do not have an incentive to reveal their true price preferences. See *id.*

398. See *id.* at 648.

399. See *id.*

400. See Meurer, *supra* note 394, at 850–51, 860–61.

401. See GOLDSTEIN, *supra* note 33, at 4–5.

402. See *id.* at 145–46.

403. See *id.*

404. See *id.* at 14–15.

free to use.⁴⁰⁵ Even the greatest legal minds admit that there is no way to know proactively whether a party's intended "use" is on the side of angels, an "idea," or the side of devils, an "expression."⁴⁰⁶ Heralded by the property rights adherents as the most important (if not only) legitimate limitation on rights holder, it is also another doctrine rooted in the distribution rubric of copyright. The idea-expression doctrine is not consistent with the knowledge principle, which maximizes access to knowledge resources for the purposes of learning and education, as a pre-condition to the creation of new knowledge.

What would be the fate of Juan, Sheila, and Frank in the property rights model? How would the idea-expression doctrine help them? In the digital copyright model, the content has been protected by digital locks and licensing restrictions.⁴⁰⁷ Only users with authorization from the content holder can access the "ideas." Content producers have not been willing to grant special access to public libraries for purposes of learning and education.⁴⁰⁸ In their view, public libraries represent another commercial channel to maximize the revenue from their copyrighted goods.⁴⁰⁹ The property rights model does not consider the market distribution effects of its absolute protection model. As the digital divide deepens, the knowledge principle will be further stymied, resulting in a weakening of the knowledge production system. This creates greater strain on the fabric of the democratic system as more individuals are left behind.

Mark Rose has stated that copyright is an "institution built on intellectual quicksand."⁴¹⁰ Scholars have noted the flawed doctrinal categories and incoherency of copyright jurisprudence, but they have neglected the relationship between the original justification for copyright encouragement of learning and advancement of knowledge—and copyright jurisprudence.⁴¹¹ This missing piece has been access to knowledge, not as a peripheral benefit of the system, but as a central piece of the healthy functioning of the knowledge ecosystem and the knowledge infrastructure of society. With an

405. 1-2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03 (2014).

406. As Judge Hand remarked, "Nobody has ever been able to fix that boundary [between idea and expression], and nobody ever can." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

407. See *Digital Rights Management (DRM) & Libraries*, *supra* note 378.

408. See Stripling et al., *supra* note 19.

409. See Randall Stross, *Publishers vs. Libraries: An E-Book Tug of War*, N.Y. TIMES, Dec. 24, 2011, http://www.nytimes.com/2011/12/25/business/for-libraries-and-publishers-an-e-book-tug-of-war.html?_r=0.

410. ROSE, *supra* note 2, at 142.

411. Cf. Jaszi, *supra* note 23, at 456 ("I analyze the incoherencies of copyright doctrine from several external perspectives—most notably, modern literary theory.").

unhealthy ecosystem, the infrastructure weakens, and eventually the creation and distribution functions will suffer as well.

B. The Future of Copyright

1. Monopolies of Knowledge

This Article contends that favoring the interests associated with the distribution function, to the point of choking off access to works of knowledge, will adversely affect the creation of works of knowledge. The knowledge production function relies upon access to existing works of knowledge.⁴¹² Access to the full work is required—not merely a part of the work that is indeterminate. Contemporary copyright has lost sight of the public interest justification for Anglo-American copyright. The “public interest” has been reduced to an economic analysis of the monetary value of copyright commodities, or an abstract discussion of implications of current copyright doctrine on potential expression.⁴¹³ This Article refocuses the public interest on the implications of contemporary copyright jurisprudence on the same concern that the early British Lords and the Constitution framers were concerned with—the “advancement of knowledge” without producing “monopolies of knowledge.”⁴¹⁴

Returning to our original question: how does copyright affect access to works of knowledge for purposes of creating new knowledge? Assuming current trends in positive copyright law and financial support for public libraries continue, unequal access to the knowledge infrastructure will increase with negative implications for the knowledge ecosystem, and democratic society generally. Returning to our three types of individuals with education and learning needs—this thought experiment assumes some undefined time in the future when current trends have continued to digitize copyrighted material, and public libraries have continued to be impacted by the Great Recession of 2008. Sheila, a high school student living in West Chicago, is trying to access materials to prepare for college entrance examinations. Frank, a middle-aged construction worker in Philadelphia, is attempting to retrain for a new career as a technician in the telecommunication sector. Juan is an entrepreneur hoping to learn programming language to design and manage his website. All three share the lack of access to traditional sources of

412. See discussion *supra* Part II.A.

413. See DRAHOS & BRAITHWAITE, *supra* note 91, at 211.

414. See discussion *supra* Part II.B.

information—universities or corporations. The only knowledge infrastructure institution available to them is the public library.

Each of them has found it challenging to access the materials they need in their local public library. Sheila's neighborhood libraries have closed, and the downtown libraries have limited hours. She works after school and only has evenings to commute to the library. She has tried twice, and found the material unavailable, as the library has limited digital copies available. The more affluent suburbs have maintained their libraries by raising local funds. Sheila is not a resident, and cannot access their digital material unless she travels to their local library and works on their premises. She will still be limited by the number of hours the library will permit her use. Frank is fortunate to live in Philadelphia, where he can travel to find a library with resources. Nevertheless, he has faced significant delays to his requests for materials because of the limited amount available and the high demand for the materials. Juan lives in San Jose, California. His public library has also been affected by shrinking budgets and available materials. He has been told that local tech companies occasionally offer free seminars on computer programming. He is on a waiting list for an Oogleworks seminar.

Starting in the 1990s, public libraries warned that implementation of the DMCA would result in less copyrighted material available to those least advantaged in society.⁴¹⁵ They predicted that this would increase the digital divide among income classes.⁴¹⁶ Libraries attempted to counter this shift by compelling producers to permit more use of the digital works on par with pre-digital use, but they failed.⁴¹⁷ In the print and ink era, the work was accessible and reproducible. If the copyright holder believed that unauthorized use constituted infringement, she needed to bring legal action against the user. This paradigm shift means that the copyright holder no longer needs to initiate action against an alleged infringer. In the example of the book, e-books are delivered directly to the user, wrapped in encryption technology that controls the uses of the book by the user. The user cannot photocopy a page of the book to use for traditional "fair use" purposes. Also, the user cannot choose to transfer the copy of the book to a third party. Content owners have conflated unauthorized use with infringement.⁴¹⁸ Judicial

415. See GOLDSTEIN, *supra* note 33, at 172; Kranich, *supra* note 74.

416. See GOLDSTEIN, *supra* note 33, at 172; Kranich, *supra* note 74.

417. See *supra* notes 321–22 and accompanying text.

418. See Greg Saphier, *Copyrights and Voluntary Initiatives*, MOTION PICTURE ASS'N AM. (Aug. 26, 2014), <http://www.mpa.org/copyrights-and-voluntary-initiatives/>.

construction of the DMCA has largely supported the content producer's position.⁴¹⁹

Juan, Sheila, and Frank are at the mercy of the content producers. Shrinking public budgets have meant that those with access to information through private and public universities or corporate resources have become more privileged in society, and those without those connections become even less privileged. For many people living in urban and rural environments, the public libraries will have closed, while others will have reduced hours and fewer licensed copies of the materials needed by individuals like Sheila, Frank, or Juan to achieve their educational goals.

How would each of the prevailing copyright schools of thought respond to Juan, Sheila, or Frank? The "traditional incentives" group would continue to argue that if digital copyright is amended to insert an affirmative fair use right for users, then all would be well. Doctrinally, they would argue that this would logically expand the public domain, and that would benefit society. Now, what about our particular individuals' needs?

Assuming for the moment that creating an affirmative fair use right is politically feasible, it is still unsatisfactory. Fair use fails to meet the needs of these individuals. They need access to *all* the knowledge resources related to their educational objectives. Although as of 2013, courts have not decreed a defined percentage of material permissible for fair use, it has been acknowledged that it is not all of the material.⁴²⁰ It is probably closer to 10–20 percent of the material.⁴²¹ More importantly, there is no guaranteed-permissible amount. A user is subject to challenge by the copyright holder, and must prepare for expensive litigation. This has already had a chilling effect on libraries.⁴²² As discussed in Part III, indeterminacy and high transaction costs marred fair use in the print era. Fair use was not useful means for education and learning in the print era, and it is not useful in the digital era of copyright either.

419. See Tushnet, *supra* note 30, at 1013.

420. See Brief of Appellees at 14–16, *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014) (Nos. 12-14676, 12-15147), 2013 WL 1790921 (noting that federal district court found fair use where average length of excerpts university used in its online course material was 10.1 percent of publisher's copyrighted works); see also *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012). *But see* *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 463 (S.D.N.Y. 2012) ("Sometimes it is necessary to copy entire works.").

421. See Brief of Appellees, *supra* note 420, at 14–16.

422. See *Digital Rights Management (DRM) & Libraries*, *supra* note 368; Stripling et al., *supra* note 19.

Such a proposal is also politically infeasible for one main reason—legitimate fear of commercial piracy.⁴²³ If users had a broad fair use right—which essentially would mean that reverse engineering of digital locks on copyrighted material were permissible, subject to later challenge by the copyright holder—it would be very difficult for the copyright holder to track the abusers and enforce their lawful rights.

The property rights groups would have two possible responses, depending on whether they tended more toward natural rights theory or economic price discrimination theory. The former's response would generally be "it's not our problem; we have the rights because they are based on natural law." If society needs access, society can pay for it. Distribution should be the responsibility of government—they can pay for those who cannot afford it.

As discussed above, this argument ignores the collective nature of original works.⁴²⁴ If a natural rights adherent had to prove a work's originality and be subject to challenge similar to a patent, the tables would be turned.⁴²⁵ Suddenly, his or her rights would be significantly diminished. In addition, many have argued that natural rights, just like real property, should be subject to qualification or exception for the public interest.⁴²⁶

For the economic price-discrimination adherent, their response would be that the market would take care of the access issue. In pure price discrimination theory, this may be sound. Unfortunately, as even the price discrimination theorists acknowledge, pure price discrimination does not occur in the real world.⁴²⁷ Imperfect price discrimination is actually practiced. Falling back on the similar back up as natural rights, they would argue it is the government's responsibility to subsidize use for the less advantaged.

The problem with property rights theorists is that they neglect the possibility that less access means less learning, which may lead to less growth in society as a whole. Economists like to argue that their focus is on the growth of the pie, and it is someone else's job to think

423. See, e.g., Mark Sweney, *Game of Thrones Is World's Most Pirated TV Show*, GUARDIAN (Dec. 24, 2012), <http://www.theguardian.com/media/2012/dec/24/game-of-thrones-pirated-sky>. The MPAA is working with ISPs on voluntary agreements to exclude repeat violators of alleged copyrights of third parties. See Saphier, *supra* note 418.

424. See Litman, *supra* note 65, at 966.

425. See *id.* at 1011–12.

426. See GOLDSTEIN, *supra* note 33, at 203–04.

427. See Yoo, *supra* note 397, at 639 ("The absence of any reliable way to determine the aggregate marginal value that consumers place on a public good makes it all but impossible to determine the optimal level of production for any public good.")

about redistribution.⁴²⁸ The implicit assumption is, “do not interfere with our activity, (i.e., taxes or regulation) because that will interfere with growth.” Presumably, the least advantaged in society should rely on private charity. Interestingly, economists see the societal advantage of “public” investment in physical infrastructure, roads, ports, bridges, and so on.⁴²⁹ Without the physical infrastructure built over the twentieth century, the United States would not have been able to grow into the global commercial powerhouse that it did. The same need for infrastructure investment exists for the education and learning of all segments of the population. This need has actually intensified in the twenty-first century with increased mobility, digital communication, and reduced workplace security.

There is an acknowledged incoherency in traditional copyright jurisprudence.⁴³⁰ This Article argues that that this incoherence is derived from copyright’s focus on the distribution function, or the competing interests of producers of copyrighted materials. Current doctrine and theory are inadequate to address the constitutional justification for copyright, namely promoting the advancement of knowledge. Whether or not incentives theory can ever be proven or the incoherency of authorship and originality is ever remedied, the thesis of this Article remains valid.⁴³¹ Creators need access to knowledge resources to sustain a healthy knowledge ecosystem. Content producers will suffer as the damage to the knowledge ecosystem becomes more pronounced. Less access to knowledge for

428. The normative goal of economic analysis is wealth maximization. See Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512 (1980); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 103 (1979).

429. See NOAH BERGER & PETER FISHER, ECON. ANALYSIS & RESEARCH NETWORK, A WELL-EDUCATED WORKFORCE IS KEY TO STATE PROSPERITY 1–2 (2013); INT’L MONETARY FUND, *Is It Time for an Infrastructure Push? The Macroeconomic Effects of Public Investment*, in WORLD ECONOMIC OUTLOOK: LEGACIES, CLOUDS, UNCERTAINTIES 75, 75 (2014) (“[I]ncreased public infrastructure investment raises output in both the short and long term . . .”).

430. Commentators often refer to the “uncertainty” or “indeterminacy” of copyright doctrine. If the doctrine were more coherent, outcomes would be more predictable. See LESSIG, *supra* note 31, at 185 (“The consequence of this legal uncertainty, tied to these extremely high penalties, is that an extraordinary amount of creativity will either never be exercised, or never be exercised in the open.”); David Fagundes, *Crystals in the Public Domain*, 50 B.C. L. REV. 139, 161–74 (2009); William W. Fisher, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1686–92 (1988); Litman, *supra* note 65, at 975 (“[T]he boundaries of copyright are inevitably indeterminate.”); David Nimmer, *“Fairest of Them All” and Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 280 (2003) (“Basically, had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears that the upshot would be the same.”).

431. These include the questions of whether creation is motivated extrinsically by incentives, or intrinsically by human need, and whether authors should bear the burden of proving originality.

learning and education means less knowledge creation, and less distribution of knowledge. This results in a dysfunctional knowledge ecosystem, and a fragile knowledge infrastructure. If, however, social mobility falters, civic participation becomes anemic, economic productivity falls, the fabric of the democratic state frays.⁴³²

The next Section sketches a new framework for the creation side of copyright that places the access function central to copyright's role in the knowledge production ecosystem, thus sustaining a healthy knowledge infrastructure for society. Individuals like Sheila, Frank, and Juan would have access to the knowledge resources that they need to meet their educational objectives. Public libraries would have the right to every copyrighted material, and the ability to provide it to any citizen—regardless of wealth or status—for the purpose of learning and education. Citizens' ability to create new knowledge strengthens, and in so doing, fosters the values of our democratic society, namely social mobility, economic productivity, and civic participation.

2. Towards a "Fair Access" Rights Framework

Copyright policy should ensure that all citizens of a democratic society are able to access the intellectual commons for purposes of learning and education. This policy would be consistent with the origins of Anglo-American copyright, and more importantly, support the present needs of our twenty-first century democratic society. The "access rights" model adheres to the knowledge principle, and has the following features and characteristics. First, it recognizes that individuals must access knowledge (i.e., learn) before they can create new knowledge. Second, learners and creators, participating in the knowledge production process, do not distinguish between copyrighted and non-copyrighted knowledge resources (referred to herein as the "intellectual commons"). Third, the knowledge production process applies to all individuals in society, not to any category or class of persons. Fourth, the contingent, dynamic, and collaborative nature of the knowledge production process means that the particular spatial circumstances of the learner and creator are critical to their potential success as a learner and a creator. Fifth, it assumes that the copyright distribution right is constant, subject to rights of access for

432. See Elkin-Koren, *supra* note 58, at 260. More access to information expands opportunities for participation in social and political life. See Porter, *supra* note 38; Moises Velasquez-Manoff, *Status and Stress*, N.Y. TIMES (July 27, 2013, 2:30 PM), <http://opinionator.blogs.nytimes.com/2013/07/27/status-and-stress/>.

purposes of learning and education.⁴³³ In our hypothetical, the model would guarantee Sheila, Juan, and Frank the ability to access the materials they require for their learning needs. If they reused any portion of those materials to distribute new material, then they would be subject to existing rules of copyright jurisprudence.

Conventional copyright has been grounded in rationales of promoting creativity, expression, and production of copyrighted goods or some combination of thereof.⁴³⁴ The access rights model is grounded in the rationale of promoting knowledge in society.⁴³⁵ The model is not in direct conflict to any of the other theories, and can operate alongside them—as long as the other theories do not violate the knowledge principle. The model can be justified under consequential and non-consequential theories. This model seeks to foster the ability of the individual to fulfill her potential as a learner and creator, and in so doing, maximizes social welfare. The spatial circumstances of the individual learner and creator are the most significant factors in determining an individual's ability to participate fully in the knowledge production system. It directly affects the individual's ability to access the intellectual commons for the purposes of learning existing knowledge and creating new knowledge.

Julie Cohen has called attention to the literature's lack of inquiry in the processes involved in the creation of copyrighted works.⁴³⁶ Professor Cohen's inquiry addresses the broad scope of cultural production, which represents the whole of copyright subject matter in contemporary society.⁴³⁷ Cultural production represents not only works of knowledge, but also works of entertainment, as the reach of copyright has expanded enormously since its birth.⁴³⁸ The scope of this inquiry is narrower—it is concerned with a subset of

433. The jurisprudential story examined in Part III explains the development of the distribution function of copyright from the print era through the digital era, including the periods of digital transition and pure digital. In the pure digital era, copyright holders enjoy broad protection rights that are no longer subject to the print era doctrines of fair use and first sale. Once the digital content is encrypted, end users' limited possession rights of the content are proscribed by the copyright holder. They cannot sell, give away, or otherwise transfer the digital book to a third party. They cannot extract a portion of the digital book for reuse, though they could write it down. Works of knowledge in the digital era are encrypted, and access is far more limited than in the print era.

434. See *supra* note 349 and accompanying text.

435. This is the Author's thesis and proposed model for copyright.

436. See Cohen, *supra* note 24, at 1186. Cohen refers to social and cultural theory where the creative process is seen as a dynamic, collaborative, and contingent process, rather than a static, transcendent, and absolute one of traditional legal theory. See *id.* at 1179. She notes that the latter approach represents legal scholars' myopic tendency to restrict themselves to the lens of liberal political theory. See *id.* at 1154.

437. See *id.*

438. See *id.*

cultural production: knowledge production. The access model follows Cohen's direction that both processes of knowledge production and cultural production are not static, transcendent, or absolute, but rather dynamic, contingent, and collaborative.⁴³⁹ Accesses to inputs, knowledge inputs, and creative inputs drive both processes. Professor Cohen insightfully noted that "overly broad copyright exacerbates the structural effects of unequal access to cultural resources by placing additional obstacles in the path to cultural participation. Narrower copyright avoids this risk in some cases, and also works in the opposite direction. In removing obstacles to cultural participation, narrower copyright broadens and deepens a society's capacity for cultural progress."⁴⁴⁰ Similarly, the structural effect of obstacles to individuals in the knowledge production process significantly impedes the progress of society—the progress that copyright was intended to achieve.

In her normative insights, Professor Cohen suggests that copyright will function better with bright-line rules.⁴⁴¹ Applying her insight to the knowledge production process, a bright-line rule that benefits education and learning is proposed. This Article proposes a model that builds on Cohen's work, and focuses on the knowledge systems sustained by the creation process, or as referred to herein, the "intellectual commons." Cohen refers to the "artistic and intellectual" commons as the subset of culture that copyright is concerned with.⁴⁴² The intellectual commons represent a subset of Cohen's concept of the "cultural landscape," concerned with knowledge resources. Cultural landscape refers to all cultural resources, whether they are proprietary or public domain, as they are fixed in a spatial context and available to situated users for creative purposes.

In the ideal model, access to the intellectual commons allows for the freedom of movement of knowledge resources, and in turn, positively stimulates the processes of knowledge production, participation, and transmission that leads to more production of knowledge resources. The dynamic model works like a feedback loop, where more access and flow within the intellectual commons leads to a healthier and more robust intellectual commons. Restrictions on access and flow impair the knowledge production processes, and ultimately impair the state and welfare of the intellectual commons

439. *See id.*

440. *Id.* at 1198.

441. *See id.* at 1204. Professor Cohen notes the weak linkage between the public domain concept and the creative process. *See id.*

442. *Id.* at 1153.

itself. Less restriction on access sustains a virtuous cycle of a robust knowledge production function and healthy intellectual commons.

Public libraries play a critical role in the access function of the knowledge production of the intellectual commons. Libraries' interests are aligned with the collaborative-contingent theory of knowledge production. Libraries as an institution are best positioned to sustain the flow and movement of knowledge resources for the benefit of the intellectual commons. Libraries would circulate the texts and other materials that contain and incorporate the knowledge of the commons that need to be circulated to advance the education and knowledge of society.⁴⁴³ The libraries' mission is to extend information resources to the public, without regard to status or income.⁴⁴⁴ Public libraries serve the values of a democratic society, and are a critical instrument in the fulfillment of the goals of the copyright system, namely promoting the advancement of knowledge.⁴⁴⁵

A possible mechanism for implementing the access model into copyright policy would be an amendment to Section 108 of the Copyright Act. The amendment would grant libraries a non-waivable first-sale right to all copyrighted material, in any form—including digital content. Public libraries would have the right to acquire any copyrighted material for their institution either directly from the content producer, or if the content producer was unwilling to do so, directly from the Library of Congress. This would serve to expand access to the intellectual commons through a new “fair access” doctrine, exercisable by the public library system. Further work needs to be done to develop the structure of this proposal and to consider alternative approaches. The amendment must recognize the publishing industry's concerns that access to digital works could subsume the private market, as the lines between the two have blurred with remote access and electronic delivery of digital books.

Throughout the history of the United States, respected leaders including Thomas Jefferson, Benjamin Franklin, successful industrialist-turned-philanthropist Andrew Carnegie, and President Franklin Delano Roosevelt all acutely understood the critical role of

443. See, e.g., Press Release, Am. Library Ass'n, ALA President Barbara Stripling Unveils 'Declaration for the Right to Libraries' (Aug. 5, 2013), available at <http://www.ala.org/news/press-releases/2013/07/ala-president-barbara-stripling-unveils-declaration-right-libraries>; *Open Scholarship*, ASS'N RES. LIBR., <http://www.arl.org/focus-areas/open-scholarship> (last visited Aug. 21, 2013).

444. See *Mission & Priorities*, *supra* note 17; *Strategic Plan*, *supra* note 76.

445. See Elkin-Koren, *supra* note 58, at 266–67. The dissemination of information by digital access has threatened the ability of public libraries to make information widely available. See *id.*

public libraries in the service of democratic values and a healthy, productive society.⁴⁴⁶ Investment in libraries has served our country well, transforming it from a nineteenth century agrarian society to a twentieth century industrial society. Now, at the beginning of the twenty-first century, in the middle of the transformation to an advanced information society competing with emerging nations like China, it seems more important than ever to remember the voices from our past.

V. CONCLUSION

Significant change in copyright policy will not occur until scholars, as well as thought leaders in both higher education and public libraries, recognize that the copyright paradigm of the print era will not address access to knowledge in the digital age. Knowledge creation requires access to texts in order to educate oneself, as well as the opportunity to contribute new texts. Authors are readers, and readers are authors.⁴⁴⁷ Understanding the misalignment between copyright's justification and its modern theoretical foundations requires a closer look at the knowledge production process necessary for the creation function of copyright. A new paradigm for copyright theory recognizes the role of public libraries in actualizing access to texts in order to achieve the public good of copyright—the “progress of knowledge” and “encouragement of learning.”

446. Franklin D. Roosevelt noted that “Libraries are . . . essential to the functioning of a democratic society . . . and the great symbols of the freedom of the mind.” SIDNEY H. DITZION, *ARSENALS OF A DEMOCRATIC CULTURE* (1947). Thomas Jefferson wrote to a friend, John Wyche, in 1809, “I have often thought that nothing would do more extensive good at small expense than the establishment of a small circulating library in every county, to consist of a few well-chosen books, to be lent to the people of the country under regulations as would secure their safe return in due time.” Vinjamuri, *supra* note 7.

447. See Cohen, *supra* note 24, at 1179. Cohen refers to creative process, noting that a creator must first be a user of artistic and cultural goods before becoming (potentially) a creator. See *id.* The tight linkage between copyright and creativity, however, both fuels romantic author narratives and justifies drawing firm distinctions between authors, on the one hand, and consumers, imitators, and improvers on the other. See *id.* Those distinctions dominate the current landscape of copyright law; they undergird broad rights to control copies, public renderings, and derivations of copyrighted works and expansive readings of the rules that create liability for technology infringers. See *id.*