NO LAW

Intellectual Property in the Image of an Absolute First Amendment

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CHAPTER 2

Patents, Copyright, and Neighboring Rights

COPYRIGHT AND PATENT LAW

No two legal systems in American intellectual property are more alike in their common origins, nor (at least to a considerable degree) in their common jurisprudence. Yet none are more truly juxtaposed in the details of their existence. Copyright law and patent law are the yin and yang of intellectual property, doctrinal fields whose differing natures serve at least partly to define the boundaries between them. Copyright is the domain chiefly of expressive works, such as those that figure in the arts, entertainment, or the information industries.[1] Patent law offers protection primarily for practicable works of utility, which comprise (in the language of the Patent Act) "any new and useful process, machine, [article of] manufacture or composition of matter, including any new and useful improvement thereof. . . ."[2] Few lawyers presume to practice as specialists across both fields of law. The complexities in each are separately formidable, and the subject matter considerably antithetical. One is a copyright lawyer or a patent lawyer, but ordinarily not both.[3]

We propose to treat copyright and patent law comparatively. Their complexity, however, makes it necessary to adopt a more elaborate system of subclassification than we have thought useful in the case of other intellectual property doctrines. For the tedious burden this may impose on the reader we apologize in advance, trusting (or perhaps merely hoping) that in the end the effort will seem to have been worthwhile.

Constitutional Origins

The common origins of copyright and patent rights in American law are to be found in the Constitution, in Article I, Section 8, Clause 8, which includes among the express powers consigned to Congress the following provision: "To promote the progress of science and the useful arts, by

securing for limited times, to authors and inventors, the exclusive right to their writings and discoveries."[4]

In conventional usage the clause was referred to until recently as the "copyright clause" or the "patent clause," according to the subject matter in question. Today it is more often referred to as "the intellectual property clause."[5] This is so, despite the fact that only two among the several fields of doctrinal law under discussion in this part of our book have their origins under this power. Unfair competition, common law copyright, trade secrets, the law of publicity, and trademarks all spring from either state law or (when enacted by Congress) the commerce clause.[6] Professor Lessig has still more recently referred to the "progress clause," a usage we suppose to be original with him,[7] and one that is attractive in calling attention to what appears on the face of the text to be (as the Supreme Court has separately said) "both a grant of power and a limitation."[8] We will employ all of these terms from time to time in our discussion, choosing one as against another mainly in response to our own understanding of the matters in context.

The reader will note that neither copyright nor patent law is expressly mentioned in the clause. But both were widely recognized in the Colonies, which had adapted their laws from English statutes and custom.[9] There is no reason to doubt that the Framers supposed that the language of the clause would empower Congress to introduce these doctrines into federal law essentially as they existed at the time.[10] It also seems probable in retrospect that the Framers were less interested in copyright than they were in patent rights.[11] Patents were at the center of the practical knowledge that a new nation required. Copyright might be respectable enough to share in the aspirations of the enabling clause, but in fact it had played an insignificant role in colonial life and would continue to be eclipsed by patents in both numbers and economic significance until well into the nineteenth century.

Discrete though these rights are, their constitutional provenance is nevertheless thus common; and so is a considerable portion of their underlying jurisprudence. Each is predicated upon some form of originality; each is available for limited times.[12] Each appears to be justified by an assumption, implicit in the clause, that "securing to authors and

inventors, the exclusive right to their writings and discoveries" will offer an incentive to productivity that will "promote the progress of science (which meant, in eighteenth century usage, "the field of human knowledge") and the useful arts (in eighteenth century usage, "technology and kindred knowhow")." A decision by the Supreme Court early in the nineteenth century supports this interpretation of the clause. The Court held, in that case and in cases subsequent to it, that copyright and patent rights are to be understood chiefly in terms of what is often described as a quid pro quo: in exchange for the exclusive right to their works, authors and inventors are obliged to dedicate those works to the public domain upon expiration of their limited terms.[13]

Originality

Originality is part of the calculus of rights; the clause appears clearly to contemplate as much. But in this apparently common aspect of their jurisprudence the two rights actually begin to diverge sharply in practice.

Originality is paramount in patent law: a utility patent, now as in the two preceding centuries, issues only if the inventor's discovery is novel—or in other words, without anticipation in the "prior art" (the relevant field of invention).[14] Improvements over the prior art may be judged novel; but mere reinvention (of the wheel, for example) is no invention at all if it is anticipated in the prior art. This is so even if the inventor had no knowledge of that art.[15] The novelty requirement is reinforced by a further standard of invention that precludes the issuance of a patent if the inventor's improvement would have been obvious to one schooled in the art at the time the discovery was made.[16] Thus, to recall the facts of a well-known early decision, it is not enough that a ceramic doorknob be unanticipated (and therefore, literally, novel) if it would nevertheless have been obvious to those who were already familiar with doorknobs fashioned from wood.[17]

In contrast, a copyright is granted on an originality standard that requires no more than that the author not have substantially copied his work from another.[18] In a passage from an opinion by Judge Learned Hand (whose mastery of copyright was so acclaimed in his own time that the holographic manuscript of the opinion has been preserved under

glass in the office of the Register of Copyright), we are given perhaps the most widely quoted articulation of this principle: "[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author', and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats."[19]

This is an unlikely scenario, to be sure. David Nimmer (worthy successor author of his father's premier treatise on copyright[20]) reminds us that the first lines of Keats's Ode are these: "Thou still unravish'd bride of quietness, / Thou foster-child of silence and slow time, / Sylvan historian, who canst thus express / A flowery tale more sweetly than our rhyme: / What leaf-fring'd legend haunts about thy shape / Of deities or mortals, or of both, / In Tempe or the dales of Arcady?" Nimmer suggests that anyone who actually believes that a man who had never known it could compose anew Keats's Ode *in haec verba* is in need of a conservator.[21] Adding to the difficulty in understanding Hand's insight in practice is the fact that a second work which is an exact replica of an earlier work may also be found to have been copied from the earlier work on no greater evidence than that fact alone. From such delicious paradoxes is the doctrinal stuff of copyright derived. Nevertheless Hand's observation captures the essence of copyright originality, which requires, as we have said, nothing more than independent creation.[22] In this, copyright and patent law diverge utterly.

Term Limits

Copyright and patent law also diverge sharply in their provisions with respect to "limited times"; this divergence has become more extreme as the two bodies of law have been revised. Patents were issued in 1790 for fourteen years. Even today the most common patent expires twenty years after the filing of the application; other forms of patent rights expire sooner. Copyrights also were granted for a period of fourteen years in 1790, with a provision for renewal for an additional term of similar length. Today, however, the expected average length of a copyright term endures for ninety-five years after the right subsists. In a recent case the Supreme Court held that this extended term of protection does not

violate the "limited times" provision of the intellectual property clause—in response to which one can only ask: if not now, then when?[23]

Subject Matter

We have said that copyright protects expressive works; the most important patent right protects works of utility. This distinction is a basic one with which students of copyright and patent law quickly become familiar.

Copyright does not protect ideas, facts, events, concepts, or the like, all of which remain available to everyone.[24] The protected material in an original work of authorship consists only of the expression of these ideas and other similarly expanded or elongated elements of composition. Thus, to offer a frequently cited example, the mere concept of a British spy as a suitable subject for a novel is not protected by copyright.[25] But additional details quickly carry an author across the line from idea to expression where protection begins. Ian Fleming and his successors possess exclusive rights in the character James Bond, a womanizing, martini-swilling ("shaken, not stirred"), Aston-Martin-driving British spy, whose secret identity (007) means that he has been licensed to kill by Her Majesty's Secret Service.[26] But Messrs. Fleming et al. do not own the underlying idea of a British spy itself, which others (John LeCarre, Len Deighton, Jack Higgins, and Alan Furst, to name but a notable few) have exploited with similar success among readers. LeCarre's George Smiley, Deighton's Bernard Samson, Higgins's Sean Regan, as well as Furst's Messrs. Kolb and Brown, all move from unprotected idea to protected expression, exactly as Fleming's James Bond does. This "idea-expression dichotomy," as it is conventionally known, means of course that copyright protection is less comprehensive than it otherwise would be.[27] This is generally thought to be an encouragement to protean efforts at expression, though as we will see in the next chapter this argument is by no means universally conceded.

In patent law, meanwhile, no corresponding distinction is drawn between idea and expression. A novel idea for an improved doorknob is patentable if it is useful and not obvious.[28] The invention includes the

idea itself as well as its "reduction to practice," a standard meant to insure that patents issue only to discoveries that are capable of use.[29]

Securing Protection

In the language of the most recent (1976) General Revision, a copyright "subsists . . . in original works of authorship fixed in any tangible medium of expression."[30] Thus, for example, the artist who paints an original work on canvas earns copyright as quickly as his ideas become expression. Formalities were once a prominent feature of copyright law—and a hazardous one for the unwary, whose failure to comply with one or another of the law's complex formal requirements often had the effect of forfeiting the work to the public domain.[31] Vestiges of this system persist even today in works created or published prior to 1989.[32] Since then, however, thanks to the United States' adherence to the Berne Copyright Convention (which forbids signatories to erect or maintain formal barriers of the kind that once figured prominently in American law), formalities have played no role at all in obtaining protection for an eligible work, and only a minor part in maintaining such protection. Still, registration is generally required as a prerequisite to bringing suit for infringement of a United States work in an American court; registration prior to infringement is also a prerequisite to obtaining attorneys' fees and statutory damages.[33] As a result registration practice does continue to figure prominently among those whose works are most valuable or most likely to be infringed. Only rarely does the Copyright Office reject an application for registration outright.[34] The examination process in that Office, while not entirely pro forma, does not ordinarily inquire deeply into the provenance of the work. The application form obliges the applicant to assure the Register under oath that the work is original, but as a rule no attempt is made to search probingly for evidence of prior works that might throw suspicion or doubt upon that assurance. Most copyright applications are ultimately approved as filed. Once issued, the certificate itself is prima facie evidence of originality.[35]

In contrast to the lower profile that formalities now assume in copyright law, patent law continues to require, as it long has done, a rigorous

examination of the proposed invention along the lines of inquiry we have suggested above: that is, novelty, nonobviousness (or inventivness), and utility. The Patent Act of 1952 (the last general revision) establishes a number of hurdles that applicants must surmount if the patent is to issue; many applications falter on one or another of these grounds for objection.[36] The applicant is obliged to disclose all instances of "prior art";[37] the examiner reviews this art, and in addition conducts an independent search to determine whether other art may exist that has not been cited. It is common for the examiner to require amendments to the application to narrow the would-be patentee's claim, or to require affirmative disclaimers as to prior or equivalent art.[38] Applications are frequently rejected; patents themselves, even after issuance, are frequently held invalid.

Exclusive Rights and the Nature of Infringement

The Copyright Act confers five particularly important exclusive rights upon proprietors of copyright in original works of authorship. These include: (1) the right to reproduce the work in additional copies (such as successive print runs of a popular book); (2) the right to create derivative works (such as revised editions of books, or sequels or remakes of motion picture films); (3) the right to distribute the work in copies through initial sale, rental, lending, and the like (such as the initial publication of a book or the release of a motion picture film; the distribution right, like the reproduction right, is of particular concern today in the case of peer-to-peer downloading and uploading on the Internet); (4) the right to display a work in public (as when a museum displays a painting or other work of graphic art); and (5) the right to perform a work in public (as when a musical composition is sung by Dolly Parton on stage or is contained in a recording played on the radio).[39] Infringement of these rights occurs when a substantial exercise of one or another of them takes place without the consent of the copyright proprietor and without license to do so under the terms of the Copyright Act itself.[40] Often the infringement is singular and of little real economic effect; yet verdicts of infringement can still follow. In one memorable case a choir director in Iowa was sued for his temerity in having created an alternative vocal arrangement of a musical composition that had been published by the

composer in a different arrangement; the later arrangement by the choir director, though almost certainly harmless, nevertheless was held to have violated the derivative works right. In that case the offending arrangement probably would have been better construed as an exercise in fair use, a doctrinal offset against infringement we shall discuss more fully in a moment.[41] Sometimes, however, the claimed infringement, though single in nature, is of undeniable import. For example, a motion picture screenplay that incorporates substantial material from a novel without license may involve considerable damages as well as profits under theories approved by existing law. Meanwhile, the digital technologies and the Internet have led to instances of what can be thought of as "mass infringements" in the context of peer-to-peer file sharing, in which both the reproduction and the distribution rights are likely to be challenged.[42]

Patent law confers upon patentees the right to "exclude others from making, using, offering for sale, or selling the invention."[43] Infringement occurs when an unlicensed party exercises a right that falls within the scope of the patentee's right to exclude.[44] Patent lawyers like to note that these rights do not include the affirmative right to make, use, or sell the invention: it is possible, both in theory and in practice, to obtain a patent which cannot be made, put to use, or sold.[45] Discoveries useful in the fabrication of weapons of mass destruction, for example, may well be patentable and yet not be capable of being practiced by the inventor if the law provides otherwise. In this sense a patent is a form of "blocking right," and is often so described in treatments of the subject.[46]

Copyright infringement is most obvious when one or more exclusive rights are fully exercised in an entire work. Thus, reproducing a work completely, or selling it, or displaying or performing it in its entirety in public is, in the absence of a license or statutory privilege or fair use, an infringement.[47] Similarly in patent law, an infringement is likely to be found when the defendant is making, using, or selling an unlicensed process or structure that corresponds identically to a claim under the protection of a current patent.[48]

In both copyright and patent law, however, an additional area of exclusivity lies in and around the denominated rights. This extended

area is not specifically provided for by the respective statutes, but instead has been developed by judges in cases decided over a period of more than two centuries. These interests offer a considerable additional scope of protection for copyright and patent proprietors.

Thus, in copyright, verbatim excerpts of less than an entire work, as well as close paraphrasing and rewording, can amount to infringement; so also can appropriating the plot or outline of a work, even when there is otherwise no word-for-word similarity at all between the protected and the accused works. Learned Hand discussed the most challenging forms of penumbral infringement in *Nichols v. Universal Pictures Corp.*, a case in which one play was alleged to have infringed another:

> It is of course essential to the protection of any literary property . . . that the right cannot be limited to the text, else a plagiarist would escape by immaterial variations. That has never been the law, but as soon as literal appropriation ceases to be the test, the whole matter is necessarily at large. [W]hen plays are concerned, the plagiarist may excise a separate scene or he may appropriate part of the dialogue. Then the question is whether the part so taken is "substantial," and therefore not a "fair use" of the copyrighted work. But when the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome. Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended. If Twelfth Night were copyrighted, it is quite possible that a second comer might so closely imitate Sir Toby Belch or Malvolio as to infringe, but it would not be enough that for one of his characters he cast a riotous knight who kept wassail to the discomfort of the household, or a vain and foppish steward who became amorous of his mistress. These would be no more than Shakespeare's "ideas" in the play, as little capable of monopoly as Einstein's Doctrine of Relativity, or Darwin's theory of the Origin of Species.[49]

Nichols was decided in 1931, but the influence of this passage has proved important and enduring. Hand's understanding of the law remains at the center of copyright infringement theory today, and especially so

when the issue in a case involves an appropriation of less than an entire work—including, for example, the appropriation of patterns in such contemporary and dynamic works as computer programs.[50]

In patent law, meanwhile, a corresponding theory provides extended protection for patented discoveries. The so-called "doctrine of equivalents" permits a finding of infringement if (echoing the classic formulation of the basic concept of infringement) the accused device performs "the same work, in substantially the same way, to accomplish substantially the same result"—and this is so even if the patent claims do not read on the device:

> The doctrine of equivalence casts around a claim a penumbra which also must be avoided if there is to be no infringement. It provides that a structure infringes, without there being literal overlap, if it performs substantially the same function in substantially the same way and for substantially the same purpose as the claims set forth. Equivalence is the obverse of the discounting of literal overlap. The latter is to protect the accused; the former to protect the patentee.[51]

In recent years a substantial dispute has arisen in patent law as to whether the doctrine of equivalents should be maintained or discarded. Established in 1950 in a decision by the Supreme Court,[52] the doctrine of equivalents has never quite enjoyed the degree of acceptance that Hand's patterns test has achieved in copyright. Judges and members of the patent bar have raised the question whether such a doctrine accords with the strict standards of patentability that otherwise obtain in the field. Five of twelve members of the Federal Circuit, sitting *en banc*,[53] actually voted to abolish the doctrine some ten years ago, but the majority's decision to preserve it was subsequently affirmed by the Supreme Court, albeit with substantial modifications.[54] A still more recent decision by the Court appears to have settled on retention of the doctrine for the time being.[55]

The existence of such a dispute within the confines of patent law involves issues to be raised at some length in the next two chapters, but it will not be amiss to anticipate that discussion in summary fashion here. The question is how strictly to construe federal grants of monopolies (or monopoly-like subsidies) awarded pursuant to the intellectual property

clause? Proponents of strong intellectual property protection almost always also favor lengthening and widening spheres of protection that are enhanced in turn by more stringent measures against appropriation. That has indeed been the course that copyright and patent laws have taken since the clause was adopted and ratified in 1787; it can also be said to be true of intellectual property at large. In copyright there has been virtually no dissent from within the practicing bar as to this expansion; copyright lawyers now draft most new legislation that is introduced in Congress, drawing upon the expertise of the House and Senate staffs only after the process of drafting is well begun.[56] In patent law, however, lawyers have seen that the expanded right that favors a client today may also harm the same client tomorrow. Trademark lawyers are beginning to recognize the same prospect.

Protectionist Tendencies in Copyright

Why should copyright proprietors appear to be more determinedly protectionist than those in other doctrinal fields? Two answers can be given, the first conceded on every hand, but the second a matter of some conjecture.

The first is that copyrighted materials are by nature more susceptible to widespread unconsented-to appropriation than are the interests protected by other intellectual property doctrines. The public poses little in the way of individual threat to patents; few individuals can hope to make, use, or sell the subject matter of inventions, which typically presuppose a level of skill and access to technology or know-how not widely shared. Trade secrets are subject to reverse engineering, which means that the rules of the game contemplate and approve appropriation in circumstances that do not also involve otherwise inappropriate conduct. The public threat to trademarks is arguably greater: private usage can destroy a trademark by rendering it generic. In fact, however, that happens only rarely, and can be guarded against by an alert trademark proprietor through programs meant to elicit individual recognition of trademarks qua trademarks. If evidence subsequently shows that the public understands the mark to be a mark, then the fact that in careless usage the mark may also assume the properties of the generic (as in,

"Witherspoon, would you kindly 'xerox' this document for me"?) will not ordinarily be enough to invalidate it.

But with the introduction of new and sophisticated copying technologies some fifty years ago (including the Xerox copier, as well as analog tape recording devices and the like), a copyright proprietor became vulnerable to individual appropriations (including private copying for personal use) that had few counterparts in other forms of intellectual property. The digital era has made that vulnerability a matter of even graver concern: unauthorized copies (of movies and recordings in particular) are all but indistinguishable today from authorized copies of a work, so that the end result of private copying can seem substantially more attractive to the copier than was once the case. Still more important, Internet programs designed to facilitate peer-to-peer file sharing mean that individual copies can be downloaded and then widely redistributed to others. The copyright industries estimate that in a single year billions of dollars are lost to peer-to-peer downloading and file sharing. These estimates may be exaggerated, but there is no question from within the perspectives of the industries themselves that the epidemic of individual copying poses a severe challenge. The recording industry speaks of its ultimate extinction, a fear that may be plausible unless the industry succeeds in changing its traditional approach to the market so as to meet the challenge head-on; the motion picture industry is afflicted by the same concerns, and the same necessity for rethinking its approach to the market.[57] The recurrent question in each industry is, "How do you compete with free?" As Professor Lessig has suggested, sellers of bottled spring water might respond by pointing out that successful competition among the purveyors of "free" goods depends on pricing, packaging, assurances of quality, and perhaps above all on "branding."[58] But the copyright industries have responded primarily with programs meant to reinforce the advantages that copyright itself is supposed to afford. These efforts have had only mixed success to date, though attempts to "educate" the public continue, in such venues as movie theaters where trailers warn against "stealing" copyrighted works, and in school classrooms where specialist volunteers lecture students on the importance of extending to copyright the same "yours as opposed to mine" attitude

they would bring to other species of property. We see more extreme examples of these efforts in such desperate measures as suits against teenagers and college students, suits intended to intimidate them into submission or, failing that, to punish them with levies and sanctions, both financial and (potentially) criminal in nature.[59] As we have said, all of these concerns and responses spring essentially from the appearance of copying technologies unknown at the midpoint of the twentieth century and still far short of their present capacities a mere twenty-five years ago.

Meanwhile, we think a second explanation for increased vigilance among copyright proprietors may be seen in the so-called fair use doctrine and its indirect effects upon public perceptions of entitlement, as well as on the ethics of copying now that copying is easily achieved. Our thought in essence is that fair use and its close companion, the compulsory license, may well beget increased efforts to limit appropriations, more or less in the way that attempts at progressivity in the course of any endeavor can be expected to provoke reactionary countermeasures. If this is so, it would be natural enough to expect reaction on the part of copyright proprietors proportionately greater than in other doctrinal fields. Other fields have rough counterparts to copyright's fair use doctrine and the compulsory license, but none is as important or as pervasive in its effect upon the proprietor's exclusive rights as is the case in copyright.

Fair Use in Copyright

Much of the intellectually stimulating complexity of copyright law is to be found in the intricate limitations on proprietary rights imposed by the so-called fair use doctrine. The subject is vast, and the history alone an invitation to discursive treatment that we must resist in a book whose aim is largely elsewhere. Yet our larger undertaking would be incomplete without some serious discussion of a doctrine the Supreme Court itself has recognized as essential to the ability of copyright to withstand tests of constitutionality raised by our current understanding of the First Amendment.[60] We will defer consideration of the constitutional dimensions of fair use to subsequent chapters. For the present we will content

ourselves (and we hope the reader) with a brief account of the doctrine and how it grew, and some preliminary observations about its significance in the law.

Prior to the adoption of the 1976 General Copyright Revision, fair use fell within the province of judges and judicial opinion. In its origins it appears to have sprung from two discrete concerns, one without doctrinal significance and the other the precursor to the elaborate system of fair use we know and deal with today.[61]

Thus, on the one hand, the term "fair use" was also sometimes employed to mean what today we would be likely to refer to as a de minimis or insubstantial taking. This is not at all doctrinal: lawyers and judges have long relied on the Latin maxim, *de minimis non curat lex*, which means (essentially) that "the law takes no notice of small matters." It is a maxim of general application, whether in copyright or elsewhere.[62] Long after fair use had come to have doctrinal significance, for example, Learned Hand still sometimes employed the term "fair use" as he did in the passage quoted above from *Nichols*, when all that he meant was that the matter was insubstantial—"a trivial pother," as he put it in another case.[63]

Meanwhile, Learned Hand also suggested in *Nichols* that copyright had never been limited to "the literal text," but that is not quite so. Early on, at a time when the federal copyright statute made no provision with respect to derivative works one way or another, fair use was a way of dealing with the public's limited right to appropriate less than the entirety of a work for incorporation into a later work in which original work by another author also appeared.[64] In fact, early in the first century of our experience with it, copyright was sometimes held by the courts not to confer exclusive rights to prepare abridgements or translations of a work, which persons other than the original author might undertake to do as a simple matter of fair use.[65] Of course this particular categorical understanding of the law has long since been altered; today the derivative works right extends to abridgements and translations, as well as to any other alteration of a work in which substantial amounts of previously copyrighted expression appear.[66] But the idea that copyright protection had limitations and boundaries was fundamentally doctrinal. Although

altered and enlarged in scope, fair use itself has persisted as a term of art, enabling judges and others to distinguish between exclusive rights in a copyrighted work and rights in the public domain.[67]

In contemporary usage fair use is in the nature of a trump card to be played by an accused infringer against the hand of a copyright proprietor in circumstances in which an appropriation that may appear on its face to be an infringement is nevertheless to be excused. When its recognition still lay entirely within the discretion of judges, the question of fair use was often treated as if it were a matter of equity. Sometimes it might be recognized on grounds consistent with the practice (particularly characteristic of self-conscious American legal realism in the mid-to-late twentieth century) of referring to matters of public interest or concern as though they were categorical imperatives.[68] On still other occasions, fair use was judged according to economic precepts; one of the most intriguing essays on copyright during the late twentieth century was written by Professor Wendy Gordon, who suggested that fair use was copyright's answer to market failure.[69] Sometimes, in the end, fair use could seem essentially arbitrary or, at its worst, no better than a matter of whimsy. Even at its best, given the flexibility inherent in a doctrine that lay entirely within the keeping of judges, the availability of fair use was notoriously difficult to predict in a given case, and undoubtedly was extended or withheld in error from time to time—or would have been, at least, had anyone been able to say with certainty where error might lie.[70] We have suggested, for example, that the result in the case of the Iowa choir director was wrong—that on the facts disclosed there the court would have done better to recognize fair use in the later arrangement.[71] But Professor Nimmer (whom we generally acknowledge to have been the foremost copyright scholar of his time, and our own initial guide to understanding copyright) disagreed with this view; in his opinion, the translation was a straightforward violation of the derivative works right. Is one of us clearly right or wrong in some objective sense? Not even Professor Nimmer would have been likely to make that claim. Fair use is almost always a matter of judgment in which, as he himself suggested, the challenge is akin to practicing the Golden Rule.[72]

In theory none of the exclusive rights in a work of authorship is beyond the reach of a fair use claim. In practice, however, fair use is more likely to be recognized in some circumstances than in others.[73] Sometimes the differences seem intuitively right or natural. Substantial appropriation of commercially valuable work for competitive use is rarely allowed under current law.[74] At the same time, even extensive appropriation for critical or scholarly use in essentially noncompetitive settings is more likely to be recognized as permissible—and still more so when the appropriated work is itself without substantial commercial value.[75] Appropriations from longer or more complex works grounded in fact, such as histories or biographies, are given greater latitude than in the case of poems or musical compositions.[76] Texts are more susceptible to fair use than graphic or pictorial works.[77] Published work is more susceptible than unpublished work.[78] And so on. Sometimes, however, the justifications for differences in fair use treatment are less transparent. Appropriations for the purpose of creating new transformative works[79] are said to deserve the benefit of fair use more often than appropriations for use without additional creativity.[80] Parodies are given considerable protection under the fair use doctrine, on the ground that by definition a parody presupposes a need to "conjure up" the work which it is making light of.[81] That is no doubt so. But one might ask why that is not merely a reason for recognizing that parodies of copyrighted works are more likely to infringe than works which do not depend so heavily on appropriation? The answer given in the cases is that parodies are criticism, and that criticism is important to the public.[82] Again, fair enough (so to speak). But social satire is also important to the public, and yet satire does not enjoy the privileged place that parody does. Why not? Well, again, because satire does not depend upon appropriation as parody does.[83] Ah, then the rule must be this: that socially valuable infringements, when infringement is a necessity, enjoy a favored place within the fair use doctrine, while discretionary infringements, though they may produce work no less socially valuable, are less favored? Yes? In one sense, yes, exactly. But no one really supposes that a principle as existential in nature as this is reliable. Besides, were this the case, the derivative works right would disappear overnight. The explanation must lie elsewhere, as no doubt it

does. But where? Alas, not even the Supreme Court, whose jurisprudence lies at the heart of these distinctions, has ever advanced an answer sufficient to the need, not to this very day. In theory fair use may arise in any setting, but in practice its availability is often a mystery, neither clearly sacred nor yet quite profane.

Lawyers take a certain pleasure in obscurity of this sort—copyright lawyers no less so than others.[84] The law of fair use might have gone on indefinitely as a loosely principled judge-made collection of arcana had not a single case appeared in 1973, a case that in a sense marked the end of copyright's long period of innocence and the beginning of its struggle with the copying technologies that plague it (and for that matter plague us all) today. The case was *Williams & Wilkins Co. v. United States*, in which the United States Court of Claims held that fair use protected the National Institutes of Health against liability for infringement in using the newly introduced Xerox copier to reproduce articles from scientific journals for circulation among NIH personnel.[85] Before the advent of the copier, the journals in their entirety were routed to readers one by one, in a fashion then common and unremarkable in offices and institutions, but one that was also slow and for that reason less than satisfactory. Now, in contrast, NIH subscribed to a limited number of the journals from which it reproduced single articles in multiple copies as interest among its workers might dictate. Was this infringement or fair use? No one truly imagined that NIH would increase the number of its subscriptions merely in order to satisfy the appetite of its workers for quicker distribution of individual articles; the new copier did not in fact displace a market for the journals. Or so the Court of Claims reasoned in concluding that fair use protected the Institutes in what they were now doing.[86] Yet the publishers of the journals argued that that was exactly what NIH was doing when it employed the copier. This was neither more nor less than the exercise of the copying or derivative works right in response to an emerging market. Surely this could not be fair use! Disappointed by the result in the case, and alarmed by its implications, the copyright industries mounted a sustained attack on the underlying assumptions indulged in by the court.[87] Today, more than thirty years after the case was decided, we can see that arguments of this sort

have not diminished either in frequency or intensity. Indeed, the peer-to-peer file sharing controversy of our time turns on assumptions about displaced markets that are fundamentally like the arguments in *Williams & Wilkins*.

Congress had already determined to codify the fair use doctrine when the decision in *Williams & Wilkins* was announced. But its interest was now heightened by the cries of fear and outrage from the copyright industries, who warned that fair use might play a new and dangerous role as sophisticated copying technologies came into their own. When finally adopted, the 1976 General Copyright Revision responded with measures intended to codify existing doctrine, but also to impose a new procedural discipline upon it, and in particular to prevent findings of fair use that did not take fully into account the economic interests that might be presented by a threat of infringement in a given case. By no means was the Congressional response merely one-sided. Recurring categories of fair use were anticipated and provided for in circumstances that had not appeared in the cases. Today, the Revision provides that a copyright proprietor's rights are "subject to" some fifteen discrete sections elaborating the fair use doctrine through additional exemptions, limitations, or compulsory licenses— provisions hard fought over by interested parties as the Revision neared adoption and in the years since, and ultimately wrought in great detail and at considerable length (running to some seventy densely printed pages in the current copy of the statute that we happen to have at hand as we write).[88] Meanwhile, Section 107, the most general and overarching statement of the principles of fair use itself, provides as follows:

> Notwithstanding the provisions of section 106 [setting forth the exclusive rights], the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.[89]

On the face of the statutory text one might suppose that the exclusive rights are fundamentally subordinate to fair use. In practice, however, and consistent with the legislative history, fair use continues to be treated as an affirmative defense, which means that in an ordinary case the presumption is against the fair use claimant.[90] One might additionally suppose that the "purposes" set forth in Section 107 suggest the parameters of the fair use right, but that too is not the case. Fair use continues to extend potentially to any appropriation or other exercise of the exclusive rights for any purpose and in any setting in which such "use" is "fair."[91] The so-called "mandatory four factors" set forth in Section 107 have succeeded in imposing a formal discipline on fair use, in that every fair use decision since 1978 has dutifully considered the question in terms of the four factors, often at tedious length.[92] In substance, however, the law remains no more certain in result than it was before Section 107 was enacted. In a 2003 law review article summarizing the results in fair use cases, David Nimmer concludes that the doctrine remains largely unpredictable in practice.[93]

In at least one respect, however, the codification of fair use has resulted in a significant, albeit unanticipated, new role for the fair use doctrine. Courts have begun to consider what one might term mass infringement cases, as though they are amenable to resolution within the framework of fair use.[94] There is no warrant for this in the fair use practice prior to 1976, nor in the text of the statute,[95] nor in the legislative history.[96] To the contrary, the history suggests that fair use was to continue to be a matter for decision on a case-by-case basis, as had always been so prior to codification.[97] Yet, once again, pressures on the copyright system resulting from the new copying technologies have seemed to demand a more sweeping mechanism for review than Congress provided in the Revision. In the absence of something explicit, fair

use has been summoned to the task. The result has been a two-edged sword. On the one hand courts have been inclined to presuppose direct infringement in cases involving peer-to-peer file sharing, but only for the purpose of judging whether the manufacturer or provider of a given technology is engaged in contributory infringement. In such circumstances, for example, MP3.com, Napster, Aimster, and Grokster were each closed down (in some cases to reemerge later in a copyright proprietor-sanctioned form).[98] Yet in none of these cases was any significant liability assessed on the part of individuals. As a practical matter direct suits against individual defendants remain a daunting and at best uncertain challenge. Even the widely publicized recent actions by the Recording Industry Association of America against a few thousand individual defendants were more in the nature of a gesture (akin to swatting at gnats) than an effective deterrent to peer-to-peer file sharing. In such circumstances, one might conclude that the actual impact of fair use is at best to offer a potential defense to contributory infringers, while affording little in the way of a real assessment of the underlying problem.[99]

Thus, to telescope the history of these developments, in *Sony Corp. v. Universal City Studios, Inc.*, a case filed shortly before the 1976 General Revision took effect, but not decided finally until 1984, the Supreme Court held that home video recording for the purpose of "time shifting" was fair use.[100] The result in *Sony* has since been transmuted into much broader assumptions as to permissible copying—including such new technological generations of industry-sanctioned copying devices as TIVo, which permits digital copying of up to seventy hours of televised copyrighted work. Meanwhile, an additional part of the Court's holding in *Sony* engrafted onto copyright a principle originally (and still) recognized in patent law, to the effect that technologies that have "substantial noninfringing uses" may not be attacked on the ground of contributory infringement.[101] That aspect of the Court's fair use holding in *Sony* has recently been modified in the case of Grokster, a technology provider whose purpose in furnishing the technology was plainly to encourage direct infringements by users engaged in peer-to-peer file sharing.[102] Even so, the industries are still left with the

problem of proceeding individually against millions of infringers—in effect a no-win situation.

In summary, then, fair use encourages individual appropriation without effectively defining the point at which it shades into infringement. Meanwhile, the contributory infringement cases against the technology providers have had a mixed outcome at best. On the one hand, it is by now apparent that the providers cannot survive an incautious encouragement to direct infringement. Yet the fundamental holding in *Sony* survives *Grokster*:[103] some forms of appropriation for personal use are still permissible; we are merely unable to say what forms, and when. It is frustration with the practical impact of fair use, engendered by this sort of indeterminacy, that contributes to the industries' urge toward increased and alternative forms of protection.

The Compulsory License

Akin to fair use and intertwined with it in the structure of the 1976 Act, yet distinct in concept and practice, is the so-called "compulsory license,"[104] a device that figures prominently in copyright law.[105] The idea of such a license appeared first in 1909, when Congress enacted an earlier General Revision that for the first time addressed mechanical prefigurations of today's sound recordings. No recognition or protection for sound recordings themselves was made available in the 1909 Act: a decision by the Supreme Court in 1908 had raised the question whether a copyright could inhere in a copy that was not "visible to the naked eye," and Congress chose not to court trouble (so to speak) by extending protection to a medium of embodiment that clearly would not meet that test.[106] But sensing a purpose within the Italian music industry of the time to corner the market in musical compositions worldwide (so it was said),[107] Congress did provide that when a composition was recorded by or with the consent of its proprietor others would have a right to record that composition in similar fashion, upon the payment of a statutory royalty.[108] Whatever threat the Italians may in fact have posed soon passed into the sweet oblivion of scarce-remembered history. The compulsory license lingered on. In time the music industry in the United States accommodated itself to the idea of the license and, as is common in

law, devised methods of contracting around it. Thus, in fact, most "covers" of musical compositions were licensed on terms measured against but not by the statutory provision. In other words, the terms of the compulsory license provided a benchmark against which to negotiate, but did not themselves often figure in the actual negotiated license that the musical composition proprietor relied on. With some revisions not important to our narrative, that remains the state of the law and practice with respect to the compulsory license in musical compositions to this day.[109]

Meanwhile, the number of compulsory licenses in copyright law has grown dramatically, even as their complexity has increased by many orders of magnitude. The cable television industry, for example, relies on compulsory licenses with respect to copyrighted works imported via distant signals. Other compulsory licenses (tedious, complex, and considerably diverse in nature) can arise in settings involving such activities, for example, as the satellite carriage of copyrighted content offered by television superstations; certain digital transmissions of sound recordings; and ephemeral recordings intended to facilitate retransmission by the owners of the works so recorded.[110] Of course there is more that could be said about compulsory licenses, but we would be mad were we to delineate these provisions at still greater length in this book, and the reader would be even madder to indulge us. What we have said is enough to frame our original point: the compulsory licenses, like fair use, represent a notable incursion into the property interests that copyright proprietors might otherwise claim.[111] When to these licenses (fairly so called, in that each contemplates upon its exercise some form of prescribed or negotiated payment by licensee to proprietor) are added the many further exemptions and limitations the 1976 Copyright Revision imposes upon the proprietor's exclusive rights with no thought of payment at all, one can see that the nature of the property interest at stake in copyright is substantially different from the more exclusive interest one ordinarily has in a piece of real estate or an automobile—or for that matter in a patent.[112] It is not implausible, then, to suppose that copyright proprietors may be more than ordinarily aggressive in protecting such interests as remain to them. In this, as we have said, they may be acting

upon incentives that have no true counterpart in unfair competition, trademark, or even patent law.

The Question of Property in Copyright and Patent Law

Against this lengthy but (we think) necessary background we are ready once again to consider the question that we have posed at the foot of our discussion of each of the doctrinal fields we have previously addressed: in what sense, if any, can copyright and patent rights be considered "intellectual property"? We have seen that unfair competition and trademark doctrines share a community of interests amounting to what we have called "a rough correspondence" among them. As in these fields, so again we can recognize in copyright and patent law a concern for decency and fair play, and for maintaining the origins, identity, and integrity of writings and discoveries, and thus ultimately a coherent market for them. No less so do we reward the original author or inventor with recognition and an ability to recoup his or her investment in productivity through exclusive rights. Indeed, exclusivity is at its zenith in patent and copyright law, where in current law exclusivity is the cardinal incentive to creative productivity and the efficient management of a particular embodiment of creative products—or in other words, the "writings and discoveries" contemplated by the copyright and patent clause.[113] The incentive to be derived from exclusivity may even appear from the text of the copyright and patent clause to have been the very reason for the clause's introduction into the Constitution. In more than one opinion the Supreme Court has affirmed that reading of the clause.[114] Thus it can be said that the hallmarks of property that we encountered earlier in unfair competition and trademarks—exclusivity juxtaposed against the threat of unlicensed appropriation—reappear in the fields of copyright and patents, if anything redoubled in the vigor with which they may be advanced by proprietors. In this, copyright and patent rights may be seen against other forms of intellectual property rights as *primus inter pares*.

It is no less true, meanwhile, that in patent and copyright law we encounter heightened concerns for the interests of others: of individuals as well as the public at large.[115] These are part of the positive law, both

statutory and judge-made, as in unfair competition and trademarks; but as is not so in these other doctrinal fields, the concerns for the public domain are bred into copyright and patent law by the decisions of courts construing the language of the clause that justifies them. Thus, the "exclusive rights" that the copyright and patent clause authorizes Congress to confer upon "authors and inventors" may endure for no more than "limited times" in works, and presumably even then only when conferring these rights will "promote the progress of science and the useful arts."[116] As the constitutional provenance of copyright and patent rights is clearer and more obviously justified than is true of other doctrinal fields such as unfair competition and trademarks, so is that provenance limited more directly by the Constitution.[117]

It seems true as well that authors and inventors may have moral claims to recognition that proprietors of rights in other forms of intellectual property share in some measure.[118] In more than one opinion, the Supreme Court has cast doubt upon this proposition, saying in effect that copyright and patent rights are grounded in the Constitution's concern for the intellectual economy that these rights are meant to bring about. Yet recognition of some moral claim as an aspect of an interpretation of the proprietary rights seems intuitively justified. When we speak of "moral rights," however, we must make our meaning clear, for the question of moral rights is inevitably complicated by the even more important question of the public domain.

MORAL RIGHTS AND THE PUBLIC DOMAIN

Moral Rights

The French, who generally figure in any account of *le droit moral*, are said to envision authors as entitled to recognition along four lines of what may be thought of as natural rights: the right to be identified as the creator of a work; the right to decide when and whether to disclose, publish, or otherwise disseminate the work; the right to withdraw from public association with the work, should that association later prove to be embarrassing or otherwise unwelcome; and perhaps most important among the four, the right to prevent others from dishonoring the author

or the work through such offensive assaults upon it as distortion, truncation, abridgement, alteration or the like. These four rights are widely recognized in Europe and elsewhere in the world; they are what most who refer specifically to "moral rights" mean by that term unless they clearly indicate otherwise.[119]

Moral rights also play a central role among the provisions of the Berne Convention on Copyright, to which the United States, acting somewhat reluctantly and then only after nearly a century's delay, finally adhered in 1988 (effective March 15, 1989).[120] This reluctance reflected the United States's long-held insistence that its copyright regime was not based in natural (or moral) law, but rather in the copyright clause's contemplation of an intellectual economy based on incentives to productivity provided through limited terms conferred in exchange for eventual dedication to the public domain.[121] Article 6 *bis* of the Convention requires that moral rights be recognized "independently of the author's economic rights," and provides further that "even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[122] These provisions could pose a serious dilemma in the United States where, if not severely limited, they might lead quickly to a confrontation with the First Amendment, not to mention the copyright law itself.[123] Happily, however, Article 6 *bis* also provides that "the means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed." Relying on this provision and a *soupçon* of disingenuousness, the United States professes to see in its legislation provisions sufficient to meet the moral rights requirements reflected in the Convention.

The reader should understand, meanwhile, that when we refer to moral rights in the present context we do not mean to endorse the particular moral rights regimes of France or of the signatories to the Berne Convention. We do not necessarily suppose that moral rights can survive an expired term of copyright in the United States, nor for that matter that they can survive a complete transfer of "the author's economic

rights." We have already suggested that the moral entitlement of an author against mutilation of a work must be limited so as to avoid conflict with both the copyright clause and the First Amendment. There is also ample reason to doubt that an author can insist on acquiescence in or acknowledgment of his wish to publicly repudiate a work that he himself has consented to disclose; First Amendment questions surely would arise were a court to attempt to forbid the public from drawing associations between author and work that are in fact there to be seen.

On the other hand, we see no conflict lurking in the proposition that an author or inventor should be entitled to decide whether or not to publish a work or disclose an invention in the first place. That decision is among the exclusive rights granted to an author under the provisions of Section 106 of the 1976 General Copyright Revision; but even in the absence of an explicit provision in the positive law it seems likely as a matter of intuition that most of us would recognize such a right nevertheless, and would think it sensible to speak of it as a matter of moral entitlement. The patent law does not grant any corresponding affirmative right with respect to disclosure, but it clearly presupposes that an inventor may suppress or abandon an invention; the penalty may sometimes result in a forfeiture of the patent claim, but there is no mechanism within the law that obliges the inventor to disclose. Again, positing a right not to disclose in the case of inventions seems intuitively correct.

Similarly, one can easily imagine acquiescing in an author's or inventor's claim to recognition with respect to an original work or discovery. Under current law, patents issue in the name of the inventor. Copyright contains no similar requirement, but there is no reason to suppose that it would be offended by a reasonable provision with respect to recognition, whether or not under separate law, including a provision grounded in moral entitlement. The issue raised by such a provision would seem to have at least as much to do with matters of expedience as of jurisprudence. No serious obstacle grounded in the philosophy of the underlying law should stand in the way. An acknowledgment of provenance is barely more than a matter of truth telling; yet it no doubt cuts to the heart of what is truly at stake in a creator's wish to be recognized. As we will argue in succeeding chapters, an ancient longing to be noted for

one's gifts is probably nearer to the true reason why authors and inventors create than is the mere prospect of financial gain.[124] Yet the provenance of a writing or discovery blurs quickly as time and distance, augmented by circumstance, separate it from its author or inventor. At some point the moral claim to recognition must be rejected firmly, more or less as Hand envisioned in the case of the patterns test he posed in *Nichols v. Universal Pictures*.[125] The obligation to acknowledge an author or creator should no doubt be balanced against the practical difficulty in doing so.[126] Scholars may sometimes choose to meet that difficulty head-on, though that is hardly an obligation for all scholars, nor is it necessarily productive of the best scholarship. Sometimes the question of provenance is primarily an obstacle to additional creativity. It is disturbing to imagine Shakespeare or Wittgenstein spending a moment of their precious time on concerns for the origins of the works upon which they built. And obstacles in the path of genius are merely illustrative of the underlying problem and its corollary. No one, great or small, should be warned away from the public domain by the burden of identifying the origins of works that lie within it.

The Public Domain

What do we mean when we speak of "the public domain"? The answer to this is surprisingly complex and indeterminate. Until perhaps twenty-five years ago, one might have responded by saying that the public domain was merely the term to be given to such rights in ideas, discourses, or inventions as might remain after the demands of the intellectual property spheres had been satisfied.[127] Even today that is often what is meant by those who use the term in conventional settings.[128] But the term has taken on additional significance among contemporary students of intellectual property, including judges, practitioners, legislators, and academics, who have come to understand that the public domain also can assume the form of an affirmative entity, as deserving of recognition and entitlement in its own right as any of the discrete doctrines.[129] Seen in this way, the public domain stands as an embodiment of the natural state of being in which ideas and their expression flourish freely prior to their appropriation by persons entitled to claim them by

the processes of positive law.[130] Some see the public domain as a commons, a cultivated place akin to a public park, in which all are free to share equally, on common terms.[131] Others see it as a wilderness or frontier, in which ideas and their expression roam free, subject to no rules at all.[132] Still others see the public domain as a status conferring entitlements that are personal, portable, and defining.[133] Under any of these three views, however, and others like them, the role of the public domain vis-à-vis the intellectual property doctrines (trademarks, trade secrets, patents, copyright, and so on) is exactly reversed from conventional understanding: it is the public domain that is the *ur*-right—standing, in order of precedence, first as natural entitlement, then as presumption, and finally in default, while the doctrines themselves are an exception to the rule of free appropriation and expression. Moral rights are not inevitably inconsistent with this concept of the public domain, but neither are they its equivalent; and when they conflict with the public domain, it is they that must step aside.[134] Even the intellectual property clause and the First Amendment, powerful as they are (or ought to be) in the governance of the American Republic, can do no more than partial work in the service of the public domain, where the rights of the American citizen with respect to ideas and their expression ultimately begin and end.

These concepts are at the center of our next two chapters, and we will defer additional discussion accordingly. In the meantime, they bring us to a point of joinder with additional questions addressed to the idea of intellectual property and its merits.

AD INTERIM: A SUMMING UP

Why do we recognize interests in intellectual property? Not for historical reasons; intellectual property has little in the way of history, whether in the United States or elsewhere. In its general usage, the term itself is less than half a century old in this country, and not much older (if as old) in many other parts of the world. Even the discrete doctrines from which intellectual property is derived have had no very considerable past. Copyright in Anglo-American law is barely three centuries old; patent law is scarcely older. Their real development has come mainly in

the twentieth century, and in the latter half of the century at that. Trademark proprietors and their lawyers and agents claim a lineage that can be traced to antiquarian practices of marking goods, wares, or services—amphorae inscribed with the names of their owners, for example, or guild practices intended to insure that unlicensed artisans and vendors did not ignore the entitlements conferred upon them by their lords and masters. Even so, contemporary laws governing trademarks and unfair competition bear little resemblance to the practices of antiquity; like copyright and patents they trace their contemporary development largely to contemporary circumstances.

Nor is there any widely accepted progenitive theory to which the origins of these doctrines can be attributed. Natural law or moral rights may justify recognition of copyright and patent law in some quarters of the world—mainly in post-Enlightenment Europe, beginning at the end of the eighteenth century. In America, however, these laws are grounded chiefly in a very different sense of their worth, one in which the justification for laying restraints upon what otherwise would belong to the public domain is said to lie in the "progress" that will follow if originality is rewarded with "exclusive rights" for "limited times." The appearance of a constitutional imprimatur undoubtedly furnishes a significant justification for Americans, who ascribe to the Framers a transcendent wisdom that is its own argument for acceptance. Until late in the twentieth century, however, neither natural rights nor a purpose to encourage creativity was widely recognized elsewhere in the world. With the exception of countries in Western Europe, most sovereign powers did not take copyright or patent law seriously, nor did they accord the sort of respect to trademarks common in the West. In the several Asias, the Near and Middle East, Eastern Europe and Latin and South America, observance of the doctrines was limited or nonexistent; in some countries (among them, notably, India and China, and of course the Soviet states whose collectivist views were antithetical to the notion of private interests in thought and speech) the doctrines were affirmatively ignored or rejected. Repackaged as intellectual property, the doctrines came into their own chiefly in the last three decades of the twentieth century, propelled forward in no small part by the desire for global commerce that fed the

trade policies of a handful of so-called "developed nations"—foremost among them the United States, which was determined to lead the rest of the world into the "trade related intellectual property accords" that were engrafted onto the General Agreement on Tariffs and Trade in the course of the Uruguay Round, and ratified at Marrakech in 1994. The result of these developments is the World Trade Organization, a powerful body with considerable political influence around the globe, to be sure, but in no ordinary sense a product of high theory.

Economists, whose prescriptive theories have made their way increasingly into the precincts of legal thought in the last half of the twentieth century, have advanced arguments that justify the doctrines in intellectual property in terms that reflect and augment the Framers' underlying assumptions—that is, as incentives to productivity and efficient management. Economic arguments (especially by lawyer-economists) continue to be the strongest source of theoretical justification for the recognition of these doctrines; but the arguments for them have declined in force as the objects of their attention have gained increasing attention in their own right. The fact is that intellectual property interests lack the finite tangibility characteristic of most forms of property; things protected by copyright and patent are not "rivalrous": once created, they are readily susceptible to replication and subsequent sharing without diminution. Some have argued that the interests provided for by the Framers were never intended to amount to property, but were rather envisioned in terms that today would be seen as regulatory regimes.

In the end, as Justice Holmes might well have observed, the justification of the intellectual property doctrines has come not from theory, but rather from experience. In practice, arguably, they have afforded a great measure of wealth to the nations who acknowledge them and the proprietors who pursue them.

If there were nothing else to consider, then few among us would question the justification for the intellectual property doctrines. But there is another perspective to be taken into account. In recent decades the omnipresence of these doctrines in individual lives, and their convergence with the digital media (including the Internet), have led many to decry what only a few recognized as troublesome before, namely, that we may

be recognizing property in ideas and expression only at the expense of thought and speech. This is by no means conceded on every hand. Indeed, the matter is hotly contested. Among the several questions implicit in this debate, three are paramount. One, of course, is whether the original insight is so: whether, in other words, contemporary interests in intellectual property come frequently at the expense of freedom of thought and speech? The second is whether, if that is indeed so, we should continue nevertheless to nurture the growth of the existing doctrines, upon which much of our contemporary culture undeniably is founded and may very well depend? And the third is whether it is possible that the very framework of law and policy from within which these issues spring is itself flawed, so as to suggest the possibility of a resolution of such conflict as there may be along lines not yet widely considered or discussed? These are surely among the most significant public issues of our time. In the chapter that follows we will address them, one by one.

CHAPTER 3

Exclusivity versus Appropriation: Some Questions and Costs

AS WE HAVE SEEN, copyright in America encourages intellectual productivity by protecting the original expression of authors against appropriation by others for a period of time. Patents encourage productivity by inventors in similar fashion. Trade secrets encourage a more modest form of inventive productivity by protecting secret know-how and business practices against improper appropriation. Trademarks and unfair competition encourage confidence and efficiency in the marketplace by protecting trade identity against confusion and appropriation.

Note that intellectual property laws typically do not stop at forbidding unfair, immoral, or otherwise undesirable conduct. They also create or recognize or imply possessory interests that are themselves protected against the forbidden conduct. In copyright this means that expression is typically secured against appropriation as though expression were property—that is to say, with the implied entitlement to exclusivity that the concept of property typically affords. In patent and trade secret law, inventions and know-how become kindred species of property. In trademarks, the law professes to be concerned chiefly with confusion, but in reality often treats trade identity as though it too is property entitled to exclusivity. In unfair competition the law was once concerned mainly with improper conduct such as passing off, but now is concerned more insistently with exclusivity, as is the case with such examples of misappropriation as common law copyright and the right of publicity. The law of intellectual property thus encourages productivity, confidence, and efficiency, or so it is said—but in each instance, of course, an entitlement to exclusivity means that the interests of some persons are protected at the expense of the interests of others.

Questions and costs are implicit in the last sentence. Let us take them each in turn.

SOME QUESTIONS

Does intellectual property encourage productivity, and if it does, is it productivity of a sort that we would not otherwise have? It is sobering to reflect on how little we have in the way of an empirical answer to even the first part of this question. The truth is that we simply do not know in what absolute measure intellectual property encourages productivity. Economists (of the law and economics variety) mostly seem to think it significant. Policy analysts mainly concur. Lawyers and their proprietor clients claim it is. Judges are obliged by law to act as though it is. Lay persons suppose it is. Surely it must be. But where does the evidence really lie? We can ignore for the moment economists, who famously produce beans and can openers on desert islands, while bickering endlessly about how best to do so. Likewise the wonks, who are these days mainly economists manqué. Let us ignore the lawyers and judges, who in matters of this sort are mockingbirds, singing the songs of others. Let us also ignore intellectual property proprietors and their proponents, whose testimony is likely to be tainted by privilege. Ignore them all though we may, however, in the end it is still difficult to deny our own powers of observation. We appear to have, for example, a lot of the stuff the two principal intellectual property regimes supposedly encourage: from copyright (it seems) we have books, movies, songs, recordings, plays, art, architecture, computer programs, and so on; from patents (it seems) we have medicines, new technologies, improvements on old ones, and so many other supposed advances over prior arts that their sheer numbers can mislead the unwary and the optimistic. (A commissioner of patents observed at the end of the nineteenth century that patent law had been so effective that we had by that time invented everything that could be invented.) In an absolute sense it would seem that intellectual property works as it is supposed to.

But then again, how do we know that these things are the net result of intellectual property? Some medicines, yes: it does seem likely that pharmaceuticals are patent-dependent to a notable degree, given the contours of the present marketplace.[1] And some entertainment: it seems obvious enough that copyright or something like it is a necessary ingredient in the production of big movies—works like *Star Wars*, for example,

which surely depend on copyright for the financial security that continuing investments in them must have. (In truth this last proposition is debatable; we'll simply concede the point here for the sake of discussion, and return to it later.) But is it accurate to say that all (or most, or *any*) of the products of the intellect that we have listed here are dependent for their very existence on copyright and patent law? If copyright and patent law were abolished would we have these things in equal measure nevertheless? Or fewer of them, or none at all? Or would we, perhaps, simply have as many of them as we actually want and need, and a number of others besides—the latter appearing at the edges of the marketplace from time to time, to test their prospects as new products do when competition is truly free?

Others before us have posed questions like these. There are no certain answers. Let us contemplate them here, for example, in the context of copyright.

Enter the Economists, Pursued by a Breyer

Stephen Breyer (now an Associate Justice of the Supreme Court), while still a young law professor at Harvard some thirty-five years ago, challenged the easy assumptions we make about copyright in an essay that raised questions along just such lines, questions that provoked an uneasy response (mainly silence at the time) from the copyright community.[2] Breyer's argument was that "lead time" (that is to say, getting to market first), augmented by some other corresponding advantages—including, or so a reader might have supposed, the advantage of authenticity that being first often begets in the minds of consumers who associate the product with its first producer—might well furnish most, if not all, of the incentives and protection that copyright affords.[3] The focuses of his study were book publishing, photocopies, and computer programs (then still very new), but the implications in his thinking went considerably further. Most works to which copyright applied at the time seemed to be covered by the thrust of Breyer's arguments. Architectural works were not added to the copyright regime until 1990. But these too would have fallen rather easily within the framework of Breyer's arguments, assuming that such arguments were needed: architects and

their works (think Louis Sullivan or Frank Lloyd Wright or Mies van der Rohe) have never been dependent upon the exclusivity afforded by any of the intellectual property regimes.[4]

The weight of opinion has mainly ignored or coopted, rather than refuted, Breyer's arguments, not just then but still today. A common belief is that intellectual property incentives are important to productivity—that the correlation between the products that we see around us, and intellectual property's incentives to their production, is strongly positive, and that the incentives themselves are almost certainly necessary.[5] Further, a common assumption is that investment in new entrepreneurial undertakings is contingent upon the availability of well-established and protected intellectual property regimes. This is most evident in the context of foreign direct investment,[6] which is the focus of the studies, but seems equally plausible in the case of venture capital for start-ups in the United States as well.[7] In this sense, at least, intellectual property and productivity appear to be interdependent.

Yet in the end, the assertion that exclusivity equals productivity is essentially thin or testimonial or theoretical, or some combination of the three, and "believe" is the operative word. We do not know in absolute fact whether intellectual property regimes significantly encourage intellectual productivity, much less whether they are "necessary."[8] A handful of inquiries into the question (mainly in the context of patents) have produced mixed results, as readily supportive of arguments against the necessity of intellectual property regimes as the other way around.[9] Meanwhile, no serious, comprehensive, and elongated inquiry has ever been conducted to determine the answer to either of the questions we have raised at large, nor is one likely to be, for the reason that such an inquiry would require us to experiment in ways we are plainly unwilling to dare—and also for the reason that we are a nation which, given the intellectual property clause, has to a considerable extent presupposed the answers from the beginning of its existence. Believing in intellectual property is like believing in Tinker Bell: we clap our hands, and it is so.

Yet there is also ample anecdotal evidence that intellectual property regimes are in fact often marginal in encouraging the production of

many forms of creative productivity, and, at least in terms of exclusivity, may indeed be unnecessary.[10] For the purposes of our book this is especially significant in the case of expression amounting quite clearly to speech—expression of the sort that copyright particularly protects against at-will appropriation.

Breyer was clearly correct, for example, in suggesting that computer programs do not depend for their existence on the sort of exclusivity that copyright confers.[11] Whatever doubt there might once have been about this question, our collective experience in this field is sufficient by now to demonstrate that copyright has been a convenience to some and a burden to others in the field, but by no means a necessity.[12] To be sure, Microsoft has relied heavily on copyright and patent law alike,[13] as have a number of its counterparts; but it is also true that Microsoft's principal competitors today include numerous programs in which protection is either disclaimed altogether or modified so as to eliminate or curtail exclusivity in favor of sharing.[14] In this latter sense, computer programming can be thought of as an extension of American arts and artisanship.[15] Potters, metalsmiths, woodworkers, cabinetmakers, carpenters, blacksmiths, jewelers, and the like have not historically relied on exclusivity, but rather on priority, reputation, and authenticity, as well as other corresponding advantages earned in the marketplace in much the manner suggested by Breyer's analysis.[16] This historic indifference to exclusivity among artisans may well be changing: it is hard not to be aware of intellectual property in our time, and the appeal in it is often strong. But no one can say that the arts and crafts movement in America has been dependent on exclusivity. Much the same thing is true of the fine and applied visual and graphic arts (including photography), which do not appear to have been copyright-dependent in the past, though they are undoubtedly more sensitive to it now that copyright is omnipresent in the culture. Note well the limitations in our claim: we do not say that copyright and exclusivity do not play a role among the arts today, but rather that it is not evident that exclusive rights have been, or are now, essential to such productivity as we have had or may yet desire.

Popular industrial and commercial designs have been similarly independent of intellectual property incentives in the main. Copyright has

never extended clear-cut protection to industrial or utilitarian designs as such;[17] trademark law occasionally does,[18] but the protection is problematic and uncertain. Design patents present challenging hurdles and do not in fact reach many popular designs, not even when in theory they might do so.[19] Automobile manufacturers, for example, have never relied on any form of comprehensive protection for their designs, despite the undoubted fact that design can and generally does play a key role in sales. Designs are regularly imitated by competitors, sometimes so closely as to make it difficult to distinguish one car from another at any distance. In this setting, lead time is clearly a source of advantage to the innovator, and a powerful incentive to change in others. Of course automobile makers do depend heavily on their trade identity:[20] the Cadillac mark is a powerful symbol and an undoubted source of advantage in the market. But the design of the Cadillac itself, at any given time, is likely to be one among a number of designs converging upon a common, if constantly evolving, aesthetic, including such notable milestones in design as chromium-plated breasts jutting from the grill, and of course tail fins. In numerous other settings in which design appeals strongly to the public at large, or to some significant segment of it, intellectual property has played no important historic role. Clothing designers, like auto makers, rely heavily on design, but depend chiefly on lead time, authenticity and reputation (or trade identity), as well as price and quality (and sometimes service), for competitive advantage.[21] So do appliance and tool makers.[22] In these last two cases, functionality is to some extent a determinative factor in design, but not entirely: the avocado and copper tints of kitchen appliances, circa 1960, were driven by taste, and not by advantages inherent in exclusivity. Interior designers, meanwhile, like architects, rely on their reputation for aesthetic superiority for such advantage (often very considerable) as they possess in the marketplace. Even when, as in the case of fabric[23] and carpet[24] designs, copyright appears to play a stronger role, the likelihood is that exclusivity does not so much encourage productivity as discourage competition. We would likely have the same multiplicity of designs with or without copyright; exclusivity merely makes them more expensive. In short, despite occasional arguments in favor of design protection in these and similar set-

tings, there is little evidence that such protection has ever been needed, nor does it appear to be needed now.[25]

But what about information and data? The proprietors of data collections relied to some extent on copyright until 1991, when the Supreme Court, in a remarkable departure from its more typical support of copyright in all its manifestations, held that the rationale of the copyright protection claimed by these proprietors was flawed, both in an immediate statutory sense, and still more broadly in terms of the copyright clause itself.[26] The standard rationale for data protection was that the gatherers of this information had expended labor and money (or money's worth) in their collection.[27] Their efforts were often described in the copyright setting as "sweat of the brow"; protection followed on essentially Lockean terms. This had been a well-established doctrine in copyright: by 1991 an extensive line of cases had approved the "sweat of the brow" doctrine, their provenance going well back into the nineteenth century.[28] Yet the Court, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, held that "sweat of the brow" was a concept recognized neither in the definition of the term "compilations" under the 1976 General Copyright Revision, nor in the provisions of Article 1, Section 8, Clause 8, which explicitly presuppose "originality" in works of authorship.[29] The result of this turnabout in the law was that data proprietors were stripped of a considerable amount of the protection they supposed they had enjoyed.

Dire warnings followed, of course, in all the usual quarters: in conferences, professional[30] and academic (the latter perhaps better described on the whole as approving, rather than dire); in journals; in Congress;[31] and so on. In Europe a Database Directive followed after some years of study and debate, the effect of which was to secure protection there—not of course as a direct consequence of *Feist* (which had no immediate significance in European nations), but still at least as an indirect response to what data proprietors around the world were lamenting as Armageddon in the United States (where, the center not having held, the Rough Beast was now slouching toward Bethlehem).[32] Despite constant efforts to persuade Congress to offer some alternative form of protection (perhaps under the commerce clause, where "originality" plays no greater

role than does the concept of "interstate commerce" itself), none has followed to this day. And yet (*mirabile dictu!*), years after the decision in *Feist*, data go right on being collected and their gatherers continue to flourish in their customary marketplaces and beyond.[33]

Was copyright ever necessary, whether as incentive or as protection? Data proprietors relied on it as a security blanket of sorts, without doubt—but was it necessary? It is not easy to make the case that it was. It is easier to make the case that data will be compiled, whether or not protection follows, for essentially the reasons Breyer contemplated decades ago: those who come to the market first, with reliable information, conveniently packaged and sensibly priced, are likely to go on enjoying the custom of others who prefer to trust the market leaders while leaving the investment in research and development to them.[34]

Meanwhile, with perhaps one notable exception, the press does not depend much today on copyright, and in truth never has done so on any widespread basis. News moves too quickly to make these forms of protection useful. More important than copyright, the ethics of journalism provide alternative sources of incentives, chiefly through aggressive competition augmented by acknowledgment and attribution in cases in which one competitor has managed to "scoop" others. Peer recognition (as in the case of the Pulitzer Prize) also plays an important role in encouraging innovative professional behavior in journalism. Even then, the patterns of competition reemerge quickly; in journalism, one can rest neither on one's laurels nor on the sort of long-term exclusivity afforded by intellectual property. It is not yet entirely fashionable to think of Internet bloggers and their ilk as the next generation of journalists and public intellectuals (though that is plainly what they are), but they are clearly beginning to be an important factor in the so-called "marketplace of ideas"; and it must be said that there is no important evidence that their emergence is a function of copyright or some similar system of exclusivity. If anything, quite the opposite is so. Indeed, when we consider the nature of these and other public discourses in American life, it is difficult to think of a single example that is truly dependent for its very existence upon the availability of exclusive rights in its expression. The Supreme Court has said more than once that "copyright is the

engine of free expression,"[35] but, as we will see later, that is mainly hokum and blather. Americans are not fundamentally dependent on copyright exclusivity to generate public discourses. To the contrary, in the relatively rare instances in which such discourses intersect importantly with copyright, the net effect of exclusivity is apt to be suppressive rather than the other way around.

We say "with one notable exception": television news and sports agencies, like their earlier counterparts, the newsreels, and, to a lesser degree, pictorial magazines (now mainly nonexistent, thanks to television), probably have relied on copyright to generate some portion of their revenues at the margin. This was almost certainly not a significant factor in their origins, however: neither newsreels nor magazines like *Life* or *Look* are likely to have relied on business plans that were truly copyright dependent. Newsreels fed at the same trough as movies; advertising and circulation revenues provided the cornerstones of magazines' existence.[36] Such revenues as these media realized from the sale of photos or footage came in the form of windfalls. (This remains true even today in the case of magazines.) The evidence that revenues from licensing have played no greater role in the evolution of the visual media can be seen in this important fact: none of these has established any serious effort at marketing their wares to the public at large beyond the outlets in which they first appear. For example, there are no true counterparts among these media to the clearing houses that are commonplace in music where widespread licensing plays a real part in the continuing existence of the music publishing business.[37]

Exclusivity does play a more important role in the entertainment industries—which, significantly, are also often referred to as "the copyright industries." It is perfectly clear even here, however, that such protection has not always been a necessary incentive to productivity, and may in fact be inessential today. Until the beginning of the twentieth century, the three principal forms of entertainment in America were to be found in books, theater, and music.[38] We shall not repeat Breyer's analysis of "the uneasy case" for copyright in books, except to emphasize that the practice of advances, followed by a well-negotiated publication agreement (between publisher and author), followed by a carefully

orchestrated and aggressive marketing plan, have undoubtedly played a considerably stronger role as an incentive to productivity by authors than has copyright itself. Historically, meanwhile, statutory copyright played a minor role in the case of theatrical productions, which also depended instead on incentives like the ones discussed by Breyer. This was especially true in the later medium of vaudeville and burlesque, where wholesale appropriation of the work of others was not only rampant, but also arguably necessary to the evolution of the medium.[39] To be sure, vaudeville and burlesque are now dead, but not for lack of intellectual property protection; they were killed off by the emergence of new media, including motion pictures, radio, and television[40]—the latter two governed by regulatory blue laws that made it impossible to transfer the coarser amusements of vaudeville and burlesque from the stage to the airwaves.[41] The new media have all relied far more heavily on copyright and similar forms of protection since the middle third of the twentieth century; theater learned to do so in that time as well.[42] It is at least debatable, however, whether any of these media have flourished primarily (or significantly) as a consequence of the exclusivity afforded by the intellectual property regimes. Of course we do not doubt that these regimes have been convenient; nor do we doubt that exclusivity has played (and continues to play) a central role in the copyright industries' business plans. We mean merely to question whether in fact the sort of exclusivity that is among intellectual property's most important hallmarks has been essential to their success.

Item: The Music Business

Is copyright exclusivity a necessary incentive to productivity among musicians? Let us begin our response to that question with some anecdotal evidence dear to our hearts.

The Grateful Dead, among the most phenomenal rock bands in the history of the art, did not rely much on intellectual property for their extraordinary success. But then, neither did they object to appropriation of their music and performances.[43] As the now-sainted Jerry Garcia was known to observe, "Once we've played it, it's yours."[44] In every venue the Dead reserved the choicest seats for fans who brought recording equip-

ment to copy the concert from beginning to end. At one hallowed moment in the evolution of the group, before the advent of the digital technologies, the Dead even allowed these tapers to jack their equipment directly into the band's own sound system, the better to suppress the background "noise" that otherwise would have degraded the recordings.[45] It was understood that copies of these recordings would be multiplied a thousandfold and exchanged for similar recordings of other performances among fans who prized their collections the way the Louvre prizes the *Mona Lisa* (which, by the way, was not produced in response to copyright either). The Dead issued some commercial recordings and participated in some film productions, but these were not the dominant source of the group's revenues, nor were they intended or expected to be.

Copyright incentives thus obviously played a smaller-than-ordinary role in the band's financial success, which was extraordinary nevertheless. Judged entirely in terms of revenues produced,[46] the Dead may have been the single most successful rock band of their time. And how did they succeed? Through the loyalty of their fans (who in reality were something closer to disciples), many of whom followed the group around the country on its frequent tours, camping out at each venue in a caravan that was in its own way a major part of the Dead's appeal.[47] No one who has ever savored a Corona Extra and a grilled cheese sandwich hastily cooked on a well-crusted one-burner hotplate and served at sundown from the not-all-that-sanitary hands of besandaled sprites in tie-dyed apparel, while wandering amidst the jumbled array of gaily painted one-time school buses and VW Micros (ideally the model with opera windows, like the one Arlo Guthrie drove to the dump in *Alice's Restaurant*), in a pleasant haze of body odor, burning grease, and patchouli, is likely to forget the experience, or what it meant to one's understanding of transcendence. It was easy, in such circumstances, to Expect a Miracle. The Dead themselves meanwhile said nothing to their fans at any of these events. They simply walked onto the stage and began to play, the performance itself enough, and the music all the more deeply satisfying because, already familiar and needing no introduction, it also belonged already to the audience as much as to the Dead.[48]

The Dead did not rely on copyright because, as we have said, copies of their music were readily available—but far more than that, because copies were not the true nature of their product, which, as any member of the audience could have told you, was not a product at all, but rather an exercise in community, experience, and authenticity: the communal celebration of the music once again, experienced in the company of others in the authentic presence of the Dead.[49] Perhaps all concerts are religious experiences in some secular sense; if so, the Dead offered something close to a Rapture. Ah, but then, where did the money come from? From the sale of tickets to the concerts, which disappeared by the fistful as soon as they were made available at a signal from the Dead's headquarters, located somewhere north of the Golden Gate and south of Bolinas. And from merchandising—the Dead did sell some paraphernalia—tie-dyed stuff, mainly. These authorized promotional goods were almost certainly copyrighted and trademarked. But then you could buy the same things or their equivalent cheaper outside in the midst of the caravan, where, given their imperfect handmade quality, and their often grimy and sometimes even faintly desperate aspect and character, the authenticity of these items was arguably a notch or two higher than their more expensive and obviously commercial counterparts inside the gated venue itself.

Is copyright an important incentive to productivity among musicians? We have just seen that this isn't necessarily so. The example of the Dead suggests at least that much. To be sure, copyright is a convenience, as well as the norm, for many (let's say most) artists and producers in the contemporary recording industry. Bob Dylan, the Dead's contemporary, friend, and sometime collaborator, has relied on it for a substantial portion of the revenues he has earned over the years. So have countless others. Performers generally count on it, at least indirectly, and the recording industry now swears by it—though in fact this industry had no protection from copyright at all until 1971, and managed to flourish nevertheless. But new recording technologies make all the difference, the recording industry maintains; faced with peer-to-peer file sharing, how can it hope to "compete with free" in the absence of an ever-stronger copyright regime? As numerous contemporary observers of the scene have suggested, the answer to that question is, once again, a function of

the business model.[50] If the old model is no longer viable, then the industry may be obliged to find another, the way buggy manufacturers and horse traders did when the automobile came to stay in America. The standard ingredients in successful free-market competition are priority and lead time, quality, price, and service. In the context of the music industry, these can be augmented by authenticity and ambience. Given some combination of these ingredients and others like them, it is always possible to compete with free. There is reason to think the industry is beginning to come to the same judgment. The success of the iPod and its cousins shows that new, lucrative business models are possible, demonstrating at the same time how quality and convenience can be powerful antidotes to simple copying. Copyright and exclusivity may still be a convenience and the norm in that part of the music business devoted to performance and recording. But are they necessary? No. Clearly not.

And what about songwriters and music publishers? Copyright is the norm in many settings here too. Plan to use a musical composition in a theatrical production or a musical or in a television advertisement or motion picture drama, or in a host of other settings like these, in which grand performing rights or synch or master recording rights are involved, and you will need to negotiate a license, which may or may not be granted on terms you like or can afford. Yet negotiated licenses of this sort are not the sine qua non in what is perhaps the most common setting of them all. Recall the compulsory license. When a musical composition has been recorded with the consent of the proprietor, then others who wish to record the music may do so in similar fashion, subject to a statutory obligation to pay for the taking.[51] In this setting, copyright in musical compositions has not depended on exclusivity for most of the past century. Copyright in recorded compositions involves instead what some call a "liability" or "regulatory" regime—in which appropriation by others is a matter of entitlement upon the payment of a rent or fee—rather than a conventional property regime.[52]

Is copyright's more typical exclusivity necessary to the business of song writing and music publishing? Again, no. The compulsory license makes that clear enough. Is at least some form of payment essential as an incentive to the creation of new music? Perhaps not, in some absolute

or ultimate sense. Music is an innate form of human expression, and must out whether or not it is bidden. But if music is to be a business, much less an industry, then the answer is yes, of course. Once again the compulsory license offers one model for securing payment. But it is not the only model. In a thoughtful recent book, *Promises to Keep*, Professor William Fisher offers a sensible alternative to copyright and its systems of exclusivity and liability alike.[53] In essence, Fisher's model proposes measuring the value of a composition in the marketplace by tracking its appeal to the public, then compensating the composer accordingly from public funds generated through a special tax designed for the purpose. Not everyone will approve of a scheme that involves government intervention (though the present copyright system is itself a government-centered scheme), much less one envisioning compensation derived from tax revenues.[54] But then it isn't necessary to embrace the details of Fisher's model in order to embrace its deeper wisdom. His proposal clearly demonstrates that it is possible to reimagine incentives to productivity in the entertainment industries—and to do so in a way that does not turn on exclusivity. If copyright were to be displaced and supplanted by something else, Fisher's would be one way to maintain present levels of productivity. Alternatively, as in the case of the recording industry, what may be required, again, are new business models initiated from within the industry itself. In later chapters in this book, we ourselves will endorse another model, not necessarily better than Fisher's in theory, nor superior to models originating within the industry, but also feasible in our opinion, and arguably more responsive in conceptual terms to the other changes we also will propose.

Item: Movies

The motion picture industry actually had its origins in piracy on nearly every level. Would-be producers faced rent-seeking claims and still more oppressive practices arising from the infamous Edison patent trusts, which held patents on essential aspects of motion picture technology.[55] These artists found a measure of relief in escape to the west coast, where not only were the weather and the light more congenial to filmmaking, but where the filmmakers themselves could escape across the border into

Mexico, if need be, one jump ahead of the Pinkerton detectives who bedeviled them on behalf of Edison.[56] (This is, of course, an oft-told tale. Peter Bogdanovich's *Nickelodeon* offers a pleasing version of it in film.) Outlaws that they already were, these producers did not scruple at appropriating the work of others in support of their efforts: early twentieth-century film history is replete with cases in which copyright violations were alleged by authors and their publishers against filmmakers (including, for that matter, Edison) who had produced what today the industry itself would recognize as infringing derivative works.[57] We hasten to add that these early conflicts do not contradict the underlying point we are making here in any fundamental way. In the setting of that time, the plaintiffs in the cases were nothing more than advantage-seeking opportunists, anxious to shore up their place in markets in which they were unwilling simply to compete.[58] Their adversaries were mainly undaunted until the industry reached the point at which advantage-seeking opportunism appealed widely enough to make monopolies the norm. (Film buffs call the period that followed The Golden Age of Hollywood.)[59] Meanwhile, reading the history of the film business, one can be pardoned for concluding that the industry emerged, not as a consequence of copyright and other intellectual property regimes, but rather in spite of the drag on development they represented.

Of course, that was then and this is now. A century later, the motion picture industry can perhaps lay the strongest claim to being copyright dependent. Films in the commercial marketplace range widely in cost of negative, which is to say, the amount of money it takes to develop, produce, and complete a finished picture, ready to reproduce in prints for release and distribution.[60] On the low end, arguably, a creditable feature can be produced for as little as fifty thousand dollars, though that is low indeed;[61] a more typical low-budget feature ranges in cost from perhaps two hundred thousand to something between twelve and twenty million.[62] The typical cost of negative for a modest first-class feature film today comes closer to the fifty-million-dollar mark (give or take twenty million or so); and as every consumer of entertainment news knows full well, budgets well in excess of one hundred million dollars are by no means unknown or, indeed, uncommon.[63] No other

form of entertainment varies as widely in cost of production. And this is merely the beginning of the investment. To the cost of negative must be added sums to cover prints and advertising, as well as release and distribution expenses, amounting in all to roughly two to three times the cost of negative. Thus the investment in a fifty-million dollar production really presupposes an investment approaching two hundred million to bring the finished film to market.[64] This is a sum that cannot be recouped from foreign and domestic theatrical distribution alone,[65] but depends as well on subsequent revenue sources, including pay-per-view,[66] video, and DVD sales[67] and rentals,[68] and a number of other so-called "windows,"[69] as well as ancillary (promotional) goods such as toys, games, and the like.[70] (Remember Mel Brooks's discourse on "merchandising, merchandising" in *Spaceballs*.)

The sheer size of the investment typically made in the production, release, and distribution of a feature film invites analogies to the cost of developing new drugs.[71] The economic arguments in favor of patent protection for pharmaceuticals are thus roughly equivalent to the arguments in favor of copyright for the most expensive feature films. Investments of such size are unlikely to be made in the absence of extraordinary market mechanisms enhancing the likelihood of their recovery, at a profit. But the investment in theatrical features is not fixed by objective external considerations to the same degree as is true of drug developments. The cost of the latter is a function of legal standards and testing that must be met and surmounted before the drug can be marketed. Nothing of the sort has ever been so in the case of theatrical film production. Investments at higher levels reflect shifting expectations originating within the industry, rather than the immutable requirements either of law or, for that matter, the marketplace. To put the proposition another way, when investments of gargantuan size are made in such epics as *Waterworld* or *Heaven's Gate* or *Ishtar*,[72] it is because these investments are thought to be justified in the judgment of a relatively small handful of production executives and interested artists, whose reliability in such matters is nicely illustrated by these examples. Even *Star Wars*, a reflection of aesthetic and financial judgment in sharp contrast to the ones just listed, cannot be said absolutely to require the investment that

produced it. In fact, an amazingly sophisticated feature-length "episode" in the series has been produced within the past five years by unauthorized independent creators, using digital technologies, for less than fifty thousand dollars.[73] (To his great credit George Lucas has not objected to either the creation or the noncommercial Internet release of this adulatory but plainly derivative work, though it seems clear that he would not approve its theatrical or other commercial release.)[74]

In theory, then, we do not have to have big pictures. Small budget features can be made at levels of investment that do not depend on exclusive rights. In such cases, analysis akin to Breyer's would lead one to expect adequate returns on invested capital, and adequate incentives to continued productivity. Ordinary principles at work in the market would suffice. But big pictures are another matter. Investments in the scores of millions of dollars in a single feature almost certainly cannot sensibly be made in the absence of some form of extramarket sanction that suspends the ordinary rules governing investment, competition, and return, and converts them into rules amounting to a subsidy. (In this dependency filmmakers have come to resemble farmers.)[75] Even then, in the absence of substantial cross-collateralization among theatrical features the industry would collapse. In a nutshell this is the model of the film business today.

Is exclusivity itself a necessary part of that model? In fact the role that copyright and exclusivity have played in the development of the industry has been at best uncertain and uneven. Like the recording industry, movies came late to copyright, and then existed for decades without relying much on copyright's protection against simple copying.[76] There was no need to rely on copyright: films were beyond the copying capabilities of most who saw them; and unauthorized exhibition was similarly impractical.[77] Pirates were a nuisance, but little more. Copyright served mainly as a device for avoiding vigorous competition in the marketplace in the case of derivative works. But then, like the music business, movies began to be more directly threatened by the new copying technologies.[78] By the early 1970s the motion picture industry judged it necessary to fight back. This it did in *Sony Corp. v. Universal City Studios, Inc.*, the case in which the industry attempted to outlaw the

Betamax video recorder.[79] That attempt ended in apparent failure, as the Supreme Court finally decided, in 1984, that recording copyrighted work in a broadcast format for the limited purpose of "time shifting" was not necessarily a violation of copyright;[80] even more important, the Court concluded that the manufacturer of the recording device itself could not be held accountable on a theory of contributory infringement since the recorder was clearly capable of "substantial non-infringing uses."[81] We say apparent failure: in fact the VCR proved to be the biggest boon to revenues the industry had experienced in decades. Video sales and rentals opened a new window for distribution. The motion picture industry itself soared, borne aloft not merely on additional revenues but on the incentives to productivity that new marketing techniques provided.[82]

Then a second shoe dropped. The VCR had been an analog technology, which had inherent limitations: copies of movies on tape suffered from loss of resolution that tempered a potential copier's desire to own them,[83] much less make them a primary source for initial screening. By the end of the 1980s, however, it was clear that the digital technologies offered a threat several orders of magnitude greater than the industry had faced before. Digital copies are all but perfect in the resolution they achieve; in the right circumstances (technically, a matter of compression and bandwidth in the electronic spectrum), copies of two-hour films can be downloaded in a matter of minutes, and shared with others via the Internet.[84] In 2003, Jack Valenti, then president of the Motion Picture Association of America, estimated that 500,000 copies of feature films were being recorded daily without benefit of license.[85] Once again the industry fought back, this time joining the Recording Industry Association of America in efforts to stamp out the successive waves of recording devices that threatened both industries in approximately the same way. The Supreme Court's decision in *Grokster*,[86] in the summer of 2005, though not a decisive victory for the industries, nevertheless made it clear that manufacturers of technologies devised or offered explicitly to facilitate copyright infringement could be held liable on contributory grounds even if the technologies might otherwise be put to noninfringing uses.

Is the sort of exclusivity that copyright affords necessary to the continued existence of the film industry? Despite the Sturm und Drang of the last thirty years, the answer is still clearly, No. Exclusivity is one way to approach the problem of securing revenues sufficient to encourage continued investment in big pictures. Once again, however, other sources of revenue can be envisioned. Professor Fisher's suggestions for direct subsidies presuppose an abandonment of the main structure of exclusivity.[87] Liability regimes (like the ones advanced by our colleague Jerome Reichman) also offer an alternative to the property-centered regime that copyright has become, with its emphasis on exclusivity.[88] Copyright proprietors resist these alternatives, understandably preferring the system they know to ones that might change the rules of the game in unanticipated ways. If nothing were at stake but the question of incentives and rewards, then perhaps it would make sense to close our eyes and pretend that nothing need be done. Copyright proponents could go on believing in the viability of a system of exclusivity which, in the main and despite every effort to defend it, is still unproven as to necessity and apt to go on that way until the end of time.

But something else is at stake. For even if it is true that copyright exclusivity encourages the intellectual productivity its proponents think it does, its very nature forces us to face another stark set of consequences, ones no less important in the scheme of things than copyright itself.

THE COSTS

Copyright quite routinely forbids us to speak or sing or write or draw or paint or dance, or take or exhibit photographs, or read aloud to friends or share music with them, or make or distribute or exhibit films or videos, or for that matter to do a host of other, similar things—if we do them publicly (and sometimes even privately) without license, whether or not for profit, knowing that the expression we choose has already been claimed by others acting under color of law. Copyright is not alone in raising barriers to expression. Patent law forbids us to engage in business practices or to use designs assigned by law to others. Trademarks forbid us to identify ourselves in symbols similarly "belonging" to

others. Unfair competition forbids us to imitate or model ourselves after others, lest we engage in "free riding." We have seen, of course, that in each instance there is more to be said in behalf of the rights that forbid us to think and speak as we please. We are earnestly assured that a decent recognition of rights like these will encourage productivity or avoid confusion while securing efficiency. Yet the fact remains that as a consequence of these rights much of our culture is no longer available to be shared freely among us, but is controlled instead by persons other than ourselves, acting in turn under color of law. And the fact is also that more of that culture is thus absorbed by persons other than ourselves with every passing day. Intellectual property rights—rights that make up the several doctrines that we have examined in our first two chapters—are increasingly intrusive and repressive. No ordinary day passes in which we are not confronted by rights supposedly belonging to others, rights meant to constrain us against an exercise of expression that otherwise we would take for granted. The costs we incur in granting these rights are quite literally incalculable, for we can never know what has been foregone in order to indulge them.

Let us consider these costs in terms of creativity and self-expression. When we speak of *creativity* and *self-expression* we mean to use these words in ways that do not presuppose special knowledge. We accept it as given that most of us are born with some innate desire to communicate with others, a desire that seeks its outlet in expression. We suppose that some of us feel this desire more urgently than do others. We understand that sometimes self-expression can amount to an exercise in creativity, and that some of us are more creative in this sense than others. (We take it for granted that Shakespeare was more gifted than Ben Jonson.) We assume that creativity can be cultivated and developed, as can other innate capabilities. We assume as well that it can be encouraged, and we agree that it should be. We assume that it can play a role in any instance of expression, including a spectrum running from the private to the public, and from the personal to the political, which we suppose are sometimes, but not always, the same. But we assume no less firmly that in a free and democratic society we ought not to sanction self-expression in some at the expense of others, the question of creativity notwithstanding.

Whether or not we possess the gifts that Providence assigned to Shakespeare or Jonson, surely in America we are all equal before the law in our entitlement to thought and expression. We accept as true what Justice Louis Brandeis said in *Whitney v. California* about the nature of our mutual compact under the Constitution and the Bill of Rights: that in protecting freedom of speech and press the Founders intended to insure that each of us would be free "to think as you will and to speak as you think."[89] We take that proposition as our mantra throughout this book, for we imagine that in that phrase lies the fullest meaning of what it is to speak of freedom of expression in America. It is the right to self-expression that matters, in our view, and it matters irrespective of the questions of originality and creativity.

We have indicted intellectual property doctrines at large for their constraints against expression. But it is copyright that offends most gravely, and copyright that must bear the brunt of our complaint. Let us be direct: the dark side, and indeed a principal aim, of copyright is to suppress unauthorized expression for a period of time amounting, on average, to almost a century. This may or may not be an encouragement to originality or creativity or some other form of favored productivity in some; it is unquestionably repressive as to others.

Originality

The problem in copyright begins with the originality standard, which (as we have seen) amounts to little more than a requirement that the protected work not have been copied from an antecedent source. Judges have summed up this standard in colorful passages that every copyright lawyer can recite by heart. Here is Holmes, for example, in *Bleistein v. Donaldson Lithographing Co.*, a case in which one question was whether a poster advertising circus acts could be protected by copyright, despite the fact that the acts, as depicted, were essentially faithful representations of performances one might actually see under the Big Top itself:

> It is obvious that the . . . case is not affected by the fact, if it is one, that the pictures represent actual groups—visible things. They seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been

drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. . . . The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the [copyright] act.[90]

This is akin to the standard that Learned Hand had in mind when he said, in *Sheldon v. Metro-Goldwyn Pictures Corp.*, that "if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's."[91] Of course we are as susceptible as the next law professor to the Delphic and the unimaginable. Justice Story said once that copyright "comes nearer to the metaphysical" than any other branch of law.[92] We ourselves have no doubt that a well-taught course in copyright obliges the initiate to master even more in the way of pleasurable arcana than does admission to the highest order of Odd Fellows or the ultimate degree of the Masonic Lodge. The fact remains, however, that a threshold as low as copyright's originality standard is bound to produce absurd results and egregious overprotection. We see it at its nadir in a passage from yet another oft-cited and much remarked-on opinion, this one written by Judge Jerome Frank in *Alfred Bell & Co. v. Catalda Fine Arts*, in which mezzotint engravings derived from well-known paintings in the public domain were held entitled to protection, as against arguments grounded in the copyright clause and its supposed requirement of "originality":

It is clear . . . that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. . . . All that is needed to satisfy both the Constitution and the statute is that the "author" contributed something more than a "merely trivial" variation, something recognizably "his own." Originality in this context "means little more than a prohibition of actual copying." No matter how poor artistically the "author's" addition, it is enough if it be his own. . . . There is evidence that [the engravings] were not intended to,

and did not, imitate the paintings they reproduced. But even if their substantial departures from the paintings were inadvertent, the copyright would be valid. A copyist's bad eyesight or defective musculature, or a shock caused by a clap of thunder, may yield sufficiently distinguishable variations. Having hit upon a variation unintentionally, the "author" may adopt it as his and copyright it.[93]

Bad eyesight, defective musculature, a clap of thunder, followed in each instance by a claim of entitlement—upon such poppycock as this is originality in copyright constructed.

The underlying justification for a standard that is no standard at all is to be understood in terms of the threat that bourgeois Philistinism might represent were the originality standard to be more demanding. This concern is suggested in the passage from Holmes we have quoted above, and is made more explicit still in another part of the same opinion: "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[94] This is not in itself a silly thought, to be sure. And if granting protection were all that were at stake, one could afford to be sympathetic toward the degraded standard that has evolved from thinking like this. But in the end, despite Hand's fanciful image, copyright is essentially a zero-sum game. To recognize originality in one work is generally to confer an entitlement to exclusivity that precludes appropriation of the protected subject matter of that work in yet another work. In each of the cases we have cited, and in scores of others like them, the ultimate outcome is that one person's defective musculature (or clap of thunder or whatever) provides the basis upon which another person may be silenced by law. This is more than ad hoc; it is arbitrary to an unconscionable degree. The Red Queen herself would be pleased.

We see that these outcomes apparently do not violate the copyright clause. But how can a regime like this be defended against obvious claims that it violates the First Amendment? Why is it not the rule that judges "trained only to the law" should be obliged to decline altogether to pass judgment on which works are entitled to expression and which not?

There are essentially two such defenses, each of them internal to the copyright doctrine itself: one is that the idea-expression dichotomy allows ideas to remain free to all even if the expression of the ideas may be held exclusively by only a few; the other is that the fair use doctrine insures that exclusivity will be waived in favor of appropriation in circumstances in which, on balance, a waiver is justified. These defenses are greatly prized and much cited by copyright protectionists and their allies in adjacent fields of intellectual property. A majority of the Supreme Court has appeared to approve them in passing, most recently in *Eldred v. Ashcroft*, the last case before the Court in which an opportunity to do so was presented.[95] Yet this purported resolution of the First Amendment question is surely far from settled law; no case has ever been decided in which the question was squarely presented and addressed at respectable length, and the authority for this position is scant. Nor is either defense an adequate safeguard against the essentially repressive nature of copyright and its prevailing system of propertied exclusivity.[96]

The Idea-Expression Dichotomy

We are told that copyright constraints mean merely that we must choose another form of expression.[97] The idea remains free; only the protected expression of that idea is forbidden to those who have no license to make use of it.[98] This is at best a hollow distinction, however, and one that is essentially whimsical in practice.[99] Ideas and their expression are frequently inseparable. Learned Hand acknowledged as much when he said, in one of the last opinions he was to write: "The test for infringement is of necessity vague . . . [N]o principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc."[100] This was admirable candor from a judge nearing the end of a professional lifetime considerably devoted to an effort to make sense of copyright. Copyright specialists in our own time have reason to know how truly Judge Hand wrote. The distinction between idea and expression cannot be predicted in advance with any degree of certainty. Given a dispute between a copyright proprietor and Hand's "imitator," and barring early settlement or capitulation, only litigation offers hope of final resolution as to

the distinction between idea and expression,[101] and then the outcome is the result of a judicial coup de main: the parties in dispute propose; the court disposes. This is nice work if one happens to be a copyright lawyer or a judge. It is expensive agony and dangerous for the litigants, however, who find themselves caught up in a potentially ruinous winner-take-all contest, one that will be decided (they learn sooner or later, often to their horror) on the basis of a judgment that is, as Hand conceded, "inevitably ad hoc."[102]

Meanwhile, the central assumption embodied in the idea-expression dichotomy is itself deeply flawed. It simply is not the case that ideas ordinarily can find an adequate outlet in independent and original expression.[103] As courts have recognized, this is clearly not so when multiple forms of expression are inefficient, or when expression is dictated by circumstances or expectations external to the speaker.[104] Peter Pan's instructions to Wendy Darling as to the best route to Neverland ("Follow the first star, then turn to the right, and fly straight on until morning") cannot be improved upon as an efficient guide. Nor is there any way to produce a comprehensive theatrical feature film treatment of the Battle of Gettysburg that does not pose Blue against Gray and friend against friend, or contemplate Lee's troubled relationship with the faithful but recalcitrant Longstreet, or reenact Pickett's charge against the Federal cannon waiting among the trees just beyond the meadow. The filmmaker in each production must have similar common recourse to the underlying history and circumstances of both time and place. Indeed, copyright does not always pretend otherwise: recurring problems like these sometimes find their resolution in one or another of copyright's subordinate internal doctrines, such as merger and *scenes à faire*, under which copyright protection is set aside in favor of the public domain.

Merger is recognized in theory when an insistence on separating idea and expression will lead beyond the ad hoc to the inefficient, the impossible, or the absurd. When merger makes its appearance in a case, the entirety of the expression is treated as if it is no more than the idea, and protection is forfeited accordingly.[105] Simple directions (such as instructions for entering a contest, written on the side of a package

of cereal) are the classic example; but the doctrine lends itself to cases that go well beyond that. Merger is appropriate in any case in which idea and expression cannot be separated sensibly.[106] Meanwhile, the concept of *scenes à faire* similarly acknowledges the necessity of rendering certain settings according to custom or prevailing expectation (as in the appearance of the Eiffel Tower in a film whose *mise en scène* is Paris). Like merger, *scenes à faire* represents an exception to protection.[107] The latter doctrine works reasonably well, though not always: Judge Hand himself may have failed to take *scenes à faire* adequately into account in deciding *Sheldon v. Metro-Goldwyn Pictures Corp.*,[108] involving the film *Letty Lynton* (starring Joan Crawford and Robert Montgomery, directed by Clarence Brown, and released by MGM in 1932), in which widespread public fascination with South American settings and scenarios in that time may have played a more important role than Hand allowed in the development and production of what he found to be an infringing work in part because of its setting in Rio. The consequences of his opinion for the film were dire. Though critically well reviewed and considerably well received by filmgoers upon release, it has been generally unavailable to the public since the decision against it in 1936. But then that is an entirely acceptable consequence of copyright, if not indeed its purpose, is it not: to silence or darken unlicensed expression in the interest of expression that has the imprimatur of monopolists licensed by the state?

Meanwhile, merger is often overlooked or avoided by judges who cannot quite bear the thought that the inseparability of idea and expression will mean repudiating protection in a work that seems to them (intuitively) to be worthy of it. Photographs and other visual or graphic works, particularly works reflecting natural settings (like the one in *Bleistein*), often benefit from this avoidance of responsibility.[109] By now, judges have invented an entire vocabulary of illicit conceptualization, such as the absurd notion that a work's original expression can be detected in its "total concept and feel."[110] Never mind that this is a measure even more ungovernable than is the idea-expression dichotomy itself.[111] A "concept" is explicitly excluded from copyright originality under Section 102(b) of the Act. Half of the standard is thus forbidden

to begin with. The other half cannot even be discussed, much less debated, beyond the precincts of the judge's breast.

But these are small potatoes. Let us suppose that doctrinal exceptions to protection, such as merger and *scenes à faire*, are enough sometimes to dispose of some concerns in some recurring settings, whether considered under copyright or from the perspective of a nascent First Amendment. The central proposition in the idea-expression dichotomy—that an idea ordinarily may find adequate expression in infinitely variable forms—remains no less deeply flawed.[112]

The idea-expression dichotomy generally presupposes that an idea precedes or follows from expression, as prologue or précis; but very often it is closer to the mark to say that the idea itself is the product of a particular instance of expression, apart from which it has no relevant existence at all. It is one thing to say "I regret that I have but one life to give for my country," and quite another to say that "I'm a Yankee Doodle Dandy / Yankee Doodle, Do or Die." One may at first imagine that the idea is approximately the same in each of these instances of expression, but that is not really so unless we retreat to a level of generalization at which it becomes meaningless to speak of "freeing" the idea.[113] The important idea in each instance is not merely different from the other, but is in fact produced by its own expression, rather than the other way around.[114] To speak meaningfully of ideas, then, is generally to speak of them in contexts in which their expression has given them meaning.[115] It is little more than blather to speak of a dichotomy between idea and expression. The careful thinker, the precise speaker, the truly imaginative creative artist, will not like to be told that he or she must find still a third way to express an idea, when it is already clear that two will sometimes be two too many.[116]

Sometimes we must be able to speak in the words of others for reasons grounded in the very fabric of our culture. We know, for example, that the ideas behind Martin Luther King's "I Have a Dream" speech cannot truly be understood apart from the expression in which he conveyed them at the foot of the Lincoln Memorial in the summer of 1963. The speech gripped our imagination then, as it does now, precisely because of the language in which it was expressed. King himself argu-

ably appropriated significant portions of the speech from various sources of inspiration, among them the Bible and spirituals which no doubt he had known all his life, and from sermons he had heard or delivered himself.[117] These were sources we would have expected him to revisit, and to use as he saw fit, without hesitating for a moment out of fear that he might trespass on someone else's claim.[118] In appropriating what he took from them, and joining them with what he thought to add himself, he fashioned inspiration of his own. Our lives are enriched by King's words and even by the very manner in which he gave them voice. And let us brook no argument about it: these were King's words, for the speech he gave that day made them in the truest sense his own. The ideas in that speech alone, though noble and aspiring beyond all doubt, cannot truly be comprehended in that setting apart from the language and the delivery in which he gave them thought and form and feeling. No less so, his words are ours as well. Our sensibilities fairly urge us to express them in identical terms, so far as we are able, as if in communion with him and his auditors in that moment. In a sense it is even disrespectful to propose that we do otherwise.

Just so, the remarkable film that Abraham Zapruder took in Dallas later in that same year, as President Kennedy's motorcade approached and then passed by Dealey Plaza, is priceless today, not because of the ideas that lay behind it but because of the moments of agony and loss it captured and expressed—and beyond these, because of the information potentially conveyed within the individual frames from that film: How many shots were fired? From which direction? By one assailant or more? Copyright's claims upon us in these circumstances are insignificant and absurd, as are the purported distinctions between idea and expression. Copyright surely played no role at all in the original decision by Zapruder to station himself on the grassy knoll; other incentives, no doubt largely personal, led him there.[119] He chose the place from which to film, and the film itself, and the camera and the lens and the technical settings—yes, all of these things he chose, to be sure; but these have nothing at all to do with originality in copyright, properly understood, much less with the distinction between idea and expression. The techniques by which he "rendered" his work belong to everyone, as did the "timing" which brought him there.[120] He had nothing to do with composing the subject of his work (God forbid!); it was serendipity and nothing more that enabled him to record the actual moment in which the president was slain. His perspective on the scene arguably gave him some slight claim to copyright in the work, though only of the thinnest imaginable sort, for idea (or subject) and expression merge in this film, as they often do in photographic works in which images themselves are appropriated from reality.[121] But then suppose that copyright had played a larger role—what of it? In the end the justifications for exclusivity in copyright all fall in upon one central insight, evident to all but the most ardent and insensitive proponents of protection: it is monstrous to think that the expression in this film should or could belong exclusively to anyone. In decency, if not in law, idea and expression in this setting cannot be separated. The supposed dichotomy between them is altogether meaningless.[122]

These examples, each well known to copyright specialists, and endlessly discussed and debated, serve as vivid illustrations of our point about the essential impossibility in the supposed distinction between idea and expression. But they stand apart merely in the transcendence of the moments they convey. No less important to our rejection of the idea-expression dichotomy are those instances of less dramatic import, which are legion.[123]

Novels go unwritten and unpublished, or are published under threat of liability, injunction, seizure, and destruction. Why? Because they depend in some measure on work under claim of exclusive entitlement (to characters, for example, and other elements of expression) by an earlier author or proprietor who will not license their creation. In such cases, observing the distinction between idea and expression, and treating the latter as the exclusive property of the earlier author, can threaten or even foredoom a later work.[124]

Alice Randall's *The Wind Done Gone* is a recent example.[125] Intended as a parody of Margaret Mitchell's *Gone With the Wind*,[126] Randall's novel was written from the perspective of the slaves at Tara whose interpretation of the events created by Mitchell was not at all as Mitchell herself would have imagined or approved.[127] Her estate sought

an injunction on the ground that characters and plot from the original novel had been infringed,[128] and prevailed in that effort despite arguments on behalf of Randall's work to the effect that no substantial part of Mitchell's actual expression had been appropriated.[129] The injunction stood until set aside by the Eleventh Circuit: the court ruled initially from the bench at the conclusion of oral argument on First Amendment grounds (for the first and only time in copyright history)—pending an opinion on a fair use defense,[130] which eventually sent the case back to the district court for further hearings.[131] The case was then settled without an ultimate determination on the fair use ground.[132] In many respects, Randall and her publisher, Houghton Mifflin (whose determination to stand up for the novel was as admirable as it was unusual), can be seen to have obtained a victory in the affair. But at what cost? The novel itself was under injunction for weeks; in another federal circuit the outcome might have been very different. The parties meanwhile can reasonably be calculated to have spent sums approaching half a million dollars in order to bring the matter to a point at which it could be resolved—all of this in a case in which copyright was interposed as a bar to expression by an African-American author who sought to reimagine and then relate an alternative and untold slave narrative in an era central to the nation's history and its culture.[133]

Sometimes personal sentiment of a more benign sort plays a role. During his lifetime the popular author John D. MacDonald published scores of novels, one series comprising twenty-two books featuring the character Travis McGee.[134] McGee was an amiable self-described boat bum, who made his home aboard the *Busted Flush*, a houseboat he had won in the course of a poker game, and which he now kept more or less permanently moored in Slip F-18 at Fort Lauderdale's fictional Bahia Mar. A worthy counterpart to such other rugged adventurers as his contemporary James Bond, with whom he shared a taste for gin and women, McGee made his living as a "salvage expert," who recovered things that had been lost (always as a result of malign human forces) by unfortunates less physically and mentally capable than he (and considerably less daring), to whom he extended his assistance in exchange for fifty percent of the value of the salvage (a real bargain when you knew the circumstances, and not

infrequently a maiden's only hope for survival to boot), meanwhile occasionally finding time to reflect at large on the wondrous nature of human existence.[135] The series was among the most popular and financially successful of its time—and in our view justifiably so.[136] Even now, some twenty years after the last work in that series was published (MacDonald died in 1986),[137] Travis McGee novels remain much sought after in secondhand bookstores, which seldom manage to keep more than a few in stock for longer than a few weeks. First editions are rare and very expensive. MacDonald's work in this series was, in short, nothing less than a masterpiece in the estimation of his many readers.

More than one would-be successor author[138] has applied for permission to write and publish additional novels derived from the series. But MacDonald's son has refused a license to all comers, saying that he does not wish to see his father's achievement and memory sullied by imitations. A number of things can be said of the son's position in a setting like this. On the one hand it is an understandable and even admirable demonstration of filial loyalty and devotion. Yet these are not traditionally among the principal interests to be protected by copyright. Recall that copyright in American law is protected for reasons aimed at promoting the progress of human knowledge, rather than for reasons of moral or sentimental entitlement. Would it not suffice, in circumstances such as these, to require an attribution to the senior MacDonald, acknowledging him as the originator of Travis McGee, accompanied perhaps by a further acknowledgment to the effect that later novels employing the character are derived from the earlier ones, but are not the work of the original author, and that they have not been "authorized" by his heirs or representatives? Would these attributions and acknowledgments not faithfully reflect the facts of the matter, while doing no harm to the legitimate aspirations of a successor author?

For otherwise consider the consequences of indulging the author or his heir in simple exclusivity: legions of admirers, not merely of the father's achievements, but of Travis McGee's as well, are to be deprived of further news of the latter's adventures for another half century. Eventually, to be sure, in the year 2056, when copyright in the last Travis McGee novel

will presumably expire under current law, additional novels by admiring imitators may be written and published, with or without the approval of MacDonald's son.[139] But that thought is in the nature of a stork's dinner, for by that time the series will no doubt seem as dated as the Hardy Boys do now (not to mention all those once-enthralling but now-forgotten novels about the daring lads who flew Spads and Sopwith Camels against the ravening Hun in the Great War). And those among us who today would read (and write) additional novels in the Travis McGee series, with an appetite still stronger than our failing pulse rate, will, by that time, be as dead as MacDonald père is now.

Novels make useful examples of what copyright costs in terms of expression threatened or foregone, besides being especially dear to our hearts. But they are joined by countless other examples in other mediums. Biographies and other works of the public intellect are enjoined or abandoned, and the research in anticipation of their appearance forfeited. Why? Because their completion depends on access to expression in the subject's earlier work that is now forbidden. Films go unproduced, or are released in truncated or distorted versions. Why? Because rights to the earlier expression they incorporate cannot be cleared, or can be cleared only at costs in excess of the filmmaker's resources.[140] Dramatic works are darkened, comedy squelched, and music silenced, in response to claims to exclusive rights by earlier composers: recall, again for the sake of example, the fate of the hapless choir master in Clarinda, Iowa, who sought only to create an arrangement that would match the limited capacities of his singers, and who then sought only to share what he had done with the composer of the original song, whose thanks took the form of a suit for infringement.[141] In each of these settings, and again in hundreds of others like them, the effect of recognizing exclusivity in copyright is to silence the expression in a later work. And note that this is so even when the later work is created by an author who has no conscious recollection of the earlier work at all.[142] Why? The answer according to copyright orthodoxy, in this setting, as in all other cases of infringement, is that appropriation must be seen as an actionable offense (akin to trespass) against exclusive interests in property, without regard to motive or intent if the taking is substantial.

Fair Use

Copyright sometimes recognizes the inadequacy of the idea-expression dichotomy, in circumstances like the ones just discussed, as well as others. In such cases, sometimes, the Copyright Act itself may offer some relief, always limited in scope, however, and tailored to fairly specific circumstances in which Congress has decided, on balance, to make no law abridging freedom of expression.[143] In other settings, more generally, the Act provides, as we have seen, that fair use of a work under copyright is not an infringement of a proprietor's exclusive rights if the later work, on balance, is viewed favorably according to four mandatory "factors."[144] Taken together, these provisions do represent a formal concession to what the copyright industries like to call "users' rights."[145] (This is a term that reflects an underlying conception of creativity we will say more about in due course.) Perhaps at one time fair use might even have served as an adequate accommodation of the conflict between rights generated under the copyright clause and rights protected against abridgment by the First Amendment. Professors Patterson and Joyce have suggested as much.[146] But the fair use doctrine today is altogether inadequate.[147] An all but indecipherable hodgepodge of precedents and statutory mandates, fair use in our time (measured in light of the decided cases) often amounts to little more than caprice heaped upon caprice, with no one in the end but judges to decide when and whether exclusivity or appropriation is to have the upper hand in a given setting.[148] (David Nimmer correctly suggests that "reliance on the four statutory factors to reach fair use decisions often seems naught but a fairy tale.")[149] We do not propose to make sense of fair use here, or to prescribe a better approach to its employment. In our judgment, the very concept of fair use is misplaced when questions of this kind appear.

EXCLUSIVITY VERSUS APPROPRIATION

By now it should be clear that the central issue to be confronted in cases like these is not originality, nor the idea-expression dichotomy, nor yet again, fair use; the issue, rather, is what it costs when exclusivity is juxtaposed against appropriation. We have said that the full costs

cannot be reckoned; there is no way to calculate them. We cannot know what opportunities have been missed when copyright stands in the way of subsequent expression. We are surely not wrong to suspect that the loss is likely to be substantial. Much of what is valuable in Shakespeare's works was appropriated by him without license or payment.[150] If we imagine merely that one among his many works might have been precluded under our own system of exclusivity, fees, and licensing, we can begin to sense the dimensions of what we ourselves forego—and still we cannot calculate the loss with any certainty, whether in economic, cultural, or other terms.[151] Yet we can be sure that the accommodations we are obliged to make to exclusivity demand more of us than it is either sensible to expect or possible for us to give without grave sacrifice.[152]

Why, then, do we make them? Is it that we prize independence and originality in thought and expression so strongly that all else must be sacrificed? Self-expression does not depend on them, though they are sometimes thought to be attributes of the creative mind; and even then they are rarely enough by themselves. We do not subscribe to everything that has been uttered in the past twenty years or so about the Death of the Author[153] and the Myth of the Romantic Creator.[154] But creativity of any sort surely presupposes freedom to imagine, and (as Yale law professor Jed Rubenfeld has suggested) freedom of imagination must presuppose an ability to remember, to imitate, and to appropriate.[155] Zechariah Chafee said (years ago, to be sure, and against a background of very different sensibilities) that the dwarf who stands on the shoulders of a giant can see farther than the giant standing alone.[156] No doubt that is true. It is truer still of the giant who stands on the shoulders of a dwarf. (Shakespeare's achievements were of the latter variety.) In either case, the underlying thought is undoubtedly correct: imitation and appropriation can be fully as important as originality to freedom of expression.[157] True independence of thought and expression means being free to choose one or the other or both, at will.[158] In most cases, moreover, it is unnecessary to elevate or deprecate one creator in order to understand and appreciate another. That may be the task of critics, but critics must not be suffered as censors. Most of us know the difference.

One understands that Bob Dylan created himself by immersing himself in the works of earlier artists like Woody Guthrie and Pete Seeger, and then emerging from them again as if reborn.[159] Groucho Marx wrote of coming into his own as a performer through a process of "trial and error," in which creativity began with appropriation amounting to outright theft. "If the comic was inventive," Groucho added, "he would gradually discard the stolen jokes and the ones that died and try out some of his own. In time, if he was any good, he would emerge from the routine character he had started with and evolve into a distinct personality of his own."[160] Freedom to appropriate in the service of creativity is among the more important interests at stake when we confront any doctrine grounded in the sort of exclusivity that copyright takes for granted.[161] Groucho's conditions ("if the comic was inventive; if he was any good") reflect critical judgments that come naturally to mind in settings in which creativity is on display. Groucho was not wrong to think in these terms, nor are we.[162] But does it follow that these are the sorts of judgments that should find their resolution in the law? Surely it ought not lie within the province of critics or Congress or the courts to decide these questions for us. They are decisions that lie, for better or for worse, within the sensibilities of each and every one among us.[163] Holmes said, in essence, that "judges trained to the law" should not be counted on to act as arbiters of creativity, and of course he was right.[164] Creativity is a supremely individual affair. Hand conceded, in effect, that no principle can guide us in our recognition of it; the decisions we make must be "inevitably ad hoc."[165] Neither Holmes nor Hand appears to have seen where admissions like these must lead, however. These are, or so we might have imagined, ultimately among the more important reasons why Congress is to "make no law" abridging freedom of expression. In the end it is expression that counts, not originality or creativity.

Proponents of exclusivity often speak of the property interests at stake, as if thereby to make it plain that property should prevail in any contest with interests in expression.[166] But why should propertied exclusivity ever trump free expression? In truth, the law has no principled answer to this most obvious of questions. It may make perfect sense to speak of copyright and other similar interests as though they are property; let

them be property if property they are. But surely they are also expression—or "speech" (and sometimes "press"), within a perfectly ordinary meaning of these terms as they appear in the First Amendment. To be sure, it can seem a bit odd to think of property as if it were also expression. After all, we do not ordinarily think of houses and lawnmowers as expressive—though the house in the gated community can speak volumes about its owners, as can the battered pickup truck and riding mowers that belong to the proprietors of their lawn service. But expression is exactly what springs to mind when we think of novels or poems or sermons or songs or films or choreography or the like, which in every case we recognize as central to the purposes and function of the First Amendment. Why should we think otherwise when works such as these also assume some of the dimensions of property?

Interests in property are often subordinated to more important interests, whether public or private. The homeowner whose neighbors command his obedience to restrictive covenants, or whose community enforces historic zoning regulations, will have no difficulty understanding what we mean. If interests in exclusivity are at odds with interests protected by the First Amendment, surely more is needed than a simple assertion of "property rights!" to resolve the dispute. Exclusivity may be a natural attribute of traditional interests in property; but in the context of intellectual property it is heavily counterintuitive. This is so for at least three reasons that precede, and are independent of, arguments arising from the First Amendment.

Thomas Jefferson and the Nature of Property

In the first place, as we have seen, the thing that is the subject of most traditional interests in property is also ordinarily tangible, and therefore (in the language favored by our colleagues elsewhere in the academy) rivalrous.[167] This is to say that if you have a can of beans and an opener (meanwhile presupposing the absence of an economist) you can share the beans only so far before the contents of the can are entirely depleted. If you build your house on a pretty piece of land, others who might wish to build there will be precluded from doing so to the extent that the property will sustain only one house. If you own a car or a lawnmower you are likely to lend

them to others only to the extent that your use of them is not thereby precluded. Note that these are constraints *ex naturae*—imposed by their very nature. They are not the consequence of property law, but rather presage what the law is likely to recognize and provide.[168] Most traditional property laws reflect this underlying natural state of affairs; exclusivity is thus a common (though not inevitable nor unmoderated) response.

But the thing at the heart of an interest in intellectual property is not bounded by its inherent physical nature, nor is it scarce in this physical sense.[169] Sharing it with others does not diminish or deplete it, either, for as Thomas Jefferson observed almost two hundred years ago (in a passage well known to every contemporary student of intellectual property):

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.[170]

Of course Jefferson was not speaking of "ideas" in the peculiar and forced sense in which copyright now attempts to distinguish them from "expression." It appears that he actually had patents in mind when he wrote, though the fundamental insights in this passage are no less consistent with copyright than with any other species of intellectual property in which exclusivity is under contemplation.[171] The burden of his comment went much deeper than mere doctrine. What Jefferson challenged was the logic of exclusivity in the context of intangible expression of every sort, once published.[172] Exclusivity is at odds with the very nature of ideas and their expression. This has always been so: Jefferson wrote in 1813, when no one spoke of "communications" or

"convergence"; yet what he said would do credit to a contemporary critic. Today we say that "information wants to be free"[173]—or, in Brandeis's celebrated phrase from *Whitney v. California*, "free as the air to common use."[174]

What was true for Jefferson is no less so for us in a second respect as well. The creative mind, in our time no less than in his own, is alive to the possibilities in ideas and expression alike, and is quickened by their presence in the air. It is in the nature of expression, moreover, exactly as he observed, that it should "force itself" upon us, and that we should be unable to "dispossess ourselves of it." If there is a difference across the ages in this respect, it is merely that with every passing decade the cumulative weight of the ideas and expression that bear upon us grows progressively heavier. We do not suppose that Jefferson's was a "simpler" time; it is sophomoric and narcissistic to imagine so. But even he would no doubt concede today that the "age of symbols" Justice Frankfurter observed some half a century ago has become still more intense as we have entered upon the digital era.[175] Ideas and expression, like the interests in property they supposedly reflect, confront us everywhere. It is a commonplace in our time that we cannot escape them. In our judgment, this encroachment is not new; how could we think so, knowing what Jefferson wrote? But its progress can be thought of as phenomenal, and in that sense the very omnipresence of what has always been an occasion for comment can be seen as having assumed proportions that oblige us now to act as well. If expression is to force itself upon us, and take up lodging with or without our leave, surely it cannot simultaneously reside exclusively with others, subject only to their control. If the Tinker Bell we and our children know is sent by Hollywood rather than by Peter Pan, surely we must have something to say about when she comes and goes, and how she spends her time with us, and we with her.

In these two respects, Jefferson armed us with arguments that undercut the logic of exclusivity. In a third, he suggested the shape of an alternative response:

> Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. . . . Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will of the society, without claim or complaint from any body.[176]

Note that in this passage Jefferson offers an implicit interpretation of the "exclusive rights" referred to in the intellectual property clause, an interpretation that does not envision exclusivity of the sort that both copyright and patent law have featured since the beginning of the Republic. There is no hint in his letter that he was conscious of having done so; it appears rather that he was innocently interpreting the clause in the only way that made sense of his larger view of rights in ideas and expression.[177] Exclusivity in a work (as against a right in others to appropriate it) is the wrong entitlement, for the reasons he suggested, but an exclusive right to profits may be another matter altogether. Of course one must not confuse a right to profits with a right to rents: the former presupposes that there are net revenues; the latter, on the other hand, envisions payment whether or not funds are available. Profits may make perfectly good sense, as an alternative to exclusivity; presumably nothing need be paid unless a source of payment is forthcoming. If rents are to be exacted without concern as to the availability of such a source, however, then the ability of others to appropriate a work will be jeopardized and may in fact be precluded. It follows, then, that a compulsory license (of the sort we have seen in copyright) would not suffice as a response to Jefferson's concerns.[178] Only a system that recognizes an unconditional right of appropriation for the sake of expression will suffice.

Insights More Important Than We Can Use?

What are the larger implications in Jefferson's letter?[179] His insights call into question the sufficiency of doctrinal responses to the conflict between exclusivity and appropriation. And they suggest in turn the urgency in calls for a more considered response from the First Amendment.

One of the most prominent policy issues of our time, of course, is posed by the phenomenon of peer-to-peer file sharing via the Internet. This is where the greater part of the energy now being expended on all

sides of the larger issue of appropriation and expression is actually centered. Most of us understand the phenomenon itself. Someone (and let us face it: that someone is usually a young person, and often a student) downloads a recording of a song or movie protected by copyright, using one of a host of increasingly sophisticated Internet search engines to find and record it, and then sends it on to others using the same engine. This means in theory that the recording and film industries are deprived of a sale.[180] They say that if such copying is not stopped they will decline and eventually perish. It is usual to discuss these points in economic terms; but this also usually loads the discussion, for an economics-centered analysis means that the playing field is likely to be tilted in favor of protection and away from appropriation.[181] The copyright perspective itself is relatively simple; unlicensed copying and distribution are generally forbidden.[182]

The fact remains, however, that using the new technologies to make copies of recorded works is also generally an exercise in creative expression. Even the simplest form of direct copying generally involves selection, an indisputably creative act; file sharing involves self-expression, and is also indisputably creative.[183] Copyright proponents will not like for us to say these things, but that does not mean we are wrong. Copyright rules do not prescribe the boundaries of creativity, merely because their usual function is to limit it or forbid its exercise. In the case of file sharing, the supposed miscreants are doing essentially what record and film producers themselves do when they decide what and whom to produce and release. Record producers invest more time and money, but then that is merely where the problem begins: the new technologies now make it possible for creative appropriation and sharing to cost less. Peer-to-peer file sharing reflects a major shift in the way the culture is transmitted from one person or entity to another.[184]

Or consider the proposal by Google to scan the collections of major libraries, the better to make them searchable on the net. The plan raises obvious, if unusually sophisticated, questions under three of copyright's exclusive proprietary rights: reproduction; derivative works; and distribution. In some cases, display and even performance rights may be implicated.[185] It is even conceivable that rights in one-of-a-kind works of

visual art may be involved.[186] Google does not actually contemplate an ongoing violation of these rights; in its view of the matter, it will merely offer limited access to the works so that searchers can more easily identify and then reach the works that they may wish to examine. That will be well within the reach of fair use in Google's interpretation of that doctrine. But copyright proprietors observe that Google will have to make at least one full copy of each work in order to afford the sort of access it has in mind. And this, the proprietors say, will violate at least the reproduction right, if nothing else. (As of this writing the Authors' Guild and a consortium of French copyright proprietors have filed suit, demanding an injunction against the proposed activity.)[187] We do not propose to pursue the issues raised by this dispute at length. For our purposes it is enough to observe that here again is evidence of a potential cultural shift occasioned by digital technologies and the Internet that make the underlying questions of exclusivity and appropriation a phenomenon deserving of more measured attention than it has had.

The question is whether we can bring ourselves to recognize Jefferson's insights, now that they are no longer merely prescient?

Recognizing the Public Domain

At one time it might have seemed enough to address the problems posed by copyright and other forms of intellectual property from within the parameters of the doctrines themselves. We wrote some twenty-five years ago, along lines like the ones we are revisiting here, an essay in which we proposed an affirmative recognition of the public domain, one that would restore, or so we hoped, a diminishing balance within intellectual property doctrines between protection and the free availability of works.[188] Our concern, then as now, was with the threat to creativity and a shared culture posed by increasing encroachments upon the public domain. It seemed at the time that copyright and patent law were not the main threats—that other upstart doctrines, such as the right of publicity or the notion of dilution in trademark law (both then still relatively undeveloped in the law), were the more serious potential obstacles to our ability to share the culture as we imagined we had done since the days of the Founders. Our thought was that an affirmative recognition

of the public domain should serve to remind us that there were interests at stake going well beyond the justifications that are said to underlie the intellectual property doctrines. We suggested that Congress and the courts adopt deliberate measures to balance all proposals for new legislation (legislation that would expand the reach of intellectual property) against their resulting encroachment upon no less important interests affirmatively provided for by the public domain. And (for a time) a test derived from our proposal did indeed play at least a modest role in the course of legislation under consideration in the House subcommittee that oversaw new legislation.[189] But no test as fragile as the one we suggested could withstand the forces that time and circumstances raised against it. The copyright industries, like their counterparts in other fields that make up intellectual property, have succeeded in persuading Congress that without new laws to combat the new technologies, the industries themselves are doomed to decline, decay, and eventual failure. The Digital Millennium Copyright Act of 1998[190]—an extraordinarily complex piece of legislation, drafted primarily by the industries themselves, and especially intended to permit copyright proprietors to establish virtual venues,[191] secured by digitally encoded gates and fences and protected against trespass (or hacking) by severe civil and criminal penalties—is but one of numerous responses to these pleas, with others waiting in the wings as we write these words.[192]

Many observers of this scene have written or spoken since our essay on the public domain appeared, with the result that the public domain movement in American law today is thriving well beyond the limits of our own vision.[193] Yet the last quarter century has seen the lines drawn more clearly and with greater opposing force between intellectual property proponents and the proponents of what Professor Lessig calls "Free Culture."[194] It no longer seems enough to suggest that reform can come from within the intellectual property fields and the industries they support. A conflict has erupted between the notions of exclusivity in intellectual property law and the sense of entitlement to expression the First Amendment appears to have been intended to assure. The underlying issues are not new, but the extent of the conflict and its role in our everyday existence press upon us as never before. A public domain in which we are

free to think and remember and speak as we please remains a viable and central goal. But the means for attaining that goal is now in doubt.

One might have expected the Constitution to chart the path toward the public domain. But the intellectual property clause continues to lie silent as to the most pressing issues. And the First Amendment has yet to turn its full attention to the challenge. In the chapter that follows we will examine some of the reasons why the Constitution in our time is unequal to the task before it.

CONFLICT AND THE CONSTITUTION

We have meant meanwhile to sketch, in admittedly impressionistic terms, a field of conflict between exclusive rights generated and protected by copyright and its companion doctrines in the field of intellectual property, and the very different, often antithetical rights that are recognized and protected by the First Amendment. We have suggested in this chapter that intellectual property rights amounting to exclusivity are probably less certain as to necessity than we are accustomed to supposing, but entirely certain in the encroachments they make into the public domain. We have argued that this is not, in truth, a new problem, but rather one that has been slow in gaining recognition. And we have acknowledged that in our time the conflict is recognized on every hand.

Now the question is, why has the Constitution offered neither a satisfactory response nor an adequate resolution?