Intellectual Property is Not Property:

Copyright and the Culture of Owning a Myth

by

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ABSTRACT

The purpose of this study is to explore the shifting cultural norms of copyright law, and that concept's impact on the performance and practice of artists producing original works of authorship. Although related concepts predate it, and today it exists as a subset of a broader category known as intellectual property, the purpose of copyright beginning with the United States Constitution was to allow for a temporary economic monopoly to an author of a fixed creative work. This monopoly was meant to incentivize authors to contribute to the public good with works that promote progress in science and art. However, increases over time in the scope and duration of copyright terms grant broader protections and controls for copyright owners today, while advances in technology have provided the public with the potential for near-limitless low-cost access to information. This creates a conflict between proprietary interest in creative works and the public's right and ability to access and build on those works. The history of copyright law in America is rife with efforts to balance these competing interests.

The methodology for this study consisted of flexible strategies for collecting and analyzing data, primarily elite, semi-structured interviews with professional artists, attorneys, and others who engage with the cultural and legal norms of intellectual property regimes on a regular basis. Constant comparative analysis was used to maintain an emic perspective, prioritizing the subjective experience of individuals interviewed for this research project. Additional methods for qualitative analysis were also employed here to code and categorize gathered data, including the use of RQDA, a software package for Qualitative Data Analysis that runs within the R statistical software program. Various patterns and behaviors relevant to intellectual property reforms as they relate to

artist practices were discussed in detail following the analysis of findings, in an effort to describe how cultural norms of copyright intersect with the creation of original works of authorship, and towards the development of the theory that the semiotic sign systems subject to intellectual property laws are not themselves forms of real property, as they do not meet the categorical requirements of scarce resources.

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CHAPTER 1

INTRODUCTION

Mass Mediated Communication as a Public Good

The development of copyright law over the last several centuries is a transition from an understanding of the concept as a temporary monopoly privilege granted by either a secular or religious authority to a broadly interpreted property right that may, in effect, last in perpetuity. That same paradigmatic shift in understanding has also changed the perception of copyright as a necessary incentive for authors to create works which will in some way benefit society (i.e., "progress in science and the useful arts,"[1]) to a perception that the author's rights – not privileges – are paramount. Which approach to copyright law can be said to result in a better society? A follow-up question must also be asked: a better society for whom?

If the author of any given fixed creative work possesses a monopoly on the sale and distribution of that work, then copyright is the conceptual mechanism by which that individual holds such a monopoly. This grant of exclusivity is meant to incentivize the author to perform the creative labor necessary to fix that work initially. This is true whether the fixed creative work in question is a book, visual work of art, or musical composition, among numerous other categories. However, once the initial fixed creative work has been digitally or otherwise mechanically reproduced and distributed, it is irrevocably transformed from a scarce artifact to a public good.

A good is any material that satisfies human desires, and it is public when, according to Tyler Cowen, it possesses two characteristics: nonexcludability and

[1] U.S. Const. art. I, § 8. cl. 8.

nonrivalrous consumption.[2] For a good to exhibit nonexcludability, it must be prohibitively expensive to exclude those who do not pay for access. In the case of fixed creative works, this is demonstrated to be the case by the continued development of mediating and network-enabled technology, from the printing press to the modern desktop publishing power of an inkjet printer paired with a smartphone or other personal computer. Individuals who use these technologies or other means to access a fixed creative work but do not pay for access through a legitimate source are known as "free riders." However, if the presence of free riders does not directly change the cost of the initial creation and market transactions related to a good, then that good allows for nonrivalrous consumption.

Fixed creative works, once they enter the marketplace and begin to exist in a mass mediated context, thus become public goods. From the perspective of a consumer or audience member, the downward pressure on prices to access – not costs to produce – fixed creative works engendered by mass mediating technologies is beneficial. Artists, authors, publishers, and others empowered by the privileges of copyright with regard to a given fixed creative work may also view the distributive power of these technologies as beneficial. However, authors also rely on the exclusivity granted by copyright law to counteract downward pressures on prices that technological factors may set at or near zero.

[2] Tyler Cowen, "Public Goods," in *The Concise Encyclopedia of Economics*, David R. Henderson, ed. (The Library of Economics and Liberty, December 2007). Retrieved June 18, 2018 from http://www.econlib.org/library/Enc/PublicGoods.html.

Problem of Interest

This project seeks to examine the potential ramifications of the evolution of copyright law, and its effect on the authors of original creative works and their audiences. While a copyright is in effect, its owner has an economic monopoly on that intellectual work. As proscribed by the "limited times"[3] clause present in the U.S. Constitution, though, that monopoly should not last forever. The initial Federal Copyright Act, passed in 1790, set the maximum length of statutory protection at 28 years, or two terms of 14 years. Subsequent copyright laws in America continued to extend these terms, so that current terms last for 70 years after the death of the author, or 95 years total in the case of copyrights held by corporate entities.[4] Copyright terms for fixed creative works today may still be described as existing for limited times, but they are, by statute, less limited than the lives of the authors of those works.

An author who owns the copyrights in his or her own fixed creative works may thus possess – for a lifetime – a statutory competitive advantage for the economic exploitation of those works. In the United States, this lifetime privilege has only been inscribed in law since the passage of the 1976 Copyright Act, although the proper length of copyright protection has been debated across cultures for centuries before that. One example of this was the debate between rabbinical authorities in Moravia in the nineteenth century, who started from the guiding principle that competition should be free unless there was some mitigating factor to justify a monopoly – in that case, the

[3] U.S. Const. art. I, § 8. cl. 8., declaring that Congress shall have the power "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."
[4] U.S. Copyright Office, *Duration of Copyright*, Circ. 15A (Washington, DC, 2011), 1, https://www.copyright.gov/circs/circ15a.pdf.

monopoly on the printing of certain religious texts.[5] One such mitigating factor to justify copyright grants is what these rabbis described as "theft because of the ways of peace."

"Theft because of the ways of peace" is a doctrine derived from a Talmudic story called "The Case of the Poor Man Who Shakes the Olive Tree."[6] In this tale, a man who climbs a tree to knock some olives to the ground is shocked to discover that when he climbs back down the tree, another man has taken the dislodged olives. The man who climbed the tree may have labored to remove the olives, but he never possessed them, and so rabbinical authorities did not describe the second man as a thief. Instead, they recognized that such activity can sow discord amongst civilized individuals – dissension, fighting, and hatred – and is thus described as "theft because of the ways of peace."[7]

Similarly, individuals and groups who develop original fixed creative works have labored to do so, and copyright privileges can reward these authors with the metaphorical fruits of their labors. Free riders who might profit from the creative efforts of others are prohibited from infringing on copyright protections, even if such infringement might also be termed free competition. These types of justifications have helped to expand the privileges awarded under copyright law.

Today's laws as currently written and enforced grant owners of copyrights exclusive privileges for the distribution of fixed creative works, as well as the ability to exclude derivative interpretations of those same works. This includes radical reinterpretations of fixed creative works – emphasizing potentially sensitive issues like drugs, sex and race – that the initial author or copyright owner would not see fit to create

[5] Neil Netanel, *From Maimonides to Microsoft: The Jewish Law of Copyright Since the Birth of Print* (New York: Oxford University Press, 2016), 175.
[6] *Mishnah Gittin 5:8*, explicated in Neil Netanel, *From Maimonides to Microsoft*, 175.
[7] Ibid.

or distribute themselves. This dissertation is an examination of the impact of copyright law's grant of exclusivity on the practice of artists and authors, and how they choose to enforce their own copyrights and interact with others' copyrights.

Study Purpose

The purpose of this study is to examine three main concepts – cultural norms, legal statutes and case law, and technological innovation – and describe the interactions between these concepts with regard to intellectual property regimes both in America and in international contexts. One such interaction occurs between the aforementioned exclusive benefits that may be conferred through the grant of copyright to authors of fixed creative works, and the concurrent limitation on free speech principles as granted by the First Amendment.

General Research Question Examined

At its core, this dissertation seeks to answer this question: How do culture, the law, and technology inform the current perception of copyright by creative art professionals today? More specifically, is there a sense of continuity between current perceptions of copyright as a natural right and the historic perception of copyright as a temporary privilege at the time of the initial drafting of the U.S. Constitution?

In order to better contextualize the proposed general research question, Chapter 2 of this dissertation provides a brief history of copyright and intellectual property law, tracing its development as a regulation on trade and as a means of censorship, to the modern understanding of copyright as a guarantee on property to either an author or his

or her successors and assigns. Much of this developed gradually, over the course of hundreds of years in Western Europe and later in the United States. The primary technological innovation to aid in this development was the printing press, which allowed for the mechanical act of widespread copying of written materials.

Technological developments alone, however, cannot account for the evolution of the central concept of copyright. Copyright, after all, is not used to incentivize the mechanical duplication of existing written material, but instead is meant to champion the creation of original works of authorship by the grant of entitlements that allow an author or copyright owner exclusive license to sell his or her work. According to researchers like Martha Woodmansee, the consideration of some authors as "creating" or otherwise developing "original" works, rather than the image of a craftsman following an already-established set of rules to communicate traditional ideas, is a fairly recent historical development.[8]

Again, while the development of the modern conceptualization of copyright began in Western Europe, the literature review that follows this chapter focuses particularly on the American history of copyright law. Primary and secondary source documents and relevant court cases are analyzed in order to present the history of copyright law in this country, as that national history has the greatest effect on the practices of artists working in America today.

As copyright law has changed and evolved, new and revised statutes have influenced the development and distribution of fixed creative works. This dissertation

[8] Martha Woodmansee, "On the Author Effect: Recovering Collectivity," in *The Construction of Authorship: Textual Appropriation in Law and Literature*, Martha Woodmansee and Peter Jaszi, ed. (Durham, NC: Duke University Press, 1994), 16.

examines the effects of those changes on the practices of artists and authors. These effects are analyzed by this researcher through data collected from a qualitative study consisting of elite, semi-structured interviews with professional artists. A brief summary of guiding interview questions and the methods employed to gather data for this dissertation is presented immediately below, while Chapter 3 describes the methodology in greater detail.

Guiding Interview Questions

Based on the review of literature described in Chapter 2, certain preliminary questions for artists guided the initial collection and analysis of qualitative data. These questions included:

1) What incentives currently exist for the artist or author that would not exist in the absence of formal copyright law?

2) How would the artist's practice be changed by the absence of formal copyright law?

3) What are the artist's experiences with the enforcement of copyright privileges as granted by statute?

4) How has technology changed the artist's approach to distribution of fixed creative works and other matters relating to copyright?

Other questions were developed over the course of each interview conducted as a result of the dynamic nature of each individual's responses to these guiding questions.

Significance of the Study

This study adds to the existing literature and understanding on the subject of intellectual property regimes. It also contributes to a body of knowledge that serves as a reference point for artists, authors, and other creative persons to understand what copyright law does and does not enable or incentivize for the creative process. In addition to a greater understanding of the legal nature of copyright and other intellectual property regimes, the research conducted for this study also contributes to an understanding of the technological advancements that inform the cultural perceptions of copyright, and furthers the discussion on the potential normative future for intellectual property regimes and the creation of fixed works subject to copyright.

Limitations

This project used a constant comparative qualitative methodology, and was not meant to be a large-scale ethnographic study, or one that could encompass all conceivable global participants engaged in the creation of creative works subject to copyright laws. This project, then, was consequently limited in its applications to the geographic regions and locations available to this researcher. Further, even within chosen professional settings for data collection in the form of elite interviews, complete samples of all professional, semi-professional, and amateur participants within those settings was unlikely.

The professional artists interviewed were not chosen randomly and thus are not representative of the larger population. While some statistical data was derived and accumulated, basic subjective versus objective arguments can be made and may limit

some of this research. The use of a constructivist approach, or one that assumes a shared creation of knowledge, helped to reduce this limitation by foregrounding the assumption that researcher and participants mutually create an interpretive understanding of the ethnographic setting and concepts discussed.[9] A constructivist approach informed the use of caution and explicit transparency in interviews, as subjects may omit lived details or otherwise impose a priori accounts of pattern and order.[10] Recordings and reflexive field notes were maintained during the data acquisition process, in line with grounded theory, so as to better streamline any fieldwork and move it towards theoretical interpretations that could more effectively categorize the varied components of current intellectual property regimes. Findings as a result of the conducted interviews are presented in Chapter 4. Chapter 5 provides analysis and discussion of all collected data, for the purpose of better contextualizing the numerous competing interpretations of the phenomenon of copyright, as well as to communicate a more coherent theory of its continued application by authors and publishers of fixed creative works.

[9] Kathy Charmaz and Richard G. Mitchell, "Grounded Theory in Ethnography," in *Handbook of Ethnography*, ed. Paul Atkinson, et al. (London: Sage, 2001), 160.
[10] Melvin Pollner and Robert M. Emerson, "Ethnomethodology and Ethnography," in *Handbook of Ethnography*, ed. Paul Atkinson, et al. (London: Sage, 2001), 119.

CHAPTER 2

LITERATURE REVIEW

Introduction

In order to better contextualize the proposed research questions, it is necessary to examine the history and categorical development of copyright law over the past several hundred years. This literature review discusses the conceptualization of copyright as an attendant result of technological innovation, most specifically the mechanical act of widespread copying that was first enabled by the printing press. There is also a particular focus in this literature review on the American history of copyright legislation, as described in primary and secondary source documents and relevant court cases. This will help to present the historical highlights of copyright law over the past three centuries. While the bulk of this material is presented in chronological order, the narrative will occasionally shift to a topical pattern of arrangement in order to more fully explicate current concepts of copyright law related to past or future events in the overall timeline. This may be most noticeable when attention is given to international conceptualizations of copyright, the resultant interactions with the American standard, and the impact of same on the current formation of copyright law.

The Printing Press and Free Speech

Prior to the development and widespread implementation of the printing press in the fifteenth century, any copy of a given document or book was necessarily completed as a strictly manual, and thus labor-intensive, process. Manual copying was not limited by statute, but by literal access to a written work. In this context, the practice of copying a

given fixed work of authorship was presumed to be a boon to society, although the idiosyncratic process was subject to "corruption and textual drift."[1] The printing press helped to standardize the text of books across multiple editions, as well as to significantly reduce the amount of labor necessary to create copies. But the new technology also posed a new challenge: while the labor required to set the type for a new edition of a book was certainly less than was needed to manually copy one, the process still relied on a "significant investment."[2] Publishers – more often referred to at the time as printers – desired some assurance that their efforts to bring a new edition of a book to market would not be undercut by rival reprints.[3]

This led to the development of printing privileges that granted market exclusivity to the publisher of a book until the initial investment in printing could be recovered. These privileges were decided on a case-by-case basis by either papal, secular, or rabbinic authorities. The first of these was granted to a Venetian printer in 1469 by local state authorities.[4] The system of book privileges was supplemented by book publishing cartels in various markets, often sanctioned by local authorities.[5]

Sanctions by authorities typically took the form of laws prohibiting or censoring works to be published. This was the case with England's Licensing Order of 1643, which required authors to seek license – or what were then called patents – from the government before their works could be published. Those without such imprimatur found the free

[1] Neil Netanel, *From Maimonides to Microsoft*, 19.
[2] Ibid., 4.
[3] Ibid.
[4] Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early-Modern Europe, Volume I* (Cambridge: Cambridge University Press, 1979), 120.
[5] Netanel, From Maimonides to Microsoft, 4.

expression of their own writing to be a criminal act. John Milton, in his *Areopagitica* – considered by Vincent Blasi to be the "foundational essay of the free speech tradition"[6] – called for the end of licensure as a requirement for the publication and distribution of books or other written materials, for the stated reason that such activity negatively impacts the quest for truth.[7]

Other authors would follow in Milton's footsteps, as John Stuart Mill did when he argued against censorship practices, so that individuals could be exposed to a variety of viewpoints and thus better suited to determine truth.[8] For Mill, it was clear that the more choices individuals have, the more they could develop what he called mental and moral faculties.[9] Mill likened these faculties to the human muscular system, and argued they were best improved by the introduction of resistance. More specifically, this resistance took the form of ideas that some might find cause to license, censor, or otherwise prohibit.[10]

Free speech principles and their relation to copyright were further developed by the philosopher Immanuel Kant. The continental European conception of copyright as a natural right was especially influenced by Kant, who argued that an author has a natural

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[6] Vincent Blasi, "Milton's Areopagitica and the Modern First Amendment," *Occasional Papers*, 6 (1995), *available at* http://digitalcommons.law.yale.edu/ylsop_papers/6.
[7] John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England* (London: 1644), 35. The quest for truth itself is seen as a primary function of, and justification for, free speech.
[8] John Stuart Mill, *On Liberty*, David Bromwich, ed. (Yale University Press, 2003)(1859), 31. "No argument, we may suppose, can now be needed, against permitting a legislature, or an executive, not identified in interest with the people, to prescribe opinions to them, and determine what doctrines or what arguments they shall be allowed to hear."
[9] Ibid., 109.
[10] Ibid., 113.

right claim to his work as an autonomous exercise of free will and self-expression.[11] Therefore, any publisher would have a moral duty not to claim an ownership right in an author's work, nor to publish a work without the consent of the author who created it, and should instead act only as a legitimate agent for the distribution of that work.[12]

Principles of free speech did have some bearing on the passage of laws related to copyright, especially as the concept of a free press was developed in the American colonies and early republic. However, as will be shown in the next section, the earliest specific copyright statutes were more concerned with economic considerations than free speech.

The Statute of Anne

A century and a half after the publication of *Areopagitica*, modern copyright statutes began to make explicit the rights of an author to express himself. More concretely, however, they would grant publishers some market exclusivity for the publication of those expressions. Statutory copyright was born in the early eighteenth century with the passage of the Statute of Anne in Great Britain. Depending on how copyright is defined, the Statute of Anne may technically be considered the sixth or seventh copyright statute in England, although the prior versions were more directly acts

[11] Immanuel Kant, "von der Unrechtmassigkeit des Buchernachdruckes," in *Immanuel Kants Werke*, edited by Ernst Cassirer, 213-16 (1913). *See also* Neil Netanel, *Copyright's Paradox* (New York: Oxford University Press, 2008), 53 (describing Kant's stance that publishers and printers should not "obtain title to the author's work").
[12] Immanuel Kant, "On the Wrongfulness of Unauthorized Publication of Books," in *Immanuel Kant: Practical Philosophy*, ed. Mary J. Gregor (Cambridge: Cambridge University Press, 1998), 29-35.

of censorship, including the various decrees of the Star Chamber.[13] The Statute of Anne was the first statute to provide copyright protections – and not just printing prohibitions – by the government instead of by private parties. Enacted by Parliament in 1710, its full title was "An Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasors [sic] of such Copies during the Times therein mentioned."[14]

The statute was originally passed in part due to political efforts by the Stationer's Company, a trade guild that had for more than a century enjoyed a near-monopoly on the publication of books in England.[15] Royal entitlements and the power of the Stationer's Company to grant copyrights that lasted in perpetuity also concentrated this power even more.[16] But by the end of the seventeenth century, the Crown had ended prepublication licensing requirements, hobbling the power of the guild.[17]

Members of the book trade, as represented by the Stationer's Company, believed it was important to offer some form of exclusive rights in expressive works. They argued that exclusive printing privileges were justified, because without any kind of financial incentive, the literary world would remain stagnant. Authors would fear that others, primarily publishers but also the public at large, would reap the benefits of their intellectual labor by freely copying authors' works.[18] As the preamble to the Statute of

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[13] Lyman Ray Patterson, "The Statute of Anne: Copyright Misconstrued," *Harvard Journal on Legislation* 3 (1965): 227.
[14] Great Britain, *Statutes at Large,* 8 Anne, c. 19 (1710).
[15] Diane Leenheer Zimmerman, "The Statute of Anne and Its Progeny: Variations Without a Theme," *Houston Law Review* 47, no. 4 (2010): 969.
[16] Peter W.M. Blayney, *The Stationers' Company and the Printers of London 1501-1557* (Cambridge: Cambridge University Press, 2013).
[17] Diane Leenheer Zimmerman, "The Statute of Anne and Its Progeny," 970.
[18] Ibid., 974.

Anne asserted,

> Printers Booksellers and other Persons have of late frequently taken the Liberty of printing, reprinting and publishing, or causing to be printed reprinted or published Books and other Writings without the consent of the Authors or Proprietors of such Books and Writings to their very great Detriment and too often to the Ruin of them and their Families...[19]

In an age long before digital distribution, the high cost of printing, binding, and disseminating fixed creative works led to a concentration of those capabilities in the hands of a few publishers, and the Stationer's Company copyright was the only one that existed in England up to 1709.[20] With the passage of the Statute of Anne, royal entitlements and prior acts of censorship that had allowed the Stationer's Company monopoly were supplanted by a law that allowed any author or printer, not just those who belonged to the guild, to register a copyright.[21] The guild, then, would be granted terms of protection of up to 21 years from publication, but so would everyone else who secured a copyright.[22] Even though the monopoly privilege of the Stationer's Company was lessened by the passage of the Statute of Anne, that law's version of copyright was based on the one developed by the guild, and so continued to favor the rights and privileges of publishers over authors.[23]

The Statute of Anne also had the stated purpose of promoting learning, and its guarantee of "vesting the Copies of printed Books in the Authors or Purchasors" allowed those who purchased a text to reprint the work freely following the stated period of

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[19] Great Britain, *Statutes at Large,* 8 Anne, c. 19 (1710).
[20] Lyman Ray Patterson, "The Statute of Anne," 225.
[21] Diane Leenheer Zimmerman, "The Statute of Anne and Its Progeny," 974.
[22] Lyman Ray Patterson, "The Statute of Anne," 225.
[23] Ibid., 225-226.

entitlement.[24] Again, however, during that period of entitlement the Statute served more practically as a form of trade regulation to break the monopoly of the Stationer's Company for printing and selling books.

> By providing coverage that was narrow (owners were protected only against unconsented wholesale reproduction of books) and of brief duration, proprietors would get enough protection to make the publishing business attractive but not so much that they could damage the public welfare through sustained high prices or lengthy periods of control.[25]

Such lengthy periods of control are also products of American copyright legislation, although it took several hundred years to get to that point.

The development of the printing press, principles of free speech, and early copyright legislation such as the Statute of Anne all served as prelude to the American colonial perception of copyright. The next section of this literature review describes how this perception influenced the founding fathers to include a constitutional clause concerning copyright at the dawn of the American nation.

Early American Conceptions of Copyright

According to some American jurists, the only valid way to interpret the U.S. Constitution is through the intentions of its Framers. From this perspective, according to one of those jurists, Robert Bork, judges should seek "enlightenment from the structure of the document and the government it created."[26] For some, those intentions are appropriately deduced contextually, as the words of the Constitution itself may not account for the dynamic changes in cultural norms over time. According to U.S. Supreme

[24] Netanel, *From Maimonides to Microsoft*, 24.
[25] Diane Leenheer Zimmerman, "The Statute of Anne," 974.
[26] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990), 165.

Court Justice Oliver Wendell Holmes, Jr.:

> Provisions of the Constitution of the United States are not mathematical formulas having their essence in their form, but are organic living institutions transplanted from English soil. Their significance is not to be gathered simply from the words and a dictionary, but by considering their origin and the line of their growth.[27]

Alternatively, U.S. Supreme Court Justice Antonin Scalia offered a more precise method of constitutional interpretation with textualism, wherein a text "is construed reasonably, to contain all that it fairly means," but legislative intent absent of textual support must not be used as a basis for judicial authority.[28] In either case, the balance between any government's textual – or contextual – claims to authority, and the subsequent limitations placed on individuals, must be considered in relation to the natural rights reserved by those individuals.

Here, this researcher uses the term "natural right" to refer to any principle of freedom which does not require any legal structure to enable or enforce it, and is self-evident to the individual.[29] The Framers of the U.S. Constitution had some experience with governments that would infringe on one such natural right, freedom of speech. The Framers, then, were careful to limit the powers of the new American federal government to endanger that right. Thomas Jefferson sought to strike a balance between the legalism

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[27] Gompers v. United States, 233 U.S. 604, 605 (1914).
[28] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1998), 23.
[29] See Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), in which the author argues for the existence of objective ethical rights and wrongs as a foundation for philosophy and law; also John Finnis, *Natural Law and Natural Rights* (London: Oxford University Press, 2011), 34, for discussion of "pre-moral principles of practical reasonableness," or the personal inclinations of humans (specifically the practice of speech itself) that are precursors to shared understandings of natural rights.

of England and the rationalism of France in the development of early American law.[30] Within this context, this would secure the rights of American citizens to express themselves, while also providing a temporary monopoly to print and sell one's own intellectual and creative endeavors.

Other Framers, including James Madison, were hesitant to allow for a state-granted monopoly of any scope or duration, including monopolies of copyright. Madison was perhaps most clear on this point in an essay published posthumously:

> Monopolies tho' in certain cases useful ought to be granted with caution, and guarded with strictness against abuse. The Constitution of the United States has limited them to two cases - the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner might otherwise withhold from public use. There can be no just objection to a temporary monopoly in these cases; but it ought to be temporary because under that limitation a sufficient recompense and encouragement may be given...Perpetual monopolies of every sort are forbidden not only by the Genius of free Governments, but by the imperfection of human foresight.[31]

However, both Madison and Jefferson could accept the argument for an incentive such as copyright as a means to ultimately enrich America and its people with a literary canon.[32] Both men were likely influenced by Thomas Paine, who argued at the time for "sufficient laws...to prevent degradation of literary property."[33] Paine's writings were given to Madison and other members of a committee of the Continental Congress in 1783, four

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[30] Fred Siebert et al., *Four Theories of the Press; the Authoritarian, Libertarian, Social Responsibility, and Soviet Communist Concepts of What the Press Should Be and Do* (Urbana: University of Illinois Press, 1956), 46.
[31] James Madison, "Aspects of Monopoly One Hundred Years Ago," *Harper's Monthly Magazine* 128, no. 766 (1914): 490.
[32] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), retrieved from http://www.constitution.org/jm/17881017_tj.htm.
[33] Thomas Paine, "Introduction to Letter to the Abbe Raynal, on the Affairs of North America; In Which the Mistakes in the Abbes Account of the Revolution of America are Corrected and Cleared Up" (1782), in 8 *Life and Writings of Thomas Paine*, ed. Daniel Edwin Wheeler (New York: Vincent Parke and Company, 1908), 180-182.

years before the Constitution was created.[34]

The copyright clause in the U.S. Constitution[35] is nearly identical to the language of Britain's Statute of Anne. By granting the exclusive privilege of duplication and distribution in the marketplace to the authors of original works, the copyright clause intended to "promote the progress of science and the useful arts."[36] Thus, the public good was the primary motivation for copyright legislation, and the grant of a temporary economic monopoly a means to incentivize publication of new works that would further such good. The founders, however, did not necessarily believe that the goal of progress for society as a whole was incompatible with incentives of exclusivity made for authors. As Madison wrote, "The Public good fully coincides...with the claims of individuals."[37] Jefferson made a similar point in a letter from 1813: "Society may give exclusive right to the profits arising from [intellectual property], as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done...without claim or complaint from anybody."[38]

Since the nation's beginning, then, the American government has endorsed the practice of granting a copyright, or the exclusive privilege of duplication and distribution in the marketplace, so as to advance the public good through progress in science and art. This is an incentive paradigm that recognizes the concept of a copyright as a monopoly,

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[34] Justin Hughes, "Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson," *Southern California Law Review* 79 (2006): 1021.
[35] U.S. Const. art. I, § 8. cl. 8.
[36] Ibid.
[37] James Madison, *Federalist,* No. 43 (Jan. 23, 1788), in *The Federalist Papers* (Black and White Publications, 2015), 134.
[38] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in Andrew A. Lipscomb and Albert Ellery Bergh, *The Writings of Thomas Jefferson volume 13* (Washington, D.C.: The Thomas Jefferson Memorial Society, 1907), 333-34.

however temporary (as made clear by the "limited times" clause).[39] Some scholars have stated that the primary purpose of copyright is a protection for authors against those who would steal their work.[40] However, while this belief may influence how copyright is understood by authors, publishers, and audiences today, it is, again, not the original stated legal purpose present in the Constitution.

Based on the language in Article I of the U.S. Constitution, the founding fathers intended to champion the theory of public benefit from intellectual works by means of incentivizing authors to publish their writings and discoveries with the grant of copyright.[41] Even into the twentieth century, Supreme Court decisions would foreground the importance of public benefit, as in the case of *Mazer v. Stein*,[42] wherein Justice Reed delivered the opinion of the Court that, "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that it is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"[43] The Framers enacted the compromise of economic monopolies on original fixed creative works granted to authors for a limited time, so as to advance public knowledge.

After drafting the Constitution and its copyright provision, the Congress of the

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[39] The limited times clause becomes more important in recent years due to changes in copyright legislation. Laws like the Sonny Bono Copyright Term Extension Act (CTEA) retroactively extends term protection for works already under copyright, effectively granting copyright in perpetuity.
[40] See, e.g., L. Ray Patterson and Stanley W. Lindberg, *The Nature of Copyright: A Law of Users Rights* (Athens, GA: The University of Georgia Press, 1991), 50-55.
[41] See, e.g., Robert P. Merges, et al., *Intellectual Property in the New Technological Age*, 4th Ed. (New York: Aspen, 2006), 11 ("The Constitution expressly conditions the grant of power in the patent and copyright clause on a particular end, namely 'to Promote the Progress of Science and useful Arts.'").
[42] 347 U.S. 201 (1954).
[43] Ibid., 219.

new American federal government passed its first official Copyright Act in 1790.[44] Rather than the dictatorial fiat of prior English law, this act positioned copyright as a privilege which may be sought, but which would not serve as a limitation or restriction on printing in general. Only a small percentage of published authors sought copyrights, which required depositing several copies with the appropriate authorities, including the Secretary of State, and the announcement of the copyrighted publication in newspapers.[45] In contrast to the copyright laws in effect today, the 1790 Act was also quite narrow in its proprietary grants to authors. For example, the 1790 Act allowed for the free creation of derivative works, as well as the public display or performance of works under copyright.[46] This initial Federal Copyright Act also did not apply to foreign works, as section five explicitly permitted the free reprinting of works published and copyrighted by those who were not Americans:

> That nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting, or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States.[47]

Americans were thus free to copy and distribute the literary works of Britain and other nations without remunerating the authors.

The duration of copyright as granted by the 1790 Act, and even as granted by subsequent copyright laws of the next century, was also more limited compared to today.

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[44] "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." Act of May 31, 1790, 1 Statutes at Large, 124.
[45] Ibid., § 3.
[46] Unauthorized public display or performance of works under copyright would later become specifically forbidden under the 1976 Copyright Act.
[47] Act of May 31, 1790, 1 Statutes at Large, 124., § 5.

Initial copyright terms were for 14 years with the option to renew for another 14-year term. Up to the passage of the 1976 Act, total term protection never exceeded 56 years. These limitations in duration, in accordance with the Constitution, as well as the limited proprietary rights granted by copyright itself, all reinforced the stated purpose of copyright as a means to enrich society by *temporarily* incentivizing authors to create and publish new works. Again, the early American conception of copyright was to view it not as a natural right, as the act of self-expression or speech itself was understood. Instead, it was a means by which the government could encourage authors to share their fixed forms of self-expression so that all members of society could learn from them. This is also referred to as an instrumental rights model, since it recognizes the use of copyright privileges to improve the public or common good.[48]

Wheaton v. Peters **and Copyright as a Temporary Grant**

In the decades following the 1790 passage of America's first federal copyright law, legislators and the courts continued to seek balance between incentivizing authors and limiting monopolies. This was accomplished in part by court decisions that still have some bearing on copyright norms today. In *Folsom v. Marsh*,[49] for example, Justice Joseph Story, in making a determination about what constituted an appropriate and legal use of existing written materials as opposed to illegal piracy of those materials, set forth a four-factor test that was later codified into law as the fair use doctrine.[50]

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[48] Darren Hicks, *Artistic License: The Philosophical Problems of Copyright and Appropriation* (New York: University of Chicago Press, 2017), 102.
[49] 9 F. Cas. 342 (C.C.D. Mass. 1841).
[50] *See infra* note 146 and accompanying text.

Wheaton v. Peters[51] is another important case in analyzing the development of copyright law. The ruling solidified the treatment of copyright as a statutory protection, and not a natural right or product of common law.[52] The case originated when Richard Peters and Henry Wheaton disagreed over the right to publish the decisions of the U.S. Supreme Court. Peters succeeded Wheaton as reporter for the U.S. Supreme Court in June 1828. Peters planned to publish, or more accurately re-publish, court decisions that were reported by his predecessors, including Wheaton.[53] Wheaton and his publisher filed a claim in the Pennsylvania Circuit Court against Peters and his own publisher, seeking an injunction to stop Peters. Judge Joseph Hopkinson ruled that because Wheaton had not secured statutory protection for his previous publishing of court decisions, he was not entitled to government protection now.[54]

The ruling was appealed, and the Supreme Court decided in January 1834 that opinions of the Court could not be copyrighted. Justice John McLean, in delivering the majority opinion, stated, "It may be proper to remark, that the Court is unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this Court; and that the judges thereof cannot confer on any reporter any such right."[55] The majority held that there was no common law copyright at the federal level, or at the state level (Pennsylvania), or even in England.[56] The Court also held that requirements

[51] 33 U.S. (8 Pet.) 591 (1834).
[52] Howard B. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright," *Wayne Law Review* 29, no. 3 (1983): 1178.
[53] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 658 (1834).
[54] Wheaton v. Peters, 29 F. Cas. 862 (C.C.E.D. Pa. 1832) (No. 17,486).
[55] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 668 (1834). However, marginal notes, abstracts, index notes, and other intellectual works created by the court reporter or others could indeed be copyrighted.
[56] Ibid., 592 ("The right of an author to a perpetual copyright does not exist by the

for securing copyright under the Copyright Act were mandatory and must be strictly followed to ensure statutory protection.[57]

The Court was clear: no common law interest for copyright existed. It was a privilege that must be sought, and even then, the government could deny claims for copyright in existing materials that were sought as a means to control and limit society's access to information. Dissenting opinions stressed that an author has natural rights that automatically protect his property as a matter of justice, equality, and appeals to presumed tradition.[58] So the premises of the majority and dissenters were at polar opposites, with the majority emphasizing the interest of the public, and the dissenters that of the individual author. In the end, copyright was defined as a statutory grant of a monopoly for the benefit of the author, and not a product of common law, or a natural right.[59]

This case solidified the stance that copyright in America was meant to favor the public domain and the public's right to access over the author's interests. The interests of the author were not excluded entirely, though, and were mentioned explicitly by Justice McLean in the ruling:

> That an author at common law has a property in his manuscript, and may obtain redress against anyone who deprives him of it or by obtaining a copy endeavors to realize a profit by its publication cannot be doubted, but this is a very different right from that which asserts a perpetual and exclusive property in the future

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common law of Pennsylvania"), and 657 ("...since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute [in England]").
[57] Ibid., 593 ("All the conditions [to secure a copyright] are important; the law requires them to be performed, and consequently their performance is essential to a perfect title").
[58] Ibid., 669 (Thompson, J., dissenting), ("I think I may assume as a proposition not to be questioned, that in England, prior to the statute of Anne, the right of an author to the benefit and profit of his work, is recognized by the common law.").
[59] Howard B. Abrams, "The Historic Foundation of American Copyright Law," 1178.

publication of the work after the author shall have published it to the world.[60] Independent of the ruling, authors were already protected from the unauthorized publication of an unpublished manuscript, which is more a privacy right than a copyright issue.[61,62]

The Court also referred directly to a decision in England's House of Lords in 1774 as the ruling precedent, that of *Donaldson v. Becket.*[63] There, the issue of whether a perpetual common law right in the creation of fixed works existed was famously debated. If that right did exist, reasoned England's then-Attorney General Edward Thurlow, any copyright legislation that enacted term limits on copyright would be an infringement on the natural rights of the author to control their work in perpetuity.[64] The court ruled against such common-law protections, affirming that any protections granted to the author – and the enforcement of such protections – must rely on the relevant statutes as written, and not the moral claims of a plaintiff.[65]

Again, the Supreme Court in 1834 ruled in a similar manner, declaring that by the statute of 1790, Congress did not affirm an existing (or natural) right, but created a right through legal entitlement. To rule otherwise would have opened the door for a perpetual copyright, which the Court saw as something to be limited in the interests of society, just

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[60] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).
[61] Samuel D. Warren and Louis D. Brandeis, "The Right to Privacy," *Harvard Law Review* 4 (1890): 198 ("No other has the right to publish his productions in any form, without his consent.").
[62] *See infra* notes 149-152 and accompanying text for discussion of *Harper & Row Publishers v. Nation Enterprises,* wherein the Supreme Court ruled on the preemptive publication of a manuscript that was unpublished but intended for publication.
[63] Hansard, 1st ser., 17 (1774): 953-1003.
[64] Ibid., 954.
[65] Ibid., 955-956. *See also* J.E. Elliott, "Conjecturing the Common in English Common Law: Donaldson v. Beckett and the Rhetoric of Ancient Right," *Forum for Modern Language Studies* 42, no. 4 (2006): 441-442.

as monopolies must be limited.[66] Additionally, Justice McLean questioned how some privileges granted by copyright could even be truthfully described as rights:

> A book is valuable on account of the matter it contains, the ideas it communicates, the instruction or entertainment it affords. Does the author hold a perpetual property in these? Is there an implied contract by every purchaser of his book that he may realize whatever instruction or entertainment which the reading of it shall give, but shall not write out or print its contents?[67]

This query from Justice McLean perhaps best summarizes the reasoning behind any argument that copyright cannot exist as a natural right independent of statute. The ruling "established as a bedrock principle of American copyright law that copyright is a creature of statute and not a product of the common law."[68]

Copyright in New Territories and New Media

A conspicuous absence in the 1790 Copyright Act – and one which would remain absent for the next century – was the lack of consideration for copyright protection for foreign works.[69] Throughout the nineteenth century, American politicians and publishers offered several justifications for that absence. President James Buchanan, for example, was opposed to an international treaty for copyright, stating, "But to live in fame was as great a stimulus to authors as pecuniary gain; and the question ought to be considered, whether [British authors] would not lose as much of fame by the measure asked for, as

[66] Howard B. Abrams, "The Historic Foundation of American Copyright Law," 1180-1181.
[67] Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834).
[68] Howard B. Abrams, "The Historic Foundation of American Copyright Law," 1185.
[69] Act of May 31, 1790, 1 Statutes at Large, 124, § 5.

they would gain in money."[70] The implication was clear: American authors who sought statutory protection would receive it, but foreigners must settle for being known by the American public.

Other prominent opponents of international copyright, such as American author and publisher P.H. Nicklin, made the argument that British books were more expensive than the unlicensed versions printed in America, and thus an unfair financial burden would be placed on American citizens, especially during a period – 1837 to 1843 – when America's economy was in the midst of a depression.[71] Nicklin described the "immense amount of capital" that was necessary to publish a book, and how a change in the laws to acknowledge foreign copyright would have catastrophic effects on the American publishing industry's ability to make a profit.[72] Nicklin also reiterated President Buchanan's stance that foreign authors might benefit from the increased fame that came with a wider audience. For British authors in particular, he wrote, "their American fame is echoed back across the ocean, and increases the value of their copyrights at home."[73]

On the other side of the debate, Senator Henry Clay of Kentucky led a select committee, and repeatedly introduced bills to Congress to secure copyright protections for foreign works. Clay wanted an international copyright agreement, and introduced

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[70] *Register of Debates in Congress* 24th Cong. 2nd Sess., XIII (2 February 1837), 670-671. At the time of these remarks, Buchanan was still a Senator, serving on a committee for the issue of international copyright that also included Senator Henry Clay.
[71] James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815-1854* (Columbus: Ohio State University Press, 1974), 1.
[72] P.H. Nicklin and Joseph Lowe, *Remarks on Literary Property* (P. H. Nicklin & T. Johnson: 1838), 39 (these included capital required "in printing, in binding, in making paper and types, and stereotype plates, and printing presses, and binders' presses and their other tools; in making leather and cloth, and thread, and glue, for binders; in copper plates, in copyrights, and in buildings in which these occupations are conducted.")
[73] Ibid., 15.

three different copyright bills between 1838 and 1842 that would include an Anglo-American copyright agreement. None of them received congressional support. Popular British authors of the period, including Charles Dickens, also argued for increased proprietary protection and control of their works in U.S. markets. Dickens even toured the United States in 1842 to champion his cause.[74] While some derided Dickens for being insensitive to the economic plight of Americans during the depression then, Senator Clay remarked that American publishers of foreign works were disingenuous about the costs of remunerating Dickens and other popular British authors: "[The book printers] bring forward highly exaggerated statements both of the extent of Capital employed and the ruin that would be inflicted by the proposed provision for Foreign authors."[75]

Yet even if these reports were not exaggerated, it should be noted that British and other foreign publishers would face similar costs in printing as those incurred by American publishers like Nicklin. In describing the challenges of the publishing business in nineteenth century London, one historian noted that "a publisher, to achieve success, needed charm, financial acumen, fore-knowledge of the future, a stony heart, and a very rich wife."[76] Most American legislators, however, did not see fit to enact protections for foreign publishers through the next revision of the Copyright Act in 1870.

The Copyright Act of 1870[77] made one major change to existing law: the Librarian of Congress was made the official copyright officer. Two copies of any fixed work seeking a copyright were required to be filed with the Librarian no later than ten

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[74] Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity* (New York: NYU Press, 2001), 50-55.
[75] James J. Barnes, *Authors, Publishers and Politicians*, 73.
[76] Ruari McLean, *Victorian Book Design and Colour Printing*, Second Edition (Berkeley, CA: University of California Press, 1972), 3.
[77] Act of July 8, 1870, c. 230, 16 Statutes at Large 198.

days after publication in order to secure statutory protection. This Copyright Act still allowed for the free publication of foreign works. That changed in 1891, thanks in part to efforts by the Authors' Copyright League, a collective of popular writers who spoke before Congress and otherwise petitioned for an Anglo-American copyright agreement.[78] These efforts eventually led to the 1891 International Copyright Treaty, which recognized copyrights of foreign works for the first time in America.[79] By that time, American authors and publishers had their own concerns about the strength of American copyright abroad, and several European nations were prepared to "extend reciprocal protection to the productions of Americans."[80]

Like Charles Dickens, other popular authors continued to petition the U.S. government for additional copyright terms and related entitlements, foremost among them Samuel Clemens.[81] Speaking before Congress in 1906, Clemens – more popularly known as Mark Twain, and wearing the cream-colored suit with which he is still most associated – argued for longer terms of copyright protection for authors, at a time when maximum protection lasted up to 42 years.[82] Many decades before such a change would actually be included in a statute, Clemens sought copyright terms that would last for the lifetime of the author plus fifty years. Under the system then, once the author dies, according to Clemens, "his children starve."[83] The author, however, did not argue for a

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[78] *New York Times*, "American Copyright League: Proceedings of the Adjourned Annual Meeting," December 31, 1891.
[79] International Copyright Act (The Chace Act) of March 3, 1891. 26 Statutes at Large, 1106.
[80] G.H. Putnam, *The Evolution of the Copyright Law* (Gramercy Park, N.Y.: National Arts Club, 1909), 4.
[81] Siva Vaidhyanathan, *Copyrights and Copywrongs*, 50-55.
[82] *Washington Post*, "Twain's Fancy Suit," December 08, 1906.
[83] Ibid.

perpetual copyright. “Let the grandchildren take care of themselves. That would take care of my daughters, and after that I am not particular.”[84]

Although the copyright bill that Clemens championed was not signed into law, authors and other interested parties continued to petition Congress for longer copyright terms and greater protections, so that the relevant statutes updated in 1909 included some of those provisions. The disparate interests of so many parties, including authors and publishers, meant that more than 200 copyright bills had been introduced in Congress by 1904. The Register of Copyrights responded, “The [copyright] laws as they stand fail to give the protection required, are difficult of interpretation, application, and administration, leading to misapprehension and misunderstanding, and in some directions are open to abuses.”[85] Thus, with the 1909 Copyright Act,[86] changes were made to the requirements to secure a copyright in order to ease the burden on government, which continued to see progressively more works seeking legal protection.

The Copyright Act of 1909[87] established a twenty-eight year term with a like renewal term, for a total fifty-six year term limit on copyright. This act also expanded the scope of the statutory protections and limited monopolies provided by law, granting copyright holders the exclusive right to publish or republish, translate, adapt, or perform intellectual works. The Copyright Act of 1909 still required affirmative notice on the part of the author to gain statutory protection, but it was no longer necessary to register a copy of the work with the Copyright Office. The same protections could now be sought merely

[84] *New York Times*, “Mark Twain in White Amuses Congressmen,” December 08, 1906.
[85] U.S. Copyright Office Bulletin No. 8, *Copyright in Congress 1789-1904*
[86] “An Act to Amend and Consolidate the Acts Respecting Copyright.” Act of March 4, 1909, Pub. L. No. 60-349, 35 Statutes at Large, 1075.
[87] Act of March 4, 1909, c. 320, 35 Stat. 1075, 17 U.S.C § 1 et. seq.

by the act of affixing in some way to the work itself a small, circled "C" – © – the copyright symbol.[88]

This version of the copyright law also continued the trend of repudiating copyright itself as a product of common law. This was important for emphasizing that rights of property in literary or artistic works were granted by statute, and not assumed to be natural or perpetual in their character.[89] An earlier form of the bill included a clause, "that subject to the limitations and conditions of this Act copyright secured hereunder shall be entitled to all the rights and remedies which would be accorded to any other species of property at common law,"[90] but this was not enacted in the law itself. However, the author of a copyright-eligible work was still able to seek damages by civil action from any unauthorized publisher of a private work.[91]

The scope of copyright and the types of works to which it could be applied also increased with the 1909 Copyright Act. From initial protections for books, charts, and maps in the eighteenth century, copyright could now also be applied to pictorial reproductions, sheet music, advertisements, merchandise, and new mediums such as film.[92] Still, facts and ideas themselves could not be copyrighted, and the courts set a minimum threshold for originality as a precondition for a work to be copyrighted. All work that met this threshold, though, would be eligible for copyright, independent of the perceived merits of the work itself.

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[88] Ibid., § 19.
[89] *See supra* notes 51-68 and accompanying text.
[90] R.R. Bowker, *Copyright, its History and its Law: Being a Summary of the Principles and Practice of Copyright with Special Reference to the American Code of 1909 and the British Act of 1911* (Boston: Houghton Mifflin, 1912), 44.
[91] Again, such protections describe a more general right to privacy as described by Brandeis and Warren. *See supra* note 61 and accompanying text.
[92] Act of March 4, 1909, c. 320, 35 Stat. 1075, 17 U.S.C § 5.

The expansion of copyright's potential scope – and the need for neutrality in judging a work's value or merits – was illustrated by the U.S. Supreme Court ruling in *Bleistein v. Donaldson Lithographing*.[93] In that case, Justice Holmes stated that the Court and the law must remain value neutral and not judge the merits of a particular work because of the potential risk that even an educated judge may not anticipate the true worth of a given work as determined by the marketplace and society as a whole.[94]

As a slight temporal tangent, it has also since been established that no work would be deemed original, and thus granted copyright protection, merely because of the "sweat of the brow,"[95] or the effort it took to complete. This was not made explicitly clear, however, until nearly a century following the *Bleistein* decision, in *Feist v. Rural Telephone Service*.[96] Here, the Court reinforced the principle that copyrights could not be secured in databases or other collections of information that do not meet the minimum threshold for originality.[97]

The overarching trend of copyright throughout the nineteenth century – and entering the twentieth – was an expansion of entitlements, in term length, territorial scope, and types of creative expressions included. Courts in both America and Great Britain had determined that copyright was not a product of common law. Thus, all of these expansions, petitioned for by interested parties, had to be explicitly provided by statute. As the next section of this literature review will describe, laws drafted in the twentieth century continued these expansions, as well as firmly incorporating into statute

[93] 188 U.S. 239 (1903).
[94] Ibid., 251-52.
[95] 499 U.S. 341 (1991).
[96] Ibid.
[97] Ibid.

the philosophical position that copyright is indeed a natural right.

WIPO and Copyright as a Natural Right

This dissertation seeks in part to analyze the development of the ideological conflation of intellectual property (i.e., ideas) as a subset of real property, and the resultant justification for the continued increase in scope and duration for copyright law in America. In part, this conflation originated within the trend towards globalization and internationally shared principles of copyright that were codified in the late nineteenth and early twentieth centuries, and motivated in large part by the aims of corporations to use trade agreements as a means to control ownership of works subject to copyright law, according to Debora Halbert.[98] Although these are described as internationally shared principles, Susan Sell argues that much of this trend of globalization can be traced most directly to the laws and trade agreements initiated by the United States government and American corporate interests,[99] including the efforts of Henry Clay and the Chace Act. However, as evidenced by the Berne Convention and the United Nations' creation of the World Intellectual Property Organization (WIPO) in 1967,[100] the trend of global agreements for copyright was not limited in appeal to only American corporations.

The World Intellectual Property Organization is most notable for first

[98] Debora J. Halbert, *The State of Copyright: The Complex Relationships of Cultural Creation in a Globalized World* (New York: Routledge, 2014).
[99] Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003), 60.
[100] Convention Establishing the World Intellectual Property Organization (Signed at Stockholm on July 14, 1967, Amended on September 28, 1979), Article 1-21. Retrieved from http://www.wipo.int/treaties/en/text.jsp?file_id=283854

popularizing and defining explicitly the term "intellectual property."[101] Prior to the use of the term "intellectual property," others had seen cause to refer to creative expressions and fixed works specifically as property for several hundred years prior, most often as "literary property." For example, eighteenth century English judge William Blackstone "analogized ideas, thoughts, and opinions with tangible objects to which title may be taken."[102] In his own words, Blackstone asserted that an individual who creates an original work should have rights not just in the fixed expression, but also in that work's "style" and "sentiments."[103] Literary property thus gave way to intellectual property.

As the United States Congress began to develop the 1976 Copyright Act, it would in turn use both Blackstone's and WIPO's sentiments regarding copyright to draft legislation that would include the right to exclude others from not only literal copying, but the creation of works deemed to be derivative of the original. Before discussing that statute and its ongoing impact on public perception of copyright today, it is necessary to mention the incompatibility of simultaneously acknowledging property rights in both chattel and ideas.

Chattel and other real property, by their very definitions, are finite resources. Were they not finite, there would be no legitimate need to determine ownership, as anyone who wished to exploit an infinite resource would be free, by nature, to do so. Ideas, and even the concrete expression of those ideas, either verbally or in writing, are

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[101] Ibid., Art. 1 (viii), wherein intellectual property is described as rights related to and "resulting from intellectual activity in the industrial, scientific, literary or artistic fields."
[102] Hannibal Travis, "Pirates of the Information Infrastructure: Blackstonian Copyright and the First Amendment," *Berkeley Technology Law Journal* 15, no. 2 (2000): 783.
[103] *See* Tonson v. Collins, 1 Black W. 322, 96 Eng. Rep. 180 (K.B. 1761) at 343, 96 Eng. Rep. at 189 (Blackstone arguing, "Style and sentiments are the essentials of a literary identity. These alone constitute its value," and so an author would be due any profits which arise from that value.).

among those categories of infinite resources, a fact remarked upon by Thomas Jefferson:

> 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.[104]

However, just because there is no legitimate cause to claim ownership in an infinite resource does not mean there is absolutely no cause. One reason to determine ownership over infinite resources is as a means of proprietary control, or the implementation of a monopoly – that is, a controlling party holding exclusive title to the reproduction of ideas set forth in a fixed form, e.g., the copyright of a book. Whether such a monopoly is in effect, forms of intellectual property, such as creative works under copyright, exist as what Laura Biron refers to as "multiply realisable" types.[105] These types can exist in more than one place simultaneously, and new instances, or tokens, of a single type ("distinct, physical things," such as books) are not limited by the types themselves.[106]

American courts have understood this philosophical divide between real property and intellectual property with varying degrees of success. Although not a perfect system, one of the ways that books are guaranteed a second life even when out of print is the first sale doctrine. The first sale doctrine was established in *Bobbs-Merrill v. Straus*,[107] wherein the U.S. Supreme Court decided that, "[O]ne who has sold a copyrighted article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he

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[104] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in Lipscomb and Bergh, *The Writings of Thomas Jefferson*, 333-34.
[105] Laura Biron, "Two Challenges to the Idea of Intellectual Property," *The Monist* 93, no. 3 (2010): 383.
[106] Ibid.
[107] 210 U.S. 339 (1908).

could not publish a new edition of it."[108] At least for printed works, then, this doctrine aids in the spread of culture and access to creative works, and the limited monopoly of copyright does not grant the owner absolute control over pricing and dissemination of a work.[109] In more recent years, the Supreme Court has held that the first sale doctrine allows the purchaser of a legitimate copy of a published work to sell or dispose of that copy as he wishes, even if the copy was lawfully printed in a foreign territory.[110]

In contrast to printed works, however, modern technology and digital distribution complicate the norms established by the first sale doctrine. As professor of law Thomas Dreier points out in regards to the modern consumption of tokens of works under copyright, "digital technology turns the end user into a producer of the copy that he or she consumes."[111] This means that end users, through mediums like networked personal computers, must always produce the copy of a fixed work that they read or view. Under current copyright law, this is recognized as the essential step defense, or that "it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided that such a new copy or adaptation is created as an essential step in the utilization of the computer program."[112] However, there is no guarantee in every case that such a copy is legitimate,

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[108] Ibid., 350.
[109] An exception to the first-sale doctrine is that owners of phonorecords or other musical artifacts are forbidden from renting it to the public for "commercial advantage" without the permission of the owner of the copyright. Also see H.R. Rep. No. 987, 98th Cong., 2d sess. (1984).
[110] Kirtsaeng v. Wiley, 568 U.S. 519 (2013).
[111] Thomas Dreier, "Contracting out of Copyright in the Information Society: The Impact on Freedom of Expression," in *Copyright and Free Speech: Comparative and International Analyses*, eds. Jonathan Griffiths and Uma Suthersanen (New York: Oxford University Press, 2005), 386.
[112] U.S. Copyright Act, 17 U.S.C. § 109(b).

as would typically have been presumed when technological barriers to literal copying were primarily limited to "commercial producers of copies."[113] This has also shifted the onus of potential copyright infringement from traditional publishers to those end users who access and copy digital versions of fixed creative works.

Dreier also describes how copying fixed works is made easier by digital technologies, but that "technological protection measures...are capable of restricting or blocking access to, and use of, copyright[ed] material."[114] Others, such as Sherwin Siy, the VP for legal affairs for the Public Knowledge group, have extrapolated from similar ideas regarding technological controls to "imagine a system where you can pay one amount to read a book...another amount to search the text, another amount to be able to cut and paste.... Such a system seems at best tedious and at worst dystopian, but it's within the realm of technological possibility."[115] While this outcome is positioned as dystopian by Siy, such control might be favored by proponents of a moral rights doctrine regarding copyright.

A doctrine of moral rights, from the French droit moral, has been suggested by numerous parties, including European governments, the WIPO, and even some American trade organizations, including the Graphic Artists' Guild. That guild describes the following four rights implied by the concept:[116]

1) An artist has the right to prevent modification or distortion of the initial fixed

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[113] Dreier, "Contracting out of Copyright," 386.
[114] Ibid.
[115] Sherwin Siy, "Copies, Rights, and Copyrights: Really Owning Your Digital Stuff," *Public Knowledge*, June 27, 2013, accessed July 4, 2018, http://www.publicknowledge.org/copiesrightscopyrights.
[116] Graphic Artists Guild, *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines*, 14th Edition (New York: Graphic Artist's Guild, Inc., 2013), 37.

creative work.

2) An artist has the right to be properly attributed as the author of his or her creative work.
3) An artist reserves the right to reveal or disclose his or her creative work to the public.
4) An artist has the right to recall, destroy, or disavow his or her own creative work at any time.

Thus, there is some conflict between the first sale doctrine and moral rights doctrine, centering on the just amount of proprietary control that should be afforded an author in his or her works. This amount of control is further complicated by whether it is afforded both in type and token, as well as sentiment and expression, and also what is enabled or constrained by technology. The debate regarding controls through copyright has been ongoing for more than a century. Allen Ripley Foote described, in the 1890s, the necessity of copyright laws as a matter of justice in securing rights for authors in their discoveries.[117] Foote also noted that such control should not be interminable, as "by that order of nature which sets a limit to the life of the body, the results of those who once lived...become the common heritage of all the living. The dead cannot own property."[118] Absolute and interminable control of intellectual property is incompatible with the stated aims of copyright, which again is to promote the progress of science and the useful arts by incentivizing authors to share their works and discoveries with society at large.[119]

The first sale doctrine is one way the courts have attempted to balance the rights

[117] Allen Ripley Foote, *The Right To Property in an Idea* (Philadelphia, PA: Franklin Institute, 1898), 4.
[118] Ibid., 5.
[119] *See supra* notes 35-43 and accompanying text.

of authors and audiences with regard to copyright, and to draw a clear legal distinction between types, which may not be reproduced without permission; and tokens, which may be treated as chattel without license. As the next section will show, however, the argument for copyright as a natural or moral imperative, coupled with broader interpretations of whom or what may be legally considered an author, continues the trend of increased proprietary control. With regard to copyright, the most prominent of these controls is the right to exclude other illegitimate copies of a given work from the marketplace. Language in the 1976 Copyright Act extends this right of exclusion to works derived from or substantially similar to works under copyright. This is an expansion of prior protections only against mechanical reproductions. This trend also continues to necessitate the creation of exceptions to such control, foremost among them fair use. The next section, then, examines how the 1976 Copyright Act has increased proprietary control for intellectual or literary property, as well as the moral justifications made for increases in control and even extensions of copyright terms long past the life of the author.

The 1976 Copyright Act

In the latter half of the twentieth century, the natural or moral rights arguments regarding intellectual property (IP) as advanced by WIPO were further legitimized in the United States through its participation in international conventions and treaties such as the Berne Convention.[120] The Berne Convention is the oldest international copyright treaty, created in Switzerland in 1886. It "requires signatories to recognize the copyright

[120] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris, July 24, 1971, 828 UNTS 221.

of authors from other member countries," which some argue guarantees both economic and moral protection for authors across borders.[121]

The Berne Convention also requires signatories to eliminate registration requirements for securing a copyright. This same policy was not completely enacted in America until the Copyright Office ended the requirement to affix a copyright notice to a new creative work in order to gain protection.[122] This occured in 1989, the year the United States acceded to the Berne Convention.[123] Prior to that, the United States ended requirements to register a work with the Copyright Office to gain protection with the 1976 Copyright Act, in part to ease the burden on the U.S. Copyright Office, which continues to see increasingly more authors seeking copyrights through registration, with more than 600,000 registrations per annum in recent years.[124] Registration still affords potential copyright owners certain advantages over those who do not register a work, such as establishing prima facie evidence for the validity of a copyright and the ability to sue for infringement.[125]

The 1976 Copyright Act,[126] still in effect today, offers owners of copyrights five broad privileges, including the right to copy, distribute, display, perform, or develop

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[121] Darren Hicks, *Artistic License*, 102. The requirement itself is codified in the Berne Convention, Article 2 (6) ("...works...shall enjoy protection in all countries of the Union.")
[122] U.S. Copyright Office, *Copyright Basics*, Circ. 1 (Washington, DC, 2017), 4, https://www.copyright.gov/circs/circ01.pdf.
[123] WIPO, *Accession by the United States of America*, Berne Notification No. 121 (November 17, 1988), http://www.wipo.int/treaties/en/notifications/berne/treaty_berne_121.html.
[124] Graphic Artists Guild, *Graphic Artists Guild Handbook*, 27.
[125] U.S. Copyright Office, *Copyright Basics*, 5.
[126] U.S. Copyright Act, 17 U.S.C.

derivative works from the original work in question.[127] The last privilege, "the exclusive right…to prepare derivative works based upon the copyrighted work,"[128] is an entitlement that presumably limits how future authors may respond to, and critically examine, a work under copyright.[129] Additionally, this act extended terms to more than a century, and helped to advance the natural rights argument with language that positions these privileges as rights.

The 1976 Act also grants protections to the owner of a copyright, which may not always be the initial author of a fixed work. An author who creates fixed works "within the scope of his or her employment," and who contributes to a collective work like a film or instructional text, has created a work made for hire under the law, and the copyright rests with the employer, most often a corporation rather than individual.[130] Some researchers have noted the internal inconsistencies in the law about how collective works are defined as pre-existing materials, yet the work for hire provisions of the law recognize that materials for a collective work may be newly commissioned and created.[131]

Artists who relinquish their rights in the works they create demonstrate that such rights are not inalienable. This phenomenon calls into question the description of such statutory terms as rights, and for some parties is even positioned as morally dubious at

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[127] Ibid., § 106.
[128] Ibid., § 106 (2)
[129] See, e.g., Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998), 6 (describing how existing legal structures potentially impede "interpretative appropriation [of intellectual property] in the service of other interests and alternative agendas").
[130] U.S. Copyright Act, 17 U.S.C. § 101.
[131] David S. Nimmer, Peter S. Menell, and Diane McGimsey, "Preexisting Confusion in Copyright's Work-for-hire Doctrine," *Journal of the Copyright Society of the U.S.A.* 50, no. 1-4 (2003): 423.

best. The Graphic Artists' Guild, for example, is opposed to work for hire practices on the grounds that "it strips the artist of the moral right of paternity," or being recognized as the author of a given work.[132] The possibility that an author may divest themselves of their right of paternity is further impacted by changes in copyright terms under the 1976 Act.

The scope and duration of copyright were both significantly expanded by the 1976 Act. Copyright terms now last for the life of the author and an additional 70 years after that author's death.[133] However, as the work for hire provision demonstrates, these expansions benefit only the owner of a copyright, not necessarily the author. Should an author create a new fixed work under work for hire terms, the employer is always the owner of the copyright, and entitlements granted by law are vested in that employer, who can exclude anyone, including the initial author, from distributing or otherwise exploiting a work in the marketplace.[134] The lack of an individual author with whom the copyright rests also necessitates a different metric for copyright term length in work for hire cases, since corporate entities do not have finite "lifetimes." In cases of works made for hire, then, the "the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first."[135]

Besides the limitations that may be placed on an author, the 1976 Act also limits the use of works subject to copyright by the audiences for those works. Those audiences

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[132] Graphic Artists Guild, *Graphic Artists Guild Handbook*, 34.
[133] U.S. Copyright Act, 17 U.S.C. § 302(a).
[134] Maureen O'Rourke, "A Brief History of Author-Publisher Relations and the Outlook for the 21st Century," *Journal of the Copyright Society of the U.S.A.* 50, no. 1-4 (2003): 441.
[135] U.S. Copyright Act, 17 U.S.C. § 302(c).

are also referred to as end users, or the individuals presumed to use a product, such as the reader of a book. Provisions within the act allow for exceptions to the entitlements granted by statute, under the assumption that end users may have justification in certain contexts to further disseminate or otherwise copy creative expressions to which they have been exposed. The most important of these exceptions is arguably fair use.[136] Detailed discussion of the fair use doctrine and its application is undertaken in the next section, and is important to this dissertation as a whole for its relation to free speech and the nature of what constitutes derivative versus transformative expression.

The Fair Use Doctrine

The concept of fair use is derived from the idea of copying a significant portion of an original creative work for non-commercial use, such as in academic settings, and is perfectly legal. While this section is primarily concerned with the application of fair use as it relates to the creation of new derivative works, there is some brief coverage here of how mechanical reproduction of fixed works and information can also trigger concerns of fair use. For example, groups assigned to the task of determining what type of use in even academic contexts constitutes fair use – and thus not a breach of copyright law – have been unable to reach consensus. This was the case with the Working Group on Intellectual Property Rights, organized by the executive branch of the federal government to convene Conferences on Fair Use at separate times from 1993 to 1996. This group was unable to determine in that time what constituted fair use of digital images subject to

[136] Ibid., § 107 (1-4)

copyright law in electronic classrooms and distance learning.[137]

Fair use is often linked by copyright law to the concepts of plagiarism and/or transformation in academic settings.[138] This is especially true in the context of academic writing when scholars are accused of improper attribution, an act that may simultaneously be fraud (plagiarism) as well as theft (copyright infringement).[139] Even without triggering copyright concerns, such activity has long been ill-advised, especially for students. Samuel Johnson, writing in the eighteenth century, described the temptation among university students to rely on and repeat the established work of others, rather than to cogently form their own thoughts: "He that adopts the sentiments of another, whom he has reason to believe wiser than himself, is only to be blamed, when he claims the honours which are not due but to the author, and endeavours to deceive the world into praise and veneration."[140]

The additional layer of copyright, again, means that actions that may have once been merely plagiaristic now also can be described as theft. Describing such activity as theft, however, means that the repetition of existing information is in some way curbed, so that free speech concerns are broached. The courts have adopted the stance that a potentially infringing work is transformative – and thus a fair use (i.e., a non-violative use) of an original work – if it "adds something new...with a further purpose or different

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[137] Graphic Artists Guild, *Graphic Artists Guild Handbook*, 28.
[138] See, e.g., Martine Courant Rife, "The Fair Use Doctrine: History, Application, and Implications for (New Media) Writing Teachers," *Computers and Composition* 24, no. 2 (2007): 154-78.
[139] Gary Layne Hatch, "The Crime of Plagiarism: A Critique of Literary Property Law," Paper presented at the Annual Meeting of the Conference on College Composition and Communication, Cincinnati, OH, March 1992. Distributed by ERIC Clearinghouse: 1-14.
[140] Samuel Johnson, "Dangers of Imitation," in *The Rambler (1750-1752)* (London: J. Payne, 1752), 185.

character, altering [an original work] with new expression, meaning, or message."[141] Although it is overwhelmingly agreed that plagiarizing another work by copying a whole or part of the work without citation is unethical,[142] legal protections against plagiarism must be balanced against whether a work is strictly copied, derivative of an original work, or so transformative of another work as to be fairly interpreted as an original work itself.[143] Under American copyright law in the nineteenth century, statutory protection only extended to a finished work as published, and other authors were free to abridge, translate, make derivations, or transform a given work as fair use.[144] Today, copyright statutes specifically define fair use as a requirement to allow a type of copying or borrowing. In addition, those laws label copying that does not meet this requirement as infringement, a change in culture and policy that expands the monopoly of copyright at the expense of limiting free speech.[145]

Such limitations on speech are ostensibly balanced in the current regime by the fair use doctrine described under statute. These justifications of fair use take the form of defenses when an individual is charged with copyright infringement. A defendant may claim fair use, for example, for reasons such as academic use, critical commentary, or parody. These reasons are then weighed according to four factors explicit in the 1976 Copyright Act:

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[141] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
[142] Hatch, "The Crime of Plagiarism," 2. The author lists several prominent academic examples of plagiarism and the resultant critical responses.
[143] See Max W. Thomas, "Eschewing Credit: Heywood, Shakespeare, and Plagiarism before Copyright," *New Literary History* 31, no. 2 (2000): 293 (discussing types of plagiarism - appropriation, misattribution, adulteration, etc. - and the effects of their practice on ongoing cultural norms regarding the unlicensed use of intellectual property).
[144] L. Ray Patterson, "Folsom v. Marsh and Its Legacy," *Journal of Intellectual Property Law* 5, no. 2 (1988): 431.
[145] Ibid., 432.

(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.[146]

The application of this defense, though, is potentially at odds with principles of free speech, for the reason that fair use rulings can enjoin speech based on why it is thought to be made. The motive of a speaker – whether a motive for profit or to say things that might be thought offensive – should not automatically result in the forfeiture of the right to free speech.[147] As Frederick Schauer argues, the motive of a speaker should be disregarded because what is of greater concern to principles of free speech is not why products of free speech are produced, but the products themselves: "The interest of the speaker is recognized not primarily as an end but only instrumentally to the public interest in the ideas presented."[148] Again, this public interest in ideas is constitutionally guaranteed by the copyright clause, but "the progress of science and the useful arts" cannot accurately be determined by a single speaker or author. Works that are created purely for profit – at least in the mind of the initial author – may ultimately be interpreted by audiences as worthwhile contributions to scientific and artistic progress. In short, the *why* of any speech is transactional, and not merely determined by the speaker or any one listener or reader.

The courts do not ordinarily seek to determine motive, including a motive for

[146] U.S. Copyright Act, 17 U.S.C. § 107 (1-4).
[147] Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), 158-160.
[148] Ibid., 159.

profit, when ruling on whether certain speech or expressions should be tolerated. In cases related to copyright, however, courts have emphasized commercial motives as a reason to rule against defenses of fair use, according to Eric Barendt.[149] In the case of *Harper & Row Publishers v. Nation Enterprises,*[150] for example, the Supreme Court ruled that the unauthorized publication of excerpts from President Ford's memoirs prior to their publication in book form was not a fair use because the defendants intended to make a profit from that publication. The Court ruled that an "author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use."[151] This is contrary to the language present in § 107 of the Copyright Act: "The fact that a work is unpublished shall not itself bar a finding of fair use."[152]

The Supreme Court, in refusing to categorically position an unlicensed use of a copyrighted work as fair for reasons outlined in statute, also emphasized the case-by-case or idiosyncratic nature of determining findings of fair use. Fair use, then, is an affirmative defense, for which the burden of proof is on the defendant, the party expressing the allegedly infringing speech.[153] The courts, in enacting such a requirement, are in effect ruling that one who reproduces an existing work under copyright, or even one who creates a derivative work, must demonstrate no harm to both actual markets and potential markets that a copyright owner could exploit.[154] Since decisions on cases that invoke the

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[149] Eric Barendt, "Copyright and Free Speech Theory," in *Copyright and Free Speech: Comparative and International Analyses*, eds. Jonathan Griffiths and Uma Suthersanen (New York: Oxford University Press, 2005), 26.
[150] 471 U.S. 539 (1985).
[151] Ibid., 540.
[152] U.S. Copyright Act, 17 U.S.C. § 107.
[153] Harper & Row v. Nation Enterprises, 471 U.S. 561 (1985).
[154] Neil Netanel, "Locating Copyright within the First Amendment Skein," *Stanford Law Review* 54, no. 1 (2001): 1.

fair use defense are done on a case-by-case basis, and arguably randomly applied,[155] there is likely some chilling of speech as individuals would seek to avoid a costly legal battle that could result in their own work being enjoined by the courts. Again, this chilling of speech may not seem as bad when the limitations are merely on pirated expressions, but such limitations may also affect new, derivative expressions, the subject of the next section.

Fair Use in Derivative, Transformative, and Satirical Works

Neil Netanel suggests that when charges of infringement are applied to works that are not literal copies of an existing work – but still in some way derived from the original work – that the burden of proof should fall on the plaintiffs, since they are attempting to stifle speech, derivative or not.[156] Further, Netanel argues on First Amendment grounds that even if the derivative work is found to be infringing, remedy should come in the form of a licensing fee, and not enjoining the work.[157] Again, this is in part because enjoining the publication of works that are derivative downplays the contention that such derivations are not mechanical reproductions of fixed works. Instead, they are new forms of expression themselves, albeit ones that have drawn the ire of the copyright owners of the allegedly infringed original work. Derivative works may not be conveying the

[155] *See* David Nimmer, "The Public Domain: "Fairest of Them All" and Other Fairy Tales of Fair Use," *Law and Contemporary Problems* 66 (2003): 280 (analyzing 24 cases upholding fair use and 36 which denied it, and claiming that Congress would have done just as well to legislate "a dartboard" to determine what use of a copyrighted work would qualify as fair).
[156] Neil Netanel, "Copyright and the First Amendment: What Eldred Misses - And Portends," in *Copyright and Free Speech: Comparative and International Analyses*, eds. Jonathan Griffiths and Uma Suthersanen (New York: Oxford University Press, 2005), 149.
[157] Ibid.

message the original copyright owner would want, but that very fact is evidence that the derivative expression has in some way overcome the low threshold necessary to be deemed original itself. Enjoining such works, then, represents a threat to freedom of expression, and reinforces the importance of changes in copyright law as an issue relevant to scholars of First Amendment principles. As Stephen Smith states, the Constitutional Framers were committed to the discovery and production of new ideas, and intended a wide diffusion of ideas and knowledge.[158]

The case law regarding fair use in this context has been predictably unpredictable over the last several decades, since each decision does little to establish reliable doctrine, so that the legal determination of whether a use is fair is impossible without a lawsuit.[159] Defendants charged with infringing upon a plaintiff's copyright or trademark have used a defense of satirical fair use as a transformative act, or one that calls upon the original work being satirized without being so derivative as to be perceived as "fulfilling the demand for the original."[160] Courts have decided such satirical fair use can be a protected form of expression under the First Amendment.[161] While this has been a successful defense in recent years, such as in the case of *Charles Atlas, Ltd. v. DC Comics,*[162] defendants in the past have faced damning charges of pornographic intent and a likelihood of confusion with the original work, as in the case of *Walt Disney Productions*

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[158] Stephen A. Smith, "Promoting Political Expression: The Import of Three Constitutional Provisions," *Free Speech Yearbook* 27 (1989).
[159] Darren Hick, *Artistic License*, 4.
[160] William C. Walker, Jr., "Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium," *Louisiana Law Review* 43, no. 3 (1982): 754-55.
[161] *See, e.g.*, Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).
[162] 112 F. Supp. 2d 330, 331 (S.D.N.Y. 2000)(ruling for summary judgment for the defendant, as the plaintiff's claims of unfair competition and confusion in the marketplace were outweighed by First Amendment protections for trademarked material used in parody).

v. Air Pirates.[163]

Derivative works that are thought to be obscene or contain other cultural improprieties are also often accused of copyright infringement. Owners of popular copyrighted works have, at times, framed the argument of legal proprietary interest in intellectual works as a form of moral guardianship.[164] More specifically, these owners allege the cultural damage that could result from the unlicensed creation of obscene derivations of the original work in question. In *Walt Disney Productions v. Air Pirates*, Disney objected to comic book artists drawing its trademarked characters engaging in sexual activities and drug use, and successfully obtained a court order that enjoined the publication of such works by the defendants.[165] Along similar lines, representatives for the estate of Dr. Seuss have argued that if that author's works were in the public domain, transformative works of stories such as "The Cat in the Hat" could be used to "glorify drugs or to create pornography."[166] Prior to that, the estate of George Gershwin argued that it should continue to own the copyright to the play "Porgy and Bess" because the estate had the moral duty to refuse to license it to anyone who does not cast African-Americans in the play's roles.[167] Further, licenses granted by corporations like the above examples will often include a nondisparagement clause that forbids the licensee from using licensed material in any way that could cast a negative light on the copyright owner

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[163] 581 F.2d 751 (9th Cir. 1978), cert. denied, 439 U.S. 1132 (1979)(ruling that defendants copied more than was necessary to "conjure up" the works being parodied, and that such wholesale copying was not protected by fair use).
[164] *See, e.g.*, Dr. Seuss Enterprises v. Penguin Books, 109 F.3d 1394 (9th Circuit 1997), *cert. denied*, 521 U.S. 1146 (1997).
[165] Netanel, *Copyright's Paradox*, 19.
[166] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin, 2006), 166.
[167] Donal Henahan, "In Opera, Race Isn't a Black or White Issue," *New York Times*, April 14, 1985.

or original copyrighted work itself.[168]

Owners of copyrighted works with continuing economic appeal, then, often put forth legal arguments that the public or society at large cannot be trusted with certain intellectual property, which should remain under exclusive control in perpetuity. Lawrence Lessig describes this assumption surfacing as a result of the blind acceptance of the idea of property in American culture: "[W]e don't even question when the control of that property removes our ability, as a people, to develop our culture democratically."[169]

Despite the current extended nature of copyright terms, there is still the underlying expectation, at least as expressed in copyright law, that all creative works eventually lose protection and enter the public domain. One example of the type of art that can be created and distributed legally once the copyrights on popular creative works have expired – and one that would trigger the moral guardian concerns described above – is the comic book *Lost Girls*. Writer Alan Moore and artist Melinda Gebbie released this graphic novel – a colloquialism for comics that adhere to a particular narrative structure and physical binding style[170] – through publisher Top Shelf in 2006. *Lost Girls* features numerous popular literary characters, including Alice from *Through the Looking Glass*, Wendy from *Peter Pan*, and Dorothy from *The Wizard of Oz*, all of whom are engaged in explicit sexual activity throughout the story. Since those original works all reside in the public domain, Moore and Gebbie were free to publish *Lost Girls* without fear of

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[168] Netanel, *Copyright's Paradox*, 146.
[169] Lessig, *Free Culture*, 187.
[170] Traditionally, comics tend to be stapled – saddle stitched – and present a single chapter in an ongoing narrative. Graphic novels are most often understood to be a complete story published under a single cover, most of which are either bound by glue – perfect bound – or stitched together in hardcover – smyth sewn.

copyright infringement. There was one notable exception, though: the Great Ormond Street Hospital in England, to which J.M. Barrie had bequeathed the copyright to *Peter Pan*, blocked the publication of *Lost Girls* in the United Kingdom until that copyright expired on January 1, 2008.[171]

Besides that minor conflict, *Lost Girls* is notable for being an example of pornography that has been positioned as possessing literary merit. As the publisher, Chris Staros, stated, "There's no confusion that it has literary merit, which in this country means it's not obscene."[172] Moore himself echoed that sentiment, and offered proof from legal authorities on the matter:

> We got back a wonderful letter from the Canadian Customs Authority, basically saying that, even though there were scenes that were tantamount to bestiality or incest, this could in no way be considered obscene, and even though it did appear that there were underage people taking part in some of the sex scenes, this could in no way be considered as child pornography, and that it was a work of great social and artistic benefit.[173]

The first two printings of Lost Girls earned revenues in excess of $1.5 million in its first year of publication,[174] and the book is still in print more than a decade later. At the same time, Disney and other family-minded publishers continue to create new derivations also based on the original works of Lewis Carroll, J.M. Barrie, et al. At least in this singular case, then, a moral guardianship of fictional works and the characters within those works is unnecessary, and it is clear that the market is willing to support multiple derivations of the same fictional settings and characters, regardless of an

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[171] Michael Faber, "Released at Last," *The Guardian*, last modified January 5, 2008. https://www.theguardian.com/books/2008/jan/05/comics.
[172] Lance Parkin, *Magic Words: The Extraordinary Life of Alan Moore* (London: Aurum, 2013), 344.
[173] Ibid., 348.
[174] Ibid., 359.

existing copyright in the underlying original work.

Thus, as shown by the example of *Lost Girls*, once works under copyright are released into the public domain, individuals are free to copy, distribute, or use them in the creation of derivative works as they wish. But under today's copyright regimes, when does this typically happen? The next section of this literature review will explore the evolution of the legal role of the public domain and its relation to copyright law.

The Public Domain

The idea of the public domain has always been present within the U.S. brand of copyright law, with the Constitution drawing a distinction between actual property and intellectual (creative) property. For actual property, the Fifth Amendment includes a "Takings Clause" that requires the government to pay "just compensation"[175] for the privilege of taking someone's property.[176] On the other hand, the Constitution requires that creative property must be released into the public domain after a "limited time" (again, the original statutory provision was 14-28 years), with no compensation for what a copyright holder might perceive as a taking of personal property.[177] James Madison proposed in his "Essay on Monopolies" that government should have "a right to extinguish the monopoly [of patents and copyrights] by paying a specified and reasonable

[175] U.S. Const. amend. V. "...nor shall private property be taken for public use, without just compensation."
[176] Bruce Benson, "The Evolution of Eminent Domain: A Remedy for Market Failure or an Effort to Limit Government Power and Government Failure?", *The Independent Review: Journal of Political Economy* 12, no. 3 (2007): 423 (writing that this process of condemnation and compensation is another inheritance from English common law and today is more commonly referred to as eminent domain).
[177] U.S. Const. art. I, § 8. cl. 8.

sum,"[178] but it was assumed that the privilege granted by copyright was never in perpetuity, and that a perpetual copyright would be a loss to society.[179] Instead, any proprietary control over the commercial duplication of a fixed creative work was understood to be temporary, and the fate of any creative work was to enter the public domain, or what might also be called the creative commons or public sphere.

This domain could be considered the natural state of communicated expression, and the previously discussed decisions of the English House of Lords and American Supreme Court support that claim.[180] However, because current copyright law grants lifetime statutory protection automatically upon creation, new original works typically do not enter the public domain for upwards of a century, so that the ease with which such works may be legally accessed is necessarily limited.

This impediment to access might not matter outside of the minor added cost or inconvenience one might experience in accessing a work under copyright versus one in the public domain. Lessig, however, argues from a democratic perspective the importance of works entering the public domain. This notion is rooted, he writes, in a "competitive context, not a context in which the choices about what culture is available to people and how they get access to it are made by the few despite the wishes of the many."[181] Further, a healthy public domain, aided by modern networked culture, encourages cultural diversity by allowing unfettered access to a variety of creative works, as well as the

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[178] James Madison, *Detatched Memoranda, Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments* (ca. 31 January 1820), retrieved from http://founders.archives.gov/documents/Madison/04-01-02-0549.
[179] Walter Arthur Copinger, *The Law of Copyright in Works of Literature and Art* (London: Stevens and Haynes, 1904), 83-84.
[180] *See supra* notes 51-68 and accompanying text.
[181] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin, 2006), 71.

ability to effectively "remix" those works.[182] The potential to remix or otherwise alter a creative work also emphasizes the inherently unstable nature of meaning-making that attends the interpretation of fixed creative works. Moreover, Rosemary Coombe argues that copyright law is a means to limit cultural development by prohibiting the creation of derivative works that change the intended meaning of an original work, or what Coombe refers to as resignification or alterity.[183]

While any resignification or remix of a fixed work can affect the market demand for the original, that resignification does not itself change the existence of the original. Again, the nature of actual property is distinct from that of intellectual property,[184] and the recognition of this fact has led some to argue that differences among classes or categories of property should result in differences in their treatment by law.[185] David Lange further argues that the increasing scope of intellectual property interests through changes in copyright law should be offset by a purposeful expansion of individual rights in the public domain.[186] Sometimes, though, new or improved rights for either party are an accidental or secondary effect of technological advancements, such as the rise of Internet culture.

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[182] Lawrence Lessig, "Remixing Culture," interview by Richard Koman, *O'Reilly Policy Devcenter*, Feb. 24, 2005, retrieved from http://archive.oreilly.com/pub/a/policy/2005/02/24/lessig.html (noting the increasing ease with which audiences are able to transform previously "fixed" works, and the technologies which enable this activity: peer-to-peer networks, open source editing tools, and inexpensive consumer electronics being foremost among them).
[183] Rosemary J. Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998), 169.
[184] *See supra* notes 104-106 and accompanying text for prior discussion on the distinction between intellectual property and chattel.
[185] Zechariah Chafee, "Reflections on the Law of Copyright," *Columbia Law Review 45* (1945): 503.
[186] David Lange, "Recognizing the Public Domain," *Law and Contemporary Problems* 44 (1981): 147.

Individuals acting without commercial interest have used the low-cost publishing platform of the Internet to distribute public domain works. One such individual is Eric Eldred, a retired computer programmer who, in 1995, uploaded the works of Nathaniel Hawthorne to a server. This is an example of what Lessig calls a "noncommercial publication of public domain works."[187] Eldred even added annotations and contextual images, so that his contribution to the public domain was arguably transformative of the original works. He enjoyed the project, and continued adding other authors to his online archive, until his planned addition of Robert Frost's collection of poems, *New Hampshire*, was inhibited by Congress' decision in 1998 to further expand the duration of copyright through the Sonny Bono Copyright Term Extension Act.[188]

For some, a frustrating aspect of extended statutory protection for economic reasons is that the limits on freedom of expression and creativity do not generally result in an economic boon for copyright holders. As Justice Stephen Breyer remarked in a dissenting opinion in *Eldred v. Ashcroft,*[189] close to 98 percent of copyrights are worthless after about half a century.[190] Building from that, some believe that to continue to grant statutory protection to those works is an unnecessary impediment to public

[187] Lessig, *Free Culture,* 154.
[188] Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(b), 112 Stat.
2827, (amending 17 U.S.C. § 302 to extend existing copyright terms for an additional twenty years).
[189] Eldred v. Ashcroft, 537 U.S. 186 (2003). The petitioner here is the same Eldred who had uploaded the works of Hawthorne and Frost, and who claimed that the Sonny Bono Copyright Term Extension Act was unconstitutional for violating the "limited times" condition of the copyright clause.
[190] Ibid., 248 (Breyer, J., dissenting)("only about 2% of copyrights between 55 and 75 years old retain commercial value- i.e., still generate royalties after that time")

access.[191] Moreover, an impediment to public access is an impediment to learning, a purpose of clear prominence in all American copyright legislation for more than 200 years, from the Constitution, to the most recent Copyright Act, and even supplementary legislation such as the TEACH Act.[192]

It is not always clear that the public's ability to access works is endangered by overly-broad copyright protections. When corporations seeking ever-longer terms of copyright lobby members of Congress, this does not appear to overtly interfere with the production of new works or create undue monopolization.[193] Therefore, each new piece of copyright legislation continues to expand the term of copyright, as well as ensuring a system where a copyright owner is legally entitled to the full value associated with an authored work.

There continues to be a variety of new creative expressions available for consumption under the current regime of copyright. However, some research suggests that as time passes, fixed creative works still under copyright become prohibitively inaccessible. Paul J. Heald, for example, has emphasized the loss to the cultural commons caused by what he believes to be excessive copyright terms.[194] In a random sampling of 2000 recently published works of fiction available from the online bookseller Amazon,

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[191] See, e.g., Brad A. Greenberg, "More than Just a Formality: Instant Authorship and Copyright's Opt-Out Future in the Digital Age," *UCLA Law Review* 59, no. 4 (2012): 1072.

[192] This is stated explicitly in copyright's constitutional provision ("...to promote progress in science and the useful arts...") as well as the exceptions to copyright deemed as fair use in the 1976 Act and further refined by the TEACH Act in 2002 ("the following are not infringements of copyright: performance or display of a work by instructors or pupils...in a classroom")(17 U.S. Code § 110).

[193] Lunney, "Reexamining Copyright's Incentives–Access Paradigm," 655.

[194] Paul J. Heald, "How Copyright Keeps Works Disappeared," *Journal of Empirical Legal Studies* 11, no. 4 (2014): 829.

Heald found that books originally published in the 1880s were more available than those from the 1980s, suggesting a positive correlation between an active copyright and the unavailability of works from 1923 onwards.[195] Heald described the results of his research: "Copyright correlates significantly with the disappearance of works rather than with their availability. Shortly after works are created and proprietized, they tend to disappear from public view only to reappear in significantly increased numbers when they fall into the public domain and lose their owners."[196] Books tend to go out of print very quickly, most within the space of a year, and of the books published between 1927 and 1946, only 2.2 percent were in print at the turn of the twenty-first century.[197] Heald's research further suggests that the commercial lifespan for most creative works is brief, so that publishers are deterred from releasing books again until they are in the public domain.[198]

Heald's research strengthens the claim – made by individuals like David Bollier[199] and organizations like Duke Law's Center for the Study of the Public Domain[200] – that works in the public domain are not valueless, and there are organizations that still profit from them. The clearest difference between works in the

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[195] Ibid.
[196] Rebecca J. Rosen, "The Hole in Our Collective Memories: How Copyright Made Mid-Century Books Vanish," *The Atlantic*, July 30, 2013, http://www.theatlantic.com/technology/archive/2013/07/the-hole-in-our-collective-memory-how-copyright-made-mid-century-books-vanish/278209/.
[197] R. Anthony Reese, "The First Sale Doctrine in the Era of Digital Networks," *Boston College Law Review* 44 (2003): 593 n. 51.
[198] Paul J. Heald, "How Copyright Keeps Works Disappeared," 841.
[199] David Bollier, *Why the Public Domain Matters: The Endangered Wellspring of Creativity, Commerce, and Democracy* (Washington, D.C.: New America Foundation & Public Knowledge, 2002), https://www.publicknowledge.org/pdf/why_the_public_domain_matters.pdf.
[200] "Center for the Study of the Public Domain," Duke Law School Centers & Programs, accessed May 20, 2018. https://law.duke.edu/cspd/.

public domain and those under copyright is only that there is no monopoly on who is able to legally profit from their distribution. As described earlier in this chapter, for example, there is no copyright on the opinions of the Supreme Court, and anyone can freely access them through a library.[201] However, LexisNexis and Westlaw also have electronic versions of case reports available to their service subscribers, and they can charge users for the privilege of gaining access to court opinions in addition to other items. Publishers such as Hackett also continue to sell and make available new copies of works in the public domain. Without the burden of excessive regulation and interminable monopolies, a variety of works that might disappear are instead republished in a competitive context that drives prices lower, to the benefit of readers and other end users of fixed creative works.

With regard to the current reality of copyright, Lessig states, "The law's role is less and less to support creativity, and more and more to protect certain industries against competition."[202] Protecting against competition, however, arguably creates the very problem that copyright was originally meant to eliminate: the danger of a permanent monopoly on information by limited proprietary interests. As show in the preceding section on fair use, owners of valuable copyrights are protected against not just competition with those exact works under copyright, but also resignified or alternate derivative versions.

Some researchers have argued that the monopoly privilege of copyright, as an incentive to create and disseminate original creative works, must also have some impact on how those same creative works are accessed by audiences. Glynn Lunney, for

[201] *See supra* note 55 and accompanying text.
[202] Lessig, *Free Culture*, 17.

example, notes that incentivizing authors to produce new works must in some way, most often economically, limit the ability of the public to access such works.[203] Additionally, he argues that incentives and proprietary protections provided to authors since the original copyright statute in 1790 are unwarranted, and are at best "superficially attractive"[204] in justifying the expansion of copyright. This expansion of term length continues to minimize the importance of the public domain, and its designation as the natural and final destination for creative works. Excessive term lengths also disregard the stated legal purpose of copyright, as a means to benefit society and ensure the diffusion of a variety of creative works which might promote the progress of science and the useful arts. The Supreme Court has been especially clear on this point, as when Justice Sandra Day O'Connor wrote the opinion, "The primary objective of copyright is not to reward the labors of authors, but '[t]o promote the Progress of Science and useful Arts.' Art. I, § 8, cl. 8.... To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[205]

The Expanding Scope of Copyright

Judicial opinions within the realm of copyright have historically favored a work's benefit to society and the public good over author's rights, as noted above. As the Supreme Court held, "The copyright law...makes reward to the owner a secondary consideration."[206] However, the increase in proprietary control for copyright, the minimization of the public domain, and the reconceptualization of intellectual property as

[203] Lunney, "Reexamining Copyright's Incentives–Access Paradigm," 655.
[204] Ibid.
[205] *See* Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc., 499 U.S. 340, 349-50 (1991).
[206] United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

a natural right of the author, have all contributed to a current legal culture that sees no problem in limiting the benefit to the public for the "rights" – again, more accurately, privileges – of the author. This is made explicit in the 1976 Copyright Act, which no longer requires any registration or other voluntary process to affirm a copyright. The reformed process of registration is described above.[207] It is also mentioned again here to draw attention to the possibility that while the act of creation itself is enough to gain a copyright for a lifetime and more,[208] all of the attendant privileges granted by copyright law are not always sought or even desired, as the rise in copyleft[209] or creative commons schemes demonstrates.[210]

Some scholars have argued that the extension of copyright to the lifetime of the author plus seventy years does not promote creativity. According to Siva Vaidhyanathan, such term lengths "rewards the established at the expense of the emerging."[211] New and emerging artists, from this point of view, should be allowed "maximum exposure" to creative works that came before, along with "liberal freedoms" to use existing works' elements in the creation of new works, even if those works are deemed derivative by

[207] *See supra* notes 122-125 and accompanying text.
[208] U.S. Copyright Act, 17 U.S.C. § 302(a).
[209] Enrique Muriel-Torrado and Juan-Carlos Fernández-Molina, "Creation and Use of Intellectual Works in the Academic Environment: Students' Knowledge About Copyright and Copyleft," *The Journal of Academic Librarianship* 41, no. 4 (2015): 441-48. Authors discuss copyleft here as interstitial state between "all rights reserved" standard of copyright and "no rights" of ownership for works in the public domain.
[210] Laura Gordon-Murnane, "Creative Commons: Copyright Tools for the 21st Century," *Online* 34, no. 1 (2010): 18-21. Author discusses creative commons in similar terms to copyleft, specifically that authors may reserve some rights but otherwise allow others to freely license works under copyright for various "noncommercial" uses.
[211] Siva Vaidhyanathan, *Copyrights and Copywrongs*, 186.

potential audiences.[212] Others, such as Barendt, have pointed out that examples of works that may broadly be described as unoriginal or derivative, including satirical works or critical reviews, should enjoy greater free speech protections because they "enhance our understanding of literature or the arts."[213]

In a discussion of freedom of speech as it relates to copyright, it is important to note that the government does not bring charges against those whose speech may be unoriginal. That would be in clear violation of the First Amendment.[214] An individual can freely copy the speech and work of others without fear of independent state enforcement of copyright statutes, because accusations of copyright infringement depend on the owner of a copyright choosing to bring suit against any potential infringers. Instead, when copyright infringement claims are filed, they are done so by private parties. When those cases go to trial, the courts then interpret and apply the intellectual property rights granted by statute, and such enforcement must balance the privileges of the copyright owner against potential free speech and/or fair use exceptions.[215]

In striking this balance, the courts have placed some limitations on freedom of speech, and Supreme Court Justices have spoken to the justifications for such limitations. Justice Ruth Bader Ginsburg, for example, believes that freedom of speech considerations weigh heavily in favor of allowing an individual to make his or her own speech, but less so on the ability to make others' speeches again.[216] Such an argument is

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[212] Ibid. See also U.S. Const. amend. I, "Congress shall make no law...abridging the freedom of speech, or of the press..."
[213] Eric Barendt, "Copyright and Free Speech Theory," 18.
[214] Ibid., 13.
[215] Ibid., 18.
[216] Eldred v. Ashcroft, 537 U.S. 186, 221 (2003). "The First Amendment securely protects the freedom to make – or decline to make – one's own speech; it bears less

easy to make for examples of blatant commercial piracy and the pure mechanical reproduction of fixed works under copyright, an act that most understand to enjoy little to no protection under the First Amendment or free speech principles.[217] According to Melville Nimmer, "One who pirates the expression of another is not engaged in self-expression in any meaningful sense."[218] Outside of such literal copying, however, determining what constitutes one making his or her own speech – thus creating an original expression rather than an imitation or copy of others' speeches again – is difficult to determine. Additionally, there is some disagreement about who should be responsible for determining if expressions accused of infringement are pure imitations or original in some way. Nimmer points to the First Amendment as evidence that the burden of proof to show that a copier is not entitled to free speech protections should be on the copyright owner in every case.[219]

The courts, too, have long recognized the difficulty faced by authors who attempt to balance novel and existing expressions in the development of original works. As previously mentioned in this literature review,[220] Justice Holmes acknowledged – a century before Justice Ginsburg's opinion – that even an educated judge may have no clear understanding of what makes a creative work valuable in the eyes of the consuming public.[221] Truly original and great works, he stated, might possess "novelty [that] would make them repulsive until the public had learned the new language in which their author

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heavily when speakers assert the right to make other people's speeches."
[217] Eric Barendt, "Copyright and Free Speech Theory," 18-19.
[218] Melville Nimmer, "Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?" *UCLA Law Review* 17 (1970): 1192.
[219] Eric Barendt, "Copyright and Free Speech Theory," 19.
[220] *See supra* notes 93-94 and accompanying text.
[221] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

spoke."[222] Even a minimum threshold for originality leaves open the possibility that expressive works which, while new and likely meeting such a threshold, may still be described as derivative of another creative work, and thus guilty of copyright infringement.

A century prior to that Holmes opinion, Thomas Jefferson also seemed to recognize the furtive nature of what might be deemed original, and how much of that designation could rightly be said to be in the eye of the beholder: "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."[223] Ideas, however, are no longer perceived in the Jeffersonian conception as random discoveries that may, by nature, be used by all people if the discoverer can be enticed to make them public. Instead, the expression of an idea is thought to be the exclusive purview of the individual or corporation that owns the copyright, and this monopoly disenfranchises others who may expand or develop on that expression, with terms of copyright protection that last for close to a century.

The length of copyright terms, even those as long as a century, might still be charitably described as "for limited times." But the scope of copyright protection is likewise expanded when alternative terms for intellectual property are applied to creative works, granting perpetual ownership and further preventing those works from ever entering the public domain. The next section of this literature review will describe the application of trademark law to works under copyright, and how this expands the scope

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[222] Ibid.
[223] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in Lipscomb and Bergh, *The Writings of Thomas Jefferson*, 333-34.

of privileges granted to certain types of intellectual property.

The Conflation of Trademark and Copyright

As briefly noted above, ideas may be granted further protections in addition to what copyright law provides if they are used in commercial transactions as a mark of authorship and labeled trademarks rather than merely works subject to copyright. Trademarks, under the Lanham Act,[224] are granted entitlement protections similar to copyright, in the sense that owners of a registered trademark may exclude others from the use of that mark in commerce.[225] However, in contrast to copyright, trademarks may be renewed and remain proprietary intellectual property in perpetuity.[226]

There is the potential for the entitlements granted by trademark law to limit others' freedom of expression in using those marks or logos for artistic purposes that their owners do not intend or desire. The courts have attempted to reconcile conflict between the Lanham Act and the First Amendment in cases like *New York Racing Ass'n v. Perlmutter Publishing*.[227] In that case, the court ruled that an artist painting scenes from the Saratoga Race Course was within her First Amendment rights to include trademarks in the paintings, since those marks actually appeared in the real life scenes depicted, and thus served the "artistically relevant purpose of accurately depicting the scene (realism)."[228]

Alternatively, artists' freedom of expression when using trademarked imagery

[224] Lanham (Trademark) Act of July 5, 1946, Pub. L. No. 79-489, 60 Stat. 427.
[225] Trademarks, 15 U.S.C. ch. 22, §§ 1051-1141n.
[226] 15 U.S.C. ch. 22, § 1059.
[227] New York Racing Ass'n v. Perlmutter Publishing, 959 F. Supp. 578, 581 (N.D.N.Y 1997).
[228] Ibid.

absent of a realist context is more limited. The economic exploitation of fictional characters in a specific medium is one of the areas of creative expression that most confuses and conflates the related legal concepts of trademark and copyright. Michael Todd Helfland argues that this is a violation of the intent of intellectual property law, enabled by courts which merge claims of unfair competition, common law trademark, and statutory copyright.[229] The original intention of a trademark was to use a specific image, logo, or mark on a product as a clear referent to the product's source. It is simple to call to mind the trademarks of companies such as Ford, Nike, and McDonalds. In addition, some fictional characters have their own specific logos that have been registered as trademarks. Batman's chest emblem, a yellow oval surrounding a black bat, is one, and the three circles used to denote the head of Mickey Mouse is another.

Jasmina Zecevic notes that, compared to characters that are purely literary and thus graphically-abstract, characters from more visually-dominant mediums such as comic books and cartoons enjoy greater protection under copyright law.[230] An existing and consistent visual design for a character also allows for the registration of that character as a trademark. Moreover, once a character is legally classified as a trademarked image, unlicensed use of that imagery on products sold across state lines infringes on the intellectual property entitlements of the copyright and trademark

[229] *See, e.g.,* Michael Todd Helfand, "When Mickey Mouse is as Strong as Superman: The Convergence of Intellectual Property Laws to Protect Fictional Literary and Pictorial Characters," *Stanford Law Review* 44 (1992): 623.
[230] Jasmina Zecevic, "Distinctly Delineated Fictional Characters That Constitute the Story Being Told: Who Are They and Do They Deserve Independent Copyright Protection," *Vanderbilt Journal of Entertainment and Technology Law* 8, no. 2 (Spring 2006): 369.

owner(s).[231]

Although it is more difficult for a literary character without a consistent visual design to find protection under copyright or trademark laws, it is not impossible. If, for example, certain literary characters are deemed to be "distinctly delineated," then they may enjoy such protection. The phrase "distinctly delineated" is derived from a decision delivered by Judge Learned Hand: "It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly."[232] However, it is not clear from that statement what the proper test to determine distinction deserving of copyright protection might be.[233]

An examination of relevant case law provides examples of what characters have overcome the hurdle to be considered distinctly delineated and thus copyrightable. One of these is the popular character Tarzan, determined to be distinct enough to warrant copyright protection in *Burroughs v. Metro-Goldwyn-Mayer*.[234] The character's description in that case is as follows: "Tarzan is the ape-man. He is an individual closely in tune with his jungle environment, able to communicate with animals yet able to experience human emotions. He is athletic, innocent, youthful, gentle and strong. He is Tarzan."[235]

It is unclear whether that description, absent the familiar name of Tarzan, would be enough to call to mind this specific character, rather than a number of other competing

[231] 15 U.S.C. ch. 22, § 1127.
[232] Nichols v. Universal Pictures Corporation, 45 F.2d 119, 121 (2d Cir. 1930).
[233] Jasmina Zecevic, "Distinctly Delineated Fictional Characters," 373.
[234] 519 F. Supp. 388 (S.D.N.Y. 1981).
[235] Ibid., 391.

similar characters, such as, for instance, Mowgli from *The Jungle Book*.[236] However, the name "Tarzan" is enough to call to mind the character independent of further description. This means that Tarzan, as a name, is distinct enough to enjoy protection as a trademark unto itself.

The legal status of Tarzan with regard to trademark and copyright is further complicated by the fact that the original stories that feature the character are no longer under copyright protection. The first story featuring the character, *Tarzan of the Apes*, was published in 1912, meaning the copyright has since expired and the work is in the public domain. However, the author's estate still owns a trademark on the character name of Tarzan, preventing any competing economic exploitation of that character. As one legal researcher put it, the unlicensed use of the image of Tarzan, including the relevant indicia – the character's loin cloth as well as movement by swinging on vines – is likely to cause some confusion in the marketplace, as consumers assume that the Burroughs estate "has approved or is affiliated" with that use, triggering infringement concerns.[237] This is true as long as the character enjoys trademark protection and thus prevented from entering the public domain.

If Tarzan as a character is never allowed to enter the public domain, this provides an economic benefit to the factions, or publishers, who are allowed to exploit stories about the character in the marketplace. However, this continuing entitlement for those publishers must also necessarily limit the potential number of competing, unlicensed

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[236] Jasmina Zecevic, "Distinctly Delineated Fictional Characters," 373.
[237] Roger L. Zissu, "Copyright Luncheon Circle: The Interplay of Copyright and Trademark Law in the Protection of Character Rights with Observations on Dastar v. Twentieth Century Fox Film Corp," *Journal of the Copyright Society of the U.S.A.* 51, no. 2 (Winter 2004): 461.

iterations of stories featuring Tarzan that would be created if no permanent monopolies were granted, and the trademark is allowed to expire. It is unknown what the results of a popular character like Tarzan entering the public domain would be, especially in terms of the average perceived quality of the numerous competing new interpretations of the character. There would be no centralized authority in charge of the usage of Tarzan in new fixed creative works, which also means there would be no centralized authority to legally exclude or suppress forms of speech and expression featuring the character. Based on the principle established by Mill that the suppression of speech is detrimental to both the individual and to society,[238] laws that make content-specific restrictions on creative expression would also be detrimental. This is also, in part, a deference to Milton, who argued that the quest for truth is negatively impacted by a requirement to gain license;[239] and to Lessig, who argues for a greater democratic and competitive context for the maturation of cultural elements.[240]

There are numerous other popular characters created in the early-to-mid part of the twentieth century that have yet to fall out of copyright, and if current trends towards the extension of terms continue, may never enter the public domain. As Gerald Jagorda states, there has been a cultural and legal shift in the past century "from initial uncertainty whether fictitious characters were entitled to protection separate from a work's text...to the present, where the interplay of copyright law [and] trademark law...have erected an

[238] John Stuart Mill, *On Liberty*, 33. In the words of Mill, such suppression is tantamount to theft, as "the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race."
[239] *See supra* note 7 and accompanying text.
[240] *See supra* note 169 and accompanying text.

impenetrable barrier, possibly protecting characters indefinitely."[241] This indefinite protection will likely be sought by certain interested parties, foremost among them The Walt Disney Company. Disney's copyright term for the Mickey Mouse cartoon "Steamboat Willie," made in 1928, is scheduled to expire at the end of 2023. But even if that date is not legally postponed and the fixed work itself passes into the public domain, Disney would still own the trademark of Mickey Mouse, which it may renew indefinitely.[242]

Trademark, though, is not a product unto itself, but the indication of a marked product's source. Viva Moffat makes this point in describing the transformation of visual depictions of characters from "drawings [which]...initially were...part of the product [under copyright], and then became...a trademark signifying the source of the product."[243] This overlap in intellectual property protections is in part enabled by the market exclusivity granted by copyright terms. Since Disney has heretofore been the only legitimate source of works under copyright that feature Mickey Mouse, audiences strongly associate that character with the company, and it is that association that allows for the grant of legal trademark protection for images of the character.[244]

The extent to which trademark protection would allow Disney to exclude from the

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[241] Gerald S. Jagorda, "The Mouse that Roars: Character Protection Strategies of Disney and Others," *Thomas Jefferson Law Review* 21 (1999): 235.
[242] Stephen Carlisle, "Mickey's Headed to the Public Domain: But Will He Go Quietly?", *Nova Southeastern University*, last modified October 17, 2014, http://copyright.nova.edu/mickey-public-domain/.
[243] Viva R. Moffat, "Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection," *Berkeley Technology Law Journal* 19, no. 4 (2004): 1509 (referring to a court case with no formal ruling about the proprietary nature of illustrations of Peter Rabbit: Frederick Warne & Co., Inc. v. Book Sales Inc., 481 F. Supp. 1191 (S.D.N.Y. 1979)).
[244] Moffat, "Mutant Copyrights," 1508.

marketplace derivative interpretations of "Steamboat Willie" and its constituent elements – including characters – is unknown, both during the initial terms of copyright protection, as well as following the expiration of the initial work's copyright. Concurrent protection through both copyright and trademark potentially allow Disney to circumvent fair use exceptions granted by copyright law but absent from trademark law, such as the ability to create and publish a visually similar parody of Mickey Mouse.[245] Following the expiration of a copyright, the trademark protections granted to imagery from a work that is newly in the public domain are also unclear.

The preceding literature review, then, may better contextualize the history of copyright in the United States, but there are still issues that require additional clarification. For example, additional entitlements granted by overlapping intellectual property protections may be perceived as beneficial to the owner of a character such as Mickey Mouse that is subject to both copyright and trademark, but the overlap also creates confusion about which branch of intellectual property protection has a greater impact on the incentive to create new works.[246] To the extent they seek their own legal grants of market exclusivity through copyright and/or trademarks, artists interviewed for this research project might be able to speak more authoritatively on the incentives that drive their own acts of creation. As a means to better understand the impact of the overlap between these two forms of intellectual property, then, the following chapter of this dissertation proposes a methodology for the collection and analysis of qualitative data. This data will in part be used to develop a theory of the effects of copyright law on the practice of artists and other individuals engaged in the creation of fixed works subject

[245] Ibid., 1516.
[246] Ibid., 1517.

to intellectual property laws.

CHAPTER 3

METHODOLOGY

Examining the Balance of Public and Private Interests

This research project sought to examine the potential ramifications of the evolution of copyright law, and its effect on the authors of original creative works and their audiences. More specifically, the impact of the overlap between the two forms of intellectual property – trademark and copyright – most relevant to current professional artists was examined through procedures described in this methodology chapter. This researcher proposed a methodology to uncover the effects of copyright law on the practice of creative artists and the resultant art created: a qualitative study comprised of elite, semi-structured interviews with some of those most involved in the professional categories of creative expression of artifacts that include trademarked and copyrighted characters.

Flexible strategies were employed for collecting and analyzing data, primarily elite, semi-structured interviews[1] with professional artists, attorneys, and others who engage with the cultural and legal norms of intellectual property regimes on a regular basis. Strategies that emphasized both emic and ontological perspectives were used throughout the research process. By emic, this researcher means the use of a perspective that foregrounded the norms and cultural practices of those interviewed with regard to intellectual property as perceived and expressed by those individuals themselves. By ontological, this researcher means a perspective that foregrounded the interpretation of

[1] J.L. Hochschild, "Conducting Intensive Interviews and Elite Interviews," *Workshop on Interdisciplinary Standards for Systematic Qualitative Research* (2009), Retrieved March 3, 2018, from http://scholar.harvard.edu/jlhochschild/publications/conducting-intensive-interviews-and-elite-interviews.

reality according to those interviewed. Again, the aspect of reality with which this researcher was most concerned was the ontological interpretation of norms of intellectual property as expressed in copyright law, and more importantly, the impact of artists' beliefs on the underlying social phenomenon of the concept of the moral right to copy and/or modify an existing fixed work. Because these beliefs regarding copyright in the aggregate constitute a social reality independent of what is allowed by nature, it is considered by this researcher to be an idealist ontological position.[2] In short, the shared interpretations of those interviewed – as well as the countless others who were not interviewed – contributed to an iterative process of meaning making with regard to the ontology of copyright as both concept and law.

Constant comparative analysis was used to maintain an emic perspective, prioritizing the subjective experience of individuals interviewed for this research project.[3] From an ontological perspective, artists interviewed were presumed to help establish and ground background conceptions for categorization of fixed creative works as, for example, works of literature, film, or illustrations.[4] This ontology of art, rather than depending on an empirical examination of artifacts themselves, thus depended on a conceptual analysis of artistic practice as revealed by those interviewed.[5] Further, in the aggregate, interviews conducted may suggest an epistemic basis for "the causal role of

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[2] Norman Blaikie, "Ontology/Ontological," in *The SAGE Encyclopedia of Social Science Research Methods*, ed. Michael S. Lewis-Beck, Alan Bryman, and Tim Futing Liao (Thousand Oaks, CA: SAGE, 2004), 767.
[3] Sheila M. Fram, "The Constant Comparative Analysis Method Outside of Grounded Theory," *The Qualitative Report*, 18(1) (2013): 1-25.
[4] Amie L. Thomasson, "The Ontology of Art and Knowledge in Aesthetics," *Journal of Aesthetics and Art Criticism* 63, no. 3 (2005): 226.
[5] Darren Hicks, *Artistic License: The Philosophical Problems of Copyright and Appropriation* (New York: University of Chicago Press, 2017), 34.

the works of art in the relevant culture,"[6] especially here in regards to the conception of copyright and intellectual property norms, such as the categorization of given fixed creative works as either original or derivative.

It is the hope of this researcher that such a study is a worthy contribution to the existing scholarly literature and ongoing public debate regarding the balance between an author's and the public's interests in the continued dissemination and (re)interpretation of fixed creative works subject to copyright law. The method utilized here was appropriate to the task of providing data for the analysis of these competing interests, as artists interviewed for this dissertation provided their own ontological interpretations on the issues presented here and the balance between public and private interests. This balance has no doubt shifted over the years, and changes in the categorization of artifacts as a means to increased proprietary control over creative expressions will likely continue to affect that balance.

As posited in the introduction to this dissertation, the dialectical approaches to copyright may have lasting impacts on culture and society. Again, copyright as granted by law may be interpreted as either a temporary monopoly on what will become public knowledge and property, or as the legal certification of the natural right of property an author is due. Which approach to copyright law can be said to result in a better society: the latter, modern interpretation of fixed forms of expression as the natural property of the author (or copyright owner)? Or the Framers' belief that expressions belong to all once they have been made public, but that there must be an incentive granted to the initial author so that he or she might in the first place make them public? Again, it is at this

[6] Amie L. Thomasson, "The Ontology of Art and Knowledge in Aesthetics," 226.

point unclear which approach to intellectual property may result in the greatest good.

If there is a balance to be struck between these two interpretations, it will not be achieved without an understanding of the issues faced by those who regularly create and disseminate fixed works subject to copyright law and policy. In turn, this serves as partial justification for the methodology employed here and this dissertation as a whole, as artists interviewed for this project offered unique and valuable perspectives on the issues presented here. This researcher also believed at the outset of this project that interviewed artists would be able to speak on the incentives and privileges enabled by copyright and intellectual property regimes, as they engage with the cultural and legal norms of copyright and intellectual property on a regular basis.

For these reasons, the interviews conducted and the selection of interview subjects for this research project were not chosen at random or anonymously, and are elite in the sense described by Hochschild, in that subjects were "chosen because of who they are or what position they occupy."[7] Interviews are also intensive in the sense described by Lofland, as they are meant to "collect instances and episodes of action and...problems;"[8] in this case, instances and episodes related to enforcement and/or protection of intellectual property rights as guaranteed by law.

Subjects were selected specifically for their ownership of copyrighted works or participation in transfer of ownership of such works. This meant that the most important demographic characteristic for each interview subject selected was profession, so that all interview subjects either contributed directly to the creation of fixed works – artists and

[7] Hochschild, "Conducting Intensive Interviews and Elite Interviews."
[8] John Lofland, *Doing Social Life: The Qualitative Study of Human Interaction in Natural Settings* (New York: John Wiley & Sons, 1976), 8.

writers – or facilitated the contractual agreements that determined ownership of those works subject to copyright law – attorneys and publishers. Certain multinational corporate entities – particularly Disney and AT&T – own a large swath of the type of intellectual properties – including fictional characters, films, books, and comics – subject to copyright and trademark laws as discussed in the literature review. For this reason, current and former employees and contractors of those particular companies and similar companies were also selected as interview subjects, particularly as persons who were presumed to speak more authoritatively on the work for hire practices used by those companies. For these reasons, interview subjects selected were thought to be uniquely suited to describe and provide context for the application of intellectual property regimes in modern professional settings. The relevant demographic characteristics of interview subjects are listed in Table 1 below. Certain individuals who were interviewed also had experience that ran the gamut of multiple creative professions and with multiple firms and organizations, and these distinctions are noted in the list and within the findings when relevant to quoted material.

Guiding Interview Questions

Based on the review of literature in Chapter 2, certain preliminary questions for artists guided the initial collection and analysis of qualitative data. These questions included:

1) What incentives currently exist for the artist or author that would not exist in the absence of formal copyright law?

2) How would the artist's practice be changed by the absence of formal copyright

law?

3) What are the artist's experiences with the enforcement of copyright privileges as granted by statute?

4) How has technology changed the artist's approach to distribution of fixed creative works and other matters relating to copyright?

Other questions were developed over the course of each interview conducted as a result of the dynamic nature of each individual's responses to these guiding questions. This interviewer listened and responded to comments made by interview subjects, and these responses took the form of follow-up questions to these initial guiding questions.

IRB Approval and Preliminary Research

Because this research required the participation of human subjects, approval by Arizona State University's Internal Review Board (IRB) was necessary to ensure ethical treatment of those participants, and all requirements of the IRB were followed accordingly. Following IRB approval, roughly eight months of official data collection was necessary before theoretical saturation – or the point at which related concepts were thoroughly developed[9] – was achieved. Copies of the recruitment letter and consent form are in Appendix A and B, respectively. Analysis of the interviews conducted during the data collection phase of this study – detailed below – yielded significant findings related to the practices of artists in the absence of formal copyright law, as well as a comprehensive theory on how current copyright law informs the practice of creating new or derived works.

[9] Herbert J. Rubin and Irene Rubin, *Qualitative Interviewing: the Art of Hearing Data*, 2nd Ed. (Thousand Oaks, CA: SAGE, 2005), 67.

As part of a pilot study, this researcher spoke with and interviewed artists at various points on the subject of intellectual property, most often at festivals, galleries and conventions related to the mass production of works subject to copyright. This was done on and before October 2017, the date when this current research project was initiated and a formal research plan and methodology was finalized. Observations made and discussions conducted in these settings before that date allowed this researcher to develop the current study by way of Lofland's four crucial phases[10] for studying natural settings of social interaction:

1) *Intimate familiarity*, or getting close to those actually involved in the creation and dissemination of works subject to copyright;

2) *Situation*, or the focus on what legal and cultural norms exist surrounding copyright in the selected environments;

3) *Strategies*, or how artists confront or deal with issues related to copyright, and:

4) *Disciplined abstractions* of a variety of specific episodes that may then be analyzed in relation to each other.

This preliminary research, conducted between May 2015 and October 2017, aided in the design and nature of the current study.

[10] Lofland, *Doing Social Life*, 3.

Sample

The sample for the current study consisted of 14 semi-structured elite interviews with artists and other professionals directly impacted by copyright and intellectual property regimes, conducted between November 2017 and July 2018. These interviews were semi-structured in the sense that they all begin with the same guiding questions for each individual being interviewed, but were primarily driven by the idiosyncratic experiences or felt concerns of those individuals, and it was understood by this researcher that the perception of each interview subject might change in other circumstances or at different times.[11] This researcher sought interviews with professionals until theoretical saturation was achieved, or until each subsequent interview added less and less to what was already known, and eventually only the same information was suggested by new interview subjects.[12] Relevant demographic characteristics of each participant are listed in Table 1.

[11] Lewis Anthony Dexter, *Elite and Specialized Interviewing*, Handbooks for Research in Political Behavior (Evanston, Ill.: Northwestern University Press, 1970), 120.
[12] Rubin and Rubin, *Qualitative Interviewing: the Art of Hearing Data*, 67.

Table 1

Name	Professional Firm Experience	Job Roles	Years of Professional Experience
JS	Marvel, Broadway Video	Writer, Editor, Publisher	50+
TR	CBS, Mattel, 20th Century Fox, Marvel, AT&T (Time Warner)	Visual and Sequential Artist	20+
DF	Hasbro, 20th Century Fox, Image Comics	Storyboard Artist, Songs and Lyrics	25+
EM	Self-Published	Writer, Artist, Publisher	20+
JB	Self-Published, Image Comics, Licensed work with Hasbro, Licensed work with 20th Century Fox	Writer, Publisher	20
JR	Marvel/Disney, AT&T (DC/Time Warner)	Visual Artist (Inker)	40+
MH	AT&T (DC/Time Warner), Image Comics	Writer, Editor, Publisher	25+
BA	AT&T (DC/Time Warner)	Writer, Editor	35+
TM	AT&T (DC/Time Warner), Marvel, Image Comics	Writer, Artist, Publisher	35+
DE	Disney	Writer	20+
ZR	Verizon Communications (Subsidiary), Marvel	Senior Content Analyst	15
BS	Legal Firm	Attorney in IP Law	19
CC	Legal Firm	Attorney in IP Law	20+
RC	Legal Firm	Attorney in IP Law	8

As a means to improve interpretative validity, all interviews were audio recorded with subjects' permission, and written notes to mark times and emphasize certain

comments were taken by the researcher. Interviews were later transcribed and coded using a constant comparative method, described below. This process helped to ensure a more concrete process or protocol for data collection and analysis.

The purposive sample of semi-structured interviews with artists and other professionals in this study provided what Jessica Silbey refers to as a "database of language," a thick description[13] both of what individuals think and how they engage with copyright law in practice.[14] This database eventually led to theoretical saturation, or the point at which all concepts relevant to this study became fully developed.[15]

Constant Comparative Method

This research utilized a constant comparative method for coding, beginning with open coding, where interview transcripts were read thoroughly and tagged with initial codes, primarily drawn from the relevant literature.[16] These included codes such as "the public domain," "moral rights," "work made for hire" and "employer practices." This was followed by focused coding, where the initial categories were further refined, most often to clarify an interview subject's perceived value judgments of the initial codes. So, for example, the codes listed above would be further refined as "advantages of the public domain," "disadvantages of the public domain," etc.

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[13] Bent Flyvbjerg, "Case Study," in *The SAGE Handbook of Qualitative Research*, ed. Norman K. Denzin and Yvonna S. Lincoln (Thousand Oaks, CA: Sage, 2011), 311.
[14] Jessica Silbey, "Harvesting Intellectual Property: Inspired Beginnings and Work-Makes-Work, Two Stages in the Creative Processes of Artists and Innovators," *The Notre Dame Law Review* 86, no. 5 (2011): 2099.
[15] Rubin and Rubin, *Qualitative Interviewing: the Art of Hearing Data*, 67.
[16] Kathy Charmaz, "Grounded Theory Methods in Social Justice Research," in *The SAGE Handbook of Qualitative Research*, ed. Norman K. Denzin and Yvonna S. Lincoln (Thousand Oaks, CA: Sage, 2011), 367-371.

The final step for the coding process was in vivo coding, where specific examples and phrases expressed by interview subjects were used as categories.[17] The methodology for coding collected data was also informed in part from a similar study of artist practice by Silbey,[18] such that interview transcripts were analyzed and coded both inductively, as a result of the emergent language of interviews; and deductively, as a result of the preliminary findings and research conducted prior to interviews. By this process, inductive codes described how interview subjects perceived their own relationship to categories such as their own rights as an artist, while deductive codes contextualized these perceptions within the broader skein of copyright policy throughout the historical term discussed in the literature review. The coding process also consisted of thematic analysis of interview data, so as to better examine commonality, differences and relationships.[19] This analysis most specifically compared interviewed artists' accounts with one another to see what common threads or experiences began to emerge in the findings, as well as what experiences were not shared by multiple interviewed artists.

As the coding process was implemented through the course of this research, units of data that shared "certain generic properties" were organized into separate categories.[20] This categorization served to organize units of data – more specifically, discrete passages of text from transcribed interviews – as "belonging to, representing, or being an example of some more general phenomenon," according to Susan Spiggle.[21] Some of the coded

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[17] Ibid.
[18] Jessica Silbey, "Harvesting Intellectual Property: Inspired Beginnings and Work-Makes-Work, Two Stages in the Creative Processes of Artists and Innovators," 2132.
[19] Jamie Harding, *Qualitative Data Analysis from Start to Finish* (London: SAGE, 2013).
[20] Thomas R. Lindlof and Bryan C. Taylor, *Qualitative Communication Research Methods*, 2nd Ed. (Thousand Oaks, CA: SAGE, 2002), 189.
[21] Susan Spiggle, "Analysis and Interpretation of Qualitative Data in Consumer

categories for this research project included, but were not limited to, shared and idiosyncratic artist practices with regard to the exercise of creative control of copyright, experiences with copyright norms as a function of relationships among artists, and the additional competitive context of using creative works that exist in the public domain. Because these examples of categories do not refer to easily recognized and concrete things, and because they require the simultaneous assimilation of ambiguous and abstract concepts, they are high-inference or "fuzzy categories."[22] For example, artists interviewed may be using different working definitions for abstract concepts like moral or natural rights in relation to copyright, and separate individuals may emphasize or disregard elements of such a category depending on their unique professional experiences.

These categories, and the coding method used in general for this research, was digitally organized through the use of Computer Assisted Qualitative Data Analysis Software (CAQDAS). The specific software used for this study was RQDA, a free Linux distribution that allows for coded interviews to easily be compared and contrasted for repeated and emphasized codes, categories, cases, and attributes. This is in line with Corbin and Strauss' suggestion to develop categories as a response to concepts that are repeatedly and similarly emphasized by different interview subjects as the researcher purposively looks for patterns that emerge within the findings.[23] However, the use of high-inference categories means that some described instances may point to multiple,

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Research," *Journal of Consumer Research* 21, no. 3 (1994): 493.
[22] Lindlof and Taylor, *Qualitative Communication Research Methods*, 215.
[23] Juliet Corbin and Anselm Strauss, "Grounded Theory Research: Procedures, Canons, and Evaluative Criteria." *Qualitative Sociology*, 13, no. 1 (1990): 8.

even contradictory, meanings, according to Lindlof and Taylor.[24] Moreover, as suggested by Corbin and Strauss, this researcher has attempted to account for any variations within the patterns established by the interviews, and to examine data "for regularity and for an understanding of where that regularity is not apparent."[25] Further, attempts were made in the chapters of this dissertation on findings, conclusions and discussion to account for potential conceptual discrepancies when applicable, and to provide "clear, formal theoretical definitions of [each] working category."[26] In short, this researcher used the method described in this chapter to better explicate what each working category meant, and to provide clear definitions of those categories as a product of qualitative data analysis.

The definitions of categories were heavily informed by interview subjects' own experiences and interpretations of events related to the norms of copyright law. This was enabled in part by the development of follow-up questions within each individual interview. This researcher also allowed interview subjects to contribute in some way to the interviews that followed. This was enabled by the development of memos to elaborate on coded and analyzed data so as to determine what additional theoretical sampling would be required in future interviews.[27] These memos aided in providing greater focus both to the process of data collection and this researcher's own ideas.[28] Through an iterative process of coding and categorizing collected data, this researcher was able to

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[24] Lindlof and Taylor, *Qualitative Communication Research Methods*, 215.
[25] Corbin and Strauss, "Grounded Theory Research: Procedures, Canons, and Evaluative Criteria," 10.
[26] Barry A. Turner, "Connoisseurship in the Study of Organizational Cultures," in *Doing Research in Organizations*, ed. Alan Bryman (New York: Routledge, 1988): 109-110.
[27] Charmaz and Mitchell, "Grounded Theory in Ethnography," 167-68.
[28] Ibid.

continually determine what additional theoretical sampling would be necessary to elaborate on the analysis of categories, as well as to more accurately compare individual accounts and discuss variation between those accounts.[29] Again, this sampling primarily took the form of elite interviews. Since these interviews were conducted with individuals who may at different times operate at different points along the continuum of the creation of a fixed creative work, an analysis of process was also employed to denote when changes in working conditions led to changes in an artists' interpretations of the concepts and categories discussed during interviews. This analysis of process was informed most clearly by the methodological techniques of Corbin and Strauss, who suggest analyzing process as a byproduct of the prevailing conditions in a workplace environment.[30]

All of these disparate elements were taken into account for the interviews conducted and that served as the units of analysis for this study. Elite, semi-structured interviews were conducted with artists and other professionals engaged with creative works subject to copyright, to the ultimate purpose of developing a rich tapestry of the various effects of current copyright norms on how, why, and what individual creative works of authorship are produced. One of the primary reasons for speaking with creative persons involved in the film, comic book, and general entertainment industry about their perceptions of copyright was the potential in those markets for continued inconsistencies in the application of legal and cultural norms for what constitutes derivative and infringing practices versus transformative and fair use practices. As explicated in the literature review, these include norms regarding resignification and remixing of fictional

[29] Ibid.
[30] Corbin and Strauss, "Grounded Theory Research: Procedures, Canons, and Evaluative Criteria," 10.

characters subject to trademark but not copyright. As the findings of these interviews demonstrate in Chapter 4, there were several concrete examples of artists perceiving inconsistent application of copyright norms during their own careers.

Further justifications for the sample subjects chosen include the unique economic considerations that exist for artists creating works of authorship intended for a mass audience. Many such artists, from amateurs to professionals, are engaged in market transactions of original and derivative creative works in a loosely licensed environment. Some professionals, who have a continuity of employment at creative firms such as Marvel or DC Comics from the 1970s onward were also able to describe their personal interpretations of how the norms and laws related to intellectual property have changed over a lifetime.

One final justification for the interview subjects chosen was that some artists represent efforts to create or enhance moral rights arguments for copyright independent of existing legislation, and thus have a prior stated interest in addressing copyright norms.[31]

[31] One such individual, Neal Adams, successfully campaigned in the 1970s on behalf of the creators of Superman, Jerry Siegel and Joe Shuster, to receive ongoing creator credit and financial assistance from the publisher, DC, which owns the copyright and trademark to the character and was not legally obliged to care for ex-employees (Rafael Madoff, "Superman: Saving His Jewish Creators," *Jewish News Service*, June 10, 2013, http://www.jns.org/latest-articles/2013/6/10/superman-saving-his-jewish-creators#.WUAjpR8qdSU=). Today, The Hero Initiative (www.heroinitiative.org) and other charities engage in similar efforts to assist aging or infirm artists, while the Comic Book Legal Defense Fund (www.cbldf.org) is dedicated to the protection of the First Amendment rights of artists, with the support of numerous professional artists.

Participant Observation and Researcher Background

As this dissertation has so far shown, governments, private interest groups, authors, and representatives of the public have engaged in arguments about the proper role and implementation of copyright for hundreds of years. This researcher also acknowledges a personal connection to the current research as an audience member for fixed creative works subject to copyright. As an audience member, this researcher has also developed assumptions about the creative process followed by artists and authors like the ones interviewed for this research project even before the official onset of research conducted for this dissertation. Additionally, artists themselves have often written explicitly about personal experiences with copyright norms, enforcement, etc., creating a "reasonably useful cache of direct observation reports,"[32] as well as pointing the way in certain cases towards individuals who would be willing and interested to discuss subject matter relevant to this study and dissertation.[33]

Such pre-existing information informed what would serve as starting points for questions asked of interview subjects, although effort was made to critically reflect on the stated aims of those interviewed and remain aware of this researcher's own personal "intuitive inclinations" that could at times alternatively contradict or support those statements.[34] This researcher sought to assure interview subjects at all times that although guiding questions would be used to facilitate and direct their communication through the research topic of norms related to copyright and intellectual property, their own perceptions and responses would "not meet with denial, contradiction, competition, or

[32] Lofland, *Doing Social Life*, 9.
[33] See, e.g., *supra* note 29.
[34] Valerie Janesick, "Intuition and Creativity: A Pas De Deux for Qualitative Researchers," *Qualitative Inquiry* 7, no. 5 (2001): 533.

other harassment."[35] Interview protocol was also designed with both flexibility and rapport in mind. A flexible design for interviews and the collection of data helped to emphasize what Dexter describes as "the interviewee's definition of the situation; encourag[e] the interviewer to structure the account of the situation; [and] let the interviewee introduce to a considerable extent...his notions of what he regards as relevant."[36] Rapport with each interview subject aided in the sense described by Lindlof and Taylor, in that this researcher was able to quickly establish the nature of this study and how the interview would be conducted,[37] both aided by the short consent form and opening questions provided to each interview subject.

However, like any research project, this one has limitations. Because this is a qualitative study, and does not include a representative sample, the findings from interviews should not be generalized to a broader population.[38] This researcher did attempt to include interview subjects from a variety of professional backgrounds related to the research category of copyright, and interviews were conducted over the course of several months until theoretical saturation had been achieved.

In addition to the limitations of the research methods used for this dissertation, there are also benefits to this type of qualitative research. For example, a qualitative research design such as this allows for a more effective study of human symbolic action

[35] Mark Benney and Everett C. Hughes, "Of Sociology and the Interview: Editorial Preface," *American Journal of Sociology* 62, no. 2 (1956): 140.
[36] Dexter, *Elite and Specialized Interviewing*, 5.
[37] Lindlof and Taylor, *Qualitative Communication Research Methods*, 189.
[38] Earl R. Babbie, *The Practice of Social Research*, 11th ed. (Belmont, CA: Thomson Wadsworth, 2007).

within the context of performance and practice[39] than does a quantitative design. Interviews conducted provided valuable data concerning the "creative, local, and collaborative interaction events"[40] that comprise each artist's performance of communication. In the aggregate, these collective performances also point to shared practices that become routine in their repetition. This qualitative data was of great benefit in helping to catalog and analyze the ontology of copyright in the early twenty-first century and how it is epistemologically interpreted by working professionals at this time.

[39] Thomas R. Lindlof and Bryan C. Taylor, *Qualitative Communication Research Methods*, 3rd Ed. (Thousand Oaks, CA: SAGE, 2011), 4.
[40] Ibid.

CHAPTER 4

FINDINGS

The Interviews

This chapter presents the findings related to interviews conducted with professional artists and other individuals engaged with creative works subject to copyright law. Individual interview subjects quoted here are not identified by name, but their positions within the creative industries they inhabit are listed when relevant to their comments. These individuals include visual and sequential artists. Sequential artists is a term used to describe those whose art is used to tell a narrative story, most often for comic books or storyboards for film. Other interviews were also conducted with authors of written works, editors, publishers, CEOs of comic book companies, and attorneys who specialize in copyright law. Interview subjects have either current or previous employment experience with a variety of firms that specialize in the publication of works subject to copyright law, including Marvel/Disney, Time Warner/DC Comics, Hasbro, Mattel, 20th Century Fox, CBS Corporation, Broadway Video, Verizon Communications, and a number of smaller publishers.

Interviews with these individuals provided information related to common experiences with real or perceived copyright infringement, as well as thoughts related to potential future changes in copyright law. From this information, excerpts were taken and organized into the sections of this chapter. These sections are 1) artists accused of copyright and/or trademark infringement, 2) artists' defense of intellectual properties, 3) joint authorship and collective works, 4) the nature of work for hire and copyright as a transferable right, and 5) the role of the public domain. These categories were chosen and

formalized as a result of the emic perspective of the interview subjects and the repeated similarities in experiences between those interviewed. As described in the preceding Methodology chapter, constant comparative analysis was used to help maintain such an emic perspective[1] – or the foregrounding of the norms and cultural practices of those interviewed as those individuals experienced them – so that their subjective interpretations were most often presented in their own words. Through these categories, artists described their personal understanding of the boundaries of their rights and privileges in relation to copyright norms and policy, as well as the permeability of those boundaries as they interact with other individuals and groups engaged in similar artistic practice.

The emic perspective of the interviewed individuals was also enabled by presenting the original words of those individuals as quotations whenever possible. In the interest of clarity and brevity, some quotes have been altered through the use of ellipses to excise extraneous words (...) including vocal fillers such as "like," "you know," etc. Entire sentences have also been excised through the use of ellipses (....) when those sentences are deemed unnecessary to communicate the interviewed individual's thoughts, or tangential to the relevant category. Finally, a double hyphen (–) is used in quotes to indicate a pause in speech or incomplete sentence.

This method, and the resultant categories described above, allow the interviewed artists to contribute to a mosaic of the current culture of copyright among professionals who create fixed artistic works. The findings, then, rather than depending on an empirical examination of the fixed artistic works – or artifacts – themselves, employs a conceptual

[1] Sheila M. Fram, "The Constant Comparative Analysis Method Outside of Grounded Theory," *The Qualitative Report*, 18(1) (2013): 1-25.

analysis of artistic practice as revealed by those interviewed.[2] Many more examples of competing fixed artistic and/or creative works that could conceivably trigger concerns related to copyright exist. However, the examples in this chapter are the ones that are foregrounded and volunteered by the professionals interviewed, all of whom regularly engage with fixed creative works subject to copyright policies.

Artists Accused of Copyright and/or Trademark Infringement

Several artists who this researcher interviewed had prior experiences of being accused of actual or potential copyright and/or trademark infringement during their professional careers. Although a few instances of these accusations of infringement resulted in court battles and thus were a matter of public record, this researcher was most often unaware of these accusations before interviews were conducted. Therefore, interview subjects were not selected because of any known connection to situations involving accusations of infringement.[3] These situations typically entailed receiving cease and desist letters that requested the accused artist to refrain from the further use of specific titles or imagery reserved as intellectual property under copyright or trademark laws. In more severe scenarios, interviewed artists have had to enter protracted legal battles in the court system, with the attendant time and material costs that such endeavors require.

One individual interviewed describes a lawsuit concerning trademark

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[2] Darren Hicks, *Artistic License: The Philosophical Problems of Copyright and Appropriation* (New York: University of Chicago Press, 2017), 34.

[3] One exception to this is the example described by the artist *infra* note 12 and accompanying text. This researcher was aware of this example of perceived trademark infringement before the interview, and so selected that interview subject in part to better explicate the known event.

infringement directed at a comic book company called Defiant for which he worked in the 1990s. At the time, Defiant published *Warriors of Plasm*, a name similar enough to a then-forthcoming title from Marvel Comics called *Plasmer*, that Marvel sued Defiant for "trademark infringement and unfair competition growing out of defendant's use of the name 'Plasm' in the name of a comic book."[4] The individual interviewed for this dissertation recalls that the claim was not so much about a genuine potential for confusion between the two titles, instead "it was about trying to put [Defiant] out of business."[5]

The judge for the case, Michael B. Mukasey, who would later serve as U.S. Attorney General, seemed to agree with the interviewed individual's assessment, as Mukasey's initial ruling was to deny the plaintiff's motion for declaratory judgment,[6] and Marvel dropped the suit without appeal. The interviewed individual provides further context:

> [Mukasey's] trying the first World Trade Center bombers in the morning, and he's trying comic book stuff in the afternoon. When he read his opinion, [Marvel] lost every point of every category. Every one. And then he gave a fairly glowing review of *Plasm*, [Defiant's] *Plasm*, and then he finishes his opinion, and he calls the Marvel lawyers to the bench, and he covers his mike, but you can hear him anyway, and he says, "You ever use my court as a business weapon again, and you will sincerely regret it. And you better not appeal." And Marvel withdrew the suit. Anyway, that's what they were doing, it was a business weapon, to put us out of business before we got started.[7]

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[4] Marvel Comics, Ltd. v. Defiant, a Division of Enlightened Entertainment, Ltd., 837 F. Supp. 546, 547 (S.D.N.Y. 1993).
[5] Interview with JS, February 11, 2018.
[6] Marvel Comics, Ltd. v. Defiant, a Division of Enlightened Entertainment, Ltd., 837 F. Supp. 546, 550 (S.D.N.Y. 1993). The plaintiff sought a declaratory judgment, or legally binding determination of the court, specifically in this case to hold that the plaintiff's trademark in the name Plasm, first sought in the United Kingdom, would be granted statutory protection at the same date in the United States.
[7] Interview with JS, February 11, 2018.

This individual is also clear about the negative ramifications of having to defend against charges of trademark and copyright infringement, even in spite of doing so successfully. "It cost $300,000 to win, which is a lot like losing."[8]

Other artists interviewed for this dissertation provide examples of accusations of infringement that had far less severe material costs. Like the prior example, the next situation is one wherein the dual intellectual property protections of trademark and copyright in relation to fictional characters are conflated.[9] One individual, another writer and publisher, describes receiving a cease and desist letter from Marvel for allegedly infringing on the trademark of one of its characters, the Punisher, who wears a prominent white skull logo on a black t-shirt. As the writer/publisher describes it:

> We were publishing a series with a gothy girl character wearing fishnets and everything else, and she had a t-shirt on her with a cartoon skull. Marvel sent a cease and desist based on an [advertisement featuring that character], and said "you cannot use a black shirt with a skull on it, that's our trademark for the Punisher." It was just Marvel's lawyers looking for stuff to go after. So my attorney wrote a big response going back to the Jolly Roger flag and pirates and all kinds of shit. But Marvel...are going to do whatever they want, so instead we changed the t-shirt on the cover to say 'punish me.'[10]

For this publisher, then, it was acceptable to make changes to the iconography of a yet-to-be published cover to avoid a protracted legal dispute. However, the inclusion of the phrase "punish me" did add a sly metatextual commentary to the whole affair, satirizing Marvel's efforts to enforce its exclusive use of select iconography. Since this satire was employed as a result of threatened legal action, it is also political speech. This relationship between satirical and political speech is examined in more detail in the

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[8] Ibid.
[9] *See supra* notes 224-245, Chapter 2, and accompanying text, for discussion of this conflation of trademark and copyright in relation to fictional characters.
[10] Interview with JB, May 26, 2018.

conclusions and discussions chapter.[11]

Another artist describes how his publication of a comic he wrote and drew attracted the attention of a popular rock band. The band's legal representatives requested this artist cease using the current title for his book, which was also the name of the band. As this artist recounts the incident:

> Back in 1994, I put out a [comic] book called *Black Flag*, and the idea was that this character was betrayed by his government, and so he blacked out all the flags on his uniform. That's where I got the name from. I put it out, and I thought eventually, "Maybe the roach spray might send me a letter or whatever." They never did, but I did get a letter from the Henry Rollins band, Black Flag, asking me to cease and desist. I got scared, because I didn't know anything at the time about it. So I just changed the name to *Black Seed*.[12]

This artist describes how if he received a similar letter today, he would be less likely to change the name of his comic book. "I realized that the only way they could do that in reality is if there was brand confusion. If I had a band called Black Flag, or if my comic had an album or music associated with it, and it said Black Flag on it, there would be brand confusion."[13] Ultimately, because the manufacturers of roach motels, the rock music band, and this artist himself were all serving separate markets, there was and still is an inconsequential likelihood of consumers being confused about the differing nature of each product. "You can fight some of these things. People get an itchy trigger finger with their legal letters, and you can talk to somebody that knows some things and find out that you can keep on going. In that case, I could."[14]

Other individuals interviewed reinforce the claim that litigation is not always necessary to reach an agreement between parties in a case of potential infringement. One

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[11] *See infra* notes 39-52 and accompanying text, Chapter 5.
[12] Interview with DF, February 16, 2018.
[13] Ibid.
[14] Ibid.

artist and publisher describes the following situation, wherein the president of a rival publishing firm called to inform him that a potential lawsuit for trademark infringement was being considered:

> [The president of the rival company] called and said, "We're going to have to sue you." My partner...at least was a lawyer, so I put [them] on the phone with him. And [the president] was a big music fan, and [my partner] was associated with the Allman brothers band. And so in exchange for getting Allman Brothers backstage passes, he forgot it. He just said, "Ok, you guys can do it. I get the backstage passes."[15]

The publisher interviewed describes this particular situation as likely being a case without merit. "[The rival publisher] sort of over-reached. Even back then, they were over-litigious."[16] Still, at least in that example, those accused of infringement found it more beneficial to come to an agreement with a rival publisher accusing them of infringement, rather than to pursue the matter in a court of law.

Individuals with prior experience working for large publishing corporations describe how those corporations have employed discretion in making and pursuing claims of copyright infringement against artists. For example, a former talent manager at Marvel states that artists who had worked for the company are free to reproduce and sell work they had created featuring Marvel characters under certain guidelines.

> It's not really a stated record, but Marvel kind of, as long as you work for the company or had worked for the company, you're allowed to feature their intellectual property in 30 percent of your sketchbook.... If you have a 100 page sketchbook, 30 pages can have Marvel property on it, and they won't really pay attention to it.... [The company] likes to have it on their radar as long as you're communicating that. I feel like that's a good rule of thumb.[17]

This individual also states that Marvel is within their statutory rights to pursue

[15] Interview with JS, February 11, 2018.
[16] Ibid.
[17] Interview with ZR, July 10, 2018.

claims of copyright infringement against those artists who hew to the 30 percent standard, but that they are unlikely to do so. However, this does not mean that writers and artists who have worked with the company are absolutely free to reproduce and distribute work for which Marvel owns the copyright. For example, a former writer for Marvel, Gary Friedrich, sued the company for the copyright in the character of Ghost Rider that he had co-created in 1972.[18] Simultaneous to this lawsuit, Friedrich was also selling reproduced printed materials of the character at conventions and online, leading to a countersuit by Marvel.

According to the talent manager, "[Friedrich] was trying to sue Marvel for a piece of the pie from the Ghost Rider movies. And with him raising such a stink about it – I think they looked a little bit closer at 'Look at all these prints you're selling at shows.'"[19] At one point, Friedrich was ordered to pay $17,000 for his unlicensed distribution of copyrighted materials.[20] "It kind of shook the comics community a little bit because [Marvel] kind of made an example out of him."[21] Eventually, Marvel and Friedrich "amicably agreed to resolve all claims," according to Friedrich's lawyer.[22] Again, this talent manager describes this situation as a rare case, and that artists typically are allowed to make limited reproductions of their own artistic works even if a publisher or other third party owns the copyright.

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[18] Gary Friedrich Enters., LLC v. Marvel Characters, Inc., No. 12-893 (2nd Cir. 2013).
[19] Interview with ZR, July 10, 2018.
[20] Kiel Phegley, "Friedrich Ordered to Pay Marvel $17k Over 'Ghost Rider,'" *Comic Book Resources*, February 9, 2012, accessed July 10, 2018, https://www.cbr.com/friedrich-ordered-to-pay-marvel-17k-over-ghost-rider/.
[21] Interview with ZR, July 10, 2018.
[22] Eriq Gardner, "Marvel Settles Lawsuit with 'Ghost Rider' Creator," *The Hollywood Reporter*, September 9, 2013, accessed July 10, 2018, https://www.hollywoodreporter.com/thr-esq/marvel-settles-lawsuit-ghost-rider-624609.

> I can't speak for [Marvel], but I have worked in comics for nearly fifteen years. I think they kind of turn a blind eye as long as you are working with the company and not infringing too much on their intellectual property. It's almost like it's good for business, right? And I don't think there's anything set in stone. I just know that when I was training there, if [an artist was] being greedy, they'll know.[23]

The 30 percent rule, then, does potentially establish a standard policy for an acceptable amount of infringement. Further, the transfer of ownership for the copyright of a fixed creative work allows for this initial possibility that an artist's reproduction of their own creative labor might legally be construed as infringement. The next section of this chapter presents examples of artists who instead own all underlying copyrights in their creative works, and later sections further discuss the phenomenon of copyright itself as a transferable right.

Artists' Defense of Intellectual Properties

In contrast to the prior section's examples of artists who were accused of copyright and trademark infringement, this section describes the experiences of interviewed artists who sought to defend their own intellectual property rights when others infringed upon them. For example, one artist, previously mentioned,[24] describes how he had asked another artist who had solicited the sale of a new comic, titled *Black Flag*, to refrain from using that title.

> At some point, last year or 2016, I saw a comic that was going to be coming out that they were calling *Black Flag*, and of course I had to send them a letter. I sent it myself, I didn't get any lawyers involved. And I just explained to them, "Hey, you know, maybe in other instances it would be okay, but I already have a comic called *Black Flag*, and if someone searches on the web for 'Black Flag comic,' now both of ours are going to show up, and that doesn't make any sort of sense."

[23] Interview with ZR, July 10, 2018.
[24] *See supra* notes 11-13.

They agreed, and changed the name of their book.[25]

This artist describes how this use of the *Black Flag* title would have a greater likelihood of brand confusion among consumers than the prior examples of roach motels and rock music bands using the same name. He also describes how he did not personally find it necessary to employ an attorney or send a more formal cease and desist letter. This procedure was successful for him, but stands in contrast to the procedures used by some of the other copyright owners interviewed for this dissertation, who did retain legal representation when enforcing their own copyrights.

Other individuals interviewed describe several situations where they employed legal and pre-legal practices to protect their own intellectual property. Again, a common method for this, especially when infringement takes the form of literal mechanical copying of existing artwork – as opposed to the use of underlying ideas and forms in the creation of new derivative works – is the use of cease and desist letters. One respondent, the president and chief operating officer of a mid-range publishing company, states,

> Yeah, we have definitely had to send cease-and-desist letters to people who were misappropriating our artwork. It's actually more people using our artwork for things. We haven't really had any issues with fan fiction or stuff like that. But I have found that a lot of times we will find our artwork used in advertising. I have found our artwork being used for advertising for a strip club in Florida. We sent them a cease and desist letter and they immediately took it down. We have a trademark and IP [intellectual property] attorney that I use, and we have a separate attorney, too. I can email him the link, and he'll just take care of it.[26]

The same respondent notes that this tactic for discouraging unlicensed use of copyrighted art and other fixed works has its limitations. Since cease and desist letters rely on the potential enforcement of legal statutes, the threat of enforcement is absent in

[25] Interview with DF, February 16, 2018.
[26] Interview with MH, November 4, 2017.

jurisdictions where laws differ on what constitutes acceptable derivative use. He describes the initial shock of traveling to Japan and finding that his company's characters were being used in numerous unlicensed, sexually explicit derivations:

> In Japan, you go into comic book stores and they have separate rooms where – The publishers in Japan allow this and it's legal, they will publish fan fiction that is often pornography. You'll have Capcom characters fucking *Final Fantasy* characters in some comic series, and you can go into this room if you want to see *Street Fighter* fucking so-and-so, you can buy it. I remember going over there when we doing [licensed versions of our characters] in Japan, there was some of our stuff there and it freaked me out. Whenever it's pornography, you're always concerned about your character, but in that culture, it's allowed and considered normal. But if that was done [in the United States], if somebody started publishing some *Wonder Woman* porno comic, they'd get shut the fuck down in a heartbeat.[27]

Artists in America trying to protect their intellectual property, then, may have difficulties controlling the unlicensed use of materials under trademark and copyright in cultures outside the United States. Efforts are further impeded by the differing cultural and legal norms of foreign territories, although cultural norms may diverge even between exclusively American artists. For example, either side in a case of infringement may have contradictory viewpoints on what may be deemed socially appropriate imagery, as the next example demonstrates.

One interviewed artist who owns his own comic book character describes having a vested interest in preventing unlicensed usage of his intellectual property out of concern for being wrongfully associated with infringing parties. He talks about an experience where another artist used a character he had created without permission: "I took offense to it.... It's not his property, it's my property. I probably would have let it slide, or I

[27] Ibid.

would have been okay with it, had he said, 'Hey, can I do this?'"[28] This artist states that permission would be granted on the condition that anyone who sought a legitimate license refrained from creating imagery of his character that featured content such as alcohol consumption. He further states,

> There were shot glasses, the character was dreaming, but there were shot glasses and alcohol [in the unlicensed image], and in the caption while the character's punching, they say something about light beer or whatever. For me, I draw comic books that are for everyone, and I go to the library and I teach a class there, and I do little seminars.... I would certainly hate it if I was trying to work out something with someone where I was going to go speak with them, and they say "Let's do a little background check on this guy," and they type it in Google, and the first thing that pops up is that image and they see shot glasses. They might say, "Hey, we gotta hit the brakes on this, this is not going to work. We don't want to mix kids and alcohol."[29]

New derivative interpretations of artistic expressions and characters, then, can be at odds with the intentions of the original creators and/or current copyright owners, as this example shows. Again, unlicensed derivations may have negative effects on the copyright owner's use and economic exploitation of the original work in traditional markets. Examples such as those articulated above that describe or depict alcohol use or sexually explicit behavior especially may be cause for concern if they are misinterpreted by potential clients and patrons of the original creator as originating from that creator.

This researcher did not interview the infringing artist in that example, but another artist speaks about potential motivations for creating art using another person's characters instead of new ones: "For me, and for a lot of creators, the attraction of them and the pleasure of them is that we are not using the largest icons, but [comic book characters]

[28] Interview with EM, March 3, 2018.
[29] Ibid.

did have their status as icons, and to plug into that is kind of cool."[30] As that artist states, the personal interpretation of a previously published character can be a satisfying creative experience for many artists.

New interpretations of existing fixed works and fictional characters may be created at the behest of the copyright owner, but according to one writer interviewed, there are also legal grey areas when artists create new derivative works without license. This writer describes the scene at typical comic book and pop culture conventions:

> Any convention you go to, it's full of technically illegal bootleg prints by people drawing other people's characters.... If a smaller creator sees their stuff bootlegged, it might be a little weirder to them, a little closer to home, different than a corporate entity or character. But that person's not doing anything differently than if they were drawing Deadpool [a character owned by Disney].[31]

As this person describes it, while the act of creating an unlicensed derivation of a corporate-owned character is legally the same as doing so for a creator-owned character, there are cultural distinctions. If an artist owns the copyright and trademark in a character he or she created, others may feel more inclined to respect that artist's preferences towards the creation of derivative interpretations of that character.

Another writer and editor describes this same phenomenon of individuals "selling prints of other people's trademarked and copyrighted characters," and states, "It's interesting because technically that's a violation of copyright law. But it's not being enforced." This writer notes that there are exceptions to that lack of enforcement, such as one writer/creator who "pretty routinely will walk around and if he sees a...print [of his character], will tell them to take it the fuck down or he's going to sue them, and people

[30] Interview with BA, November 4, 2017
[31] Interview with JB, May 26, 2018.

just take it down."[32]

One writer describes a spectrum of infringement in these types of cases:

> I take issue when it's more of a straight-up copyright violation versus trademark infringement. If someone draws your character, shares it, posts it, that's another level, you can argue if it was right or wrong. It's way different than if someone takes the image you created and duplicates or reposts that image. So that I would have a problem with. If someone was taking my covers for my books and scanning them, then putting them on things and selling them, that person I'm going to go after. If someone made a new print of [my character], it'd probably be flattering. I don't know, I don't want to open myself up to "it's okay."[33]

That last statement – that the writer would prefer not to open himself up to the widespread reinterpretation of his creative works as acceptable without license – suggests that that individual at least would prefer artists to seek license when creating derivative interpretations of works and characters for which he owns the copyright. The prior examples listed above also present some of the potential consequences of ignoring this licensing requirement in general.

There are some key historical examples of artists who did not seek license for derivative interpretations, and yet found great success in the marketplace. It is also possible for artists to create derivations of existing works that receive greater acclaim and become more valuable – in dollar terms – than an original work on which they are based. A prominent example of this phenomenon in the twentieth century is the work of Roy Lichtenstein, who repurposed comic strip and comic book art as fine art, but without attribution to the original artists or publications from which they were derived. So while Lichtenstein's work is often described favorably, an artist interviewed for this dissertation does not hold such an opinion:

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[32] Interview with MH, November 4, 2017.
[33] Interview with JB, May 26, 2018.

> Yes, that no-talent Roy Lichtenstein. Who stole Russ Heath, and Irv Novak, and Jack Abel images, and turned them into prints. I brought one of those to show to Jack Abel, and I said Jack, why don't you sue this guy? And he's making millions off the image that he stole from Jack. I think DC Comics should have sued Lichtenstein, because taking your product and just saying it's now become fine art – it's one thing to put it on your living room wall, or maybe on the side of your comic book company, but it's another thing to start selling it for millions, and not give any percentage of it to the original source.[34]

Those who potentially infringe a copyright through unlicensed duplication or derivation, then, may have noble or at least innocuous intentions, but for a professional artist such duplication also represents potentially lost revenue. The same artist states, "I do paintings and drawings...and so if I found anyone just using my image – well, on one level, it's flattering, on another level, if you think so highly of it, compensate me for it."[35] Again, some artists might like additional attention for their work, but would almost certainly also enjoy some additional remuneration. This phenomenon is addressed in more detail in the conclusions and discussion chapter of this dissertation.[36]

All of the preceding examples of real and perceived copyright infringement may be discouraging to artists and writers who would prefer not to have to confront such issues. Further, as discussed in the literature review,[37] it is the responsibility of the copyright owner to initiate any claims of infringement, and the government does not enforce related statutes absent such claims. Several of the preceding examples from interviewed artists describe how these claims may unfold in physical and print settings, but potential cases of infringement are even more ubiquitous through the mediated virtual space of the Internet, where the barriers to digital publication and distribution are

[34] Interview with JR, November 4, 2017.
[35] Ibid.
[36] *See infra* notes 4-11, Chapter 5.
[37] *See supra* notes 214-215, Chapter 2, and accompanying text.

comparatively low. One individual, a senior content analyst for a popular Internet site that enables widespread distribution of user-generated content, describes his job as "Basically – Internet police.... I'd say my job is 40 percent moderating copyright infringement or DMCA policies."[38] This analyst reinforces the point that in cases of potential copyright infringement on the site, all removal of copyrighted material is initiated by the request of a copyright owner, and not by himself or the site. As he describes it:

> A lot of that is user-reported, and they have to, when they report content that they think is theirs, and is being infringed upon, they have to swear an oath, under penalty and perjury that "I swear this content is mine." As well as provide a source of where the content may have been taken from. If that source is no longer online, they have to explain where it might have been taken from....
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> It would be illegal to pre-emptively remove [material] without hearing from a copyright owner. The volume is just so high, and there's that grey area of what's considered transformative work. So with that grey area of transformative work – that's on a case-by-case basis. Because at the end of the day, we are a platform founded by creators, so we want to make sure that creators have some breathing room. And if it's transformative enough, we're going to fight for the user's right to use that content.[39]

Again, the ultimate responsibility of claiming a copyright in a given fixed work rests with the owner of the copyright to that work. And while enforcement of copyrights for literal mechanical copying are generally more clear, the use of an underlying work in the development of a derivative or transformative new work potentially obfuscates who is morally and legally in the right.

A derivative or transformative work may trigger copyright concerns for the author of the original underlying work. Sometimes, though, new works may share only minor qualities with an existing work, or both artists may create works drawing inspiration from

[38] Interview with ZR, July 10, 2018.
[39] Ibid.

similar sources without awareness of the other. One writer and publisher offers the following advice to aspiring creators who worry about others that create similar works:

> You have to kinda not worry about people stealing your ideas, which might be a counterintuitive thing. You can't protect certain ideas or – It really seems that no matter how unique your idea is, and it seems like you're pulling it out of the ether, there's going to be like three other people somewhere at the same time that pull the same idea down.... Every author feels like that, you come up with something and then hear about something real similar like two months later, and think "shit." Honestly, you gotta protect yourself, but you can't be delusional about that stuff. The best thing you can do is get out there and get it into circulation. Not being an attorney, I think the best thing you can do is, before copyright filing, before any of that, just get it out there in the world, get it circulated in multiple states.[40]

Artists who bring their work to market, then, are not guaranteed absolute protection against infringement. However, having their work widely circulated is the best defense in case issues of infringement develop. As the next section shows, these issues may be further complicated when creative works are produced by multiple, or joint, authors.

Joint Authorship and Collective Works

Findings presented in this chapter so far have been related to examples of copyright and trademark infringement as experienced by artists and publishers. Examples of such infringement are enabled by the view of copyright as an entitlement that allows artists to exclude competing derivative works from the legitimate marketplace. Such entitlements are most clearly understood in cases where a single author is the owner of a particular copyright. The creation of fixed works by multiple parties, however, particularly in film, television, and comic books, means that two or more authors may have legitimate claims to ownership of a copyright in a jointly created work. In the

[40] Interview with JB, May 26, 2018.

absence of a formal contract or agreement between individuals who have jointly authored a fixed creative work, any party may exercise any and all exclusive rights enabled by copyright law without the consent of the other party or parties. As one attorney describes it:

> Joint authors all have the same rights, and the same degree of ownership. So if you have four people, those four people all own that work, and any one of them could do whatever they want with it without the permission of the other three, because they are all equal owners. The only time they need permission, is when they're going to grant an exclusive license. A non-exclusive license, which maybe a toy company will take because we can see, for example, there's tons of toy companies making Star Wars toys, or what have you. A non-exclusive license, they can give it to someone, and the only responsibility then is to account to [the other copyright owners], saying, this is how much money we made, and now we're going to split it.[41]

This legal entitlement to license or distribute a creative work without the consent of a coauthor can lead to disagreements between individuals, and is in part why two lawyers interviewed for this research project strongly advise developing a written contract between authors before a creative work is published.[42,43]

> There's nothing wrong with saying to your co-authors, "Hey, I'm excited about this project, we're all going to work together on it. But let's talk about it now. Let's get it down in writing. Let's figure out exactly what we're going to do. So that way, we've finished with the business end, and now we're going to focus on the creative process...." It's very difficult to do, especially if, in a lot of these collaborative situations, people are friends. People have been friends since childhood, people are neighborhood friends or in the same comic book circles. And nothing sours a friendly relationship faster than a contract.[44]

Despite this risk of potentially damaging a long-standing relationship by broaching the subject of a written contract, every attorney interviewed – and the majority of artists – emphasize the necessity of a written contract for long-term success. Otherwise,

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[41] Interview with BS, January 11, 2018.
[42] Ibid.
[43] Interview with CC, January 11, 2018.
[44] Ibid.

disagreements between joint authors later on, after a fixed creative work has potentially found economic success in the marketplace – and in the absence of a contract between the joint authors – can lead to protracted and expensive legal battles. As one attorney describes it, "Once something is successful, everyone is positive that they are a genius. And if you have multiple geniuses negotiating against each other, see you in court."[45] For a lesser-known author or creator, such legal proceedings are "basically professional suicide."[46]

Another attorney provides specific details on the cost of litigation to pursue charges of copyright infringement. "I tell my clients, plan to spend five to ten grand a month if you're in litigation. And if it's in a situation like copyright where you could be rewarded substantial damages, just because you win doesn't mean you're going to collect."[47] Even for a successful artist, attorney's fees are a significant cost – starting at "$250 and up an hour"[48] – so this attorney recommends that artists know and communicate what their goals are when deciding to litigate:

> My first question [to a potential client] is "How do you want this to end?" So if all they want is just for the person to take down the content, then that helps me to tell them what is the right way to proceed. Because if I can use a DMCA takedown or a cease and desist letter, that is much more affordable than full litigation.[49]

Wealthier and more established creators may be able to afford the legal costs of a copyright dispute with a joint author, but would likely prefer to avoid those costs by establishing a contract before publication. "I guarantee that in taking a case up to the United States Court of Appeals for the Seventh Circuit, there were hundreds of thousands

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[45] Ibid.
[46] Ibid.
[47] Interview with RC, June 5, 2018.
[48] Ibid.
[49] Ibid.

of dollars of legal bills on both sides by the time they got there,"[50] states one attorney, citing a prominent case that centered on a copyright dispute and ownership of jointly developed comic book characters.[51] "It was a gigantic amount of money. And they could have gotten out of it...[with] maybe one or two difficult conversations with their friends."[52] Instead, besides the dissolution of a previously amiable working relationship, that case resulted in a decision that allowed each party to claim ownership in joint works where the individual contributions to those works were not in and of themselves copyrightable.[53] The plaintiff in that case, Neil Gaiman, also received full copyright and trademark ownership of a comic book character called Angela as a result of a settlement between the two parties, and would later sell these rights to Marvel Comics in toto.[54]

As one attorney states, an existing written contract between Gaiman and defendant Todd McFarlane at the outset of their working relationship would have helped to prevent the lawsuit that did occur, and thus eliminate the legal costs associated with such a suit. According to this attorney:

> Doing this stuff in advance of the problem is a lot easier, a lot cheaper, and at the end of the day, you're a creator, you're an artist, you're a writer. You don't want to be spending your time – It takes a lot more money, aggravation, etc. to fix the problem than it does to avoid it. Time and the aggravation to try and fix something that will take time out of your day and put you in a terrible mindset.... You don't want to be in the business of solving problems, you want to be in the business of creating.[55]

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[50] Interview with CC, January 11, 2018.
[51] Gaiman v. McFarlane, 360 F.3d 644 (7th Cir. 2004).
[52] Interview with CC, January 11, 2018.
[53] Teresa Huang, "Gaiman v. McFarlane: The Right Step in Determining Joint Authorship for Copyrighted Material," *Berkeley Technology Law Journal* 20, no. 1 Part 2 (2005): 673.
[54] *San Diego Union Tribune,* "Neil Gaiman, Angela character are Marvel-bound," March 21, 2013. Accessed June 10, 2018. http://www.sandiegouniontribune.com/sdut-neil-gaiman-angela-character-are-marvel-bound-2013mar21-story.html.
[55] Interview with BS, January 11, 2018.

Interviewed artists reinforce this notion of the primacy of creativity as a preferred practice rather than litigation. One artist states that contracts, promissory notes, and other written agreements are a secondary concern to the act of creation, and have so far had little bearing on his professional creative career. However, this also means that he has been willing to work with others without an existing written contract. For example, this artist describes a working relationship with another author, with whom he shares a copyright in a multimedia project: "It's all handshakes.... Because I know and trust him. Again, I know you should never say that that's the best way to do it."[56] This artist notes that this approach to written contracts, or the lack thereof, is not one he would recommend to others. However, he also states that he has not found written contracts, when created, to be of much help in cases where money or other considerations are owed to him. "I literally have paperwork that is promissory monies for this that and the other, ownership of stock in companies – I once worked for a guy, and when that company went belly up, he owed $7500 in unpaid monies to me. Never got it."[57] This artist further describes that such an experience is to be expected, but that he bore no ill will. "If I ever saw that dude – I would stand up and give him a big hug." Again, this artist notes how he would not offer this method for business dealings to others, but in his own words, "I don't ever want to have problems with anybody, I don't ever want to cause strife. Maybe I'm the world's greatest punching-bag, but – I'm hopefully not dealing with any of those people anymore."[58]

Another writer and publisher states that he would typically use written contracts

[56] Interview with TR, January 11, 2018.
[57] Ibid.
[58] Ibid.

instead of relying on verbal agreements, but "verbal contracts, you know, I have done it before, but you gotta really know the people you're doing it with. Written, it's all explained."[59] As with the example from the prior artist described above, this writer states that disagreements, particularly about unpaid monies, may still arise. "If you have a verbal agreement with someone, and then you work together for a year, and then you go sue each other, either one of you are lucky to get anything out of it other than grief."[60] However, it is possible, according to this writer, that a judge may see evidence of a verbal contract and working relationship that was followed for a period of time before promised payments ceased. A judge might rule in favor of a plaintiff in such cases, but this writer warns, that judge could also dismiss a case entirely. "In my experience, judges do have a lot of power in terms of what they decide."[61]

Attorneys interviewed do recognize that written contracts, in and of themselves, are not a guarantee against litigation when disagreements arise. Contracts that are not specifically tailored to the needs of all involved parties, and instead drawn up in whole or in part from boilerplate or generic documents, can open creators up to costly legal battles if disagreements arise. "There's a lot of liability in that, because a contract that's 80 percent good enough for you is 100 percent going to wind up in a lawsuit."[62] The best way to prevent this, according to attorneys, is to not rely on generic written agreements, and instead "talk over your issues" with a lawyer, focusing on things like "who are you working with, what do they bring to the table, what issues do you see coming up, what

[59] Interview with JB, May 26, 2018.
[60] Ibid.
[61] Ibid.
[62] Interview with CC, January 11, 2018.

problems have you had in your discussion?"[63] From there, legal professionals can help creators draft a contract specific to their situation.

Attorneys also point out that creators looking to draft any written agreement should not rely on just one person: "Be wary of one attorney who says they can handle everything."[64] Authors and artists engaged in the creation of joint works must necessarily recognize that the creation of their fixed creative works was not achieved by the efforts of just one person. Therefore, there is a familiar logic to the suggestion that contractual agreements for the administration of rights related to copyright can similarly not be completed by a single individual.

In summary, interviews conducted for this research demonstrate that joint works in general presume that all creative parties involved in the creation of a specific fixed work share in the ownership rights granted by copyright law. But as the next section will describe, copyright itself is a transferable right, and authors may divest themselves from ownership in a copyrighted work. With works made for hire, this transfer of ownership is enacted even before a creative work has been fixed in tangible form.

Work For Hire and Copyright as a Transferable Right

In addition to the complications that arise from the joint creation of creative works and the resultant shared ownership of a copyright, any individual who owns a copyright also has the legal ability to transfer that ownership to another party. This transfer of copyright shifts the authority of who may legally exclude others from the marketplace. These transactions may be done following the completion of a fixed

[63] Interview with BS, January 11, 2018.
[64] Interview with CC, January 11, 2018.

creative work, or even prior to any artistic labor being enacted. A priori transfer of copyright is described in the law as work made for hire.[65]

Since work made for hire as a legal concept was introduced with the 1976 Copyright Act, enough time has passed for successful publishing firms to be aware of the statutory requirements and secure work for hire agreements with employees when relevant. However, one editor who was working at a popular comic book publisher at the time of the law's initial implementation in 1978 describes the difficulties of securing the then-new written agreements from employees and independent contractors. The publisher had not prepared for the changes in copyright law, and "we had to play catch-up, because nobody had done anything. No preparations made, it just took us all by surprise. And we had to get agreements from people that say that everything they ever did was work for hire."[66] This lack of preparation stood in contrast to at least one rival publisher that the interviewed editor describes as "always pretty buttoned up. So, by the time the copyright law changed, they had already had all-new vouchers printed, with the work for hire statement on it, and they were totally prepared."[67]

The editor states that his organization's lack of preparation for the changes in statute also had the effect of discouraging writers and artists from signing any work for hire documents drafted by the company. "The first document that was prepared by lawyers was all scary language...and nobody wanted to sign it. Nobody. So I rewrote it, and made it one page. Vetted it through the lawyers, they said, 'Yeah, that's okay.' We

[65] U.S. Copyright Act, 17 U.S.C. § 101. *See supra* notes 130-135, Chapter 2, and accompanying text.
[66] Interview with JS, February 11, 2018.
[67] Ibid.

finally got everyone to sign.... It was really a mess."[68] While this individual no longer works for this publisher, that company continues to publish comic books today, and owns copyrights to the vast majority of the creative work it publishes.

An artist working for that same publisher at the same point in time describes the situation in similar terms:

> Yeah, the work for hire thing started to be distributed, and people were saying, "I'm not going to sign it, and I got a lawyer." That was dishonest and disingenuous, because by the act of signing the back of the check, it said you agreed to all this stuff. Again, I'm part of the team, so I didn't create anything, so I didn't have the outrage others did, but I was in solidarity with them. But ultimately, I don't know of anybody who fought the system and won it.[69]

Now, with work for hire existing as an ingrained practice at many publishing firms for decades, artists have developed an understanding of its potential ramifications. Artists interviewed for this dissertation describe the recognition that such a transfer of ownership divests an artist of his or her rights in relation to the reproduction and publication of a creative work. One artist states,

> I don't have any rights. I signed a contract, that said "you give up any rights for any work we do, work-for-hire." I mean, it's kind of sad and ironic all at the same time, because there are people who say, "Well, I'm not going to give my good work to this company, because I'm going to wait until I do it on my own. Because they're going to own my characters."[70]

Work for hire practices, then, potentially encourage artists to withhold what they might consider their own best work. They recognize that they will have limited or non-existent control of that work's presentation in the marketplace, as well as limited or non-existent financial reward when a work made for hire achieves economic success.

The alternative to such work made for hire agreements, according to interviewed

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[68] Ibid.
[69] Interview with JR, November 4, 2017.
[70] Ibid.

attorneys, is for artists to negotiate for retaining the copyright in the work they create. Retaining the copyright then allows the artist to license initial or derivative publication rights to publishers or other third parties. One attorney provides the potential financial advantages of such an agreement:

> Nowadays you would say, "I'm not going to sign [a work for hire agreement], I'm going to license it to you. And I'm going to get royalties. And you're going to pay me 5 percent." And 5 percent of a billion dollars is a lot of money, rather than the $10,000 you got paid and you thought "That's great, I can't believe I made ten grand off of this. That's terrific." Now are you going to be successful negotiating that all the time? Probably not, unless you're established and have a big name, and you have a good track record. But there's no sense in not trying. Say that up front, don't wait for it to go completely out of control.[71]

As that hypothetical negotiation proposes, the financial rewards for retaining the copyright in a creative work can be significant. However, many artists and writers may not have a complete understanding of the differences between work for hire and creator-owned agreements. One interviewed artist speaks about creative persons in the comic book industry as falling into one of two camps with regard to work for hire:

> The thing is, most of the people I talk to, are either people who work on freelance comics, so they don't own anything. Or they are people who do independent comics books, so they own what they're doing, but they haven't done anything big enough where they've sold the rights outright.[72]

Economic considerations are foregrounded, then, for artists who are considering not just the sale of copies of their creative efforts, but also the sale of the copyright itself. Such a sale may be the result of economic success, but as the same artist states, it can also be the result of destitution and bankruptcy:

> When you go bankrupt and you're a comic book professional, and you own [a copyright or trademark], it becomes part of your assets. So you can lose your thing.... Certain people, if they end up having to file for bankruptcy because they

[71] Interview with BS, January 11, 2018.
[72] Interview with TR, January 11, 2018.

> overproduce content or otherwise put themselves in harm's way, then have to file for bankruptcy, the characters they own are an asset. And they lose them because someone else will swing in and go "I will buy this because I'm now going to take over this." And the money goes to basically cover whatever people are owed. I've seen this happen.[73]

Another option for artists who enter into a publishing agreement with certain publishers is to sell or transfer a portion of the copyright to the now economically-invested third party. In some cases, while the original artists or other creative persons may retain the title of copyright in whole or in part, the publisher will retain controlling interest in the licensing of derivative works based on the original work, and otherwise administer intellectual property rights in new media. As one publisher states,

> We have work made for hire contracts, and we have different types of deals. We can have a deal where the creator has 90 percent of the rights, but we control the rights....We can have a minority share in a property, but we control the rights and we administer the rights. That person is just a passive participant, and that's most of our deals, actually. It's happened to me many, many times, because we are very creator friendly, where if there is an issue, we will often just give them the rights back, or sell them back cheaply. We just don't want problems with creators.[74]

This publisher describes how authors and artists who deal with his company may regain controlling interest and full copyright in their intellectual properties once the company has recouped its financial investment, but also notes that working with larger companies like Disney often require an artist to surrender all ownership claims to the work they create. "They do it every day. It happens all the time, and most people do it willingly."[75]

One interviewed attorney states that artists who are willing to entirely surrender copyrights to their own work are often financially motivated. Artists may sell their copyrights or complete work for hire projects because the money paid upfront is

[73] Ibid.
[74] Interview with MH, November 4, 2017.
[75] Interview with MH, November 4, 2017.

perceived to be greater than potential future profits from a given creative work. According to this attorney, such actions possibly belie an artist's lack of belief in his or her own abilities:

> Sometimes there's investments in time, sometimes it's an investment of belief in yourself. I have some creator friends who have had movies or television shows made out of their work, and inevitably they are faced with a choice at the outset of today's money or the prospect of a percentage when this is successful. And today's money might seem like a lot of money, and it is, and if you don't believe in your work or you don't believe that it's going to make it, then you might take the money. But in almost every situation, even if it's only moderately successful, the long-term royalties, dollars, and ownership, retaining even a small piece of ownership or licensing power over that thing, a little bit of belief in yourself can set you up for life if you hit the right project.[76]

Artists with limited professional experience, then, may not consider the long-term economic viability of the work they create. According to one writer/publisher, those with limited experience simply do not consider the factors related to intellectual property: "Most indy guys who come into this business don't think about trademark or copyright at all."[77]

Even artists and other creative persons who do think about those concepts may not have a complete understanding of things like the length of copyright terms or the fact that copyright is granted automatically upon creation of a fixed creative work. One artist interviewed for this dissertation states, "I wasn't even aware it was automatic."[78] Another artist states that he did not know copyrights continued for a period of time after an artist's death: "Run that by me again. When you create something you own it for the duration of your life plus 70 years?"[79]

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[76] Interview with BS, January 11, 2018.
[77] Interview with MH, November 4, 2017.
[78] Interview with JR, November 4, 2017.
[79] Interview with DF, February 16, 2018.

There is the potential for misunderstanding or confusion about what the law allows with regard to a work made for hire, too. For example, as Title 17 of the United States Code is written, only specific mediums of expression are eligible for consideration as works made for hire, including

> ...a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas...[80]

According to an attorney who specializes in intellectual property, an author who takes this statute at face value might assume that mediums not listed, such as comic books, are ineligible for consideration as work made for hire:

> Comic books isn't in the list, in the statute, of things that can be work made for hire. So, people say, "Great. I own everything, this could never be made as a work made for hire." That would be great for creatives, but that's not the case. Because there's something on the list called collective works, which means like a periodical or a magazine. And comic books are a lot like a magazine. So the publishing companies, as long as they have you signing an agreement, saying it's a work made for hire, then they own it all.[81]

This attorney also describes the central importance of the written agreement that allows for a fixed creative work to be treated as a work made for hire. "If you're an independent contractor, you own that work, unless you signed a work made for hire agreement."[82] In the absence of such a contract, copyright initially is reserved for the individual or individuals who fix a creative work in a tangible form. Again, without contracts specifying work for hire terms, a third party that commissions the creation of an original piece of art such as a painting does not own a copyright in that piece of art. The copyright rests with the artist, and not the owner of the physical artwork. In such cases, according

[80] U.S. Copyright Act, 17 U.S.C. § 101.
[81] Interview with BS, January 11, 2018.
[82] Ibid.

to this attorney:

> What you own is the paper, and the ink.... You own that physical copy.... Just because you're holding the paper, even though it's the original, you can't start making copies of it and just selling them. There's a difference between owning the copy of something, and owning the original work, and owning the copyright in it, which is the right to reproduce it and redistribute it and make money on it. So, the artist retains that right. It would be like going to order a book off Amazon, and can you start making copies of it? No. So the same thing applies to your commission.[83]

Again, under statute, artists reserve the right to control the reproduction of fixed works they create unless they transfer this right in writing.

Artists who do not think about the conditions of work made for hire run the risk of losing copyrights in their creative works as a contractual condition of employment. One artist who – in conjunction with another writer – developed a character to be published by a major comic book publisher, states that his agreement to work for hire terms meant he had no ownership stake in that character, and would not share in any profits arising from the exploitation of that character's image in the marketplace. "I signed a work for hire agreement that said they pay me for the work and that's that.... I wish I would have been a little smarter with it, but it is what it is."[84] He also describes how professional artists need to negotiate terms of ownership with a publisher if those factors are important to them. "If anybody wants to have their own characters and their own creations, they need to go through the process of creating it themselves, and make sure that they are the ones who the trademark and copyright are assigned to."[85]

Other artists interviewed also speak about how creative individuals need to negotiate with publishers if they want to avoid unfavorable terms. One artist describes the

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[83] Ibid.
[84] Interview with DF, February 16, 2018.
[85] Ibid.

editor-in-chief of a large American comic book publisher as a personal friend, but states,

> If the writer/penciller/inker knows to ask for stuff, then [my friend is] a negotiator. If they don't know to ask, he's not going to volunteer it. Now you'd think someone who has been an artist's champion all his life would do that, but I think he was just saying, "You know, there's money involved, there's expenses." Some people will ask for paper or profit and that will cost the corporation more money. So if they don't know and they don't care, the corporation will save money. It got to the point where comic books were published on the cheapest possible paper available to print on without ripping, just to save the company money. You could see the image on one side from the other side. I don't mind that they do this, because they are a business.[86]

Further, artists recognize that successful negotiations also depend on the dynamics of power between interested parties. "Certain companies hold, in the balance of power, they have the power. I could have said I wouldn't do work for hire, I want credit for this and that, and they could easily go, alright, well, someone else is doing it."[87] Depending on the contracts they sign, artists may also find related moral rights – such as a right to proper attribution – are impacted by the terms of employment. Examples of this and other issues related to the category of ethical treatment of artists by employers and publishers are described in the next section.

The Ethics of Employment and Copyright

In interviews conducted for this dissertation, artists describe examples of both perceived ethical and unethical treatment by publishers or other creative firms in the course of their employment by those organizations. These examples, as with prior categories discussed, center on instances concerning copyright law and ownership of copyright as determined by contract. Responses from professional artists emphasize the

[86] Interview with JR, November 4, 2017.
[87] Interview with DF, February 16, 2018.

personal responsibility of creative individuals to negotiate for the contract terms they want, and the understanding that a publisher is not necessarily incentivized to freely offer the most generous terms to employees or independent contractors. As one artist puts it:

> My advice would just be, if you want to have ownership of your character, do it yourself. Don't give your creations away. If you're in a place where you can create something, at least be smart enough to negotiate, you know? Obviously they want you to sign it all away, it's in their best interests.[88]

Another artist makes similar points, citing the career of Jack Kirby, a comic book artist who worked steadily in comics from the 1930s until his passing in 1994, but did not own the copyrights to many of his most popular creations. Most famously, Kirby – along with writer Stan Lee – created many of the Marvel superhero characters, including the Fantastic Four, the Hulk, and the X-Men.[89] The artist interviewed for this dissertation invokes Kirby's name as a prime example of the neglect shown to creative employees by corporate employers as a matter of course:

> When they changed the price of the comic from 12 cents to 15 cents to 25 cents, it was never because the artist got a raise. They never said, "We should pay our people better money. We're just being forced to pay more to paper manufacturers, printers, and distributors, I guess we have to raise our rates." So these artists, whether it's Jack Kirby, who practically invented comics, or all the other people, we don't care. They'll die, someone else will come around. Kids will buy the new stuff. Every now and then you'll get a champion for your work, but most of the time and especially now, it's kind of a mindless, faceless corporation.[90]

Other interviewed artists offer similar descriptions of publishers and other organizations as "mindless, faceless corporations," but also suggest distinct reasons for why that is the case. Successful corporations, over time, will employ new and different individuals, including legal professionals, each of whom may have different

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[88] Ibid.
[89] Ronin Ro, *Tales to Astonish: Jack Kirby, Stan Lee, and the American Comic Book Revolution* (New York: Bloomsbury, 2004), 288.
[90] Interview with JR, November 4, 2017.

interpretations of what constitutes acceptable practices regarding the treatment of intellectual property. This is made clear by the experience of one artist who has worked for a prominent creative firm over the course of several years. In his words:

> I still work for [this company]. I made no bones about it, and this is in no way a disparagement towards them. They're a good company to work for, but the policy at the time, and I have to preface it with the words "at the time" because they have a revolving legal department. Some lawyers that are there are not there anymore, and so during the time when I was working on a [movie] project.... I wrote a lot of lyrics for the music.... They basically said it was under my job description of something I should do, and they would not give me any sort of credit for doing it. They said it would be convoluted and we have a music supervisor and all these other things. Of course I was upset, because I wrote a high-percentage, more than 80 percent of the lyrics...and they just told me that I could not get credit.
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> Two years later, someone else was doing the same job I was.... They wrote a song. Not only did they get credit, they got publishing [royalties] and they got paid. And it's only because the lawyers that were present when they asked saw no problem with it. So it was literally a subjective thing from the lawyer's point of view.... I asked, they gave me a big no, and two years later it was a yes. The thing I thought was kind of a bummer was I just wanted credit. The songs were good songs, good enough that they were being sold on iTunes and making [the company] money. So I was a little miffed about that. But it is what it is, they were within their rights, and their legal counsel at the time, that was his or her recommendation. They suggested to [the company] it would be a bad idea to give me credit. Of course, new lawyers came in and their opinions were different, that supervising director did get credit and publishing, so it was subjective.[91]

Work for hire practices are primarily used as a means to assign copyright, but as the preceding example demonstrates, this system may also result in a lack of attribution for an artist engaged in creative work.

There are other instances when artists may not receive attribution when contributing to a joint work. Sometimes, this lack of attribution is understood and agreed upon by all parties. This is the case for some artists who contribute to officially licensed derivations of intellectual properties that are meant to hew as closely as possible to

[91] Interview with DF, February 16, 2018.

already existing fixed works. For example, one writer/publisher interviewed describes how, in the process of producing officially licensed comic books for a popular broadcast animated series, his company was provided style guides. These style guides inform licensors how to accurately represent characters and scenarios from the original work in licensed derivations, and any deviation may result in denial of publication to the licensed derivative work. As this writer/publisher states,

> That was by far the absolute worst licensing experience from the creative process. One of the best-selling things we ever did. It was phenomenal and they all came out well. They were literally – when you do a T-shirt or something like that, or when you do any kind of generic product license, they just send you a style guide, and you copy and paste the files from the style guide on to the packaging. That's it, it's not like comics. And we had to hire their own animators to draw the comics. And the regular animators were too busy, so you had the assistant animators drawing at the animation studio, showing it to their bosses, getting it approved, sending it to us, and then we would send it to [the studio that owned the copyright], and then it would get rejected. And we were like, "Your own people drew this." So then we started taking the style guide, the picture, and pasting it, because they had all types of images of all the characters. So anytime we could we would just paste in the images from the style guide, and those would get rejected, they'd say this drawing is wrong, and it's literally from the style guide, and they said, "Oh, well we changed that."[92]

Again, in situations like this, when the goal for the finished product is to represent as closely as possible an existing visual interpretation of a character or setting, attribution may not be given for every single creative individual's contribution to the derivative fixed work. Further, this writer/publisher describes the final result as being successful financially, but a negative creative experience because of limitations that required the visual look of the derivative work to hew so closely to the original.

Artists engaged in the creation of derivative works or joint works may not have a strong claim as an individual author seeking attribution, but many would still prefer to be

[92] Interview with JB, May 26, 2018.

given credit for the contributions they make to a fixed creative work. Attribution, when properly given, should also extend past the life of both the author(s) and the copyright itself. Again, copyrights in theory do not last in perpetuity, and expire at a point determined by statute. The next section of this chapter describes artists' conceptions of that stage of intellectual property where creative works are no longer subject to proprietary license or copyright ownership: the public domain.

The Future of the Public Domain

The preceding sections of this findings chapter have all covered instances where a specific fixed creative work is claimed under copyright by one or more individuals. As those instances and examples demonstrate, such claims of ownership through copyright necessarily limit the ability of parties without copyright ownership of a given work to reproduce, create derivative works from, or otherwise critically engage with that work. As described in the literature review, however, the ultimate fate of all works under copyright – at least prior to the twentieth century – was to eventually enter the public domain. Once in the public domain, a fixed creative work may be reproduced or used to create derivative works by any and all individuals, independent of legal title. Artists interviewed for this research project offer some descriptions of both the advantages and disadvantages of the current cultural perceptions of the public domain, as well as how the concept may be applied to intellectual property under current corporate ownership going forward.

Interview subjects are overwhelmingly in agreement that popular works and characters currently under copyright and trademark will continue to be owned by

corporations in perpetuity. Most also believe that certain corporations, foremost among them Disney and Time Warner, will continue to successfully engage in lobbying lawmakers to retroactively extend copyright terms. One artist, when asked when he believes characters like Superman and Mickey Mouse will enter the public domain, states,

> I don't. I think those are giant, multi-billion dollar corporations, with hundreds of thousands of employees, and hundreds of thousands of square feet of retail space, amusement park space, that are dependent on some of these larger brands. And they have enough control and enough money that they'll change the laws. And they've already done it. I know the power of these entities. I've worked with them, and I don't see it happening.[93]

This is a common response among artists interviewed: the assertion that currently popular iconic characters, such as Mickey Mouse and Superman, will never entirely enter the public domain. In the words of another interviewed author, "Disney will change the laws, get the laws changed whenever they need to. I think every time. These major corporations lobby and pressure and have the law stretched to their convenience."[94] And another: "I wouldn't be surprised if they fought it and got it pushed back again."[95] And another: "Those [Superman and Mickey Mouse] will be extended with protection forever."[96]

One interviewed writer/publisher states that this current paradigm is "dangerous territory.... Companies are too big, and the way that Disney has expanded the copyright on things – There's a whole school of thought that there's almost like a copyright

[93] Interview with MH, November 4, 2017.
[94] Interview with JS, February 11, 2018.
[95] Interview with JB, May 26, 2018.
[96] Interview with DF, February 16, 2018.

cartel."[97] Excessive copyright terms also lead this individual to the conclusion that "there needs to be limitations on copyright."[98] After describing early American term lengths – in his words, a "Jeffersonian conception" where copyright lasted "about fifteen years" – this researcher asks if he would personally be satisfied with copyright terms that brief. "Oh, definitely not. I think fifteen years is crazy.... I think, after fifty years, max, you should have to give up the copyright."[99] He also makes moral arguments similar to the ones proposed by Samuel Clemens before Congress in 1906, that certain dispensations should be made to provide for the children of authors by extending copyrights, but not to the extent that terms would also protect grandchildren or future generations.[100]

As noted in the literature review,[101] a fictional character's initial appearance in print or in film could fall out of copyright, enter the public domain, and be free to use without license by anyone. However, the name and likeness of the character would remain a protected trademark in perpetuity, or as long as corporations continue to use those marks in commerce. Interviewed attorneys also comment on this phenomenon as it relates to artists who may regain copyrights in characters they created but have sold to third parties:

> These characters and these titles can become trademarks, and trademarks don't expire. So if the publishing company has established a trademark in a character or title, [an artist who created a character] may get the copyrights back, but [they] can't do anything with it, because [they] don't own any of the trademarks. And once some of these bigger characters start going into the public domain, you're going to see a lot of fights about whether or not trademark law can basically artificially extend the copyrights.[102]

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[97] Interview with JB, May 26, 2018.
[98] Ibid.
[99] Ibid.
[100] *See supra* notes 81-84 and accompanying text, Chapter 2.
[101] *See supra* note 237 and accompanying text, Chapter 2.
[102] Interview with BS, January 11, 2018.

This legal distinction between ownership of a character through copyright or through trademark also means the sale or transfer of the copyright of a character does not also necessarily result in the transfer of ownership for the trademark of that same character. This was made explicit in court rulings related to the heirs of Superman's creators – the Siegel and Shuster families – attempting to reclaim ownership of that character.[103] Specifically, the court held in that instance that should current corporate ownership of Superman be terminated and the ownership of the copyright was reassigned to the creators' heirs, trademark ownership for elements such as the image of the Superman logo would not also be reassigned.[104]

Additionally, although a copyright in the initial appearance and publication of Superman may have been either assigned to the creators' heirs or entered the public domain, the same could not be said for subsequent appearances of that same character in comic books, film, etc. As one writer/editor for a large publishing firm states,

> That's what we're coming up with, and that's what was the crux of the most recent Siegel family settlement. *Action Comics* No. 1 material and the first Superman story fell into the public domain, and [Siegel's family] were going to start reprinting it, because they had the right to do that. DC entered into a good-faith negotiation [with the author's heirs]. There was nothing DC could do about stopping publication that they wanted to. What they wound up doing – and I don't know that this was the settlement – but they wound up making it worth their while. So they maybe get a piece of the character as it continues. But the fact of the matter is, that one story, you wouldn't have gotten very far, because you have 70 years of the character [not in the public domain].[105]

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[103] Siegel v. Warner Bros. Entm't, 542 F. Supp. 2d 1098, 1135 (C.D. Cal 2008). See also Jesse J. Krueger, "Copyright and Kryptonite: The Failings of Intellectual Property Law through the Eyes of Superman," *Duquesne Business Law Journal* 14, no. 2 (Summer 2012): 240, for greater discussion of the findings of the court with regard to rights the Siegel family could reclaim from the publisher, and those they could not.
[104] Siegel v. Warner Bros. Entm't, 542 F. Supp. 2d 1098, 1135 (C.D. Cal 2008).
[105] Interview with BA, November 4, 2017.

Thus, as a hypothetical, Superman's initial appearance would be free to reprint, although that reprint could not bear the title *Action Comics*. In addition, authors could not, in such a paradigm, reprint, remix, or create derivative works of that public domain story that included later familiar additions to the ongoing Superman narrative: kryptonite, the ability to fly, the major metropolitan newspaper *The Daily Planet*. All of these and more appeared in officially published or broadcast iterations of the character following that first appearance in *Action Comics* No. 1.

One interviewed attorney states that it was likely that the knowledge of these limitations influenced the Siegel family to accept a deal with Warner Bros. and DC Comics rather than try to publish the character on their own once the copyright had been reassigned.

> They settled, and they got something way more than what they used to have. But why would [the Siegel family] make a deal? Why wouldn't they just take it and say "We're going to do our own thing on it." Well, do you know how to do your own thing with that? Because [Warner Bros. and DC] is a company that's been doing it for 60 years, longer in some cases. They have all the marketing in place, they know how to make good movies or bad movies that sell, they know how to exploit, and that's not a bad word, it just means they know how to use something. They know how to exploit this intellectual property. What are you going to do? You don't have an in at Mattel or Hasbro or anything like that. Are you going to start up all of a sudden? You're not going to do it. So let's arrange for a deal now, and we'll cut you in on some of this, and everybody's happier than where they were. We don't lose, the publisher doesn't lose, the property's there, the creators see some revenue, they're happy, everybody loses, everybody wins a little bit.[106]

Even if the original authors of a creative work – or their families – can reclaim copyright ownership for that work, they thus face potentially insurmountable hurdles in continuing to exploit that work in the marketplace. This attorney suggests that the new owners would be limited in their ability to exploit an intellectual property like the

[106] Interview with BS, January 11, 2018.

Superman character with the same success as the current enterprise. This is in part due to the specific lack of publishing experience of the new owners, and in part due to the piecemeal nature of what aspects of a popular fictional character's copyright would be reassigned.

Other artists also note the limitations imposed by a hypothetical piecemeal release of the early published appearances of popular characters into the public domain as statutory terms expire. One artist remarks that as much as he would enjoy creating Batman comics without corporate oversight or the need to license the character, he would still, hypothetically, be limited by what stories have entered the public domain. "I would use Batman, but it's gotta look like the old Batman."[107] In the 1930s, when Batman first appeared in the pages of *Detective Comics*, the visual design was absent many of the familiar indicia that make the character recognizable today, such as the yellow oval surrounding the bat chest emblem, and the modern shape of the character's cowl and cape.

One artist describes the mutability of popular characters like Batman or Mickey Mouse as one reason for their continued success. In comparing the official representations of Batman from the 1930s to the 1960s and 1980s, he states,

> You look at [creator and artist] Bob Kane's Batman, and he's changed [since then].... That's fine, because times change too, right?... Frank Miller's Batman was indicative of where we were as a society in 1986. The campy Batman, fighting guys with giant balloons and clowns and all that, unless it had a bit of grit and darkness to it, had no place in the 1980s....That's the thing with any sort of really strong character. You're going to have that, and that's going to be part of why it has a life in the first place.[108]

This artist further hypothesizes that, were he to ever personally create a character with

[107] Interview with TM, March 4, 2018.
[108] Interview with DF, February 16, 2018.

lasting appeal, or "something of that legacy quality," he would refuse to assign its copyright to anyone outside of family: "[that character] can only be licensed."[109]

Following this licensing practice, this artist allows for the possibility that a future licensed version of a character he creates could become more popular than his own original creation, but states, "If it strengthened and gave life to a legacy character, and ensured it's longevity through that period of time, then I'm 100 percent behind it."[110]

Current legacy characters that have stood the test of time, including popular corporate-owned characters like Batman or Superman, have had numerous interpretations in various media over the preceding decades, all while under copyright. However, there are of course many examples of characters that are in the public domain that have also received numerous creative interpretations and still remain popular. Interview subjects are able to offer some thoughts on how still-popular works and characters in the public domain continue to influence the creative process for artists working today. For example, one author notes, "Things that may have been forgotten about 50 years ago find new life and popularity once they're in the public domain."[111] This statement suggests that the popularity of any given creative work, concept, or character is not strictly a function of proprietary ownership, and that certain works that are less popular while protected by copyright law may become more popular once copyright protections expire.[112]

Proprietary ownership, in the form of a copyright and/or trademark, does ensure to an extent that an author is able to maintain market exclusivity for a published work, an

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[109] Ibid.
[110] Ibid.
[111] Interview with DE, March 5, 2018.
[112] *See supra* notes 194-198 and accompanying text, Chapter 2, for discussion of related research by Heald on how excessive copyright terms keeps a majority of less popular works out of print and thus limited in availability.

advantage that is not shared by works in the public domain. Again, works in the public domain may remain popular or become even more popular than when they were initially published, but this is a popularity which may be exploited by anyone. The same interviewed author states, "The downside of doing your unique take on Dracula is that there's probably 20 other people doing that same thing."[113] Authors and other creative individuals, then, must deal with a competitive context when using public domain works that is not present when a published work is deemed wholly original and non-derivative of an existing work.

One artist notes that despite this competitive context, some fictional characters appear to have limitless potential for exploitation, despite how many iterations have previously been fixed in mediums of expression like film, novels, and comic books. "Robin Hood will always be cool. And people know who King Arthur is, or Mother Goose, Aesop, Grimm, those things that exist in [the public domain]."[114] This artist also states that in some instances, just using underlying themes or ideas from works in the public domain can have broad market appeal:

> I'd be just as interested in seeing a new take on Robin Hood as a new character that might be doing the same sort of things in a different setting. Like Robin Hood in Space. They don't need to call him Robin Hood, they could totally change his name and just have this guy who is the protector of the poor and whatever. They're both interesting. If you're a capable writer, and can put new clothes on an old idea, you're going to be better for it.[115]

This ability to "put new clothes" on existing concepts, according to this artist, is a large part of the cultural benefits provided by the existence of the public domain.

The public domain gives people toys to play with. It's a good setting for exploring

[113] Interview with DE, March 5, 2018.
[114] Interview with DF, February 16, 2018.
[115] Ibid.

> ideas with low risk. It's a fertile ground for people to explore their creativity. I'm happy the public domain stuff does exist, and it gives people the chance to try their ideas on things that are workable.[116]

There is a benefit to even fictional material finding its way eventually into the public domain. According to one writer/publisher,

> The original laws [in America] were if you invent something, then you can protect it in commerce for [about fifteen] years, and then you gotta let it go, because otherwise that hurts competition. The whole reason why copyright is supposed to expire is so that you don't get stagnated and you don't stop inventing things. Imagine if you couldn't do a Santa Claus story or a Frankenstein story or Dracula story because a family from a thousand years ago still owned those characters. Or you couldn't write the Bible without getting permission from the descendants of the nephews of Jesus or something. Best-selling book of all time, you don't think there would be people fighting for that?[117]

There are other examples of works that have entered the public domain and are thus free for anyone to exploit. However, the interviewed writer also describes how fixed works or characters that are in the public domain may still be claimed – sometimes falsely – as intellectual property under proprietary control. He states that his own publishing company released a book featuring a character known to be in the public domain, and yet still received a cease and desist letter from a company that had formed a limited liability corporation with "the character's name, comma, LLC. Imagine it's Santa Claus, you're coming out with a comic book about Santa Claus, and Santa Claus LLC [sends a cease and desist]."[118] While the interviewed writer was still eventually able to publish the allegedly infringing work featuring that public domain character, he describes this incident as one way that copyright and trademark laws are abused even after those protections have expired. The interviewed writer also suggests that popular works and

[116] Ibid.
[117] Interview with JB, May 26, 2018.
[118] Ibid.

characters currently subject to copyright and trademark terms might one day also enter the public domain, but that there is no evidence it will happen any time soon.

As a whole, the interviews conducted for this dissertation reveal an existing culture among professional artists that emphasizes the continued utility of many works in the public domain. However, there does not seem to be any expectation among those interviewed that the popular works under copyright from the early and middle twentieth century will ever fall out of copyright and enter the public domain. Artists are also willing to agree to licensing or work for hire terms as a means to create derivative interpretations of works and characters under copyright, even when such terms are judged to be morally and ethically lacking. These findings also reveal how some artists interpret current copyright norms, and how those norms shift through the application of new laws, technology, and the intersection between the two.

As a conclusion to this chapter, this researcher notes again that each individual interview conducted followed an idiosyncratic trajectory, meaning that each interviewed artist focused on aspects of copyright that he or she found to be most personally meaningful. Despite this idiosyncrasy, numerous repeated patterns and categories were prominent throughout multiple interviews, including 1) the experiences artists and authors have had in enforcing their intellectual property rights, or having others enforce such rights against them; 2) how the artist's practice would be changed by the absence of formal copyright law; and 3) artists' perceptions on the public domain and its role within the broader skein of cultural norms related to the concept of copyright. While any particular artist's experiences may not be ultimately generalizable to the collective practices of all artists working professionally, each example that falls under one of these

described categories is useful as data for what can actually happen under current copyright law. The final chapter of this dissertation positions these current cultural norms within the broader history of copyright in the United States, and theorizes how norms related to original creative expression may continue to develop.

The findings of this study also offer jumping off points for future research related to artists' practices and copyright. It is possible to conduct a similar study with more artists who have specifically served as defendant or plaintiff in litigation regarding copyright infringement, or artists who have made a conscious choice to eschew the transfer of their copyrights through work made for hire. Specifically with regard to the public domain – and focusing on sociocultural norms rather than the more clinical norms discussed here – future research may also examine cultural developments that may incentivize working artists to adopt practices associated with actively forgoing copyright, such as creative commons or copyleft schemes.[119] Findings here are also prominently related to material concerns and claims of ownership, but the exploration of intellectual property as a primary factor in the development of self-identity and the resultant impact on interpersonal communication as a means to create and maintain personal brands may also serve as an avenue of future research. There are many options available, and the study of copyright norms in cultural and legal capacities remains a rich vein for study.

[119] *See supra* notes 209-210, Chapter 2, and accompanying text.

CHAPTER 5

CONCLUSIONS AND DISCUSSION

A Theory of Rights in Intellectual Property

The goal of this research project has been to contribute to the existing body of knowledge on the subject of copyright in a way that may help to serve current professional artists and the general public in understanding what copyright law does and does not allow. More importantly, an additional goal of this dissertation is to critically analyze *why* copyright law allows what it does, as well as why any individuals would deviate from the proscriptions of the law. This researcher has endeavored to examine how current cultural norms are potentially in conflict with the law – in either constitutional provision or statute, as well as according to the philosophical aims of the initial passage of copyright laws in America. The most profound of these conflicts is the one between the categorization of copyright as a temporary monopoly versus that of a perpetual property right.

This chapter, then, must seek some manner of resolution to that conflict. This researcher argues for that resolution in a particular way in large part because of the misclassification of certain behaviors as copyright infringement. For example, it is concluded here that the current cultural and legal norms of copyright allow some derivative creative expressions to be incorrectly classified as theft. In this researcher's view, this type of improper labeling arises from the primary misclassification of intellectual property itself. As initially posited in the title of this dissertation, intellectual property is not property. This dissertation concludes, in part, by formulating a theory that intellectual property is not property. Further, this chapter is meant to explain the theory

and support that conclusion. Intellectual property cannot be accurately defined as real property for the reasons outlined in the literature review,[1] most explicitly that real property must be scarce as a prerequisite for the need to determine ownership of that property.

Creative works that are reproduced are removed from the context of existing as individual artifacts, and copyright law attempts to offer rights of entitlement and limited ownership that nature does not provide when scarcity is overcome in this way. A natural state allows for the unlimited reproduction of creative works – either by manual or mechanical labor – in theory, and digital technologies allow for the unlimited reproduction of those works in practice. Limitations on this natural state arise from the moral arguments made by artists and individuals who speak on behalf of those artists so as to appropriately incentivize and reward the continuing development of original creative works. It is posited here that the research conducted for this dissertation – including the evidence provided by findings from interviews and the historical record surrounding copyright law – supports this researcher's conclusion that intellectual property is not property.

Again, despite the moral arguments made by artists and legislators for centuries, the types of infinitely reproducible creative efforts that are subject to copyright law simply do not conform to the categorical requirements of real property. It is more accurate to consider creative works as various instances of semiotic sign systems. These are what Ferdinand de Saussure called semiological facts: "a set of signs fixed by

[1] *See supra* notes 104-106, Chapter 2, and accompanying text.

agreement between the members of that society; these signs evoke ideas,"[2] and those ideas are naturally open to endless interpretation, reinterpretation, and reproduction. In short, creative works are public – not finite – goods.[3] This statement serves as the underlying theoretical principle that informs the remainder of this chapter. The principle will thus be used as the narrative spine connecting the remaining sections of this chapter and the conclusion of this dissertation.

This researcher concludes that the categorization of intellectual property as real property – and the resultant framing of copyright entitlements as property rights – have clear impacts on modern interpretations of numerous categories in relation to the concept of copyright. As mentioned above, the primary misclassification of intellectual property itself allows for a range of behaviors to be falsely positioned as criminal acts. Foremost among these is the framing of unlicensed duplication as a form of theft. It is within the scope of this chapter to discuss why such acts cannot reasonably be described as theft, and to make relevant conclusions regarding the impact of this modern framing on the right to attribution and authorial paternity, concerns related to freedom of speech, economic exploitation of fixed creative works, permissions in virtual marketplaces enabled by new technology, and the role of the public domain. All of these categories and associated conclusions are developed within this chapter through analysis of the findings from interviews conducted, as well as analysis of the literature regarding copyright as described in chapter 2 of this dissertation. This is done to bring more cohesion and support to the theory and conclusion championed here that intellectual property is not

[2] R. Harris, E. Komatsu, *Saussure's Third Course of Lectures on General Linguistics* (Elsevier Science, 1993)(1910-1911), 9a.
[3] *See supra* note 2, Chapter 1, and accompanying text.

property, and to examine the cultural norms that are created and reinforced by the conflation of the two categories. An example of this type of connective analysis is the use of experiences that artists shared in interviews regarding the enforcement of intellectual property rights, used in tandem with the history of prominent American court cases and statutes related to copyright. Again, this is done to more fully analyze current cultural and legal norms of professional behavior.

The discussion of cultural norms will include subsections dedicated to a determination of what constitutes originality in the creation of an artistic work, as well as distinctions made between theft, infringement, and inspiration. Fair use exceptions to charges of infringement will also be discussed, with satirical works being the most prominent types of exceptions currently allowed by law and cultural norms. There will also be discussion of fair use exceptions for charges of infringement as a result of political speech and copyright's relation to First Amendment guarantees for freedom of the press and of speech. Again, this discussion is informed by analysis both of interview findings, as well as the historical record of intellectual property dating back to the development of copyright as a concept distinct from censorship.

Following the sections related to cultural norms, various points related to the role of the public domain will be explicitly connected to this researcher's conclusions with regard to the nature of intellectual property. This is done to determine the role of the public domain with regard to professional artistic environments and how it may be minimized, expanded, or otherwise changed in the future, and there are also recommendations made about those types of changes. Again, the most prominent argument made throughout this chapter is the overarching conclusion of this dissertation:

an appeal for the continued cultural and legal understanding that intellectual property is not property, but rather a means to reward creative labor with temporary exclusivity in the mechanical duplication of a fixed creative work.

Economic Fruits of Creative Labor

A common thread among the interviews conducted as part of this research was an emphasis by artists that they have a personal understanding of what their own claims to intellectual property are, similar to what Elizabeth Eisenstein refers to as a "possessive individualism"[4] that characterizes authors' relationships to their own work since the development of print. Much of this possessive individualism arises from each author's self-evident truth that he or she must enact some creative labor in order to produce even derivative fixed works. A distinction is made here between labor that results in an original – or even derivative – fixed creative work, and what could be called rote labor. The products of rote labor might produce something inherently useful, like an alphabetic listing of phone numbers for a given region. However, such products, according to court rulings,[5] do not overcome the hurdle to be deemed original and thus eligible for copyright protection. Artists who labor creatively, though, most often want to be recognized and rewarded for the fruits of their labors, and they also wish to prevent perceived theft of those fruits.

The metaphor suggested by "the fruits of their labors" may be helpful in

[4] Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early-Modern Europe, Volume I* (Cambridge: Cambridge University Press, 1979), 121.
[5] *See, e.g.*, Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc., 499 U.S. 340 (1991). The ruling invoked here is most often referred to as "the sweat of the brow" doctrine. *See also supra* note 95, Chapter 2, and accompanying text.

determining what constitutes theft when it comes to the complicated concept of copyright. This metaphor alludes to a Talmudic story, previously cited in the introduction to this dissertation,[6] called "The Case of the Poor Man Who Shakes the Olive Tree."[7] In this tale, a man who climbs a tree to knock some attendant olives to the ground is shocked to discover that when he climbs back down the tree, another man has taken the dislodged olives, the literal fruit of his labors. As discussed in the literature review,[8] however, a logical distinction must be drawn between intellectual property and chattel. Chattel, or real property, if possessed, must necessarily be dispossessed by all others. Anyone who removes the olives from the ground after they have fallen deprives all others, including the man who labored to shake them from the tree. Intellectual property, when copied, may be possessed simultaneously by as many individuals as there are tokens that exist. It is as if olives were not taken from the ground, but copied or duplicated, so as not to deprive the individual who shook them loose. Artists and others who perceive that they are the victims of theft when tokens are copied or otherwise derived without license are not deprived of any property. They are, however, potentially placed into a competitive context with their own creative output, an aggrievement that can lead to a range of potential behavioral reactions, such as a withdrawal from the marketplace and the refusal to create, or more likely, the refusal to distribute future authored works, to share "the fruits of their labors."

This framing emphasizes the potential effectiveness of an incentive paradigm for the further creation – and especially for the distribution – of works subject to copyright,

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[6] *See supra* notes 5-7, Chapter 1, and accompanying text.
[7] Neil Netanel, *From Maimonides to Microsoft: The Jewish Law of Copyright Since the Birth of Print* (New York: Oxford University Press, 2016), 175.
[8] *See supra* notes 104-106, Chapter 2, and accompanying text.

and thus a justification for the creation of a copyright scheme within statute. Despite this justification, this framing also acknowledges that while such a scheme may incentivize the creation of new fixed works, it does not bestow upon the creative contents of such works the qualities that would make it property. "Intellectual property" and its historical antecedent, "literary property," are both misnomers, as they do not in a real sense describe the concepts to which they refer. Property that may be infinitely reproduced or duplicated is not property.

When fixed creative works are mechanically duplicated, such duplication results in the creation of additional tokens that are also property, and artists or publishers must contend with the additional competition of those newly existing tokens in the marketplace. The modern interpretation of copyright and subsequent implementation of related laws make moral claims for the unfairness of such competition to the artists who labor creatively, for reasons of improper attribution[9] or perceived loss of personal profit.[10] Artists interviewed for this dissertation have also made convincing arguments for the unfairness of this type of unlicensed competition with their own creative output.[11] Again, however, it is posited here and concluded that such competition is not theft, since intellectual property is not property. The rabbinic scholars of centuries past recognized this in their interpretations of "The Man Who Shakes the Olive Tree." Those scholars did not describe even the taking of unattended olives – real property – as outright theft, but instead referred to it as "theft because of the ways of peace."[12] In similar fashion, the unlicensed duplication or copying of an artist's creative works may offend that artist,

[9] *See supra* notes 11-12, Chapter 2, and accompanying text.
[10] *See supra* note 74, Chapter 2, and accompanying text.
[11] *See supra* notes 34-35, Chapter 4, and accompanying text.
[12] *Mishnah Gittin 5:8*, explicated in Neil Netanel, *From Maimonides to Microsoft*, 175.

providing a disincentive for the creation and distribution of future works, and disrupt the peace of a paradigm that normally incentivizes artists and grants them strong claim to the exclusive distribution of their creative output.

Work For Hire and Authorial Paternity

Unlicensed duplication is not the only way that artists can be said to be deprived of the fruits of their labors. There is another, more concrete legal means by which authors may be deprived of claims to their creative output. This is the sale or transfer of their copyrights in a given fixed creative work to a third party, usually the publishing entity that initially commissioned or otherwise financed the creation of the fixed work in question. The perception of copyright as a temporary monopoly would position such a transfer as an agreement by an author not to compete with the publisher in economically exploiting a fixed creative work for a limited time. However, the perception of copyright as a claim to property falsely promotes work for hire as a transfer of property.

Oftentimes in the comic book publishing industry, writers and artists are divested from their initial copyrights because of work for hire contract terms that explicitly retain the copyright of a work for the publisher. Some authors, such as Alan Moore,[13] have spoken out against work for hire practices, and subsequently refused to work with publishers that use those practices.[14] Related trade organizations, like the Graphic Artists' Guild, also decry the practice of work for hire as it relates to comic books, stating that the

[13] *See supra* notes 170-174, Chapter 2, and accompanying text, for previous discussion of Moore and an example of his creative work that initially broached concerns related to copyright law.
[14] Andrew Hoberek, *Considering Watchmen: Poetics, Property, Politics* (New Brunswick, NJ: Rutgers University Press, 2014), 81.

publishing category is not specifically listed in statute as a valid medium for the practice, and that artists are often independent contractors and not employees, further invalidating the claims on copyright made by publishers.[15] The result is that authors like Moore, as well as artists interviewed for this dissertation who sense they will be legally deprived of authorial claims of paternity or financial remuneration, may self-inhibit their own creative output,[16] theoretically to the detriment of the public.

Again, there is no explicit mention in statute of comic books as a form of expression for which work for hire practices may apply. However, continued cultural practices, including the perception of copyright as a property right and the agreement of comic book artists to submit to work for hire terms, has legitimized the practice for those artists even in the absence of explicit statutory support. As noted in this dissertation's Findings chapter, attorneys interviewed described the language of Title 17 of the U.S. Code[17] as being close enough, with descriptions of "collective works" functionally serving as an appropriately legal descriptor for most mediated audiovisual works created by multiple individuals at the behest of a centralized employer.[18]

However, this is not to suggest that artists have no other option but to submit to work for hire terms exclusively. The 1976 Copyright Act,[19] reinforced by court decisions,[20] does require that an author and employer must both agree before the creation of a work that it will be work for hire. This agreement is what allows for the legal transfer

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[15] Graphic Artists Guild, *Graphic Artists Guild Handbook: Pricing & Ethical Guidelines*, 14th Edition (New York: Graphic Artist's Guild, Inc., 2013), 268.
[16] *See supra* note 70, Chapter 4, and accompanying text.
[17] U.S. Copyright Act, 17 U.S.C. § 101.
[18] *See supra* note 81, Chapter 4, and accompanying text.
[19] U.S. Copyright Act, 17 U.S.C. § 101.
[20] *See, e.g.*, Playboy Enterprises, Inc. v. Dumas, 960 F. Supp. 710, 720 (S.D.N.Y. 1997).

of a copyright from the author to the author's employer. This agreement can be merely verbal, and does not require a written contract. For this reason, the Graphic Artists' Guild recommends that artists are clear about their paternal claims of authorship for a given creative work from its inception, and that they inform potential clients that they have, for example "a studio policy of not signing work for hire contracts."[21] Also, upon receiving checks from clients that include work for hire language as a condition for receipt of moneys, artists are within their rights under the law to cross out such language and write "deposited without conditions," preventing late-stage introductions of work for hire terms.[22] If the public were also to more broadly accept that intellectual property is not property, this would further limit the acceptance that any individual or group could reasonably claim continued ownership of any author's work outside of limited exclusivity for initial publication.

Work for hire terms under the 1976 Copyright Act have also continued to roll back protections for the initial author of a given creative work that were standard with prior copyright statutes. The 1909 Copyright Act allowed for two terms of 28 years, and required that the author of a given work personally petition for the second term.[23] This was meant to lessen the bargaining power of publishers by preventing them from holding exclusive rights in the sale and distribution of a given creative work for the full length of statutory copyright protection.[24] However, the Supreme Court held in *Fred Fisher Music*

[21] Graphic Artists Guild, *Graphic Artists Guild Handbook*, 127.
[22] Ibid., 35.
[23] Copyright Act of March 4, 1909, Pub. L. No. 60-349, 35 Statutes at Large, 1075.
[24] Jesse J. Krueger, "Copyright and Kryptonite: The Failings of Intellectual Property Law through the Eyes of Superman," *Duquesne Business Law Journal* 14, no. 2 (Summer 2012): 233.

v. M. Witrock & Sons[25] that authors could assign ownership of the second term of copyright before the first had expired. This advanced the trend of increasing privileges for publishers and decreasing protections for authors, so that moral claims made in support of granting initial copyright protections to incentivize authors are undermined. There are historical examples of publishers who have misrepresented their controlling interest in an author's creative works – most often as a claim to the "property" of those works – to coerce those artists into signing over copyright in the renewal term.

One of these examples is the Captain America character, developed by Joe Simon and Jack Kirby and first published by Timely Comics – later renamed Atlas and then Marvel – at the end of 1940. In 1969, as the initial copyright term for the character's introductory comic book appearances expired, Simon applied for renewal. Marvel's publisher, Martin Goodman, misled Kirby about his own rights in the character as a coauthor of those early *Captain America* comics. Kirby signed away any controlling interest he had in the character for promises of payments that were never forthcoming.[26] Again, even for someone who "practically invented comics," as characterized by an artist interviewed for this dissertation,[27] there is not much evidence that publishers are inclined to consider an artist's cultural contributions to a given medium of creative expression during negotiations of copyright ownership.

Some of the individuals interviewed for this dissertation describe publishers as now having even more outsized bargaining power compared to a writer or artist.[28] One

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[25] 318 U.S. 643 (1943).
[26] Ronin Ro, *Tales to Astonish: Jack Kirby, Stan Lee, and the American Comic Book Revolution* (New York: Bloomsbury, 2004), 134-5.
[27] *See supra* note 90, Chapter 4, and accompanying text.
[28] *See supra* note 87, Chapter 4, and accompanying text.

prominent reason for that power is a publisher's ability to purchase a copyright that lasts for 95 years if the writer or artist agrees to work for hire terms at the outset. Again, this is ultimately not a property right or a claim to ownership, but a set term of exclusivity in the continued publication of a fixed work. From that point of view, an author who submits to work for hire terms effectively agrees – for a literal lifetime – not to publish or license to publish a work that he or she created. It is posited here that this is an absurd term length for a monopoly on publication rights, and the existence of work for hire in the law betrays the myth that copyright is a natural or moral right.

Artists do not have to submit to work for hire terms, although as one interviewed writer states, there are many artists who "do it every day. It happens all the time, and most people do it willingly."[29] Current laws do not favor these artists' chances of maintaining authorial paternity and ownership of their copyrights. Moreover, the popular cultural interpretation of a copyright as a property right positions the creation of certain derivative works as a form of theft. For example, an artist would be charged with infringement for creating a new fixed work using an existing character – even a character he or she created – if that character was created under work for hire terms. This standard is in place despite the fact that outside of mechanical reproductions of prior works, all such works are original in the sense that they represent the fruit of some new creative labor.

The next section of this chapter describes additional complications that may arise when even seemingly original creative works may also be categorized as derivative of another, earlier work, and thus an infringement on that earlier work. Again, this is

[29] Interview with MH, November 4, 2017.

examined in large part as a means of providing additional support for the conclusion that intellectual property is not property, but instead in these cases the enforcement of a monopoly grant.

Claims of Originality

Idiosyncratic claims to originality and the labor required to create art necessarily complicate the development of legal norms for what might objectively be understood as an original fixed creative work. As discussed in the literature review,[30] courts have been unable to clearly delineate where inspiration ends and excessive taking begins. U.S. Supreme Court Justice Ruth Bader Ginsburg, for example, has written that freedom of speech considerations weigh heavily in favor of allowing an individual to make his or her own speech, but less so on the ability to make others' speeches again.[31] This statement suggests that copyright laws may be used to enjoin speech that is duplicated or derived from what are considered original expressions. Further, the ideal form of expression – i.e., speech that is arguably most deserving of copyright protection – would be one that is wholly original. Unfortunately, this ability to enjoin unoriginal speech still clashes with the foundational philosophy of freedom of expression as guaranteed by the First Amendment. Political speech, for example, is rarely wholly original, and yet enjoys the most explicit protection under the First Amendment. Also, as will be further described below, nearly all forms of speech may be understood and interpreted as derivative of other, earlier expressions. The standard for freedom of expression should weigh more

[30] *See supra* notes 220-222, Chapter 2, and accompanying text.
[31] Eldred v. Ashcroft, 537 U.S. 186, 221 (2003). "The First Amendment securely protects the freedom to make – or decline to make – one's own speech; it bears less heavily when speakers assert the right to make other people's speeches."

heavily, then, on the side of protecting all speech, regardless of the degree of originality assumed. However, copyright law, especially when positioned as a property right, makes room for only limited exceptions to copyright's exclusive grant.

Satirical derivations and representations of existing works under copyright is one broad category that enjoys specific fair use exceptions to infringement, despite relying partially on non-original expression. A satirist changes the character or tone of an original work, and this may be considered the source of the derived satirical work's own originality. A derivative work that lacks satirical or political modifications is less obviously a new original work for which the artist may be granted a copyright. The lack of modifications is likely what led the court in *Gracen v. Bradford Exchange*[32] to allow film studio MGM to reproduce an artist's photo-derived illustration of *The Wizard of Oz* without the artist's permission.

MGM owned the copyright in the film – the original or underlying work in this context – and so was thought to be allowed to reproduce an unlicensed derivation without satirical or political character. It took years for another court to reverse this decision and acknowledge that artists who create derivative versions of copyrighted works may retain a copyright in the new derivation, which would allow them to exclude the original copyright owner's use of that work in the market.[33] Still, an artist who creates a derivative work has no recourse to reproduce that derivative work because it infringes on the copyright of the original work. Copyright law serves as a form of mutual blocking of publication and reproduction in these situations. In a sense, the complications of this type of mutual blocking trigger concerns related to the expressive and distributive capacities

[32] 698 F.2d 300 (7th Cir. 1983).
[33] Schrock v. Learning Curve, 586 F.3d 513 (7th Cir. 2009).

of either party, creating a metaphorical Gordian Knot. Again, the argument that intellectual property is not property provides perhaps the swiftest cut to that knot: if there is no inherent ownership right in a given creative expression, and only a limited monopoly on its literal reproduction, then an artist would be free to create and publish derivative expressions that use the same underlying semiotic sign systems – in this case, images of characters from *The Wizard of Oz* – without license.

Under current copyright law, what is allowed in such situations is not as clear as just letting anyone freely publish his or her own work, derivative or not. However, artists engaged in the creation of derivative works often have an understanding of how the law limits access and economic exploitation of other popular works subject to copyright. Many of the artists interviewed for this dissertation repeatedly demonstrate such understanding as a result of communications with other artists,[34] licensing authorities for creative works,[35] and infringement concerns that resulted in the use of cease-and-desist letters.[36] Again, these limitations are a function of the proscription of law, and not of any intrinsic qualities of property. As noted above, visual representations of fictional characters are an example of what de Saussure called semiotic sign systems or semiological facts[37] and there are no natural limitations on the continued dissemination and (re)interpretation of those signs.

It is posited here that copyright law itself is a type of superstructure sign system, a means to mark the limitations that at least some parties agree to in the continued reinterpretation of fixed creative works. Under this system, legal justifications are

[34] *See supra* note 25, Chapter 4, and accompanying text.
[35] *See supra* note 92, Chapter 4, and accompanying text.
[36] *See supra* note 26, Chapter 4, and accompanying text.
[37] Harris and Komatsu, *Saussure's Third Course of Lectures on General Linguistics*, 9a.

required for a derivative work to meet both the threshold for originality and a finding of fair use that would allow it to be published without license. The addition of political or satirical themes aids in that determination. Legal justification, though, does not always equate to moral justification.

As the next section describes, derivative fixed creative works that rely on other "original" creative works to make satirical or otherwise explicitly political statements have been developed throughout the historical periods examined in this dissertation. The practice also continues today. However, even when such artistic derivation is not legally prohibited, it is also not enacted, in the words of Thomas Jefferson, "without claim or complaint from anybody."[38]

Satirical and Political Derivations of Fixed Creative Works

Satires and parodies are the types of derivative works that are most often allowed under copyright law to be published and reproduced without license as fair use of existing fixed works. The analysis of these types of derivative works is relevant to this researcher's conclusion that intellectual property is not property because they are the most prominent examples of works that are granted exemptions for copyright protection. It is argued here, however, that similar exemptions should be more broadly granted and assumed to be fair use even absent satirical – or overtly political – elements within a derivative work. For example, a character, either fictional or based on some real person, is one common element of an existing work used in satirical derivations. The

[38] Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in Andrew A. Lipscomb and Albert Ellery Bergh, *The Writings of Thomas Jefferson volume 13* (Washington, D.C.: The Thomas Jefferson Memorial Society, 1907), 333-34.

interpretation of characters under copyright law as a form of intellectual property, coupled with the common requirement of satire to expose or ridicule the original work it is satirizing, means that artists are often sensitive to unlicensed derivations of the characters they create and for which they claim ownership.[39]

Whether they are reading legitimately licensed or bootlegged derivations, modern audiences are familiar with a wide variety of interpretations of popular characters, from comic book superheroes to the fantasy characters of the Brothers Grimm. Fictional characters that are still under copyright today, such as Superman, have been satirized numerous times over the years, often without the license or permission of the copyright holders, and such derivative works are allowed according to law. One notable example is Harvey Kurtzman and Wally Wood's "Superduperman," a comedic satirical take on Superman that appeared in *Mad Magazine* in 1953. Like many satirical derivations, "Superduperman" applied a "real world logic to a kind of inherently absurd...situation,"[40] according to writer Alan Moore. In turn, this method for structuring a story inspired Moore to apply real world logic to super-hero stories – like the ones he wrote for the British character Marvelman – so as to produce greater dramatic effects, to "make something that was quite startling, sort of dramatic and powerful."[41]

Partly as a result of courts ruling that humorous satirical derivations are protected under copyright law as fair use,[42] one might assume that satire must be comedic to be deemed fair use. However, Moore's critical thoughts on the subject show that effective

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[39] *See supra* notes 28-29, Chapter 4, and accompanying text.
[40] Interview with Moore, quoted from George Khoury, *Kimota!: The Miracleman Companion* (Raleigh, NC: TwoMorrows, 2001), 11-12.
[41] Ibid.
[42] Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

satire can adjust an original work's tone along multiple thematic trajectories in the creation of a derivative interpretation. In turn, this derivative work overcomes the hurdle to be deemed an original work itself, offering a novel contribution in terms of tone, theme, or other formalist element(s) absent in the work being satirized. This novel contribution can even be explicitly political, and there are examples of that in fictional works that long predate the current cultural and legal norms of copyright.

During the nineteenth century, derivative interpretations of existing works may not have been as widespread compared to today, but there are still numerous examples from that time of authors satirizing existing works for new purposes and audiences. The example that follows is valuable both for its political additions to an existing fixed creative work, as well as for the resultant critical reaction from literary stalwart Charles Dickens.

In addition to his tours of America to champion his cause for an international treaty on copyright,[43] Dickens also held strong opinions on the malleability of texts to create derivative works. He was personally opposed to the revision or derivation of fixed creative works to suit a new author's political purposes. One prominent example of this opposition revolved around the temperance-themed fairy tales developed by fellow Briton George Cruikshank, an artist who had previously worked with Dickens as an illustrator on several editions of the latter's popular works, including *Oliver Twist*.[44]

Cruikshank, in works published between 1853 and 1864, created derivative interpretations of popular fairy tales such as *Cinderella* and *Puss in Boots*, adding

[43] *See supra* note 74, Chapter 2, and accompanying text.
[44] Charles Dickens and George Cruikshank, *Oliver Twist: Or, the Parish Boy's Progress*, (London: Richard Bentley, 1838).

political and moral claims that alcohol was dangerous, and that abstinence or temperance was the solution.[45] Dickens was offended at the use of existing fixed creative works to advance a political agenda. He responded with the essay "Frauds on the Fairies," which included this line: "Whosoever alters [these tales] to suit his own opinions, whatever they are, is guilty...of an act of presumption, and appropriates to himself what does not belong to him."[46]

Dickens did not claim that Cruikshank was forbidden to hold or express his opinions on temperance, but he did claim that the existing creative settings and characters of other authors were ill-suited vehicles for those arguments. It is not clear how necessary the use of these specific fairy tale characters were for the purpose of promoting temperance: would, for instance, a "Raccoon in Waders" serve as an effective replacement for "Puss in Boots," and still allow Cruikshank to communicate his literary message as intended? With *Campbell v. Acuff-Rose Music,*[47] the U.S. Supreme Court positioned a similar question as one of parody versus satire: "Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[48] Ultimately, though, this is an argument about superficial aspects of a satirical work. All satires and parodies must reference pre-existing works: if parody makes such reference more explicit, this guarantees only that the parodied original work served as some sort of inspiration for the

[45] Ruari McLean, *Victorian Book Design and Colour Printing*, Second Edition (Berkeley, CA: University of California Press, 1972), 163-164.
[46] Charles Dickens, "Frauds on the Fairies," in *The Works of Charles Dickens: Miscellaneous Papers*, (London: Chapman and Hall, 1908): 407.
[47] 510 U.S. 569 (1994).
[48] Ibid., 580-81.

parody. Absent a more specific critical analysis of the parody, even the nature of that inspiration is obscured. Bruce Rogow, the attorney for Campbell in that case, provides further clarification for the specific needs of a parody to make use of an existing creative work:

> In order to do the parody, you have to take a large body of the other work. That's why I think you have more latitude in the parody case to win under fair use, even though you've taken a lot. The joke isn't there without the listener understanding that this came from some other source and is now being recreated in a different way to make fun of something. So I think there's a lot more room in parody to take pretty much the whole work.[49]

In the prior example of Cruikshank's fairy tales, it was clear that Cruikshank was satirizing the vice of drink, and employed parodies of fairy tale characters to do so. Perhaps, in the eyes of Dickens and other critics, an original fairy tale by Cruikshank would have been deemed a more suitable means to express his political views. But then, how much would need to be changed, how different and novel would these new fairy tales need to be, before they could be fairly described as original creative works unto themselves? If parody serves as a type of explicit bibliography for the content of satire, then the removal of superficial allusions or references to existing works does not make a derivative work more original. Again, under the presupposition that copyright is a temporary term of exclusivity and not a property right, this researcher posits that the only meaningful metric for a determination of originality is that an author or artist enact some creative labor to fix a work. This is true even if that creative labor employs the use of preexisting semiotic sign systems, including fictional characters or the melody of a popular song. Laws that rule otherwise, or that demand political or satirical justification for the use of preexisting signs, potentially obscure the continuity of the derivative

[49] Bruce Rogow, interviewed by Joseph Russomanno, February 22, 2001.

author's creative inspiration and process, and stifle the expression of that artist.

Similar cases continue to be prevalent today, even as the cultural and legal norms of copyright change. The artist Matt Furie, for example, has repeatedly brought suit against numerous parties for the unlicensed use of his cartoon frog character, Pepe, in political contexts.[50] The political character of these satirical Pepes is often associated with extremist ideologies, with the result that the Anti-Defamation League even took the step of adding Pepe to its database of hate symbols.[51] Talk show host Alex Jones defends these derivations as fair use because "it's political speech, it's totally protected."[52] This defense is characteristic of the present paradigm of copyright law, wherein unlicensed and derivative use of existing fixed works requires an affirmative defense of why such use should be allowed, rather than a justification for why it should be enjoined. Furie makes it clear that he is not happy with the association of unlicensed images of Pepe with extremist political ideologies. However, this dissatisfaction is not purely a political issue, and is instead a subset of a larger issue faced by artists of misappropriation and misattribution.

The next section describes how intellectual property law has adapted itself to questions of these issues with regard to originality in more generic terms, outside of the realms of satirical or political intent. It also discusses the consequences for individuals creating and distributing new fixed works that are used in the creation of derivative works

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[50] Jessica Roy, "Creator of Pepe the Frog is suing Infowars," *Los Angeles Times,* March 6, 2018.
http://www.latimes.com/politics/la-na-pol-pepe-the-frog-infowars-lawsuit-20180306-story.html#

[51] *BBC*, "Pepe the Frog meme branded a 'hate symbol,'" September 28, 2016. Retrieved from https://www.bbc.com/news/world-us-canada-37493165 on August 01, 2018.

[52] Jessica Roy, "Creator of Pepe the Frog is suing Infowars," *Los Angeles Times,* March 6, 2018.

or determined to be derivative themselves. The conclusion that intellectual property is not property is also reinforced by the evidence provided below that such derivative works do not alter the existence of the original works from which they are derived.

Originality, Unfair Competition, and Confusion in the Marketplace

Outside of satirical or political contexts, where creative works are repurposed to espouse a political statement that in some way relies on explicit reference to a particular creative work, it is still difficult to make claims that any single fixed creative work is itself wholly original according to the norms of existing copyright law. The discussion of originality within this section examines some of the moral concerns raised by artists with regard to unlicensed derivations of their work. However, it also reemphasizes the point that the very possibility of creating such derivative works without changing a particular token of the original work means that neither original nor derivative types of intellectual property are property.

There are numerous examples from this dissertation's findings, including its interviews, demonstrating that creative works that might be considered wholly original are shockingly easy to contextualize as derivative of prior existing works. Were it otherwise, existing and potential audiences would find no appeal in what would be a completely alien and indecipherable expression. This is similar to a point made by U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. in *Bleistein v. Donaldson,*[53] and previously cited in the literature review of this dissertation.[54] As Justice Holmes wrote, even an educated judge may have no clear understanding of what makes a creative work

[53] 188 U.S. 239 (1903).
[54] *See supra* notes 220-222, Chapter 2, and accompanying text.

valuable in the eyes of the consuming public.[55] Truly original and great works, according to Holmes, might possess "novelty [that] would make them repulsive until the public had learned the new language in which their author spoke."[56]

It is posited here that the law should not demand too stringent a test for originality, then, partially because authors often must balance competing creative needs of using both novel and familiar forms to effectively communicate with an audience. If the law demands even a minimum threshold for originality, this demand allows for the possibility that expressive works that are new and likely meet such a threshold for originality may still be described as derivative of another creative work. Once a fixed creative work is positioned in this way, there is the additional possibility that the artist of such a work will be accused of copyright and/or trademark infringement. This is in line with research conducted on inductive reasoning in general, and the tendency for individuals to perceive similarities between categorical instances as causally related.[57]

Individual artists, too, may possess strong claims for authored works similar to their own to be derivative in some sense, and may also wish to limit the attendant associations that form in the minds of audience members who perceive similarities between existing creative works.[58] In contrast to the prior example of Dickens and Cruikshank – where satire was used to condemn vice – one interviewed artist describes how his misappropriated character was drawn as engaging in alcohol consumption.[59] The interviewed artist says his most prominent concern is being wrongfully associated with

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[55] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903).
[56] Ibid., 251.
[57] Evan Heit, "Properties of Inductive Reasoning," *Psychonomic Bulletin & Review* 7, no. 4 (2000): 583.
[58] *See supra* notes 24-29, Chapter 4, and accompanying text.
[59] *See supra* notes 28-29, Chapter 4, and accompanying text.

the infringing party and the potential impact such infringement could have on future business opportunities. This potential for confusion in the marketplace based on wrongful association serves well as a moral justification for enjoining that specific derivative work. But what about the next one? Or the one after that? As the example of Furie and Pepe most prominently shows, artists ultimately have no absolute control over how their works are interpreted and resignified by future parties, even if they might be able to prevent some instances of such derivative activity. Again, this is evidence that all creative works exist as sign systems – and not property – that may be naturally and endlessly resignified, even as those resignifications may offend artists responsible for an original work.

All creative works – despite the wishes of any artist – are ultimately part of an unending chain of derived expressions, with every artist and creative work a corresponding link. The boundaries between these links may be more or less distinct based on the relative perceived novelty of any given fixed creative expression. This novelty may be a function of the artist or other copyright owner enforcing that copyright through litigation, but this method also allows for broad overreach by parties that attempt to claim ownership in more generic expressions. This latter category may help perpetuate claims of originality or novelty, but also has the simultaneous effect of minimizing the scope of the public domain.

Marvel Comics, Ltd. v. Defiant,[60] described within the context of the Findings chapter,[61] is an example of how current intellectual property regimes allow for broad overreach with regard to claims of ownership of an image, concept, logo, etc. As noted by the interviewed author in that case, and as supported by separate interviews with

[60] 837 F. Supp. 546 (S.D.N.Y. 1993).
[61] *See supra* notes 4-8, Chapter 4, and accompanying text.

attorneys, the financial costs are high to successfully defend against claims of infringement in a court of law.[62] Even absent formal legal proceedings, artists may see their works removed from legitimate marketplaces by distributors if a third party makes claims of ownership to a particular phrase defined as a trademark.

This was the case with M.C.A. Hogarth, a woman who wrote a digitally-published book, *Spots the Space Marine*. She initially made it available for purchase through online retailer Amazon's CreateSpace Independent Publishing Platform. Amazon, however, removed the book from its online store after a U.K. company, Games Workshop, claimed it had a trademark for the phrase "space marine" that enabled it to exclude other uses of that phrase from the marketplace.[63] Games Workshop may have wished to reinforce the notion of perceived novelty and originality of the term "space marine" in the minds of consumers and other potential audiences, but again, the descriptive model of creative expressions as links in an unending historical chain is useful here. In this case specifically, the use of the phrase "space marine" in similar creative contexts predated the uses from either Games Workshop or Hogarth, having been used in 1932 as the title of an *Amazing Stories* tale: "Captain Brink of the Space Marines."[64] With the aid of the Electronic Frontier Foundation, a U.S. civil liberties advocacy organization, Hogarth was able to convince Amazon that the trademark infringement claim was not legitimate, and her book continues to be sold on the company's website.

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[62] *See supra* notes 8 and 47-48, Chapter 4, and accompanying text.
[63] Corynne McSherry, "Trademark Bully Thwarted: Spots the Space Marine Back Online," *Electronic Frontier Foundation*, last modified February 8, 2013. https://www.eff.org/deeplinks/2013/02/trademark-bully-thwarted-spots-space-marine-back-online.
[64] "Captain Brinks of the Space Marines," *Pulp Covers*, last modified March 2, 2013. http://pulpcovers.com/captain-brink-of-the-space-marines/.

Both *Marvel Comics, Ltd. v. Defiant*[65] and Hogarth's trouble with the use of the term "space marines" are examples of situations in which creative individuals, accused of copyright or trademark infringement, needed to expend time and material resources to defend against those accusations if they hoped to continue publication and distribution of their creative works in a legitimate marketplace. Artists who wish to avoid similar issues are thus incentivized to minimize attendant associations between the original works they create and any fixed creative works that served as inspirations for their new works. The author Ronin Ro, for example, in writing about the career of Jack Kirby, suggests that Kirby's comic book art served as source material for the development of George Lucas' *Star Wars* films:

> Jack himself felt the name Luke Skywalker sounded suspiciously like Mark Moonrider from [Kirby comic] *The Forever People*, and that Lucas's the Force was similar to [Kirby characters] the New Gods' vague cosmic essence the Source. In *Star Wars*, a kind, gray-haired mentor urged Luke to join a galactic battle and returned from the dead, just the way Himon recruited Scott Free in *Mister Miracle* and also overcame death. Like Darkseid, Darth Vader ruled Stormtroopers and lived on a planet that had a huge circle carved into its side (like the flaming fire pit he'd always drawn on Apokolips). And Darth Vader served the Dark Side.[66]

The preceding excerpt is only a partial sample of the similarities noted by Ro between Kirby's comics and the *Star Wars* films. Ro also quotes a friend of Kirby's who stated that "Jack didn't want any money or anything from Lucas, but he wished that Lucas had at least admitted where he got most of those ideas."[67] The culture of copyright, however, simply does not incentivize or encourage authors to describe their own creative output as being derived in whole or in part from prior works. The exception to this, as

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[65] 837 F. Supp. 546, 547 (S.D.N.Y. 1993).
[66] Ronin Ro, *Tales to Astonish*, 200.
[67] Ibid.

noted by several interviewed artists as part of this research, include works that are in the public domain and may be freely referenced without license.[68] However, for works that are still under copyright, the framing of that copyright as a property right denies the continued resignification of semiotic sign systems as a kind of continuous communicative act among all creative parties and audiences. It also encourages individuals to claim ownership in expressions of myth and remain silent on the inspirational source of those expressions. Ironically, the most prominent exception to this is satire or parody, which again are most often used as tools to ridicule or criticize an existing work or person. For many authors, then, a discussion of the process of development for a particular creative work still under copyright protection is not worth the trouble of accusations that might accompany that discussion, and again, the resultant expenditures in time and materials that dealing with such accusations entails. As the next section describes, these expenditures in time and materials are somewhat offset by technological advances that enable greater access to the marketplace. However, legal claims of infringement and the framing of copyright as a property right potentially minimize what may be counted as legitimate. The conclusion that intellectual property is not property is also contrasted in this next section with the development of laws for computer hardware and software that more explicitly grant proprietary protections for the manufacturers of such products.

Legal Reactions to Technological Innovation

As mentioned in the prior section, broad expansions in publishing options enabled by advances in technology, foremost among them networked culture and the Internet as a

[68] *See supra* notes 113-117, Chapter 4, and accompanying text.

whole, have ensured that the marketplace to sell one's creative efforts today has lower barriers to entry. The most significant of these barriers is merely the digitization of a specific token, whether that is a book, film, comic book, etc., into a binary expression of data that may then be read by any personal computer. An analog fixed creative work may already be infinitely reproducible in theory, but digitizing that work makes the action of reproduction a push-button affair that almost entirely negates material costs for copying. This easing of technological limitations on literal copying has been met in the law with increasingly broad entitlements and intellectual property protections granted to owners of valuable copyrights, especially with regard to networked computer hardware and the software that it runs. This section will discuss how copyright law has expanded and changed as a direct result of innovative technology and technological adaptations, and how the categorization of copyright as a property right legally inhibits the ways consumers and audiences may interact with the actual – i.e., not intellectual – property they own. This is important to the dissertation as a whole for providing another point of comparison with regard to semiotic sign systems. Like the fictional characters mentioned above, software and other digital code exists as an idea, endlessly reproducible and without the intrinsic qualities of real property. However, copyright law continues to artificially restrict how these sign systems may be used on the basis that such intellectual property remains the property of the copyright owner even after a sale has been made.

The preceding sentence briefly describes the most significant change in copyright law as it relates to new technologies: the grant of continuing proprietary interest for copyright owners in the single tokens of a work even after the first sale. This is because the legal download of most programs, files, and other digital tokens most often require

users to sign an End User License Agreement (EULA), and such agreements typically present language that positions the purchase of software or digital editions of fixed creative works as a temporary license, and not a permanent sale. Such agreements stand in stark contrast to the essential assumption of the first sale doctrine. As described in the literature review,[69] this doctrine allows those who purchase a token of a fixed creative work to dispose of that token as they wish, including by resale.[70]

Court rulings from the last decade have, in some ways, reinforced the first sale doctrine, as in *Kirtsaeng v. Wiley*.[71] The Supreme Court ruled in that case that individuals may sell or dispose of legitimate physical copies of published works as they wish, even if the copy was lawfully printed in a foreign territory. However, in digital marketplaces, the first sale doctrine is increasingly limited by rulings regarding the redistribution of digital creative works. In *Vernor v. Autodesk, Inc.*,[72] for example, a man was held liable by the court for reselling software that he himself had bought second-hand and never installed on his own computer, so he had never even agreed to the EULA. The courts have essentially empowered companies that sell digital works to determine the legal use of software and other files "licensed" to a user. Thus, there is not only an infringement on the right of first sale, but the interaction of the user with the software is subject to copyright infringement even if there is no duplication of the work in question.

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[69] *See supra* notes 107-110, Chapter 2, and accompanying text.
[70] 17 U.S.C. § 109(b). "The owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."
[71] 568 U.S. 519 (2013).
[72] 621 F.3d 1102 (9th Cir. 2010).

When software companies sue a user for what they determine to be an abnormal use, that use might really be a result of the essential step defense. In the language of the specific statute, "It is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided that such a new copy or adaptation is created as an essential step in the utilization of the computer program."[73] This is a statutory recognition of the fact that it is impossible to create a digital recording in such a way that it does not automatically copy itself again, since the recording must at some point "generate an unencrypted stream of data that can be interpreted by a sound system or screen."[74] Again, besides the logical inconsistency of labeling digital files as real property, since they are not finite, the architecture of a personal computer automatically duplicates such "property" as a necessary step for access.

Copyright owners such as software companies are thus empowered to seek an injunction if they are dissatisfied with how users interact with their software.[75] This was demonstrated in the case of George Hotz, an American hacker who gained root access to his Sony Playstation 3 video game system and published the results. Sony sued him for breach of the Digital Millennium Copyright Act[76] and Computer Fraud and Abuse Act,[77] both of which have such broad language as to prevent a user from gaining unauthorized

[73] 17 U.S.C. § 117. Subject Matter and Scope of Copyright.
[74] William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment* (Stanford, CA: Stanford University Press, 2004): 87.
[75] MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928 (9th Cir. 2010).
[76] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860.
[77] Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, (amending 18 U.S.C. § 1030).

access to devices they have purchased.[78] The DMCA is ostensibly meant to protect copyrights, but it was also a partially reworked piece of legislation meant to control access.[79] The DMCA thus allowed for an individual to be prosecuted for attempting to circumvent any access control on a piece of technology, independent of whether the technology controls access to copyrighted materials. In short, Hotz was found in violation of contributory copyright infringement for modifying the property he owned, even though he did not unlawfully duplicate copyrighted materials.

The larger issue at play is that although creators do have more platforms and publishing options today for distributing fixed creative works, these venues are arguably compromised by laws that favor increased regulation of those same platforms and the technological means to access them. Again, the philosophical grounding of such laws, including the DMCA, is that those in possession of a copyright are exercising a property right when they limit how end users and audiences engage with the tokens of software and other digital files that they purchase. When combined with the longer terms of exclusivity that current copyright law provides for copyright owners, the cultural trend overall points toward statutory limitations on access at the same time that network technology mechanically disinhibits access to information. In addition, larger existing firms that own valuable copyrights continue to lobby Congress for even greater periods of exclusivity. As the next section describes, these efforts help to increase the proprietary

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[78] Nilay Patel, "Sony Follows Up, Officially Sues Geohot and Fail0verflow Over PS3 Jailbreak," *Engadget*, January 12, 2011, accessed July 25, 2018, http://www.engadget.com/2011/01/12/sony-follows-up-officially-sues-geohot-and-fail0verflow-over-ps/

[79] Fisher, *Promises to Keep,* 93. Fisher notes that Title I of the DMCA was initially the "WIPO Copyright and Performance and Phonograms Treaties Implementation Act of 1998," and the law states that "no person shall circumvent a technological measure that effectively controls access."

claims of copyright owners, while continuing to limit the scope of the public domain.

The Role of the Public Domain

It is notable that every artist interviewed for this dissertation believes that popular characters currently owned by corporate entities will remain under the protection of copyright and trademark regimes in perpetuity. A typical response from an interviewee comes from a writer who states that popular characters currently under copyright are unlikely to ever enter the public domain: "[Corporations] have enough control and enough money that they'll change the laws. And they've already done it. I know the power of these entities. I've worked with them, and I don't see it happening."[80] As shown by the prior example of Simon and Kirby's Captain America, changes in statutes are not necessarily the only means for publishers and other corporations to exercise their control of popular creative works subject to copyright.[81]

It is possible to examine changes in copyright legislation over the last several decades and find clear lobbying efforts to retroactively extend copyright terms for existing works and otherwise expand protections granted by intellectual property regimes. Sometimes, there even appears to be a certain amount of quid pro quo between lobbyists and senators who support such changes. Senator Patrick Leahy, who once wrote about the necessity of the United States acceding to the Berne Convention as a means to "improve its trade balance" vis-à-vis the economic exploitation of copyrightable materials,[82] has championed copyright expansion for decades. In return, corporations that

[80] Interview with MH, November 4, 2017.
[81] *See supra* notes 26-27 and accompanying text.
[82] Patrick Leahy, "Time for the United States to Join the Berne Copyright Convention,"

benefit from such expansion, such as Time Warner, reward Leahy with participation in the creation of new fixed creative works: to date, Leahy has appeared in more feature films starring *Batman* than any other actor, including any who have played the role of Batman.[83] Leahy earns royalties from his appearances, all of which are donated to the Kellogg-Hubbard public library in Montpelier.[84] Time Warner, the corporation that owns the Batman trademark and copyrights on all legitimately published works featuring the character, has also donated more to the Democratic Senator from Vermont than to any other single politician.[85]

These facts suggest how entrenched media firms are able to petition for the extension of copyright terms. The facts, however, do not on their own answer the question of why these firms continue to expend such effort to lobby for these extensions. The understanding of intellectual property as a property right to be protected against theft through infringement is a partial explanation. This misunderstanding of the proper role of copyright could in turn be used to justify holding creative works under exclusive proprietary control in perpetuity. Regardless of the beliefs of those who lobby for the laws and the legislators who draft them, unlimited copyright term extensions mean that fewer and fewer creative works will continue to reliably enter the public domain. As noted by one publisher interviewed for this dissertation, this is further complicated by

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Journal of Law and Technology 3 (1988): 177-186.

[83] Kevin Collier, "Senator who Wrote Pipa Called Out for Batman Cameos," *The Daily Dot*, last modified December 11, 2015, https://www.dailydot.com/layer8/patrick-leahy-pipa-dark-knight-cameo/.

[84] Paul Heintz, "Holy Cash, Batman!" *Seven Days*, July 11, 2012, accessed August 18, 2018, https://www.sevendaysvt.com/vermont/holy-cash-batman/Content?oid=2184373.

[85] "Time Warner: All Recipients," *Open Secrets*, accessed March 31, 2018. https://www.opensecrets.org/orgs/recips.php?id=D000000094&type=P&state=&sort=A&cycle=2010.

organizations that attempt to falsely claim ownership of public domain works and characters through abuse of related intellectual property laws such as trademark.[86] However, if intellectual property as a concept was more broadly understood by all involved parties as a grant of temporary exclusivity for copying rather than an underlying property right, such false claims would be minimized as creative works would be more often presumed as public goods rather than private chattel.

Corporations also lobby for the extension of copyright terms, even for copyrights in less valuable works, because the public domain serves as another source of competition. Just as works protected by copyright compete with each other in the market, works in the public domain compete with those under copyright, and public domain works possess the advantage of lower costs to access. The public domain also has no commercial interests of its own. Since commercial and noncommercial material now primarily share the common delivery system that is the Internet, a strong public domain also has a distinct advantage over copyrighted content that requires additional permissions to access, distribute, and transform works. For that reason, many corporate owners of valuable copyrights would prefer that no other intellectual works ever enter the public domain, and for close to two decades, this has been the case.[87] According to Lawrence Lessig, "A good Republican might say, here government regulation is simply getting in the way of innovation and creativity. And...a good Democrat might say, here

[86] *See supra* note 118, Chapter 4, and accompanying text.
[87] This is due to the Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827, (amending 17 U.S.C. § 302 to extend existing copyright terms for an additional twenty years). The passage of this law means that most creative works published since 1923 remain under copyright protection, although works from that year are anticipated to enter the public domain in 2019.

the government is blocking access and the spread of knowledge for no good reason,"[88] emphasizing the political failings of either party on their own ideological grounds.

The political failings of either party with regard to copyright, in the opinion of this researcher, can be traced to the underlying and false assumption that intellectual property is property, and so must be protected as such. Fortunately, if the public can become better informed on the nature of copyright and intellectual property, it is possible for the related laws to be adjusted and refined so as to better champion the progress of all the arts, no matter the idiosyncratic nature of their perceived value among disparate audiences. Recommendations to accomplish this goal, then, is the subject matter of the final section of this chapter and of this dissertation.

A Possible Future of Copyright

This researcher's conclusion that intellectual property is not property prioritizes the role of the public domain over the temporary grants of copyright provided to authors of new fixed works. Despite the inconvenience to individuals or parties who possess the monopolies that are valuable copyrights, a free market for creative and intellectual works should be the default setting for the iterative process of defining, distributing, and refining the culture related to those works. In order to continue to "promote the progress of science and the useful arts,"[89] as the Constitution permits, those monopolies should be granted to authors of new works. However, copyright's privileges should be temporary and not subject to automatic unlimited extension.

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[88] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (New York: Penguin, 2006), 177.
[89] U.S. Const. art. I, § 8. cl. 8.

This researcher further argues that copyright protection length should be unalterably established at the time a work is created, and not subject to post hoc extensions. If a work produced and published in 1960 was initially subject to a maximum 56-year term of copyright, then the public has every right to expect that work to reliably enter the public domain in 2017. As the source of statutory protections on copyright, the government must also be the source of reliable information on what works have entered the public domain after copyright terms expire. This is in line with the founders' intentions for copyright,[90] and is the most effective way to encourage public benefit from the dissemination of intellectual and creative expression, which is the primary purpose of such monopolies.

The form and character of such public benefit may not be immediately obvious. Clear quality of life improvements accompany advances in intellectual property subject to patent law, such as medicines and other life-saving technologies, so that in those situations the benefit to the public is evident and monopoly terms thus do not exceed 20 years. On the other hand, there are no clear direct effects towards the public – either of benefit or of harm – that accompany extending copyright terms for fictional creative works. However, it is possible that what some individuals position as modern problems related to artifacts of popular culture would be ameliorated by shorter copyright terms and a greater cultural emphasis on the public domain as final destination for fixed creative works.

To pick one prominent example, the space opera adventure series *Star Wars* has enjoyed a lengthy term of fairly sustained popularity since the initial film's release in

[90] *See supra* notes 39-43, Chapter 2, and accompanying text.

1977. In 2015, *Fortune* estimated the total value of the franchise at around $42 billion, greater than the annual gross domestic product of some small nations.[91] However, one criticism of the *Star Wars* franchise that has become more prominent in recent years is the lack of representation for individuals with different sexual, racial, and ethnic backgrounds than the primarily heterosexual, Caucasian, male cast of the films. Despite the numerous repetitions of this argument for greater representation for minority groups,[92] none frame the issue as a result of the exclusive controlling interest of Disney that is enabled by copyright. Indeed, were the copyright in *Star Wars* to expire, any individuals or groups would be free to develop their own derivative or transformative interpretations of the work, and could include any amount of diverse elements that they so desire.[93] This freedom to refine and reinterpret a fixed creative work is the natural state of any mediated expression, and copyright remains a temporary suspension of that natural state for the purposes of incentivizing initial publication.

Whatever the hypothetical results of limited copyright terms might be, it is clear to this researcher that current norms of copyright provide excessive reward through monopolies, such as terms of exclusivity that can extend long past the life of those with any genuine moral claim to paternity as the author of a given creative work. If that trend

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[91] Jonathan Chew, "Star Wars Worth More Than Harry Potter and James Bond, Combined," *Fortune*, December 24, 2015, accessed July 4, 2018, http://fortune.com/2015/12/24/star-wars-value-worth/.

[92] Google offers more than 22,000 results for the search "representation in Star Wars," with headlines including "The Quest for Queer Representation in Star Wars," "Why Star Wars' Increased Female Representation is Important," and "Do Minorities Exist in Star Wars?"

[93] Coincidentally, had Star Wars been subject to the maximum 28 years of copyright protection granted by the initial American federal statute of 1790, the first film in that series would have entered the public domain in 2005. This was also the year that series creator George Lucas released what would ultimately be his final film contribution to the series.

continues, private control will totally eclipse social benefit, and limited monopolies will exist as absolute monopolies. Enabling such complete proprietary control of interminable copyrights to private ownership undermines the stated purpose of all copyright legislation – to promote the continued development of science and art for the benefit of society as a whole – and diminishes the public's ability to contribute to aspects of culture they find to be personally meaningful. Granted, while there is benefit in incentivizing authors with temporary economic monopolies, the words of John Milton may best express the ultimate danger of locking down the marketplace of ideas: "Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes, and standards. We must not think to make a staple commodity of all the knowledge in the Land, to mark and license it like our broad cloth, and our woolpacks."[94] Instead, among this dissertation's conclusions is that it is in the best interests of society, economically and intellectually, to implement any new copyright legislation with the same foundational sense of purpose that was intended by the framers of the Constitution. In that way, individuals may be rewarded for their intellectual efforts, but not interminably, and not at the expense of the public's ability to further develop culture through the use of published creative works. If, indeed, copyright is to be positioned as a natural right in the same sense that freedom of speech is a natural right, then it must be a universal right for all to make copies, and for the relevant statutes to make only minor and temporary limitations on that right.

This is not to say that individuals have no moral or natural claim to the creative labor they enact. This researcher is not inured to the moral claims of artists, especially the

[94] John Milton, "The New Inquisition," from the *Areopagitica*, collected in *English Prose Vol. II. Sixteenth Century to the Restoration*. Henry Craik, ed. (1916) Retrieved from http://www.bartleby.com/209/417.html on June 15, 2018.

claims that artists make on behalf of themselves. If an artist, for example, directly requests that another individual not use a character he or she created in a new derivative work – either for reasons of preventing confusion[95] or limiting competitive interpretations[96] – this request certainly has a stronger moral imperative than a third party doing the same thing for a character whose original creator passed on decades ago. To some artists, the extensive copyright terms that allow the existence of the latter category might even serve as evidence for "copyright cartels,"[97] organizations that continue to petition for greater terms of exclusivity absent a moral justification for such. Ultimately, if copyright is going to be perceived – even illogically – as a moral or natural right, it is still necessary for an individual to claim that right, but not a third party who is disengaged from the creative labor that initially fixed a work. The desire to more fully understand and appreciate those moral claims at the level of the individual was at the heart of this research, and is the reason interviews were conducted with creators who can best express examples of those claims, including writers, editors, graphic sequential and illustrative artists, among others.

In turn, it is the hope of this researcher that those same creative individuals, even as they are incentivized to share their original works with the public, understand that the act of publication must necessarily disenfranchise them in some way from the ultimate control of such works. Perhaps more importantly, the publishers and corporations that often initially bring those works to market must understand that their own control of those works and the derivative interpretations of such is also limited. No creative work –

[95] *See supra* note 29, Chapter 4, and accompanying text.
[96] *See supra* note 32, Chapter 4, and accompanying text.
[97] *See supra* note 97, Chapter 4, and accompanying text.

or semiotic sign system – is incorruptible, everlasting, or unchanging from its present or original form, even as a result of the laws of man. The greatest of myths may endure and inspire, but no individual can truly own them, and no singular voice can determine the stories that will contribute to a better society. Rather, a commitment to the protection of the natural rights of individuals to freely express themselves – even when such expressions are unoriginal or derivative – is the greatest guarantee of the iterative approach of a finer world.

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U.S. Copyright Act, 17 U.S.C. §§ 101-810.

Computer Fraud and Abuse Act of 1986, Pub. L. No. 99-474, (amending 18 U.S.C. § 1030).

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APPENDIX A

CONSENT FORM

The Impact of Copyright Law on Artist Practice

I am a graduate student under the direction of Professor Joseph Russomanno in the Walter Cronkite School of Journalism and Mass Communication at Arizona State University. I am conducting a research study to analyze the impact of copyright law and norms on artists' practices.

I am inviting your participation, which will involve a 20-45 minute interview on this subject matter and your professional assessment of it. You have the right not to answer any question, and to stop participation at any time.

Your participation in this study is voluntary. If you choose not to participate or to withdraw from the study at any time, there will be no penalty.

There are no foreseeable risks or discomforts to your participation. Although there is no personal financial incentive for participation, benefits of your participation include the potential contribution to scholarly knowledge on this subject matter.

The results of this study may be used in reports, presentations, or publications. Your name, or identifying demographic characteristics may be used in connection with quotes you provide to this researcher. Otherwise, all data collected will remain confidential to the extent that only the primary researcher has access to data maintained on secure ASU cloud storage.

I would like to audio record or video record this interview. The interview will not be recorded without your permission. Please let me know if you do not want the interview to be recorded; you also can change your mind after the interview starts, just let me know.

If you have any questions concerning the research study, please contact the research team at: (Evan Billingsley, ebbillin@asu.edu). If you have any questions about your rights as a subject/participant in this research, or if you feel you have been placed at risk, you can contact the Chair of the Human Subjects Institutional Review Board, through the ASU Office of Research Integrity and Assurance, at (480) 965-6788. Please let me know if you wish to be part of the study.

By signing below you are agreeing to be part of the study.

Name:

Signature: Date:

APPENDIX B

INTERVIEW QUESTIONS

- IQ1. What incentives currently exist for you as an artist or author that would not exist in the absence of formal copyright law?
- IQ2. How would your practice be changed by the absence of formal copyright law?
- IQ3. In what ways may a derivative work be said to be an infringement of another's copyright, and how would those ways differ, legally and culturally, with the absence of formal copyright law?