

From Temporary Incentive to Perpetual Entitlement: Historical Perspective on the Evolving Nature of Copyright in America

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The original purpose of copyright legislation in America was to grant a temporary economic monopoly to an author of a creative work. This monopoly is meant to incentivize authors to contribute to the public good with works that promote progress in science and art. However, increases in the scope and duration of copyright terms have led to a situation where copyright owners are automatically granted overly broad protections and controls of creative works. At the same time, advances in technology have provided the public with the potential for near-limitless access to information. This creates a conflict between proprietary interest in creative works versus the public's right and ability to access same. Efforts to balance these competing interests must consider the history and changing role of copyright in America. This article employs an historical methodology, examining the numerous American copyright statutes and court decisions over the last several hundred years, to argue that while there is benefit in incentivizing authors with temporary economic monopolies, it is in the best interests of society, economically and intellectually, to implement any new copyright legislation with the same integrity and sense of purpose that was intended by the framers of the Constitution. If such measures of sound policy are pursued, then individuals may be rewarded for their intellectual efforts, but not interminably, and not at the expense of the public's ability to educate itself.

The First Amendment of the United States Constitution guarantees that Congress shall pass no law abridging the freedom of speech. Unfortunately, American laws regarding copyright have expanded the scope, duration, and control of copyright so as to endanger freedoms of political and creative expression through the increasingly broad legal interpretations of what constitutes a derivative work. Copyright, as defined by Howard Abrams in his article "The Historic Foundation of Copyright Law," is "the exclusive right to manufacture, distribute, and sell copies of the work in question."¹ That definition, as well as the language of early American copyright laws, makes clear that copyright is meant to limit the actions of publishers. However, recent changes in the scope of copyright, as well as advances in technology, have allowed almost any individual to act as a publisher online of works that are intended to be transformative, but are often found by the courts to be derivative and

1 Howard B. Abrams, "The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright," *Wayne Law Review* 29 (1983): 1119-1191.

in breach of statutory copyright protections. This is also exacerbated by two competing legal perceptions on copyright. One perception views the public's interest as paramount, and treats copyright as a monopoly granted for a limited time to an author. This limited time was originally 14 years, with an option to renew a copyright term for an additional 14 years. The other perception is copyright as an essential natural property right, with the act of creation granting the author protection by excluding others from exploiting his property. This perception has led to copyright terms that can now last up to 95 years, and is at direct odds with the intentions of the Framers of the Constitution.

The intentions of the Framers should be taken into account when considering contemporary legal interpretations for the Constitution. As Robert Bork states in his book *The Tempting of America*, the only valid way to interpret the Constitution is through those intentions, from which judges should seek “enlightenment from the structure of the document and the government it created.”² Based on the language present in the first article of the United States Constitution, which states that the primary objective of copyright is “to promote the Progress of Science and the useful Arts,”³ it seems clear the intention of the founding fathers, particularly James Madison of Virginia, in drafting a copyright clause, was to simultaneously champion the theory of public benefit from intellectual works and to discourage monopolies. Again, those monopolies discouraged often take the form of publishers, but the point is confounded when any modern individual has all the technological power of an 18th century publisher in their own home. The primary goals behind copyright legislation were to protect the rights of authors as well as financially incentivize and reward intellectual expression, so that a limited monopoly was in effect granted to authors for a limited time.

The copyright clause in the United States Constitution was a near copy of the language of Britain's Statute of Anne. The stated purpose for the clause in the Constitution itself makes it clear that the public good is the primary impetus for

2 Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Free Press, 1990): 165

3 U.S. CONST, art. I, § 8, cl. 8.

copyright legislation, but the founders did not necessarily believe that such a goal was incompatible with incentives made for authors. As James Madison explains in *The Federalist Papers*. “The Public good fully coincides...with the claims of individuals.”⁴ Thomas Jefferson also made a similar point in a letter from 1813, in which he stated, “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.”⁵

Many authors have since argued that if the government wants to serve the public good in learning and improving on the past, copyright, if it existed at all, should be brief and narrow, encouraging even geniuses to develop newer work after such a term expires. Further, an argument for natural rights and creative control is moot if any copying of the work in question does not impede the creator’s own use of that work. Even judicial opinions have historically favored public good over author’s rights. “The copyright law ... makes reward to the owner a secondary consideration.”⁶

Copyright is frequently discussed in the extant literature as it relates to the competing notions of incentives and access. In his article “Reexamining Copyright’s Incentives-Access Paradigm,” Glynn Lunney 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.⁷ Lunney and others have argued in the literature concerning copyright legislation that such incentives and proprietary protections provided to authors since the original copyright statute in 1790 are unwarranted, and are at best “superficially attractive”⁸ in justifying the expansion of copyright.

Statutory copyright itself was born with the Statute of Anne in Great Britain, the first statute to provide copyright protections by the government instead of by private parties. Enacted by Parliament in 1710, its full title was “An Act for the

4 As quoted in Diane Leenheer Zimmerman, “The Statute of Anne and its Progeny: Variations Without a Theme,” *Houston Law Review*, 47 (2010): 965-1011, p. 987

5 Thomas Jefferson to Isaac McPherson, 13 Aug. 1813, in *The Founders’ Constitution* ed. by Philip B. Kurland and Ralph Lerner, 5 vols. (Chicago: University of Chicago Press, 1987) 3:42

6 *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)

7 Glynn S. Lunney Jr., “Reexamining Copyright’s Incentives-Access Paradigm,” *Vanderbilt Law Review* 49 (1996): 483-656.

8 *ibid.*, p. 655

Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasers [sic] of such Copies during the Times therein mentioned.” This was originally done because it was seen as important for government to offer some form of exclusive rights in expressive works. Otherwise, the argument goes, without any kind of financial incentive, the literary world would remain stagnant, as authors would fear that others, primarily publishers, would reap the benefits of their intellectual labor by freely copying literary works. As the preamble to the Statute of Anne asserted, “Printers Booksellers and other Person 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...”⁹ This is a tad hyperbolic, to be sure, but in an age before digital distribution, the high cost of printing, binding, and distributing led to a concentration of those capabilities in the hands of a few publishers. In Britain at the time of the Statute of Anne’s passing, royal entitlements also concentrated this power even more, so that in effect the Stationer’s Company held a monopoly on the book trade.

The Statute of Anne had the stated purpose of promoting learning, but was in actuality more a trade-regulation statute to break the monopoly of the Stationer’s Company for printing and selling books. Zimmerman notes, “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.”¹⁰ Such lengthy periods of control are exactly what ends up happening with American copyright legislation, although it takes several hundred years to get to that point.

Opinions about copyright in the American colonies during the latter half of the 18th century were heavily informed by an admiration for and jealousy of Britain’s literary heritage. The early patriotic view, as expressed by Bugbee, was that the

9 Great Britain, *Statutes at Large*, 8 Anne, c. 19 (1710)

10 Zimmerman (2010), p. 974

“dignity of the young republic required a crown of literary achievement.”¹¹ In trying to foster an environment for such literary achievement, then, early American intellectuals such as Thomas Paine argued for legislative action that would create stronger financial incentives for the creation and controlled distribution of intellectual works. In his *Letter to the Abbe Raynal*,¹² Paine stated that “The state of literature in America must one day become a subject of legislative consideration. Hitherto it hath been a disinterested volunteer in the service of the Revolution, and no man thought of profits; but when peace shall give time and opportunity for study, the country will deprive itself of the honour and service of letters, and the improvement of science, unless sufficient laws are made to prevent depredation on literary property.” And when such legislation was eventually passed, much of it was founded on the example set by British copyright law and the Statute of Anne in particular.

Other American citizens who were early champions for copyright included Andrew Law and Noah Webster, although these two gentlemen were not necessarily interested in securing copyright protection for their fellow man. Instead, both of these men sought private copyrights, and petitioned the Connecticut legislature for such. Law received a private copyright for a collection of psalmody in October, 1781, while Noah Webster specifically made request “for a law to secure to me the copy-right of my proposed book”¹³ on October 24, 1782. The proposed book was Webster’s Dictionary, titled *The Grammatical Institute of the English Language*, a work of such monumental undertaking that to deny it statutory protection would have bordered on cruel.

The petitions for private copyright eventually led to a general copyright statute in Connecticut, passed in January, 1783. This “Act for the Encouragement of Literature and Genius” in turn set a precedent that the other states eventually followed, again with help from the direct petition of Webster, who engaged in a long

11 B.W. Bugbee, *The Genesis of American Patent and Copyright Law*, (Washington, D.C.: Public Affairs Press, 1967): p. 104

12 Full title: *Letter to the Abbe Raynel, 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)*, collected in *Political Works of Thomas Paine (London, 1817)*

13 Bugbee (1967) p. 107

series of correspondence with James Madison throughout the years. In a letter dated July, 1784, Webster wrote to Madison with the request that Madison would consider adopting a copyright statute in Virginia. “The *Grammatical Institute of the English Language* is so much approved in the Northern States, that I wish to secure to myself the copyright in all.”¹⁴ He went on to write that the periods of statutory protection in states with a general copyright law ranged from 14 to 20 years, with some (like Connecticut), offering to renew statutory protection for an additional 14 years. He also noted the inherent reciprocity common to all these statutes: “[A]ll give the inhabitants of other States, the benefit of the laws, as soon as the State where the author is an inhabitant shall have passed a similar law.” But again, Webster’s notion to pass a general copyright law was secondary to his own personal interest: “[I]f the Legislature shall not think proper to pass a general Law; be pleased to present a petition in my name for a [particular] law securing to me & my heirs & assigns the exclusive right of publishing & vending the above mentioned works in the State of Virginia for the term of twenty years - or for such other term as the Legislature shall think proper.” It is possible that from this correspondence, Madison began to see the benefits of a general copyright statute in encouraging authors to create and publish intellectual works such as Webster’s book, for the Virginia Act was passed on October 17, 1785, with a statutory term of 21 years. This act also set penalties for the breach of copyright at double the value of copies reprinted without permission.

Eventually, each state had passed laws granting statutory protection with New York being the last on April 29, 1786. Several of these state statutes on copyright were passed in response to the Continental Congress’ resolution “recommending the several States to secure to the Authors or Publishers of New Books the Copyright of such Books.”¹⁵ Eight of these state statutes directly defined the purpose and reason for copyright. The purpose was to secure profits for the author, and the reason for that was to encourage authors to create new works that would encourage learning. If this is interpreted literally, then access to those works, provided that access did not infringe

14 Letter from Noah Webster to James Madison, Hartford, Connecticut (1784), Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

15 U.S. Copyright Office, *Copyright Laws of the United States of America 1783-1862*, 1 (1962)

on an author's ability to sell his own works, would be supremely important. But as Patterson states, the pragmatic reason was more simply to prevent piracy of printed works and provide order for the book trade.¹⁶ However, eventually the author's rights must give way to the paramount rights of society, so that any monopoly on copyright must be limited in term.

The states could have theoretically continued to grant the security of copyright on a case-by-case basis, as was done for Webster and Law. Instead, the path was set for a national law that would define the statutory copyright terms afforded to any man seeking them. As Madison stated in his *Federalist Papers*, "The states cannot separately make effectual provision for [copyright]." A national consensus would have to be met, and so it was as the Constitutional Convention in Philadelphia began in May, 1787. Its fifth written proposal was to protect the works of authors and inventors, and this was unanimously accepted. On August 18, 1787, two sets of proposals regarding intellectual property were introduced at the Convention to revise the Articles of Confederation. The first was from James Madison, with nine proposed Congressional powers and the other by Charles Pinckney of South Carolina, who proposed 11 Congressional powers. There is some speculation that Pinckney possibly copied Madison in some of his proposals. His own contributions centered on patents, specifically the creation of a Federal power to issue patents of invention.¹⁷ But it would be several more years before a Federal law was enacted regarding copyright, and the law passed separated the protections afforded to literary works versus inventive works.

On January 28, 1790, Aedanus Burke of South Carolina presented "a bill for securing the copy-right of books to authors and proprietors,"¹⁸ which is notable for separating legislation having to do with inventive property versus literary property. Several different forms of bills for both patent and copyright made the rounds of legislature before President Washington signed a bill into law on May 31, 1790,

16 Lyman Ray Patterson, *Copyright in Historical Perspective*, (Nashville: Vanderbilt University Press, 1968); p. 183

17 Bugbee (1967) p. 126

18 Bugbee (1967) p. 138

providing a legal basis for a Federal copyright system, with a 14 year statutory term and the option to renew for an additional 14 years. Although this Federal copyright act was a step beyond private copyrights, the statutory protections it afforded were not granted automatically, as they are today. Instead, the act of 1790 stated that an author seeking statutory protection for his work was to deposit a copy of it with the clerk of the district court where he lived, in addition to sending a second copy to the U.S. Secretary of State within six months. The law also removed limitations on the author's ability to set a market price for his work, which had been a standard part of copyright legislation previously, beginning with the Statute of Anne. On June 14, 1790, John Barry registered *The Philadelphia Spelling Book, arranged upon a plan entirely new*, with the District Court of Pennsylvania, making it the first book to receive statutory protection under the new law.

It is worth noting that while the second section of the Federal Copyright Act defined a potential infringement of a copyright as selling a work which infringed a copyright, this did not apply to foreign works, as section five explicitly permitted the piracy of such. "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."¹⁹ So Americans were free to copy and distribute the literary works of Britain and other nations without remunerating the authors. This makes clear the nationalistic tenor towards copyright at the time, and the patriotic interest in developing an American literary canon, but not necessarily a global literary canon.

In fact, a lack of official recognition for foreign copyrights existed for another century in America. According to historian James Barnes, the issue of international copyright was of little concern to America in the years following the Napoleonic wars, and most literature was imported from England.²⁰ But since this importation was

19 Library of Congress: 1 Stat. 124 (1790) Sec. 5 Copyright Act, New York. Primary Sources on Copyright (1450-1900), eds L. Bently & M. Kretschmer, www.copyrighthistory.org

20 James J. Barnes, *Authors, Publishers and Politicians: The Quest for an Anglo-American Copyright Agreement 1815-1854*, (Columbus: Ohio State University Press, 1974): p. 49

initially of physical books bought from English publishers, there was obviously less of an impetus to create any statutory protections for the intellectual works themselves. Manuscripts from England did begin to find their way into pirated published books in America, though, and a fervor started to grow for the creation of an Anglo-American copyright treaty.

However, American citizens seeking reform to copyright legislation in the 19th century still tended to be motivated by national, not international, interests. On February 3, 1831, “An Act to Amend the Several Acts Respecting Copyright” was signed, and it extended the term of copyright for American authors from 14 to 28 years with an option to renew for an additional 14. Also, if the author died, his widow or children could apply for the extension. Congressman Guilian C. Verplanck, who was considered a member of the American literati, was instrumental in the drafting and passage of this law. Another member of the House of Representatives, William W. Ellsworth, who also championed the term extensions present in the act, likely did so not entirely for patriotic reasons, but for familial ones. Ellsworth was married to the eldest daughter of Noah Webster, a man who had sought copyright protections for his spelling books since 1783, and continued to do so more than 50 years later. While waiting on the President’s signature of the passed bill, Webster wrote, “This law will add much to the value of my [literary] property,”²¹ demonstrating the source of his own, chiefly financial, interest in statutory copyright protection.

Court decisions at the time also solidified the treatment of copyright as a statutory protection. Specifically, the landmark case of *Wheaton v. Peters*²² firmly established the principle of copyright as a statute. The origin of the case was a dispute between two men, Richard Peters and Henry Wheaton, over the right to publish the decisions of the U.S. Supreme Court. Peters succeeded Wheaton as reporter for the United States Supreme Court in June 1828. He planned to publish, or more accurately re-publish, court decisions that were reported by his predecessors, including Wheaton. Wheaton and his publisher, Robert Donaldson, filed a bill in the

21 Barnes (1974) p. 51

22 *Wheaton v. Peters* 33 U.S. (8 Pet.) 591 (1834)

Pennsylvania Circuit Court against Peters and his publisher, John Griggs, seeking an injunction. Judge Joseph Hopkinson delivered the opinion in circuit court that because Wheaton had not secured statutory protection for his previous publishing of court decisions, he was not entitled to government protection now.

The case 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 opinion of the majority, stated, “It may be proper to remark, that the court are 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.”²³ The majority held that there was no common law copyright at the federal level, nor the state level (Pennsylvania), nor even in England. The second main point of the case was that requirements for securing copyright under the Copyright Act were mandatory and must be strictly followed to ensure statutory protection.

Dissenting opinions in the case stressed that an author should have natural rights that automatically protect his property as a matter of justice and equality. 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 ultimately defined as a statutory grant of a monopoly for the benefit of the author, and not a product of common law. This case set the assumptions for copyright in America as favoring the public domain and the public’s right to access over the author’s interests, although those were not excluded entirely. What authors were primarily protected from before that, and what was misunderstood as common law, was the unauthorized publication of an unpublished manuscript, which is more a right to privacy than a copyright. The court also referred directly to the decision in England’s House of Lords in 1774 as the ruling precedent, and declared that by the statute of 1790, Congress did not affirm an existing right, but created a right.

23 (33 U.S. (8 Pet.) 591, 668) However, marginal notes, abstracts, index notes, and other intellectual works created by the court reporter or others could indeed be copyrighted.

The Supreme Court's decision in *Wheaton v. Peters* made it difficult for those arguing for an international copyright agreement, since the Federal government was unlikely to grant statutory protection to foreigners, and thus any previously published foreign manuscripts were fair game for American publishers. Still, in the fall of 1837, a select committee of six in the Senate was formed by Senator Henry Clay of Kentucky to discuss the issue of securing copyrights for foreign works. Clay wanted an international copyright agreement, but President James Buchanan was against it, with a stated reason that would surely have made Webster bristle: "But to live in fame was as great a stimulus to authors as pecuniary gain; and the question ought to be considered, whether they [British authors] would not lose as much of fame by the measure asked for, as they would gain in money."²⁴ The implication was clear: American authors should be financially incentivized with statutory protection, but foreigners should be happy just to be known by the American public.

Other prominent opponents of international copyright, such as author P.H. Nicklin, made the argument that British books were more expensive than American pirate versions, and thus an unfair financial burden on American citizens.²⁵ In his book "Remarks on Literary Property," Nicklin wrote that "...an immense amount of capital is employed in publishing books, 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."²⁶ Nicklin's knowledge of publishing came from his long-term business relationship with the firm of Carey & Lea, a Philadelphia publisher that thrived from the reproduction of English works. Nicklin's rhetoric may have emphasized the public good by keeping prices low, but like Webster, his own financial self-interest played a role in his position on international copyright.

24 *Register of Debates in Congress* 24th Cong. 2nd Sess., XIII (2 February 1837), pp. 670-1

25 The American book trade, like other businesses, also suffered as a result of a national depression from 1837-1843.

26 P.H. Nicklin, "Remarks on Literary Property," (1837)

Senator Clay introduced a copyright bill that would include an Anglo-American copyright agreement three times between 1838 and 1842, but each was unsuccessful in securing congressional support. By 1842, it was clear that an international copyright agreement would not be passed any time soon, despite the efforts of authors like Charles Dickens, who toured America in 1842 in part to promote the cause. While some derided Dickens for being insensitive to the economic plight of Americans during the then-current depression, 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.”²⁷

The Copyright Act was revised again in 1870,²⁸ but its major change to existing law was that the Librarian of Congress was made the official copyright officer, and two copies were required to be filed with this person no later than ten days after publication in order to secure statutory copyright protection. This Copyright Act still allowed for the free publication of foreign works. This changed in 1891, thanks in part to efforts by the Authors' and Publishers' Copyright Leagues. Congress introduced a provisional statute to copyright law giving the protection of copyright to the works of foreign authors and artists. 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.”²⁹ Clearly, it took the threat of a negative economic impact abroad for American copyright holders to acquiesce to an Anglo-American copyright treaty.

More than 200 copyright bills had been introduced in Congress by 1904, prompting the Register of Copyrights to state, “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

27 Barnes (1974) p. 73

28 Act of July 8, 1870, c. 230, 16 Stat. 198

29 G.H. Putnam, *The Evolution of the Copyright Law*, (Gramercy Park, N.Y.: National Arts Club, 1909):4

directions are open to abuses.”³⁰ Unfortunately, this was not about to change anytime soon, and the copyright laws of the 20th century would prove to be even more misunderstood than those of the 18th and 19th centuries.

The Copyright Act of 1909³¹ established a term of twenty-eight years with a like renewal term, for a total fifty-six year term limit on copyright. This act also furthered the scope of the statutory protections and limited monopolies provided by law, with copyright holders granted the exclusive right to publish or re-publish, translate, adapt, or perform intellectual works. An earlier form of the bill included a common law 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,”³² but this was not enacted in the law itself. However, before publication, the author of a copyrightable work now explicitly received common law protection and could seek damages by civil action from any unauthorized publisher. In addition, the Copyright Act of 1909 allowed for advertising labels and merchandise tags to be copyrighted as well. All of these amendments to copyright law have encouraged the point of view that copyright is an entitlement or natural right, and not a privilege granted by the state. The view of copyright as a natural right of man has also led to cultural shifts that helped to change the legal definition of trademarks to include intellectual property rights. These shifts have traditionally aided publishers and corporations more than individual authors, which is at direct odds with the intentions of the Constitutional Framers in limiting monopolies.

The Copyright Act of 1909 still required affirmative notice on the part of the author to gain statutory protection, but this changed as the view of copyright as entitlement gained in popularity throughout the 20th century. Authors who publish today, under the 1976 act, enjoy automatic statutory protection, for a term of life plus 50 years. The Act also created a 75 year statutory term for anonymous works,

30 U.S. Copyright Office Bulletin No. 8, *Copyright in Congress 1789-1904*

31 Act of March 4, 1909, c. 320, 35 Stat. 1075, 17 U.S.C § 1 et. seq.

32 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): p.44

pseudonymous works, and works made for hire, so that an individual seeking to reproduce a creative work would have to prove that it was in the public domain, but potentially be unable to identify who owned the copyright. These changes to copyright had the unintended consequence of automatically providing statutory protection to authors who are not motivated by incentives. As Brad Greenberg points out in his comment on instant authorship³³, returning to a system where authors must opt-in to receive a copyright on works would unnecessarily hinder authors who are incentivized by the current regime. However, if an author chooses an option of copyleft, creative commons, or some other form of copyright opt-out, there is no hindrance to them doing so, financial or otherwise. And there is potential for abuse in either an opt-in or opt-out copyright system, at least in terms of the continually shifting balance between legislation and expectation of statutory protections. As authors are further incentivized, they “respond to continually increasing expectations, which Congress supports through periodic expansion of copyright.”³⁴

And that periodic expansion continued with the Sonny Bono Copyright Term Extension Act of 1998, through which Congress lengthened statutory protection to a term of life of the author plus 70 years.³⁵ Publishers and corporations that solicit works made for hire gained even greater statutory protection of intellectual property, with terms lasting as long as 95 years. The combination of longer terms, automatic statutory protection, and broader rights of monopolistic exploitation has thus led to an “evolution of copyright from little more than a prohibition on literal duplication to broader and more sophisticated concepts of intellectual plagiarism.”³⁶ This is most evident in the last century in how the terms of art used in defining the role of copyright in America have changed. Fair use, a concept which is derived from the idea of copying a significant portion of the original work for non-commercial use, is

33 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): 1028-1074.

34 *ibid.*, p. 1072

35 Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827,

□2827 (amending 17 U.S.C. § 302)

36 Abrams (1983), p.1133

often inexorably linked by copyright law to the concepts of plagiarism and piracy. Leaving aside for a moment ethical concerns about plagiarism, strictly speaking, protecting against plagiarism is a protection of ideas themselves, and not protection of a fixed creative work.

But who is protected by copyright laws that guard against plagiarism? No common law recognizes the creative interest of the author, and statutory protection is only granted to the copyright holder. So when a publisher is the owner of a copyright, authors do not receive creative interest protections, and do not possess any legal rights to determine how their ideas are used. An author's economic and creative interests are thus stymied. Despite the stated goals of the founding fathers in drafting American copyright laws for the promotion of learning, copyright itself is basically no more than a trade-regulation device designed to protect against competing economic exploitation of intellectual property. As Patterson states, one of the greatest ironies of copyright law is that "in a society where there was no freedom of ideas, copyright protected only against piracy; in a society where there is freedom of ideas, copyright protects against plagiarism."³⁷ And legal protection of ideas, or intellectual property, unnecessarily restricts not just access to those ideas, but also the freedom of expression that exists as a principle of liberty in America.

This threat to freedom for expression answers the question of why changes in copyright law is an issue relevant to communication scholars. As Stephen A. Smith states in "The Import of Three Constitutional Provisions," the Constitutional Framers were committed to the discovery and production of new ideas, and intended a wide diffusion of ideas and knowledge.³⁸ Madison even wrote 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 sum."³⁹ And this proposed governmental protocol to extinguish a copyright is contrasted by the "crown copyright" of Britain and its commonwealth nations.

37 Patterson (1968) p. 225

38 Stephen A. Smith, "Promoting Political Expression: The Import of Three Constitutional Provisions," *Free Speech Yearbook*, 27 (1989): 1-32.

39 As quoted in Smith (1989): p. 24

Crown copyright, a result of legislation regarding copyright in Britain in 1911, 1956, and 1988, grants the British government a perpetual common law copyright for works created or published under the direct supervision of the Crown.⁴⁰ Such a system allows for the government to potentially censor and control perceived seditious ideas. However, in America, with the decision of *Wheaton v. Peters* that prevented a copyright from being attached to the opinions of the court, the function of copyright was shown not as an instrument of control, but for the spread of knowledge and ideas, which is anathema to the near-perpetual statutory protections granted to publishers in this country today.

Another 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 Breyer remarked in a dissenting opinion during the case of *Eldred v. Ashcroft*, close to 98 percent of copyrights are worthless after about half a century⁴¹, so to continue to grant statutory protection to those works is an unnecessary impediment to public access. And an impediment to public access is an impediment to learning, the most clearly stated purpose of all American copyright legislation for more than 200 years.

Unfortunately, it is difficult to prove that the public's need to access works is endangered by overly-broad copyright protections. When Congress is lobbied by corporations seeking ever-greater terms of copyright, this does not appear to overtly interfere with the production of new works or create undue monopolization.⁴² Therefore, each new piece of copyright legislation continues to expand the term of copyright, as well as ensuring a system where an author is legally entitled to the full value associated with an authored work. However, public access is not the only risk associated with broad copyright terms. There is also the possibility that broad copyright terms do not "promote the progress of science and the useful arts."

40 Ted Tjaden, "Chapter 4: The Impact of Crown Copyright on Access to Law-Related Information" in *Access to Law-Related Information in Canada in the Digital Age*. (University of Toronto, 2005)

41 Greenberg (2012), p. 1072

42 Lunney (1996), p. 655

Lunney argues that the variety of new works of authorship that comes as a result of broad copyright protections is not inherently valuable to society. From a legal and economic perspective, there must be justification for devoting resources towards creating and enforcing statutory copyright protections, since society does not benefit from the production of additional works created because of an inability to access existing works that would serve the same purpose. Under the current system of copyright, those who unlawfully access or distribute copyrighted works are infringing the statutory copyright of an author and are subject to fine or imprisonment.

Granting a right to access and use materials that would otherwise result in infringing an author's copyright is the ostensible purpose of the fair use doctrine. But William Fisher, in his article "Reconstructing the Fair Use Doctrine," states that there is an incoherence in how fair use is used in legal settings.⁴³ Similar to Lunney, Fisher argues that copyright's present legal form is economically inefficient, and that the courts can best improve that efficiency through a revised litmus test for whether a use of a copyrighted work is considered fair or not. The crux of Fisher's litmus test is that a producer of a work which has been infringed must prove "substantial harm"⁴⁴ resulting from the infringement. However, this substantial harm is too broadly defined, so that an application of fair use in legal doctrine would remain unpredictable even with Fisher's suggested changes.

The continuing role of copyright in America is more predictable, at least in general terms. It is unlikely that legislation will be passed that curtails existing statutory protections or decreases copyright terms. If anything, history shows that these elements will only increase, with the resulting feedback loop creating a greater sense of copyright as entitlement or a natural right, rather than a statutory right with the original intention of temporarily incentivizing authors with the right to exclusively copy their works.

Another factor that must be considered is the continued advance of technology, which will continue to undermine copyright's promise of exclusivity in

43 William Fisher III, "Reconstructing the Fair Use Doctrine," *Harvard Law Review* 101, no. 8 (1988): 1661-1795.

44 *ibid.*, p. 1782

distribution. Writing about copyright in 1962, Lyman Ray Patterson wrote, “Technology outpaced the law.”⁴⁵ That statement is even more relevant in today’s world, where instant authorship and digital copying and distribution of almost any possible intellectual expression is the norm.

There is no doubt that the Internet provides an efficient platform for the instantaneous worldwide publication of an intellectual work. As the architecture of the Internet exists today, there is no distinction made between whether information that is shared is subject to copyright or not. But that may not always be the case, and future research should consider what the implications are for changes in the law that will impede the Internet’s ability to share all information without prejudice, or to impose stricter punishments for those who promote the free flow of information without regard to copyright. As Lawrence Lessig states, “The law’s role is less and less to support creativity, and more and more to protect certain industries against competition.”⁴⁶ But protecting against competition creates the very problem that copyright was originally meant to eliminate: the danger of a permanent monopoly on information by limited proprietary interests.

The ability to instantaneously distribute information or ideas without restricting access to the same at their point of origin is one of the great gifts of technology and the Internet in particular. But the notion behind that technology is not itself new. In a letter to Isaac McPherson from 1813, Thomas Jefferson stated, “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.”⁴⁷ Short of competing for profits with the original author of a fixed intellectual work, then, no law on copyright should infringe on an individual’s ability to use or access a copyrighted work in any way they may see fit. This was the intention of the Constitutional Framers in drafting a copyright clause, and it is what should continue

45 Patterson (1968), p. 214.

46 Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, (New York, Penguin: 2006): p. 17

47 Thomas Jefferson, vol. 6 (Andrew A. Lipscomb and Albert Ellery Bergh, eds., 1903), 330, 333-34

to motivate legislators and the courts in determining what is the appropriate scope, duration, and control of copyrights in America today.