

A History of Copyright in the United States

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Chapter 1: The Nature of the Study

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 everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move and have our physical being, incapable of confinement or exclusive appropriation.¹

US President Thomas Jefferson
13 August 1813

Morality is sufficient ground for putting a stop to the theft of intellectual property, but it isn't the only reason... Foreign sales and exports of intellectual property are bigger than automobiles, aircraft and other manufacturing. U.S. copyright industries achieved foreign sales and exports of more than \$80 billion last year. The same year, these industries accounted for nearly 5 percent of GDP adding more than \$450 Billion Dollars to our economy. Intellectual property is a foundation of the U.S. economy. And copyright law is THE foundation for intellectual property . . . In the public's mind, peer-to-peer technology is all about stealing music and increasingly stealing movies... Right now we have lawsuits and cease and desist orders; we have no security, not a single legitimate business offering for music, no security, no sound quality or creative control over the look and feel of the files and a large segment of the development and user community who never want to see these networks be required to have licenses to trade copyrighted works. Frankly, that benefits no one, not even the users who think they are getting a free ride... That doesn't mean we're stopping our legal efforts. We have no choice but to continue them as long as copyrights are being infringed.²

RIAA President Hillary Rosen
6 November 2001

The basis for copyright in the United States can be found in Article I, Section 8 of the Constitution which states 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.” While this statement may have seemed simple enough for the Founding Fathers, the history of copyright law is showing that the American interpretation of what copyright is and what it should do has evolved. The various

expansions to the power of copyright in both terms of duration and scope have created some difficult legal questions: how long is a limited time? Should copyrights protect international works? Does granting of a copyright constitute the creation of “intellectual property?” Is infringement of a copyrighted work the same as theft?

At odds over copyright in America are corporations, authors, publishers and other creators of copyrighted material and the general public, the users of copyrighted material. The founding fathers incorporated the copyright clause into the Constitution with the hopes of striking a balance between these two competing interests. Madison wrote, “the public good fully coincides . . . with the claims of individuals,” when addressing the concerns over the copyright clause.³ Since that time, Congress and the courts have revisited the issue many times, and have seemingly moved towards protecting “the claims of individuals” over “the public good.” Recent examples of this include the Sonny Bono Copyright Term Extension Act of 1998, which adds another 20 years to the amount of time copyrighted works are protected, and the Digital Millennium Copyright Act (DMCA) that creates criminal penalties for reporting on scientific flaws in copyrighted materials. The stakes involved in this fundamental shift regarding the purpose of copyright have implications for both American business and American democracy.

Purpose of the Study

The purpose of this study is to investigate and analyze the development of copyright law in the United States. More specifically, this study will focus on both how and why copyright has deviated from its original purpose: to equally balance the interests of authors and the public good – with the public good being the ultimate decider of copyright’s limitations, as well as how both the Digital Millennium Copyright Act and the Copyright Term Extension Act of 1998 are contradictory to what copyright in the United States was originally meant to do. The research hypothesis presented is that modern copyright law is contradictory to the visions both Jefferson and Madison had concerning the purpose and function of copyright in an open, democratic society.

Scope of the Study

The scope of this study will extend across five centuries, from the mid 1500’s to the modern day. More precisely, this study will examine four distinct time periods: from the mid 1500’s to the early 1700’s in England, when the first modern copyright laws were developed; post-revolutionary America, ranging from the mid 1780’s to 1800, the time period when American

ideals of liberty laid the foundation for copyright in this country; late nineteenth and early twentieth century America, when technological advances brought about drastic changes in copyright law and its interpretation; and modern day America, from the 1970's onward, when copyright law moved away from the balance of promoting the public interest.

Seemingly, these four time periods have little to do with each other. However, they represent a chain of events that has brought copyright to where it stands today. During each of these time periods, a series of events and ideas have prevailed resulting in a radical change of how copyright was viewed. When the scope of this study is viewed in its entirety, it becomes clear how this series of events has led us to our modern interpretation of copyright, and how this interpretation stands in glaring contrast to what copyright was originally intended to do in this country. In viewing the scope of the study as a whole, it is also significant to observe the purpose of American copyright today has striking similarities to the purpose that English copyright once served.

Structure of the Study

The first chapter of the study serves as an introduction to the subject matter, providing a framework for discussion. Chapter two will trace the historical roots of copyright through English law and examine its development in that nation. Since the framers of the US Constitution based American copyright on the English courts' interpretation it is essential that the English development of copyright be examined.

Chapter three will focus on the American development of copyright, its inclusion into the US Constitution, and the ideas of the men who were most responsible for copyright in this country: James Madison and Thomas Jefferson.

Chapter four follows the evolution of copyright law in the early twentieth century and how authors such as Mark Twain helped to shape copyright. Chapter four will also detail copyright's transformation into a property right.

Chapter five will examine modern copyright law, including the Copyright Term Extension Act and the DMCA, and see how these laws represent a fundamental shift in copyright philosophy. A critical examination of these laws and their implications for America will also be presented.

Chapter six will crystalize this study's findings and include comparisons of the original English copyright laws to modern day copyright laws in America, and how the two bodies of law

are now achieving similar effects. Conclusions will then be drawn as to whether or not copyright law has shifted too far from its original purpose and what implications this shift might have for democracy and liberty in America over the long term.

Importance of the Study

The compromise that became copyright in America created a delicate balance between promoting individual interests and protecting the rights of the public. When this balance begins to sway too far to one side or the other, America and the liberties of its people will ultimately suffer. Copyright was designed to give brilliant minds incentive to think and produce while at the same time allowing society to benefit from those actions. Too often, however, copyright law has shifted focus away from the societal benefits that copyright provides, focusing instead on the financial bottom line that it gives to creators of intellectual works.

With this study, I will examine the historical changes that have occurred to copyright law and clarify the nature of the premises in public argument regarding copyright law as it applies to business and societal good. By examining the changes to copyright, I hope to provide evidence that shifting the balance of copyright protection towards the creators of intellectual works is not in the best interest of the public, goes against Jefferson and Madison's intentions of copyright's purpose, and does not "promote the Progress of Science and useful Arts" as the Constitution requires. Moreover, I believe my study will show that tighter copyright restrictions are not only harmful to consumers, but will also have a long-term negative impact on producers and publishers of intellectual works as well. As organizations like the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA) push for tighter restrictions on the materials they produce, we as Americans can demand solid argumentation and reasoning for any proposed changes. We can demand to know why we should give up further rights when the software and entertainment industries were able to flourish under the laws even prior to the status quo. Should we choose not to make these demands, then we allow corporate and private interests to fully trump the public good; all at the expense of our liberty, our democracy, and – eventually – our pocketbooks. It is my intention for this study to make some contribution to a more fully informed and adequate discussion on the nature and history of copyright law in the United States by tracing its evolution from a tool for the promotion of democracy to a tool for the promotion corporate profits.

Communication Law Review

Chapter 2

From Caxton to the Courtroom: Copyright's Origins in England

Prior to the introduction of the printing press to England in 1476 by William Caxton, there is very little indication of copyright being in existence anywhere else in the world. Roman law stipulated that whoever possessed the parchment a text was printed upon was the owner of that text. This reflected the prevailing notions of tangible property ownership under Roman law. Since all texts of the time period were written or copied by hand, there was limited understanding as to how mass duplication would affect ownership rights.⁴

The introduction of the printing press to England resulted in numerous publishing shops being set up within a relatively short time period. Unfortunately for these early entrepreneurs, they quickly encountered a large glut in the market for books and texts. The excess supply was the result of the relatively large population of illiterates in England who had no need to buy books.⁵ Further, they had little desire to learn to read, as being illiterate was something in which many – including the King – could take pride.⁶ However, it was also during this time period that two other large-scale changes were occurring in Europe: the Renaissance and the Reformation. It wasn't long before they found their way across the Channel to England, and with them came a newfound significance concerning the importance for reading. The Renaissance brought with it the historic rebirth of the arts and sciences; the Reformation brought the idea that it was necessary to be able to read scripture in order to ensure salvation. Combined with the ability to mass-produce printed materials, England saw a dramatic rise in literacy throughout the sixteenth and seventeenth centuries.⁷

With the increases in literacy among the general populace, publishers were finally seeing a stronger demand for the works they were printing. Due to the requests of publishers and the strong censorship policies in Britain at the time, the Crown granted the Stationer's Company (comprised of London's leading publishers) a royal charter in 1556, giving them a monopoly on anything printed.⁸ The nature of the charter provided benefits to both publishers and the monarchy. For the publishers, it provided the benefit of a government-enforced monopoly. With the granting of a royal charter to publish a work, a particular stationer was all but ensured that they would be the only one publishing a particular work. With a charter, a stationer would be allowed to destroy any of the books it licensed which were found to have been published by someone else. The crown gained the benefit of ensuring that unfavorable works would not be

published. With the granting of the charter, it was necessary for publishers to stay in good favor with the crown, lest the crown revoke a publisher's rights to print. Thus, the crown was ensured a reliable means of censorship through the continued granting of this charter.⁹

Through the various Star Chamber censorship decrees of 1566, 1586 and 1637, the Stationer's charter was continued. Parliament's issuing of the Licensing Act of 1662, however, would mark the last of the major censorship acts. The political landscape in England was changing. The rise and fall of Oliver Cromwell had led many to question what the extent of tolerable censorship was.¹⁰ Additionally, popular resentment against monopolies had been growing steadily throughout the seventeenth century.¹¹ These changes in thought, coupled with the Whigs rise to power in Parliament after the Glorious Revolution in 1668, led to an unfriendly environment for the stationers. The stationers realized that they were quickly losing the battle to keep their monopoly in place, and stepped up their lobbying efforts to ensure the continued existence of the Licensing Act. Lord Camden described the lobbying efforts of the Stationers, saying "(Publishers) came up to Parliament in the form of petitioners, with tears in their eyes, hopeless and forlorn; they brought with them their wives and children to excite compassion, and induce Parliament to grant them statutory security."¹² Despite these efforts however, Parliament made the determination that the Licensing Act of 1662 was no longer proper, and allowed for its expiration. The Licensing Act of 1662, which was based on the Star Chamber Decree of 1637, was very comprehensive in nature, and required the stationer's copyright in order for someone else to publish works. Without this requirement embodied in a codified statute, there was no longer any law to prevent anyone with a printing press from publishing whatever they chose.¹³

With the expiration of the Licensing Act of 1662, problems with piracy began to emerge. Among the stationers themselves, there was little piracy. The members of the Stationer's Company still respected each other's "right of copy." Whenever a stationer wanted to publish a work, they would still enter it into the Stationer's Company registry book to ensure that no one else had already registered the right to publish the text just as they had done under the Licensing Act. Instead, piracy came from presses independent of the Stationer's Company. These rogue printers would wait for a work to be published and, if it became sufficiently successful, would recopy it and sell it for a lower price. Additionally, these independent publishers would publish works considered to be obscene, blasphemous, and seditious under the Licensing Act. However, with its expiration, there was no longer any real form of prior restraint. Any crime committed

through publishing such a work would be dealt with in the courts, rather than by the prior censorship of the crown.¹⁴

While the publication of potentially blasphemous or seditious works was of little interest to the Stationer's Company, the piracy of the works they published was. Knowing that they would not be able to sway Parliament to pass another Licensing Act, they decided to take a different approach. They appealed to authors' interests to regain their monopoly on publishing. Additionally, the lobbyists for the Stationers began to persuade Parliament that both the interests of authors and the public were hurt by the lack of price stability for books in the marketplace.¹⁵ This new line of argumentation persuaded Parliament sufficiently enough for them to pass the Statute of Anne in 1710. This new legislation was a radical departure from the old Licensing Act. For the first time, the rights of the author were explicitly recognized. The Statute gave the author the power of copyright for all new works, rather than the publisher. This essentially served as a means to encourage and create incentive for learning and writing new works.¹⁶ The Statute of Anne also ended the perpetual monopoly created by the old Licensing Act. Under the Statute, copyright would be granted to all new works for a period of fourteen years, renewable for another fourteen. After this twenty-eight year period expired, the work would go into the public domain, and anyone would be free to publish it without having to compensate the author. For works published prior to the passage of the Statute of Anne, the term of copyright was for a non-renewable twenty one years, after which time the work would go into the public domain.¹⁷ The Statute of Anne also required that authors register their claims of authorship to "protect the 'many Persons' who 'through Ignorance' might otherwise 'offend against this Act'."¹⁸ Authors registering under the statute also had to provide nine copies of their books for the libraries throughout Great Britain.¹⁹ In these ways, the Statute of Anne sought to balance the author's interests with the public good, while at the same time preventing a perpetual monopoly of copyright.

In the years following the enactment of the Statute of Anne, two court cases – each with entirely different outcomes – would determine the future of copyright by helping to define from where the power of copyright is derived: does it stem from legal statute or is it a right of an individual embodied within the common law? Interestingly, several publishers in England decided not to leave the matter to chance, and instead chose to stage a lawsuit. A bookseller named Tonson sued another named Collins for violating Tonson's copyright after the twenty-

eight year period had expired. It was agreed that Collins would essentially throw the case and decline to appeal, thus ruling the statutory limitations on the length of copyright embodied in the Statute of Anne void. However, the judge who was to hear the case – Lord Mansfield - heard about the collusion between the two men and dismissed the suit.²⁰

The first legitimate case about the term and origins of power for copyright came before the courts in 1767 in the case *Millar v. Taylor*. In this case, a publisher named Andrew Millar bought the rights to a work called *The Seasons* from a poet named James Thomson in 1729 and published it. After the twenty-eight year period for the copyright had passed and the work entered into the public domain, another publisher – Robert Taylor – began to print the work. Millar filed a suit against Taylor for violating his copyright. The case was heard before Lord Mansfield, who ruled in favor of Millar. In his opinion, Mansfield expressed the ideas of a natural law justification for copyright as property, essentially meaning that the author should have copyright perpetually. Thus, it seemed that the statutory limitations on copyright term posed by the Statute of Anne were not going to be upheld by the courts.²¹

In 1774, however, *The Seasons* reappeared in court again over the same issue in the case of *Donaldson v. Beckett*. Shortly after Millar won his case in 1767, he died and his estate sold the rights to *The Seasons* to a group of publishers which included Thomas Beckett. Realizing an opportunity to get the courts to rule on this case again and hopefully re-establish the copyright limitations created by the Statute of Anne, a Scottish publishing firm run by Alexander and John Donaldson published an unauthorized copy of *The Seasons*. Beckett sued and obtained an injunction against the Donaldsons. They appealed the ruling, and the case eventually ended up before the House of Lords, which ruled in favor of the Donaldsons. The House of Lords (being one of the bodies originally passing the Statute of Anne) made it abundantly clear that there was almost no basis in common law for a perpetual copyright and that, since it directly contradicted the Statute of Anne, the Statute of Anne and its limitations on the term of copyright would stand. This ruling not only helped to firmly establish the roots for a statutory limitation on copyright term, but also where the origins of the power to grant copyright reside. The ruling stated in unequivocal terms that copyright was not some kind of perpetual natural right that flows from the author's pen. Rather, it was a power granted by the state, and that its privilege should last for a limited time.²²

Communication Law Review

Chapter 3

A Necessary Evil: Copyright's Development in the United States

Until America asserted its independence from England in 1776, American copyright law was embodied in English law. However, due to the crudity of the conditions of the American colonies during the seventeenth century, there was very little literary activity. The Massachusetts Puritans held education in very high regard, which resulted in the first printing press being established near Boston in 1639.²³ In 1672, a “copyright statute” was passed in Massachusetts through the lobbying efforts of John Usher. After Usher commissioned Samuel Green to print a revised of *The General Laws and Liberties of the Massachusetts Colony* pursuant an order of the General Court at his own expense, he petitioned the General Court to grant him statutory security for his investment. The General Court responded by passing legislation granting publishers a monopoly on their work. Very similar to the Licensing Act, the statute seemed to be perpetual in its nature, but it did not require the works to be registered because the General Court was not concerned with the suppression of seditious works.²⁴ Despite Massachusetts’ introduction of printing to the New World, it was slow to catch on. It would be 26 years before the second press was established in the New World. By the end of the seventeenth century, there were only three presses operating throughout the Americas.²⁵ Most of the output of the presses in the seventeenth and early eighteenth century consisted of government documents and items such as advertisements, tickets and forms; materials very unlikely to be a source of contention of copyright.

After America won independence from England, it set up no national power for the control of copyrights under the Articles of Confederation, despite the efforts of individuals such as Thomas Paine and Noah Webster. In order to gain copyright protection for his works, Webster focused his efforts on the states beginning in 1782. Webster focused his first efforts on the legislatures of New York and New Jersey, but was unsuccessful in getting them to pass a copyright statute.²⁶ Webster then showed his book to Princeton theology professor Samuel Stanhope Smith, who was so impressed with his manuscript that he wrote a letter to the Connecticut legislature supporting Webster’s copyright legislation. With this backing, Webster returned to Connecticut in October of 1782 to meet with the legislature which was in session at the time. He petitioned the legislature “for a law to secure to me the copy-right of my proposed book,” but the legislature adjourned before they were able to consider it.²⁷ Webster again petitioned the legislature on

January 6, 1783 – this time directing his request to Representative John Canfield and other “literary gentlemen in that state.”²⁸ These efforts resulted in the Connecticut legislature passing a broad copyright statute on January 29, 1783. This law reflected the importance in securing authors’ rights to their works, while at the same time “do[ing] Honor to their Country, and Service to Mankind.”²⁹

Shortly after the enactment of the copyright law in Connecticut, Massachusetts and Maryland followed suit. On May 2, 1783, the Continental Congress passed a resolution “recommending the several States to secure to the Authors or Publishers of New Books the Copyright of such Books.” Following this resolution, all of the states – save Delaware – complied by passing copyright statutes of their own.³⁰ However, with all of the individual copyright statutes, there was a lack of uniformity of protection. The various statutes differed in terms of the length of copyright protection, what materials were to be protected, damages which could be received, and if an authors heirs would inherit the copyright upon the author’s death. Furthermore, in Delaware, which had no copyright protection, an author’s works could be pirated and the author had no means of legal recourse. This inherent flaw had been recognized by many politicians, including James Madison, who later pointed out, “The states cannot separately make effectual provisions for [copyright].”³¹

When the Constitutional Convention met in Philadelphia in 1787, copyright was an issue that – while pertinent – did not receive much discussion, but it was most certainly an issue in which members of the delegation were experienced. Along with Madison, George Washington had supported the Virginia copyright law Noah Webster had pushed for. Hugh Williamson had served on the congressional committee – along with Madison – which had passed the legislation recommending the states enact their own copyright statutes. Charles Pinckney had been a member of the South Carolina legislature that had enacted that state’s copyright law. Roger Sherman had been a member of the Connecticut Council of Assistants when it passed the new country’s first copyright legislation. These men represent some of the more prominent examples of delegates who had been concerned with matters of copyright before attending the Constitutional Convention.³² These men had seen first hand the problems with leaving the authority to grant copyright in the hands of the states, which may help to explain why they felt there was no problem in granting the power of copyright to a federal body.

On August 18, 1787, the first mention of copyright is found in the records of the Constitutional Convention. On that day, both James Madison and Charles Pinckney submitted – apparently independently of each other – separate proposals to add provisions to the new constitution concerning both copyrights and patents.³³ Madison’s proposals included granting Congress the power “to secure to literary authors their copy rights for a limited time. To establish an University. To encourage by premiums & provisions, the advancement of useful knowledge and discoveries.”³⁴ Pinckney’s proposal included the powers “to secure to Authors exclusive rights for a . . . certain time.”³⁵ When presented to the delegation, both of these proposals were unanimously referred to committee. When the committee reported back to the delegation with their recommendations on September 5, among them was a proposal that Congress have the power “to promote the progress of science and the useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.”³⁶ The provision was agreed to by the delegation without debate, creating the copyright clause of the Constitution. It seems clear from both Madison’s and Pinckney’s proposals, as well as the copyright clause agreed to by the delegates, that copyright was meant to be limited in time and serve a primary purpose of promoting the flow of ideas through the public, with a secondary purpose of providing authors with financial incentives and rewards. The clause first establishes what the purpose of copyright is to be – to promote the useful arts and sciences – and then talks about how to promote them – by securing authors and inventors exclusive rights to their discoveries.³⁷

As the individual states were debating the ratification of the proposed Constitution, very little was said about copyright, although what was said seems to indicate that advocates of the Constitution believed it was appropriate to grant this power to Congress to overcome the confusion from laws differing in each state.³⁸ While Madison and the federalists were eventually successful in getting the Constitution ratified, the debate over the scope and purpose of copyright continued into the First Congress. When Madison wrote to Jefferson with a summary of the amendments to the Constitution which were to become the Bill of Rights, Jefferson suggested adding amendment specifying that “Monopolies may be allowed to persons for their own productions in literature and their own invention in the arts for a term not exceeding ___ years but for no longer term and no other purpose.” While Madison didn’t act on this proposal, it seems evident that Jefferson’s ideas were espoused in the Copyright Act of 1790. This first US

copyright act very closely mirrored the Statute of Anne; so closely in fact, that Maurice Holland jokes that “the very first thing that should have been condemned under the new Copyright Act was the act itself, because it was almost a verbatim copy of the Statute of Anne.”³⁹ The Copyright Act of 1790, like the Statute of Anne, allowed protection of copyrighted works for 14 years, renewable for another 14 years if the author or the author’s heirs were living. Jefferson’s viewpoints are particularly important when considering this portion of the act. As Stephen Smith points out:

“The original act is important for two reasons. First, it provides a clear indication, as do the original state statutes, on the Framers’ understanding of the phrase ‘a limited time.’ Patents were limited to the original 14 years only. Second, it is important, in view of Jefferson’s dictum that ‘the Earth belongs to the living,’ that the first statute contemplated rights as vesting in living persons – not in perpetual corporations.”⁴⁰

Additionally, the purpose behind the public policies advanced by copyright legislation was also advanced by Jefferson’s thoughts regarding the protection for authors and inventors. His beliefs were grounded in the desire for ideas to be generated and then diffused, rather than having the government control potentially “dangerous” ideas. The argumentation presented by Jefferson, Madison and the other framers of the Constitution and the Copyright Act of 1790 indicate that this should be the primary purpose of copyright legislation.⁴¹ This represents a fundamental shift from the original English Licensing Acts whose primary purpose was censorship, not the dissemination of ideas.

It is important to note that the copyright clause in the Constitution, as well as the Copyright Act of 1790, did not consider copyright to be a function of property rights. Copyright was instead a matter of policy – a bargain among the state, authors and citizens. In fact Jefferson explicitly argued against the idea that copyright was a protection of property. According to Jefferson, unlike tangible property, ideas and expressions are not scarce in nature. If someone takes an idea from another, it does not mean that the idea disappears from the first person: To the contrary, it actually enhances the intellect of both, for now the idea can be expanded upon. Jefferson feared that by equating copyrights with property, copyright might eventually expand to include the protection of ideas, not just the protection of the *expression* of ideas. Thus, monopolists would be able to use their state-granted copyrights to control the flow and dissemination of ideas and expressions. They could avoid the powers of a competitive

marketplace by setting artificially high prices for access to ideas. Although Jefferson's fears would not come to pass for more than a century, his thoughts on the dangers of copyright played an essential role in legal thought during the 19th and early 20th century. He believed that copyright was – at best – a necessary evil, a limited monopoly which was artificially created by the government, and that its powers should not be granted nor expanded lightly.⁴²

Chapter 4

The Early 20th Century: Twain Sells Copyright Down the River

Almost immediately after the passage of the Copyright Act of 1790, authors and publishers (including Noah Webster) began to lobby for its expansion. They succeeded in 1802, when Congress added an amendment to the Copyright Act to include prints among the materials that were to be considered protected. In 1831, they succeeded again by getting a new general law passed revising the entire copyright system. In addition to the works already protected, the 1831 law expanded copyright to protect musical compositions. It also allowed the author's widow and children to file for the renewal of a copyright. Most importantly, the act increased the length of time copyright protection was offered, from a length of fourteen years, renewable for fourteen more, to twenty-eight years, renewable for fourteen more. Interestingly, Webster and some of his fellow lobbyists had urged for perpetual copyright to be granted, despite the explicit Constitutional prohibition of such a measure.⁴³

After 1831, there would be no change in the duration of copyright law for nearly 80 years. However, that would change in the beginning of the twentieth century, due largely to the work of Mark Twain. It is somewhat ironic that Twain, who “creatively borrowed” many of the stories, ideas and themes in his writings from the works of others, would argue for increased protection of authorship. However, this contradiction didn't seem to be relevant to Twain, who did not mind contradicting himself.⁴⁴ Due largely to his influence on members of Congress, the US would extend the length of copyright again. Not only that, but Mark Twain – as a lobbyist – was successful in resurrecting the idea of copyright as a property right – an idea which eventually permeated American copyright law and is now the *de facto* interpretation of copyright's purpose.

Twain's early career as a writer found him on the completely opposite side on issues concerning copyright from where he would end up later in his life. One of the first areas of copyright where Twain became active was in the scope of international copyright. As an author, Twain suffered from a lack of international copyright on two different fronts. First, it allowed

for massive piracy of his works in England and Canada, meaning that he saw no revenue from his works' sales in those countries. Second, because British works – which were almost invariably more popular with Americans than were American works – could be cheaply pirated in the United States without fear of legal sanction, American authors often had to fight for shelf space in bookstores. Readers in the US were not likely to pay \$2.75 for a copy of *The Adventures of Huckleberry Finn* when they could get a copy of Sir Walter Scott's *Ivanhoe* for only \$0.10. Even while suffering an economic loss, however, Twain saw himself – and other Americans – benefiting from it as readers, and at least somewhat endorsed its continuance.

Writing to Howells in 1880, Twain said,

“My notions have mightily changed lately. Under this recent & brand-new system of piracy in New York, this country is being flooded with the best of English literature at prices which make a package of water closet paper seem an ‘edition de luxe’ in comparison ... These things must find their way into the kitchens and hovels of the country. A generation of this sort of thing ought to make this the most intelligent and the best-read nation in the world.”⁴⁵

Twain's opinions on the necessity of international copyright would change a few years later as he realized that American readers were more interested in reading the sugary novels of British authors such as Scott rather than the more literarily significant works of authors like Lord Macaulay. This led him to begin fully advocating the creation of international copyright protection.⁴⁶ He wrote articles talking of the dangers of filling readers' imaginations with the images of nobility and the “sugar-coated injustices and oppressions” often found in foreign works, arguing that it would eventually breed “dissatisfaction with our country and form of government, and contempt for our republican commonplaces and simplicities.”⁴⁷ In 1886, the US Congress took up the call of Twain and other authors and proposed the Hawley Bill, which would recognize international copyright. Called to testify before the US Senate on the issue, Twain made it quite clear that he was not in favor of this particular piece of legislation. He thought it treated British and American publishers too harshly. He also urged an amendment requiring a foreign work to be printed in an American plant to get American copyright. Although the Hawley Bill failed, a bill Twain found more favorable was passed in 1891, and for the first time international copyright was the law of the land in America. Twain had written to Howells earlier that “if we can get this thing through Congress, we can try making copyright perpetual, some day.”⁴⁸ Seemingly, “some day” had arrived for him.

Twain spent the next several years studying copyright law and refining and publicizing his arguments favoring expanded copyright protection for authors. *The Great Republic's Peanut Stand*, an unpublished piece written by him in 1898, uses a Socratic dialogue between a senator and a wisdom-seeker (whom Twain embodies) to discuss Twain's ideas on copyright. In the discourse between the senator and the wisdom-seeker, he elaborates on his views of copyright. In addition to arguing for perpetual copyright protection for authors, he argues in favor of "requir[ing] the publisher to issue a cheap addition, and always keep it on sale."⁴⁹ Twain didn't mind ignoring Article 1 of the Constitution, and so what was to stop him from ignoring the First Amendment as well. In April of 1900, Twain was called before a select committee of the British House of Lords to discuss some pending copyright legislation. Summarizing the points he had outlined throughout *The Great Republic's Peanut Stand*, Twain argued the case for creating perpetual copyright in Britain. But, he took his arguments one step further, arguing that there is no real difference in the role of ideas in copyright and the role of ideas in real property. In doing so, Twain introduced a whole new line of argumentation concerning copyright and property. Previous arguments had claimed that there is a property right inherent within an idea itself. Twain shifted this argument and claimed instead that there are ideas attached to all forms of property. Although the House of Lords would reject Twain's ideas on both perpetual copyright and the property aspects of copyright, his testimony once again marked the re-initiation of property talk and copyright.⁵⁰

In 1906, Twain was called before the US Congress to testify in support of completely revising US copyright law. The proposed bill would have changed the term of copyright protection from 28 years, renewable for 14 more to the lifetime of the author plus an additional 50 years. Although the bill did not offer perpetual copyright protection, Twain was still in favor of it. Testifying about the term of copyright protection the bill offered, he said, "I think that would satisfy any reasonable author, because it would take care of his children."⁵¹ While this particular bill failed to pass through Congress, the copyright bill of 1909 was passed. However, the "Life plus 50" provision of copyright protection offered in the 1906 bill did not survive committee scrutiny, and the term of protection in the 1909 bill was set at twenty eight years renewable for another twenty eight. Although it was not everything that Twain had hoped for, he was still quite pleased with the bill's passage. Writing to Senator Champ Clark about the bill, Twain said, "Is the new copyright law acceptable to me? Emphatically, yes!"⁵²

Communication Law Review

The 1909 copyright bill was the last one passed in the United States which could even remotely be considered in line with the original intentions of the founding fathers. Madison had argued very persuasively on the delicate balance that had to be struck between creating incentives for authors to write works and the general good of the public to have access to materials to read, analyze and criticize. Clearly, there was incentive to produce works prior to 1909. Twain, who argued that the system was inherently imbalanced, managed to profit greatly from the old system that he claimed was so unfair. Madison also wanted ideas to be spread, rather than contained and censored by the government. With Mark Twain's rhetoric on the need for extended copyright protection, copyright legislation after 1909 drifted away from the intent of Madison. Rather than the censoring of ideas by the government, authors and publishers did it under the guise of copyright protection. Since Twain began his cause for extended copyright protection, the concept of copyright as a function of property has become the mantra of the entertainment industry, publishers, and legislators as well. He successfully managed to persuade people – though not in his lifetime – that an author's words should be protected as property is protected. His words and writing helped to shape the future discourse on copyright that, by the end of the twentieth century, would cause the fears that Jefferson had about the dangers of granting a state-issued monopoly to come to pass.

Chapter 5

The End of Copyright As They Knew It

After the Copyright Act of 1909 was passed, copyright law was rather fallow for a number of years. Technology, however, was changing at a very rapid pace. Radio was becoming more popular. Televisions made their way into peoples' homes. Computers were appearing in an increasing number of homes and businesses. And photocopying machines enabled users to quickly and cheaply duplicate printed materials. By the mid-1970's, Congress again felt that it was time for a revision to copyright law in the United States. What they enacted was a broad, sweeping piece of legislation that basically uprooted nearly 200 years of copyright law and tradition in the US.

The Copyright Act of 1976 made several large changes in copyright law. First, it extended the time that a copyright was granted, from the 28 years renewable for another 28 years in the 1909 copyright law, to the life of the author plus an additional fifty years – just as Twain had asked Congress to do nearly 70 years before. Second, it changed the nature of what copyright

Communication Law Review

covers, for the first time allowing electronic media – such as television broadcasts – to be covered by copyright. Third, it stated that copyright protection is offered from the moment a work is created, rather than from when it is actually published. Finally, it codified the Fair Use doctrine.⁵³

After its passage, criticism of the new copyright law sprang up almost immediately. One of the first major criticisms was about the length of copyright protection offered by the new law. This will be discussed in detail later in this chapter. There was also criticism about the change in how copyright is obtained – from getting copyright when a work was published to getting it upon creation. Under previous copyright laws, copyright was given not to the original work itself, but to the copies of that work. This essentially meant that in order to be granted a copyright, the material had to be disseminated. By stating that copyright was given to the original work upon its creation, the 1976 copyright law allowed for a pure monopoly on ideas. It created a situation where an author could write or create something, never disseminate the work to the general public, and then prevent others from publishing thoughts or ideas in the same form.⁵⁴ Essentially, the 1976 law set up the basis for censorship of ideas not by the government, but instead by authors, publishers and corporations. Jefferson and Madison, who both felt that copyright should be granted for the purpose of encouraging people to come up with new ideas so the general public could discuss them and benefit from them no doubt would have found this provision of the act abhorrent.

Another criticism had to do with allowing television broadcasts to receive copyright protection. On a very basic level, this provision of the Copyright Act of 1976 is unconstitutional. The Constitution guarantees protection only for “writings” to their “authors,” things for which a broadcast of a live football game or unscripted television show would not qualify.⁵⁵ More importantly, offering copyright protection to these types of broadcasts goes against the “learning” provision of the copyright clause. With printed materials, even with the new provision allowing copyright protection upon the initial creation of the work, the materials will likely have to be disseminated in order for the copyright holder to realize a profit. The same does not hold true for live broadcasts. Transmission over the public airwaves of any performance obtains copyright protection under the 1976 law and allows for a profit. Although this original transmission may or may not be available for the general public viewing, it does not necessarily allow for the public to have access to the work for future study and criticism. The

copyright holder now has the ability to control when and who gets to see the broadcast again, basically creating the ability to profit multiple times for people to have access to the same copyrighted work.⁵⁶ Questions can also be raised as to how the public could ever access this information once it is initially broadcast if the copyright holder decides not to broadcast the performance again. Printed materials have tangible relics after they are no longer published; the same is not true of a live broadcast. This not only goes against the purpose of copyright to promote “Science and the useful Arts” as stipulated by the copyright clause in the Constitution, but it affirms Jefferson’s fears about the danger of monopolies and their ability to control and stifle ideas.

The Copyright Act of 1976 ended nearly 200 years of loose copyright legislation. Prior to that act, copyright legislation had been short and fairly flexible in its interpretation. The 1976 law changed all that by being very specific and lengthy and covering completely new areas of copyright law. This change cleared the way for two pieces of legislation in the late 1990’s which were unparalleled in both their scope and in the power they gave to copyright holders: The Copyright Term Extension Act of 1998 and the Digital Millennium Copyright Act.

The Copyright Term Extension Act (CTEA) was introduced by former Congressman and recording artist Sonny Bono, and was passed in 1998. It is often referred to as the Disney Copyright Law, largely because Disney was a major lobbyist in the campaign to get the bill passed.⁵⁷ Under the Copyright Act of 1976, the Walt Disney Co. was about to lose its copyright on Mickey Mouse, Donald Duck, and several other major Disney cartoon characters. The Copyright Term Extension Act of 1998 extended the time a corporation – such as Disney – can have a copyright, from 75 years under the 1976 law, to 95 years. It also increases the amount of time that an individual can hold a copyright from life plus fifty years to life plus seventy years.⁵⁸ It should be noted that the CTEA was introduced and passed through both houses of Congress in a single day with very little debate.⁵⁹ Soon after it was passed, Eric Eldred and several others filed a joint lawsuit against the US Government (*Eldred v. Ashcroft*) alleging the CTEA was unconstitutional on the grounds that it violated free speech rights and was overstepping the “limited times” aspect of the copyright clause. While the case was struck down in both district court and the appeals court, the Supreme Court decided to hear the case, the results of which are still pending.⁶⁰

Communication Law Review

Perhaps even more far reaching in scope than the CTEA is the Digital Millennium Copyright Act (DMCA). Promising to deliver new forms of content and entertainment to the public if they had the means to ensure security of their materials, members of the entertainment industry persuaded Congress to enact legislation giving copyright holders never-before held legal powers to ensure that their copyrights were not violated.⁶¹ Thus, the DMCA was passed through both houses of Congress in 1998. Among the provisions of the DMCA, two have particular importance regarding the balance of power between copyright holders and the general public. First, the DMCA prohibits the circumvention of any copyright-protection device, such as encryption on a CD. Second, the DMCA prohibits the dissemination of programs, devices, or information which could be used to circumvent copyright protection.⁶² Never before had a piece of copyright legislation given copyright holders the ability to file criminal or civil penalties for the act of *potentially* violating a copyright, and it was this new power for copyright holders which immediately alarmed many critics of the DMCA. These critics argued that the DMCA could allow for prosecution of people who – pre-1998 – would have had their research on technology classified as academic, rather than criminal. They argued that it would create a pay-per-view world where copyright holders could charge a user every time they accessed a copyrighted document, essentially eliminating the “first use” principal whereby a copyright holder loses some of their “exclusive” rights upon selling their copyrighted work to someone. Critics also said that the potential for censorship by copyright holders would be imminent because they could now stifle research and debate on issues concerning copyright by citing the clause of the DMCA prohibiting the dissemination of information regarding copyright protection mechanisms.⁶³ These critics would soon have their fears confirmed as the entertainment industry filed lawsuits against researchers, professors, programmers and computer enthusiasts under the DMCA. Copyright holders have now turned to the DMCA as their largest weapon for enforcing their copyrights. In the process, the DMCA has fully destroyed the balance that once existed between benefiting both the author of an original work and society as a whole.

Chapter 6

Oh...If They Could See Us Now

Clearly, copyright has faced substantial evolutionary change since its introduction in Renaissance England. Especially in recent times, we find that copyright law has undertaken a rather momentous shift away from the balance of power that was originally envisioned by both

Madison and Jefferson and outlined in the Constitution and the Copyright Act of 1790. With this deviation comes substantial threat to our democracy and our individual rights to free speech. Jefferson and Madison both felt that copyright was a necessary evil and its ultimate purpose was to serve the good of the nation by creating intellectual benefits for society as a whole. The changes made to copyright legislation – especially throughout the past five years – have bastardized the intent that Jefferson and Madison had for copyright and have created a fundamentally flawed and unfair system.

The Copyright Term Extension Act (CTEA) represents a deviation from what was originally meant in the Constitution by the phrase “limited time.” Both the Statute of Anne and the Copyright Act of 1790 set the maximum time that a copyright holder would be able to receive protection for their works at 28 years – fourteen years after receiving a copyright renewable for another fourteen years. It seems fairly evident that this time frame is one our founding fathers saw to “promote the progress of science and the useful arts.” While the Constitution does give Congress latitude in determining how “a limited time” should be interpreted as, the historical precedent set during the United States’ infancy should serve as a base for determining what latitude Congress should be given for defining that phrase. It would seem that giving an author a *minimum* copyright of seventy years is clearly not what the founding fathers had in mind. Further support of this is evidenced by Jefferson’s correspondence with Madison, where after initially proposing a limitation on monopolies be placed in the Bill of Rights, he uses actuarial tables to suggest that the copyright be granted for 19 years.⁶⁴ History shows us what both Madison and Jefferson thought a “limited time” meant, and the CTEA strays very far from their interpretation.

Another aspect of the CTEA is even more problematic than the term for which it offers copyright protection: the fact that it was passed so quickly after the last major copyright overhaul. Prior to the time period between the 1976 and 1998 copyright laws, there had been between a 40-80 year period before the term of copyright was extended. The most recent extension was enacted only 22 years after the last extension – and it increased the length of copyright time by 20 years. If this scenario plays out again – which it very well may if past actions are any indication of the future – then the “limited time” concept outlined in the constitution is rendered useless. There would be virtually no difference between Congress’ passing of a law granting perpetual copyright and Congress’ perpetually enacting copyright laws

lengthening the duration of copyright. If there is no definitive standard placed on the meaning of a “limited time,” it would allow Congress to create copyright that, in the words of MPAA president Jack Valenti, would last “forever less one day.”⁶⁵ For Madison and Jefferson, this grant of a nearly perpetual monopoly would have been abhorrent. They judged monopolies to not only be a threat to the general welfare, but to government itself. Madison even expressed this thought to Jefferson, writing him to say that monopolies could be classed among the “greatest nuisances in government.”⁶⁶ He also argued that the public should have the right “to abolish the privilege [of monopoly] at a price to be specified in the grant of it.”⁶⁷ Our founding fathers believed that monopolies were a nuisance and should only be tolerated as long as they were beneficial to the public. Madison and Jefferson believed that their powers should – at most – be limited (Jefferson had doubts that monopolies should even have limited powers). With the continual extension of copyright, Congress has ignored the intent of our Constitutional framers and abused the power that the Constitution grants them to determine the term of copyright protection. By upsetting the balance that was originally envisioned by Madison and Jefferson and espoused in the Constitution’s copyright clause, Congress has sold out the interests of both the public and our democracy in the name of increasing the power of the monopolies copyright creates.

The extension of copyright and the shifting away from our founding fathers’ intent has ultimately changed the nature of copyright itself. Mark Twain’s quest, which began over 100 years ago to get copyright to be recognized as a property right, has been further solidified by the CTEA. Copyright was never meant to represent a form of ownership. Both Madison and Jefferson believed that copyright was a grant which – unlike property – existed for the sole benefit of providing the public with intellectual materials. Jefferson especially believed that an idea cannot be owned, but that a particular expression of that idea should perhaps provide an author with financial incentive to publish it. However, the lengthening of copyright protection has only served to enhance the notion that copyright is somehow a property right. During the Senate Judiciary Committee debates over the CTEA, one Senator remarked that “intellectual property is the only form of property whose ownership rights are limited to a period of years.”⁶⁸ Clearly, this type of rhetoric is a far cry from what copyright was intended to be. Even Congresswoman Mary Bono, the widow of CTEA sponsor Sonny Bono, showed that both she

and her late husband had a severe misunderstanding of both copyright's origins and purpose when she stated,

“Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also Jack Valenti's proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.”

Seemingly, our representatives in Congress view the expiration of copyright as some sort of legal anomaly that is comparable to the seizing of property which, without Constitutional limitations, could otherwise be “owned” in perpetuity. This would also indicate why Congress has felt motivated to continue extending the term of copyright protection. However, this notion of copyright as a form of property requiring protection is flawed. Copyright was something created as a bargain between authors and the public. Madison even went so far as to suggest that the “privilege” of copyright was one which the public should be able to “abolish” in “all cases” if it was seen fit to do so.⁶⁹ This would suggest that copyright was not a property “right” of the owner, but was instead a privilege granted to someone – a privilege with the purpose of benefiting the public and which could be taken away if it was to the benefit to the public to do so. Justice Holmes expressed affirmation of this notion when he said:

“In copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but it is in vacuo, so to speak. It restrains the spontaneity of men where, but for it, there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right...It is a right which could not be recognized or endured for more than a limited time. . .”⁷⁰

Holmes seems to indicate that, while copyright could be considered a property right, it is simply not practical to view it as such. By stating the public must “endure” copyright, Holmes affirms that copyright is meant for the benefit of the public. This is very much in line with the beliefs of Madison and Jefferson who felt that copyright should only provide “sufficient recompense and encouragement” so that literary works would be as widely distributed as possible and be debated and discussed.⁷¹ They never intended copyright to represent the near-permanent lifetime-plus-seventy-year ownership that the CTEA provides for.

This shift in copyright towards ownership and longer terms of protection begs the question of how the CTEA helps to promote the copyright clause's purpose of "promot[ing] science and the useful arts." Quite simply, the CTEA not only does nothing to further promote these things, but actually works to hinder them. First, any copyright that offers protection after the author is deceased does not offer further incentives to create. While the author can enjoy the monetary compensations received for a copyrighted work while they are alive, the benefit to that author ceases immediately upon their death. Jefferson expressed this view when he was doing his actuarial calculations of what a reasonable term for copyright would be, saying, "that the earth belongs to the living."⁷² Thus, the contention that lengthening the term of copyright for any amount of time beyond the death of the author provides an incentive for that author to create can be assumed false.

Second, the CTEA extends the copyright protection of works already created. Since these works already exist, extending copyright protection on them does nothing to promote their creation, but instead serves for the sole purpose of benefiting the author. Benefiting the author of an already-created work for an even longer period of time will always be at the expense of the public: the public will have to pay for something already existing and obtainable sooner for a substantially lower price were it not for the copyright extension. This is opposite of what the purpose of the copyright clause was meant to be.

Finally, the CTEA works to shrink the public domain (the collection of materials with expired copyrights now available for the public to use in any manner without having to pay royalties to the author). Madison and Jefferson firmly believed that our nation would only be able to maintain its liberties and democratic spirit if its citizens were well informed and able to freely discuss and debate ideas. They supported copyright with the understanding that its purpose would be to provide an incentive to get authors to create works that would soon become part of the public domain so that future authors could build upon the ideas previous authors had expressed. They wanted the public domain so that others would be able to use their own creativity to further debate and discuss ideas freely. This is why they wanted copyright to be relatively short in its duration. With the lengthening of copyright that the CTEA provides, the public domain is hurt. The grant of limited monopoly copyright provides not only allows authors to profit from their works for longer periods (thereby creating a price people have to pay in order to be able to have access to the expression of ideas), but it also allows an author to control access

to those ideas. Authors who hold a copyrights can decide whether or not to print and distribute their thoughts. They can control how many copies they want produced. They can control who has access to those copies. This is the essence of the monopoly power that copyright provides, which is why Madison and Jefferson regarded copyright as a problematic issue to be allowed for as little time as was necessary to provide a creative incentive to an author. Through the CTEA's lengthening of copyright, authors can keep their works out of the public domain for even longer and hurt the benefits of debate, discussion and creativity that the public domain provides. At the point where the CTEA helped to create a system where financial benefits to an author are privileged over the public good, open debate and creativity, it ceased to serve the copyright clause's purpose of "promot[ing] science and the useful arts."

Although the incremented copyright protection provided CTEA has undoubtedly worked to create an unfair copyright system, its transgressions pale in comparison to those of the Digital Millennium Copyright Act (DMCA). The balance that copyright provided during early US history – though imperfect – offered the best possible solution for balancing the competing interests of the public and authors. Each side was able to benefit from the creation and dissemination of printed works. The DMCA has tipped that balance almost completely in favor of the creator of a work. Provisions of the DMCA forbid the "cracking" of electronic code "protecting" copyrighted works. There is no limitation or qualifier allowing for getting around this code at any point – it essentially offers perpetual protection to the author of that work. A work which would have otherwise become part of the public domain – available to anyone to use in any manner they see fit – would still be controlled by the "no-cracking" provision of the DMCA. This means, for example, that if the copyright on a piece of software or a DVD expired, a person could not try to circumvent the electronic gates protecting the digital coding inside. Unlike printed materials, which cannot have electronic locks without first being encoded into a digital format, electronic materials can be encrypted in many ways to prevent access to the code creating them. By not allowing people to be able to get around this code – even after the work enters into the public domain – the DMCA essentially "upends more than 200 years of democratic copyright law" through the creation of a system which allows a backdoor to perpetual copyright protection.⁷³

The DMCA gives the author of a work all the cards when it comes to accessing their materials. Since the DMCA creates a system of perpetual copyright protection, the users who

want access to a copyrighted work have to bow to the wishes of the author of that work. This situation removes the power to regulate copyright away from Congress and puts it in the hands of those who hold the copyright. This makes for a dangerous situation in which the copyright holder can set all terms of use for their product. They can extract contractual obligations as to how their materials will be used. Unlike the old system – where copyright would *eventually* expire – the DMCA destroys the public domain, meaning that users will forever have to follow the wishes of the copyright holder. The implications of this are very substantial. The creativity, debate, discussion and democratic benefits that Madison and Jefferson envisioned coming about from offering copyright essentially cease to exist. If a user can prohibit someone from criticizing, satirizing, discussing or further using or enhancing the critical elements of their copyrighted work, then the further progression of the arts and sciences are fully hindered. This is not only contrary to what Madison and Jefferson intended for copyright to be, but it is unconstitutional as well.

The broad scope of powers that the DMCA provides also threatens the public's right to free speech. Traditionally, even copyrighted materials were subject to fair use, meaning that a user could, for example, check out a book from the library, copy a few pages of that book, read it aloud, criticize it and quote passages from it. Fair use ensured that there was a balance between the monopoly the author was granted through copyright and the First Amendment rights of the user. By prohibiting circumvention of technological measures limiting access to a work, copyright holders can extort all kinds of contractual promises from users. They can create a pay-per-use system where the free borrowing of books, CDs and movies no longer exists, and where you have to pay a fee for each word copied out of an electronic book. The authors can prohibit users from discussing works or making backups of them for their own personal use (some e-books licenses have even gone so far as to limit users from reading them aloud or even criticizing them).⁷⁴ This is a brazen form of censorship – one completely allowable under the DMCA. This type of censorship, and even the limitation of First Amendment rights, is something Madison and Jefferson would have found appalling. They wanted a country where people were free to express themselves without fear of prosecution. The DMCA, through its destruction of fair use, threatens to destroy the critical debate and discussion that are essential to maintaining a democracy. As Representative Rick Boucher, one of the most vocal Congressional critics of the DMCA, points out, “In fact, fair-use rights to obtain and use a wide

array of information are essential to the exercise of First Amendment rights. The very vibrancy of our democracy is dependent upon the information availability and use facilitated by the fair-use doctrine.”⁷⁵

The DMCA’s history already demonstrates that it has had a very negative effect on promoting creativity and discussion. Under the DMCA, software maker Adobe had a Russian programmer who was giving a talk to a group of scientists about security issues concerning Adobe’s E-books arrested for violating the DMCA’s anti-circumvention provisions. While this programmer, Dmitry Sklyarov was never accused of violating the copyright of any of Adobe’s materials, the mere act of discussing the security features that encrypted Adobe’s E-books was enough to land him in jail. Another example of the DMCA’s negative effects on creativity and discussion occurred when Professor Edward Felten was going to publish a paper concerning the Secure Digital Music Initiative (SDMI). After Felten and his associates succeeded in removing the digital watermarks that the SDMI representatives had challenged him to remove, he planned on discussing his efforts and results at an academic conference. When he announced these plans, he received notice from the SDMI representatives that if he presented his findings, they would sue him under the DMCA. These scenarios are completely contrary to the purpose of copyright. Copyright was intended to allow people to openly discuss their findings; in that way, science is further progressed. By not allowing open and free discussion of scientific findings, the DMCA not only violates the First Amendment right to free speech, but also creates a danger for others as well. As Jeffrey I. Schiller, a network manager for MIT points out:

“The longer a flaw is kept under wraps, the more time can go by for the flawed system to be deployed. Eventually, the flaw will be found by black hats and exploited. At that point, it may be very hard to fix if the flawed software or hardware is widely deployed. Catching the security problems early is very valuable -- a value being discarded by the DMCA.”

In this way, the DMCA does not promote the system of copyright balance our founding fathers envisioned. Instead, it creates perpetual monopolies for a limited number of authors, allowing them to keep their works under lock-and-key and giving them the right to set all of the terms of use for their work. Through its destruction of fair use, the DMCA has destroyed the free speech rights of citizens when it comes to the use of copyrighted materials. When Madison wrote of copyright that “[t]he utility of this power will scarcely be questioned,” he surely never envisioned the day when the DMCA would be enacted.⁷⁶

Communication Law Review

The evolution of copyright throughout the past four and a half centuries has seen monumental changes in the evolution of copyright. But, how far has copyright, especially in America, really progressed? Copyright originally began as a tool for the government and publishers to censor unpopular ideas. It eventually evolved into something much more utopian: a system whereby the public and democracy itself could benefit from the genius of others. When intellectual revolutionaries such as Madison and Jefferson debated the merits of copyright over two centuries ago, they both agreed that it had one fundamental purpose – to promote intellectual debate, creativity and discussion among the populace for the sake of the new republic. They both felt that monopolies were dangerous, which is why they understood the fundamental need to make copyright a limited privilege. They valued the ideas that authors penned, but felt that these ideas should be made available to the public as quickly as possible while still providing enough incentive to encourage authors to distribute their writings. Although originally considering setting a term limit to copyright in the Constitution, our founding fathers understood that copyright law needed to be flexible, so they left setting the scope and term of copyright up to future generations. Our early Congresses understood this principle as well, which is why they kept copyright both short in duration and made the legislation fairly ambiguous. They understood that “a leaky copyright system works best,” because it allows for the optimal balance to be struck between the competing interests of authors and readers.⁷⁷ Only recently have we shifted dangerously far from this understanding. Since the mid-1970’s, the United States has continually expanded the term of copyright, shifting its purpose from that of a tool to promote public interest and democracy to that of being a property right. Both Madison and Jefferson rejected this notion outright: they firmly believed that an idea and the expression of it was not something that could be owned. They understood that if the government allowed people to control ideas, then censorship and control of those ideas by copyright holder would ensue. This situation has played out. The CTEA and DMCA have both moved copyright law from the purpose of being an incubator for meaningful debate and creativity, to instead serving the purpose of fostering censorship and control. As Vaidhyathan points out, “when constructed recklessly, copyright can once again be an instrument of censorship, just as it was before the Statute of Anne.”⁷⁸ As we move into the 21st century, this is the situation that has begun to play out. Copyright has evolved and come about full circle. From what was once believed to be a monumental shift away from the repressive censorship of Renaissance England towards an open

and vital society in America, copyright has again found its way back into the realm of controlling and suppressing ideas. If the United States continues down this path, we will find ourselves in a pre-Statute of Anne situation. Open discussion will cease to exist, and we will again find ourselves at the mercy of repressive monopolies and censors, exactly as Thomas Jefferson had feared.

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⁶⁹ Madison, "Letter to Thomas Jefferson."

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⁷⁵ Rick Boucher, "Time to Rewrite the DMCA."

⁷⁶ Madison, "Federalist Paper No. 43," The Federalist Papers 231.

⁷⁷ Vaidyanathan, Copyrights and Copywrongs 184.

⁷⁸ Vaidyanathan, Copyrights and Copywrongs 184.