

The Recording Industry v. James Madison, aka “Publius”: The Inversion of Culture and Copyright

*Liam Séamus O’Melinn**

I. COPYRIGHT BEFORE CULTURE: THE RECORDING INDUSTRY V. JAMES MADISON, AKA “PUBLIUS”

In midsummer, the recording industry stunned the nation by announcing its intention to file suit against the estate of Founding Father and former President James Madison. An industry spokesman declared that Madison would be sued for plagiarism and copyright infringement and that the industry would ask for injunctive relief as well as statutory damages:

We are bringing this suit in order to show people that even those who placed the intellectual property clause in the Constitution are not immune to its strictures. Most people who revere the Founding Fathers do not realize just how dishonest they really were. We will not allow a Pirate to hide behind the mantle of President, and we know only too well how to expose the identities of pirates who seek the shield of anonymity. ‘Publius’ will be treated no differently.

In response to a question about whether Madison’s intimate connection with the Patent and Copyright Clause of the Constitution should afford him a special place in understanding the purpose and extent of the copyright power, the spokesman replied, “The true father of American copyright is an English philosopher named John Locke, who understood so much better than our own Founders what the purpose of American copyright was.”

He further indicated that two more defendants would be named: Madison’s alma mater, Princeton University, because the university had “for more than 250 years ignored its obligation to teach its students that

* Professor of Law, Pettit College of Law, Ohio Northern University. I would like to thank Keith Aoki, Joanne Brant, Michael Landau, Michael Lewis, Devan Desai, John Cross, Jon Garon, Llewellyn Gibbons, Steven Hetcher, Pam Karlan, Lou Lobenhofer, Eben Moglen, Lars Smith, Sharon Sandeen, Mark Schultz, Vern Traster, Deborah Tussey, Steve Veltri, and Peter Yu. I would also like to thank Dean David Crago of Ohio Northern University for generous financial support. Finally, I would like to thank Sean Mott for excellent research assistance.

there is a fundamental norm against unauthorized copying and that copyright protection is a right recognized by both common and natural law.” Additionally, Benjamin Franklin would be named on the basis of his unauthorized transmission and publication of a series of private letters.

Would James Madison, Benjamin Franklin, and Thomas Jefferson have downloaded copyrighted works if they had the technological means to do so? That is one of the questions presented by the recording industry’s seemingly fanciful suit, a suit that presents an unusual opportunity to compare the ethos of copyright at the time of the Founding Fathers with copyright in the present day. To put the issue differently, does the vision of copyright currently espoused by the music and movie industries represent a fundamental departure from the traditional contours of copyright law?

This question could hardly be more timely. On March 7, 2011, the U.S. Supreme Court decided to hear *Golan v. Holder*, a case involving the constitutionality of section 514 of the Uruguay Round Agreements Act, which granted copyright to foreign works already in the public domain in the United States.¹ *Golan* invites the Court to reconsider its admonition in *Eldred v. Ashcroft* that congressional copyright legislation that departed from the “traditional contours of copyright” should be adjudicated under a high level of scrutiny.² The Court has proclaimed the importance of tradition in other recent cases as well. For example, in *eBay v. MercExchange*, a case holding that injunctions should not issue as a matter of course in patent infringement actions, the Court called attention to the importance of history.³ Justice Thomas’s majority opinion asserted that there was a well-settled course of equity practice governing injunctive relief in patent suits going back to the time of the nation’s founding,⁴ and Chief Justice Roberts’s concurrence insisted that “a page of history is worth a volume of logic.”⁵

Moreover, history has once again become a subject of central concern to intellectual property scholars. Both Adam Mossoff and Justin Hughes seek to develop a richer historical context in which to situate the origin of intellectual property law.⁶ Both Hughes and Mossoff challenge

1. *Golan v. Holder*, 609 F.3d 1076 (10th Cir. 2010), *cert. granted*, 131 S. Ct. 1600 (2011).

2. See *Eldred v. Ashcroft*, 537 U.S. 186 (2003). In *Eldred*, the Court applied rational basis scrutiny in upholding the Copyright Term Extension Act. *Id.* at 204.

3. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

4. *Id.* at 391–92.

5. *Id.* at 395.

6. More specifically, Adam Mossoff delves into the origins of patent law. See Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953 (2007) [hereinafter Mossoff, *Who Cares*]. Justin Hughes, while not exclusively focused on the origins of copyright and patent, explores the question of whether intellectual property was conceived as property in the early republic and assesses promi-

the shared wisdom of scholars on the character of intellectual property law in the early republic on two points in particular: first, that the inspiration for the law was purely utilitarian rather than rights-based, and second, that copyright and patent were not thought of as property in the early years. Thus, both argue a different theory of the rationale behind the creation of patents and patent law, and both authors call for further investigation into the history of the law. Their studies indicate a renewal of scholarly interest the history of copyright and patent.

The expansion of copyright, with regard both to the subject matter that is eligible for protection and the degree of protection offered, is also a subject of current scholarly interest. Copyright was originally unavailable for musical compositions or photographs, and scholars have detailed the processes by which copyright was extended to music⁷ and photos.⁸ There is also a burgeoning literature on the relationship between creativity and copyright in music and art, much of which focuses on borrowing and remixing issues.⁹

nent early Americans' attitudes toward copyright and patent. See Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993 (2006). For an analysis of Locke's 1694 memorandum on the proposed renewal of licensing, see Justin Hughes, *Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)* (Benjamin N. Cardozo School of Law, Jacob Burns Institute, Cardozo Legal Studies Research Paper No. 167, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936353. More recently, Mossoff's *Use and Abuse of IP at the Birth of the Administrative State*, although focused on more modern issues, claims that Lockean theory influenced the development of intellectual property in the early years of the Republic. Adam Mossoff, *Use and Abuse of IP at the Birth of the Administrative State*, 157 U. PA. L. REV. 2001 (2009). Where I do not see that Locke himself applied his theory to literary works, both Mossoff and Hughes maintain that he did.

7. For thorough treatments of "how and when in Western history music came to be the subject of proprietary claims vindicated by law," see Michael W. Carroll, *Whose Music is it Anyway?: How We Came to View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1408 (2004); Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907 (2005). James Boyle writes that among the many articles taking up questions of music and copyright, these are "[t]he two articles that influenced me the most." JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 278 (2008) [hereinafter BOYLE, *THE PUBLIC DOMAIN*].

8. For a thorough discussion of the extension of copyright to photographs, see Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385 (2004).

9. Some notable contributions to this literature include KEITH AOKI, JAMES BOYLE & JENNIFER JENKINS, *BOUND BY LAW* (2006), available at <http://www.law.duke.edu/cspd/comics>; Keith Aoki, *Pictures Within Pictures*, 36 OHIO N.U. L. REV. 805 (2010); Olufunmilayo B. Arewa, *Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use*, 37 RUTGERS L.J. 277 (2006); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006). In addition to being among the first to take up these issues, Aoki, Boyle, and Jenkins are symbolically at the fore of the movement; in *Bound by Law*, they used the comic book format to address an intended audience of artists rather than lawyers. They are moving squarely in the direction of music in their upcoming comic book, *Theft: A History of Music*. KEITH AOKI, JAMES BOYLE & JENNIFER JENKINS, *THEFT: A HISTORY OF MUSIC* (forthcoming 2011). For more extensive bibliographic references, see BOYLE, *THE PUBLIC DOMAIN*, *supra* note 7, at 277–83.

Less attention has been paid to the process by which records became entitled to copyright protection. This is an important area of inquiry because even though the recording industry poses as the defender of a timeless norm prohibiting unauthorized copying, records did not originally fit the contours of copyright law. Copyright for sound recordings was once controversial, and in resolving the controversy, the law dedicated itself to some improbable propositions with consequences stemming from the quiet operation of the common law theory. In the broadest sense, these consequences can be understood as an inversion in the relationship between copyright and culture.

At the outset, it will be helpful to clarify two points. This Article argues that the development of the law has resulted in what I have termed “the inversion of culture and copyright.” What is meant by this phrase is that while copyright is formally justified by its critical role in fostering creativity and the development of culture, it has actually taken pride of place so that culture is being forced to take on the shape of its copyrighted container. The notion that copyright exists in order to encourage creativity has grown into a dogmatic proposition that there is no creativity without copyright, which is obviously false in a factual sense. Nonetheless, it is becoming truer and truer in a legal sense; that is, the law requires us to believe in an essential connection between copyright and a flourishing culture, even when there may be no connection. Next, the phrase “common law copyright” can be vague and confusing; in fact, this has frequently been an advantage to the advocates of common law copyright. In this Article, the phrase is used interchangeably with “natural law copyright,” and signifies a belief that copyright is a natural right that preceded any statute.¹⁰ Additionally, the phrase is commonly, but not necessarily, associated with a belief that copyright should be perpetual.

The public domain is also the subject of much scholarly inquiry.¹¹ This issue is a cognate one because the expansion of copyright has often come at the expense of the public domain. Indeed, this issue is at the

10. The phrase “common law copyright” can have several different meanings. I use the phrase to indicate a theory of copyright that asserts a timeless, common law or natural law basis for copyright, reflecting a moral right that existed even before any positive enactment. Thus, this Article does not use the phrase to refer more generally to bodies of common law copyright, such as state laws.

11. The public domain has become the focus of many scholars. Just a few who have considered the origins and meaning of the public domain include BOYLE, *THE PUBLIC DOMAIN*, *supra* note 7; Jane C. Ginsburg, *Une Chose Publique? The Author's Domain and the Public Domain in Early British, French and US Copyright Law*, 65 C.L.J. 636 (2006); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2002). For a full bibliography, see BOYLE, *Notes and Further Readings*, in *THE PUBLIC DOMAIN*, *supra* note 7, at 249–96 and Ginsburg, *supra*, at 638.

heart of *Golan*.¹² The extension of copyright to sound recordings represents one of the most important instances of the struggle between copyright and the public domain; the inversion of culture and copyright that is the hallmark of common law copyright theory reflects our misunderstanding of the relationship between copyright and the public domain. It is true in some sense, as Jane Ginsburg puts it, that the “public domain is all the rage.” Yet, it is also true that the public domain has an equivocal status, and that to the American legal mind, the public domain stands a distant second to the private domain of copyright. Noted copyright theorist Zechariah Chafee, Jr. once described copyright as the “Cinderella of the law.”¹³ In its current state, the public domain is the place Cinderella would go to if she fell on hard times, and in large measure, this is the result of forcing culture to take on the contours of copyright.

Ginsburg challenges what she takes to be “anachronistic assertions of the ‘immemorial’ quality of today’s aggressive concept of the public domain.” This Article argues that when we consider the issue as a question regarding the relative priority of culture and copyright, it is rather the theory of common law copyright that is anachronistic, based on improbable propositions, and aggressive.

Further, this Article addresses a question about the nature of common law copyright that has been raised by implication but rarely tackled head-on. Why has common law copyright endured? Numerous scholars have demonstrated that common law and natural law copyright are fictions. As Jessica Litman observes, historians of copyright have “persuasively debunked” the notion of a “common law literary property right in 17th century England.”¹⁴ Nonetheless, common law copyright has been

12. This is not to say that the public domain is necessarily shrinking as copyright expands. As Tony Reese notes, *Eldred v. Ashcroft* confirmed in January 2003 the delayed entry of copyrighted works into the public domain in the same month that many unpublished works entered the public domain: “Two weeks before the Court’s decision, every unpublished work ever created by any author who died before 1933 entered the public domain.” R. Anthony Reese, *Public but Private: Copyright’s New Unpublished Public Domain*, 85 TEX. L. REV. 585, 586 (2007).

13. The full quotation is both pretentious and significant, suggesting as it does that copyright is somehow the friend of inventions capable of copying and transmitting:

Copyright is the Cinderella of the law. Her rich older sisters, Franchises and Patents, long crowded her into the chimney-corner. Suddenly the fairy godmother, Invention, endowed her with mechanical and electrical devices as magical as the pumpkin coach and the mice footmen. Now she whirls through the mad mazes of a glamorous ball.

Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, in COPYRIGHT AND RELATED TOPICS 1 (Los Angeles Copyright Society & UCLA School of Law eds., 1964).

14. Jessica Litman, *The Invention of Common Law Play Right*, 25 BERKELEY TECH. L.J. 1381, 1388 n.41 (2010) (citing RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 73–74, 195–210 (2004) [hereinafter DEAZLEY, ORIGIN OF THE RIGHT TO COPY]; RONAN DEAZLEY, RETHINKING COPYRIGHT: HISTORY, THEORY, LANGUAGE 63–65 (2006) [hereinafter DEAZLEY, RETHINKING COPYRIGHT]; 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:11 (2009); MARK ROSE, AUTHORS AND OWNERS, THE INVENTION OF COPYRIGHT 22 (1993); Howard Abrams, *The Historic Foundation*

remarkably tenacious, and no amount of debunking seems sufficient to overcome it. This Article explores the problem by focusing not only on the *myth* of common law copyright but also on the *mythology* of common law copyright. What is the source of the common law vision, if not the law? As Litman writes of the nineteenth-century natural law copyright treatise author Eaton Drone, he was unconcerned with legal precedent, creating “his legal principles out of whole cloth” and discussing judicial decisions chiefly to demonstrate whether they were consistent with his own principles.¹⁵ Litman identifies a pattern of scolding the law for its failure to live up to philosophical principles, a pattern that goes to the heart of copyright for sound recordings. This Article addresses two questions that are raised by Litman’s observations: what was the whole cloth made of, and why has such a legally flimsy argument achieved such success over a period of centuries? To put these questions differently, why has American law rejected the more obvious assertions of common law copyright and at the same time shown a predilection for more elegant and polite statements of the theory?

Finally, if a comparison of the ethos of copyright for sound recordings with the ethos of copyright at the nation’s founding seems irrelevant to the modern music and movie industries’ claims, they have invited the inquiry. By insisting that the prohibition of unauthorized copying represents a universal and timeless norm, the recording industry has called for a reexamination of the history and theory of copyright. For years, the industry has pursued a well-publicized course of litigation intended to protect its copyrights. It is attempting to establish a very broad duty to prevent copying, a duty that it explains in terms of a conventional moral prohibition by equating downloading movies with the theft of a car. At the behest of the recording industry, universities are quietly, but insistently, being pressured to protect recordings’ copyrights. The legislative, judicial, and executive branches are combining to create a general duty to superintend the property of the copyright industries.

Did the founding generation subscribe to the vision of copyright urged by the music and movie industries? Would James Madison, Thomas Jefferson, and Benjamin Franklin have downloaded music and movies without paying for them? The answer might seem too easy, given the Founders’ punctilious defense of private property rights and their reputation as conservative businessmen and amateur economists. Yet, it is highly unlikely that the Founders would have aligned themselves with the modern copyright industries.

of American Copyright Law: Exploding the Myth of Common Law Copyright, 29 WAYNE L. REV. 1119, 1134 (1983).

15. Litman, *supra* note 14, at 1424.

The historical milieu in which the Founders worked provides an interesting comparison with the milieu that the music and movie industries are currently working hard to establish. Many of the Founders were themselves authors and inventors, and some educated guesses as to their attitudes on the relationship between copyright and the Internet may be hazarded. Further, while musical compositions became copyrightable long ago, there were no sound recordings when the Founders lived. Even after the invention of the sound recording, decades passed before records received copyright protection, suggesting that the Founders would be surprised to see how their copyright law was used.

The Founders also provide an opportunity to conduct an important philosophical investigation into the nature of copyright. Intellectual property scholars commonly agree that copyright and patent laws serve utilitarian goals and that natural law comes in second.¹⁶ Nonetheless, the specter of John Locke continues to exert a peculiar and inappropriate influence on the law. While most courts and scholars appear to have concluded that the true justification for intellectual property law is utilitarian and is not based on a Lockean theory of labor investment, the ghost of Locke is an especially tenacious apparition. Locke is a famous name whose labor theory of property fits so well with American sensibilities that he lulls us into ready acceptance of the likeness between intellectual property and conventional property. Not only does he induce people to think that the justification for intellectual property must be similar to the justification for more ordinary forms of property but he also forces the scholars who deny his influence to include him in their textbooks and casebooks.

Although the theory that natural rights is the basis of copyright and patent has been formally discredited, it influences the law in a quiet but determined fashion. Apparently, whatever the law may say about Locke's irrelevance, he seems to force at least the admission that copyright and patent are property, so that to oppose the rights of intellectual property is to oppose property itself. As the content industries like to put it, "You wouldn't steal a car, so why would you download a movie?" Such an appeal is made in the belief that there is a moral core to the argument for intellectual property that is at the heart of all ownership.

The Founders offer an interesting way to assess this belief. They have acquired a lasting reputation as defenders of the sanctity of private property, even as ruthless defenders of slavery. Despite their many misgivings, they were willing to sacrifice the "self-evident" human rights of others for the rights of private property. No sentimental attachment to

16. See, e.g., *id.* at 1382; Abrams, *supra* note 14, at 1185.

borrowing and remixing would have led them to ignore true property rights, and if copyright and patent are like other forms of property, the Founders should be advocates of modern intellectual property rights. If they would have *opposed* the modern intellectual property rights, their opposition has something to say about the direction that the law of intellectual property has taken.

Ultimately, what emerges from a comparison of the past and present is a clearer understanding of the recording industry's philosophical basis for what may be called natural law or common law copyright. The claim that copyright is the codification of a deeply rooted moral sensibility protective of a natural right is also an assertion that copyright precedes communication—a counterintuitive and dubious notion that will be examined more fully below, but one most often expressed in the assertion that people will not create in the absence of a monopolistic economic incentive.

What does it mean to say that copyright is made to precede communication when it is obvious that communication came first, with copyright a comparatively recent development? Under the urging of the entertainment industries and other copyright insiders, we have become accustomed to accept the premise that people do not create in the absence of a monopolistic incentive. We have increasingly forced culture to take on the shape of its copyrighted container. It is certain that copying came before copyright. If it seems odd to say that the philosophy of common law copyright puts copyright ahead of communication, then consider this question: Why do we have histories of *copyright* in the 1790s but no histories of *copying*?¹⁷

II. COPYING IN 1790: PATRIOTIC PLAGIARISM AND MADISON'S PURLOINED *FEDERALIST* NO. 10.

A. Madison's Purloined Federalist No. 10

Federalist No. 10 was James Madison's most famous writing, and it was plagiarized from several essays written by David Hume. Madison dealt with the same problem confronted by Hume, which was the tendency of faction to undermine the public interest. In the language of the time, this was akin to the modern notion of private and selfish interests. Hume wrote incisively on the question of whether a large nation could

17. See Craig Joyce & L. Ray Patterson, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909 (2003). I am not, of course, suggesting that we should not have histories of early copyright but that our understanding of a right to prohibit copying must be informed by understanding the extent of a right to copy.

survive as a republic and came to the original conclusion that it could.¹⁸ He denounced the “falsehood of the common opinion, that no large state, such as France or Great Britain, could ever be modeled into a commonwealth, but that such a form of government can only take place in a city or small territory.”¹⁹ Hume stated emphatically that nearly the reverse was true when it came to preserving a republic as opposed to founding one: “Though it is more difficult to form a republican government in an extensive country than in a city; there is more facility, when once it is formed, of preserving steady and uniform, without tumult and faction.”²⁰

Madison likewise countered the conventional wisdom by insisting that larger republics would prove more resistant to factions than smaller nations, and apparently found in Hume a most convenient source for his arguments.²¹ Hume wrote, “In a large government . . . the parts are so distant and remote, that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest.”²² In *Federalist* No. 10, Madison proposed a very similar view on the solution to the problem of faction:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.²³

Madison copied without acknowledgment from at least three of Hume’s essays: *Of the First Principles of Government*, *Idea of a Perfect Commonwealth*, and *Of Parties in General*. Plagiarism is one thing, but the norms of modern copyright law cast Madison’s furtive copying in a still darker light. Not only did he plagiarize by taking the general idea without attribution but by modern standards he might also have infringed on Hume’s copyright by copying exact phrases and by taking the “heart” of the work.²⁴ Hume died in 1776 and thus was unable to expose Madi-

18. DAVID HUME, *IDEA OF A PERFECT COMMONWEALTH* (1742), reprinted in HUME: *THEORY OF POLITICS* 242 (Frederick Watkins ed., 1951).

19. *Id.*

20. *Id.*

21. Several scholars disagree with Douglass Adair about the extent of Hume’s influence on Madison, most notably Edmund S. Morgan. For the lively controversy, see Mark G. Spencer, *Hume and Madison on Faction*, 59 WM. & MARY Q. 869 (2002). Spencer concludes that Hume did indeed influence Madison directly. *Id.*

22. HUME, *supra* note 18, at 243.

23. THE FEDERALIST NO. 10 (James Madison).

24. See Douglass Adair, “*That Politics May be Reduced to a Science*”: David Hume, James Madison, and the Tenth Federalist, in *FAME AND THE FOUNDING FATHERS* 93, 97–105 (Trevor Colbourn ed., 1974).

son's barefaced piracy. That left it to twentieth-century historian Douglass Adair to discover Hume's influence on Madison and to see how closely Madison's essay followed Hume's; it was not Adair's concern to engage in moral or legal characterizations.²⁵

Madison's takings from Hume may represent two different kinds of copyright infringement. This was explained by the Honorable Jon Newman—years before his expansive opinion in *Universal City Studios v. Corley*²⁶—in *Warner Brothers v. ABC*.²⁷ First, copying small amounts of text here and there amounts to “fragmented literal similarity,” while the overall similarity between the works demonstrates “comprehensive non-literal similarity,” duplicating the “fundamental essence or structure of a work.”²⁸ Historian Adair's characterization of Madison's copying suggests just such a duplication:

Madison had no capacity for slavish imitation; but a borrowed word, a sentence lifted almost in its entirety from the other's essay, and, above all, the exactly parallel march of ideas in Hume's “Parties” and Madison's Federalist No. 10 show how congenial he found the Scot's way of thinking and how invaluable Hume was in the final crystallizing of Madison's own convictions.²⁹

Hume thus provided the material for Madison's most famous piece of literary property, *Federalist* No. 10, inspiring both the statement of the problem and the solution. Hume also supplied Madison with the goal of distinguishing himself “by memorable achievements the first place of honour [that] seems due to Legislators and founders of states.”³⁰ In other words, Madison brazenly used Hume's own literary property in order to achieve immortal fame as the preeminent Founder of the United States.

If the norms of plagiarism and copyright are founded in a law of human nature, it is obvious that Madison is in trouble, for his *Federalist* No. 10 violated both. As one of the people responsible for the introduction of the law of copyright and patent into the United States, he seems to be caught in an unseemly and hypocritical position. The copying that went into *Federalist* No. 10 is similar to that in *Harper & Row Publishers v. Nation Enterprises*, in which *The Nation* magazine, having ob-

25. *Id.*

26. *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

27. *Warner Bros. v. ABC*, 720 F.2d 231 (2d Cir. 1983).

28. *Id.* at 240, 242 (quoting Melville B. Nimmer & David Nimmer, 3 NIMMER ON COPYRIGHT § 13.03 [A] [1], [2] (Mathew Bender 2010)).

29. Adair, *supra* note 24, at 103.

30. DAVID HUME, OF PARTIES IN GENERAL (1742), reprinted in HUME: THEORY OF POLITICS 168 (Frederick Watkins ed., 1951).

tained a “purloined manuscript” of former President Gerald Ford’s memoir, copied enough of the language to capture the “heart of the book.”³¹

A consideration of the ethos of copyright and patent at the nation’s founding suggests a different relationship between human nature and copyright than the one now promoted by the industries. Madison would not have been ashamed if his plagiarism and copyright infringement were discovered, for at the time, this kind of copying was common. Benjamin Franklin copied rather freely, as did many contemporary authors. The music and movie industries are attempting to attach copyright to the most deeply held moral restrictions on stealing; to them, plagiarism and copyright infringement are sister offenses that tear at the institution of property. To Madison’s generation, there seemed no such connection. Additionally, while the industries assert that the norm is universal, Madison’s blatant copying of Hume, coupled with the fact that common law copyright was purely English, points to the positive character of the law and away from any foundation in natural right.

Franklin helps make this point. Not only was he a plagiarist by today’s standards but he was also an inventor who did not seek patents. Franklin was a notable scientist in his time and his accomplishments were recognized by Americans and Europeans alike. In 1762, David Hume wrote a letter to Franklin indicating his high regard for Franklin’s intellect: “America has sent us many good things; gold, silver, sugar, tobacco, indigo, etc., but you are the first philosopher, and indeed the first great man of letters for whom we are beholden to her.”³² The Comte de Buffon, one of the European philosophers and scientists who had propagated the theory that Americans were degenerates, nonetheless credited Franklin for his achievement in harnessing lightning. Franklin never sought a patent on any of his inventions, saying, “As we enjoy great advantages from the inventions of others, we should be glad of an opportunity to serve others by any invention of ours; and this we should do freely and generously.”³³

*B. The Shallow Roots of Intellectual Property in the Early Republic:
Thomas Jefferson and the First Patent Troll*

The Founders were not particularly shy about copying, suggesting that there was no widespread feeling that copying was wrong. When Americans passed patent and copyright laws, they did not codify com-

31. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 542, 565 (1985).

32. Letter from David Hume to Benjamin Franklin (May 10, 1762), in 1 *THE LETTERS OF DAVID HUME* 357 (J.Y.T. Greig ed., 1932).

33. *BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN* 208 (Philadelphia, Henry Altemus 1895).

mon law rights; in fact, Thomas Jefferson's famous dispute with Oliver Evans offers evidence that the roots of the law were quite shallow in the early years of the Republic. Jefferson's credentials in patent law have been challenged by Adam Mossoff,³⁴ but Jefferson's most famous foray into the debate over the nature of intellectual property offers important clues about how shallow these roots were in the new nation, more than a decade after the passage of the first patent and copyright acts.

Jefferson's 1813 letter to Isaac McPherson concerning the patents held by Oliver Evans became famous by virtue of the Supreme Court's opinion in *Graham v. John Deere Co. of Kansas City*, which determined that an improvement to a plow was unpatentable for obviousness.³⁵ Jefferson was a handy source for the Court, which pointed out that Jefferson had himself invented a plow for which he did not seek a patent. Jefferson's lack of interest in patenting his invention is important indeed,³⁶ but attention has tended to focus on his more abstract reasoning regarding the desirability of the ownership of ideas, and less on the greater significance of the protracted conflict that took place between Evans and the many people whom he accused of infringing his patents.

The controversy has a seamy side that tells us more about attitudes toward patents in the early 1800s, for Oliver Evans was the first American patent troll.³⁷ To be fair to Evans, he was apparently an inventor of note, so he does not fit the profile of the modern patent troll in this regard.³⁸ On the other hand, he policed his inventions and enforced his patent rights strictly enough to make any modern patent troll envious. He also sought to lengthen the term of the patent based on the argument that the patent belonged to the inventor just as surely as real estate to the discoverer of "a piece of unlocated land."³⁹

He enjoyed both successes and failures, his failures leading him in 1809 to burn a sheaf of writings that apparently contained inventions of various sorts. His explanation of the unusual action was that he wanted to spare his children a lifetime of fruitless invention, but his subsequent return to invention, patenting, and patent infringement suits suggest that Evans was somewhat unstable. His frustration highlights a more impor-

34. See generally Mossoff, *Who Cares*, *supra* note 6.

35. *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1 (1966).

36. Boyle writes that Jefferson offers "a classic set of cautions" regarding the nature and reach of the law that he terms the "Jefferson Warning," comparable in importance to the Miranda Warning. BOYLE, *THE PUBLIC DOMAIN*, *supra* note 7, at 21.

37. A patent troll is a nonmanufacturing company that purchases already issued patents and then sues other companies for infringing on them.

38. See GREVILLE BATHE & DOROTHY BATHE, *OLIVER EVANS: A CHRONICLE OF EARLY AMERICAN ENGINEERING* (1972). The Batthes concede that Evans was litigious but maintain that he was an important inventor. *Id.* at xv-xviii.

39. *Id.* at 214.

tant point when it comes to establishing the milieu in which patent and copyright came into being, for it also indicates that his view of the natural rights basis of patent law—the American version of the common law justification—held little sway in either the law or public opinion.⁴⁰

In explaining his unhappiness at congressional inaction, Evans himself indicated that people generally did not agree with him on the importance of using the law to secure inventors' rights for an adequate length of time. He asserted that there was a general feeling in support of inventors' rights: "He that creates or produces a thing that never before existed, is by common consent, and the laws of nature, the only true proprietor, as no other person can possibly have any claim or right to it."⁴¹ Yet, this "common consent" appears to have arisen more from wishful thinking on Evans's part than from widespread public sentiment. Evans lamented that the inventor's proper entitlements were recognized neither by Congress nor by the community: "Inventors are so few in number, that they are never represented in legislation, and cannot defend their rights, but are subject to the rest of the community, who forget to legislate, to protect such property as inventors produce."⁴² Perhaps the mass of his fellow citizens disagreed with him, or perhaps they simply had no opinion on the nature of intellectual property rights. In either case, the inference is that there was no widely shared belief that protection of intellectual property sprang from some deep Lockean wellspring in American culture, and that the law did not represent the codification of tradition. Jefferson confirmed this point in a letter to Evans by noting that the matters over which the two disagreed had never been decided, and that many issues would need to be resolved by future adjudication.⁴³ He suggested that it was premature to decide these points of patent law "when so new a branch of science has been recently engrafted on our jurisprudence, one with which its professors have till now had no call to make themselves acquainted."⁴⁴

In other words, patent law and copyright law were young in the United States. The law did not codify a tradition and did not appear to express the general sense of the public. They did not have a legal or cultural history in the United States, and they did not spring from a body of

40. *Id.* at xv (noting that the "United States did not give inventors of that day the help and protection that they receive in these days" and that Evans felt deep "injustice and bitterness at the lack of sympathetic support both morally and financially from those who were most anxious to reap the harvest of his inventions").

41. *Id.* at 215.

42. *Id.*

43. Letter from Thomas Jefferson to Oliver Evans (Jan. 16, 1814), in 14 THE WRITINGS OF THOMAS JEFFERSON 67 (Andrew A. Lipscomb et al. eds., 1903).

44. *Id.*

custom or a conventional manner of thought about a social contract. When Americans of the founding generation thought that a right had a basis in the social contract or in natural law, they were never shy to say so. If they did not say so with regard to intellectual property, it must be because either they did not believe it, or it had not occurred to them.

To be sure, as Adam Mossoff argues, there was some support for the view that natural law formed the basis of patent and copyright law,⁴⁵ as the conflict between Evans and Jefferson shows. The conflict also shows the weakness of the natural law position in patent law. Evans spoke a language of inventors' property rights very similar to the modern language of authors and ownership, while Jefferson spoke the language of public benefit. Evans promoted the idea that patent right was a natural right that should be extensive, while Jefferson insisted that it was a right conferred by the public in order to further the public interest, and that it should be accordingly limited. And to judge by his writings, Evans felt that his position was a lonely one with little social or legal support.

The novelty of the law in these early years is important. The theory of common law copyright, described in detail below, paints copyright law as springing from a primordial past and confirming timeless rights. Scholars have expended much ink on the question of what the Founders thought about what we now call intellectual property, but it is not clear that they thought much about it at all. This is what might be expected of "so new a branch of science," as Jefferson put it.⁴⁶ The Founders enacted copyright in the hopes of future achievements beneficial to the public. As the Supreme Court later stated in *Wheaton v. Peters*, (the American analogue to *Donaldson v. Beckett*)⁴⁷ in passing the Copyright Act of 1790,⁴⁸ Congress "instead of sanctioning an existing right, as contended for, created it."⁴⁹

C. The Goal of American Cultural Equality and the Myth of Lockean Copyright

If the Founders were neither codifying natural law nor giving legal expression to a culture of copyright and patent that already existed, it remains a fair question to ask what they *were* doing by bringing copyright and patent into being.

45. Mossoff, *Who Cares*, *supra* note 6, at 982–83.

46. Letter from Thomas Jefferson to Oliver Evans (Jan. 16, 1814), in 14 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 43, at 67.

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

48. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

49. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 661 (1834).

What did they think that copyright meant? This is, at least initially, a difficult question about which there is little direct evidence. Nonetheless, the context of the Founders' enactments allows us to draw conclusions about their overriding purposes. While most of the state copyright statutes of the 1780s mentioned the author's entitlement in the preamble, referring in some cases to natural law and natural right, that entitlement was nothing like the perpetual right that the owner of real property enjoyed. The author's right was severely restricted in accord with the public purposes that the statutes were meant to serve.⁵⁰ In contravention of the notion that there was a common law copyright that antedated statutory copyright, it also appears that those who introduced copyright and patent wrote on a nearly blank slate. There was a robust tradition of the protection of conventional property in colonial America; there does not seem to have been any corresponding tradition in what we now call intellectual property.

The striking policy considerations underlying copyright in the Founding era are the promotion of American culture, equality, and the increase of federal power. Much attention has been focused on Noah Webster's travels on horse from state to state lobbying for legal recognition of the rights of the author.⁵¹ Much less attention has been paid to the nature of the works that copyright sought to protect and to the kind of people who pressed for copyright acts. The most prominent proponents of copyright laws were notable advocates of a distinctly American culture that would serve as the equal of European culture.⁵²

Tyler Ochoa and Mark Rose argue that the Founders had a deep suspicion of monopoly that led them to offer copyright protection only for a very limited time.⁵³ American copyright and patent law also reflected the desire of Americans to take aim at another monopoly—a presumed European monopoly over intellectual and cultural products, ex-

50. For example, the copyright term was fourteen years with a provision for renewal should the author survive the first term. Notice of the record of registration had to be published within two months, and a copy of the work had to be deposited with the Secretary of State. WILLIAM PATRY, 2 *COPYRIGHT LAW AND PRACTICE* 25–35 (1994). As Patry notes, “Rather than grant copyright protection to all authors throughout the world without the need of complying with formalities of any kind, as France would do one year later, Congress fell back upon the system of formalities and restrictions inaugurated by the Statute of Anne.” *Id.*

51. Thus, his biographer Harry Warfel states that Webster “unquestionably is the father of copyright legislation in America.” See DAVID MICKLETHWAIT, *NOAH WEBSTER AND THE AMERICAN DICTIONARY* 74 (2000). Henry Steele Commager gave similar credit to Webster. See MARCUS DANIEL, *SCANDAL & CIVILITY: JOURNALISM AND THE BIRTH OF AMERICAN DEMOCRACY* 336 n.29 (2009).

52. For example, Noah Webster, Joel Barlow, Hugh Williamson, David Ramsay, and expatriate Englishman Thomas Paine. See PATRY, *supra* note 50, at 14–21.

53. Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 49 *J. COPYRIGHT SOC'Y U.S.A.* 675 (2002).

pressed in an attitude of disdain toward Americans. One of the chief motivations in establishing copyright and patent laws was the desire to establish Americans as the equal of Europeans. The American Revolution was a very public repudiation of an English imperial theory that had sought to make colonial Americans into a permanent underclass on the theory that Americans were degenerate Englishmen, at best half-Englishmen who did not deserve the rights of true Englishmen.⁵⁴ In a similar but more philosophical vein, famous European thinkers speculated that Americans were degenerate Europeans. After the Revolution, it became imperative to establish the equality of Americans with Europeans, and artists, authors, and scientists strove to create a uniquely American culture that could match Europe's finest creations.

The result was a burgeoning national literature explaining and exalting America, the most prominent example of which was Jefferson's *Notes on the State of Virginia*, first circulated in France. A host of others followed him in the attempt to create an American culture worthy of repudiating the degeneracy thesis, and the most famous advocates of copyright were among them. Noah Webster, Joel Barlow, and David Ramsay were notable early proponents of copyright, and each of them was intensely concerned with demonstrating that the United States was the equal of Europe.⁵⁵ Webster promoted the development of a distinct American language that might one day prove superior to the English language. One of the most zealous early proponents of copyright, he insisted that language reform was necessary because "an attention to literature must be the principal bulwark against the encroachments of civil and ecclesiastical tyrants" and because he wanted to break America's dependence on English books.⁵⁶

The literature that came from this movement was thus truly national and animated by an attachment to equality. The most obvious equality that they sought was that between Europeans and Americans, but this equality was simply part of a more thoroughgoing republican equality that had quickly taken over the American stage in the two decades after the Revolution. Even geography and arithmetic took on a decidedly republican cast, as did representations of family life in fiction. Given that the European and English critique of American degeneracy had empha-

54. I develop this argument at length in *Our Discrete and Insular Founders: American "Degeneracy" and the Birth of Constitutional Equality* (Oct. 27, 2009) (on file with author), available at http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website__academics__colloquia__legal_history/documents/documents/ecm_pro_063528.pdf.

55. See PATRY, *supra* note 50, at 14–21.

56. HOWARD MUMFORD JONES, O STRANGE NEW WORLD 331–32 (1964).

sized inequality, it was natural that the American repudiation of the theory would insist on equality.

Copyright was supposed to promote Americanism and an American version of republican equality, both of which were intimately concerned with the public good. Accepting this view has proven surprisingly difficult because of the competition offered by a Lockean theory of intellectual property. Although Locke himself does not seem to have applied his theory of property to copyright, and the Founders were attached to a rather different theory, the Lockean view that traces intellectual property to a right founded in the creator's labor has been strangely persistent. This persistence, which stresses the private character of the right, is difficult to account for in legal terms, given the evidently public character of both copyright and patent law in these early years. It can be explained in part by a reflexive tendency in American law to justify all forms of property by a single theory: that one who invests his labor in a thing is entitled to the thing.

The Lockean explanation of intellectual property has a vagueness to it that is functional; it provides a convenient philosophical origin that serves as a substitute for the more questionable historical origins of intellectual property. Both copyright and patent represented the exercise of a prerogative power on the part of government that is foreign to Americans and embarrassing from a modern point of view. It is more natural to think in Lockean terms. Copyright in England had its origins in censorship, which was to be secured through placing all rights of publication in a company of booksellers.⁵⁷ The role of the infamous Stationers' Company in enforcing censorship in early modern England is widely recognized, but the relationship between copyright and its censorious antecedents may not be fully appreciated.⁵⁸

Licensing and censorship created a corporation that had outlived its usefulness with the expiration of censorship at the end of the seventeenth century, so the Stationers' Company went to work securing its status by asserting the rights of the author as the justification for copyright. Lockean labor had almost nothing to do with the creation of copyright, but the desperate need of the London booksellers to maintain their monopoly did. And thus, they began a campaign emphasizing the right of the author, which after decades of agitation bore legal fruit in 1769 with the

57. AUGUSTINE BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 51–52 (1971).

58. For a succinct account of the relationship between the press and copyright, see Craig Joyce, *Prologue: The Statute of Anne: Yesterday and Today*, 47 HOUS. L. REV. 779 (2010). Joyce recognizes that censorship should not be left out of the story of the beginnings of copyright: "Not so incidentally, the new technology threatened the Crown, which shuddered at the thought of widespread dissemination of works advocating religious heresy and political dissent." *Id.* at 781.

famous decision in *Millar v. Taylor*.⁵⁹ *Millar* gave the booksellers their common law perpetual copyright, but it was to last only until 1774, when the House of Lords took the right away in *Donaldson v. Beckett*.⁶⁰ The booksellers recognized their defeat and quickly sought parliamentary relief in the form of a bill, but they did not get it. In 1774, it was clear that common law copyright was not the law.

By the time American states began enacting copyright laws in the 1780s, the Lockean view had lost its brief hold on English law. Americans had little reason to think of copyright as a traditional common law right, and the laws they passed did not indicate otherwise.

As I have suggested, however, Locke's specter is a tenacious one. Well more than 100 years after the Copyright Act of 1790, when it came time to decide whether sound recordings should be protected under copyright and whether protection would be consistent with the Constitution, it exerted its influence on American shores. Common law copyright was legally dead, but it remained spiritually alive.

III. WRITINGS THEN AND NOW: CONSTITUTIONAL INSOUCIANCE AND THE ADVENT OF COPYRIGHT FOR SOUND RECORDINGS

Article I, Section 8, Clause 8 of the Constitution permits Congress to offer copyright protection to "Writings." While the recording industry now appears to be the natural steward of copyright law, sound recordings did not always enjoy copyright protection, and historically, records had either to satisfy or evade the writings requirement. It may seem that the prohibition of copying recordings is based on timeless natural law, but records did not achieve copyright protection quickly or easily, and the story by which they did is important in an assessment of the traditional contours of copyright.

At the nation's founding, copyright law covered only maps, charts, and books. Now recorded performances are "Writings" protected by copyright.⁶¹ So are dances, buildings, vessel hulls, semiconductor chips, and computer programs.⁶² Can fashion design be far behind? The *Eldred* Court warned that it would look askance at a fundamental departure from the traditional contours of copyright law,⁶³ and a consideration of the ever-expanding categories of subject matter covered by copyright is just such a departure. Copyright term extension pales in comparison.

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

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

61. Copyright Act, 17 U.S.C. § 102(a) (1990).

62. *Id.*

63. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

The point is not that the Clause should be construed so narrowly that only writings in the most literal sense should qualify for copyright. The language of the Constitution has been interpreted broadly in a number of areas, notably in Commerce Clause and First Amendment jurisprudence. It is not simply the fact that there have been expansive changes; rather, it is the nature of the changes that have taken place and the manner in which they have been justified that are at issue. It is one thing to extend the original purpose of a constitutional provision, and yet another to run entirely counter to it. It is as much the manner as the substance of the departure from the writings requirement that leads to the observation that there has indeed been a fundamental departure from the original contours of copyright law. One of the best indices of the departure is the expansion of copyrightable subject matter.

First, the process by which records found their way into copyright law is telling, marked by what I characterize as “constitutional insouciance,” championed by insiders, and justified by an anachronistic and counterintuitive philosophy dressed up as if it were in accord with common sense and supported by historical evidence. Second, the triumph of the sound recording, and the various other subject matters that have followed, represents more than a simple departure from the original contours of copyright law. It represents a near reversal.

It does not require faith in a narrow constitutional textualism to see that the increase in subject matter that may be copyrighted signals corruption in the law. The departure from the writings requirement is symptomatic of a radical and largely unstated change in the purpose of copyright law, which once included a “legibility” requirement in the early years of copyright, indicating that copyrighted writings were meant to be read. In its early years, copyright was supposed to be pressed into the service of a distinctively American culture. Charts were to be created and used; maps were to be charted and followed so that the American hinterland might be further discovered; and books were to be written *and read* so that the American character might be strengthened.

It is not a textual quibble to note that the law appears to have abandoned the limitation imposed by the word “writing.” It is rather to note that the extension of copyright to a variety of subject matters that are not writings represents a subversion of the purpose of the law—to allow the public to understand. Copyright has been subjected to a steady onslaught of subject-matter extension. This extension is problematic because it is premised on a vague combination of the inapposite Lockean theory of copyright, formally discredited in *Feist Publications v. Rural Telephone*

*Services*⁶⁴ as the “sweat of the brow” theory, and an equally inapposite unfair competition theory.⁶⁵ It does not fit well with the historical justification of copyright as a means to achieve public purposes. Next, quite apart from the dubious elements of unfair competition and Lockean labor, the steady progression of the law also raises a constitutional issue. The Constitution allows Congress to protect *writings* under the Copyright Act,⁶⁶ and some justification would seem to be in order for the protection of sound recordings, which are not evidently writings.

What should be made of the constitutional question of whether only writings can be protected under the Copyright Act? Two interesting studies written in 1956 and 1957—the first commissioned by Walter Derenberg and written by law students at New York Law School, the second written by future Register of Copyrights Barbara Ringer—seemed to agree that the best way to deal with the problem was to consider it and then ignore it. Derenberg’s study, *The Meaning of “Writings” in the Copyright Clause of the Constitution*, begins by observing that a “literal reading of this clause would invalidate part of every copyright law passed since 1790 and prevent any copyright protection for such presently protected matter as advertising, photographs and motion pictures, paintings, maps, cartoons, and three-dimensional objects.”⁶⁷ The piece concludes by observing that it “seems reasonable to assume that no copyright statute passed by Congress allowing copyright protection to new forms of expression will be declared unconstitutional. This is so, *despite the discussion in some cases that certain objects are not ‘writings’ within the meaning of the Constitution.*”⁶⁸ What the author appears to conclude here is that the constitutional limitation imposed by the word “writings” can safely be ignored.

Future Register of Copyrights Barbara Ringer came to a similar conclusion in her study on copyright and sound recordings. She first raised the question of whether “[r]ecords are not ‘writings’ since (a) they are not legible, (b) the Supreme Court has held that they are not ‘copies,’ and (c) they are material objects or mechanical devices and thus belong under patent rather than copyright protection.”⁶⁹ Any one of these objec-

64. *Feist Publ’ns, Inc., v. Rural Tel. Servs. Co.*, 499 U.S. 340 (1991).

65. *Id.* at 359–60.

66. See U.S. CONST. art. I, § 8, cl. 8 (“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”).

67. Walter J. Derenberg, *The Meaning of “Writings” in the Copyright Clause of the Constitution*, in 1 STUDIES ON COPYRIGHT 43, 45 (Copyright Soc’y U.S.A. ed., 1963).

68. *Id.* at 86 (emphasis added).

69. Barbara A. Ringer, *The Unauthorized Duplication of Sound Recordings*, in 1 STUDIES ON COPYRIGHT 119, 165 (Copyright Soc’y U.S.A. ed., 1963).

tions would seem to lead to the conclusion that records are not writings, but Ringer concluded without much analysis that “[r]ecent decisions, together with the weight of opinion of the many commentators on this subject, seem to have weakened, if they have not destroyed, the force” of this argument.⁷⁰

This is really to say, as the Court in *Eldred* suggested by sanctioning the most recent term extension on the basis that there had been previous extensions,⁷¹ that if the constitutional objection is ignored for long enough it ceases to be troubling. The law has continued to follow this course, refusing to consider whether something is enough of a writing to warrant constitutional protection.

If Madison, Jefferson, and Franklin were to make peace with the march of copyright, they would need to not only accept vast changes in the limits of the law but also accept an accompanying lack of justification that leaves the stated purposes of the law untouched. They would also be confronted by glaring inconsistencies, for although the law would attempt to assure them that copyright protects only expressions and never ideas or functions, the assurance would be belied by the de facto protection that is often afforded. If they were to ask where and when this sort of copyright protection originated, they might be surprised to be told that it predated the United States as the product of English common law.

IV. COMMON LAW COPYRIGHT AND SOUND RECORDINGS

There is more to the story of copyright for sound recordings than wishing away the constitutional language of “writings.” There had to be some motivation for the extension of copyright, some explanation that made common law copyright attractive enough to make us forget whether records were actually writings deserving of copyright protection. The story of how copyright was extended to records is an important one in large measure because it aids in the understanding of how a sweeping departure from copyright’s original contours was accomplished. Despite the recording and movie industries’ attempts to pose as the stewards of a copyright law based on a timeless principle, it took a long time for records to come under the protection of the law. The arguments supporting the extension of copyright to records are also interesting, both for their insouciance as to the constitutional basis for the law and for their close resemblance to arguments made and discarded centuries ago.

70. *Id.* She also notes several other arguments and concludes that all but one had been effectively countered. The one argument that remained viable, in her view, was that “[r]ecord manufacturers cannot be regarded as ‘authors’ since their contributions do not amount to original intellectual creations.” *Id.*

71. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

Copyright for records was essentially a clever replay of the means by which publishers in eighteenth-century England had extended their control over books from an old licensing regime intended to enforce censorship to a newer copyright regime intended to further the education of the public in Britain and the “Progress of Science and the Useful Arts”⁷² in the United States. Their first resort was to something resembling contract. In a series of moves reminiscent of London’s eighteenth-century booksellers, and presaging the practices of modern software licensors, they simply declared that unauthorized copying of sound recordings was unlawful. Records were sold with legends resembling modern clickwrap and shrinkwrap licenses, specifying the record’s uses and claiming that the purchaser had agreed to the restrictions.

More importantly, suits were brought under state law theories of misappropriation and common law copyright infringement. Initial failures were followed by successes, most notably the 1955 decision in *Capitol Records v. Mercury Records*, a case in which the Second Circuit decided that sound recordings were protected, not by federal copyright law, but by New York law on the basis of common law copyright and unfair competition.⁷³ The case evidences the tendency that lies at the heart of the expansion of copyright: while admitting that federal copyright law did not at that time extend to sound recordings, the court seemed intent on remedying a failure of federal law to live up to its true principles.⁷⁴ A largely imaginary private right was the focus, with no attention paid to the public benefit that is the *sine qua non* of federal copyright law. Copyright for sound recordings was the result of a process that disregarded the public benefit that lies at the heart of federal copyright law. It was ostensibly crafted in order to benefit authors. It was the product of an inapposite combination of unfair competition and common law copyright, and it was based on a spurious right that had never existed—but one that is highly compelling to the American legal imagination, an imagination predisposed to think that there must have been a common law right for centuries.

The extension of copyright protection under state law also represented the codification of a theory that inverts the relationship between culture and copyright, a theory that envisions a culture in which people will not communicate unless they are assured of a right to prohibit copying of their communications, as discussed below.

This theory, although never formally passed into law, has had far-reaching influence. It is not as far a leap as it may first seem from copy-

72. See U.S. CONST. art. I, § 8, cl. 8.

73. *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955).

74. See *id.*

right for sound recordings to copyright for computer programs, buildings, dances, vessel hulls, and semiconductor chips. On the basis of a vague idea, as Professor Chafee put it, that we are supposed to transform “the natural justice of copyright into positive law,”⁷⁵ and that new creations have great value and thus deserve to be protected,⁷⁶ we have fallen into the habit of ignoring the constitutional basis of the law of copyright. In the process, copyright has been pushed farther and farther from the principles on which it was founded and in the direction of its ostensible common law origins.

*A. The History of Common Law Copyright and the
Ghost of Donaldson v. Beckett*

Common law copyright is the product of a rather fanciful version of history and an improbable philosophical vision. It relies on a story that cannot start at the beginning and that is populated by characters of mythical proportion, such as John Locke and William Shakespeare.⁷⁷ The characters are truly mythical because they bear little resemblance to the historical Locke and Shakespeare and are made to espouse views the real individuals unlikely held. In fact, it would be more accurate to describe the history of common law copyright as a history of events as they *should* have taken place, from the point of view of adherents of common law copyright. Because there is little evidence indicating that the original prohibitions on copying came into being as a consequence of authors’ demands, the theory of common law copyright posits a class of authors who *must* have desired such protection.

The result is a view of the nature and origins of copyright that is based on a great deal of faith in some very unlikely propositions. As is widely known, copyright in England was the stepchild of state-sponsored censorship, and although our modern credo insists that people will not create in the absence of a monopolistic incentive to publish, the regulation of printing came into being precisely because people were writing too much without any such incentive.⁷⁸ And they were writing on things that mattered most: affairs of state and religious issues.⁷⁹ Censorship, however, is not an attractive starting point for the story of common law copyright. That story prefers to begin with the famous decision in *Millar*

75. Chafee, *supra* note 13, at 28.

76. *Id.*

77. Again, both Adam Mossoff and Justin Hughes are among those who believe that Locke did indeed apply his theory to literary property. See *supra* note 6.

78. Joyce, *supra* note 58, at 781.

79. *Id.*

v. *Taylor*⁸⁰ and to avoid *Donaldson v. Beckett*.⁸¹ For if *Donaldson* can be made to go away, then surely in 1790, Americans were passing the result of *Millar* into American law, recognizing and codifying the view that copyright was a common law right of perpetual duration.

This leaves the result in *Donaldson* to explain away, a process that has a lengthy and noble lineage. As copyright historian and theorist Ronan Deazley notes, Justice Graffeo's 2005 New York Court of Appeals opinion in *Capitol Records v. Naxos of America*⁸² shows the influence of "the long shadow which the orthodox (and erroneous) accounts of *Millar* and *Donaldson* still cast upon current copyright doctrine and discourse."⁸³

To see how the avoidance of *Donaldson* is related to sound recordings, there is no better place to start than in a brilliant essay written by copyright attorney John Whicher in 1961, entitled "The Ghost of *Donaldson v. Beckett*."⁸⁴ This essay attempts to persuade readers that there is a natural or common law basis for copyright that has not received due notice. Whicher's essay should be better known because of the systematic nature of its argument, which helps to explain the otherwise mysterious success of the theory of common law copyright.

"Do the dry bones of *Donaldson v. Beckett* live again?"⁸⁵ So begins this formidable piece of adversarial scholarship, a lively attempt to breathe the spirit of the common law into copyright and thus extend the subject matter of copyright into a wider variety of areas.⁸⁶ The question states the purpose of the piece, which is to cast doubt on the legitimacy and reach of the *Donaldson* decision. The ghost is the spirit of the decision itself, an apparently pesky apparition engaged in a centuries-long quest to rob common law copyright of its rightful authority.

The gist of Whicher's argument is that *Donaldson v. Beckett* was never properly the law, neither in England nor America, for a variety of reasons that are essential to understanding the tenacity of the myth of

80. *Millar v. Taylor*, (1769) 98 Eng. Rep. 201 (K.B.) (holding in favor of a common law perpetual copyright).

81. *Donaldson v. Beckett*, (1774) 98 Eng. Rep. 257 (H.L.) (effectively reversing the holding in *Millar*).

82. *Capitol Records, Inc. v. Naxos of Am., Inc.*, 4 N.Y.3d 540 (2005).

83. DEAZLEY, RETHINKING COPYRIGHT, *supra* note 14, at 169. Deazley is the most thorough historian of eighteenth-century English copyright. See also DEAZLEY, ORIGIN OF THE RIGHT TO COPY, *supra* note 14, at 3–4.

84. JOHN WHICHER, *The Ghost of Donaldson v. Beckett*, in THE CREATIVE ARTS AND THE JUDICIAL PROCESS 85 (1965).

85. *Id.*

86. *Id.*

common law copyright.⁸⁷ First, *Donaldson* was not clearly the law in England because its result was uncertain. After conceding, as an ethical adversary must, that *Donaldson* overruled *Millar*, Whicher asserts that it was nonetheless unclear what *Donaldson* actually did decide: “But when we ask what doctrine, precisely, the Lords preferred to that which they thus cast aside, Clio (that coy muse) simply shrugs.”⁸⁸ Referring to confusion among the various reports of the case, he contends that subsequent ages supplied unwarranted clarity by concluding “that the decision was based on the theory that the statute did ‘impeach or take away’ the common law right in published works.”⁸⁹ This supposed lack of clarity stands in contrast to the certainty of the *Millar* decision, which announced the true law of copyright in 1769, only to be plagued by the ghost of *Donaldson v. Beckett*—a series of mistakes and misunderstandings obscuring the purity of the common law vision.

Second, according to Whicher, if the meaning of *Donaldson* was unclear in England, it was not even the law in America, making the case for common law copyright purer still. He could make the case’s result uncertain in England, but he could not make it go away. America provided a brighter prospect, for the news of *Donaldson* might have failed to cross the sea. Perhaps Americans did not even know of the case! Further, he thought he saw evidence that American booksellers already believed in a common law copyright, and he proudly observed that Massachusetts had produced a copyright law in 1672, predating the Statute of Anne and showing that “Yankee ingenuity thus framed a primitive copyright act more than a quarter of a century before the English Statute of Anne was passed.”⁹⁰ In addition, according to Whicher, James Madison was a proponent of perpetual copyright and a supporter of the decision in *Millar v. Taylor*—all of which provides a shorthand way of saying that Americans were unaware of the *Donaldson* case and that in passing their own copyright statutes, they were endorsing *Millar*’s common law view.⁹¹

87. For drama, Whicher’s presentation cannot be beaten. He writes of the issue in *Donaldson* as “the unlaidd ghost of a question that was asked nearly two centuries ago.” *Id.* Although the question had been answered in America as well as in England, he argues otherwise in equally florid language: “Today it haunts the constitutional foundations of American copyright law, seeking the requiescat of a final answer.” *Id.*

88. *Id.* at 126.

89. *Id.* at 133.

90. *Id.* at 136–37.

91. *Id.* at 138–49. The basis of Whicher’s view is Madison’s “reference to common law copyright” in *The Federalist* No. 43, which “made clear . . . American approval of the booksellers’ doctrine.” *Id.* I have argued elsewhere that this passage does not lend support to the common law view. See Liam Séamus O’Melinn, *Software and Shovels: How the Intellectual Property Revolution is Undermining Traditional Concepts of Property*, 76 U. CIN. L. REV. 143, 156–57 (2007).

Whicher's views are worth considering because they are at once elegant and fanciful, purportedly historical but based more clearly in faith than in evidence. It would seem that if Americans really had meant in 1790 to endorse the result in *Millar v. Taylor*, the contours of copyright law in the United States would have conformed to the common law view from an early date. They did not, and in order to trace *Millar's* influence, Whicher takes an enormous stride ahead in time to the famous *International News Service v. Associated Press* case, decided by the Supreme Court in 1918,⁹² and then to its migration to state courts, particularly those of New York.⁹³

The legacy of *International News*, according to Whicher, was the emergence of state law doctrines of unfair competition and misappropriation in connection with works of authors. And despite the relatively new character of the doctrines, what he found striking about unfair competition in particular was "the virtual identity of the right it enforces with the old, eighteenth century conception of a common law copyright in published works which Blackstone had set out in the *Commentaries* and Justices Willes, Aston, and Lord Mansfield had defended with such vigor and brilliance in *Millar v. Taylor*."⁹⁴ The new right and the old right share several essential characteristics: first, the rights primarily protect the rights of authors; second, they are confined to original works; third, they are property rights.⁹⁵

Given the near identity discerned by Whicher between the new right and the old right, and their common emphasis on copyright as an *author's* right of *property*, we might well ask, "What old common law copyright?" But to ask that question would be to miss the import of the argument, which is that to the supporters of common law copyright the right must be timeless. Despite their aversion to historical evidence, they must find the origins of copyright in a distant and dignified past, the kind that the phrase "common law" is supposed to bring to mind, and in a necessary and beneficial relationship between effective communication and the regulation of the printing press.

Focusing on the ghost of *Donaldson v. Beckett* is a clever way of admitting that *Donaldson* superseded *Millar*, but only technically, while implying that the decision is a moribund distraction from the true spirit of copyright that *Millar* endorsed. Within its adversarial bounds, the essay is executed ethically, and Whicher is rather determined to convey the

92. *Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

93. WHICHER, *supra* note 84, at 213–14.

94. *Id.* at 214–15.

95. *Id.* at 215.

impression that there has always been a common law copyright that recognizes an extremely strong property right in authors.

There has never been such a right in the United States, and there was one in England for just five years, as noted above. The brilliance of Whicher's argument lies in the sleight of hand that first presents this to the reader and then leads her to forget it. After dealing with the defeat of the common law right first in England in *Donaldson* and then in the United States in *Wheaton v. Peters*,⁹⁶ he adds two nonrights together to get a complete right, identifying a modern common law right with an "ancient" common law right, each of them an author's property right.⁹⁷

The conversion of a nonexistent right into a right of property might seem a feat of which only an academic is capable, but Whicher was a practicing attorney, and his statement of the issue is really a restatement of a long-influential attitude. The argument has several tendencies important to the extension of copyright law, including the emphasis on the author's entitlement considered as a property right, without reference to a corresponding public benefit. More importantly for the common law theory, the new right turns out to be nothing less than a manifestation of the old right, which survived centuries awaiting its proper recognition in positive law.

B. The Theory of Common Law Copyright and the Inversion of Communication and Copyright

Whicher's history is actually a philosophical statement of what the law of copyright should have been in the past—a statement on the contours of an ideal copyright law. Common law copyright relies on a defective historical account, which of necessity ignores the actual circumstances under which copyright came into being. It is nonetheless a psychologically seductive foundation built on a very questionable philosophical position on the relationship between communication and copyright. As suggested above, the conventional justification has to do with a vague notion of rewarding authors for their labor under a natural right theory, a seemingly innocent notion that accords well with American sensibilities regarding the origin of property. Yet, the innocuous Lockean attitude conceals a far more sweeping and surprising theory, most clearly stated

96. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). For excellent accounts of *Wheaton v. Peters*, see Craig Joyce, "A Curious Chapter in the History of Judicature": *Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUS. L. REV. 325 (2005); Craig Joyce, *Wheaton v. Peters: The Untold Story of the Early Reporters*, 1985 Y.B. OF THE SUP. ST. HIST. SOC'Y 35 (1985).

97. "[I]n the first place, the modern common-law right, like its ancient and ill-starred counterpart, is rooted in authorship Thirdly . . . the modern author's right, like the old one, is a right of property." WHICHER, *supra* note 84, at 215.

by Judge Leibell in his 1939 district court opinion *RCA v. Whiteman*.⁹⁸ Judge Leibell insisted that there had been a performer's right in sound recordings before there were record players, and the passage is worth quoting at length:

Prior to the advent of the phonograph, a musical selection once rendered by an artist was lost for ever, as far as that particular rendition was concerned. It could not be captured and played back again by any mechanical contrivance then known. Thus the property right of the artist, pertaining as it did to an intangible musical interpretation, was in no danger of being violated. *During all this time the right was always present, yet because of the impossibility of violating it, it was not necessary to assert it.*⁹⁹

This statement supplied Barbara Ringer, noted previously for her lack of interest in whether the Constitution permits copyright for sound recordings, with the basis for asserting that recorded performances should be copyrightable: "It appears settled that the contributions of performing artists to a sound recording constitute an original intellectual creation, and are therefore eligible for common law copyright protection." The Second Circuit reversed Judge Leibell in *RCA*,¹⁰⁰ and it is interesting that a future Register of Copyrights was so anxious to show that records were copyrightable that she would rely on a decision that had been reversed. Perhaps she was right to do so, however, for Leibell's view as to the common law property and unfair competition issues was eventually to prevail, and it sheds real light on the thinking of those who defend the common law or natural law basis of copyright.

Judge Leibell's statement is based on a counterintuitive view of the relationship between communication and copyright. In his view, communication is predicated on the ability to prohibit copying. This implies that people who engage in ordinary communication are actually "performing" with the expectation that they can prohibit "copying" if they choose. In other words, long before the invention of either the sound recording or the printing press, when people spoke, sang, or wrote, they were not trying in the first instance to communicate with one another but were deciding whether to protect their performances or not against copying.

Like Whicher, Judge Leibell believed in a natural right to prohibit copying. Taken together, they offer the theory that quietly overcame the constitutional objections to copyright for sound recordings raised (and

98. *RCA v. Whiteman*, 28 F. Supp. 787, 791 (S.D.N.Y. 1939), *rev'd on other grounds*, 114 F.2d 86 (2d Cir. 1940); Ringer, *supra* note 69, at 130 n.105.

99. *RCA*, 28 F. Supp. at 791 (emphasis added).

100. *RCA v. Whiteman*, 114 F.2d 86 (2d Cir. 1940).

dismissed) by Barbara Ringer so long ago—“[r]ecords are not ‘writings’ since (a) they are not legible, (b) the Supreme Court has held that they are not ‘copies,’ and (c) they are material objects or ‘mechanical devices’ and thus belong under patent rather than copyright protection.”¹⁰¹ Their theory, however, was simply a modern version of a very old theory adopted in *Millar*.¹⁰² When copyright was extended to sound recordings, a constitutional limitation on the scope of copyright was removed (or ignored) and an eighteenth-century English apparition, the ghost of *Donaldson v. Beckett*,¹⁰³ was laid to rest.

V. THE FICTIONS OF COMMON LAW COPYRIGHT: FROM SHAKESPEARE TO MARTIN LUTHER KING, JR.

How has common law copyright, which has been so fully and formally discredited, continued to live such a vibrant life in the shadow of the law? How has it managed to distract us from constitutional limitations? The answer is that it appears to make sense. What it lacks in history, the theory of common law copyright attempts to make up in a philosophy whose principles are supported by illustrious and unimpeachable personalities from the past, and it offers a vision of the relationship between copyright and communication that corresponds with the view propounded by Leibell and Whicher. Judge Leibell’s appraisal of the timeless nature of the right is probably the purest philosophical statement of the basis of common law copyright, but it is not the most attractive. His view is too stark and perhaps too transparent to withstand scrutiny. But it can be expressed via several more palatable propositions: first, that copyright is essential to effective communication; second, that the necessary intermediary between the author and the reader is the printing press. These beliefs are in turn dedicated to the general proposition that copyright is intuitively sound, fair, and forward-thinking—that its precepts are found in our law because they make good sense.

To take the last of these propositions, there is the notion that the Copyright Act¹⁰⁴ is simply a positive affirmation of a natural right. Chafee’s influential *Reflections on the Law of Copyright* provides one of the most attractive statements of the purpose of the Copyright Act: to transform “the natural justice of copyright into positive law.”¹⁰⁵

101. Ringer, *supra* note 69, at 165.

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

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

104. Copyright Act, Pub. L. No. 111-36, 123 Stat. 1926 (2009) (codified as amended in scattered sections of 17 U.S.C.).

105. Chafee, *supra* note 13, at 28.

What is the natural justice of copyright law, and how natural is it? This question requires an assessment of the elements of common law copyright that serve to make it plausible, the first of which is its timelessness. Even if it does not have a history, the theory of common law copyright has a past of a different kind, a nonhistorical past. The historical past of copyright is unattractive to the modern audience, but common law copyright has a *philosophical* past that consists primarily of two items: (1) the immemorial right of the author (or performer) to prohibit unauthorized copying, and (2) the printing press. Where the history of copyright would tend to call our attention to censorship and corporate monopoly, the theory of common law copyright begins with a seemingly obvious statement about the relationship between printing and communication. Its goal is to make an intuitive connection between the immemorial right of the author and the statutory copyright introduced by the Statute of Anne in 1710, without the inconvenience of discussing corporate monopoly and censorship.

The theorists of common law copyright do not ignore the booksellers entirely; in fact, as discussed below, they attach extraordinary importance to the invention of the printing press. They acknowledge the origins of copyright indirectly and without calling attention to the printers by asserting that the printing press provided a necessary connection between the interest of the author and copyright.

The influence of this view is great; thus, in *Sony Corporation of America v. Universal City Studios*, the Supreme Court explained the advent of copyright as the necessary consequence of the invention of the printing press: "Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection."¹⁰⁶ What was it about the printing press that gave rise to the original need for copyright protection? The real answer is that the unregulated printing press allowed too many people to express too many views on religion and politics, and the government responded with an assertion of its prerogative power over the press—a prerogative power to regulate communication.

Of course, that is not what the Court meant. The effect of the *Sony* Court's statement (which is a partial quotation taken from a more accurate assessment by Benjamin Kaplan) is rather to imply the necessity of a connection between copyright and effective communication, with copyright leading the way to mass communication. But to accept this implication is to turn a blind eye to the order in which events actually occurred. The appeal is undeniable: Who would want to deny the printing press its

106. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984).

rightful place in the history of communication, and in the same stroke, deprive authors of their common law rights to protect their work and the public of the opportunity to enjoy them?

Who, moreover, would wish to stand in the way of technological progress? One effect of asserting a natural and necessary relationship between copyright and the printing press is to make copyright a forward-looking proposition. As noted copyright scholar Paul Goldstein asserts,

Copyright was technology's child from the start. There was no need for copyright before the printing press. But as moveable type brought literature within the reach of everyone, and as the preferences of a few royal, aristocratic, or simply wealthy patrons were supplanted by the accumulated demands of mass consumers, a legal mechanism was needed to connect consumers to authors and publishers commercially. Copyright was the answer.¹⁰⁷

It all seems perfectly natural, and if not quite timeless, it is nonetheless old stuff.

A. Practice in Need of a Theory: The Quest for Authors

Copyright was an unusual answer, for it was not preceded by a question. The earliest adherents of common law copyright were London's bookseller-printers and their legal counsel. From late in the seventeenth century, their most formidable task was to fashion a question to which copyright was the answer. The question they were actually answering was not a very attractive one: "How can we protect our monopoly over publishing perpetually without the legal basis previously provided by the licensing acts in the furtherance of censorship?" As a 1709 petition for a new copyright act put it, a new law was needed to restrain "the liberty now set on foot of breaking through *this ancient and reasonable usage*."¹⁰⁸ The "ancient and reasonable usage" was the exclusive control over the book trade afforded by the licensing acts—the laws that enforced censorship by giving a monopoly to the Stationers' Company. Mark Rose observes that London's printers had not been shy about endorsing censorship in the seventeenth century, making a direct connection between their own prosperity and the propagation of the truth that was the goal of censorship.¹⁰⁹ He quotes a pamphlet published by the booksellers in 1643, after the collapse of censorship during the English

107. PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY* 21 (2003).

108. BIRRELL, *supra* note 57, at 92 (emphasis added).

109. ROSE, *supra* note 14, at 15.

Civil Wars: “And commonly where Printing droops, and Printers grow poor by neglect of Government, there errors and heresies abound.”¹¹⁰

Once censorship could no longer serve them, the task of the booksellers was to show that the ancient usage actually was reasonable in standing for something beyond their own interests, and they eventually posed the question, “How can the law protect the rights of authors?” This was a good question, for it called attention to the right of the author and away from the booksellers, even though the benefits of the law would be enjoyed by booksellers as well.

The mythology of common law copyright began with a quest to assert the interest of the publisher in the name of the author, and it began early. The “ancient and reasonable usage” was finding a modern justification in the immemorial right of the author, the essential ingredient of the theory that would justify the perpetual copyright sought by the booksellers. In 1760, Alexander Wedderburn, arguing for the plaintiffs in *Tonson v. Collins*,¹¹¹ delivered what was becoming a staple element of the mythology. Wedderburn began his argument with the general claim that an author’s labor entitled him to realize any profits that the publication might make: “From the industry of the author, a profit must arise to somebody: I contend it belongs to the author.”¹¹²

Then he asserted that “[t]his right is recognized by the laws of England” and explained copyright as a necessary consequence of the arrival of the printing press in England: “Manuscripts are quite out of the case. They could produce no profit. Therefore I shall begin from the introduction of printing by Caxton in 1471.”¹¹³ By this sleight of hand, the “wily Wedderburn” meant to direct attention toward the printing press (and the book that emerged from it) and to divert attention from the handwritten manuscript that preceded the printed book.¹¹⁴

What is more, manuscripts also had authors and were also copied. That is why they had to be dismissed. The judges were not supposed to start thinking about monks and the copyright that they engaged in.¹¹⁵ Thinking about manuscripts reminds us that there was once a literary world without copyright, and Wedderburn did not want to invite compar-

110. *Id.*

111. *Tonson v. Collins*, (1761) 96 Eng. Rep. 169 (K.B.).

112. *Id.* at 170.

113. *Id.* at 171. The passage is quoted in part in BIRRELL, *supra* note 57, at 41.

114. BIRRELL, *supra* note 57, at 41. The “wily Wedderburn” is Birrell’s characterization.

115. For a provocative and balanced consideration of the role of the medieval monk in copying manuscripts, see Peter K. Yu, *Of Monks, Medieval Scribes, and Middlemen*, 2006 MICH. ST. L. REV. 1 (2006). Yu is more concerned with the role of the monk as an intermediary and the modern implications; I make the point that the monk invites us to think differently about the relationship between copyright and the printing press.

isons that might call his theory into question. As Peter Yu observes, the “existence of a large number of scribes copying books every day” was not conducive to “a new property right in literary works.”¹¹⁶ The timeless right that Wedderburn sought to protect appears to have been asserted less by authors than by printers.

One more reason to keep the manuscript out of the argument is that any lengthy consideration of the history of manuscripts would have called into serious question the relationship between the printing press and communication that Wedderburn sought to establish. Of course, the printing press *was* connected with the origin of copyright, but Wedderburn was not making the historically true point that the monarch’s desire to control printing led to a regime of censorship that was the direct antecedent to copyright law. He was doing the opposite, making copyright “technology’s child from the start,” rather than “censorship’s child from the start.” He was also making a very broad statement on the necessity of copyright in a world in which the press served as the preeminent means of disseminating information and making profit.

Wedderburn’s argument was “wily” in the manner in which it connected the right of the author with the interest of the printer—by hiding the printer behind the author—and at the same time directed attention toward the printing press and away from the manuscript. Thus, the interest of the publisher was quietly advanced as if it were identical to that of the author. An important part of the mythology was in place. From this point on, publishers found it convenient to make authors their mouthpieces.

The dismissal of the manuscript furnished a still more important element: the notion that there is a necessary connection between creation and copyright, via the intermediary of the printing press. One consequence of this connection is again to deemphasize the interest of the publisher, and another is to assign a priority to the printing press over other means of publication, prior *and* subsequent. The first of these is important to the theory of common law copyright by virtue of its insinuation that copyright had always reflected a belief in the right of the author.

B. Shakespeare, the Pirates, and the Printing Press

Historically speaking, however, the proponents of the common law view were short of the authors needed to support the theory. Edward Thurlow, who argued for the defendant in *Tonson v. Collins*, appears to have been correct in contending that the privileges granted to printers in the earliest years of printing implied “no idea whatsoever of copy-right

116. *Id.* at 20.

in authors. They relate[d] merely to printers.”¹¹⁷ There were a few notable authors who supported copyright early in the eighteenth century, and according to tradition, Jonathan Swift authored the original draft of the Statute of Anne.¹¹⁸ But there seems to be no evidence supporting Swift’s authorship, and these few authors do not appear to be of much use to devotees of common law copyright—an immemorial right must find its authors in a more distant past.

This deficiency has persisted for centuries. The theory continues to need important authors from earlier times, and what the theorists have always needed was an author so important as to stand above history—an author with mythical status who might illuminate the prehistory of copyright and thus obscure its more accurate but mundane history. In modern times, the gap has been filled by Shakespeare, who holds a surprising and illuminating place in the theory of common law copyright. Did Shakespeare hold a copyright, or more properly, a common law right against unauthorized copying? This question, which began to interest Shakespeare scholars nearly 100 years ago, is a figurative statement of the question whether authors held something akin to a natural or common law copyright in the ages before copyright law proper. It is also symptomatic of the counterintuitive and posthumous role played by Shakespeare in providing copyright with more dignified origins.

Shakespeare is the human embodiment of Whicher’s view of copyright history and Judge Leibell’s statement of the theory of copyright. As James Boyle has noted, divining Shakespeare’s intent is in some respects very similar to divining the Founders’ intent, and the many uncertainties surrounding Shakespeare make him an attractive mouthpiece:

Just as the “Intent of the Framers” is used as an argumentative device to limit the range of interpretations of the Constitution, so the Shakespearean biographies seek to invent a richly detailed picture of the author, a picture which can then be used to constrain the interpretation of the very works from whence it was drawn.¹¹⁹

Shakespeare was just such a figure to the theory of common law copyright—an author who was morally entitled to prohibit the unauthorized publication of his plays, even before there was a copyright act, and if he had been a singer or trumpet player, he would presumably have asserted his right to prohibit unauthorized copying of his records. That is to say, Shakespeare fills a universal role by virtue of his putative right and

117. *Tonson*, 96 Eng. Rep. at 173.

118. BIRRELL, *supra* note 57, at 93.

119. James D. A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625, 626 (1988), available at <http://www.law.duke.edu/boylesite/shakesp.htm>.

desire to prohibit copying, and in this sense, he corresponds very well to Judge Leibell's prehistoric performer who holds a right to prohibit copying even before the means of copying has actually come into being.

An expansive statement of such a view was presented in 1917 in A. W. Pollard's *Shakespeare's Fight with the Pirates and the Problem of the Transmission of His Texts*.¹²⁰ Given the title, it is interesting that Shakespeare fails to appear frequently, if at all, in this monumental battle. The book is opaque but is suffused with a vague notion that authors in Shakespeare's time enjoyed some sort of ill-defined literary property right, the invasion of which amounted to piracy. At the same time, although some "pirates" were taking authors' works against their will, there appeared an incipient if grudging ethos among printers acknowledging the author's right. Thus, even before the Statute of Anne, authors and booksellers were developing a reasonably harmonious relationship based on their recognition of authors' rights. This notion accords with Pollard's belief stated on the first page of the book and is consistent with the case made by London's booksellers in the 1800s and the recording industry in the 1900s—that the historical development of copyright law began with a desire to protect the author's rights, a protection necessitated by the invention of the printing press. Expressing disappointment that scholars had not devoted attention to what he believed to be the gradual development of the notion of literary property, Pollard suggested that the interests of the author and publisher were naturally intertwined in the age of the press:

Legal writers on English copyright have not shown much interest in the steps by which the conception of literary property was gradually built up The accident by which our first English printer [i.e., William Caxton] was also an exceptionally prolific literary producer and possessed of considerable influence at Court might well have led to a very early recognition of an author's rights to the fruits of his brain, had there been any competitor possessed of sufficient capital to be a really formidable pirate.¹²¹

The misfortune of the history of copyright, then, is the absence in the fifteenth century of any pirate capable of forcing Caxton to exercise his indubitable right. Why did copyright not come into being at an earlier time? Because—remembering Judge Leibell's insistence in *RCA v. Whiteman* that there had always been a right to prohibit the copying of

120. ALFRED W. POLLARD, *SHAKESPEARE'S FIGHT WITH THE PIRATES AND THE PROBLEM OF THE TRANSMISSION OF HIS TEXT 1* (1917).

121. *Id.*

sound recordings—Caxton had a right that he did not need to assert because it could not be violated.¹²²

In Shakespeare, on the other hand, there was apparently an “exceptionally prolific literary producer” in an era when there were formidable pirates. Shakespeare thus is made to stand for a timeless moral right to prohibit copying and to stand in for all the authors harmed by the *Donaldson* decision. He also provides the critical connection with the printing press—the early modern precursor to the phonograph recorder—as the instrument that demonstrated the inevitability and moral rectitude of copyright.

C. Shakespeare and the Fictions of the Law

Shakespeare’s most famous appearance in copyright law is probably in Judge Learned Hand’s famous 1930 *Nichols* opinion.¹²³ In *Nichols v. Universal Pictures Corporation*, Hand explained that while what we now call “nonliteral” copyright can give rise to a claim of infringement, at some level of abstraction the copying is not actionable.¹²⁴ Here, Shakespeare was made to take on a somewhat different role than the one assigned to him by literary criticism; the role was to explain the reasonableness of the precepts of copyright law. It would be impossible to infringe merely by copying “Shakespeare’s ‘ideas’ in [a] play,” which were “as little capable of monopoly as Einstein’s Doctrine of Relativity, or Darwin’s theory of the Origin of Species.”¹²⁵ He came into the case via a seemingly harmless exercise in anachronism, presumably because of the resemblance between the works at issue in that case and *Romeo and Juliet*,¹²⁶ but less restrained jurists than Judge Hand have been prepared to turn anachronism into a fighting faith.

Shakespeare’s first role was to give common law copyright its indispensable author, standing above and apart from an inconvenient history, who demonstrates the necessity and reasonableness of copyright. In *Nichols*, he performs another service, which is to show that some of the most important tenets of copyright law are sensible and even intuitive.¹²⁷

122. See *RCA v. Whiteman*, 28 F. Supp. 787, 791 (S.D.N.Y. 1939), *rev’d on other grounds*, 114 F.2d 86 (2d Cir. 1940).

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

124. *Id.* at 121.

125. *Id.*

126. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*.

127. The opinion states:

These would be no more than Shakespeare’s ‘ideas’ in the play, as little capable of monopoly as Einstein’s Doctrine of Relativity, or Darwin’s theory of the Origin of Species. It follows that the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly.

Nichols, 45 F.2d at 121.

The theory of common law copyright, based as it is on the *necessity* of copyright as a matter of natural law and as a condition necessary to effective communication, requires us to believe things that are factually false, even though they may be legally true. Most prominently, a reverence for intellectual property encourages the belief that people neither create nor invent without a monopolistic economic incentive, and Shakespeare has been called into the service of this questionable proposition.

At its extreme, this view leads to statements such as the following attempt, in a well-known article by Howard Kalodner and Verne Vance, to link *Romeo and Juliet* to copyright incentives. In relating the incentive idea to the idea and expression dichotomy, Kalodner and Vance write, “Progress is promoted by granting to Shakespeare the exclusive rights in *Romeo and Juliet*, but not by prohibiting others from writing plays about young lovers whose death, resulting from the belligerence of their families, draws the families together in the common tragedy.”¹²⁸

That is an odd thing to say about a play that did not enjoy copyright protection, that Shakespeare himself never put into book form, and that was copied and printed shortly after his death without payment to his estate. As Lord Camden put the matter in arguing the winning side in *Donaldson*,

[Shakespeare’s] works, which he left carelessly behind him in town, when he retired from it, were surely given to the public if ever author’s were; but two prompters or players behind the scenes laid hold of them, and the present proprietors pretend to derive that copy from them, for which the author himself never received a farthing.¹²⁹

The “present proprietors” were printers, rather than authors, who interposed themselves between the author and public in order to hold a monopoly.

It is an odd, but not an accidental, thing to identify Shakespeare with the principles of copyright, for the history and theory espoused by Whicher and Leibell require human illustrations of improbable propositions. If the natural character of the law is to be demonstrated then heroic figures are needed. Judge Jon Newman, famous for his decision in *Universal City Studios v. Corley*, also used Shakespeare and Einstein to illustrate the intuitive character of the idea expression dichotomy:

It would not be difficult . . . to tell Einstein that when he had the idea that $E=MC^2$, others could copy and use that idea without pay-

128. Howard I. Kalodner & Verne W. Vance, Jr., *The Relation Between Federal and State Protection of Literary and Artistic Property*, 72 HARV. L. REV. 1079, 1088 (1959).

129. *Donaldson v. Beckett*, (1774) 98 Eng. Rep. 257, 265 (H.L.).

ment of license fees or infringement damages, and, on the other hand, to tell Shakespeare that when he wrote *Romeo and Juliet*, others could not sell copies of his play without his permission (and a royalty payment to him).¹³⁰

The image of a federal judge lecturing to Shakespeare and Einstein on the principles of intellectual property is amusing, but it is also instructive. It is hardly accidental that a supporter of the incentive argument reaches into the (English) past in search not only of an author in need of copyright but an author who also lends credence to the premises of the law. It is difficult to see how Shakespeare is really fit for this role, for whatever *Romeo and Juliet* may show about the need for copyright law, it does not support the incentive argument. Shakespeare, himself a notorious plagiarist, apparently did not let the lack of a copyright statute stand in the way of writing his plays and having them performed.

One may object that Shakespeare's importance is overstated here, that it is unfair to focus on the occasional and playful use of Shakespeare in order to illustrate some propositions about copyright law. Yet, it is telling that he is pressed into service of the most questionable propositions, as if attaching a founder of legendary stature to an assertion were enough to establish its truth. Shakespeare serves here as an antidote to history, and the playful use of Shakespeare is supposed to secure easy acceptance of some unlikely propositions. Given that people have always created in the absence of monopolistic protection, and that the idea and expression dichotomy itself makes sense only in its most abstract statement, the theory of common law copyright needs an author who invites easy agreement. It is as if we were invited to a table with Shakespeare and Einstein in order to ponder the premises on which copyright is built. As they sat nodding in agreement while federal judges explained the relationship between copyright and creativity, what ordinary person would dare to dissent?

Finally, the use of Shakespeare is symbolic of the belief that lies at the heart of common law copyright theory—that copyright has a spiritual essence stemming from the immemorial right of the author, which is in turn dependent upon a particular machine. Pollard wrote of “Shakespeare's Fight with the Pirates” in the faith that among “the steps by which the conception of literary property was gradually built up,” the very first step was to protect the author's right to prohibit copying.¹³¹ As Pollard saw it, Caxton had the right but had no need to assert it. Pollard's position, which is the position that Shakespeare is adduced to support, is

130. Jon O. Newman, *New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age*, 17 CARDOZO ARTS & ENT. L.J. 691, 693 (1999).

131. POLLARD, *supra* note 120, at 1.

uncannily similar to Judge Leibell's dubious assertion about the performer who always had the right to prohibit copying of her performance but had no need to assert it before such copying was possible.

If common law copyright's history is a bit embarrassing and its central premises untenable, Shakespeare apparently diminishes the embarrassment.

D. I Have a Dream and the Inversion of Copyright and Culture

Once we have forced culture and communication into the unshapely vessel of copyright, the law teaches us to believe things that are legally true even though they are factually false. When Reverend Martin Luther King, Jr. delivered his famous speech, *I Have a Dream*, the world knew that it was witnessing a cultural event of the utmost importance with a message intended to reach the widest possible audience. Many welcomed the message, and many opposed it; many of those who opposed it must have wished that the message did not travel as broadly as it did. The speech was delivered on the National Mall in Washington, D.C. and was attended by approximately 200,000 people. The event took place on federal property, and federal marshals provided the security. The entire speech may, as of this writing, be viewed at www.youtube.com.¹³²

Its presence on YouTube, however, is a precarious one; it is accessible either because the executors of the King estate are content that it is available there or because they have failed to notice it. The precarious status of the event owes itself to the philosophy of common law copyright. In *Estate of Martin Luther King v. CBS*, the Eleventh Circuit grappled with whether CBS was prevented from including portions of King's celebrated *I Have a Dream* speech given on the National Mall in 1963.¹³³ It was clear to the court that the speech was a copyrightable performance; the vexing question was whether Dr. King dedicated it to the public and thereby divested it of copyright status. Refusing as it does to recognize what the speech actually was—a major cultural and social event as unsuited to copyright as an event could be—this approach does not make sense, except that it conforms to the contours of copyright law. It is appropriate to think of *Romeo and Juliet* as a performance but hardly appropriate to think the same of a seminal speech of the civil rights movement.

In a legal universe in which copyright precedes communication, however, the pairing of *I Have a Dream* and *Romeo and Juliet* makes

132. Martin Luther King, Jr., *I Have a Dream* (Aug. 28, 1963), available at <http://www.youtube.com/watch?v=iEMXaTktUfA>.

133. *Estate of Martin Luther King v. CBS*, 194 F.3d 1211 (11th Cir. 1999).

sense. Fanciful notions are not troublesome to a mythology: Shakespeare is the author who would have sought a copyright had the law been wise enough to implement the true principles of copyright law during his lifetime, and King is what Shakespeare wished he could have been—the author who did avail himself of a copyright thus reserving to himself the decision of whether to “publish” a “performance” that took place in front of 200,000 live observers. This is the result of making copyright a foundational norm, one that supersedes the desire to communicate and threatens to impose a servitude on every new means of conveying information.

The language of authors’ rights and natural law rings well in American ears, but it also has a deceptive simplicity that cloaks this servitude. If we are to understand it more fully, we will do well to pay attention to Judge Leibell’s statement in the early years of the sound recording wars. As discussed previously, he asserted that before “the advent of the phonograph,” it was impossible to capture an artist’s musical performance.¹³⁴ “Thus the property right of the artist, pertaining as it did to an intangible musical interpretation, was in no danger of being violated. *During all this time the right was always present, yet because of the impossibility of violating it, it was not necessary to assert it.*”¹³⁵

Judge Leibell thus placed copyright before communication, given that in his view of society, people seek to guard their rights to their “performances” before they are communicated, reserving a right to control any means of reproduction thereafter devised. This is a counterintuitive vision that bears examination because it is intimately related to common misapprehensions about intellectual property.

In pursuit of the continuation of the monopoly it secured on the basis of technology that is now obsolete, the recording industry seeks to impose John Whicher’s and Judge Leibell’s philosophy of copyright in draconian fashion. The recording industry seeks to establish, in the most explicit terms, that copyright is a fundamental norm, sometimes even equating infringement with child pornography; as William Patry notes, Jack Valenti claimed that p2p software was responsible for the distribution of “the most throat-choking child porn . . . on a scale so squalid it will shake the very core of your being.”¹³⁶ In 2010, groups representing the music industry, including the Recording Industry Association of America (RIAA), sent an open letter to Google CEO Eric Schimdt expressing concern over net neutrality and placing copyright infringement

134. *RCA v. Whiteman*, 28 F. Supp. 787, 791 (S.D.N.Y. 1939), *rev’d on other grounds*, 114 F.2d 86 (2d Cir. 1940).

135. *Id.* (emphasis added).

136. WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 137 (2009).

and child pornography right next to each other.¹³⁷ In furtherance of what Patry describes as a campaign based on “moral panics,”¹³⁸ they seek to protect their interests by all means possible—litigation, legislation, and education—and to make the inversion of copyright values complete by imposing broad public burdens to support private benefits.

And while they do this in the name of the artist, just as London’s eighteenth-century booksellers touted the interest of the author, they are really justifying an “ancient and reasonable usage”—their monopoly over music. As one industry spokesman said in 1963, “I think it is the general, if not unanimous, view of the record industry that protection against unauthorized duplication should be embodied in the new copyright law; *provided, of course, that the record manufacturer is designated as the copyright proprietor.*”¹³⁹ The similarity to the eighteenth century should give pause, for even today, pragmatic attachment to the interests of the intermediary can be obscured by the philosophical attachment to the author, in a fashion reminiscent of Alexander Wedderburn’s 1760 argument in *Tonson v. Collins*.

VI. YOU WOULDN’T STEAL A CAR, SO WHY WOULD YOU STEAL
LIGHTNING? BENJAMIN FRANKLIN AND THE TRADITIONAL
CONTOURS OF COPYRIGHT

It may seem anachronistic to return to the Founders after considering the history and theory of copyright for sound recordings. After all, is the Patent and Copyright Clause not forward-looking, making place for progressive protections in the interests of advancements in invention and creativity? The answer is that the theory of common law copyright, as argued above, is not as forward-looking as we might think. Change in copyright law has indeed been sweeping, but the nature of the change has in some respects been easy to overlook. It has been gradual, and it is easy to miss and to become accustomed to gradual change. Also, changes have typically been made in the name of progress, and they thus seem to accord with the forward-looking nature of the clause. To the casual observer, the theory of common law copyright appears friendly to innovation and innovators, and changes in copyright (and patent) are frequently promoted and viewed as promoting progress.

137. Andy Carvell, *Music industry cites child porn in piracy crackdown letter to Google*, GEEK.COM (Aug. 20, 2010), <http://www.geek.com/articles/news/music-industry-cites-child-porn-in-piracy-crackdown-letter-to-google-20100820/>. “The music community we represent believes it is vital that any Internet policy initiative permit and encourage ISPs and other intermediaries to take measures to deter unlawful activity such as copyright infringement and child pornography.” *Id.*

138. PATRY, *supra* note 136, at 133–37.

139. Averill C. Pasarow, *Viewpoint of the Phonograph Record and Music Industries*, 2 BULL. COPYRIGHT SOC’Y U.S.A. 25, 26 (1963) (emphasis added).

It is thus easy to forget that the triumph of common law copyright does represent a departure from the traditional contours of copyright, but it is a strange and anachronistic departure in the direction of a mythical past. The recording and movie industries have touted copyright as a friend to progress, and they have certainly succeeded in bringing about sweeping changes in the law. Lest these changes tempt us to think that the march of copyright law is progressive, it is important to see that the theory on which they have based their claims is hundreds of years old. The philosophy of common law copyright comes to us almost unchanged from the eighteenth century, and as argued earlier, theorists such as Whicher would take us back to the eighteenth century to show us the continued vibrancy of *Millar v. Taylor*.

The project championed by Whicher, Judge Leibell, and others was to return copyright law to the bright moment represented by *Millar* in 1769 and to import *Millar*'s view to American shores. This view is not tenable. The theory of common law copyright was available to and rejected, or perhaps not even considered, by the Founders. As discussed above, common law theorists, such as Whicher, have gone to great lengths to draw attention away from the *Donaldson* decision, and among other things, have claimed that Americans were ignorant of the decision when they enacted the Patent and Copyright Clause¹⁴⁰ and the 1790 Copyright Act.¹⁴¹ In other words, they maintain that American copyright follows the model laid out by Mansfield, Blackstone, and Alexander Wedderburn. This is a view that Benjamin Franklin's confrontation with Alexander Wedderburn makes very difficult to sustain.

A. Benjamin Franklin, Solicitor General Wedderburn, and Donaldson

On January 29, 1774, Franklin, dressed in a suit of blue Manchester velvet, stood before Alexander Wedderburn—then England's Solicitor General—and an assemblage of lords and ladies, including such notable figures as Edmund Burke and Jeremy Bentham.¹⁴² The dramatic scene demonstrated the depth of English contempt for American colonists. Franklin's purpose was to present a petition on behalf of the colony of Massachusetts Bay for the removal of Governor Thomas Hutchinson and Lieutenant Governor Peter Oliver. But as Franklin sensed by the time of the event, the Solicitor General's purpose was very different. For nearly an hour, Wedderburn harangued, harassed, and bullied Franklin, implying very clearly that Franklin was nothing more than a thief.

140. U.S. CONST. art. I, § 8, cl. 8.

141. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (repealed 1831).

142. See Liam Séamus O'Melinn, *What if James Madison Were to Assess the Intellectual Property Revolution?*, 2008 MICH. ST. L. REV. 401 (2008).

From Wedderburn's perspective, Franklin stood before him not to present a petition but to be punished. Franklin was calling for Hutchinson's removal on the basis of views that Hutchinson had expressed in a series of letters between himself and Oliver.¹⁴³ These letters spoke of the Massachusetts colonists in very unflattering terms and suggested that the only way to deal with them was to take away their liberties. The letters came into Franklin's hands via "a gentleman of character and distinction (whom I am not at present permitted to name)," as Franklin later noted.¹⁴⁴ From Franklin's hands they somehow found their way across the Atlantic and into print in the *Massachusetts Gazette*, causing a public outcry against Hutchinson and Oliver.

Wedderburn claimed to be incensed at what he viewed as Franklin's unauthorized publication of a series of private letters. Franklin remained quiet, motionless, and impassive for the whole of Wedderburn's attack on him, but later justified his behavior by denying (implausibly) that he intended the letters to be published.

Just a few weeks later, the same Wedderburn, a Scotsman, was arguing on behalf of perpetual common law copyright and against the Scottish booksellers in the House of Lords in the famous case of *Donaldson v. Beckett*.¹⁴⁵ Franklin remained in London during this time, and it is nearly impossible that he missed the controversy over the source and nature of copyright. The encounter with Wedderburn had been a memorable one. During the harangue, Franklin stood silent and motionless for the entire time so as not to dignify either the substance or the style of the assault, but he later defended himself, remembered the incident bitterly, and it began to signal to him that his attempts to find common ground between imperial policymakers and American colonists were futile. When he attended the signing of the Treaty of Paris in 1783, he donned the same blue velvet suit for the occasion. Wedderburn had made his mark on Franklin, who had to know of his adversary's appearance before the Lords on behalf of Thomas Beckett and the other *Donaldson* plaintiffs.

The evidence that Franklin had to know of *Donaldson* goes beyond this coincidence. The two controversies were reported contemporaneously in the London newspaper the *Public Advertiser*, which carried a series of pieces attacking Wedderburn and defending Franklin. (At least one of

143. 4 BENJAMIN FRANKLIN, *An Account of the Transaction Relating to Governor Hutchinson's Letters*, in THE WORKS OF BENJAMIN FRANKLIN 405 (Jared Sparks ed., Boston, Hilliard, Gray, and Co. 1837).

144. Franklin wrote this explanation of the Hutchinson letters in 1774, but it was not published until after his death. BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON 257 n.52 (1974).

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

them was written by Franklin, as discussed below.) During these weeks, the paper also carried reports of the proceedings in *Donaldson*, and on February 16, 1774, it printed a defense of Franklin in the first column; in the second column, it printed *Extract from the Argument in Defense of Literary Property* by Francis Hargrave (in effect a publicly circulated amicus brief in *Donaldson*, arguing on behalf of the common law right); and in the third column, it printed a report that the Lords “proceeded to hear the Opinions of the Judges relative to Literary property,” that is, in the *Donaldson* case. This three-column coincidence makes it harder still to imagine that Franklin was unaware of the case.¹⁴⁶

Wedderburn’s attack on Franklin and on the Scottish booksellers took place within a small timeframe and within a small world of eighteenth-century British public figures and intellectuals. David Hume, the philosopher whose own literary property would soon be purloined by Madison, wrote frequently to William Strahan, a plaintiff in *Donaldson*, and his letters display an intimate acquaintance with the issues that mattered to authors and booksellers.¹⁴⁷ A letter from Hume to Strahan written on March 1, 1774, took up both “your great Cause concerning literary Property”—the *Donaldson* case—and Franklin’s treatment at the hands of Wedderburn, giving the opinion that there was “nothing treacherous or unfair” in Franklin’s behavior.¹⁴⁸ In addition to suggesting that the two events were conjoined in the minds of learned people, Hume’s letters remind us that the literary world in which he and Franklin operated was a small one where authors were likely to know printers and understand the issues that engaged them. Franklin was a much sought after dinner companion in fancy London and Edinburgh (and later Parisian) circles, and a noted scientist and author who had more than an ordinary interest in printing.

Moreover, Franklin wrote books that were published in England in many editions. He would have had to try very hard to miss the news of *Donaldson*. He knew English printers personally, and it seems that two of his books were published by plaintiffs in the *Donaldson* case: Hume’s correspondent Strahan (whom Franklin knew well) and Thomas Beckett himself.¹⁴⁹ Finally, he corresponded with both Strahan and Beckett, and

146. PUBLIC ADVERTISER, Feb. 16, 1774, microformed on x1287 Reel 895 (Early English Newspapers Film). There were pieces on the Franklin-Wedderburn controversy on February 3, 5, 8, 10, and 15. There was a report of proceedings in *Donaldson* on February 9. See the *Public Advertiser* on the specified days. *Id.*

147. See generally 2 THE LETTERS OF DAVID HUME (J.Y.T. Greig ed., 1983).

148. Letter from David Hume to William Strahan (Mar. 1, 1774), in 2 THE LETTERS OF DAVID HUME, *supra* note 147, at 286–88.

149. BENJAMIN FRANKLIN, THE INTEREST OF GREAT BRITAIN CONSIDERED (London, Printed for T. Becket 1761); BENJAMIN FRANKLIN, SOME ACCOUNT OF THE SUCCESS OF INOCULATION FOR

years before *Donaldson* was decided, observed to Beckett that because the Library Company of Philadelphia believed that the bookseller's prices were too high, they decided to buy no more books from him.¹⁵⁰ At the bottom of a letter he wrote to Mary Stevenson in 1762, Franklin named Beckett, to whom Strahan was to give some of Franklin's printing of Cicero's *Cato Major* (a translation by James Logan printed by Franklin in 1744) to sell.¹⁵¹ In a 1763 letter, Franklin asked Strahan to "put Mr. Becket in mind to send me the French Work on the Arts as it comes out."¹⁵² He also wondered what became of the 300 copies of Cicero's *Cato Major* he had sent; even by 1782, he had no real answer, and Strahan indicated that he thought he gave them to Beckett, who was at that point bankrupt.¹⁵³

Franklin thought about Beckett often enough that his opinion of the printer changed over the years. In 1761, he described Beckett as "a very honest and diligent Book-seller."¹⁵⁴ Two years later, he conveyed the Library Company's complaint of Beckett's inflated prices. In 1764, he complained to Strahan, "I think I am slighted lately per Mr. Becket."¹⁵⁵ When Franklin sought to present a petition from the Continental Congress to King George in 1775, he found himself further slighted by Beckett. Franklin, William Bollan, and Arthur Lee, acting as agents for Massachusetts, had decided not to make the petition public until Parliament reconvened on January 19 so that the King could present the petition. Beckett beat them to it, printing it first in a pamphlet that the Americans described as "surreptitious as well as materially and grossly erroneous."¹⁵⁶

Franklin's encounter with Solicitor General Wedderburn in 1774, taken together with his interest in printing and his familiarity with the

THE SMALL-POX IN ENGLAND AND AMERICA (London, Printed by W. Strahan 1759). I have seen no indication that there was either another T. Becket or another W. Strahan among London's printers.

150. Letter from Benjamin Franklin to Thomas Becket (Dec. 17, 1763), *available at* <http://franklinpapers.org/franklin/framedVolumes.jsp>.

151. Letter from Benjamin Franklin to [Mary Stevenson] (June 21, 1762), *available at* <http://franklinpapers.org/franklin/framedVolumes.jsp>.

152. Letter from Benjamin Franklin to Willian Strahan (May 9, 1763), *available at* <http://franklinpapers.org/franklin/framedVolumes.jsp>.

153. Letter from William Strahan to Benjamin Franklin (May 27, 1782), *available at* <http://franklinpapers.org/franklin/framedVolumes.jsp>.

154. Letter from Benjamin Franklin to Joseph Morris (Feb. 20, 1761), *available at* <http://franklinpapers.org/franklin/framedVolumes.jsp>. Morris was treasurer of the Library Company. *Id.*

155. Letter from Benjamin Franklin to William Strahan (June 17, 1764), *available at* <http://franklinpapers.org/franklin/framedVolumes.jsp>.

156. DAVID T. MORGAN, *THE DEVIOUS DR. FRANKLIN, COLONIAL AGENT: BENJAMIN FRANKLIN'S YEARS IN LONDON* 238 (1996) (quoting William Bollan, Benjamin Franklin, Arthur Lee, *Public Notices Concerning the Petition from the Continental Congress*, WHITEHALL EVENING POST (Jan. 17, 1775), *available at* <http://franklinpapers.org/franklin/framedVolumes.jsp>).

world of London's publishers and intellectuals, offers important evidence against the view that the Americas were unaware of the *Donaldson* decision and thus intended their early copyright acts to codify *Millar v. Taylor*. Franklin had to know of *Donaldson*, and it is highly unlikely that when he attended the Constitutional Convention thirteen years hence, in 1787, he allowed other Americans to believe mistakenly that *Millar v. Taylor* remained the English law of copyright.¹⁵⁷

B. Uploading the Literary Property of Public Figures

The timing coincidence between Franklin's appearance before Wedderburn and Wedderburn's argument before the Lords in *Donaldson* offers important evidence that at least one very prominent American knew of *Donaldson*'s result. The *substance* of the event was also important for another reason relevant to the history and theory of copyright: To Wedderburn's mind, Franklin had to be rebuked, for he had stolen literary property. Franklin took a very different view, contending that his actions were appropriate because of the public nature of the subjects discussed in the letters. When Franklin appeared before Wedderburn he intended to press for the removal of Governor Thomas Hutchinson of Massachusetts Bay, who had expressed rather unflattering views of the colonists and called for an abridgment of colonial liberties.

The copyright industries urge us to believe that when Franklin appeared before Wedderburn on January 29, 1774, there was an ethos against unauthorized copying and distribution, one that expressed a commonly held moral sensibility. But was there? Wedderburn, about to argue the losing side in *Donaldson* in support of common law copyright, would appear to agree with the industries; he thought the matter self-evident, insinuating unmistakably that Franklin was a thief. Wedderburn delighted his audience with a reference to Plautus, branding Franklin as a man of three letters, "fur" (the Latin word for thief).¹⁵⁸

Franklin's published reply shows a strikingly different view of the relationship between culture and the protection of intellectual property, with clear modern relevance because Franklin stoutly resisted the imputation that transmitting letters of public importance was tantamount to theft.¹⁵⁹ In a pseudonymous letter in the *Public Advertiser* on February

157. Especially given what seems to be his own skeptical attitude toward the protection of ideas.

158. "'Tun, trium litterarum homo me vituperas? fur' (Do you find fault with me? You, a man of three letters—thief!)," ROBERT MIDDLEKAUFF, BENJAMIN FRANKLIN AND HIS ENEMIES 232 n.23 (1996) (quoting PLAUTUS, AULULARIA).

159. Benjamin Franklin, *The Reply of Homo Trium Litterarum*, PUBLIC ADVERTISER, (Feb. 16, 1774), available at <http://franklinpapers.org/franklin/framedVolumes.jsp>.

16, 1774, Franklin pointed out facetiously that the greatest European thinkers agreed with Wedderburn's assessment and, in fact, thought Franklin a more audacious thief than did the Solicitor General.¹⁶⁰ In a passage likening Franklin to Prometheus for stealing fire from the sky—a reference to Franklin's experiments with electricity—the author wrote first in French and then in English:

To steal from Heaven its sacred Fire he
taught,
The Arts to thrive in savage Climes he
brought:
In the New World the first of Men esteem'd;
Among the Greeks a God he had been deem'd.¹⁶¹

The letter was signed “HOMO TRIUM LITERARUM,” i.e., a man of three letters, a thief.¹⁶²

Wedderburn, by contrast, spoke the language of London's booksellers, and if we translated his claim into modern terms, they would be received equally well by the recording industry. He had accused Franklin of transmitting or “uploading” private literary property without authorization and thus of being a thief. Franklin's response corresponded with his attitude toward invention, as evidenced by his refusal to seek patents on his inventions, and it was at odds with the argument that Wedderburn was just about to make in *Donaldson* in support of common law copyright.

When accused of being a thief for his distribution of literary property, Franklin proudly accepted the mantle. Years later, when the Constitutional Convention adopted the Copyright and Patent Clause, whose vision did they intend to enact? The one espoused by Wedderburn in *Tonson v. Collins* and in his losing argument before the Lords in *Donaldson*, delivered just weeks after his harangue against Franklin, or the one championed by Franklin, Jefferson, and Madison?

VII. WHEN SELLING TRASH BECOMES COPYRIGHT INFRINGEMENT: COPYRIGHT SHAPING CULTURE

In the *Eldred* decision, the Supreme Court warned us to be alert for a departure from the traditional contours of copyright law.¹⁶³ In *eBay*, the Court cautioned that patent law had to conform to traditional principles of jurisprudence, and in the area of patent, the Court has gone farther

160. *Id.* While the letter was published pseudonymously, the editors of the Franklin Papers attribute the letter to Franklin.

161. *Id.*

162. *Id.*

163. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

still.¹⁶⁴ More recently, in *Bilski v. Kappos*, which was expected to be a monumental decision on patentable subject matter, the Court affirmed a view that time-tested principles of patent law are adequate to resolve an array of modern patent issues.¹⁶⁵

The Court gives the appearance of being interested in maintaining a traditional continuity within the law of intellectual property, and copyright law has indeed departed in a fundamental and perverse way from its origins. The theory of copyright at the time of the nation's founding has gradually been giving way to a variety of powerful influences. Copyright for sound recordings may now seem a natural extension of copyright law, but it actually signaled the adoption of principles that had no previous basis in the law and that stand on unsound historical and philosophical ground.

The subject matter of copyright has grown in defiance of principle and without regard to the constitutional clause permitting Congress to enact legislation to protect writings; we have moved in the direction of a legal regime premised on the notion that copyright represents a timeless natural right. This has resulted not only in protection for nonwritings, such as recordings, but also in the extension of the equivalent of patent protection under the aegis of copyright law.

To see this departure more clearly, it is helpful to look at the operation of the norm that the industries are establishing. The version of copyright propounded by the copyright industries, representing as it does an inversion of the public and private burdens and benefits of the original purpose of American copyright law, has still broader consequences for the public. The virulent pursuit of legal means to enforce socially untenable propositions has resulted in a strange reversal by which the copyright industries enjoy private benefits via the imposition of broad social burdens.

*A. United States v. Chalupnik: Distribution of Trash as
Infringement and Statutory Damages*

The most bizarre illustration of the inversion of public and private comes from the case of James Chalupnik, who in 2007 became a victim of the spirit of copyright for sound recordings.¹⁶⁶ Chalupnik was a custodial supervisor with the U.S. Postal Service in Fargo, North Dakota.¹⁶⁷ The Postal Service had arranged with BMG to destroy undeliverable CDs and DVDs, and over a period of years, Chalupnik secretly rescued many

164. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

165. *Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

166. *United States v. Chalupnik*, 514 F.3d 748 (8th Cir. 2008).

167. *Id.* at 750.

of these disks from the trash and sold them to local record stores.¹⁶⁸ His secrecy was not sufficient, however, for he was discovered and charged with felony mail theft.¹⁶⁹ Pursuant to a plea bargain, Chalupnik pleaded guilty to copyright infringement, and the district court ordered him to pay restitution to BMG in the amount he realized from the sale of the CDs and DVDs—a sum in excess of \$78,000 dollars.¹⁷⁰ The Eighth Circuit affirmed the district court's ruling that BMG was qualified to recover under the Mandatory Victims' Recovery Act (MVRA), but it vacated the award of restitution and remanded with instructions that the government must show proof of loss before BMG could receive any money.¹⁷¹

Chalupnik represents an ominous step in the history of copyright. It seems to stand for the proposition that there is a general public obligation to tend to the property of copyright holders; thus, the government enforces criminal sanctions on behalf of BMG. BMG's standing as a victim under the MVRA is also peculiar, for BMG did not show any evidence that it held any of the copyrights in question. Further, the value of the disks to the participants in the case raises important questions regarding economic waste and copyright remedies. Chalupnik was able to sell the disks for more than \$78,000, but to BMG, they were not worth the cost of postage. In the ordinary civil copyright case, statutory damages are available even in the absence of proof of loss, so a copyright holder might well recover handsomely from infringement of copyrighted material destined for the trash.

Although Chalupnik's conviction points to a new and frightening phase in the extension and enforcement of copyright law, it is only a recent and logical extension of more distant developments. Just forty years ago, before sound recordings received copyright protection, Chalupnik's actions could not have amounted even to *civil* copyright infringement. But a combination of constitutional insouciance and a psychologically compelling, but vaguely defined, natural law theory has created a strong presumption in favor of broadening the range of copyrightable subject matter. Not only has the subject matter expanded but the rights have also evolved, reaching the point at which copyright threatens to become a peculiar hybrid right—under which benefits are purely private and burdens are borne by the public. Originally, the public purpose of the law was clearly paramount, with the private benefit to the author considered as important, yet incidental.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 755.

In the strangest of inversions, not only has the law become more protective of private interests but it also has moved decisively in the direction of creating a broad social obligation to tend to their copyrighted “property.” The result is the gradual imposition of a general duty to preserve rights attached to an outmoded technology and to impose a servitude on newer means of communication and transmission of information. In this instance, the old technology is embodied in sound recording apparatus, while the servitude is imposed, for the moment, on p2p software and devices that promote “circumvention.”

The *Chalupnik* case is still more instructive when considered in light of statutory damages awards issued in suits against downloaders and uploaders. The disparity in *Chalupnik*—that disks not worth the price of postage could be sold by someone without a distribution network for \$78,000—is striking enough, but consider that in a civil copyright case, the copyright holder can receive statutory damages in lieu of actual damages, doing away with the requirement of harm and permitting the plaintiff to receive a minimum of \$750 per act of infringement to a maximum of \$30,000.¹⁷² The amount of statutory damages can be staggering. In *Capitol Records v. Thomas-Rasset*, a jury originally awarded \$220,000 to Capitol on the basis of twenty-four songs; a second trial resulted in an award of \$1.92 million, an award later reduced to \$54,000 by Judge Michael Davis. In a third trial, the jury awarded \$1.5 million—\$62,500 per song, an amount reduced again to \$54,000 by Judge Davis.¹⁷³ Even this lower amount reflects an award of \$2,250 per song. In *BMG v. Tenenbaum*, a jury awarded \$675,000 on the basis of thirty songs, subsequently reduced to \$67,500 on constitutional grounds by Judge Nancy Gertner.¹⁷⁴ Moving from *Chalupnik* to *Thomas-Rasset* and *Tenenbaum* takes us not only to the question of what kind of economic disparities the law will allow but also what kind it will breed.

The rationales offered in support of statutory damages are hollow: a United States Department of Justice brief in the *Thomas-Rasset* case argues that it is difficult to calculate actual damages, and there is a need for deterrence in furtherance of the public interest.¹⁷⁵ Neither justification is plausible; each of them illustrating that the extension of copyright is, in large measure, an assault by copyright upon culture, justified by the solemn repetition of untrue premises. Why does the government not ob-

172. 17 U.S.C. § 504(c) (2006).

173. *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. 2010).

174. *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 89 (D. Mass. 2010).

175. See United States of America's Memorandum in Defense of the Constitutionality of the Statutory Damages Provision of the Copyright Act, 17 U.S.C. § 504(c) (2006); *Capitol Records Inc.*, 680 F. Supp. 2d at 1045.

serve that statutory damages as applied to file-sharing are unjustifiable? As Pam Samuelson and Tara Wheatland observe, “Awards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”¹⁷⁶

These are large awards in themselves. When considered on a per-song basis, they become staggering, and when compared to the harm that an illegal download actually causes, they appear senseless. As Judge Gertner noted in the *Tenenbaum* case, “Each of the songs that Tenenbaum illegally downloaded can now be purchased online from the iTunes Music Store and other retailers for approximately \$0.99 or \$1.29 a piece. And for each \$0.99 song sold on the iTunes Music Store, it appears that the recording companies only receive about \$0.70.”¹⁷⁷ Thus, Joel Tenenbaum is required to pay \$2,250 for a song he could have purchased for \$0.99 and gives the industry considerably more than the \$0.70 it would have received.

Does copyright law need to adapt to changes in culture? Seemingly not, according to a number of courts considering the issue of what constitutes innocent infringement for the purposes of assessing statutory damages under Section 504(c). On November 29, 2010, the Supreme Court denied certiorari in *Harper v. Maverick Recording*, a case involving songs downloaded by Whitney Harper when she was sixteen years old.¹⁷⁸ In *Harper*, the district court ruled that whether Harper could qualify as an innocent infringer under Section 504(c)(2), which would reduce the statutory minimum damages from \$750 per violation to \$200, was a factual question to be resolved by a jury.¹⁷⁹ The Fifth Circuit reversed, holding that Section 402(d) precluded Harper as a matter of law from proving that she was an innocent infringer.¹⁸⁰ Section 402(d) provides, as Justice Alito wrote in dissenting from the denial,

that if a prescribed notice of copyright ‘appears on the published *phonorecord* or *phonorecords* to which a defendant . . . had access, then no weight shall be given to . . . a defendant’s interposition of a defense based on innocent infringement in mitigation of actual or statutory damages.’¹⁸¹

There is a problem, as Justice Alito observed, in applying section 402(d) to a case that does not involve “phonorecords” or any “material

176. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009).

177. *Tenenbaum*, 721 F. Supp. 2d at 112.

178. *Harper v. Maverick Recording Co.*, 131 S. Ct. 590, 590 (2010).

179. *Maverick Recording Co. v. Harper*, 598 F.3d 193, 195 (5th Cir. 2010).

180. *Id.* at 199.

181. *Harper*, 131 S. Ct. at 590 (Alito, J., dissenting).

objects” that would afford notice of copyright to someone who was downloading files over the Internet.¹⁸² In such an instance, he wrote, “[T]he question would simply be whether the infringer ‘was . . . aware and had . . . reason to believe,’ that the downloading was illegal.”¹⁸³ In ruling that Harper’s knowledge of whether her behavior was illegal was irrelevant, the Fifth Circuit declined to take her age into account. Justice Alito took exception to the appellate court’s indifference on this count, suggesting that Harper’s “youth and lack of legal sophistication were relevant considerations.”¹⁸⁴

Legally speaking, however, we remain in the age of the phonorecord, in which the sound recording enjoys a legal ascendancy that seems quite out of keeping with an outmoded technology and that appears to be asserted all the more strongly on account of its irrelevance. Tony Reese has written that copyright law’s hostility to innocent infringement is a modern development, and that it was only between 1909 and 1989 that “almost all of copyright law’s original safeguards protecting innocent infringers eroded.”¹⁸⁵ (A period of time that coincides rather nicely with the history of the sound recording.) The Court did not share Justice Alito’s opinion that the case was worthy of review, which leads to the suspicion that it remains under the influence of the view that the modern printing press (sound recording apparatus) is the necessary instrumentality connecting author (or performer) and public—with the publisher and record company hiding behind the scenes.

Justice Alito noted that section 402(d) was enacted in 1988, years before downloading over the Internet was possible, an observation indicative of a healthy interest in the relationship of law, technology, and culture.¹⁸⁶ He might also have noted that it was enacted just sixteen years after federal copyright protection was extended to records, despite the industries’ claims to stand on the basis of a timeless moral prohibition against unauthorized copying. The legal ascendancy of the sound record-

182. “[A] person who downloads a digital music file generally does not see any material object bearing a copyright notice, and accordingly there is force to the argument that § 402(d) does not apply.” *Id.*

183. *Id.* (citing 17 U.S.C. § 504(c)(2) (2006)).

184. *Id.* at 591.

185. He further states:

Thus, for much of its early history, copyright law overall strove to avoid holding copiers liable for innocent infringement . . . [B]etween 1909 and 1989, almost all of copyright law’s original safeguards protecting innocent infringers eroded. The general risk of committing copyright infringement increased dramatically, as ever more material was protected for ever longer periods against ever more uses.

R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133, 134 (2007).

186. *Harper*, 131 S. Ct. at 590 (Alito, J., dissenting).

ing is of comparatively recent vintage, the consequence of a real departure from the traditional contours of copyright law. In order to accept that it makes sense, we must be made to believe in several propositions that are not true: that the idea and expression distinction exists in nature, that people do not create in the absence of monopolistic incentives, and that—to give just one example—when Martin Luther King, Jr. delivered his *I Have a Dream* speech, he was engaged in a “performance” in the nature of a play or a rock concert, which perhaps he did not “publish” by performing it in front of 200,000 people, on federal property, and with federal protection.

Given the importance of the teenager to the copyright industries’ campaign and the dire need to reshape cultural moral sensibilities, there may be something to be said for the view taken by the Fifth Circuit in *Harper* and by the Seventh Circuit in *BMG Music v. Gonzalez*.¹⁸⁷ Perhaps it is an appropriate time to put teenagers on general notice of what they will be required to believe in order to preserve the industries’ monopoly. Perhaps it may not be an appropriate time to invite them to think about whether the law makes sense. As Eben Moglen has noted archly, “[T]welve-year-olds do a better job of distributing music than the music companies.”¹⁸⁸ The point should be carefully considered because the copyright industries are obviously targeting youth in an effort to educate them in copyright law and its supposed values. The attempt to found copyright on a universal norm, a natural law, is in the long run, an attempt to say to the youth of the nation that copyright corresponds to their values.

When copyright comes before culture, it means that values must be made to conform to the law, and it might thus be unwise to allow teens to comment on the values that underlie the law. Teenagers may be less enamored of technology that appears archaic, and may not understand why rules that came about when transmission of information was difficult and expensive should continue to apply when transmission is easy and inexpensive. They may likewise find it difficult to understand why the law should support monopolies built on this archaic technology, while suppressing technology that promises easy distribution. They may not comprehend that statutory damages far out of proportion to actual damages actually make sense, and that their innocence as to the legality of their activities cannot, as a matter of law, qualify them as innocent infringers obligated to pay only \$200 for a download with an actual value

187. *BMG Music v. Gonzalez*, 430 F.3d 888 (7th Cir. 2005).

188. Eben Moglen, Professor of Law, Columbia Law School, *Freeing the Mind: Free Software and the Death of Proprietary Culture* (June 29, 2003), available at <http://emoglen.law.columbia.edu/publications/maine-speech.html>.

of no more than \$1—because the CDs, from which they did not obtain their unauthorized copies, bore copyright notices. They may not perceive that prosecutors must ensure that CDs earmarked for destruction do not wind up in record stores, or that an enterprising custodian must be punished for turning trash into \$78,000, or that for selling trash he was convicted of criminal copyright infringement.

B. Does the Supreme Court Endorse the Common Law Vision?

There is a line between the outright advocacy of common law copyright principles and their tacit acceptance, and the Supreme Court has generally stayed on the polite side of the line. There are certainly enough decisions explaining that the public benefit is the primary purpose of copyright. At the same time, in various important instances, the Court has accepted some of the more palatable premises underlying common law copyright, and this acceptance casts doubt on whether the Justices would actually be capable of recognizing an unwarranted departure from the traditional contours of copyright.

It also means that the Court may contribute, albeit unintentionally, to the servitude that copyright places on new means of communication. This servitude is the result of the inversion of the relationship between culture and copyright, and it has been working its way into the law incrementally. Among polite statements that tacitly invert the order of culture and copyright, Paul Goldstein's paean to the printing press may be the most direct: With the invention of the press, "a legal mechanism was needed to connect consumers to authors and publishers commercially."¹⁸⁹ The law threatens to put its imprimatur on the philosophy that flows from the *Sony* Court's intimation that copyright is the child of technology and the friend of progress: "Indeed, it was the invention of a new form of copying equipment—the printing press—that gave rise to the original need for copyright protection."¹⁹⁰ The statement sounds innocent enough, except that it leaves out an inconvenient portion of the historical record—censorship and corporate monopoly as the origins of copyright. It also tacitly invokes a pseudo-history in which a variety of characters as diverse and as fanciful as a dubious Locke, Shakespeare, and the ghost of *Donaldson v. Beckett* seek to persuade us that the basis of copyright is natural, and that copyright is essential to the effective dissemination of information.

Given the opportunity, the Justices would undoubtedly disclaim the more fanciful premises of common law copyright. Yet, they have sub-

189. GOLDSTEIN, *supra* note 107, at 21.

190. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984).

scribed to at least one of its principal fictions. It may seem harmless or even sophisticated to believe with the *Sony* Court that the advent of the printing press made copyright necessary.¹⁹¹ As I have argued, however, this belief is at the core of common law copyright theory. The conflict between the expansion of copyright and technological advance is not incidental. Nor is the strange contrast highlighted in *Chalupnik* and the statutory damages cases coincidental. It is what comes of the law's desperate attempts to create a broad social responsibility for the maintenance of the industries' copyrights, and to force all cultural exchange into the hallowed "bundle of sticks" protected as property.

Despite its *Eldred* admonition, the Court itself has more than once encouraged a departure from copyright tradition by providing a subtle endorsement of the common law view while failing to resolve the issue actually before it. To the surprise of many, the *Grokster* Court evaded the principal issue presented in the case—in the Court's own words, "under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product"—by asserting that the answer was to be found in "rules of fault-based liability derived from the common law."¹⁹² In *eBay*,¹⁹³ a patent case with implications for copyright and trademark, Justice Thomas noted a departure from tradition in the issuance of injunctive relief in patent cases, but then seemed to dismiss it as a blip running counter to a venerable tradition dating back to the nation's founding.¹⁹⁴ In *Bilski*, a patent case, Justice Kennedy likewise claimed that the answer to the question lay in the Court's prior jurisprudence, which it did only in the most abstract sense¹⁹⁵ (which is ironic, given that the Court ruled that *Bilski*'s claimed subject matter was abstract and thus unpatentable). Now that Congress has used copyright to remove works from the public domain, will the Court be able to judge whether that action represents a departure from tradition?

191. *Id.*

192. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 918, 934 (2005).

193. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

194. Thus, the majority opinion appears to see a departure in the automatic issuance of injunctions, but one that was sudden, short-lived, and inexplicable—rather than a gradual departure that occurred for some reason. For example, Justice Thomas writes, "And as in our decision today, *this Court has consistently rejected invitations to replace traditional equitable considerations* with a rule that an injunction automatically follows a determination that a copyright has been infringed." *Id.* at 392–93 (emphasis added).

195. *Bilski v. Kappos*, 130 S. Ct. 3218 (2010).

*C. The Difficulty of Transmission and Downloading
Books for the United States*

Intellectual property law and its attendant social conditions pose increasingly serious challenges to jurists. Although providing real solutions lies beyond the scope of this Article, some observations are in order. There are at least three related threats in copyright that highlight the distension that occurs when copyright is placed before culture: the staggering disproportionality of statutory damages and the harm caused by infringement; the dichotomy between the private benefits enjoyed by the copyright industries and the public burdens imposed to support them; and the ominous entry of the government into the fray on the side of the industries.

A first step toward an appropriate response to these issues necessarily involves an examination of the premises of copyright law, with three goals. The first of these goals is to treat the premises as conditions of offering copyright protection, standards by which the extent of copyright protection may be developed in accord with the goal of copyright law. The asserted relationship between copyright and incentives to authorship should serve as a requirement imposed on legislation, rather than as an axiom that recklessly justifies every extension of the law in the belief that more copyright equals more creation. In other words, one important question to ask when considering a copyright issue is “what result is most consonant with the stated purpose of copyright law?”

A more fundamental change requires a restatement of the trite assertion of the relationship between copyright and the printing press (and its modern stand in, sound-recording technology), an assertion that cleverly makes copyright into a timeless right connected with a dated piece of machinery. Of course, at one time the printing press made mass dissemination much easier than it had ever been in some respects, hence the need that sovereigns felt to hobble authors and printers. The importance of the press, rather than standing for a fictional proposition on the timeless origins of copyright, should serve as a reminder that copyright came into being at a time when it was difficult to disseminate information. This point has certainly been made before, but it has not made its way into the law with any certainty, and it helps to take us back to the reasons that copyright was enacted in England by the Statute of Anne in 1710, and in the United States by a series of state statutes in the 1780s and in the Copyright Act of 1790.

It is a point made by James Madison’s correspondence with Thomas Jefferson regarding Madison’s desperate quest for books in the time leading up to the Federal Convention. Given Madison’s character as a plagiarist and “pirate”—an infringer who breaks a moral law against co-

pying in the absence of a positive law—it should come as no surprise that he was also a downloader. Not content to steal from the works of Hume, he downloaded other sources for the information that he used in inventing the United States. More precisely, people downloaded the information from the ships that carried the books that Jefferson sent him from the bookstalls of Paris. His downloading was somewhat more innocent than his plagiarism; although he was to borrow shamelessly from them without authorization, at least he paid for the books, as he had to at the time. In the months before the Constitutional Convention, Jefferson sent Madison a wide variety of books on history and politics from Paris.¹⁹⁶ The results of his study included Madison’s famous writings *Notes of Ancient and Modern Confederacies* and *Vices of the Political System of the United States*,¹⁹⁷ which historian Douglass Adair describes collectively as “probably the most fruitful piece of scholarly research ever carried out by an American.”¹⁹⁸ These studies also led Madison to the controversial and novel conviction that the republic had to be expansive, a position that he laid out in his famous speech of June 6, 1787, and later made at length in *Federalist* No. 10.

Madison wanted the books because he was in the midst of designing a new nation, and his correspondence with Jefferson reminds us how hard it was for Americans to get books at the time. This is an image that should give us pause: A Founding Father anxiously awaiting the arrival of a ship from Paris, desperate to read more about ancient governments so as to distill the principles of republican government.

If European books had been readily available at no charge to Madison by means of technology newer than the printing press, would he have waited for old bound books to arrive by ship and then paid large sums for them? He was not insouciant when it came to the protection of property rights, but if Jefferson had offered to send the requested books immediately and without charge, it is difficult to imagine Madison refusing out of respect for a norm against unauthorized copying. The answer that the content industries would like to hear is that he would have refused this invitation to “piracy,” despite the aid that it would have provided in the furtherance of his greatest invention, the United States. Given the protectionist character of copyright and patent at the founding, however, such an answer seems unlikely. The very reason that Madison worked so diligently at creating a new republic was that he rejected the version of British law that would have imposed a political monopoly on American co-

196. Adair, *James Madison*, in *FAME AND THE FOUNDING FATHERS*, *supra* note 24, at 134.

197. ADRIENNE KOCH, *JEFFERSON AND MADISON: THE GREAT COLLABORATION* 15, 18–19 (1950).

198. Adair, *James Madison*, in *FAME AND THE FOUNDING FATHERS*, *supra* note 24, at 134.

lonists. There is little reason to think that he would have shown much respect for a copyright law that hindered his attempt to create an expansive republic impervious to the perils of degeneration. Neither he, nor Franklin, nor anyone now famous as a Founder, ultimately deferred to an unjust imperial political monopoly justified in the name of the law, and it would have been an unlikely thing for them to allow a law protecting literary property to impede the progress of the United States.

Indeed, the chief purpose of the Copyright Act was to produce writings that would serve America's interests, and not a more abstract individual entitlement. The purpose of copyright was certainly not to privilege outmoded means of communication and to burden innovation, and the law today should not be wedded to a view of copyright that does just that. In *Grokster*, the Ninth Circuit offered an assessment, more accurate than its counterpart in the Supreme Court's *Sony* opinion, of the uneasy relationship between the copyright industries and the technological advances that make it easier to copy and distribute their content:

From the advent of the player piano, every new means of reproducing sound has struck a dissonant chord with musical copyright owners, often resulting in federal litigation. This appeal is the latest reprise of that recurring conflict, and one of a continuing series of lawsuits between the recording industry and distributors of file-sharing computer software.¹⁹⁹

This is an appropriate view to take of the relationship between copyright and technology, a view that considers progress as a condition of copyright protection and not as an axiom that justifies the endless extension of the law.

To return to the fanciful problem of the recording industry's suit against Madison and Franklin, which may not be so fanciful after all, what would the Supreme Court do if Madison and Franklin were found liable by a lower court for copyright infringement? Would it proceed in the spirit of copyright at the time of the nation's founding, animated by an ethos that permitted Madison to "plagiarize" freely from the works of David Hume, and Franklin to "make available" copies of ostensibly private letters deemed to be the literary property of the Governor and Lieutenant Governor of Massachusetts?

Or would it decide on the basis of an attractive but deceptive vision of copyright championed by publishers of literature, music, and movies, supported by an eighteenth-century English Solicitor General, a John

199. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1158 (9th Cir. 2004).

Locke pressed into the service of a dubious theory, and a Shakespeare made to play the critical role of the author in search of copyright law?

Would the majority or the dissenting opinion begin with the sentence used by Franklin to justify his distribution of the Hutchinson-Oliver letters, "He stole fire from the sky?" Unfortunately, the answer is not clear.