COPYRIGHT, COMMODIFICATION, AND CENSORSHIP: PAST AS PROLOGUE—BUT TO WHAT FUTURE?

by
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Copyright, commodification, and freedom of expression have often been viewed as harmonious and complementary concepts. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, for example, the Supreme Court characterized copyright law as the "engine of free expression."[1] Holding a left-leaning news magazine liable for copyright infringement for publishing excerpts from Gerald Ford's forthcoming memoirs was not, in the Court's view, to condone an act of private censorship. It was in harmony with first amendment principles because copyright incentives would ensure that these memoirs would reach the public through the normal operation of the marketplace.[2] Copyright scholars such as Neil Netanel and Niva Elkin-Koren have emphasized copyright's contribution to democratic discourse in providing rights that enable independent writers and artists to make a living from their expression.[3]

In the mainstream view, one reason copyright and free expression are harmonious is because copyright protection extends only to an author's "expression," not to her "ideas" or information the work may contain.[4] Other authors are always free to express the same idea or reuse information derived from a protected work in a subsequent work as long as he expresses the ideas or information in different way. This substantially limits the potential for private censorship in copyright. Also contributing to the compatibility of copyright and freedom of expression principles has been the fair use doctrine.[5] When Howard Hughes acquired copyright in a magazine article about his life and tried to use it to stop publication of an unauthorized biography, an appellate court rebuffed the effort to use copyright to accomplish private censorship by finding that the biographer had made fair use of the article.[6] Acuff-Rose Music, Inc., which owned a copyright in the popular song "Pretty Woman," may similarly have hoped to stop Two Live Crew from selling its

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[1] 471 U.S. 539, 558 (1985).

[2] Cutting against fair use were The Nation's attempt to "scoop" the part of Ford's memoir about the Nixon pardon and the allegedly "purloined" nature of the manuscript from which the Nation's editors drew the excerpts as cutting against The Nation's fair use defense. Id. at 562-64.

[3] See, e.g., Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283 (1996); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright*, 14 Cardozo Arts & Ent. L.J. 215 (1996).

[4] See, e.g., Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantee of Free Speech and Free Press?*, 17 UCLA L. Rev. 1180, 1186-89 (1970). Nimmer also regarded the limited duration of copyright as important to the consistency of copyright and the first amendment. Id. at 1193.

[5] See, e.g., Paul Goldstein, *Copyright and the First Amendment*, 70 Colum. L. Rev. 983, 1011-15, 1017-22 (1970). See also Robert C. DeNicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Cal. L. Rev. 283 (1979).

[6] See Rosemont Enterp. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966).

rap parody version of the song because of its distaste for the parody. However, the Supreme Court was persuaded that this parody was the kind of critical commentary on a protected work that the fair use doctrine should permit.[7] In these and other cases, courts have invoked fair use to prevent the exercise of copyright as a means of censoring content of which the copyright owner disapproved.

Occasionally, fair use and the idea/expression distinction have failed to preserve as much harmony between copyright and free expression principles as society deems desirable. In the aftermath of the Supreme Court's *Harper & Row* decision, for example, biographers and historians, perceived themselves to be at risk of private censorship if they quoted from unpublished letters or manuscripts of public figures, such as those by the famously private J.D. Salinger or the controversial founder of the Scientology movement.[8] Congress responded to these concerns by amending the fair use provision to clarify that the unpublished nature of copyrighted works did not preclude the exercise of fair use.[9] A seeming deviation between copyright and freedom of expression principles was thus mended, and historians and biographers, among others, breathed a sigh of relief.[10]

On other occasions, the common law adjudication process has taken care to allay concerns about copyright being in conflict with freedom of expression principles. Some years ago, for example, Fred Yen expressed concern that the "total concept and feel" test for software copyright infringement was so vague as to threaten freedom in computer programming expression.[11] Later cases repudiated the broad "look and feel" claims,[12] and so, this conflict between copyright and first amendment principles was resolved.

These doctrines and developments seem to have bred some complacency among copyright professionals about the compatibility of copyright and freedom of expression principles. Oddly enough, there has been to date remarkably little scholarship produced by first amendment scholars on the compatibility of copyright and free expression principles. Such literature as exists has largely been produced by copyright scholars who have tended to visit the first amendment literature to find support for their arguments on specific copyright issues. Copyright professionals may have been blinded by familiar doctrines from perceiving certain threats to free expression values that a first amendment scholar would easily perceive.

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[7] See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
[8] See, e.g., Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990) (discussing cases).
[9] See 17 U.S.C. sec. 107, as amended.
[10] Yet concerns persist about chilling effects on free expression of visual artists from rulings such as Rogers v. Koons, 751 F. Supp. 474 (S.D.N.Y. 1990), aff'd, 960 F.2d 301 (2d Cir.), cert. denied, 113 S.Ct. 365 (1992). See, e.g., Louise Harmon, *Law, Art, and the Killing Jar*, 79 Iowa L. Rev. 367 (1994).
[11] See Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel,"* 38 Emory L.J. 393 (1989). The principal case endorsing this concept was Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987).
[12] See, e.g., Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994) (rejecting "look and feel" claim for user interface); Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807 (1st Cir. 1995), aff'd by equally divided court, 116 S.Ct. 804 (1996) (rejecting "look and feel" claim).

Shaking off the field's complacency is a new generation of scholars—Yochai Benkler, Julie Cohen, Niva Elkin-Koren, Lawrence Lessig, Mark Lemley, Neil Netanel, and Eugene Volokh, among them—who recognize a greater potential for disharmony between copyright and freedom of expression principles than their predecessors.[13] The need for this work arises from the fact that the rights of copyright owners have expanded considerably in recent years and that fair use principles have been under attack.[14] These young scholars have looked to first amendment and other constitutional principles to shore up limiting doctrines of copyright law and to make policy recommendations about how copyright law should evolve. As admirable as this new literature is, it largely ignores the fact that copyright has at least as long a history of being a handmaiden of censorship as it has a history of being the so-called "engine of free expression."[15] Understanding this history may be valuable in assessing whether this past may be a prologue to a future in which copyright and censorship will once again be conjoined.

So let us briefly visit this history: The Anglo-American copyright regime arose out of practices and policies of the English Stationers' Guild in the late 15th and early 16th centuries.[16] To ensure harmony within the ranks, the guild established a registry system for staking claims in books. Members entered into the guild register the names of books in which they claimed printing rights,[17] whereupon other guild members were expected to refrain from publishing the same book. A private enforcement system enabled guild members to resolve disputes amongst themselves over rights in particular books. While some stationers in this era were surely noble fellows who sought to enlighten the public, the private copyright system of the pre-modern era mainly functioned to regulate the book trade to ensure that members of the guild enjoyed monopolies in the books they printed.

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[13] See, e.g., Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, 74 N.Y.U. L. Rev. 354 (1999); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 Conn. L. Rev. 981 (1996); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 Cardozo Arts & Ent. L. J. 345 (1995); Mark A. Lemley and Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke L.J. 147 (1999); LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (2000); Netanel, supra note 3.

[14] See, e.g., Report of the Working Group on Intellectual Property, Intellectual Property and the National Information Infrastructure 63-84 (Sept. 1995) (hereinafter "White Paper") (expansively interpreting copyright's exclusive rights and criticizing fair use).

[15] See supra note 1 and accompanying text. For a history of the pre-modern era of copyright, see, e.g., L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE (1968). See also MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993); JOHN FEATHER, A HISTORY OF BRITISH PUBLISHING (1988). Rather than heavily footnoting the text's discussion of what I call the pre-modern era of copyright, as in a law review article, I am citing here the three works from which I drew this history. Readers wishing to engage in further investigation should consult these works.

[16] The guild included not only the printers of books, but others involved in the book trade, such as book-binders and booksellers. English kings and queens also granted letters patent to certain printers conferring on them exclusive rights to print certain types of works was an auxiliary system of regulating the printing trade that in time was folded into copyright. Over time, the Stationers' Company became the predominant copyright system.

[17] Rights to print these books were regarded by guild members as perpetual in duration; they could, however, be assigned or licensed to other guild members.

This system was, however, conducive to taking on a second function. Conveniently for English authorities, the guild's practices provided an infrastructure for controlling (i.e., suppressing) publication of heretical and seditious materials. The English kings and queens were quite willing to grant to the Stationers' Guild control over the publication of books in the realm in exchange for the guild's promise to refrain from printing such dangerous materials.[18] Until its abolition, the Star Chamber was available to enforce judgments emanating from the stationers' private adjudication system.

The pre-modern copyright system undoubtedly promoted freedom of expression by making books more widely available. However, this was an incidental byproduct of the market for books, not an intended purpose of the then-prevailing copyright system. Far more harmonious was the relationship between copyright and censorship in that era. Men burned at the stake for writing texts that were critical of the Crown or of established religion, and printers of such books could expect no better fate. The stationers' copyright regime was part of the apparatus aimed at ensuring that these texts would not be printed or otherwise be made widely accessible to the public.

The principal development that ushered in the modern era of copyright was the English Parliament's passage of the Statute of Anne in 1710.[19] On its face, this statute was both a repudiation of several principal tenets of the stationers' copyright system and a redirection of copyright's purpose away from censorship and toward freedom of expression principles. In addition, it sought to promote competition among printers and booksellers—that is, to break the stranglehold that major firms within the Stationers' Company had had over the book trade.

The Statute of Anne achieved these goals in several ways: First, the act granted rights to authors, not to publishers. Second, it did so for the utilitarian purpose of inducing learned men to write and publish books. Third, the act established a larger societal purpose for copyright, namely, to promote learning. Fourth, it granted rights only in newly authored books. Thereafter, ancient books were in the public domain and could be printed by anyone. Fifth, it limited the duration of copyright protection to fourteen years (renewable for another fourteen years if the author was living at the end of that term), thus abolishing perpetual copyrights.[20] Sixth, the statute conferred rights of a limited character (not to control all uses, but to control the printing and reprinting of protected works). Seventh, it imposed a responsibility on publishers to deposit copies of their works with designated libraries. Eighth, it provided a system for redressing grievances about overpriced books.

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[18] That the Licensing Acts were integrally interrelated with the Stationers' copyright system is demonstrated in part by the fact that the Stationers Company emphasized the valuable role of these acts in suppressing dangerous speech when arguing that Parliament should reinstate the Licensing Acts after they expired in the late 17th century.

[19] See, e.g., Rose, supra note 15 (discussing the Statute of Anne).

[20] A "grandfather" provision allowed holders of existing copyrights some additional time to exploit the rights, but the duration was limited. Id.

While it took an additional fifty years or so for pre-modern copyright system to die away,[21] the modern law of copyright emerged from the Statute of Anne's precepts. Censorship held no place of honor in this new copyright system. The modern copyright system embraced Enlightenment values that influenced the framers of the U.S. Constitution.[22] Article I, sec. 8, cl. 8 of the Constitution, which empowers Congress to promote the progress of science and the useful arts by securing to authors and inventors for limited times an exclusive right in their respective writings and discoveries, should be viewed in historical context as an American endorsement of England's repudiation of the speech-suppressing, anti-competitive and otherwise repressive pre-modern copyright system that the English Parliament meant to reshape through the Statute of Anne. Core elements of the Statute of Anne are reflected in that clause's purpose ("to promote Science"), in the persons to whom rights were to be granted ("authors"), and in the duration of rights ("for limited times").

Marci Hamilton has sometimes asserted that the Constitution did not include a provision on freedom of speech because the framers had done everything necessary to ensure a healthy system of free expression by authorizing enactment of a copyright law.[23] Though I would not go that far, I would agree that the copyright clause of the Constitution, properly construed, embodies first amendment and anti-monopoly principles. Because of this, I agree with Professor Hamilton that there is a "dormant copyright clause" waiting to be reawakened in the caselaw—and hopefully in Congress—after a long sleep in which the clause has become a meaningless cliché.[24]

To understand why rejuvenation of this clause may be desirable, it may be worth considering some parallels between copyright in the pre-modern era and copyright as it has evolved in the past decade or so, the trend toward which I will call "post-modern copyright."

- CONSOLIDATION IN THE COPYRIGHT INDUSTRIES: The rise of publishing and media giants, such as Reed Elsevier, AOL-Time-Warner, and Disney, harkens back to the dominance of certain London booksellers in the Stationers' Company and their influence on pre-modern copyright policy. As the work of James Boyle has shown, major copyright industry players have been remarkably successful in recent years in promoting a high protectionist agenda in the national policy arena, as though theirs were the only interests worthy of concern.[25] This should be of concern in part because the work of Yochai Benkler suggests that strengthening intellectual property rights does not broadly advance the interests of all creators, but rather advantages large vertically integrated content providers while disadvantaging small scale firms

[21] See, e.g., id. (discussing litigation about the implications of the Statute of Anne on common law rights).
[22] See, e.g., OFFICE OF TECHNOLOGY ASSESSMENT, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION 37-39 (1986).
[23] Address to the Section on Defamation and Privacy, Association of American Law Schools, San Francisco CA, January 1998.
[24] Marci Hamilton, *The Dormant Copyright Clause* (manuscript on file with the author).
[25] See, e.g., James Boyle, *The Politics of Intellectual Property: Environmentalism for the Net?*, 47 Duke L.J 87 (1997).

and individual creators.[26] Consolidation in the copyright industries also affects the ability of free lance writers to negotiate fair contracts with major media firms who tend to want writers to assign all rights in their works for a one-time payment.[27]

- THE DECLINE OF THE AUTHOR/THE RISE OF THE WORK: As in the pre-modern era, the post-modern copyright emphasis is on "the work," "the copyright," and "the rights holder," rather than on "authors."[28] The post-modern copyright system promotes the interests of rights holders in their works more than it promotes the interests of individual authors. The "major labels" in the recording industry, for example, have systematically advanced their interests in a way that has worked to the disadvantage of many individual performers, including by seeking legislation to designate sound recordings as "works for hire" so that individual creators would not be able eventually to exercise termination of transfer rights.[29]

- A DECLINE IN THE UTILITARIAN AND LEARNING PURPOSES OF COPYRIGHT/THE RISE OF PROFIT MAXIMIZATION: From the standpoint of dominant players in the content industries, the purpose of copyright law is to maximize revenues for the benefit of rights holders, not to provide the minimum level of protection necessary to incent a desirable level of investments in creative activity, let alone to promote learning or innovation.[30] Hollywood firms may have recouped its investments in films many times over, but they nevertheless wish to exploit whatever residual value exists in those films. That the utilitarian rationale for granting authors limited rights in their works has given way to pure rent-seeking behavior is especially evident in the Congressional decision in 1998 to extend the copyright term for another twenty years.[31]

- A PREDICTED DEMISE OF FAIR USE AND OTHER COPYRIGHT LIMITATIONS: The pre-modern copyright system had no fair use or other public interest exceptions to the scope of publisher rights, nor did it seek to promote science, innovation, or freedom of expression, values which in the modern era, have given rise to fair use and other exceptions in the modern era.[32] Historically fair use and related limitations on the scope of copyright have been regarded as part of the social bargain

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[26] See, e.g., Benkler, supra note 13, at 400-08.
[27] See, e.g., P. Bernt Hugenholtz, *The Great Copyright Robbery: Rights Allocation in a Digital Environment*, presented at New York University Law School (April 2000), available at http://www.ivir.nl/medewerkers/hugenholtz-uk.html.
[28] See Peter Jaszi, *Toward a Copyright Theory: The Metamorphoses of Authorship*, 1991 Duke L. J. 455 (1991).
[29] See, e.g., Courtney Love, *Courtney Love Does the Math*, Salon Magazine, http://www.salon.com/tech/feature/2000/06/14/love/; Shawn Zeller, Compromise, Hell!, 32 Nat'l Law J. 3668 (11/18/00) (discussing the recording industry's success in obtaining legislation naming sound recordings as works for hire).
[30] See, e.g., Netanel, supra note 3.
[31] See, e.g., Pub. L. No. 105-298 (1998). A constitutional challenge to this extension of the copyright term was rejected at the trial court level. See Eldred v. Reno, 74 F.Supp.2d 1 (D.D.C. 1999).
[32] See, e.g., 17 U.S.C. secs. 107-121 (copyright exceptions).

of the U.S. copyright system.[33] In the postmodern era, U.S. policymakers have sometimes spoken of fair use and other limitations as a "tax" on publishers.[34] They have predicted that fair use will fade away because copyright owners are developing new licensing schemes through they can be compensated for access to and uses of their works.[35] The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) arguably limits national authority to create exceptions and limitations that interfere with the ability of rights holders to control exploitations of their works.[36] Some representatives of the copyright industries have already expressed a desire to use this agreement to challenge copyright exceptions in national copyright laws.[37]

- PERPETUAL COPYRIGHTS: In the pre-modern era, copyrights were perpetual. In the modern era, copyrights have been limited in duration, intended to be long enough to enable authors and their progeny to benefit from any commercial value deriving from the author's work, and enriching the public domain thereafter.[38] The willingness of Congress to extend the copyright term to save Mickey Mouse and other valuable intellectual creations from being consigned to the public domain suggests that copyright in the post-modern era may be on its way to becoming perpetual again—this time on the installment plan, as Peter Jaszi so wittily observed.[39] The public domain may also be threatened by the use of technical measures to protect works whose copyright is nearing expiration because the technical measures will not cease limiting access and use when the copyright expires. Technical measures may, moreover, be used to control access to and uses of public domain works. This may mean that works that copyright law officially conceives of as being in the public domain may instead be perpetually protected by technology, backed up by the anti-

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[33] See, e.g., Jessica Litman, *Revising Copyright Law for the Information Age*, 75 Or. L. Rev. 19, 31-35 (1996).

[34] See, e.g., White Paper, supra note 14, at 84.

[35] Id. at 49-53, 82.

[36] See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, reprinted in THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS--THE LEGAL TEXTS 2-3 (Gatt Secretariat ed. 1994); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, reprinted in RESULTS OF URUGUAY ROUND, supra at 6-19, 365-403. See TRIPS, art. 13.

[37] See, e.g., Eric Smith, *Worldwide Copyright Protection Under the TRIPS Agreement*, 29 Vand. J. Trans'l L. 559, 577-78 (1996). But see Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int'l L. 369, 398-409 (1997)(arguing that existing copyright exceptions and limitations are compatible with TRIPS).

[38] See, e.g., Peter Jaszi, *Goodbye to All That: A Reluctant (and Perhaps Premature) Adieu to a Constitutionally Grounded Discourse of Public Interest in Copyright Law*, 29 Vand. J. Transn'l L. 595, 597-600 (1996).

[39] Statement of Professor Peter Jaszi, Washington College of Law, American University, On S. 4839. The Copyright Term Extension Act of 1995, Before the Senate Judiciary Committee, Sept. 20, 1995.

circumvention rules discussed below as long as rights holders use the same technical measures to protect works in copyright as well as works out of copyright.[40]

- THE DECLINE OF ORIGINALITY AS A MEANINGFUL CONSTRAINT ON PUBLISHER RIGHTS: If major information industry players, such as Reed Elsevier, have their way in the U.S. as they did in the European Union, Congress will soon adopt a new form of intellectual property protection for collections of information that will, in essence, obviate the need to show any creative "originality" for an informational work to receive copyright-like protection.[41] Some digital media firms have been claiming copyright protection in digitized versions of public domain works.[42] If public domain works in digital form cannot be fully controlled by copyright because of lingering questions about the sufficiency of their originality, one can expect such firms to use technical protection measures to control access to and use of these works and/or to obtain intellectual property-like protection through mass-market licenses governed by the law of jurisdictions that have adopted the Uniform Computer Information Transactions Act (formerly known as Article 2B of the Uniform Commercial Code).[43]

- EXCESSIVE PRICING: In the post-modern era, as in the pre-modern era, complaints about excessive pricing of copyrighted works have become common. Universities have been especially vocal about excessive pricing of science journals sold by publishing giants such as Reed Elsevier.[44] Noticeably absent from public discourse about intellectual property in the U.S. is any serious consideration of the possibility of imposing compulsory licenses, legal licenses, or obligations to license on fair and reasonable terms as a way to counteract this problem, although some scholars have raised these possibilities.[45]

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[40] See infra notes 68-70 and accompanying text. Development of a tool to bypass a technical measure used to protect a public domain work will be illegal under these rules as long as copyright owners use the same measure to protect works in copyright. See 17 U.S.C. sec. 1201(a)(2) and (b)(1).

[41] H.R. 354, 106th Cong., 1st Sess. (1999). See, e.g., J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 Vand. L. Rev. 51 (1997) (explaining genesis of this legislation); J.H. Reichman & Paul F. Uhlir, *Database Protection at the Crossroads: Recent Developments and Their Impact on Science and Technology*, 14 Berkeley Tech. L.J. 793 (1999) (analyzing H.R. 354).

[42] See, e.g., Pamela Samuelson, *The Originality Standard For Literary Works Under U.S. Copyright Law*, 42 Am. J. Compar. Law 393 (1994) (discussing such claims).

[43] This model law is discussed at length in law review symposium issues. See, e.g., Symposium, *Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce*, 13 Berkeley Tech. L.J. 809 (1998); Symposium, *Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce*, 87 Calif. L. Rev. 1 (1999). UCITA has thus far been enacted in Virginia and Maryland.

[44] See, e.g., Stanley Chodorow & Peter Lyman, *The Future of Scholarly Communication*, in THE MIRAGE OF CONTINUITY (Brian Hawkins & Patricia Battin, eds. 1998).

[45] See, e.g., J.H. Reichman & Jonathan Franklin, *Privately Regulated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. Penn. L. Rev. 875 (1999).

- UNCLEAR ORIGINS OF RIGHTS: In the post-modern, as in the pre-modern era, there is noticeable fuzziness about the source of authority firms have when claiming certain rights in informational works. It is unclear, for example, whether asserted rights to license works or to technically protect them derive from ownership or possession of a particular artifact, from intellectual property law, or from some other source. In the pre-modern era, stationers considered rights in their "copie" to derive from their possession of manuscripts and any investments they may have made in printing those manuscripts.[46] In the post-modern era, claims of seemingly absolute rights to license works on all but unconscionable terms and to use technical protection measures to control access to protected works have an unclear provenance. Jessica Litman has pointed out that UCITA posits the existence of property rights in information other than those arising from intellectual property law without specifying exactly what those rights are or how far they extend.[47]

- PRIVATE ORDERING/PRIVATE ENFORCEMENT: Also evident in the post-modern copyright era is a renewed romance with private ordering and private enforcement efforts. The rhetoric employed by high protectionists about the desirability of trusting the market to work out appropriate arrangements resembles, as Julie Cohen has cogently pointed out, the rhetoric once employed in a now discredited Supreme Court decision that challenged public policy limitations on freedom of contract.[48] Yet high protectionists in the post-modern era have employed this rhetoric with considerable success. When considering the impact of private ordering and enforcement, it is also worth reflecting on the stationers' copyright system. The history of this regime reveals why leaving the exploitation of informational works solely to private ordering can have serious deleterious consequences for society, in particular, for innovation, competition, and the dissemination of learning.[49] As in the pre-modern era, industry groups in the post-modern era have played significant roles in policing compliance with copyright norms. A well-known example is the "hotline" the Software Publishers Association provides through which disgruntled employees and the like can inform on their employers for unlicensed software.

- THE RHETORIC OF "PIRACY" AND "BURGLARY": Characterizing unauthorized copying as "piracy" has both pre- and post-modern roots. In the pre-modern era, the so-called "pirates" were printers who did not belong to the Stationers' Company but dared to publish works in which stationers claimed copyright.[50] Today "pirates" seem to come in many shapes and sizes. Increasingly common is use of the term "piracy" to refer to single acts of infringement by individuals. Major firms in post-modern copyright industries are using, or planning to use, technical protection

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[46] See sources supra note 15.
[47] See Jessica Litman, *The Tales That Article 2B Tells*, 13 Berkeley Tech. L.J. 931 (1998).
[48] See Julie E. Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 Mich. L. Rev. 462 (1998).
[49] See sources cited supra notes 15.
[50] See, e.g., Rose, supra note 15.

systems to protect their works from such "piracy."[51] These firms are unwilling to rely solely on private ordering to protect their interests, however. In 1998, they persuaded Congress to make it illegal to bypass a technical protection measure used by copyright owners to control access to their works and to make or distribute technologies that can be used to bypass technical access- or use-controls.[52] They liken circumvention to "burglary" and the technologies that enable circumvention to "burglar's tools."[53] The anti-circumvention provisions of the Digital Millennium Copyright Act (DMCA), while ambiguous in some key respects, provide legal reinforcement for technical protection of rights, with criminal penalties available to punish willful violators of these norms.[54]

- INCREASED CRIMINAL SANCTIONS: The rhetoric of piracy lends itself to increased use of criminal penalties to enforce copyright interests. Post-modern copyright, like pre-modern copyright, increasingly looks to criminal sanctions to punish "bad" actors in the copyright space. In the modern era, only large-scale commercial infringers were at risk of criminal liability for copyright infringement. In the post-modern era, criminal copyright liability provisions are proliferating and casting a far wider net. For example, the No Electronic Theft Act for the first time imposes criminal liability on willful infringers without regard to commercial purpose.[55] Consider also the anti-circumvention provisions of the DMCA which seemingly allow a circumventor or maker of a circumvention tool to be held criminally liable without any showing of an underlying act of infringement.[56] Mere potential to enable infringement seemingly suffices.

Many things, of course, distinguish the post-modern from the pre-modern era of copyright, including the social, political, and economic context within which these post-modern developments are occurring. Many members of the judiciary, including members of the Supreme Court, continue to believe in modern copyright precepts. Because of this, it would be unduly alarmist to suggest that post-modernism has totally captured copyright

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[51] See, e.g., Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us To Rethink Digital Publishing*, 12 Berkeley Tech. L.J. 137 (1997) (discussing the concept of trusted system technology).

[52] See Digital Millennium Copyright Act, Pub. L. No. 105-304. The anti-circumvention provisions are now codified at 17 U.S.C. sec. 1201. These rules partly reinscribe the pre-modern Licensing Acts by requiring cryptographers to seek advance permission before attempting to circumvent a technical protection scheme used by copyright owners to protect their works. See id., sec. 1201(g).

[53] See, e.g., Testimony of Allan Adler, Hearing Before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee on H.R. 2281, 105th Cong., 1st Sess., Sept. 17, 1997.

[54] See 17 U.S.C. sec. 1201, 1204. For history of this provision and an analysis of many of its ambiguities, see, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 14 Berkeley Tech. L.J. 519 (1999).

[55] No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997), codified at 17 U.S.C. sec. 506(a)(2).

[56] See, e.g., Universal City Studios, Inc. v. Corley, 111 F. Supp.2d 294 (S.D.N.Y. 2000) (liability for violating the anti-trafficking provisions of DMCA anti-circumvention provisions do not depend on proof—or absence thereof—of infringements arising from the availability of a circumvention technology). See also 17 U.S.C. sec. 1204 (criminal liability provision).

law or that copyright law will get divorced from freedom of expression principles in order to remarry censorship. What may save copyright's second marriage from doom may well be this larger context. Yet, it would be naïve not to notice the drift toward a renewed flirtation with pre-modern concepts and do nothing to stop it.

Among the strategic efforts needed to arrest post-modern developments are, first, a renewed and refreshed discourse about "modern" copyright concepts, such as fair use, and second, an elucidation of constitutional principles for defending modern copyright from post-modern incursions. Proponents of "modern" copyright principles have sought to do this in amicus briefs in prominent cases such as A&M Records, Inc. v. Napster, Inc.[57] and Universal City Studios, Inc. v. Corley.[58] In the *Napster* case, for example, amici criticized the trial court's interpretation of the Supreme Court's decision in Sony Corp. of Am. v. Universal City Studios, Inc.[59] and the breadth of the preliminary injunction that, in essence, would have required Napster to prove that every digital music file exchanged with aid of its peer-to-peer software was a noninfringing copy.[60] In *Corley*, amici have questioned the application of the DMCA's anti-circumvention rules to a journalist who linked to sites where a decryption program could be found in the course of news coverage about a controversy about the program, as well as challenging the constitutionality of these rules if they eliminate fair use for technically protected works.[61]

Working against adoption of post-modern legislative proposals, such as UCITA, is also important. UCITA works off the base of copyright, finding in it "informational rights" that then can be licensed under its aegis. But UCITA seems to treat copyright limitations as presumptively precatory and capable of being overridden by license terms.[62] In response to strong criticism of UCITA from intellectual property law experts, the drafters of UCITA have somewhat lessened this presumption.[63] UCITA now expressly empowers courts to withhold enforcement of contract clauses that violate "fundamental public policy."[64] However, this limitation on licensor authority may be too vague to give comfort to persons whose licenses include a term that limits free expression or fair use rights. Computer scientists, for example, are likely to be deterred from posting on the Internet the results of performance tests they've run on database programs when license prohibits public dissemination of test results. Even if these scientists are convinced that public policies favoring the free exchange of ideas and information are

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[57] 114 F. Supp.2d 896 (N.D. Cal. 2000).
[58] 111 F. Supp.2d 294 (S.D.N.Y. 2000).
[59] 464 U.S. 417 (1984)(no liability for contributory infringement for selling Betamax machines because machines of substantial noninfringing uses, including home taping of television programs for time shifting purposes).
[60] Brief Amicus Curiae of Copyright Law Professors and Brief Amicus Curiae of American Civil Liberties Union In Support of Reversal, on appeal to Ninth Circuit Court of Appeals in A&M Records, Inc. v. Napster, Inc. (2000) (on file with the author).
[61] Brief Amicus Curiae of American Civil Liberties Union in Support of Reversal, on appeal to the Second Circuit Court of Appeals in Universal City Studios, Inc. v. Corley (2001) (on file with the author).
[62] See, e.g., Charles McManis, *The Privatization (of "Shrinkwrapping") of American Copyright Law*, 87 Calif. L. Rev. 173 (1999).
[63] See, e.g., David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 Calif. L. Rev. 17 (1999).
[64] See UCITA, sec. 105.

fundamental enough to make such clauses unenforceable, they may still not be keen to invite litigation to challenge these restrictions. A chilling effect may accordingly set in.

Also troublesome in UCITA mass-market licenses are clauses aimed at maintaining trade secrecy-like limitations on use of licensed information.[65] Such terms might include prohibitions on reverse-engineering, pledges not to disclose information, or assertions of the unpublished (and presumably secret) nature of that information. Terms of this sort may be unobjectionable in the context of individually negotiated licenses between sophisticated commercial firms possessing relatively equal bargaining power. However, they become disturbing if the licensed work has been the subject of a mass-market transaction. Even though reverse-engineering object code may be lawful as a matter of copyright law,[66] license restrictions may inhibit exercise of this copyright-based privilege. It remains to be seen whether anti-criticism/anti-reverse engineering clauses will continue to proliferate and how courts will deal with them.[67] The potential certainly exists for UCITA to be used to accomplish acts of private censorship that copyright and freedom of expression principles, left to their own devices, would disfavor.

Also threatening freedom of expression principles are the new anti-circumvention provisions of the DMCA. They make it illegal to circumvent a technical protection system used by a copyright owner to control access to its work[68] and to make or distribute technologies that circumvent access controls.[69] Major movie studios relied on the latter provision when they sued a journalist named Corley because he posted a computer program known as DeCSS, which can be used to bypass the Content Scrambling System (CSS) embedded in mass-marketed DVD movies, on the website of 2600 magazine in the course of covering the controversy about this program. After being enjoined from posting this program, Corley decided instead to link to sites where DeCSS could be found as part of his continuing coverage of the story. The trial court ultimately ruled that linking too violated the anti-circumvention provisions of the DMCA, even though the movie studios had offered no proof that it had ever been used to make an infringing copy of a DVD movie. Indeed, they stipulated that they had no such proof.

If Corley can be enjoined merely for linking to sites where allegedly illegal information can be found, then so too can the San Jose Mercury News and so can Jane Ginsburg who linked to sites about DeCSS so that students enrolled in her copyright course could understand the controversy about this program and analyze the application of the DMCA to it.[70] Also at risk are those who wear T-shirts bearing DeCSS source code or scientists who write articles about DeCSS, discussing its algorithm and CSS. In

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[65] See, e.g., Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. Cal. L. Rev. 1239 (1995) (questioning the enforceability of such licenses).
[66] See, e.g., Sega Enterp. Ltd. v. Accolade, Inc., 977 F.2d 1510 (1992).
[67] See, e.g., Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 Calif. L. Rev. 111 (1999).
[68] Id., sec. 1201(a)(1)(A).
[69] Id., sec. 1201(a)(2). See also sec. 1201(b)(1)(similar ban of other kinds of circumvention technologies).
[70] See, e.g., Jane C. Ginsburg, Copyright Use and Excuse on the Internet, 24 Colum.-VLA J. L. & Arts (forthcoming 2000) (discussing fair use and free speech issues raised by linking).

the post-modern era, free speech and fair use may become subsidiary values to the preeminent value of protecting the business models and technologies that copyright owners adopt for their works.

The *Corley* case is on appeal, and so perhaps Judge Kaplan's post-modern decision will be overturned if the appellate court interprets the scope of the anti-circumvention provisions less broadly than he did[71] or because it finds merit in the constitutional concerns that Kaplan brushed aside. The appellate court could, for example, decide that Corley cannot be held liable for violating the anti-circumvention rules under the First Amendment or under a subsection of the DMCA that states that "[n]othing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products."[72] By including this subsection in the DMCA, Congress seems to have realized the potential for the anti-circumvention rules to conflict with free speech/free press principles and provided courts with a statutory basis for limiting its application when free speech rights would be diminished.[73] It must be said, however, that Congress provided almost no guidance on how to mediate or resolve the tension between the interests of free speech and those underlying the anti-circumvention rule.

For copyright law to remain true to its modern aspiration to live in harmony with freedom of expression principles and to remain divorced from censorship principles, those who deeply believe in its second ("modern") marriage will need to be steadfast in monitoring the evolution of copyright and related policies and practices in the commercial market. Post-modernism has made considerable headway. However, the struggle is far from over.

Copyright's past will unquestionably be a prologue to its future. The principal question is: to which of its pasts shall we chart its course? Which choice we make will have profound consequences for the kind of information society in which we will be living in the twenty-first century. My choice would be to retain the modern concept of copyright and reject post-modern tendencies. To do this, we believers in the modern concept of copyright must work together to develop a more powerful rhetoric with which to preserve constitutionally grounded values in copyright law and policy. Rhetoric alone, however, will not suffice. We must also show policymakers how these values can be specifically implemented in copyright rules that will truly "promote the progress of science and the useful arts" and preserve an open and democratic society.[74]

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[71] See, e.g., Samuelson, supra note 54, at 537-56 (discussing ways in which courts could narrow the reach of DMCA's anti-circumvention rules by interpretation).

[72] 17 U.S.C. sec. 1201(c)(1).

[73] See, e.g., Benkler, supra note 13, at 414-29 (discussing first amendment implications of the anti-circumvention regulations).

[74] See, e.g., Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 Emory L.J. 869 (1996)(suggesting ways to translate constitutional values into the new information environment). See also Lessig, supra note 13, Chapter 11 (translating constitutional values specifically as to copyright).