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2006

War and Peace: The 34th Annual Donald C. Brace Lecture

Jessica D. Litman
University of Michigan Law School, jdlitman@umich.edu

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Recommended Citation
Litman, Jessica D. "War and Peace: The 34th Annual Donald C. Brace Lecture." J. Copyright Soc'y 53, no. 1-2 (2006): 1-21.

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READERS' COPYRIGHT

by Jessica Litman*

I.

Consider this principle:

The purpose of copyright is to encourage reading.

Read that again. Your response, I think, is likely to sit somewhere on the spectrum between skepticism and scorn. Why is that? Is it that you view copyright as a collection of goodies secured for their clients by overzealous lobbyists?[1] Would you be more receptive to this variation:

The purpose of copyright should be *to encourage reading.*

Still no, right? What you know about copyright persuades you that the purpose of copyright *should be* to give creative people incentives to do creative work. For some of you, that means that the purpose of copyright should be to confer strong, enforceable, assignable rights on creators and the entities that make investments in their work.[2] For others, that means that the purpose should be to encourage creators by giving them rights that are strong enough to enable them to make a living creating works of authorship, but not so strong that they make it difficult for future creators to make their own living doing the same.[3] Does that capture it?

Why? Why should copyright seek to serve the purpose of conferring strong, enforceable, assignable rights on creators and the entities that make investments in their work? Alternatively, why should it seek to offer rights to creators that are just strong enough to enable them to quit their day jobs if they choose to? If we attain either of those goals, what do

*John F. Nickoll Professor of Law & Professor of Information, University of Michigan. Jon Weinberg read this essay and, as usual, provided astute suggestions. I also want to thank Rebecca Tushnet, Jane Ginsburg, and the participants in the Fordham Law Intellectual Property and Innovation Colloquium for their useful questions and comments.

[1] *See*, *e.g.*, Randy Cohen, *The Ethicist: Hollywood Property Values*, N.Y. Times Mag., Feb. 20, 2011, at 17.

[2] *See*, *e.g.*, Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. Copyright Soc'y 209 (1983).

[3] *See*, *e.g.*, Christina Bohannan, *Copyright Harm, Foreseeability, and Fair Use*, 85 Wash. U. L. Rev. 969 (2007); Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 Colum. L. Rev. 503, 506 (1945); William Fisher III, R*econstructing the Fair Use Doctrine*, 101 Harv. L. Rev. 1659, 1700-05 (1988).

we achieve? If such a system encourages them to create many new works, and store them all in a safe place, will it have accomplished what we want it to?

I ask the question because I'm interested in exploring the reasons that underlie the resistance of copyright lawyers and scholars to the idea that the copyright system does or should promote reading, listening, watching and enjoying works of authorship, except, perhaps, as a by-product of its more important work.

The suggestion is hardly a new one. Copyright scholar Lyman Ray Patterson spent much of his scholarly life explaining that copyright was most properly understood as a "law of users' rights."[4] In 1995, UNESCO adopted April 23 as the annual "World Book and Copyright Day," dedicated to promoting reading.[5] Indeed, until the late twentieth century, copyright discourse commonly identified the public's interest in access to works of authorship as a key copyright goal, perhaps the most important of them.[6] Judicial opinions insisted that:

> The copyright law . . . makes reward to the owner a secondary consideration. . . . 'The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.' It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.[7]

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[4] *See* L. Ray Patterson & Stanley W. Lindberg, The Nature of Copyright: A Law of Users Rights (1991); L. Ray Patterson & Stanley E. Birch, A Unified Theory of Copyright, *printed in* 46 Houston L. Rev. 215 (2009); L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 Vand. L. Rev. 1 (1987); Carrie Russell, Users' Right in Copyright: An Interview with Ray Patterson (Dec. 1999), http://www.pla.org/ala/issuesadvocacy/copyright/copyrightarticle/usersrightscopyright.cfm; sources cited *infra* notes 18, 37. **R**

[5] *See* United Nations Educational, Cultural, and Scientific Organization, World Book and Copyright Day – Apr. 23, http://portal.unesco.org/culture/en/ev.php-URL_ID=5125&URL_DO=DO_TOPIC&URL_SECTION=-465.html.

[6] *See*, *e.g.*, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 5-6 (1961).

[7] United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) (quoting Fox Film v. Doral, 286 U.S. 123, 127). *See*, *e.g.*, Sony v. Universal Studios, 464 U.S. 417, 429 (1984); Mazer v. Stein, 347 U.S. 201, 218 (1954); Cass Country Music v. C.H.L.R., 88 F.3d 635, 642 (8th Cir. 1996); Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 780 F. Supp. 1283, 1292 (N.D. Cal. 1991), *aff'd*, 964 F.2d 965 (9th Cir. 1992); Williams & Wilkins v. United States, 487 F.2d 1345, 1352 (Ct. Cl. 1974).

Scholarly commentary emphasized the primacy of the public interest.[8] Congress, for its part, once took some care to paint its copyright laws as designed to benefit the public rather than the authors and publishers who would enjoy the profits flowing from the temporary copyright monopoly.[9]

Scholarship on copyright has continued to emphasize the importance of readers' interests.[10] Congress, not so much. Recent congressional justifications for new legislation have focused more on the advantages of the new law for copyright owners than on the advantages for anyone else.[11]

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[8] *See*, *e.g.*, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies and Computer Programs*, 84 HARV. L. REV. 281, 325-27 (1970); Harry N. Rosenfeld, *The Constitutional Dimension of Fair Use in Copyright Law*, 50 NOTRE DAME L. 790 (1975). *But see* Gary Kauffman, *Exposing the Suspicious Foundation of Society's Primacy in Copyright Law: Five Accidents*, 10 COLUM-VLA J. L. & ARTS 381, 383 (1985) ("While access is a valid interest of society, it is not the "purpose" of copyright law to protect this interest.").

[9] *See*, *e.g.*, H.R. REP. NO. 60-2222, at 6-7 (1909) ("The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given."). *Compare* H. R. REP. NO. 89-3327, at 32 (1966) ("The dual purposes of copyright protection, to stimulate authors to create and to reward them for their efforts, are of fundamental importance, and these purposes are ill-served by the 1909 statute.").

[10] *See*, *e.g.*, Laura N. Gasaway, *The New Access Right and its Impact on Libraries*, 10 J. INTELL. PROP. L 269, 272 (2003); Laura Heymann, *Everything is Transformative: Fair Use and Reader Response*, 31 COLUM. J. L. & ARTS 445 (2008); Peter Jaszi, *Caught in the Net of Copyright*, 5 OR. L. REV. 299, 300-01 (1996); Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALBANY L. REV. 677 (1995); Joseph Liu, *Enabling Copyright's Consumers*, 22 BERKELEY TECH. L.J. 1099 (2007); Joseph Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003); Glynn Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975 (2002); Malla Pollack, *A Listeners' Free Speech, a Reader's Copyright*, 35 HOFSTRA L. REV 1457 (2007); Pam Samuelson, *Copyright and Freedom of Expression in Historical Perspective*, 10 J. INTELL. PROP. 319, 326 (2003); John Tehranian, *Parchment, Pixels and Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1 (2011). *But see* Jane C. Ginsburg, *Putting Cars on the "Information SuperHighway": Authors, Exploiters and Copyright in Cyberspace*, 95 COLUM. L. REV. 1466, 1468 (1995) ("[u]ser rights, albeit important, should remain secondary. Without authors, there are no works to use . . . .").

[11] *See*, *e.g.*, H.R. REP. NO. 105-452, at 4 (1998) ("Extending copyright protection will be an incentive for U.S. authors to continue using their creativity to produce works, and provide copyright owners generally with the incentive to restore older works and further disseminate them to the public. Authors will be able to pass along to their children and grandchildren the financial benefits of their works."); H.R. REP. NO. 105-551, pt. 1, at 9 (1998) ("The digital environment now allows users of electronic media to 'send 'and re-

Courts still recite the mantra that the rewards promised by copyright are secondary to the public's interest in access to authors' creations.[12] In *Eldred v. Ashcroft*, however, the Supreme Court questioned the mantra's continuing persuasiveness. The statement that copyright makes reward to the author a secondary consideration, the majority wrote, "understates the relationship between such rewards and the 'Progress of Science'":[13]

> As we have explained, "the economic philosophy behind the [Copyright] Clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors." . . . Accordingly, "copyright law *celebrates* the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . . The profit motive is the engine that ensures the progress of science." . . . Rewarding authors for their creative labor and "promoting . . . Progress" are thus complementary; as James Madison observed, in copyright "the public good fully coincides . . . with the claims of individuals."[14]

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trieve perfect reproductions of copyrighted material easily and nearly instantaneously, to or from locations around the world. With this evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted works."); S. REP. NO. 105-190, at 8-9 (1998) (attributing unanimous committee roll call vote in favor of the bill to the broad support from motion picture, software, publishing, telecommunications and information industries as well as that of writers, directors and actors); H.R. REP. NO. 94-1476, at 47-50 (1976). *But see* H.R. REP. NO. 108-670, at 4 (2004) ("Under existing law, moral (reputational) rights do not supersede parental rights to raise children as they see fit. The Committee believes that directors should be assured that their works are properly identified as such; but these same directors may not control every detail of how their works are displayed, particularly for a legal copy aired in the privacy of a consumer's home."); H.R. REP. 105-NO. 551 pt. 2, at 27 (1998) ("H.R. 2281, as reported by the Committee on the Judiciary, contains numerous protections to protect the rights of copyright owners to ensure that they feel secure in releasing their works in a digital, on-line environment. The Committee on Commerce, however, believes that in reaching to protect the rights of copyright owners, Congress need not encroach upon the privacy interests of consumers.").

12 *See*, *e.g.*, NXIVM Corp. v. Ross Inst., 364 F.3d 471, 485 (2d Cir. 2004) (quoting United States v. Paramount) ("Though the statute allows a copyright holder to recover damages suffered at the hands of an infringer, . . . the reward to be gained (or the loss suffered) is a "secondary consideration" in the copyright scheme; its "'primary object . . . lies in the general benefits derived by the public from the labors of authors.'"); Bond v. Blum, 317 F.3d 385, 393 (4th Cir. 2003).

13 Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2004).

14 *Id.* The Court continued:

> Justice Breyer's assertion that "copyright statutes must serve public, not private, ends" *post*, at 6, similarly misses the mark. The two ends are

Thus, the longstanding trope that copyright subordinates the private incentive to the interests of the public has morphed into an assertion that copyright achieves the public interest by appealing to the aspirations of prospective copyright owners.

If the transition were thoughtless, or inadvertent, it would be rhetorically straightforward to argue that we made a mistake when we moved from understanding our copyright system as designed to benefit the reading public to an assumption that enhancing the wealth and power of copyright owners will automatically inure to the benefit of readers. Some commentators are making more-or-less that argument,[15] but without gaining any apparent purchase. Instead, it seems, copyright watchers afflicted by the current mood doubt that copyright *ever* took readers' rights seriously. Scholars' arguments about the importance of readers' rights seem to have lost their conviction. Readers' and listeners' rights get recast as the rights of potential authors,[16] inviting the inference that reading and listening don't merit a lot of protection for their own sake. One needn't look far to find cynical arguments that the language of public interest was just something that proponents of copyright said to justify their self-dealing legislative proposals.[17]

I'm fundamentally cynical by disposition, but I want to suggest that a clear-eyed examination of copyright's history reveals that solicitude for readers is, in fact, deeply encoded in copyright's DNA. That should be unsurprising. A system of copyright protection makes little sense unless it is designed to encourage the use and enjoyment of the works it induces

> not mutually exclusive; copyright law serves public ends by providing individuals with an incentive to pursue private ones.

Id.

[15] *See*, *e.g.*, Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 527-36 (2004); Edward C. Waltersheid, *Musings on the Copyright Power: A Critique of* Eldred v. Ashcroft, 14 ALBANY L.J. SCI. & TECH. 309 (2004).

[16] *See*, *e.g.*, LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USE TECHNOLOGY AND LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY 8-11 (2004); Steve Jamar, *Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context*, 19 WIDENER L.J. 843 (2010); Alina Ng, *When Users Are Authors: Authorship in the Age of Digital Media*, 12 VAN. J. ENT. & TECH. L. 853 (2010); John Tehranian, *Et Tu, Fair Use? The Triumph of Natural Law Copyright*, 38 U.C. DAVIS L. REV. 465 (2005).

[17] *See*, *e.g.*, Craig W. Dallon, T*he Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest*, 44 SANTA CLARA L. REV. 365, 438-39, 447-53 (2004); William F. Patry, *Copyright and the Legislative Process: A Personal Perspective*, 14 CARDOZO ARTS & ENT. L.J. 139 (1996); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197 (1996).

authors to create and publishers to disseminate. Somewhat more controversially, I want to suggest that the current copyright system incorporates a variety of reader-centric provisions that many of us have learned not to see. If we categorize copyright's concern for readers, listeners and viewers as extraneous or incidental, we can miss its crucial importance in the overall copyright scheme.

I suspect that much of the resistance to the explicit recognition of readers' rights in copyright is based on fear about what rights and privileges readers might demand if we acknowledged their claim to ask for any. Recognition of the legitimacy of readers' interests might be the entry of the camel's nose into the tent. Some scholars have suggested that the importance of readers' copyright interests not only counsels a copyright law of a different shape from our current one, but may constitutionally compel it.[18] This has inspired some proponents of strong copyright protection to overreactions.[19] At least one writer has complained that those who argue that readers have copyright rights are members of a conspiracy of pirates and pirate-sympathizers.[20] Another insists that defenders of "fair use rights" are "enemies of copyright."[21]

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[18] *See*, *e.g.*, L. Ray Patterson, *Copyright and the "Exclusive Right"of Authors*, 1 J. INTELL. PROP. L. 1 (1993); Richard Stallman, *Misinterpreting Copyright: A Series of Errors*, *in* RICHARD M. STALLMAN, FREE SOFTWARE, FREE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN 111 (2010).

[19] *See*, *e.g.*, David Johnstone, *Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law*, 52 J. COPYRIGHT SOC'Y 345, 373-74 (2005) (criticizing Patterson's views).

[20] *See* MARK HELPRIN, DIGITAL BARBARISM 33 (2009):

> [T]here actually is a kind of tribe, a community of interests, united by a shared passion in attacking copyright. They are in spirit the impossible fusion of the tribe of boys in *The Lord of the Flies*, the extras in a Mel Gibson post-nuclear-holocaust movie, and the American Library Association. Their wildness has been denatured into a crusade against copyright, their audacity lies in button-pushing, and their chief barbarism is the use of intemperate language behind a shield of anonymity on the internet. They are sprinkled like confectioners sugar over all the United States, although no doubt more than 99 percent of them reside within an iPod's throw of a Starbucks . . . .
>
> Make no mistake about this. They may protest that they are not against copyright itself but rather its abuses, extensions, and unnecessary inconveniences. This is an unartful dodge. Not only the persistent undercurrents of the logic and commentary, but their unselfconciously expressed arguments show their true colors.

See also id. at 35-6 ("The anti-copyright bull . . . is quick, massive, muscular, untiring, and stupid. Although it can't (or doesn't) really read, write, or think, it and others like it are setting the agenda for your future and mine.")

[21] *See* Fred I Koenigsberg, *Humpty Dumpty in Copyrightland*, 51 J. COPYRIGHT SOC'Y 677, 680-81 (2004). *See also id*. at 679:

My goal in this project is to reclaim copyright for readers (and listeners, viewers, and other members of the audience).[22] I think, and will try to persuade you, that the gradual and relatively recent disappearance of readers' interests from the core of copyright's perceived goals has unbalanced the copyright system. It may have prompted, at least in part, the scholarly critique of copyright that has fueled copyright lawyers' impression that "so many in academia side with the pirates."[23] It may also be responsible for much of the deterioration in public support for copyright. I argue here that copyright seems out of whack because it has forgotten some of its most important constituents.

My method in this essay will be incremental. I propose to take a series of very small baby steps in the direction of recognizing rights within the copyright system for readers, listeners, viewers and other members of the copyright audience. In part II of this essay, I argue that copyright law

> There is a battle raging between those who support creativity — led by creative talents such as songwriters, composers, lyricists, authors, and the business entities underwriting them, such as music publishers and motion picture companies — and those who do not — such as those in the so-called Internet "community" who claim "information wants to be free."

[22] The audience for copyrighted work has expanded over the past 300 years along with copyright's subject matter. There is an understandable temptation, at least among lawyers, to see the audiences for newfangled works as "consumptive users," to use Jane Ginsburg's phrase, and therefore less worthy members of the copyright audience than the readers of books. *See* Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y 1, 15 (1997). For that reason, some readers of this essay may accuse me of cheating by focusing on readers' rights rather than something I could name "users' rights" or "consumers' rights." The tendency to see music listeners, art viewers, television watchers, or video-game players as less deserving of copyright's solicitude than book readers, though, strikes me as misguided. We've made the choice to give authors of music, art, television and video parity with writers of books in the rights conferred by the copyright system. If we believe that these works merit copyright protection, it should follow that we value opportunities to experience and enjoy those works enough to assure the reasonable freedom to take advantage of them. *See* Jessica Litman, *Creative Reading*, 70 LAW & CONTEMP. PROBS. 175, 179-80 (2007). My quarrel with category names like "users" or "consumers" is that they obscure the important, creative, and imaginative behavior by which reading, listening, watching, and playing further copyright's goals.

[23] Preston Padden, email to cyberprof mailing list (Jan. 30, 2011, 6:03 p.m.), *available at* https://mailman.stanford.edu/mailman/private/cyberprof/2011-January/004053.html. The cyberprof mailing list is an email forum for Internet law teachers. Mr. Padden is a Senior Fellow and board member of the University of Colorado Silicon Flatirons Center for Law, Technology and Entrepreneurship, and a former Walt Disney Company executive. He graciously consented to my quotation and citation of his email messages to the list.

has historically viewed readers' interests as crucially important. In part III, I claim that a copyright system makes little policy sense unless it seeks to encourage reading and listening. In part IV, I explore the current copyright law searching for protection of readers' interests, and find significant ones. In part V, I review some of the arguments that have been or could be made against explicit recognition of readers' rights, and find them unpersuasive. In part VI, I explore very tentatively the freedoms that copyright should secure to readers, listeners and viewers. I conclude that the current fashion for discounting readers' rights both undermines copyright's usefulness and threatens its legitimacy.

II.

Gutenberg invented his printing press in the 1430s. As the press spread across Europe, individuals asked for and received exclusive printing privileges.[24] In England, the printers' guild's desire to suppress competition and the Tudor monarchs' desires to suppress sedition combined to engender a censorship regime that became known as "Stationers' Copyright." Only members of the Stationers' Guild were permitted to print books. The Guild instituted a licensing regime that both facilitated the censorship of printed matter and protected guild members from competition by other members.[25] By the end of the seventeenth century, though, both censorship and monopolies had fallen out of favor, and Parliament allowed the licensing acts that gave the Stationers their exclusive rights to lapse.[26] The Stationers lobbied heavily for the reinstitution of their exclusive printing privileges, without success.[27] In 1710, Parliament enacted the Statute of Anne, a law commonly agreed to be the world's first copyright bill, as "*An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the*

[24] *See generally* CIPIL, Primary Sources on Copyright (1450–1900), http://www.copyrighthistory.org; Craig W. Dallon, *supra* note 17, at 381-91; Joanna Kostylo, *From Gunpowder to Print: The Common Origins of Copyright and Patent*, *in* PRIVILEGE AND PROPERTY: ESSAYS ON THE HISTORY OF COPYRIGHT 21 (Ronan Deazley, Martin Keetschmer & Lionel Bently eds., 2010) [hereinafter PRIVILEGE AND PROPERTY]; Edward S. Rogers, *Some Historical Matter Concerning Literary Property*, 7 MICH. L. REV. 101 (1908). R

[25] *See* Stationers' Charter London (1557) (Ronan Deazley ed., 2008), *in* Primary Sources on Copyright (1450–1900), *supra* note 24; 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:6-§ 1:8, at 1-47–1-87 (2009); Dallon, *supra* note 17, at 391- 99; Patterson, *Copyright and the "Exclusive Right" of Authors*, *supra* note 18, at 9-12. R

[26] *See* RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY 1-6 (2004); Mark Rose, *The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne*, in PRIVILEGE AND PROPERTY, *supra* note 24, at 67, 77-82.

[27] *See* DEAZLEY, *supra* note 26, at 6-29.

Times therein mentioned." Although the Statute of Anne incorporated features drawn from the Stationers' proposals, it also diverged from Stationers' Copyright in important respects.[28] The Statute granted exclusive rights to print and reprint books. It vested those rights, at least nominally, in authors rather than Stationers. It limited the term of the rights to twenty-one years for previously printed books, and a renewable fourteen year term for books not yet printed.[29]

When copyright lawyers talk about the Statute of Anne, they tend to focus on these two innovations: the grant of rights to authors rather than to publishers,[30] and the limited copyright term.[31] It's worthwhile, though, to recall that the rights granted by the statute were also limited in scope — to printing — and in subject matter — to published books. Other uses of books were beyond the copyright owner's control. It was fine for anyone to read the books aloud, in public; it was okay to resell used copies; there was nothing illegal about dramatizing the books and performing the resulting play on the stage for paying audiences; one needed no permission to abridge the books and publish the abridgment, or to write and sell copies of a sequel or translation. Lectures, unpublished plays, operas, music, paintings, sculptures, and other non-books were unprotected.

In addition to granting authors printing rights in their books, moreover, the Statute of Anne imposed obligations. Claimants needed to register their rights (so that everyone could find out who owned the exclusive printing right and when it would expire).[32] The copyright owner was re-

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[28] *See id*. at 31-50.

[29] Statute of Anne, 8. Anne, c. 19 (1710) (Eng.), Primary Sources on Copyright (1450–1900), *supra* note 24. *See* DEAZLEY, *supra* note 26, at 41-50.

[30] *See*, *e.g.*, MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 47-48 (1993); Lionel Bentley & Jane C. Ginsburg, "*The Sole Right . . . Shall Return to the Authors": Anglo-American Authors' Reversion Rights From The Statute of Anne to Contemporary U.S. Copyright*, 25 BERKELEY TECH. L.J. 1475, 1479 (2010).

[31] *See*, *e.g.*, ROSE, *supra* note 30, at 44-46; Jane C. Ginsburg, *Un Chose Publique? The Author's Domain and the Public Domain in Early British, French, and US Copyright Law*, 65 CAMBRIDGE L.J. 636 (2006).

[32] Statute of Anne ("And whereas many persons may through ignorance offend against this Act, unless some provision be made, whereby the property in every such book, as is intended by this Act to be secured to the proprietor or proprietors thereof, may be ascertained, as likewise the consent of such proprietor or proprietors for the printing or reprinting of such book or books may from time to time be known; be it therefore further Enacted by the authority aforesaid That nothing in this Act contained shall be construed to extend to subject any Bookseller, printer, or other person whatsoever to the forfeitures or penalties therein mentioned, for or by reason of the printing or reprinting of any book or books without such consent, as aforesaid, unless the Title to the Copy of such book or books hereafter published shall, before such publication, be entered in the Register Book of the

quired to donate free copies of the book to the royal library and to the libraries of the country's major universities.[33] Finally, any member of the public who felt that the price the copyright owner charged for copies of the book was unreasonable could petition the government to set a fair price.[34]

Thus, the first copyright statute gave copyright owners narrowly bounded rights. It allowed readers the freedom to engage in a host of potentially valuable uses outside of the boundaries. Copyright owners had the obligation to make copies of their books available to the public for

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Company of Stationers in such manner as hath been usual, which Register Book shall at all times be kept at the Hall of the said Company . . . .").

[33] *See id*. ("It is hereby Enacted that nine Copyes of each book or books upon the best paper that . . . shall be printed and published as aforesaid or Reprinted and published with additions shall by the printer and printers thereof be delivered to the Warehouse Keeper of the said Company of Stationers for the time being at the hall of the said Company before such publication made for the use of the Royal Library the Libraryes of the Universities of Oxford and Cambridge the Librarys of the four Universities in Scotland the Library of Sion College in London and the Library commonly called the Library belonging to the Faculty of Advocates at Edinburgh respectively . . . .")

[34] *See id*:

> [I]t is hereby further Enacted by the authority aforesaid, That if any Bookseller or Booksellers, printer or printers, shall, after the said Five and twentieth day of March, One thousand Seven hundred and ten, set a price upon, or sell, or expose to sale, any Book or Books at such a price or rate as shall be conceived by any person or persons to be too high and unreasonable; It shall and may be Lawful for any person or persons, to make Complaint thereof to [list of government officials] who or any one of them, shall and have hereby full power and authority, from time, to time, to send for, summon, or call before him or them such Bookseller or Booksellers, printer or printers, and to Examine and Enquire of the reason of the dearness and enhancement of the price or value of such book or books by him or them so sold or exposed to sale: And if upon such enquiry and Examination it shall be found That the price of such book or books is inhaunced or any wise to high or unreasonable, Then and in such case the said [official] so enquiring and examining, have hereby full power and authority to reform and redress the same, and to limit and settle the price of every such printed book and books, from time to time, according to the best of their judgments, and as to them shall seem just and reasonable . . . .

No scholar has unearthed any report of this price control provision's actually being enforced, so it seems likely that it was never invoked. That said, book historian William St Clair reports that Parliament enacted book price control statutes as early as 1534, and that price controls on books were enforced through the sixteenth century, until Parliament repealed all book price control statutes in 1739. *See* WILLIAM ST. CLAIR, THE READING NATION IN THE ROMANTIC PERIOD 457-58 (2004).

purchase (by publishing them) and for reading without purchase (by donating copies to libraries). Readers who wanted to buy the books but couldn't afford them could appeal to the government to order the copyright owners to lower the price. These are provisions that have no point unless they are designed to facilitate reading.

I'm not yet making any grandiose claims; I'm not suggesting that contemporary American readers might be entitled to invoke rights afforded to eighteenth-century British readers. Rather, I want merely to observe that the first copyright statute took some pains to ensure the protection of readers' interests, despite the fact that the actors urging Parliament to enact such a law were printers and publishers rather than readers.[35] That shouldn't be controversial.

Scholars agree that the American framers' understanding of the Statute of Anne and the history of Stationers' copyright shaped their conception of Article 1, section 8, clause 8, and the first U.S. copyright statute enacted in 1790.[36] A power to "promote the Progress of Science," historians write, was essentially synonymous with the Statute of Anne's stated purpose of "the Encouragement of Learning."[37] Such evidence as historians have unearthed, moreover, suggests that the framers believed that encouraging the creation and dissemination of literature and knowledge would promote learning.[38] Edward Waltersheid notes that at the time that clause 8 was drafted, the book trade in the United States was modest, and the concerns of the book business were unlikely to have had much influence.[39] Thus, when the first Congress followed the Statute of Anne in

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[35] *See* William St. Clair, *Metaphors of Intellectual Property in* PRIVILEGE AND PROPERTY, *supra* note 24, at 369, 373.

[36] *See*, *e.g.*, EDWARD WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE 63, 106, 111-13, 145-51, 258-59 (2002); Samuelson, *supra* note 10, at 325.

[37] *See* WALTERSHEID, *supra* note 36, at 150-51; L. Ray Patterson & Craig Joyce, *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, 938 (2003).

[38] *See* WALTERSHEID, *supra* note 36, at 150-51; Malla Pollack, *What Is Congress Supposed to Promote?, Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the "Progress" Clause*, 80 NEB. L. REV. 754 (2001).

[39] *See* WALTERSHEID, *supra* note 36, at 150. *See also* Oren Bracha, *Early American Printing Privileges: The Ambivalent Origins of Authors' Copyright in America*, *in* PRIVILEGE AND PROPERTY, *supra* note 24, at 89, 97-100 (contrasting the colonies' "small and unorganised book trade" with publishers' guilds in Europe). The overwhelming majority of books in colonial libraries and bookstores were foreign imports, which received no U.S. copyright protection until 1891. *See* St. Clair, *supra* note 35, at 375 (books written and printed in American colonies were only "a tiny proportion of the texts that were read" by colonists).

titling the first U.S. copyright statute "An act for the Encouragement of Learning"[40] it appears to have believed that the statute would do so.

In the United States, the initial copyright law did not include either a library donation obligation or a provision for regulating book prices.[41] Nor did it limit its coverage explicitly to published works. Those would come later. The 1790 law conferred a fourteen-year exclusive right, renewable once, to "print, reprint, publish or vend" a map, chart or book on authors or their assigns who registered their claims with the clerk of the district court, and deposited a copy with the Secretary of State within six months of publication.[42] While the U.S. Statute did not (yet) incorporate the express provisions for the benefit of readers that appeared in the Statute of Anne, the restriction of the scope of the copyright exclusive right to printing, reprinting, publishing and vending, and the short copyright duration, kept the exclusive rights from impinging on the freedom of individual readers to enjoy copyrighted works.[43]

Ray Patterson relied on the history surrounding the Statute of Anne to argue that the copyright clause, properly understood in the light of its context, constrained Congress to enact copyright laws that promoted learning, protected the public domain, and vested meaningful rights in individual creators.[44] Patterson argued that the framers understood these goals to have motivated the enactment of the Statute of Anne, and that they incorporated that understanding into the copyright clause by empowering Congress to secure authors' "exclusive Right" — which the framers understood to be a time-limited right to print, reprint and vend.[45] Patterson may well have correctly divined the framers' historical understanding,[46] but we don't need to agree that his construction represents the

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40 Copyright Act of 1790, 1 Stat. 124.

41 *Id.* The law did, however, require owners of copyrights in any book, map or chart to "within six months after the publishing thereof, deliver, or cause to be delivered to the Secretary of State a copy of the same, to be preserved . . . ." *Id.* § 4.

42 *Id.* §§ 3, 4. *See* Ewer v. Coxe, 8 F. Cas. 917 (C.C. E.D. Pa. 1824) (No. 4584).

43 *See*, *e.g.*, Stover v. Lathrop, 33 F. 348 (C.C.D. Colo. 1888) ("the effect of a copyright is not to prevent any reasonable use of the book which is sold. I go to a book-store, and I buy a book which has been copyrighted. I may use that book for reference, study, reading, lending, copying passages from it at my will. I may not duplicate that book, and thus put it upon the market, for in so doing I would infringe the copyright. But merely taking extracts from it, merely using it, in no manner infringes upon the copyright.").

44 *See* Patterson, *Copyright and the "Exclusive Right" of Authors*, *supra* note 18, at 16-24.

45 *See id.* at 16, 25-32.

46 *See* Edward Walterscheid, *Originalism and the IP Clause: A Comment on Professor Oliar's "New Reading"*, 58 UCLA L. Rev. Discourse 113, 114-15 (2010), *available at* http://uclalawreview.org/?p=1428; Edward C. Walter-

original meaning of the copyright clause or limits Congress's exercise of its authority. It's enough for our purposes to recognize that early copyright laws in both England and the United States incorporated provisions intended to protect readers as well as authors and publishers.

The conventional story we tell about subsequent copyright revisions is that each new copyright law expanded the subject matter of coverage, scope of rights and duration of copyrights.[47] That picture is largely accurate. At the same time, it is easy to forget that later revisions of the American copyright law tempered the expansion with provisions designed to protect the interests of readers and other users.[48] Thus, nineteenth century copyright amendments limited the scope of coverage to published works,[49] adopted a requirement that copyright owners mark all copies with copyright notice,[50] and required the deposit of copies in the Library of Congress.[51] In the twentieth century, Congress codified judge-made privileges permitting individuals to use copyrighted works in ways that copyright owners might not authorize.[52] It adopted price controls, cast as statutory compulsory licenses.[53] Moreover, despite some lobbying to extend copyright to enable copyright owners to control private and personal uses,[54] Congress has largely refused to expand copyright rights to encompass them.[55]

Let me stop to remind you, again, of what I am not doing: I am not claiming that a copyright statute must include protection for readers' rights in order to pass constitutional muster (although others have made

scheid, *To Promote the Progress of Science and the Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 36-37 (1994).

47 *See*, *e.g.*, NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 54-80 (2008); 1 PATRY, *supra* note 27, §§ 1:20–1:115.

48 *See*, *e.g.*, ALAN LATMAN, HOWELL'S COPYRIGHT LAW 5 (rev. ed. 1962).

49 Act of July 8, 1870, ch. 230, § 90, 14 Stat. 395. *See* Boucicault v. Hart, 3 F. Cas. 983, 984-85 (1875) (No. 1692); Koppel v. Downing, 11 App. D.C. 93 (1897).

50 Act of April 29, 1802, 2 Stat. 171. *See* Mifflin v. Dutton, 190 U.S. 265 (1903); Thompson v. Hubbard, 131 U.S. 123 (1889).

51 Act of Aug. 10, 1846, 9 Stat. 106; *see* Merrell v. Tice, 104 U.S. 557 (1881).

52 *See* Copyright Act of March 4, 1909 ["1909 Act"], Pub. L. 60-349, 35 Stat. 1975 §§ 28, 31, 41; 1976 General Revision of Copyright Law ["1976 Act"], Pub. L. 94-553, 90 Stat. 2541 §§ 107, 109, 110, 117, 1008.

53 *See* 1909 Act § 1(e); 1976 Act §§ 114, 115, 118, 119.

54 *See* Copyright Law Revision, pt. 3: Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments on the Draft 137 (remarks of Barbara Ringer, Copyright Office) (1964); *id.* at 140 (Edward A. Sargoy, American Bar Ass'n); *id*. at 155 (Douglas Anello, National Ass'n of Broadcasters).

55 *See generally* Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1904-20 (2007).

that argument,[56] and it may indeed be true). Rather, I am for the moment seeking to make a more modest point: copyright law has always incorporated some solicitude for readers' interests, and it would be nonsense to argue that the concept of readers' rights is somehow alien to copyright.[57] That's all we need for my next step, which is to persuade you that it would be a stupid policy choice to enact a copyright statute that pays no attention to readers' interests.

III.

Why do we have copyright laws? Two explanations are common: under the first, we enact copyright laws to encourage creative people to engage in and disseminate creative work.[58] Under the second, we reward creative people for their creative works by giving them copyright protection.[59] Both accounts rest on assumptions about authors' motivations that have been questioned in recent scholarship.[60] For now, though, let's pretend that those assumptions are rooted in something real. How is it that either the incentive mechanism or the reward mechanism "promote[s] the Progress of Science"? Both mechanisms are said to encourage the creation and distribution of more or better works of authorship.[61] We don't always pay explicit attention to what happens to the works once they are

56 *See*, *e.g.*, Patterson, *Copyright and the "Exclusive Right" of Authors*, *supra* note 18; Rosenfeld, *supra* note 8; Hon. Stanley F. Birch, *Copyright Fair Use: A Constitutional Imperative: The 36th Annual Donald C. Brace Lecture*, 54 J. COPYRIGHT SOC'Y 139 (2007).

57 *But see* Johnstone, *supra* note 19, at 401 ("Copyright law was never meant to be about the user as a rights holder.").

58 *See*, *e.g.*, Tom Bell, A*uthors Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 237 (2003); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1, 6-8 (2008).

59 *See*, *e.g.*, Bell, *supra* note 58, at 239-40; Robert P. Merges, *Locke Remixed ;-)*, 40 U.C. DAVIS L. REV. 1259 (2007); WILLIAM S. STRONG, THE COPYRIGHT BOOK: A PRACTICAL GUIDE, at xi (3d ed. 1990) ("Copyright . . . springs from the belief that those who try to contribute to our always inadequate store of information and inspiration ought to be paid for their pains.").

60 *See*, *e.g.*, Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WISC. L. REV __ (forthcoming 2011); Eben Moglen, Anarchism Triumphant: Free Software and the Death of Copyright, 4 first monday #8 (Aug. 1999), *available at* http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/684/594; Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM & MARY L. REV. 513 (2009); Diane Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES IN LAW 29 (2011).

61 *See*, *e.g.*, PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 22-28 (1994).

made available to the public.[62] It's difficult to find a wealth of authority for the proposition that the ultimate goal of encouraging the creation and dissemination of all those works is that members of the public will read, hear, see and (sometimes) learn from the works, because we tend to take that part of the copyright ecosystem for granted.[63] Legal consideration of readers' rights abounds in discussions of censorship and education,[64] but is scarcer in copyright discourse.[65] But a moment's reflection should reveal that a copyright system with no readers, listeners or viewers to enjoy the copyrighted works that the system produces has no plausible mechanism for promoting the progress of anything. If authors create copyrighted works and deposit them in secure bank vaults, or send them off to a government storage facility for surplus creativity, the authors may find the process of creation enriching. In that scenario, though, nobody benefits from the existence of copyright protection. Readers cannot read, enjoy and learn, and creators can't earn copyright royalties from works that nobody has the occasion to read. Thus, readers, listeners and viewers are indispensable participants in a working copyright system.[66] Without them, the system is pointless.

That observation seems hardly controversial enough to be worth articulating, were it not for the resistance that the idea seems to generate. Supporters of strong copyright laws insist that copyright law's goal is to encourage the production of works; it should be up to copyright owners to decide whether and how to encourage distribution and access.[67] Pressed

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62 *But cf.* Mark Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. Chi. L. Rev. 129 (2004) (characterizing arguments for extending IP rights as "ex post" because they claim that further incentives are required to encourage IP owners to manage or control their IP).

63 *But see* Recording Indus. Ass'n v. Diamond Multimedia Sys, 180 F.3d 1072, 1079 (9th Cir. 1999) (describing the "main purpose" of the Audio Home Recording Act as "the facilitation of personal use").

64 *See*, *e.g.*, American Library Ass'n., Intellectual Freedom Manual 201-300 (8th ed. 2010); JoAnn Bass et. al, A Declaration of Readers' Rights: Renewing our Commitment to Students 58-94 (2008).

65 For particularly articulate discussions, see Julie Cohen, *A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 Conn. L. Rev. 981 (1996); Joseph P. Liu, *Owning Digital Copies, Copyright Law and the Incidents of Copy Ownership*, 42 Wm. & Mary L. Rev. 1245 (2001); Lunney, *supra* note 10; Patterson, *Free Speech*, *supra* note 4; Patterson, *Copyright and the "Exclusive Right" of Authors*, *supra* note 18; Patterson & Birch, *supra* note 4; Rebecca Tushnet, *Copy This Essay, How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 Yale L. J. 535, 562-82 (2004).

66 I explore this argument at greater length in Jessica Litman, *Real Copyright Reform*, 96 Iowa L. Rev. 1 (2010); Litman, *Creative Reading*, *supra* note 22; Litman, *Lawful Personal Use*, *supra* note 55.

67 *See*, *e.g.*, Kauffman, *supra* note 8, at 384.

as to why anyone would choose to design such a system, they respond, counterfactually, that copyright has from the beginning addressed itself to authors' rights and not users' rights.[68] Besides, they insist, as the holders of "property rights," copyright owners must be able to capture the value of their property by controlling its use.[69] That justification, though, rests on an idealized Blackstonian image of property rights that exist nowhere in the real world. The law imposes many limits, exceptions, and regulations on both real and personal property ownership, sale and licensing.[70] We're familiar enough with them to take most of them for granted, and they've become almost invisible. As many scholars have recognized, calling copyright "property" doesn't tell us very much about how the law should treat it.[71]

We treat copies and phonorecords of copyrighted books and music differently from the way we treat cases of bottled water. In both cases, the proprietor of the object has both mixed its labor with an extant resource, and made an investment in bringing the object to market (which may have generated jobs and other good things). The water purveyor has had to comply with state and federal obligations regarding sanitation, labeling, and permissible additives; the seller of books and music has not. If I spend my money on the water, I'm allowed to drink it or make soup with it. If the water seller were to instruct me that I may not cook with it and must serve it chilled, I might view it as a serving suggestion or a safety warning, but I would not conclude that I was obliged to comply with it. I may resell the water, with or without its bottle; consume it publicly or privately; share it with strangers or hoard it without opening it. If I store the water in my basement as a hedge against natural disaster, and the plastic water bottles were to survive for more than ninety-five years, my rights to the contents of the bottles wouldn't change. If, instead, I spend my money on a book, a CD, a Blu-ray disk, a painting, or a computer program, we allow the copy-

[68] *See*, *e.g.*, Koenigsberg, *supra* note 21, at 681-89; Johnstone, *supra* note 19, at 348, 350-58.

[69] *See*, *e.g.*, Joint Study on 17 U.S.C. Sections 109 and 117: Public Hearing 295, 300 (Nov. 29, 2000) (testimony of Cary Sherman, RIAA), *available at* http://www.copyright.gov/reports/studies/dmca/testimony/transcript.pdf; Andrew F. Spillane, *The Continuing Vitality of the Presumption of Irreparable Harm in Copyright Cases*, 15 MARQ. INT. PROP. L. REV. 257, 283-84 (2011).

[70] *See*, *e.g.*, Michael Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004); David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652 (2010).

[71] *See*, *e.g.*, Fagundes, *supra* note 70, at 682-701; Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization and Thomas Jefferson*, 79 SO. CAL. L. REV. 993, 1077-82 (2006); Neil W. Netanel and David Nimmer, *Is Copyright Property? – The Debate in Jewish Law*, 12 THEORETICAL INQ. L. 241, 242 (2011). R

right owner to impose restrictions on my uses of the work. The law unmakes those restrictions as soon as the copyright expires. A crucial reason for treating books differently from the way we treat bottles of water derives from the good and bad consequences we anticipate once they are distributed to consumers. If that's an important concern, it would be silly to design the system in a way that ignores it.

Arguments suggesting that copyright should pay attention to readers' rights only because the readers of today might become the authors of tomorrow miss an important point. Reading (and listening, and watching) is good in its own right.[72] Reading can be passive absorption — cramming for exams or watching some sitcoms are both more like that than not — but reading can also be a highly creative, imaginative activity.[73] We don't need post-modern literary theorists to persuade us that different readers imagine the characters in novels as very different people. Listening, too, can involve a great deal of imagination. Watching movies involves creative contribution on the viewers' parts.[74] That process, of bringing individual imagination and creativity to works of authorship made by others is important. Having a society full of individuals with creativity and imagination who exercise both regularly is good for our society in a host of different ways.

Most copyright experts would agree that encouraging that creativity and imagination has been, and should continue to be, one of copyright law's core goals. The benefits of creativity and imagination, though, need not, should not, and have not been limited to authors. It doesn't matter whether people read books and take from them something that will inspire them to grow up and win a Nobel or Pulitzer prize. At the same time, it doesn't promote the progress of science and the useful arts if the system merely results in the creation and duplication of loads of books, CDs, movies and computer programs that are then stored in some landfill for ninety-five years. A copyright system only makes sense if it facilitates communication of the works to audiences who experience and enjoy them.

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[72] Because reading is itself so important, we subsidize activities likely to encourage more of it. Nor is copyright the only subsidy. State and federal governments spend billions of dollars annually on education.

[73] *See*, *e.g.*, Litman, *Creative Reading*, *supra* note 22, at 178-80.

[74] If you've seen the film *Inception* and sampled just a small fraction of the debate about what the final shot signifies, you've seen this in action. If not, check out the "Inception Ending" blog, which claims to aggregate theories about the ending of the movie, http://www.inceptionending.com (last visited Feb. 7, 2011).

IV.

Modern copyright law seems less like a law designed to encourage reading and more like a law crafted by rent-seeking. We no longer require publication; copyrights no longer expire within a reasonable period of time; copyright's exclusive rights are no longer so bounded.[75] We still require copyright owners to deposit two copies of published works with the Library of Congress,[76] but copyright lawyers argue that the deposit requirement is really unrelated to copyright — it's simply a tax on authors to subsidize the maintenance of a national library, and shouldn't be part of the copyright law at all.[77] Copyright lawyers who represent authors or publishers insist that their clients are the primary and only direct beneficiaries of copyright, and that readers, listeners and other users have no copyright rights.[78] In the context of recent debates over copyright's expansion, it's understandable that we've forgotten the ways in which copyright law attends to readers' interests. But, in fact, U.S. copyright law still has important provisions designed to protect the freedom to read, listen and watch. We just have come to talk about them as "exceptions" rather than rights.[79]

Copyright gives no exclusive rights to control private performance or display.[80] What you do with a book, movie, or sound recording in your living room is not copyright infringement, even if your copy is pirated. Private performance and display is simply off limits. (That isn't because copyright owners didn't ask for private performance and display rights — they did. But nobody took those demands seriously, I think, because at some level everyone understood that the freedom to read and enjoy material without the copyright police looking over your shoulder is an interest that copyright law has respected and should protect.[81]) Moreover, copyright gives no right to control the resale, loan or public display of lawfully made copies by the owner of the copies.[82] (And again, it isn't that some

[75] *See* 17 U.S.C. §§ 102(a), 106, 302, 304 (2006).

[76] *Id.* § 407.

[77] *See*, *e.g.*, Shira Perlmutter, *Freeing Copyright from Formalities*, 13 CARDOZO ARTS & ENT. L.J. 565 (1995); *Copyright Reform Act of 1993: Hearings on H.R. 897 Before the Subcomm. on Intellectual Property of the House Judiciary Comm.*, 103d Cong. 117, 118 (1993) (testimony of Steven Metalitz, Information Industry Ass'n.).

[78] *See* Kauffman, *supra* note 8; sources cited *supra* notes 19, 21.

[79] *See*, *e.g.*, Ginsburg, *Authors and Users in Copyright*, *supra* note 22, at 2. **R**

[80] 17 U.S.C. § 106(4), (5) (2006).

[81] *See*, *e.g.*, Copyright Law Revision, pt. 3, *supra* note 54, at 136-37, 240 (remarks of Barbara Ringer, Copyright Office).

[82] 17 U.S.C. § 109 (2006).

copyright owners didn't request those rights.[83]) Thus the current statute has a significant and longstanding zone of personal liberty within which individuals may enjoy copyrighted works without copyright owners' interference.[84]

In addition, the statute has a number of express privileges designed to encourage reading, listening, viewing and enjoyment of copyrighted works. Some of those are carve-outs lobbied for by specific businesses; some of them are Congress's efforts to repudiate overreaching copyright claims as narrowly as possible; others are broader exceptions surviving from an earlier era when copyright laws were simpler and less encompassing. An example of a carve-out is the provisions allowing bars and restaurants to play copyrighted music over radio or television receivers.[85] An example of the narrow repudiation is the provision in section 117 allowing computer repair businesses to turn on consumers' computers if necessary to make repairs,[86] or the provision in section 110(11) allowing families to use censorware in conjunction with viewing DVDs in their living rooms.[87] An example of the surviving old-style limit is the school assembly provision in section 110(4) allowing noncommercial performances of music or literary works.[88] Those of you who eat, drink and breathe copyright law will have noticed the regulations last summer exempting six classes of works from the anti-circumvention provisions of the DMCA.[89] The Register's analysis of those exceptions revealed an investment in the notion that people who have paid for access to a work should be entitled, under the copyright law, to some freedom to enjoy it the way they want to, even if it isn't the way the copyright owner wants them to enjoy it.[90]

Finally, of course, there's fair use.[91] Copyright lawyers disagree vehemently over the proper scope of fair use.[92] Professor Glynn Lunney argues

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83 *See*, *e.g.*, Copyright Law Revision, pt. 3, *supra* note 54, at 110 (remarks of Abe Goldman, Copyright Office).

84 *See* Liu, *Owning Digital Copies*, *supra* note 65, at 1280-309.

85 *See* 17 U.S.C. § 110(5)(B) (2006).

86 *Id.* § 117(c).

87 *Id.* § 10(11).

88 *Id.* § 10(4).

89 *See* Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 75 Fed. Reg. 43825 (July 27, 2010), *available at* http://edocket.access.gpo.gov/2010/pdf/2010-18339.pdf.

90 *See* Memorandum from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Congress, Recommendation of the Register of Copyrights in RM-2008-8 (June 11, 2010), *available at* http://www.copyright.gov/1201/2010/initialed-registers-recommendation-june-11-2010.pdf.

91 *See* 17 U.S.C. § 107 (2006).

92 *Compare*, *e.g.*, Johnstone *supra* note 19, at 350 ("there are no 'fair use rights' and . . . there should not be any, inasmuch as such a scheme would be wholly inconsistent with U.S. copyright policy.") *with*, *e.g.*, PATTERSON &

that fair use should be broad enough to encompass most personal copying.[93] Copyright lawyer Fred Koenigsberg tells us that "there is no fair use right": the privilege to make a fair use must be a narrow exception, not the rule.[94] Judge Stanley Birch insists that fair use permits all personal and educational uses.[95] Professor Paul Goldstein claims that any fair use privilege but a stingy one would violate our obligations under the Berne Convention.[96] Professor Christina Bohannon writes that fair use should excuse all uses that cause the copyright owner no harm.[97] Professor Tim Wu cautions, "thanks to the inherent vagueness in the concept of fair use, and with the costs of litigation, the contours of fair use for casual infringement have not been — and may never be — well mapped out."[98] For our purposes, we need only agree that fair use will excuse some uses beyond the ones the statute otherwise expressly allows, including some uses by readers, listeners and viewers that might be characterized as "consumptive" rather than transformative.[99]

I began by claiming that copyright had taken reader's interests seriously from the very beginning of its history. I then suggested that solicitude for readers made ample copyright policy sense. I finally explored some of the ways that current copyright law preserves a zone of copyright liberty for readers, listeners and viewers to enjoy copyrighted works with relatively few legal constraints. I have not yet said anything that even the most ardent supporter of broad copyright protection should find objectionable. I'll begin to do that in the next section.

BIRCH, *supra* note 4, at 335 ("personal fair use promotes the ultimate goal of copyright law as manifested in the learning policy of the Copyright Clause: a society of informed citizens capable of self- government") and Hughes, *supra* note 71, at 1081 ("[S]ection 107 fair use draws a border on the property rights granted under section 106. Everything on the fair use side is not just fair use, it is *outside* the *property right*").

93 *See* Lunney, *supra* note 10, at 979, 983-85.

94 *See* Koenigsberg, *supra* note 21, at 679-80. *See also* Preston Padden, email to Cyberprof mailing list (Jan. 28, 2011, 4:36 p.m.), *available at* https://mailman.stanford.edu/mailman/private/cyberprof/2011-January/004038.html ("Fair Use is a very specific statutory defense to a charge of infringement. It is not a 'right.' In no legal sense does it 'act as a right.' It is a defense, period.")

95 *See* Birch, *supra* note 56.

96 *See* Paul Goldstein, *Fair Use in Contex*t, 31 COLUM. J. L. & ARTS 433, 442 (2008).

97 *See* Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007).

98 *See* Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 620 (2008).

99 An example that I've explored elsewhere is the act of backing up the contents of one's hard disk. *See* Litman, *Lawful Personal Use*, *supra* note 55, at 1897-903.

V.

Contemporary commentary on the readers' interest in copyright law for the most part seems to view readers' rights as rhetorical code for copyright reduction, supported only by copyright's enemies. Self-styled friends of copyright accuse those of us who speak of readers' rights as waging war on creativity.[100]

Writers who resist the idea of readers' rights in copyright are passionate in their opposition, but often have difficulty articulating why. Ask them what's wrong with thinking of fair use as a right for readers, listeners and viewers, and they may point you to the work of Wesley Newcomb Hohfeld, a nineteenth and early twentieth century American legal scholar who developed an influential taxonomy of rights and privileges.[101] Hohfeld suggested that the term "right" should be used only to describe claims that others had a duty to honor. If one were merely free to do as one pleased without interference, that interest should be called a privilege or liberty.[102] Supporters of strong copyright have argued that, since copyright holders have no duty to facilitate readers', listeners' or viewers' uses of their works, members of the public have no "rights" under copyright law.[103] I'm not ready to concede that copyright owners never have a duty to facilitate use of their works. I'm also not persuaded that Hohfeld is entitled to the last word: the copyright statute itself refers to "the right of fair use,"[104] and courts frequently describe fair use as a "right."[105] Nonetheless, in the spirit of baby steps, I'm happy to stop using the word "rights" to describe readers' interests in access to works and the freedom to enjoy them. Since the interests I'm referring to are liberty interests

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[100] *See*, *e.g.*, HELPRIN, *supra* note 20, at 33-39; Koenigsberg, *supra* note 21, at 679-81.

[101] *See*, *e.g.*, Johnstone, *supra* note 19; Padden, *supra* note 23.

[102] *See generally* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

[103] *See*, *e.g.*, Johnstone, *supra* note 19.

[104] 17 U.S.C. § 108(f)(4) (2006). I'm grateful to Lolly Gasaway for bringing this to my attention.

[105] *See*, *e.g.*, Latimer v. Roaring Toyz, 601 F.3d 1224, 1240 (11th Cir. 2010) ("First Amendment right to fair use of copyrighted material"); Bowers v. Baystate Tech., 320 F.3d 1317, 1338 (Fed. Cir. 2003) ("right to fair use"); Cable News Network v. Video Monitoring Servs., 940 F.2d 1471, 1485 (11th Cir. 1991) ("rights of fair use"); Warren Publ'g v. Spurlock, 95 USPQ 2d 1685 (E.D. Pa 2010) ("fair use rights"); Blackwell Publ'g v. Excel, 661 F. Supp. 2d 786, 790 (E.D. Mich. 2009) ("fair use rights"); United States v. Elcom, Ltd., 203 F. Supp. 2d 1111, 1119 (N.D. Cal. 2002) ("users' rights of fair use").

rather than property interests, I will refer to them as "copyright liberties."[106]

Some commentators view the interest in what I am terming "copyright liberties" as a newfangled product of post-modern literary criticism and consumers' giddy intoxication with new digital toys.[107] They urge caution in undermining longstanding copyright law norms in response to what may be a flash in the pan. As the discussion in part II detailed, however, solicitude for readers' interests is as old as copyright itself.

Paradoxically, another assault on the idea of copyright liberties claims that concern for readers is an artifact of outmoded quid-pro-quo thinking that characterized nineteenth century copyright cases. Congress (and the courts) may have at one time believed that it was necessary to protect the public interest from encroachment by copyright owners, but the United States grew out of such childish fancies, and repudiated our old ideas when we joined the Berne Convention in 1988 and revised our law to fit Berne's requirements.[108] Congress's choice to buttress copyright owner rights with the Digital Millennium Copyright Act and the Supreme Court's decision in *Eldred v. Ashcroft*, they suggest, epitomize this evolved understanding. Strong copyright protection, they say, is an engine of innovation and economic prosperity;[109] Congress has therefore wisely decided to leave choices of dissemination and enforcement in copyright owners' hands.

Congress is a multi-headed Hydra, which makes curious choices for complex reasons, but there's no basis to infer that recent enactments demonstrate Congress's new, modern copyright attitude, in which individual readers', listeners', and viewers' copyright interests would no longer require explicit protection. Congress continues to take the rights of individual readers, listeners and viewers very seriously. Four years after acceding to the Berne Convention, Congress passed the Audio Home Recording Act,[110] which enacted an exemption that Congress believed

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[106] I have used this locution before. *See* Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 597 (2008); Litman, *Real Copyright Reform*, *supra* note 66, at 38; Litman, *Lawful Personal Use*, *supra* note 55, at 1879.

[107] *See* Ginsburg, *Authors and Users in Copyright*, *supra* note 22, at 6-9; Justin Hughes, *Recoding Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923, 924-28 (199); Merges, *supra* note 58, at 101-04. **R** **R**

[108] *See*, *e.g.*, Shira Perlmutter, *Symposium:* Eldred v. Ashcroft*: Intellectual Property, Congressional Power, and the Constitution: Participation in the International Copyright System as a Means to Promote the Progress of Science and Useful Arts*, 36 LOY. L.A. L. REV. 323, 326-31 (2002).

[109] *See* Global Intellectual Property Center, IP Myths v. Facts, http://www.theglobalipcenter.com/pages/ip-myths-v-facts (last visited Mar. 25, 2011).

[110] Audio Home Recording Act of 1992, Pub. L. 102-563, 106 Stat. 4237, *codified at* 17 U.S.C. §§ 1001–1010 (2006).

would privilege "all noncommercial copying by consumers of digital and analog musical recordings."[111] In the run-up to the enactment of the Digital Millennium Copyright Act, members of Congress sought and received repeated assurances that the bill's provisions would not burden individuals' private reading activities, or their use of libraries, and would not reduce the availability of fair use.[112] In 2005, Congress added a new copyright exemption to ensure that families could use technology to censor the playback of commercial DVDs,[113] despite testimony from the Copyright Office that the amendment was both unnecessary and inadvisable.[114] Thus, any assertion that Congress no longer cares about individual copyright liberties strikes me as wishful thinking.

Other opponents of readers' or users' rights express concern that recognizing rights for users would unfairly limit rights for authors. As Jane Ginsburg writes, "the perspective of user rights, albeit important, should remain secondary. Without authors, there are no works to use."[115] These commentators appear concerned that there is simply not enough copyright pie to go around.[116] Authors and owners are more deserving eaters than users, who don't add much value.[117] Besides, users are so numerous that if one were to feed each of them even a little pie, there wouldn't be any left.

I can appreciate the fears driving that sort of objection, although I don't see much basis for them in the real world. According to reports issued by the major commercial copyright industries, commerce in copyrighted works continues apace, generating more jobs, bigger profits and a

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111 H.R. REP. NO. 102-873 24 (1992); *see also* S. REP. NO. 102-294 30 (1991) ("The purpose of S. 1623 is to ensure the right of consumers to make analog or digital audio recordings of copyrighted music for their private, noncommercial use.").

112 *See*, *e.g.*, *WIPO Copyright Treaties Implementation Act: Hearings Before the Subcomm. on Telecomm., Trade & Consumer Protection of the House Comm. on Commerce*, 105th Cong. 76, 80, 102-04 (1998).

113 Family Entertainment and Copyright Act of 2005, Pub. L. 109-9, 119 Stat. 218, *codified at* 17 U.S.C. 110(11) (2006).

114 *See Family Movie Act of 2004: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Judiciary Comm.*, 108th Cong. 6-14 (2004).

115 Ginsburg, *Putting Cars on the "Information Superhighway"*, *supra* note 10 at 1468. In a more recent article, Professor Ginsburg canvasses what she sees as the plausible arguments supporting user rights, and finds them unpersuasive. Ginsburg, *Authors and Users in Copyright*, *supra* note 22, at 3-5. **R**

116 *See* I. Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 226-28. *See also* Julie E. Cohen, Lochner *in Cyberspace*, 97 MICH. L. REV. 462, 504-11 (1998) (criticizing Hardy's application of the pie metaphor).

117 *See* Ginsburg, *Authors and Users in Copyright*, *supra* note 22, at 3-4; Merges, *supra* note 59, at 111-14. **R**

more impressive trade surplus every year.[118] Moreover, the idea that readers, listeners and users don't add significant value to copyrighted works is difficult to support. Our habit of treating copyright as an entitlement of a priestly class of authors and owners managed by an even more select group of copyright-knowing lawyers has taught us to disregard the considerable contributions to the copyright ecosystem made by readers, listeners and viewers, but that doesn't make their contributions less real.[119]

Finally, some opponents of explicit copyright protections for readers acknowledge the usefulness of significant reader freedom, but argue that it makes sense nonetheless to locate the power to grant or deny that freedom in copyright owners' hands.[120] If the freedom is important, copyright owners will choose to offer it; if it later becomes inconvenient, they will have the power to take it away. This argument, though, undervalues the importance of copyright liberties for the system. Copyright owners may not always be wise in the uses they choose to permit or prohibit; their immediate goals may or may not align with society's overarching goals for having a copyright system in the first place. Readers deserve guarantees that their liberties will not be subject to copyright owner whims.

VI.

So far, I have argued that readers, listeners and viewers have always been crucial beneficiaries of the copyright scheme. I have claimed that the copyright law has, through its history, included provisions designed to assure that audiences for copyrighted works have both opportunities to read, hear and see them and the liberty to enjoy them as they choose to. Without those provisions, copyright law might have frustrated its own core objectives. I have, finally, suggested that the arguments raised in opposition to readers', listeners', and viewers' copyright liberties don't make much sense, even on their own terms. From there, it is only one small baby step to assert that when we assess how well the copyright system is working, we need to pay attention to whether the opportunities and liber-

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118 *See*, *e.g.*, Stephen E. Siwek, Engines of Growth: Economic Contributions of the U.S. Intellectual Property Industries (2005) (prepared for NBC-Universal), *available at* http://web.archive.org/web/20060411213849/http://www.nbcuni.com/About_NBC_Universal/Intellectual_Property/pdf/Engines_of_Growth.pdf; Stephen E. Siwek, Copyright Industries in the U.S. Economy: The 2003–2007 Report (2009) (prepared for the International Intellectual Property Alliance), *available at* http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf.

119 *See*, *e.g.*, Litman, *Creative Reading*, *supra* note 22, at 176-77; Rebecca Tushnet, *Hybrid Vigor: Mashups, Cyborgs, and Other Necessary Monsters*, 6 I/S: J. L. & Policy 1, 3-12 (2010). **R**

120 *See*, *e.g.*, Ginsburg, *Authors and Users in Copyright*, *supra* note 22, at 17-20; Merges, *supra* note 59, at 114-15. **R**

ties secured to readers, listeners and viewers still suffice, or whether they might need to be augmented or expanded. Many of you, especially those of you who mistrusted my project from the outset, of course, suspected that I would get here eventually. It's just one more baby step to conclude that we should confirm, enhance, and modestly expand copyright liberties.

At least one purpose of copyright is to encourage reading, listening, and viewing. Readers, listeners and viewers have, and should have, liberties under the copyright statute. Whether we are interpreting the current copyright law, or evaluating how well it works with a view toward improving it, we need to focus on readers as well as authors and owners. In thinking about the appropriate scope of an exclusive copyright right, thus, we need to pay attention not only to the incentives it supplies to authors, and the prospects for commercial exploitation that it secures for owners, but also to the opportunities it gives to readers, listeners and viewers to enjoy copyrighted works creatively and in the ways they choose to. Those opportunities should include sufficient freedom to read, hear, see, experience, and share works of authorship in ways other than the ways that copyright owners might prefer.

Most copyright owners are not currently insisting on exercising close control over their users' experiences.[121] They apparently appreciate that freedom to enjoy the works they produce is valuable for their customers.[122] At the same time, though, copyright owners are loathe to concede that customers might be entitled to enjoy copyrighted works in unlicensed ways; rather, they are hoarding what they insist are their rights under the copyright law for a rainy day.[123] That fact gives us an opportunity to reclaim copyright liberties for readers, listeners and viewers without significantly undermining any real world business models that copyright owners have yet come to depend on. We thus have a window, possibly only a

[121] *But see* Aaron K. Perzanowski, *Rethinking Anti-Circumvention's Interoperability Policy*, 42 U.C. Davis L. Rev. 1549, 1569-74, 1585-89 (2009) (describing litigation by owners of the copyrights in video and computer games for violations of the anti-circumvention provisions of § 1201).

[122] *See* Ginsburg, *Authors and Users in Copyright*, *supra* note 22, at 19-20. **R**

[123] *See*, *e.g.*, U.S. Copyright Office, DMCA § 104 Report 50-66 (2001) (summarizing comments on proposals for clarifying or expanding privileges to make temporary or archival copies); United States Copyright Office Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket # RM 2005-11, Joint Reply Comments of Association of American Publishers et. al., 21-23 & n.46, 31-33 (Feb. 2, 2006), *available at* http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf; *Family Movie Act of 2004: Hearing on H.R. 4586 Before the Subcomm. on Courts of the House Comm. on the Judiciary*, 108th Cong. 67-70 (2004) (testimony of Jack Valenti for the Motion Picture Association of America, that Family Movie Act would undermine the "fundamental right" to make derivative works).

small one, when we can restore readers' liberties cheaply. That makes it important to think very seriously about the contours that copyright liberties should have.

If we want to encourage opportunities to read, hear, see and enjoy works individually and creatively, we need to maintain a zone of freedom insulated from copyright owner control. That zone need not be boundless, but it needs to be large enough to be meaningful.

In exploring the appropriate scope of copyright liberties, I want to resist the tendency in some of the literature to divide and conquer readers, listeners and viewers by insisting that the interests of creative remixers are distinct from those of passive consumers, and that one or the other of those groups has superior claims to copyright's solicitude.[124] I want to insist, instead, that copyright's purpose is (and should be) to encourage reading, listening, and viewing of both varieties. As digital tools enable audience members to interact with works of authorship in different and interesting ways, any sharp distinction between passive consumption and creative remixing dissolves into a spectrum of different ways of enjoying works.[125] When we think about the sorts of freedom that copyright law should secure to audience interests, we need to pay attention to leaving room for both the experience and the expression of individual reader, listener and viewer creativity.

We should, for example, ensure individuals' liberty to choose how to read, see, and hear works to which they've gained lawful access. We do that now by protecting their liberty to perform and display copyrighted works privately, whether or not the copyright owner could make money from licensing the performance or display.[126] I'd argue that we should go further. If copyright is intended, in part, to protect audience interests in enjoying works of authorship, then I think we need to define the scope of

[124] *See*, *e.g.*, Ginsburg, *Authors and Users in Copyright*, *supra* note 22 at 5 (arguing that consumptive users have weaker claims to privilege than creative reusers); Hughes, *supra* note 71 (arguing that passive listeners' interests in the stability of texts should outweigh the interests of creative recoders). R

[125] *See* Rebecca Tushnet. *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135 (2007); Rebecca Tushnet, *I Put You There: User-Generated Content and Anticircumvention*, 12 VAND. J. ENT. & TECH. L. 889 (2010).

[126] The Second Circuit seems to have appreciated this in its ruling in *Cartoon Network v. CSC Holdings*, 536 F.3d 121 (2d Cir. 2009), where it held that cable subscriber's use of a digital video recording system that caused a copy to be recorded remotely on servers operated by the cable system and played back via cable transmission from those servers resulted in copies made and privately performed by individual subscribers rather than made and publicly performed by the cable system.

copyright liberties to enjoy copyright works with some attention to what range of audience behavior copyright should encourage.

Some expansion in reader, listener and viewer behavior that is formally recognized as non-infringing will be relatively uncontroversial: most people, for example, support a freedom to engage in format shifting — copying a copy to a new format to facilitate reading, listening or watching if one is already entitled to read, listen or look at a copy in some other format.[127] Yes, a copyright owner could sell each format separately for additional money, and yes, copyright owners often argue that the law entitles them to do just that. Yet, mostly, they don't, because they recognize that public resistence to the idea is fierce. Thus, the lawyer for the record labels in the *MGM v. Grokster* case told his clients that if they wanted to win the case, they had to authorize him to tell the Supreme Court that it is not copyright infringement to rip a CD you own and copy the resulting file to an iPod.[128]

Archival or back-up copying is another sort of reproduction that seems uncontroversially permissible. Companies have launched businesses allowing their customers to make backup copies in the cloud,[129] notwithstanding the fact that much of what is being backed up comes within no express statutory privilege. Those companies are not afraid of lawsuits, because they perceive the general social consensus that making a spare copy of works — especially those in delicate formats — should not be copyright infringement. Copyright owner groups resist that understanding because they've imbued the word "copy" with talismanic significance. People shouldn't be able to make backup copies of anything because copyright right *means* the exclusive right to control the making of any and all copies. But that's silly. Even sillier is the insistence that that principle extends to ephemeral copies in the random access memory of a

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127 *See*, *e.g.*, Randy Cohen, *The Ethicist: E-Book Dodge*, N.Y. TIMES MAG., Apr. 4, 2010, at 15 ("Buying a book or a piece of music should be regarded as a license to enjoy it on any platform"); Ginsburg, *Authors and Users in Copyright*, *supra* note 22, at 12 ("There is an additional rationale for private copying, partially implicit in the *Sony* justification of fair use time-shifting. Where one has lawful access to the work, there may be an implied right to enjoy the work in a manner convenient to the consumer."); *cf.* Liu, *Owning Digital Copies*, *supra* note 65, at 1340-52 (proposing "unlimited right to access digital copies in one's possession"). R

128 Metro-Goldwyn-Mayer Studios v. Grokster, Ltd., 545 U.S. 913 (2005), No. 04-480, Oral Argument at 12 (Mar. 29, 2005).

129 *See*, *e.g.*, Apple, MobileMe – Access and Share Files from Anywhere, http://www.apple.com/mobileme/features/idisk.html (last visited Feb. 9, 2011); Barracuda Backup Service – Integrated Local and Offsite Backup, http://www.barracudanetworks.com/ns/products/backup_overview.php (last visited Feb. 9, 2011); Zmanda Cloud Backup, http://www.zmanda.com/cloud-backup.html (last visited Feb. 9, 2011).

computer or digital device. The idea that if you buy a Kindle book rather than a hardcopy book, the publisher should be able to give or withhold permission for every glance because each screenful of text is a new and potentially actionable copy is simply insupportable.[130] No law designed to encourage reading should do that.

Revising a work for one's own personal use is another freedom, akin to format shifting, that ought not to be deemed to encroach on the copyright owner's right to prepare derivative works. In this category, I would place the use of censorware to avoid seeing the sexually explicit or violent parts of movies on DVDs that the viewer rents or owns; or the modification of a videogame to speed it up or slow it down; or the adaptation of a computer program to make it do a better job of doing what one bought it to do. The statute and current court decisions already allow those activities in some narrow circumstances,[131] so it isn't much of a leap to decide they ought to be deemed to be okay as a general matter.

So far, I've been talking about uses that are primarily personal or private. But, I think readers' liberties need to extend to uses that are public. Sharing is important. Here, though, we need to pay attention to the fact that allowing people to make free copies and share them with other people threatens what lawyers call the "investment-backed expectations" of distributors. That doesn't mean that sharing is or should be illegal in every case, but it does mean that we need to exercise some care in defining the scope of permissible sharing. But it is untenable to argue that *no* sharing is or should be permitted without the copyright owner's permission, and nobody who makes that argument expects people to swallow it whole.

Everyone agrees that fair use should secure the freedom to criticize, comment on, talk about or respond to works of authorship, but people disagree, violently, about how broad that freedom should be. It's important that any test we use to divide the permissible comment from the infringing comment take into account the value of encouraging readers, listeners and viewers to respond to works as well as the value, if any, of allowing copyright owners to control downstream conversations about the works they own.

We are on the verge of reaching a social consensus that mashing-up is an important copyright liberty that copyright owners should not want to prevent, so long as the mashups are noncommercial. For much the same reasons, the law should regard sharing mashups non-commercially as within the sphere of permissible enjoyment. We have always encouraged

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130 *See* Liu, *Owning Digital Copies*, *supra* note 65, at 1337-65.

131 *See* 17 U.S.C. §§ 110(11), 117(a) (2006); Lewis Galoob Toys v. Nintendo of Am., 964 F.2d 965 (1992).

readers, listeners and viewers to talk with each other about works of authorship. Today, that conversation is as often as not over digital networks and as often as not includes extracts from the works. If we pay attention to copyright's goal of encouraging enjoyment of copyrighted works, then permitting those conversations seems like an easy policy call.[132]

Most importantly, I'd argue that we need to reform the discourse. Talking about readers' rights shouldn't be the province only of teenagers, communists and librarians. We need, I think, to reclaim the notion that one of the core goals of a healthy copyright system is to encourage reading, listening and viewing.

VII

This last section is more speculative. Like many copyright scholars, I've been struck by the deterioration in popular support for copyright law over the past twenty years.[133] I also find it notable that, when I try to find some scholarly defenders of ever-stronger copyright to disagree with, there seem to be fewer and fewer of them around. At least one copyright lawyer has complained of "a host of legal academic ideologues who viewed the current state of protection as a constitutional abomination."[134] That lawyer blames legal scholars and "well-funded business entities" that are egging them on for the problem.[135] There are, of course, other possibilities. Here's one: It may be that the fading appreciation of readers' interests has itself undermined copyright's legitimacy. When readers and other members of the audience are pushed out of the picture frame, copyright no longer seems to have a persuasive mechanism by which it can "promote the Progress of Science." It's hard to convince the public that copyright merits their buy-in unless it apparently and actually protects audience interests as well as the rights of authors and owners. Thus, reclaiming copyright law for readers, listeners, and viewers may offer a particularly promising opportunity for rebuilding public faith in the copyright system and interesting a new generation of academics in the work of its defense.

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132 *See* Tushnet, *I Put You There*, *supra* note 125.

133 *See*, *e.g.*, Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 63–67 (2002); Marybeth Peters, *Copyright Enters the Public Domain*, 51 J. COPYRIGHT SOC'Y 701 (2005).

134 Henry Horbaczewski, *Copyright Under Siege: Reflections of an In House Counsel*, 53 J. COPYIGHT SOC'Y 387, 392 (2006).

135 *Id.* at 394-99.