Private Rights, Public Uses, and the Future of the Copyright Clause

Richard B. Graves III
Northern Kentucky Chase College of Law, gravesr1@nku.edu

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol80/iss1/4
I. INTRODUCTION

The Intellectual Property Clause of the U.S. Constitution grants Congress the power “[t]o promote the Progress of Science and the Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹ Pursuant to this power, Congress has enacted a system of copyright protec-
tion designed to motivate authors to produce new works. In keeping with the essential purpose of the Copyright Clause, that system has, for more than two centuries, maintained a balance between the incentives of authors to produce works, and the interests of the public in having the greatest possible access to those works.

Recently, however, Congress has enacted two laws that shift the balance of the copyright system decisively in favor of rightsholders. The first was partly motivated by recent advances in technology that allow any visual or auditory copyrighted work to be copied and retransmitted over the Internet without significant cost or noticeable loss of fidelity. Congress's answer to the new ease of copying afforded by this technology has been to provide for civil and criminal penalties against persons who circumvent technological barriers erected by rightsholders against the copying of digital works. In the increasingly digitized world of the near future, this will have the effect of outlawing many previously legal public uses of copyrighted materials.

The second law extended the term of copyright from the life of the author plus fifty years to life plus seventy. This will have the effect of keeping currently protected works out of the public domain for at least another twenty years. This increase will have no meaningful effect upon authors' incentives to produce new works. Moreover, coupled with the other increases in the copyright term over the past century, this new extension raises the possibility that the term of copyright will continue to increase perpetually, thus preventing free public enjoyment of any work produced after the 1920s.

In sum, Congress's most recent copyright legislation is inconsistent with the Copyright Clause, in that it expands the scope of authors' "exclusive Right" beyond its proper bounds, and expands the duration of that right beyond any reasonable interpretation of the term "for

---

2. The term "authors" is used throughout this Article in its constitutional sense.
3. See infra Part III.
4. This term is used to refer to the portions of the Intellectual Property Clause that are specific to copyright.
5. See infra Part IV.
6. This term refers to authors, their licensees, and their assignees.
7. See generally Sharon Appel, Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers, 6 UCLA Ent. L. Rev. 149 (1999).
10. See infra Part VI.
11. See id.
12. See id.
13. See id.
14. See infra Part VII.C.
limited Times.” Admittedly, it is possible that other provisions of the Constitution, such as the Commerce Clause or the treaty power, might expand the scope of the Copyright Clause in this respect. Moreover, non-constitutional bodies of law may have a significant impact on these issues.

Nonetheless, any attempt to justify the judicial invalidation of Acts of Congress affecting copyright must begin with an examination of those acts in the context of the Copyright Clause. This Article undertakes such a beginning, and is therefore restricted to that context.

II. THE PURPOSE AND NATURE OF THE COPYRIGHT CLAUSE

The Copyright Clause owes its origin to two strong beliefs among the Framers of the Constitution. The first was that uniform, nationwide copyright protection was essential for the generation and dissemination of new works. In the words of James Madison: “The utility of this power will scarcely be questioned . . . . The States cannot separately make effectual provision for either [copyrights or patents], and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.”

The second belief was that, in light of the unhappy experience of the British with Crown monopolies, it was essential to limit the power of the federal government to impose costs on society as a whole


16. See Trade-Mark Cases, 100 U.S. 82, 99 (1879) (“In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect.”).


to benefit a favored few. Accordingly, the framers modeled the Copyright Clause on the Statute of Anne, a British law that provided for a term of copyright protection while largely supplanting the earlier system of Crown favoritism and censorship.

The framers' belief that copyright protection was necessary for the dissemination of new works was solidly grounded in economic theory that is at least as valid today as it was when the Copyright Clause was written. Producing a new work of authorship involves considerable expenditure of money, time, and effort. Likewise, publishing and disseminating such a work can be costly. Unlike an author, however, a copyist need incur only the costs of publication and dissemination.

Thus, absent copyrighted protection, copyists could always either deprive authors of their markets by selling substantially the same product at a lower price, or by selling at the same price while enjoying a higher profit margin. In either event, copyists could benefit more from authors' initial labor than would authors themselves. In sum, without copyright protection, authors would have far less incentive to produce new works.

Accordingly, the economic effect of copyright protection is to reserve to authors the monetary value of their works by making sales of infringing works more difficult and less profitable. This protection ensures that those who produce copyrightable works are far better able to support themselves by doing so. In effect, copyright protection permits one of the most important components of any free market system: specialization. Absent such protection, fewer authors who were not independently wealthy could afford to devote the time and energy to becoming adept at writing, art, music, or other activities whose fruits are protectable by copyright.

The temporary nature of copyright protection provided for by the Copyright Clause encourages the widespread dissemination of works of authorship. When a work's copyright protection eventually lapses,

22. An Act for the Encouragement of Learning, 1710, 8 Ann., ch. 19 (Eng.).
25. See id.
26. See id.
30. See id. at 328-30.
its sale price necessarily tends to fall toward the marginal cost of producing a copy of that work.\textsuperscript{31} This decreased cost tends to increase demand, thus ensuring that the work will enjoy the widest possible range of distribution.\textsuperscript{32}

III. TWO CENTURIES OF RIGHTSHOLDERS' ADVANCES

The past two centuries have seen a vast increase in both the scope and duration of copyright protection, coupled with a similarly vast increase in the wealth and political influence of the copyright industries. The first U.S. copyright statute applied only to books, maps, and charts, reserving to authors the rights to such works for a fourteen-year term, coupled with a renewal term of the same duration.\textsuperscript{33} By the end of the second century of copyright protection, the scope of protection had expanded to encompass all original works of expression fixed in tangible media, and the period of exclusivity enjoyed by authors had reached the term of life plus fifty years.\textsuperscript{34}

Meanwhile, the value of copyrighted works had increased to the point where copyright-protected industries were poised to become predominant in the American economy.\textsuperscript{35} With this new wealth, the copyright industries have also come to enjoy very substantial political influence, so much so that it is only a small exaggeration to claim that "the debate over intellectual property rights has become an economic battle by the producers of computer software and entertainment media waged to determine who will govern the world economy in the first half of the next century."\textsuperscript{36}

Any industries that enjoy both a government-enforced monopoly and considerable political power are naturally tempted to use them to their own benefit, and the copyright industries are no exception: "The legislative process is skewed to disproportionately and consistently privilege powerful, well-organized owner interests at the expense of the interests of the public in use and reuse of copyrighted informational and imaginative works."\textsuperscript{37}

In the waning years of the twentieth century, the legislative advantages enjoyed by the copyright industries have reached a new peak. As the following sections will show, new legislation has resulted

\textsuperscript{31} See id. at 328.
\textsuperscript{32} See id.
\textsuperscript{33} See Act of May 31, 1790, ch. 15, 1 Stat. 124.
\textsuperscript{34} See Litman, supra note 27, at 993; Nimmer, supra note 17, at 855.
\textsuperscript{36} Jon M. Garon, Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas, 17 Cardozo Arts & Ent. L.J. 491, 498 (1999).
in an elevation of rightsholders' interests over those of the public at large to a degree that threatens the balance of the Copyright Clause.

IV. THE EXCLUSIVE RIGHT OF AUTHORS AT THE END OF THE 20TH CENTURY

A. Congress's Discretion

The Supreme Court has made clear that the task of striking the balance of competing interests between rightsholders and the public in copyright and patent legislation is one that belongs, in the first instance at least, to Congress. Congress has broad authority "to implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim."38 The Court has also been clear in indicating that this truism applies specifically in the context of legislation that responds to pressures imposed on the copyright system by new technologies:

Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.39

As the remainder of this Article will indicate, however, there are limits to how far this deference to Congress can be extended. The next two subsections will lay the groundwork for an examination of those limits. First, a treatment of recent developments in the fair use doctrine will show that even against the backdrop of Congress's broad discretion in implementing copyright legislation, the touchstone for statutory interpretation remains the Copyright Clause and its twin purposes: preserving authors' incentives to produce new works, and maximizing the public's access to those works. Second, an examination of recent Supreme Court cases will provide a basis for determining when legislative acts pass beyond the boundaries of the Copyright Clause.

B. The Fair Use Doctrine

The fair use doctrine is the attempt of the judiciary to "strike a balance between the dual risks created by the copyright system: on the one hand, that depriving authors of their monopoly will reduce their incentive to create, and, on the other, that granting authors a complete monopoly will reduce the creative ability of others."40 In the Copyright Act of 1976,41 Congress codified the doctrine as follows:

40. Id. at 479 (Blackmun, J., dissenting).
Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phone records or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.\textsuperscript{42}

In lieu of a specific, concrete definition of "fair use," Congress elected to provide a loose, four-factor test:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{43}

Three recent Supreme Court cases interpreting the fair use doctrine have demonstrated that, in keeping with the purposes of the Copyright Clause described above, the doctrine should operate according to two principles.\textsuperscript{44} First, it should forbid competing uses by others to the extent necessary to preserve the incentives of authors to create new works. Second, it should permit as many other uses as possible. Although these cases were decided primarily on statutory rather than constitutional grounds, they are highly instructive in assessing how copyright doctrine can serve, or disserve, the purposes of the Copyright Clause.

The first of these cases is \textit{Sony Corporation of America v. Universal City Studios, Inc.},\textsuperscript{45} a case involving the impact of new copying technology on copyright doctrine. Sony sold "Betamax" videotape recorders to consumers, some of whom used them to record broadcasts of television programs owned by the plaintiffs.\textsuperscript{46} Some of those consumers used the equipment to establish videotape "libraries" of their favorite programs.\textsuperscript{47} Universal claimed both that the recording of its programs by Betamax owners constituted copyright infringement, and that Sony was liable for contributory infringement.\textsuperscript{48} The district

\textsuperscript{42} \textit{Sony}, 464 U.S. at 479.
\textsuperscript{43} 17 U.S.C. § 107.
\textsuperscript{46} See id. at 420-21.
\textsuperscript{47} See id.
\textsuperscript{48} See id.
court disagreed, and entered judgment for Sony. The court of appeals reversed.

A five-Justice majority of the Supreme Court found that the approach of the court of appeals, which would have allowed the plaintiffs to enjoin or levy royalties upon the sale of video recorders, would have "enlarge[d] the scope of respondents' statutory monopolies to encompass control over an article of commerce that is not the subject of copyright protection." The Court characterized its decision as a "rejection of respondents' unprecedented attempt to impose copyright liability upon the distributors of copying equipment."

It had long been established that liability as a contributory infringer can be found against one who knowingly and intentionally assists another's copyright infringement. The Sony Court limited this doctrine by excepting the act of providing the means by which another could commit copyright infringement.

The Court ruled that liability could only be imposed when "the 'contributory' infringer was in a position to control the use of copyrighted works by others and had authorized the use without permission from the copyright owner." Applying this rule to Sony's situation led the Court to conclude that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses."

Thus, the outcome of the dispute turned on whether consumers could use the equipment at issue in ways that were noninfringing or that fell within the scope of the fair use doctrine. The Court found that they could, noting that most consumers used their recorders mainly for the purpose of "time-shifting," i.e., recording a program for viewing at a later, more convenient time. Because the plaintiffs had failed to demonstrate that time-shifting had "impaired the commercial value of their copyrights or ha[d] created any likelihood of future

50. See Sony Corp. of Am. v. Universal City Studios, Inc., 659 F.2d 963 (9th Cir. 1981).
51. Sony, 464 U.S. at 421.
52. Id.
54. See Sony, 464 U.S. at 436.
55. Id.
56. Id. at 442 (emphasis added).
57. See id. at 421.
harm," the Court found that at least one of the substantial uses to which the copying equipment could be put was a fair use.\textsuperscript{58}

Although it was decided in the context of analog recording equipment, the \textit{Sony} case is of considerable significance with respect to the digital copying issues raised below. In \textit{Sony}, the Court concluded that allowing rightsholders to suppress a new copying technology was not necessary to ensure that authors would reap the financial benefits of their efforts, even though that technology was subject to abuse.\textsuperscript{59}

Similar issues are explored in the following sections.

The second member of the trilogy is \textit{Harper \& Row, Publishers, Inc. v. Nation Enterprises},\textsuperscript{60} a case in which the Court had to define just how little copying could be "unfair" in the fair use context. \textit{The Nation} magazine published a short article titled "The Ford Memoirs—Behind the Nixon Pardon."\textsuperscript{61} The article included extended excerpts from a purloined copy of President Ford's autobiography, which was to be published shortly thereafter.\textsuperscript{62} \textit{The Nation} intended its article to "scoop" one that was scheduled to appear in \textit{Time} magazine.\textsuperscript{63} The \textit{Time} article was to contain authorized excerpts from the book, for whose use \textit{Time} had agreed to pay a fee to Harper \& Row, President Ford's publisher.\textsuperscript{64} When \textit{The Nation} published its article, \textit{Time} canceled its agreement with the publisher.\textsuperscript{65}

Harper \& Row successfully sued \textit{The Nation} for copyright infringement.\textsuperscript{66} The court of appeals reversed, however, finding that the fair use doctrine covered \textit{The Nation}'s actions.\textsuperscript{67} A six-Justice majority of the Supreme Court agreed with \textit{Time} and the trial court, finding that "the fair use doctrine has always precluded a use that 'supersede[s] the use of the original',"\textsuperscript{68} and that \textit{The Nation}'s copying of the manuscript "had not merely the incidental effect but the intended purpose of supplanting the copyright holder's commercially valuable right of first publication."\textsuperscript{69}

Moreover, the Court found that, even though the amount of material \textit{The Nation} had copied was comparatively small, the copied portion of the manuscript was "essentially the heart of the book."\textsuperscript{70}

---

\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{See id.} at 456.
\textsuperscript{60} 471 U.S. 539 (1985).
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{See id.}
\textsuperscript{65} \textit{Id.}
\textsuperscript{66} \textit{See id.}
\textsuperscript{67} \textit{See id.}
\textsuperscript{68} \textit{Harper \& Row, Publishers, 971 U.S. at 550 (quoting Folsom v. Marsh, 9 F. Cas. 342, 344-345 (C.C.D. Mass. 1875) (No. 4,901)).}
\textsuperscript{69} \textit{Id.} at 562.
\textsuperscript{70} \textit{Id.} at 565.
PRIVATE RIGHTS, PUBLIC USES

73
copied material concerned the motives and reasoning that lay behind President Ford's decision to pardon his predecessor. These were matters of widespread interest, and they were the primary selling points for the book. In short, The Nation's article provided information that made buying the book superfluous for many consumers.

This was of critical importance to the Court, which remarked that the effect of the use upon the potential market for or value of the copyrighted work is "undoubtedly the single most important element of fair use." Because of the importance of that factor, the Court found that the court of appeals had placed too much reliance on what the latter had characterized as the "meager" or even "infinitesimal" amount of material copied. The Court concluded that "'[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied.'"

This case is significant for its sharp focus on the issue of authors' incentive to produce works. The Court's refusal to adopt mechanical formulae for how much material could be copied under the fair use doctrine is important to several of the issues raised in the following sections.

The last of the three cases is Campbell v. Acuff-Rose Music, Inc., in which the Court addressed the fair use doctrine in the context of parody. A musical group named 2 Live Crew recorded a commercial parody of Roy Orbison's song, "Oh, Pretty Woman." The parody drew heavily on the text of Orbison's song, with the result that the lyrics of the two songs were strikingly (and deliberately) similar. When sued for copyright infringement, 2 Live Crew argued that its use of Orbison's work as a parody was fair despite its commercial nature.

The trial court found that it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original." Based largely on this consideration, the trial court found that 2 Live Crew's copying of Orbison's original work was fair use, and rendered summary judgment in the group's favor. The court of appeals reversed and remanded, finding that the trial court had given insuffi-

71. See id.
72. See id.
73. See id. at 565-69.
74. Id. at 566.
75. Id. at 569.
76. Id. at 566-67 (quoting MELVILLE B. NIMMER, 1 NIMMER ON COPYRIGHT § 1.10(D) (1984)).
77. 510 U.S. 569 (1994).
78. See id. at 574.
79. See id. at 571.
80. See id. at 572.
81. See id.
82. Id. at 573.
83. See id.
cient weight to the Supreme Court's declaration in *Sony* that "every commercial use . . . is presumptively . . . unfair." 84

The court of appeals reasoned that, even if the accused work could properly be characterized as a parody, the admittedly commercial nature of that parody made the trial court's finding of fair use unsustainable because 2 Live Crew had "take[n] the heart of the original and make it the heart of a new work," 85 and that, in doing so, it had taken too much, both qualitatively and quantitatively, to be protected by the fair use doctrine. 86

The court of appeals also invoked *Harper*'s declaration that the potential damage to the market for the original, as well as for derivative works based on that original, is the most important element of fair use. 87 The court of appeals concluded that the trial court should have presumed that, because the accused use was commercial in nature, damage to the market for the original was established. 88

The Supreme Court unanimously rejected the view of the court of appeals that "harm for purposes of the fair use analysis [can be] established by the presumption attaching to commercial uses." 89 The Court characterized the fair use inquiry as one that is "not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis." 90 And in that analysis, all four of the factors are significant; they may not be weighed or assessed individually: "All are to be explored, and the results weighed together, in light of the purposes of copyright." 91 The Court reversed and remanded for further findings relevant to fair use. 92

The most significant feature of *Campbell* is that it renounced bright lines and clear formulae for fair use in favor of case-by-case analysis. 93 This is true of *Sony* 94 and *Harper* 95 as well. If the highest Court in the land cannot easily, automatically, and categorically define what uses of copyrighted material are fair, then rightsholders cannot do so. Moreover, the machines and software that rightsholders

84. *Id.* at 574.
86. *See id.*
87. *See id.*
88. *See id.* at 1437, 1439 (characterizing 2 Live Crew's use of Mr. Orbison's work as having a "blatantly commercial purpose" that "prevent[ed] the parody from being a fair use").
90. *Campbell*, 510 U.S. at 577.
91. *Id.* at 578 (citations omitted).
92. *See id.* at 594.
93. *See id.* at 577.
will seek to use to implement anti-copying schemes will be unable to do so as well.96

C. Temporary Copyright and the Public Domain

The public domain consists of all sources of information and expressions that may be freely copied. Thus, it extends to "works, or components thereof, that are not eligible for copyright, works that were created before copyright existed, works that have had their copyrights expire, and intellectual property that is defined by the Copyright Act to fall outside the scope of its protection."97 The public domain is part and parcel of the copyright system; while the copyright monopoly is "intended to motivate the creative activity of authors," it is also intended "to allow the public access to the products of their genius after the limited period of exclusive control has expired."98

Until fairly recently, the principle that the public domain is of constitutional stature was more clearly established in patent law than in copyright. In 1966, for example, the Supreme Court ruled unanimously that the Intellectual Property Clause coupled its grant of power to Congress with limits on that power:

[The Clause] is both a grant of power and a limitation . . . . The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.99

More recently, the Court has issued another unanimous opinion in the patent context that defines explicitly the relationship between statutory exclusive rights and the constitutional purposes they are intended to serve: Bonito Boats, Inc. v. Thunder Craft Boats, Inc.100

Bonito Boats designed a hull for a recreational boat, expending considerable effort and expense in doing so.101 Neither that hull design, nor the process by which the hull was built, was protected by patent.102 The hull was popular in its market, and boats incorporating that hull sold well both within and outside Florida.103 Using a direct molding process, Thunder Craft copied Bonito's hull, and thereafter marketed a boat incorporating that hull.104 Thus, Thunder

96. See infra Part VI.D.
97. Garon, supra note 36, at 545 (citations omitted).
98. Sony, 464 U.S. at 429.
100. 489 U.S. 141 (1989).
101. See id. at 144.
102. See id.
103. See id.
104. See id. at 145.
Craft was able to compete against Bonito without having to incur the expense of designing its own hull.105

Bonito sued Thunder Craft under the Florida anti-molding statute.106 The trial court found for Thunder Craft on the ground that the Florida anti-molding statute was void under the Supremacy Clause of the U.S. Constitution because the statute conflicted with federal patent law.107 The court of appeals and the Florida Supreme Court affirmed.108

The Supreme Court agreed, ruling that federal patent law affords only "a limited opportunity to obtain a property right in an idea. Once an inventor has decided to lift the veil of secrecy from his work, he must choose the protection of a federal patent or the dedication of his idea to the public at large."109 Thus, an inventor "must content himself with either secrecy or legal monopoly."110 In marketing the new hull without obtaining patent protection, Bonito assumed the risk that a competitor would take advantage of the effort and cost Bonito had spent in designing it.111

In reaching this conclusion, the Court stressed that "[t]he Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the Progress of Science and useful Arts."112 The Court reiterated its view that

the Clause contains both a grant of power and certain limitations upon the exercise of that power. Congress may not create patent monopolies of unlimited duration, nor may it 'authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.'113

Thus, when a patent expires, the invention for which it was granted passes into the public domain, "and the right to make the thing formerly covered by the patent becomes public property."114 Thus, at that point, the public has "the same right to make use of [the formerly patented invention] as if it had never been patented."115

The period of exclusivity provided for by patent law provides the incentive for innovation, but after that period, the kind of copying in

105. See id.
106. See id. at 144 (construing FLA. STAT. ch. 559.94 (1987)).
107. See Bonito Boats, 489 U.S. at 145.
108. See id. at 145-46.
109. Id. at 149.
110. Id. (quoting Metallizing Eng’g Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 520 (2d Cir. 1946) (Hand, J.).
111. See Bonito Boats, 489 U.S. at 149-151.
112. Id. at 146.
113. Id. (quoting Graham v. John Deere Co., 383 U.S. 1, 6 (1966)).
114. Id. at 152 (quoting Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 185 (1896)).
which Thunder Craft engaged is not only permissible, but desirable.\textsuperscript{116} Without the ability to copy, other inventors would be deprived of valuable techniques, and the public would be deprived of more desirable and affordable products made possible by the use of those techniques. As the Court recognized, “imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy.”\textsuperscript{117}

The Court also recognized that in addition to providing the incentive for inventors to develop and share useful new ideas that will eventually enrich the public domain, the patent system serves the purposes of the Intellectual Property Clause by the protection it denies.\textsuperscript{118} The patent system protects inventors and the general public from depletion of the common store of knowledge by denying protection to inventions that are obvious or of limited novelty. “[T]he stringent requirements for patent protection seek to ensure that ideas in the public domain remain there for the use of the public.”\textsuperscript{119}

Thus, the Court found a strong federal policy in the Intellectual Property Clause and the federal statutes implementing it of “allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”\textsuperscript{120} Because the Florida statute violated this policy, it was void under the Supremacy Clause.\textsuperscript{121}

In yet another 9-0 decision, in \textit{Feist Publications, Inc. v. Rural Telephone Service Co.},\textsuperscript{122} the Supreme Court extended this understanding of the constitutional status of the public domain into the copyright context.\textsuperscript{123} Rural Telephone Service Company, Inc. was a local public telephone company that served customers in northwest Kansas.\textsuperscript{124} Pursuant to state regulations, Rural published an updated telephone directory every year.\textsuperscript{125} Feist Publications, Inc., was a publishing company that specialized in telephone directories for

\textsuperscript{116.} \textit{Bonito Boats}, 489 U.S. at 146.
\textsuperscript{117.} \textit{Id.}
\textsuperscript{118.} \textit{See id.} at 147.
\textsuperscript{119.} \textit{Id.} at 150 (quoting Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979)).
\textsuperscript{120.} \textit{Bonito Boats}, 489 U.S. at 153 (quoting Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237 (1964)).
\textsuperscript{121.} \textit{See Bonito Boats}, 489 U.S. at 159-60 (“[T]he Florida statute allows petitioner to reassert a substantial property right in the idea, thereby constricting the spectrum of useful public knowledge. Moreover, it does so without the careful protections of high standards of innovation and limited monopoly contained in the federal scheme. We think it clear that such protection conflicts with the federal policy ‘that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent.’” (quoting \textit{Lear, Inc. v. Adkins}, 395 U.S. 653, 668 (1969))).
\textsuperscript{123.} \textit{See id.} at 343.
\textsuperscript{124.} \textit{See id.} at 342.
\textsuperscript{125.} \textit{See id.}
large geographic areas. Feist produced a directory covering eleven
different telephone service areas, including Rural's area. Both
Feist's and Rural's directories were distributed free of charge, but con-
tained advertising for whose revenue the two companies competed
vigorously.

Because it was the sole provider of telephone services in its area,
Rural's task in publishing its directory was quite simple. It re-
quired its customers to provide names and addresses to obtain tele-
phone service, and it assigned telephone numbers corresponding to
those names and addresses. It then arranged that information al-
phabetically by name, and printed the results.

Feist had no independent access to any of this information. It
offered to purchase the information from Rural, but was rebuffed.
Rural's motive for refusing Feist's offer was to render Feist's directory
incomplete, and thus less attractive to advertisers. Notwithstanding
Rural's refusal, Feist decided to copy the information contained in
Rural's directory.

Rural sued Feist for copyright infringement, arguing that the only
permissible way for Feist to obtain the information it needed was for it
to generate the information itself by means of door-to-door interviews
or telephone surveys. Feist countered that not only were such
methods costly and inefficient, they were also unnecessary because
the information it had copied was not protectable by copyright.

The trial court granted summary judgment for Rural on the basis
that courts had "consistently held that telephone directories are copy-
rightable." The court of appeals affirmed "for substantially the rea-
sons given by the district court."

The Supreme Court disagreed based upon what it termed "[t]he
most fundamental axiom of copyright law," namely that "no author
may copyright his ideas or the facts he narrates." Rural's work

---

126. See id.
127. See id. at 343.
128. See id.
129. See id.
130. See id.
131. See id. at 342.
132. See id. at 343.
133. See id.
134. See id.
135. See id. at 343-44.
136. See id. at 344.
137. See id.
139. See Feist Publ'ns, 499 U.S. at 344.
140. Id. at 344.
141. Id. at 345 (quoting Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985)).
was one created by the compilation of facts without creativity, and, as
the Court found, without originality:

The *sine qua non* of copyright is originality. To qualify for copyright protec-
tion, a work must be original to the author. "Original," as the term is used in
copyright, means only that the work was independently created by the author
(as opposed to copied from other works), and that it possesses at least some
minimal degree of creativity.142

The Court found that although the required amount of creativity was
low, the level of creativity in Rural's alphabetical compilation of
names and telephone numbers was even lower.143

Moreover, the Court found the requirement of originality to be a
"constitutional requirement."144 The Court found it "unmistakably
clear" from its precedents145 that the terms "authors" and "writings"
found in the Copyright Clause "presuppose a degree of originality."146
In sum, the Court ruled that "[t]he originality requirement is consti-
tutionally mandated for all works."147

The Court explained that mere factual compilations could not meet
this standard because "facts do not owe their origin to an act of au-
thorship. The distinction is one between creation and discovery: The
first person to find and report a particular fact has not created the
fact; he or she has merely discovered its existence."148 This is true "of
all facts—scientific, historical, biographical, and news of the day.
['T]hey may not be copyrighted and are part of the public domain
available to every person."149

Thus, factual compilations can only rise to the required level of
originality when the compiler chooses "which facts to include, in what
order to place them, and how to arrange the collected data so that they
may be used effectively by readers."150 Congress has no power to af-
ford copyright protection to works that fall below this standard.151 In
other words, Congress has no power to reward authors for the effort
invested in their works. Some lower courts had formulated a "sweat of
the brow" doctrine, under which some courts had granted copyright
protection to unoriginal works produced through diligent research:

---

142. See id. at 345 (citations omitted).
143. Id. at 363-64.
144. Id. at 346.
145. See Trade-Mark Cases, 100 U.S. 82 (1879); Burrow-Giles Lithographic Co. v.
Sarony, 111 U.S. 53 (1884).
146. *Feist Publ'ns*, 499 U.S. at 346.
147. Id. at 347 (quoting L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The
Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36
UCLA L. Rev. 719, 763 n.155 (1989)).
148. Id.
149. Id. at 348 (quoting Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1368
(5th Cir. 1981)).
150. Id.
151. See id.
The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are publici juris, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants, with their occupations and their street number, acquires material of which he is the author.

However, the *Feist* Court rejected the “sweat of the brow” doctrine. The Court found that this doctrine would condemn others to recreate easily available information, when it is “just such wasted effort that the proscription against the copyright of ideas and facts...[is] designed to prevent.” In the Court’s view, the copier’s benefitting from earlier publications is a positive virtue of the copyright system rather than an unfair, unforeseen by-product of its operation.

Like *Bonito Boats*, Feist stands for the proposition that the Intellectual Property Clause does not empower Congress to grant exclusive rights to what the public already owns and freely uses, i.e., public domain knowledge and works. By basing its decisions in these cases on the purpose of the Clause, rather than solely on the intent of Congress, the Court made it clear that the public domain has constitutional stature and does not exist merely at the pleasure of Congress.

In the copyright context, the effect of this constitutional grounding is to protect the public domain in its function “as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use.”

V. THE FUTURE OF DIGITAL COPYING

A. Digital Media and the Copyright Industries

Since approximately 1981, the explosive improvement of computer technology has been the preeminent feature of the American economy, and computer-related goods and services are now our fastest-growing industry. Moreover, the speed of the change toward a digitized, computer-based economy is far greater than the changes brought about by earlier, comparably revolutionary changes. It took radio thirty-eight years from its introduction to reach fifty million
users, whereas the personal computer needed only sixteen years to accomplish the same feat, and the Internet, once it became accessible to the general public, took only four.\textsuperscript{159}

The copyright industries deal primarily in works that can be used or experienced by consumers on computers.\textsuperscript{160} Given sufficient bandwidth, processor speed, and storage capacity, the great majority of all copyrighted works can be enjoyed fully, and without perceptible distortion, in computerized form.\textsuperscript{161} Knowledgeable commentators have claimed that these changes will have an impact on the copyright industries comparable to that of the introduction of the moveable-type printing press.\textsuperscript{162}

Digitized works can be transmitted anywhere in the world, instantly and essentially without cost.\textsuperscript{163} They can be copied in unlimited numbers, without degradation of quality.\textsuperscript{164} The economic implications of these realities have given rise to the claim that, at least as a medium for the dissemination of copyrighted works, "print on paper will go the way of the quill pen."\textsuperscript{165}

As recently as six years ago, none of this was true. The advances in computer hardware and software that permit ordinary consumers to access these technologies at affordable prices simply did not exist.\textsuperscript{166} All earlier technologies for copying involved substantial expense and the loss of fidelity with each successive generation of copies.\textsuperscript{167}

\begin{footnotesize}
\begin{enumerate}
  \item See Garon, supra note 36, at 575.
  \item See Colford, supra note 160; Stefik, supra note 160.
  \item See, e.g., Paul Hilts, \textit{Looking at a New Era}, \textit{PUBLISHERS WEEKLY}, May 8, 2000 at 26 (noting the opinion of Jason Epstein, former editorial director of Random House Inc., that digitization fundamentally changes the economics of publishing: "The transformation that awaits writers and publishers today arises from new technologies whose cultural influence promises to be no less revolutionary than the introduction of movable type, a vector of civilization which these new technologies, after half a millennium, have unceremoniously replaced in the last dozen years.").
  \item Id.
  \item See id.
  \item Jay Greene, \textit{E-books' Brass Band}, \textit{Bus. Wk.}, April 3, 2000, at EB46 (noting the opinion of Dick Brass of Microsoft).
  \item See Recording Indus., 180 F.3d at 1073.
\end{enumerate}
\end{footnotesize}
High-bandwidth Internet connections are available at most universities, and similar services for ordinary residences are becoming widely available. Consumers can now copy, store, and exchange digital works with ease. Millions of consumers are doing so regularly, and growing numbers of them have access to cheap, reliable, and permanent means of storing downloaded files on high-capacity removable disks.

The future is all but certain to see the near-total digitization of the copyright industries. Given that prospect, it is useful to consider the examples of two digital media that are already deeply embroiled in controversies arising from unauthorized copying and claims of infringement, namely Compact Disks (CDs) and Digital Video Disks (DVDs). CDs have been the predominant medium for sales of sound recordings for nearly a decade, and DVDs are an emerging, highly popular medium for disseminating motion pictures. Some 4000 motion pictures have been released in the DVD format since its introduction in 1996. More than five million DVD players have been sold, and DVDs are selling at the rate of more than one million per week.

Free, universally available software allows computer users to "rip" audio tracks from CDs and encode them into the MP3 format, which greatly reduces file size without noticeably decreasing quality. As one commentator puts it, "MP3 files are so small that hundreds can fit on a single compact disk and thousands onto a computer hard drive. That means any desktop or laptop with decent speakers can morph into a massive high-fidelity jukebox." Equally free and universally available (though putatively illegal) software allows users to defeat the copy protection incorporated into DVDs.

Thousands of sites on the Internet offer MP3 files for download by anyone, anywhere, and many of these files have been copied from proprietary sound recordings without license from their owners.


169. See id.


171. See Salkever, supra note 168, at 134.


173. See Reimerdes, 82 F. Supp. 2d at 214.

174. See Salkever, supra note 168, at 134.

175. Id.

176. See infra Part VI.B.3.

177. See Salkever, supra note 168, at 134.
Rightsholders expect that the situation will soon be the same with respect to DVDs. The MP3 situation, and the prospect of its repetition in the DVD context, have led rightsholders to petition courts to try to put the technological genie back in its bottle.

The first of these efforts came in Recording Industry Association of America v. Diamond Multimedia Systems Inc. The RIAA requested that the court enjoin the manufacture and sale of the Rio, a small, easily portable personal stereo device for playing MP3 files. The court denied that request, noting that in addition to infringing files, the Internet also supports a burgeoning traffic in legitimate audio computer files. Independent and wholly Internet record labels routinely sell and provide free samples of their artists' work online, while many unsigned artists distribute their own material from their own websites. Some free samples are provided for marketing purposes or for simple exposure, while others are teasers intended to entice listeners to purchase either mail order recordings or recordings available for direct download (along with album cover art, lyrics, and artist biographies).

The decision in this case turned on a narrow point of statutory interpretation with respect to the Audio Home Recording Act. It is worthy of note, however, that in the course of finding that the Rio was not a "digital audio recording device" within the meaning of the AHRA, the court acknowledged the following:

The Rio merely makes copies in order to render portable, or "space-shift," those files that already reside on a user's hard drive. Cf. Sony Corp. of America v. Universal City Studios, 464 U.S. 417, 455, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984) (holding that "time-shifting" of copyrighted television shows with VCR's constitutes fair use under the Copyright Act, and thus is not an infringement). Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.

Despite this early suggestion that many uses of digital copying might fall within the fair use doctrine, more recent cases suggest that courts may well interpret copyright law in such a way as to foreclose many, if not all uses of digital copying. See [references].

178. See id.
179. 180 F.3d 1072 (9th Cir. 1999).
180. See id. at 1073.
181. Id. at 1074.
182. Id. at 1075 ("RIAA brought suit to enjoin the manufacture and distribution of the Rio, alleging that the Rio does not meet the requirements for digital audio recording devices under the Audio Home Recording Act of 1992, 17 U.S.C. § 1001 et seq. (the "Act"), because it does not employ a Serial Copyright Management System ("SCMS") that sends, receives, and acts upon information about the generation and copyright status of the files that it plays. See id. § 1002(a)(2). RIAA also sought payment of the royalties owed by Diamond as the manufacturer and distributor of a digital audio recording device. See id. § 1003.").
184. See Recording Indus., 180 F.3d at 1075-78.
185. Id. at 1079.
not all, forms of unauthorized digital copying of copyrighted works. These cases are discussed individually below.

B. Recent Controversies in Digital Copying

1. Mymp3.com

MP3.com is a website that copied songs from about 45,000 CDs into MP3 format and stored them on a website. Members of the site’s free service “myMP3.com” who could prove they already owned one of these CDs could use the service to play that CD from any properly-equipped computer connected to the Internet. Proving ownership required that the member insert the CD into a computer’s CD-ROM drive so that the service’s software could authenticate the CD’s code signature (which is a form of authenticity verification, not copy protection).

Once this was done, the member could freely access MP3.com’s copy of desired songs via the website. Members did not actually store their music on MP3.com’s site. MP3.com encouraged members to do this with all their CDs, with the result that any computer with access to the Internet could become a “virtual jukebox” for members.

The owners of CDs that MP3.com copied and made available on its website sued MP3.com for copyright infringement in *UMG Recordings, Inc. v. MP3.Com, Inc.* MP3.com argued that its service was the functional equivalent of providing free computer storage space on the Internet for music already properly licensed by its members. The court found, however, that MP3.com was “re-playing for the subscribers converted versions of the recordings it copied, without authorization, from plaintiffs’ copyrighted CDs.” The court ruled that, on its face, this conduct was presumptively infringing under the Copyright Act. In fact, the court claimed that the case before it was an easy one. In its own words, “[t]he complex marvels of cyberspatial

---

188. See id.
189. See id.
190. See id.
191. See id.
192. See id. at 349.
193. See id. at 350.
194. Id.
195. See id.
196. See id.
communication may create difficult legal issues; but not in this case.\textsuperscript{197}

The court swiftly dispensed with MP3.com’s fair use argument, finding that the copying was of entire works, for profit (in the form of advertising revenue), and not transformative.\textsuperscript{198} As the court framed the issue:

Here, although defendant recites that My.MP3.com provides a transformative “space shift” by which subscribers can enjoy the sound recordings contained on their CDs without lugging around the physical discs themselves, this is simply another way of saying that the unauthorized copies are being retransmitted in another medium—an insufficient basis for any legitimate claim of transformation.\textsuperscript{199}

In doing so, the court declared that copyright law “is not designed to afford consumer protection or convenience but, rather, to protect the rightholders’ property interests.”\textsuperscript{200}

On the fourth factor, namely “the effect of the use upon the potential market for or value of the copyrighted work,” the court noted, but never came to grips with, MP3.com’s argument that only legitimate purchasers of CDs could access the copies it had made of the plaintiffs’ works.\textsuperscript{201} The court observed that the plaintiffs had the “statutory right to license their copyrighted sound recordings to others for reproduction,” and simply concluded that MP3.com had infringed that right.\textsuperscript{202} Absent from this discussion was any persuasive explanation of why MP3.com’s space-shifting into another medium was any less worthy of the court’s indulgence than was the Rio’s space-shifting (or the Betamax’s time-shifting) via other media.

2. \textit{Napster and Gnutella}

Napster, Inc. is a small Internet company that makes its Music-Share software available for free downloading to anyone on the Internet.\textsuperscript{203} The software allows all users logged-on to the Napster system to share MP3 files with one another.\textsuperscript{204} A user uses a search engine contained within the software to specify the music sought, and the engine queries the hard drives of all logged-in users for MP3 files that meet the searcher’s criteria.\textsuperscript{205} The majority, but not all, of the

\begin{footnotesize}
\begin{enumerate}
\item 197. See id.
\item 198. See id. at 351-52.
\item 199. See id. at 351.
\item 200. Id. at 352; cf. supra Part II.C.
\item 201. UMG Recordings, 92 F. Supp. 2d at 352.
\item 202. Id.
\item 204. See id.
\item 205. See id. at *4.
\end{enumerate}
\end{footnotesize}
MP3 files retrieved and copied via Napster in its first year of operation were unauthorized copies of proprietary sound recordings.\(^{206}\)

On December 6, 1999, a group of record companies sued Napster for contributory and vicarious federal copyright infringement in *A & M Records, Inc., v. Napster, Inc.*\(^{207}\) The litigation is ongoing, though the record companies have won the first three rounds: on May 5, 2000, the court found that Napster could not benefit from the "safe harbor provision"\(^{208}\) of the Digital Millennium Copyright Act,\(^{209}\) on July 27, 2000, the court granted a preliminary injunction against Napster;\(^{210}\) and on February 13, 2001, the Ninth Circuit largely endorsed the trial court's reasoning for that injunction.\(^{211}\)

The merits of those decisions are essentially irrelevant to the larger issues at hand. Napster is the first service of its kind, and one of the most vulnerable to legal action.\(^{212}\) For example, absent the main Napster server, which is located in the U.S., the service will not function.\(^{213}\) Thus, an adverse court ruling could certainly put Napster out of business. It is also easy to track the operation of the Napster service using the Internet Protocol addresses of the computers involved.\(^{214}\)

But other, less vulnerable services are emerging, and recent experience suggests that as soon as one is shut down, another will take its place.\(^{215}\) Several services like Napster are already in operation, and hundreds more are in development.\(^{216}\)

Gnutella, for example, is a peer-to-peer form of file sharing that achieves the same result as Napster without the need for a central


\(^{211}\) *See* A & M Records, Inc., v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (affirming in part, and reversing in part, to allow modification of the scope of the trial court's injunction).


\(^{214}\) *See* Salkever, * supra* note 168, at 134.


\(^{216}\) *See* Barry de la Rosa, *Pirates? They Seem More Like Pioneers, Computing*, May 18, 2000, at 19.
server—or any servers at all apart from the computers of its users. Like so many Internet stories, the tale of Gnutella is strongly reminiscent of the myth of Pandora's Box. The program originated at AOL, where a 21-year-old employee at its Nullsoft development division placed a copy of the software on the division's website. Within 24 hours, the management of AOL had removed the software from the website, declaring it to be the result of an "unauthorized freelance project." But AOL's action, swift as it was, came after some 10,000 copies of the software had been downloaded.

Gnutella allows users with any form of Internet access to engage in unmediated file-swapping among themselves. Like Napster, Gnutella can be used for sharing non-infringing files, though within the computer industry, most knowledgeable commentators find it "painfully obvious that most people will use Gnutella to find copyrighted music, video, software, and images." And unlike Napster, its use is not easy to detect; its users can interact anonymously, and its software is open-source. As a result, anyone can reverse-engineer, improve, and introduce new versions of Gnutella.

There is now a thriving global community of users who are swapping files of all kinds without using central storage or processing centers. This absence of bottlenecks has raised the prospect of rightsholders' being physically unable to prevent, or even monitor, the sharing of files that is taking place. There appears to be no means of shutting down filesharing by this service absent shutting down Internet access in its entirety. Moreover, new variants on the Gnutella theme, such as Freenet, are making significant progress toward making filesharing as anonymous and untraceable as it is unstoppable. Skilled software developers around the world have taken the Gnutella idea forward, improving it and making the fruits of their labor freely available on the Internet.

217. See Don Willmott, Is Copyright Dead? With Gnutella, Exchanging MP3 Files Is Easier Than Ever, But Is It Legal?, PC Mag., June 6, 2000, at 85.
219. Id.
220. See id.
221. See id.
222. Willmott, supra note 217, at 85, 88.
223. See id. at 85.
224. See id.
225. See id.
226. See id.
227. See id.
228. See id.
3. DeCSS

DVDs are protected from copying by the "Content Scramble System, or CSS, [which] is an encryption-based security and authentication system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs."\textsuperscript{229} A group of Norwegian computer aficionados called MoRE (Masters of Reverse Engineering) developed and distributed over the Internet a simple, small program named DeCSS that allows users to defeat DVD encryption.\textsuperscript{230}

A number of motion picture studios brought suit under the Digital Millennium Copyright Act,\textsuperscript{231} in \textit{Universal City Studios, Inc. v. Reimerdes}, against defendants who they claimed had disseminated copies of DeCSS, primarily via their websites.\textsuperscript{232} The plaintiffs did not allege that the defendants had engaged in copyright infringement, but rather that they "offer technology that circumvents their copyright protection system and thus facilitates infringement."\textsuperscript{233}

The court found this allegation compelling:

[I]t is perfectly clear that CSS is a technological measure that effectively controls access to plaintiffs' copyrighted movies because it requires the application of information or a process, with the authority of the copyright owner, to gain access to those works. Indeed, defendants conceded in their memorandum that one cannot in the ordinary course gain access to the copyrighted works on plaintiffs' DVDs without a "player key" issued by the DVD CCA that permits unscrambling the contents of the disks. It is undisputed also that DeCSS defeats CSS and decrypts copyrighted works without the authority of the copyright owners.\textsuperscript{234}

It is by no means clear that the court was correct in its conclusion that DeCSS did not fall within the Digital Millennium Copyright Act's reverse engineering/compatibility exception\textsuperscript{235} to the general rule against defeating copy protection.\textsuperscript{236} That exception reads in part as follows:

[A] person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other

\textsuperscript{229} Universal City Studios, Inc. v. Reimerdes, 82 F. Supp. 2d 211, 214 (S.D.N.Y. 2000).
\textsuperscript{230} See Dana J. Parker, \textit{Copy This Column: The Truth About DeCSS}, \textit{EMedia Prof.}, February, 2000, at 72, 72.
\textsuperscript{232} See 82 F. Supp. 2d at 213, 215.
\textsuperscript{233} Id. at 215.
\textsuperscript{234} Id. at 216-17.
\textsuperscript{235} See 17 U.S.C. § 1201(f).
\textsuperscript{236} See 17 U.S.C. § 1201(a).
programs... to the extent any such acts of identification and analysis do not constitute infringement under this title.237

The court asserted that the defendants had not put on adequate evidence to establish that exception despite the defendants' contention that without DeCSS, it is impossible to play DVDs on Linux-based computers.238 In light of authority establishing that intermediate copying is fair use when it is necessary to achieve interoperability, the court's decision is troubling.239

But once again, the precise contours of this legal dispute are beside the point: "[W]hoever wins the court cases, the CSS source code isn't going back into any bottles now."240 In fact, the most important point the Reimerdes court made was social rather than legal. The court noted that after becoming aware of the impending efforts to enjoin distribution of DeCSS,

members of the hacker community stepped up efforts to distribute DeCSS to the widest possible audience in an apparent attempt to preclude effective judicial relief. One individual even announced a contest with prizes (copies of DVDs) for the greatest number of copies of DeCSS distributed, for the most elegant distribution method, and for the "lowest tech" method.241

As the following subsection will show, this anti-authoritarian attitude is the prevailing social climate of the Internet. As a consequence, any legal regime that seeks to restrict means of defeating copy protection cannot succeed unless it is enforced by heroic, or even draconian, measures.

C. Technological Negation of Fair Use Copying

Attempting to enforce copyright law by suing individual computer users is both bad for rightsholders' public relations and largely futile.242 Thus, it is entirely rational for rightsholders to seek to keep new means of sharing and copying files out of the hands of consumers.243 For the reasons discussed above, however, rightsholders’ at-

238. See id; see also Stephen Clark Jr., DVD Learns Linux, EMEDIA PROF., April 2000, at 22, 22 (noting that before DeCSS, DVD-Video support for Linux “was simply nonexistent. Many companies that develop DVD solutions apparently have chosen not to invest the time and money that is required to develop Linux software.”).
239. See, e.g., Sega Enters. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) (holding that use of copyrighted computer work, or use of a competitor's trademark, was fair use when necessary to achieve interoperability).
tempts to achieve this are continually being outpaced by improved technology at the consumer level.244

As a result, rightsholders now hope to enlist technology on their side of the battle. They are developing Automated Rights Management systems (ARMs)245 whose effect will be to prevent unauthorized copying of works to which users have legitimate access. Rightsholders are highly unlikely to limit the operation of ARM technologies to copyright works, or to even attempt to work fair use copying features into them.246 Ultimately, ARM has the potential to give rightsholders by technology what they have never enjoyed by law:

At its most powerful, ARM supports the “superdistribution” of proprietary information. In other words, it allows information providers to market documents that disallow certain types of uses (e.g., copying) and provide continuing revenue (e.g., charging $2 per access) regardless of who holds the document (e.g., including someone who obtained it post-first sale). Superdistribution thus offers information providers a rather daunting compendium of powers.247

The vast majority of computer users would be unable, by themselves at least, to defeat ARM systems.248 But the Internet not only links images, sounds, files, and ideas: it also links talents. The vast majority of the world’s talented software programmers and developers are able to communicate and collaborate with one another via the Internet easily and essentially without cost. This ease of collaboration has allowed the development of open-source, non-proprietary software like Linux with the contributions of thousands of programmers world-wide.249 Moreover, the idea of making the Internet itself ungovernable—in effect, of making it less and less subject to the laws of any territorial authority or group of authorities—has considerable appeal to many of those programmers.250

---

244. See de la Rosa, supra note 216, at 19.
245. For a discussion of the analogous concept of “trusted systems,” see Stefik, supra note 160.
247. See Bell, supra note 242, at 566-67.
250. See id.
Thus, the question is not whether encryption and other means of preventing unauthorized copying can be defeated: it can and will. There is a global reservoir of talented volunteers who are both able and motivated to devise means of doing so and to share them with the public at large.251 Moreover, there are simple means of disseminating such information and software over the Internet with reliable anonymity.252

Thus, the question is whether the Copyright Clause can be stretched so far as to permit draconian means of deterring the use by ordinary individuals of widely available means of defeating copy protection. As is explained below, legislation that at least partially provides for this has already been enacted. If the experience of regulating child pornography distributed via the Internet is any indication, however, ARM's may only be feasible if penalties for circumventing them are even more severe, and the enforcement of anticopying laws is more vigorous and intrusive, than they are at present.253

VI. MILLENNIAL CHANGES IN COPYRIGHT LAW

The Digital Millennium Copyright Act ("DMCA")254 is the beginning of the realization of rightsholders' ambitions with respect to ARM's. While a full discussion of the DMCA is beyond the scope of this Article, the following few provisions are more than adequate to demonstrate the challenge the DMCA poses to fair use in a digitized, ARM-controlled environment:

No person shall . . . offer to the public, provide, or otherwise traffic in any technology . . . that—

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act];

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under [the Copyright Act]; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under [the Copyright Act].255

The DMCA defines "circumventing a technological measure" as the employment of means used to descramble, decrypt, or "otherwise to

251. See de la Rosa, supra note 216, at 19.
252. See Cohen, supra note 243, at 1092.
253. See Lesli C. Esposito, Note, Regulating the Internet: The New Battle Against Child Pornography, 30 CASE W. RES. J. INT'L L. 541 (1998); see also Salkever, supra note 168, at 135 ("So far, no one has been prosecuted for pirating MP3 files for personal use.").
avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner." Moreover it clarifies that "a technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work." 

The broad sweep of this language is only emphasized by the wording of some of the provisions meant to limit it. For example, two of the items listed under the heading "Other Rights, Etc., Not Affected" appear to be very much affected. The first reads as follows: "Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title." The second reads similarly: "Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, component, device, or part thereof." The emphasized prepositional phrases highlight the problem: to all appearances, liability for violation of section 1201 is not liability for "copyright infringement." Moreover, section 1204 provides for criminal penalties of up to $500,000 and five years in prison for a first-offense violation of section 1201 so long as that violation is "willful[] and for purposes of commercial advantage or private financial gain"—like the unlicensed parody in Campbell.

Thus, unless the courts interpret it more narrowly than its plain language appears to require, the DMCA sets up a legal regime under which fair use of digital works protected by an ARM would give rise to civil—or even criminal—liability. In the highly digitized world of the near future, this represents a de facto abrogation of the better part of the fair use doctrine.

This substantial increase in the scope of the copyright monopoly is matched by a substantial increase in its duration. The Sonny Bono Copyright Term Extension Act amended the Copyright Act to extend the term of copyright protection from the life of the author plus
fifty years to life plus seventy years, keeping currently protected works out of the public domain for a minimum of twenty additional years.\textsuperscript{267} The Bono Act was the product of an intense lobbying campaign by rightsholders like The Walt Disney Company, many of whose works were approaching the end of their copyright terms.\textsuperscript{268}

Thus, the question arises whether Congress’s latest efforts on behalf of rightsholders go beyond its power under the Copyright Clause.

VII. THE LIMITS OF CONGRESS’S POWER UNDER THE COPYRIGHT CLAUSE

A. “To Promote” As an Interpretive Guide

“When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach.”\textsuperscript{269} Accordingly, it is an appropriate limitation on Congress’s discretion that “[t]he monopoly privileges that Congress may authorize through copyright grants are neither unlimited nor primarily designed to provide a special private benefit.”\textsuperscript{270} The ultimate interpretive guide for determining whether Congress has accorded a private benefit or an unlimited privilege lies in the “to promote” language of the Copyright Clause.

According to a prominent commentator, “[t]his introductory phrase is in the main explanatory of the purpose of copyright, without in itself constituting a rigid standard against which any copyright act must be measured. Its effect at most is to suggest certain minimal elements to be contained in copyright legislation.”\textsuperscript{271} According to this view, the introduction to the Clause is like the Preamble to the Constitution: inspirational, but not enforceable.\textsuperscript{272}

While it is entirely reasonable to suppose that an introductory phrase imposes no “rigid” standards, it is less reasonable to posit that such a phrase is of little or no interpretative value when interpretation is unavoidable. The Supreme Court has been called upon to invalidate Congressional acts under the Clause in the past,\textsuperscript{273} and may face similar calls in the near future.

\textsuperscript{267} See Garon, supra note 36, at 522-23.
\textsuperscript{268} See id. at 523. The proponents of the bill also argued that it was important to the United States balance of trade to match the duration of protection afforded under European copyright law. See Christina N. Gifford, Note, The Sonny Bono Copyright Term Extension Act, 30 U. MEM. L. Rev. 363, 386-88 (2000).
\textsuperscript{269} Goldstein v. California, 412 U.S. 546, 560 (1973).
\textsuperscript{271} Melville B. Nimmer & David Nimmer, 1 Nimmer On Copyright § 1.03 (2001).
\textsuperscript{272} See id.; Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905).
\textsuperscript{273} See, e.g., Trade-Mark Cases, 100 U.S. 82 (1879) (striking down as unconstitutional an act of Congress that attempted to regulate trademarks beyond their use.
That Congress may choose among competing schemes of regulation (or non-regulation) for achieving the ends of the Clause is clear.\textsuperscript{274} Less clear, but no less important, is what standard courts should apply in determining whether Congress has granted copyright protection that serves no legitimate purpose under the Clause.\textsuperscript{275} In the silence left to us by the Framers' unanimous approval of the Clause, only its text and the occasional glosses on that text by the Supreme Court are of much use in finding an appropriate standard.

If the purpose of copyright protection is to disseminate expressive works throughout the country as broadly as possible, as the preliminary language suggests and the Court has affirmed,\textsuperscript{276} then interpreting the remainder of the Clause is comparatively simple. That exclusive rights are central to the Clause's approach to achieving this shows that the role of economics, and specifically of authors' incentives, is critical. That the protection to be granted under the Clause must be temporary ensures the (eventual) widespread enjoyment of works because of their availability for free duplication.

The difficulty arises when Congress elects to enhance one of the two—authors' rights or public access—at the expense of the other. Without resorting to the goal of "promot[ing] the progress of science" as an interpretive guide, it is difficult to determine whether legislation is a legitimate exercise in balancing needs or an illegitimate exercise in accommodating rent-seekers.\textsuperscript{277}

Bearing that language in mind, however, a solution becomes obvious: Congress may balance between the two any way it chooses, so long as it does not foreclose altogether any significant aspect of one or the other, and so long as there is a logical basis for concluding that Congress's action might enhance the dissemination and enjoyment of copyrightable works.

As the following subsections will show, however, Congress's latest efforts in the copyright arena fall well short of this standard.

\textsuperscript{274} See, e.g., Snapper v. Foley, 667 F.2d 102, 112 (D.C. Cir. 1981) ("Congress need not 'require that each copyrighted work be shown to promote the useful arts . . . .'"); Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 860 (5th Cir. 1979) (refusing to disqualify morally suspect works from enjoying copyright protection); 1 \textsc{William F. Patry}, Copyright Law and Practice 123-30 (1994) (discussing article I, section 9, clause 2 of the United States Constitution).

\textsuperscript{275} See Merges & Reynolds, supra note 15, at 63.

\textsuperscript{276} Robert A. Kreiss, Accessibility and Commercialization in Copyright Theory, 43 \textsc{UCLA L. Rev.} 1, 20 (1995).

\textsuperscript{277} See Cohen, supra note 15, at 1131.
B. "Exclusive Right" Versus Noncompeting Uses

The "exclusive Right" of authors provided for by the Constitution has never been absolute.\textsuperscript{278} The idea/expression dichotomy,\textsuperscript{279} the "first sale" doctrine,\textsuperscript{280} and the misuse doctrine\textsuperscript{281} are only a few of the many means by which courts have traditionally limited the scope of authors' exclusive rights. No U.S. copyright regime has ever given the copyright owner "complete control over all possible uses of his work."\textsuperscript{282}

Rather, the Copyright Act grants the copyright holder "exclusive" rights to use and to authorize the use of his work in five\textsuperscript{283} qualified ways, including reproduction of the copyrighted work in copies. All reproductions of the work, however, are not within the exclusive domain of the copyright owner. . . . Any individual may reproduce a copyrighted work for a "fair use"; the copyright owner does not possess the exclusive right to such a use.\textsuperscript{284}

More importantly, the doctrine of fair use is older than the U.S. copyright system. Under the Statute of Anne, for example, British courts found at least some uses of others' works to be "fair abridgements."\textsuperscript{285} Accordingly, while the first U.S. Copyright Act contained no explicit fair use provision, courts applying that Act recognized that the scope of copyright protection against noncompeting uses by others was far from absolute.\textsuperscript{286} Moreover, "long before the enactment of the Copyright Act of 1909, it was settled that the protection given to copyrights is wholly statutory,"\textsuperscript{287} and is thus limited rather than plenary in scope.\textsuperscript{288} When Congress codified the fair use doctrine in the 1976 Act, moreover, it did so with the intent of endorsing and continuing this "common-law tradition of fair use adjudication."\textsuperscript{289}

\textsuperscript{278} See L. Ray Patterson, Copyright and the "Exclusive Right" of Authors, 1 J. INTELL. PROP. L. 9-14 (1993).


\textsuperscript{281} See generally James A.D. White, Misuse or Fair Use: That Is the Software Copyright Question, 12 BERKELEY TECH. L.J. 251 (1997) (discussing the emergence of the copyright misuse doctrine).


\textsuperscript{284} Sony, 464 U.S. at 432-33 (citations omitted).

\textsuperscript{285} See Patry, supra note 274, at 6-17.


\textsuperscript{287} Sony, 464 U.S. at 431 (citation omitted); accord Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 661-62 (1834).

\textsuperscript{288} See, e.g., Thompson v. Hubbard, 131 U.S. 123, 151 (1889) (noting that the rights of authors under the Copyright Act "are only those prescribed by Congress").

\textsuperscript{289} Campbell, 510 U.S. at 577.
These limits grew out of the "to promote" imperative of the Copyright Clause "as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained." Denying noncompeting uses of copyrighted works to subsequent authors under the copyright law would tend to "stifle the very creativity [that it] is designed to foster." Controls on technologies that defeat copy protection threaten to do precisely that.

In digital media, which will shortly be the primary means of disseminating the vast majority of copyrighted works, copy protection will always be both feasible and defeasible. It is entirely possible to put digital copying of copyrighted works beyond the ability of ordinary consumers so long as they remain unaided by experts. It is impossible, however, to prevent experts from disseminating the keys with which to unlock copy protection—and from doing so anonymously and undetectably. It is therefore impossible to prevent consumers from having access to those keys.

For copy protection schemes to work, therefore, it is the consumer, rather than the expert, who must be the target of efforts to deter the unlocking of protected works. In effect, copy protection can only succeed when all digital copying not specifically authorized by rights-holders is criminalized. Depending upon how its rather opaque language is interpreted, the Digital Millennium Copyright Act may well be a very large step in this direction, and the political power of rightsholders suggests that it will not be the last.

Preventing infringement by denying the public the means to infringe is a new and very troubling approach to protecting rightsholders. Admittedly, it is true that the history of copyright legislation is replete with examples of revolutionary new technologies that have prompted changes in the law. For example, it was the invention of the printing press that gave rise to the need for copyright protection when it made copying for profit feasible for the first time (infringement by manuscript being largely unprofitable). Likewise, the advent of the player piano provided at least part of the impetus for the 1909 revision of the Copyright Act. And in the latter half of the Twentieth Century, the improved ability of high-fidelity tape recorders to capture


292. See Sony, 464 U.S. at 430.

293. See Sony, 464 U.S. at 431 n.11; see also White-Smith Music Publ'g. Co. v. Apollo Co., 209 U.S. 1 (1908) (holding that copying a musical composition for use on a player piano was not prohibited).
sound prompted Congress to enact the Sound Recording Amendment of 1971.\textsuperscript{294}

But these legislative responses did not consist of outlawing printing presses, player pianos, or tape decks. Nor did they impose a scheme of governmental licensing or monitoring of their private use.

This restraint suggests that, at least until recently, Congress has kept both essential policies of the Copyright Clause—encouragement of authors and public use—firmly in mind. Congress tailored its legislative responses to technical challenges according to two factors:

First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.\textsuperscript{295}

In forbidding the unlocking of digital works, however, Congress has lost sight of the second of these factors. While “fair use analysis must always be tailored to the individual case,”\textsuperscript{296} copy protection schemes deny fair use and infringement equally. Whereas Congress formerly agreed with the Supreme Court that fair use was a doctrine that needed careful and flexible application, it has now sanctioned its inflexible (indeed, in the digital context, universal) abolition.

There is good reason to believe that this extreme response is unnecessary to protect authors’ incentives. First, with respect to many consumers, “piracy” is not an issue. Large, institutional consumers are sufficiently high-profile and well-funded for rightsholders to police effectively through their protective associations.\textsuperscript{297} Moreover, among individual consumers, many are actually honest in the relevant sense: they would not make intentional, infringing use of unauthorized copies.\textsuperscript{298} And there is no reason to believe that unauthorized downloads of digital works inevitably, or even often, replace purchases that the downloading parties would otherwise have made.\textsuperscript{299}

Second, the switch to digital media, with their low overhead and universal availability, will allow many aspiring authors to sell directly to the public, as the famous novelist Stephen King did with his recent

\begin{itemize}
\item \textsuperscript{294} Pub. L. No. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.); see Sony, 464 U.S. at 431 n.11.
\item \textsuperscript{295} Sony, 464 U.S. at 430 n.10 (quoting H.R. Rep. No. 60-2222, at 7 (1909)).
\item \textsuperscript{297} See, e.g., Am. Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994) (holding that it was not fair use for Texaco to make unauthorized copies of medical and scientific journals for use of its researchers).
\item \textsuperscript{298} For a discussion of the social role played by expectations of honest conduct, see Steven H. Resnicoff, \textit{Is It Morally Wrong to Depend on the Honesty of Your Partner or Spouse? Bankruptcy Dischargeability of Vicarious Debt}, 42 Case W. Res. L. Rev. 147 (1992).
\item \textsuperscript{299} Siklos & Brull, supra note 35, at 120.
\end{itemize}
direct-to-web work *Riding the Bullet*. This will allow them to enjoy a larger proportion of the revenue stream generated by their works, even if illicit copying siphons away part of that revenue. Regardless of how revenue is divided between authors and publishers, if the recent history of new musical technology is any indication, that stream is likely to be a flood rather than a trickle:

The switch to CDs from vinyl in the 1980s allowed music companies to re-release the entire history of music with minimal production costs. With the Net, the payoff could be all the more staggering. As more and more people come online, new ways of selling and packaging music—and using the Web for marketing—should mean a boon for the labels and radio, better terms for artists, and a consumer paradise.

Moreover, even publishers should benefit from the increased overall audience and decreased costs of reaching that audience that the universal availability of digital works will bring about:

[The Web will allow the labels to market their talent in remarkable new ways while also using the medium to reap huge savings on everything from the production of CDs to the millions wasted on marketing new releases that don't succeed. Just as NBC spawned cable channels CNBC and MSNBC, and ABC teamed with sports channel ESPN, the big music “networks” should be able to not only find more buyers for their music but also to tap into new revenue streams such as advertising and e-commerce that until now have been strictly the domain of radio and retail.]

Third and finally, encryption can never stop true pirates, like those who use Third World factories to spin out CDs and DVDs by the million. They have all the funding they need to buy the talent required to decrypt the target works, and what they do has been highly illegal for decades. Compared to the efforts of true pirates, the sales revenues lost to the depredations of MP3-downloading computer users are comparatively small.

Thus, the attack on the means of copying digital works represents an unacceptable tradeoff under the Copyright Clause: it overreacts to a manageable threat by overprotecting authors' incentives to produce at the expense of largely eradicating the public's right to use copyrighted works under the fair use doctrine in the digital environment of the all-too-near future. Congress's most recent efforts in this area

303. *Id.* at 124.
305. *See* id.
306. Admittedly, the possibility remains that consumers could copy digital works by analog means, such as taping from a CD, video-recording from a viewscreen, or copying down text by hand. But it is likely that a vigorous anticopying regime would reach at least some of these activities, and some forms of fair use copying


of legislation have fallen afoul of the pitfall inherent in copyright protection "that granting authors a complete monopoly will reduce the creative ability of others." Consequently, the "exclusive Right" of authors under the Copyright Clause should not be interpreted to authorize Congress to forbid or criminalize the circumvention of copyright protection for the purpose of engaging in fair use copying.

C. "For Limited Times" Versus Creeping Perpetuity

It is generally accepted that the Copyright Clause means what it says: the Clause gives Congress no power to establish permanent copyright or patent rights. It is also widely accepted that the duration of exclusive rights under the Clause is subject to Congress's discretion. The Supreme Court has noted that the "evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces in [implementing the Copyright Clause] . . . . Absent an explicit statement of congressional intent, . . . it is not our role to alter the delicate balance Congress has labored to achieve." In the early days of the Copyright Clause, however, it was generally expected that this balance would favor a brief period of exclusivity, to be followed by universal, free enjoyment of the formerly protected work by the public. In the words of Joseph Story, written less than fifty years after the framing of the Clause:

It is beneficial to all parties, that the national government should possess this power; to authors and inventors, because, otherwise, they would be subjected to the varying laws and systems of the different states on this subject, which would impair, and might even destroy the value of their rights; to the public, as it will promote the progress of science and the useful arts, and admit the people at large, after a short interval, to the full possession and enjoyment of all writings and inventions without restraint.

---

308. See Cohen, supra note 243, at 1140-42.
309. See Marx v. U.S., 96 F.2d 204, 205-06 (9th Cir. 1938) (upholding a portion of the 1909 Copyright Act against constitutional challenge by construing it to be subject to limitations on duration contained elsewhere in the Act); U.S. v. Moghadam, 175 F.3d 1269, 1281 (11th Cir. 1999) (noting in dicta the possible invalidity of a criminal copyright statute that did not take duration into account).
311. See id. ("[T]his exclusive right shall exist but for a limited period, and that . . . period shall be subject to the discretion of congress."); see also discussion supra Part IV.B.
313. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 558, at 402-03 (1877) (emphasis added).
Because of the effect it has on incentives to produce new works, the period of exclusivity provided for by copyright is a good thing. Nonetheless, the numerous extensions of copyright duration in this century have sorely tested Mae West's dictum that "[t]oo much of a good thing can be wonderful": the rate of the increase in the copyright term has more than equaled the passage of time between extensions. If this trend continues—and there is no reason to believe that it will not—no work created after the 1920s will ever fall into the public domain absent procedural default or express dedication by the author.

This trend has vitiated the second half of the justification for the copyright monopoly; namely, that it will "allow the public access to the products of [authors'] genius after the limited period of exclusive control has expired." Moreover, there is no credible reason to believe the Bono Act's contribution to this trend will add to the incentive of authors to produce.

The proposition that any duration of more than the original period of fourteen years affords significant incentive to produce is subject to serious question. After all, only a very few works are still producing any significant revenue fourteen years after their publication, and those works are the very ones that afford their authors the greatest financial rewards. As a result,

[although there is no empirical research, one can hardly imagine that authors would cease to write, painters to paint, or software designers to design works if the copyright term were reduced—even to the fifty-six years (twenty-eight year term plus twenty-eight year renewal) afforded to authors prior to January 1, 1978. Indeed, software may become commercially obsolete after less than six months. A few works survive the test of time and remain a valuable commodity throughout the term of the copyright. Most works, however, never make it into circulation, and of those that do, only a tiny fraction have a residual value that continues throughout the life of work.]

The sole notable, additional element of incentive provided by changes in the law of copyright duration came with the 1976 Act, which measured duration from the author's death. But even assuming for purposes of argument that there is some motivating power to the slim chance of leaving a performing asset to heirs as much as

314. See Bard & Kurlantzwick, supra note 37, at 7-9.
316. See Bard & Kurlantzwick, supra note 37, at 7-9.
317. See id.
320. See id. at 1181-89.
322. See id.
fifty years after an author's death, the Bono Act faces an insurmountable obstacle with respect to its validity under the Copyright Clause.

The constitutional question posed by the Bono Act is whether Congress's discretion in fixing copyright duration stretches far enough to justify twenty more years' deprivation of the public domain. The only way it can do so is if it can reasonably—or even conceivably—motivate authors to create in exchange for exclusive rights extending seventy years beyond their deaths who would not have done so for a mere fifty years of exclusivity beyond their deaths.

The economic realities of publishing copyrighted works show that those extra twenty years simply cannot motivate authors to create works that would not have been created before the change in the law:

The decision to invest in producing a creative work is influenced in part by economic considerations. Investing time and money now produces a cash flow in the future, so one must trade off the time and money invested now with the potential returns in the future . . . . [the Bono Act] . . . will therefore have an insignificant effect on the incentives to produce such works . . . . [T]he value of investment returns after 50 years in the future has a minuscule present value compared to the early returns. Hence the value of the cash flows during these later periods has a tiny effect on the present economic incentives to invest in creative works.323

Absent the continued, annual growth of the public domain, the cost and effort involved in creating new derivative works increases.324 The Campbell Court found these words of Justice Story appropriate to the issue before it, and they are equally well taken here:

[I]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.325

Absent the Bono Act, the public would not only be free to use uncopyrightable information generated by others, but also to copy at will from others' expressions published in the (comparatively) recent past. This is the purpose of the public domain, and given the Supreme Court's emphatic endorsement of the constitutional status of the public domain in Bonito Boats and Feist, the Bono Act fails to pass the required level of scrutiny:

The constitutional rationale for such an approach is simple: the phrase "to promote the progress of science and the useful arts" is inherently prospective. It states a utilitarian, incentive-based rationale for intellectual property protection. If the term of protection could not, under any plausible set of assump-

323. Garon, supra note 36, at 519 n.134 (quoting the affidavit of Hal R. Varian, Dean of the School of Information Management and Systems at the University of California, Berkeley, filed in Eldred v. Reno, No. 1:99CV00065 (D.D.C. filed Jan. 11, 1999)).
324. See Garon, supra note 36, at 600.
tions, serve as an incentive, it fails the constitutional requirement of a
forward-looking grant of property rights.\textsuperscript{326}

Of course, the Bono Act may be justified as desirable policy by such
concerns as the rationalization of copyright regimes between the
United States and Europe.\textsuperscript{327} From the perspective of the Copyright
Clause, however, this is irrelevant: the sole concern of the Clause is to
provide for the widest enjoyment of works of authorship that is consis-
tent with the preservation of authors' incentive to create. The Bono
Act frustrates this concern.

Nonetheless, the only court that has had an occasion to test the
constitutionality of the Bono Act chose to uphold it, apparently on the
basis that Congress's discretion to extend the copyright term is unlim-
ited.\textsuperscript{328} In the interests of avoiding the complete ossification of the
public domain's stock of formerly copyrighted works, higher courts
should revisit this issue and weigh it with care.

\textbf{VIII. CONCLUSION}

The sole justification for the copyright monopoly lies in its effect of
providing the incentive for authors to create new works for public use
and enjoyment. To the extent that the public can use those works
without endangering that incentive, the Copyright Clause requires
that it be allowed to do so. The Clause does not authorize legislation
that curtails noncompeting public uses of copyrighted works, or that
keeps such works from falling into the public domain even after long
periods of exclusivity.

Such legislation expands a governmentally-enforced monopoly
without a corresponding benefit to society. Unless it is able to justify
this expansion under sources of law other than the Copyright Clause,
the judiciary should invalidate the relevant portions of Congress's
most recent copyright legislation.

\textsuperscript{326} Merges & Reynolds, \textit{supra} note 15, at 65-66.

\textsuperscript{327} See Bard & Kurlantzick, \textit{supra} note 37, at 191-201; Lisa M. Brownlee, \textit{Recent
(examining the practical effects and policy implications of new and proposed
copyright laws in the United States and the European Union).

\textsuperscript{328} See Eldred v. Reno, 74 F. Supp. 2d 1, 3 (D.D.C. 1999).