

**THE PRESENT (USER-GENERATED CRISIS) IS
THE PAST (1909 COPYRIGHT ACT):**

**AN ESSAY THEORIZING THE “TRADITIONAL
CONTOURS OF COPYRIGHT” LANGUAGE**

W. RON GARD*

ELIZABETH TOWNSEND GARD**

INTRODUCTION.....	456
I. TRADITIONAL CONTOURS OF COPYRIGHT LAW TODAY	463
II. THE “SHATTERING” OF TRADITION AND THE MAKING OF A MODERNIST “TRADITIONAL CONTOURS OF COPYRIGHT LAW”	472
III. <i>MARTIN EDEN</i> EXPLAINS THE 1909 COPYRIGHT ACT.....	483
IV. THE EARLY-MODERN DRAMATISTS’ PRESCIENT UNDERSTANDING OF VALUE	492
CONCLUSION	497

* Associate Professor, Intellectual Property Law and Property at Tulane University Law School, Co-Director, Tulane Center for Intellectual Property Law and Culture, and Director, Usable Past Project/Durationator®. Ph.D., European History, UCLA, and J.D./LL.M., University of Arizona. Thanks in particular to Evan Dicharry for his suggestions, research, and assistance and a special thanks to SKG and RJT who weathered our writing together. A nascent version of our ideas will appear as a short essay: Elizabeth Townsend Gard & W. Ron Gard, *Marked by Modernism in MODERNISM AND COPYRIGHT* (Paul Saint Amour ed., Oxford University Press, forthcoming).

** Instructor, American Literature and Writing at the University of New Orleans, specializing in contemporary literature and theory. Ph.D., American Literature and J.D., University of Arizona. Portions of this paper build upon the work begun in *Bodies of Capital: Spatial Subjectivity in Twentieth-Century United States Fiction* (August, 2007) (W. Ron Gard unpublished Ph.D. dissertation, University of Arizona) (on file with author). The paper benefited from comments and thoughts from Keith Werhan, Pamela Metzger, Jancy Hoeffel, Mark Rose, Pamela Samuelson, Diane Zimmerman, Kenneth Crews, Peter Hirtle, Glynn Lunney, Catherine Hancock, James Boyle, Mark Davis, Onnig Dombalagian, Claire Dickerson, and Peter Jaszi. We began thinking about many of these ideas with Caren Deming and the Frankfurt School Reading Group at the University of Arizona over the summer of 2002. Portions of this paper were presented by Gard and Townsend Gard at the Works in Progress Intellectual Property Colloquium, Tulane Law School (October 3-4, 2008), the Tulane Faculty Brown Bag Summer Workshop June 2009), and the Intellectual Property Scholars Conference, Cardozo School of Law August 6-7, 2009).

[O]n or about December 1910, human character changed. I am not saying that one went out, as one might into a garden, and there saw that a rose had flowered, or that a hen had laid an egg. The change was not sudden and definite like that. But a change there was, nevertheless; and, since one must be arbitrary, let us date it about the year 1910.

Virginia Woolf¹

For centuries a small number of writers were confronted by many thousands of readers. This changed toward the end of the last century. . . . [T]he distinction between author and public is about to lose its basic character. . . . At any moment the reader is ready to turn into a writer.

Walter Benjamin²

Just as water, gas, and electricity are brought into our houses from far off to satisfy our needs in response to minimal effort, so we shall be supplied with visual or auditory images, which will appear and disappear at a simple movement of the hand, hardly more than a sign.

Paul Valéry³

INTRODUCTION

In 1923, Virginia Woolf wrote that a fundamental shift in culture had occurred thirteen years before, a change that would soon be described as the Modern(ist) era. Walter Benjamin and Paul Valéry feared this modern future—their future was the twentieth century. Benjamin and Valéry saw great changes abounding because of technology, and they thus feared that the essence of culture itself was changing. Woolf too felt the essence of society changing before her eyes. In many ways, their visions have come to fruition just recently. Now in the next century, we see similar rhetoric of a fundamental shift in culture, as user-generated content has begun to dominate and transform consumers' expectations about the relationship between what Benjamin describes as writers and readers. Readers are now writers and (re)writers as well. Could it be that once again we are

¹ Virginia Woolf, *Mr. Bennett and Mrs. Brown* (1923), reprinted in MODERNISM: AN ANTHOLOGY OF SOURCES AND DOCUMENTS 395, 396 (Kolocotroni et al., eds., University of Chicago Press 1998).

² Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, reprinted in ILLUMINATIONS 217, 231-32 (Hannah Arendt ed., Harry Zohn trans., Schocken Books, 1968) (1935) [hereinafter Benjamin].

³ *Id.* at 219 (citing Paul Valéry, *The Conquest of Ubiquity*, in AESTHETICS 226 (Ralph Manheim trans., Pantheon Boosk, Bollingen Series 1964)).

witnessing a shift in the human condition?

In only the last five years, the concept of user-generated content has developed, not only in legal communities, but also as a phenomenon experienced throughout the general population.⁴ This development could be seen as creating a new kind of crisis in copyright, one that very well may come to be recognized as a postmodern turn.⁵ For the first time in history, everyday people have the technological ability to make, recreate, remash, rehash and distribute their new creations instantly around the world. Now, seventy years after Walter Benjamin feared the mass of readers becoming writers, user-generated content has reached a tipping point in cultural and legal circles. Examples abound: Fans collectively recreating the movie *Star Wars*, each contributing fifteen second segments,⁶ software that matches someone else's Flickr photos with one's latest Tweet,⁷ CNN iReports, or simply Amazon reviews of books by ordinary users are just a few of the illustrations of users creating works, rather than merely consuming them. All of these activities are governed by copyright law, and many believe that these behaviors by masses of ordinary users are changing the needs and expectations of that law. Copyright law was not created with these kinds of uses in mind. Some are calling for reform or a rethinking of what copyright law should protect and what constitutes infringement.⁸ But the phenomenal expansion of cultural production is not new, nor are the underlying questions of the role of copyright law.

For many, this latest cultural shift began with peer-to-peer file-sharing and the litigation that ensued, which ushered in the anxious response of increasing copyright protection both through law and technology.⁹ Apprehensions over the shift in subject position of the public can be felt in the court's decisions in *Metro-Goldwyn-Mayer Studios, Inc v. Grokster*, *Eldred v. Ashcroft*, and *Golan v.*

⁴ Patricia Aufderheide & Peter Jaszi, *Recut, Reframe, Recycle: The Shaping of Fair Use Best Practices for Online Video*, 6 I/S: J. L. & POL'Y FOR INFO. SOC'Y 13, 13-40 (2010); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 513-546 (2009); Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 841-870 (2009).

⁵ Peter Jaszi, *Is There a Post-Modern Copyright?*, 12 J. TECH. & INTELL. PROP. 10 (2009); Elizabeth Townsend Gard, *Conversations with Renowned Professors on the Future of Copyrights*, 12 J. TECH. & INTELL. PROP. 35 (2009) (interviewing Prof. James Boyle of Duke University School of Law, Prof. Graeme Dinwoodie of Oxford University School of Law, Prof. Peter Jaszi of American University Washington College of Law, Prof. Mark Rose of University of California, Santa Barbara, and Prof. Diane Zimmerman of New York University School of Law).

⁶ *Star Wars Uncut*, <http://www.starwarsuncut.com> (last visited Dec. 18, 2010).

⁷ Portwiture – Mashup Awards, <http://mashupawards.com/portwiture/> (last visited Dec. 18, 2010). Portwiture won mashup of the day on Feb 25, 2009, and is described as software that “grabs photography from Flickr that matches content of your most recent Twitter updates.” *Id.*

⁸ Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2 UTAH L. REV. 551 (2007).

⁹ Copyright Act of 1976 § 1201, 17 U.S.C. § 1201 (2009).

Gonzalez/Holder—all cases wherein average users were copying, or wanting to copy and use, versions of movies, books, art, and music in a way that only traditional publishers had been able to in the past.¹⁰ The long-running, very-public, legal confrontations of the Recording Industry Association of America and Motion Picture Association of America (RIAA and MPAA), both in opposition to downloaders, are a reflection of the tension-filled dynamics of this paradigm shift—the modernist concerns of losing control to the masses colliding with a postmodern turn that embraces the multivalent voices and users of works.¹¹

Our cultural world has been confronted with the compelling need to reform copyright law before—many times before—as copyright law is often tested and challenged by the advent of new technology; piano rolls, photography, radio, film, television, and the photocopier are but a few examples. Previously, we have seen the law respond with the implementation of new legal mechanisms, or alternatively, with awkward court rulings that try to fit new problems within old definitions. We suggest, however, that the twenty-first century user-generated culture-crisis has been in the making for a very long time, one that can be traced back to the 1909 Copyright Act and the condition of modernity.

The need for the 1909 Copyright Act arose out of a cultural transformation around the turn of the last century, which created a sense that rights in material objects being sold to the public were not being sufficiently protected. It was, in essence, a reaction to the rise of industrialized mass production, a cultural condition of materialization that had never before been experienced. The 1909 Act, in its construction, embodies this materialized conceptualization of modernist cultural conditions that was the source of unrest in Benjamin and others throughout the twentieth century. But the modernist moment presented additional challenges, legally speaking—the culture and technology introduced new instances that the 1909 Act in its materialist construction would be inadequate to address—namely, the rise of radio, television, broadcasting, and film. The outcry became so great and arose so quickly (even before the 1909 Act became law) that calls for a new act would continue throughout the twentieth

¹⁰ *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005) (holding that “one who distributes a device with the object of promoting its use to infringe copyright” is liable for such uses by third parties); *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003) (upholding constitutionality of the Copyright Term Extension Act of 1998 (CTEA)); *Golan v. Gonzales*, 501 F.3d 1179, 1184, 1193 (10th Cir. 2007) (finding removal of works from the public domain a violation of a bedrock principle of U.S. Copyright).

¹¹ Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337 (2002). See also *How Not to Get Sued by the RIAA*, Electronic Frontier Foundation, (July 2006), <http://www EFF.org/wp/how-not-get-sued-file-sharing>.

century, eventually culminating in the enactment of the 1976 Copyright Act. But the modernist assumptions inscribed in the 1909 Act were carried forward into the 1976 Copyright Act, which we still live with unexamined today, and as our world becomes more (post)modern, those assumptions, particularly about the material world, become strained and untenable.

Both 'modernism' and 'postmodernism' are of course notoriously unruly terms. We invoke them, however, because they resonate at the very least with a certain duality. Each refers to a historical period, but also to cultural configurations and responses undertaken in efforts to negotiate those configurations.¹² The condition of modernity or postmodernity, then, is a historically-manifest cultural environment within which one is situated, intrinsically inflecting the development of one's awareness or viewpoint. In the barest of terms, we are recognizing the modernist period as being symbolically initiated in 1914 by Henry Ford's introduction of assembly-line production, an event which was preceded by several decades of intense development of industrialized mass production which literally reconfigured the space of culture in which people lived, and which only found its fullest cultural form following World War II when conditions beyond U.S. borders allowed the U.S. in conjunction with Great Britain to put in place an international system that insured a degree of national stability within U.S. domestic borders. Ironically, in the very creation of this system were sown the seeds of its destruction; the stability it put in place lasted only a very short period of time. With the rise of competing international markets and industrial bases of manufacture, coupled of course with significant cultural and technological developments such as digital computing and communication, the stability of a modernist environment was, following its symbolic demise in the early 1970s, rather quickly dismantled and reconfigured once again, this time bringing far more world players into the system, creating a much more multivalent and complex global arrangement and organization. This postmodern period, which we are still in today, exhibits an intensification of many modernist dynamics, such as a further expansion of production and consumption practices and cultural commodification generally, but the extent of continued intensification in conjunction with fundamental global reordering establishes a qualitatively different environment. It is to this

¹² This notion of response to cultural environment is often utilized as a means for critically theorizing the artistic styles across the many different aesthetic fields which have in retrospect been codified as exemplary of their respective periods, e.g. modern literature, modern art, postmodern architecture, and so on.

environment and condition that ‘postmodernism’ refers.¹³

We contend that our current cultural condition, as embodied in user-generated culture exemplifies the larger cultural transformation taking place, from what might be called a modernist to postmodernist condition and requires scholars, Congress, lawyers, and judges to reformulate their thinking about copyright law, to move it from its modernist foundation focused on the materiality of the object, to a postmodernist conceptualization that instead centers on the relationship to the object in the form of what we are calling “circulation.”¹⁴ This article argues that the 1909 Act misunderstood the needs of the modern world, and that this misunderstanding has continued to imprint legal thinking throughout the twentieth century, leading to the current crisis of how user-generated content and their relationship to already-produced goods fit within the copyright system. We argue that the misunderstanding centers on the law’s focus on the object, rather than on the value of the object, and that without a reorientation towards the concept of circulation, a solution to current problems will suffer the same fate as the 1909 Copyright Act, the 1976 Copyright Act, and the more recent amendments of the 1990s (which attempted to “fix” problems such as bootlegged copies of live performances and copying of entire films or movies).¹⁵ How, in short, does a home movie of a dancing baby set to a Prince song reveal a distinctly modernist problem, and by recognizing this, how can we better understand and conceptualize solutions to the problem?¹⁶ To answer these questions we find a need to return to the 1909 Act to develop an understanding of its misconceptions regarding objects, circulation of those objects, and the consequent formation of value. We contend that it is only through such a process—an unraveling of where we have been in order to discern where we need to go—

¹³ The historical, economic, and cultural events and formations to which we refer are fairly commonly recognized. For specific examinations, however, see DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 126 (Blackwell, 1989); BARRY AXFORD, *THE GLOBAL SYSTEM: ECONOMICS, POLITICS, AND CULTURE* (St. Martin’s, 1995).

¹⁴ The term “circulation” is used here in an economic manner to describe the production, distribution and consumption of goods within any given configuration of capitalism. For more discussion of the general term and its use within literary examples, see generally, W. Ron Gard, *Bodies of Capital: Spatial Subjectivity in Twentieth-Century United States Fiction* (August, 2007) (unpublished Ph.D. dissertation, University of Arizona) (on file with author).

¹⁵ See generally Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075 (1909), *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976), Copyright Act of 1976, 90 Stat. 2541 (1978); Uruguay Rounds Agreement Act, 108 Stat. 4809 (1994); Copyright Term Extension Act, Pub. L. 105-298 (1998); Digital Millennium Copyright Act, 112 Stat. 2860 (1998).

¹⁶ *Lenz v. Universal Music Corp.*, No. C 07-3783 JF, 2010 WL 702466, (N.D. Cal. Feb. 25, 2010); Edenza, *Let’s Go Crazy #1*, YOUTUBE (Feb. 7, 2007) <http://www.youtube.com/watch?v=N1KjJHFWlhQ>.

that we will be able to confront with insight and efficacy the contemporary problems of copyright.

This article argues that a more persuasive and, indeed, productive understanding of the foundations of copyright can be found by looking to the socio-cultural nature of economic development as it occurred in the United States from the latter portion of the nineteenth century to the present, and by articulating copyright law as arising discursively within and as part of such a context. Only by viewing copyright law and the U.S. copyright acts specifically as discursive manifestations arising within the historic structural trajectory of U.S. economics can one come to understand the particular nature of the legal protections arising in relation to particular kinds of works at particular points in time.

Modern copyright law's origin is most clearly viewed as stemming from a historical moment in which material production so quickly and pervasively developed to transform the cultural environment that it resulted in a concept grounding of copyright law within those same material structures. Thus, socio-cultural developments led to an undue placement of primary emphasis on the materially-produced object itself, with a pre-conceived assumption that the work, as a material item, would be placed into the realm of commerce. Yet, as a historical, economic examination demonstrates, this conceptual grounding is historically contingent and, thereby, increasingly trails further and further behind twentieth-century cultural developments wherein the circulation of goods increasingly comes to outstrip the tangible aspects of goods being circulated. We no longer necessarily buy an actual book—we are just as likely to download a “Kindle” version. The material item is quickly disappearing in our world. These issues continue presently to cloud conceptualizations of copyright law, although this is not widely recognized. By moving beyond a simple formalistic examination of the 1909 Copyright Act and the 1976 Copyright Act to a reading of them as culturally-specific constructions that homologously evidence in their linguistic operations the formations of value configuratively occurring at the level of social exchange, we can far better understand the current problems.

Part I of our article looks at the development of the phrase “traditional contours of copyright law.” We present our theory of reading copyright through the lens of the “traditional contours of copyright.” The phrase, with little articulation, appeared in the 2003 *Eldred* Supreme Court decision, and was subsequently invoked by the Tenth Circuit in *Golan* wherein the court outlined the three-step journey of a copyrighted work: creation, legal

protection, and foray into the public domain.¹⁷ The *Golan* Court's inquiry focused solely on the last step: how and when a work enters the public domain.¹⁸ We contend, however, that it is essential to analyze conceptualizations of the spaces between the first two steps within the traditional contours—namely the transition between creation of a work and legal protection of that work—to understand the cultural needs of the law in conditions of modernity and postmodernity. We see that the transition that occurs involves a work going from a private creation to one in circulation—circulation in a Marxist economic sense, rather than merely copyright law's concept of distribution or physical circulation—triggering the need for federal protection. We also contend that the “traditional contours” to which the courts are turning are a historically specific modernist moment. Therefore, to understand the phrase “traditional contours of copyright,” we must fully understand both the theoretical as well as the historical underpinnings. We must understand our history and the theory underlying our contemporary construction of that history. Only then can we disentangle from residual rhetoric while keeping the necessary structure.¹⁹

Part II situates the 1909 Copyright Act within a historical context—specifically, placing the Act within the cultural environment of the late nineteenth century, the threshold period for the rise of modernism in the United States. The article then in Part III turns to understanding this historical moment and its dynamics through a reading of Jack London's novel *Martin Eden*, a textual work that, likewise, appeared in 1909.²⁰ London's novel incisively demonstrates the struggle with these matters during this period. Specifically, the worries of the novel's title character reflect the paradigm shift under way at the time. As soon as one major shift occurred, another followed, and with this the 1909 Copyright Act struggled with modernist anxiety for much of the twentieth century until it was replaced with the 1976 Copyright Act. We suggest that the problem lies in a misconception of value, and therefore, the law itself was ill-equipped to adjust to new challenges. Part IV then turns to a more forward-thinking vision expressed by the dramatists during the hearings for the 1909 Act, suggesting that within the culture itself, even at the time was an

¹⁷ *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *Golan v. Gonzales*, 501 F.3d 1179, 1184, 1193 (10th Cir. 2007).

¹⁸ *Golan*, 501 F.3d at 1189-96. Note, *Golan* has had two cases since this Tenth Circuit decision, neither of which focused as heavily on mapping the “traditional contours of copyright law.”

¹⁹ RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 121-127 (1977) (Williams' concept of residual, dominant, and emergent hegemony).

²⁰ JACK LONDON, *MARTIN EDEN* (1909) [hereinafter LONDON].

awareness of the need for a shift in how the law values culture. Finally, our article concludes by bringing together the strands of our analysis and offering suggestions for work going forward.

I. TRADITIONAL CONTOURS OF COPYRIGHT LAW TODAY

Traditionally, copyright has been viewed as an incentive for authors to create works for public consumption. In exchange for these labors, the author is awarded for a limited time a set of exclusive rights over the use of the work, after which the work enters the public domain and becomes “free as the air to common use.”²¹ For most of copyright’s history, these laws were designed as boundaries between one publisher and another—the average user had little reason to need laws governing the making of copies or creation of new versions of a particular work that would be disseminated beyond a merely private use.

Recent technological developments allow users to create their own versions of works and post those works on the Internet. In doing so, the copyright balance has been upset, as those who once were limited to being consumers of culture now have the means and opportunity to move beyond that role, becoming producers/remixers/mash-upers of culture.²² For example, a low cost video camera and computer allows today’s user to record a home movie of a baby dancing to the Prince song *Let’s Go Crazy* and subsequently post the creation on YouTube for all to see.²³ Such creation and distribution, however, potentially violates both Prince’s derivative right and his public performance right within the traditional context of copyright law, even though the Pennsylvania mom had no commercial interests or intentions, as would a traditional publisher creating a derivative work for sale.²⁴

²¹ *Int’l News Serv. v. Assoc’d Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

The general rule of law is, that the noblest of human productions – knowledge, truth ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.

Id.; see also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Diane Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297 (2004).

²² Documentary: GOOD COPY, BAD COPY (Denmark, 2007) (on the state of copyright and culture), available at <http://www.goodcopybadcopy.net>. See also Jessica Litman, *Lawful Personal Use*, 85 TEXAS L. REV. 1871 (2007).

²³ *Lenz v. Universal Music Corp.*, No. C 07-3783 JF, 2010 WL 702466 (N.D. Cal. Feb. 25, 2010); Edenza, *Let’s Go Crazy #1*, YOUTUBE (Feb. 7, 2007), <http://www.youtube.com/watch?v=N1KjJHFWlhQ>; Chris Francescani, *The Home Video Prince Doesn’t Want You to See, Pa. Mom Fights Back with Lawsuit Against Music Company*, ABC NEWS, Oct. 26, 2007, available at <http://abcnews.go.com/TheLaw/story?id=3777651>.

²⁴ *Lenz v. Universal Music Corp.*, No. C 07-3783 JF, 2010 WL 702466 (N.D. Cal. Feb. 25, 2010) (finding for the user under the fair use doctrine). See also *Dancing Baby v. Universal*:

Those who once were solely consumers are now creating culture in ways the copyright act could never have predicted, and some are wondering if this has created a fundamental shift, necessitating a reform of current copyright law.²⁵ We argue that the shift in thinking may be achieved through a theoretical reworking of the phrase “traditional contours of copyright law,” and argue that this is a fundamental step for any reformulation of the copyright law itself within the new context of ubiquitous producers.

In the last five years, the courts have begun turning to the phrase “traditional contours of copyright law” as a tool for evaluating whether new amendments to the 1976 Copyright Act are constitutionally allowable. One recent Tenth Circuit decision, *Golan v. Gonzales*, held for the first time in the history of the Copyright Act²⁶ that an amendment was indeed unconstitutional because it violated the “traditional contours of copyright law.”²⁷ In

Baby wins! Assess Fair Use First, US Court Warns Copyright Holders, REGISTER, Aug. 25, 2008, http://www.theregister.co.uk/2008/08/25/dancing_baby_universal_dmca. As a result of these kinds of situations, YouTube has created a tool and the Content Verification Program, to assist copyright holders in situations where a user has illegally posted materials. See Content Verification Program, http://www.youtube.com/t/copyright_program (last visited October 30, 2010). Derek Slater, from Google, explained at Innovate/Activate in 2010 that the program allows copyright holders to place ads and make revenue off of the video that had been created by a user from the copyright holder materials. New forms of distribution and payment such as these abound, where the copyright holder is not the instigator, but the recipient. Innovate/Activate: An Unconference on Intellectual Property and Activism (2010), *available at* http://www.nyls.edu/centers/harlan_scholar_centers/institute_for_information_law_and_policy/events/innovate_activate/videos/.

²⁵ See, e.g., Pamela Samuelson, *Preliminary Thoughts on Copyright Reform Project*, 3 UTAH L. REV. 551 (2007); Pamela Samuelson, Presentation at the Tulane *Future of Copyright* Speaker Series (2009).

²⁶ See Stanford Law School Fair Use Project, <http://cyberlaw.stanford.edu/node/6149> (last visited November 1, 2010).

²⁷ *Golan v. Gonzales*, 501 F.3d 1179, 1184 (10th Cir. 2007); *Golan v. Holder*, 611 F. Supp. 2d 1165 (D. Colo. 2009) (Tenth Circuit held the removal of works from the public domain was a violation of the First Amendment and remanded to district court for First Amendment scrutiny). See also Krystal Joy Gallagher, *Golan v. Gonzales: An Opportunity to Reexamine the Relationship between First Amendment Rights and Copyright Protection*, 9 NEV. L.J. 453 (2009); Carrie Claiborne, *Golan v. Gonzales and the Changing Balance Between the First Amendment, Copyright Protection, and the Rest of the World*, 86 DENV. U. L. REV. 113 (2009); Johnathan N. Schildt, *One's Own Speech: First Amendment Protection for the Use of Public Domain Works in Golan v. Gonzales*, 58 DEPAUL L. REV. 219 (2008); J. Matthew Miller III, *The Trouble with Traditions: The Split Over Eldred's Traditional Contours Guidelines, How They Might be Applied, and Why They Ultimately Fail*, 11 TUL. J. TECH. & INTELL. PROP. 91 (2008); William McGinty, *First Amendment Rights to Protected Expression: What are the Traditional Contours of Copyright Law?*, 23 BERKELEY TECH. L.J. 1099 (2008); J. Blake Pinard, *Defending the Public Domain - The First Amendment, The Copyright Power, and The Potential of Golan v. Gonzales*, 61 OKLA. L. REV. 395 (2008); *Tenth Circuit Subjects Copyright Statute to First Amendment Scrutiny - Golan v. Gonzales*, 501 F.3d 1179 (10th Cir. 2007), 121 HARV. L. REV. 1945 (2008); Daniel Choi, *Golan v. Gonzales: The Stalemate between the First Amendment and Copyright Continues*, 9 N.C. J. L. & TECH. 219 (2008); Keith Glaser, *A Tune-Up on the Engine of Free Expression: The Traditional Contours of Copyright in Golan*, 18 DEPAUL J. ART. TECH. & INTELL. PROP. L. 185 (2007); David E. Shipley, *Congressional Authority over Intellectual Property Policy after Eldred v. Ashcroft: Deference, Empty Limitations, and Risks to the Public Domain*, 70 ALB. L. REV. 1255 (2007); Matthew Dean Stratton, *Will Lessig Succeed in Challenging the CTEA, Post-Eldred?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 893

spite of its use of this phrase, however, the courts have done little to define it.²⁸

The phrase was first judicially invoked in 2003 by the U.S. Supreme Court's *Eldred v. Ashcroft* opinion, addressing a case involving petitioners who questioned the legality of the 1998 Copyright Term Extension Act (CTEA), which added twenty years to the term of copyrighted works created after 1922.²⁹ The petitioners were users who depended on republishing public domain works as part of their business model, and the CTEA effectively had frozen, for twenty years, published works from coming into the public domain.³⁰ The petitioners wanted the court to find that such an extension required First Amendment scrutiny. The Court found to the contrary, however, with Justice Ginsburg writing, "when . . . Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."³¹ Copyright law has always extended terms for works already in existence, along with new works. This situation was no different.

The *Eldred* Court used the phrase "traditional contours of copyright" in a sort of off-handed way, towards the end of the opinion, without any further insight or guidance into what the phrase might mean.³² In *Golan*, the Tenth Circuit subsequently analyzed the Court's use in *Eldred* of the "traditional contours" phrase:

The *Eldred* Court did not define the 'traditional contours of copyright protection,' and we do not find, nor do the parties suggest that the phrase appears in any other federal authority that might shed light on its meaning. Nevertheless, the term seems to refer to something broader than copyright's built-in

(2005); Arlen W. Langvardt & Kyle T. Langvardt, *Unwise or Unconstitutional?: The Copyright Term Extension Act, The Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, 5 MINN. INTELL. PROP. REV. 193 (2004).

²⁸ Scholars have written a good deal about *Eldred* and the "traditional contours language." See generally Marshall Leaffer, *Life After Eldred: The Supreme Court and the Future of Copyright*, 30 WM. MITCHELL L. REV. 1597 (2004); Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J. L. & ARTS 397 (2007); Stephen M. McJohn, *Eldred's Aftermath: Tradition, the Copyright Clause, and the Constitutionality of Fair Use*, 10 MICH. TELECOMM. & TECH. L. REV. 95 (2003).

²⁹ 17 U.S.C. § 301-304 (2009).

³⁰ Dover Publications was one of the petitioners. Dover specializes in republishing of fiction and children's novels now in the public domain. Their website reads, in part, "Thank you for visiting Dover Publications. Since 1941, we've built our reputation by offering remarkable products at amazing prices." Dover Publications Home Page, About Dover, <http://www.doverpublications.com> (last visited Jan. 22, 2010). Previously, each year Dover Publications added new public domain works, and so businesses that depended on the availability of new public domain works were crippled by the additional term of copyright protection. See Brief of Petitioners at 18, *Eldred v. Ashcroft*, 537 U.S. 186 (May 20, 2002) (No. 01-618), available at <http://cyber.law.harvard.edu/openlaw/eldredvashcroft/supct/opening-brief.pdf>.

³¹ *Eldred*, 537 U.S. at 221.

³² *Eldred*, 537 U.S. at 221.

free speech accommodations.³³

In *Golan*, the court applied the “traditional contours of copyright” phrase that had first been articulated in *Eldred*.³⁴ The Plaintiffs in *Golan* were all groups or individuals again who relied on public domain works, but this time, the plaintiffs had actually been using the public domain works—creating new versions or merely playing the standard ones, when they suddenly found the music composition or film was re-copyrighted (or restored, as it has been called) by new legislation. With the enactment of Section 104A, works that had previously been in the public domain were now automatically under copyright, and so either the petitioners had to cease activities with these works, or obtain licenses from the now new copyright holders.³⁵ In many cases, the works at issue had been chosen by the petitioners explicitly because no fees or permissions were required.³⁶ The petitioners were groups with little to no budgets for licensing fees, and so any cost attached to the works prohibited their use. The plaintiffs argued that the legislature’s act of removing works that previously had been available in the public domain violated the traditional contours of copyright law, and therefore required First Amendment scrutiny. The Tenth Circuit in *Golan* set out to analyze and parse the phrase “traditional contours of copyright law.”³⁷

In reaching its decision, the *Golan* court for the first time gave shape to the “traditional contours” language, defining the phrase as a three-step process consisting of creation, a period of copyright protection, and finally a bringing of the creation into the public domain³⁸ (*see* Figure 1). The court explained, “[u]ntil [Section 104A], every statutory [copyright] scheme preserved the same sequence. Thus, by copyrighting works in the public domain, [Section 104A] has altered the ordinary copyright sequence.”³⁹ After further review, the court concluded, “[t]hus, [104A] deviates from the time-honored tradition of allowing works in the public domain to stay there.”⁴⁰

³³ *Golan v. Gonzales*, 501 F.3d 1179, 1184 (10th Cir. 2007).

³⁴ *Eldred*, 537 U.S. at 221.

³⁵ 17 U.S.C. § 104A(a)(1) (2002).

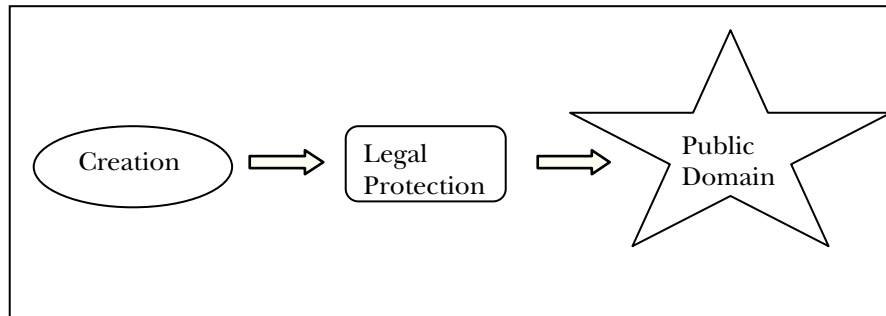
³⁶ *Golan v. Ashcroft*, 2001 U.S. Dist. Ct. Pleadings 1854B, ¶74.

³⁷ *Golan*, 501 F.3d at 1187.

³⁸ *Id.* at 1189.

³⁹ *Id.* at 1189.

⁴⁰ *Id.* at 1192.

Figure 1

The *Golan* court concentrated its analysis on the third prong, the public domain, because of the nature of the case before them. We see this as a good beginning, but we would like to extend the analysis in two ways. First, we concentrate on the transition between the first two categories.⁴¹ We know that term limits—where the *Eldred* court began—control the move from legal protection to public domain; but what triggers the move from creation to legal protection? Second, we place the discussion of traditional contours within a larger historical context, rather than within merely the narrow reading of the historical context of the public domain itself, which is where the *Golan* court focuses its energy. We feel that the “traditional contours” phrase holds great value in understanding contemporary issues, as with the case of copyright restoration, but we must begin to parse out the phrase—the functionality of the phrase itself (moving from one category to another) and the traditions to which the contours speak.

How does the transition from creation to legal copyright protection occur within a traditional contours context, particularly taking into account that the 1909 Copyright Act and the 1976 Copyright Act had very different ideas about the nature of this transition? For it was specifically this transition—when a work became eligible for federal copyright protection that caused tremendous struggle under the 1909 Act. Additionally, as the

⁴¹ For a discussion of the mechanism for legal protection, namely questions of authorship and originality within a theoretical and historical context, see Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets and Liberal Values in Early American Copyright*, 118 *YALE L. J.* 186 (2008). Another way to look at the second prong would be to consider what rights are included within the legal protection phase. See Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property*, ch. 3 (June 2005) (unpublished S.J.D. dissertation, Harvard University), available at <http://www.obracha.net/oi/oi.htm> (discussing the transformation of what legal protection of a copyrighted work included). Bracha pinpoints the 1879 Drone Copyright Treatise as a moment of transition where the rights connected with a work were not only the right of reproduction, but now included the right to control derivative uses, along with a limitation with fair use. *Id.*

Golan court noted, the legal transition from creation to copyright protection was dramatically altered from the 1909 to the 1976 Copyright Act.⁴² Under the 1909 Copyright Act, federal legal protection only occurred upon the act of publication, recognized as a required series of formal steps that gave proper notice of one's intent to enforce the copyright. In contrast, federal copyright protection under the 1976 Copyright Act arises automatically upon creation of the work, so long as the work is fixed in a tangible medium of expression, requiring no specific formal steps.⁴³ For example, under the 1909 Act, if a novel upon publication did not contain proper copyright notice, the work immediately fell into the public domain, free for anyone to use in any manner. However, under the 1976 Copyright Act, that same novel would automatically have been protected upon the author's placing of the words on the page (presuming original composition), and would be protected for the life of the author plus seventy years, without any further requirements or formalities.⁴⁴ The *Golan* court seems almost to stumble to explain why this dramatic change does not alter the traditional contours. We suggest there is a trigger that explains both processes: circulation.

We begin our analysis with a basic property law concept that every first-year law student learns: property law is about social relationships among people in regard to things.⁴⁵ A copyright is a form of property right, as it is a limited monopoly of rights granted by the government. Cultural works need law to create artificial boundaries of ownership in ways that land or a tangible object like a chair does not. Only one person can eat the same apple, but many can sing the same song. Without legal protection, a song would not be controllable once it was shared with others. Within a property context, then, a copyright creates relationships between the creator of the work, the government, and those that come into contact with the creative work. The government grants a temporary right of use to the work. In doing so, the work can now freely circulate without fear that someone else might exploit

⁴² *Golan*, 501 F.3d at 1189.

⁴³ The Copyright Act of 1976 eliminated many of the formalities required under the Copyright Act of 1909, such as renewal after twenty eight years. However, until 1989, notice of copyright printed on the work was still required. See DAVID NIMMER, 2-7 NIMMER ON COPYRIGHT § 7.01 (2010).

⁴⁴ 17 U.S.C. 102(a) (2009).

⁴⁵ See, for example, JOHN SPRANKLING & RAYMOND COLETTA, PROPERTY: A CONTEMPORARY APPROACH (1st ed. 2009); see also JESSE DUKEMINIER, ET. AL, PROPERTY (7th ed. 2010). See even the Wikipedia article for "property": "Scholars in the social sciences frequently conceive of property as a bundle of rights. They stress that property is not a relationship between people and things, but a relationship between people *with regard to* things." Property, WIKIPEDIA, <http://en.wikipedia.org/wiki/Property> (last visited Dec. 24, 2010) (emphasis in original).

its value without permission. But this temporary exclusive use is limited in two ways: first, the legislation allows exceptions for use during the copyright term, such as fair use and specific classroom uses;⁴⁶ second, once the limited monopoly expires, the work enters the public domain,⁴⁷ becoming unencumbered by any copyright restrictions, and then is fully exploitable in any manner by anyone.⁴⁸

We turn back to the triadic structure of “creation, legal protection, and public domain” as the process underlying the traditional contours of copyright law. If copyright law is about the social relationships surrounding an object (in this case, in culture fixed in a tangible form), then copyright law protects not the object, but the relationships to the object (the creator, the copyright holder, the user of that work). Legal copyright protection under the 1909 Act was triggered by publication.⁴⁹ In the absence of exchange, no federal protection was seen as necessary. It was only when social relations with the object were introduced that the 1909 Act stepped in, and for the thinking of the times, that occurred through publication. The transition, or trigger, then becomes circulation of the object, because it creates social relationships with that object.⁵⁰ Legal protection under the 1976 Act is triggered by fixation of the work in a tangible medium of expression.⁵¹ The change came about, in part, because determining when publication occurred became too unwieldy in an age in which the object itself was not published and circulated in the traditional contexts; radio, television, and film were all considered unpublished even though masses of people had watched and experienced them in the same way they would have read a book. Under the 1976 Copyright Act, a work, from its

⁴⁶ 17 U.S.C. 107 and 110(1) (2009).

⁴⁷ 17 U.S.C. 301-304 (2009).

⁴⁸ Interestingly, a distinction still exists where the object itself is protected by law, and one can even contract around copyright in many instances—that is, even if the work is in the public domain, one can put contract or access restrictions on the object itself. Museums do this all of the time, where patrons are not allowed to take pictures of public domain paintings, using the justification that the museum can put restrictions on what individuals do on their property, rather than the restriction coming from copyright law. Daniel J. Wakin, *A Historic Discovery, in Beethoven's Own Hand*, N.Y. TIMES, Oct. 13, 2005, at E1. Another recent example is the Beethoven manuscript recently discovered in 2005. The musical composition itself is in the public domain, but the anonymous buyer now holds the actual object, and so controls access to the work.

⁴⁹ 17 U.S.C. § 9 (2009).

⁵⁰ See generally, Elizabeth Townsend Gard, *Unpublished Work and the Public Domain: The Opening of a New Frontier*, 54 J. COPYRIGHT SOC'Y OF U.S.A. (2007). This thesis becomes more powerful when one considers that courts devised a “limited publication” category for when a work was circulated to a limited group of people for a limited purpose with further restrictions on distribution. If the publication was “limited,” then no general publication had occurred, and copyright notice was not required. The work remained protected by state common law with a right of first publication, the legal mechanism available to keep works safe until federal protection was obtained.

⁵¹ 17 U.S.C. 102(a) (2009).

inception, is protected. The social relationship begins upon the fixation of the work and at this time, the copyright holder gains the right of circulation of that work to the public.

The “creation, copyright, public domain” sequence of traditional contours of copyright situates the focus on the “thingness” of the cultural work, as it is fixed in its tangible medium of expression, but as the struggles of the twentieth and now twenty-first centuries demonstrate, the object itself is not always where the concern is placed—it was not just the film itself or the radio script that copyright owners needed to protect. Moreover, the moment when crossover from creation to copyright (through publication; through fixation) occurs is not always clear. We posit that rather than focusing on the materiality—the publication or fixation of a particular work—the transition from creation to protection should hinge on the concept of valuation—value manifesting in the act of circulation. For it is at the point of circulation that the 1909 Copyright Act proved unable to adjust.⁵² Likewise, it is at the point of new forms of circulation that we see the 1976 Copyright Act’s approach challenged, as well.⁵³

The *Golan* court, in its analysis of the third prong of the term “traditional contours of copyright law,” sought both a historical and functional context for its definition.⁵⁴ We also see history as playing a role in understanding the transformation of the needs of the law, both at the turn of our current century as well as the turn of the past century. We see the formulation of “traditional contours,” and even our addition of circulation, as historically contingent on the modernist framing of what constitutes copyright law. We also see the need for a further theoretical rooting of the term “circulation” to better understand functionally our view of what is occurring between the first two prongs. We turn next, then, to an historical contextualization of “tradition” within a modernist moment, subsequently connecting that contextualization to a functional and theoretical understanding of the “contours” of that tradition.

The *Golan* court did not define the step from creation to legal protection, even in its noting that the process of how one acquired a copyright had altered dramatically from the 1909 to the 1976 Copyright Act.⁵⁵ We have come to see that placing the triggering event at circulation makes sense of this transition, and also gives us a theoretical tool to navigate the future. This concept of

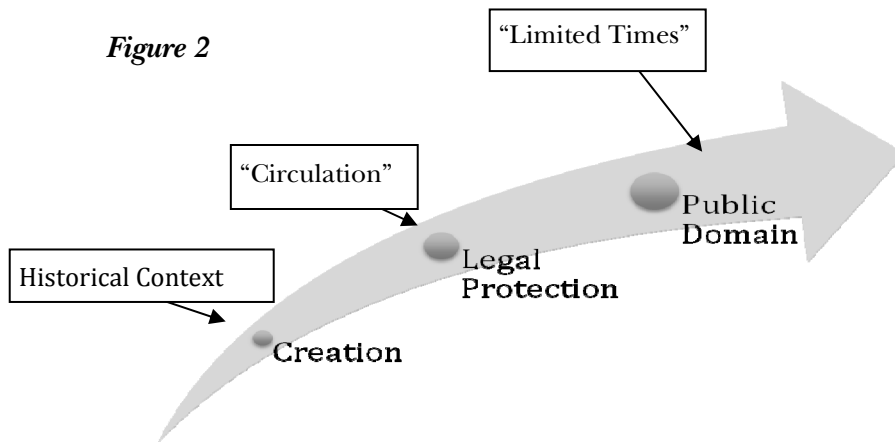
⁵² See Gard, *supra* note 50, for an explanation of a breakdown of the 1909 Copyright Act, particularly with the introduction of new technologies such as broadcasting and television.

⁵³ See, e.g., Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921 (2009).

⁵⁴ *Golan v. Gonzales*, 501 F.3d 1179, 1189 (10th Cir. 2007).

⁵⁵ The *Golan* court merely discussed function and history. *See id.*

circulation, however, fits within the historical and functional context of how circulation can occur for the given society. In this section, we explore the specific trigger the 1909 Act developed—appropriate for the conception of the historical moment, but that quickly became challenged by new technologies, and how we see the pattern repeated in the 1976 Copyright Act, and again with the 1996 WIPO Copyright Treaty.⁵⁶ We suggest that what all of these documents have in common is either that they grant protection in anticipation of or in the act of circulation itself of a work, or that they grant rights to the copyright holder to protect the work in its circulating form. We turn once again to the 1909 Act to understand the historical moment that has produced the value of circulation in a modernist configuration—a necessary turn in order to understand the postmodern condition of circulation.⁵⁷



⁵⁶ World Intellectual Property Organization Copyright Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17, at 1 (1997), 36 I.L.M. 70 [hereinafter WCT].

⁵⁷ Circulation within both a modernist and a postmodernist condition is, of course, driven by the same motive: profit within a capitalistic system. The qualitative difference is premised in materiality, however. The United States within the modernist period was experiencing for the first time mass production and the presence of tangible consumer goods increasingly infiltrating the many aspects of social life. While there is no question that the postmodern period has brought a hyper-intensification of the presence of consumer goods, the seamless fluidity of these goods, coupled both with the overseas relocation of the production base for the vast quantities of these goods (causing material production to be largely invisible) and the increase in the segment of the market comprised of intangible goods (typically a consequence of technological developments, and the basis for the common reference to the United States as an “information society”) creates a cultural experience of dematerialization. We contend that within the hyper-intensified postmodern cultural condition, circulation itself, though always the real foundation from which value arises, naturally becomes more apparent. Essential to examine, however, are the ways in which the dynamics of circulation within the modernist and postmodernist periods differ, thereby giving rise to qualitatively different experiences of the formation of value within culture.

II. THE “SHATTERING” OF TRADITION AND THE MAKING OF A MODERNIST “TRADITIONAL CONTOURS OF COPYRIGHT LAW”

“[A]pprehending the mere presence of things can become a difficult task”

Bill Brown⁵⁸

The traditional contours of which we speak are a relatively recent creation, and could more accurately be described as a modern tradition. Oren Bracha in *The Ideology of Authorship Revisited*⁵⁹ and Brad Sherman and Lionel Bently in *The Making of Modern Intellectual Property Law*⁶⁰ identify a fundamental shift in the thinking of copyright law both in the United States and the United Kingdom. Their works trace the shift to the rise of industrialization in the nineteenth century, and both works focus their inquiry on the period leading up to the enactment of the 1909 Copyright Act. These authors focus on the more narrow questions surrounding copyright law, namely authorship. Bracha believes the rise of the book publishing industry throughout the nineteenth century, and the turn of the book into a commodity of value (extending the interests of the book to the original book and any derivative works) is key.⁶¹ Sherman and Bently trace the transition of thinking about a work as a literary property emanating from its creator to an object to be sold.⁶² We place this modern shift within a larger context of industrialized capital, and also move the discussion into the twentieth century and the modernist condition. We want to understand not only the historical condition that gave rise to the thinking behind the 1909 Act, but also how the life of the Act was informed by its own period. In doing so, we assert that the traditional contours of which the *Eldred* and *Golan* courts speak is a modernist tradition, made from the experiences of industrialized mass production, and that when they speak of contours, it is with the 1909 Act and 1976 Act in mind, and only peripherally copyright from its beginnings. This transition was not easily swallowed. As an example of how this fundamental thinking played out, we turn to the literary example of Jack London's *Martin Eden*.

The 1909 Copyright Act was designed to address a broad

⁵⁸ BILL BROWN, A SENSE OF THINGS: THE OBJECT MATTER OF AMERICAN LITERATURE 1 (2004) (emphasis omitted) [hereinafter BROWN].

⁵⁹ Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008).

⁶⁰ BRAD SHERMAN & LIONEL BENTLEY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE (1999).

⁶¹ Bracha, *supra* note 59 at 210-211.

⁶² Sherman & Bentley, *supra* note 60 at 33-34.

category of works.⁶³ In fact, the broadening of copyrightable subject matter was something some found alarming.⁶⁴ In *The Nature of Copyright*, at the end of their chapter on the development of copyright in the early twentieth century, L. Ray Patterson and Stanley W. Lindberg write, “One further note: a complete assessment of copyright under the 1909 act requires a consideration of an additional development that is too seldom discussed—the trivialization of copyright.”⁶⁵ They attribute this trivialization to the extension of copyright protection

. . . to such ‘writings’ as ‘statuettes, bookends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays.’ Compare these ‘copyrightable works’ with newspapers—for which one court in the nineteenth century had actually refused to recognize copyright protection, on the grounds that they did not contribute to learning! That overly narrow ruling led to the 1909 act’s designation of newspapers as being copyrightable, but in the process the fundamental intent of copyright was seriously compromised with the simultaneous inclusion of so much extraneous baggage.⁶⁶

When situated in its historical moment of time, the 1909 Copyright Act’s fixation on the expansion of categories of “thingness” recognizably corresponds to developments of the modern corporation and industrial mass production—developments that are emblematic of a shift in value that would mark the modernist response through a good part of the twentieth century. To adequately conceptualize the 1909 Copyright Act, therefore, one need recognize the Act’s intrinsic relationship to the historical period within which it was formulated and enacted. The four-plus decades from the conclusion of the Civil War in 1865 to the passage of the 1909 Act mark a profound period of change in the United States. During this period, the activities and structures of the U.S. economic system were radically remade, and with these changes came an equally radical transformation of the lived experience of culture in the United States.⁶⁷ It is by no means an exaggeration to say that the creation of the 1909

⁶³ Works under the 1909 Copyright Act were strictly divided into categories such as books, periodicals, dramatic or dramatico-musical compositions, photographs, reproductions of a work of art, musical compositions, etc. See 17 USC § 5 (1909 Copyright Act).

⁶⁴ L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 88 (1991) [hereinafter PATTERSON]. This third major revision of the copyright act had a number of new elements previously not included, including work for hire, compulsory licensing for musical works, and an explicit right to copy.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ ALAN TRACHTENBERG, *THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE (AMERICAN CENTURY)* 121-22 (Eric Foner ed., 1982) [hereinafter TRACHTENBERG].

Copyright Act was in response to this transformation and that the Act's specific formulation manifestly exhibits the dynamics of the economic and cultural transformations of this historical period.

Among the most notable and outwardly visible of cultural changes occurring in these decades was the appearance of mass produced goods.⁶⁸ From the clothes people wore to the food they ate, from the tools of their labor to the implements of their personal hygiene, mass produced goods increasingly came to occupy all aspects of life.⁶⁹ An origin point of our own contemporary hyper-consumerist society, the second half of the nineteenth century marks the period in which agrarian and merchant-based capitalist economies (and, indeed, even financial markets) in the United States began to be eclipsed and soon were outstripped by mass manufacturing.⁷⁰ While in the present day we have grown somewhat accustomed to short product cycles and introduction through marketing of the newest and latest, for the average person living in the last decades of the nineteenth century, the introduction of the new must have been awe-inspiring as the market, through a feverish expansion of mass manufacturing, moved to exploit the many available realms of culture. In pursuit of profit, the market sought to make available anything and everything that individuals might desire. Marketers quickly came to recognize that desire was not finite; it too, with a little educational help advanced by a marketing department, could be manufactured, turning a mere individual into something much more valuable, a consumer.⁷¹

Less immediately apparent, but far more important to grasp, is the larger cultural remaking necessary to bring about this transformation to an economy of mass production. As one sociologist characterizes it, "[t]he period at the turn of the twentieth century marked the transformation from one way of life to another, from a society based on rural, agrarian, local, small-scale, individual relations to one based on urban, industrial, national, large-scale, and organizational relations."⁷² Economies, one must recognize, are spatial and temporal. They play out physically and in time as a series of relations among individuals engaged in particular actions in particular locations. In the last

⁶⁸ See WILLIAM R. LEACH, *LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE* 3-12 (1994); JAMES LIVINGSTON, *PRAGMATISM AND THE POLITICAL ECONOMY OF CULTURAL REVOLUTION, 1850-1940* 51-52 (1997).

⁶⁹ TRACHTENBERG, *supra* note 67, at 129-39.

⁷⁰ WILLIAM G. ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* 4-5 (1997) [hereinafter ROY].

⁷¹ PAUL A. BARAN & PAUL M. SWEETZ, *MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER* 114-31 (1966); RICHARD OHMANN, *SELLING CULTURE* 74-75 (1998) [hereinafter OHMANN].

⁷² ROY, *supra* note 70, at 3.

decades of the nineteenth century and at the turn into the twentieth, massive quantities of capital, much of which previously was limited to the financial realm, were being converted to productive capital within the realm of manufacturing, a development that brought with it a spatial system of mass production of goods, mass market distribution and consumption of those goods, and a rising, increasingly consumerist middle class to enact and oversee (as a professional managerial class) the spatial system's operations.⁷³ Moving in a relatively short period of time, substantial percentages of the population from rural, agrarian, sparsely-populated environments to urban, industrial, densely-settled ones, and creating for them new professional and social roles, enacted a profound reconfiguration of social space, dramatically altering the experience of everyday life, especially for, but not limited to, those positioned as part of the burgeoning middle class.⁷⁴

This capital transformation occurring at the end of the nineteenth and beginning of the twentieth centuries functioned to fundamentally remake the cultural experience by means of expanding the marketplace and bringing it ever more deeply into personal and private life. Describing the cultural conditions prior to this transformation, economic historian Harry Braverman wrote, “[i]n the earlier stage of [eighteenth- and nineteenth-century] industrial capitalism, the role of the family remained central in the productive process of society. While capitalism was preparing the destruction of that role, it had not yet penetrated into the daily life of the family and the community.”⁷⁵ These conditions, and along with them, the constitution of the family and the individual, radically changed, however, in the last decades of the nineteenth century as industrial manufacturing increasingly colonized the domestic spaces of culture through mass production of consumer goods.

One early example, food processing, serves to demonstrate the change in cultural dynamics that later was to occur throughout an increasing number of cultural activities. Food processing, previously “the province on the one side of the farm family, and on the other of the household,” underwent significant change as industrial capital “thrust itself between farm and household, and

⁷³ ROBERT WIEBE, *THE SEARCH FOR ORDER, 1877-1920*, 111-13 (1967) [hereinafter WIEBE]; ROY, *supra* note 70, at 4-5; OHMANN, *supra* note 71, at 118-23. For a succinct but cogent examination of economic transformation specifically within the realm of print publishing, including newspapers, books, and magazines, over the second half of the nineteenth century, see OHMANN, *supra* note 71 at 18-29.

⁷⁴ WIEBE, *supra* note 73, at 112-17; TRACHTENBERG, *supra* note 67, at 112-15; HARRY BRAVERMAN, *LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* 271-83 (1st ed., 1974) [hereinafter BRAVERMAN].

⁷⁵ BRAVERMAN, *supra* note 74, at 272.

appropriated all the processing functions of both, thus extending the commodity form of food in its semi-prepared or even fully-prepared forms.”⁷⁶ As the changing economy increasingly moved populations from rural agrarian lands to crowded urban centers, the available means for individual food production and preparation were substantially reduced, but so too was the barrier that previously had stood in the way of commodity expansion into this realm. The burgeoning industrial marketplace was quick to advance in these areas, making available to domestic households during this period such things as slaughtered livestock, baked goods, and canned fruits and vegetables, to name just a few.⁷⁷

The fulfillment of a vast array of social needs similarly was subsumed in these decades by the processes of industrialized mass production. As Braverman notes, “[a]s with food, so with clothing, shelter, household articles of all sorts: the range of commodity production extended itself rapidly.”⁷⁸ And through such means “the capitalist mode of production [began to] take . . . over the totality of individual, family, and social needs and, in subordinating them to the market, also reshape[d] them to serve the needs of capital.”⁷⁹ In sum, the massive capital transformations occurring during this period, particularly as they were realized through mass production of consumer goods, translated into reconfigurations of social relations in both space and time, that fundamentally reconstituted the cultural experience during this period.

This transformation could not have occurred, however, were it not for a reshaping of institutional and societal formations that reconfigured the forms and flows of capital in their relation to industry, the state, and the nation’s population. Among the most significant societal formations, as noted above, was that of a professional managerial class which arose to carry out the necessary operations of a modern corporate structure that functioned to subject a greater and greater range of societal operations to processes of industrialized mass production.⁸⁰ Through such a circuit of finance capital flooding into manufacturing, production processes being overseen by a vastly expanding managerial class, resultant mass consumer goods being distributed and marketed far more widely than before, and acquisition of those goods by middle class households that substituted such purchases for their previous means of local and

⁷⁶ *Id.* at 274.

⁷⁷ *Id.* at 275.

⁷⁸ *Id.*

⁷⁹ *Id.* at 271.

⁸⁰ BRAVERMAN, *supra* note 74, at 59-69, 271-283. *See also* OHMANN, *supra* note 71, at 118-172.

domestic production, a tightly knit interrelation was developed between the domestic and the professional spaces of middle class life at the turn into the twentieth century.⁸¹

This shift in focus analytically from material presence to the social relations producing that presence is, of course, a fundamental aspect of Karl Marx's analysis of capitalist dynamics. The commodity form, after all, approached from this viewpoint and interrogated as a material abstraction, initiates Marx's analysis in *Capital*.⁸² Following Marx's lead and further underscoring the relationship between material manifestation and social relations, Georg Lukács identifies the "problem of commodities" as the "the central, structural problem of capitalist society," leading him thereby to contend that it is only in "the structure of commodity-relations" that one can recognize "all the objective forms of bourgeois society together with all the subjective forms corresponding to them."⁸³

A Marxist articulation of the dynamics of the commodity form, particularly with attention paid to the occurrence of reification, unquestionably helps illuminate the profound social significance of the sudden appearance of a wide array of mass-produced goods and the reconfiguration of culture these developments wrought. Such an articulation underscores not only the important matters of what and how a society produces, as well as how society is spatially and temporally configured for that production, but also the intrinsic relationship between production and individual cultural experience. It is understandable that in a society that has come to be heavily occupied in a very short span of time by manufactured material goods and is in the midst of a deep reconfiguration to bring about that state of production, the presence of material objects—the very "thingness" of things played a substantive role in the shaping of one's own sense of self. As Bill Brown has observed, the late nineteenth century proved to be a period in which there is a notable "slippage between having (possessing a particular object) and being (the identification of one's self with that object)."⁸⁴

⁸¹ *Id.*

⁸² KARL MARX, CAPITAL 43-87 (Frederick Engels ed., 1967).

⁸³ GEORG LUKÁCS, HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS 83 (Rodney Livingstone trans., 1971) [hereinafter LUKÁCS].

⁸⁴ BROWN, *supra* note 58, at 13 (emphasis omitted). Brown's analysis distinctly advances a consideration of the inherent excess of "thingness," the ways in which material objects always intrinsically manifest more than their commodity-situated existence can entirely contain. Brown contends that in this excess, naturally magnified during this initial historical period of mass production of goods, one can recognize cultural possession, a haunting by things in a manner that in Brown's terminology served to organize desires, provoke fantasies, and assign new value and meaning. *Id.* at 12-14. On a slightly different note, but particularly pertinent to this article, Brown notes that William Carlos Williams' famous dictum "no idea but in things" first appeared in 1926 in an early lyric, "Paterson"

At a glance, the Marxist insight and directive seems almost rudimentary. Materiality necessitates spatial and temporal configuration, which inherently structurally organizes social relations. Consequently, to understand social relations, one must analytically track backwards from material conditions to the spatial and temporal configurations giving structure to those material conditions. Yet even in so doing, the more expansive question remains: how do spatio-temporal social relations account for, to use Lukács' language, 'subjective forms'?

To begin to respond to this question, it is useful first to observe a significant quality marking a cultural condition of industrial mass production. As the above brief discussion of food processing suggests, one unavoidably becomes ever more dependent on marketplace exchange for one's needs as the marketplace itself, seeking to supplant and dominate, forecloses alternative sources that might supply given items. In this way, within an environment of mass manufacturing of commodities, the marketplace continually advances ever more deeply in its infiltration of the locations of one's existence. Further, the marketplace by its nature is motivated to expand exponentially in the range of goods it might produce as it seeks to capture profit, a characteristic of the marketplace fully on display in the economic development of the United States through the twentieth century. Consequently, in any attempt to derive subjective forms from material conditions, one quickly encounters the vexing problem of peeling away for analysis the former from the latter, as the reified state of culture, a growing domination of mass-production of commodities, increasingly permeates existence. Within such conditions, one is tempted to believe that material objectification and consciousness are inseparable, or, as Lukács has described it, "the structure of reification progressively sinks more deeply, more fatefully and more definitively into the consciousness of man."⁸⁵ Such a tendency in thinking is readily discernible in Marx's analysis, undertaken as it was during this late nineteenth-century phase of historical transformation when the commodity form was fully on the rise. One likewise sees such thought central in the recognition during this period of a need to reformulate copyright law, leading only a short time later to the passage of the 1909 Act.

(William Carlos Williams, *Paterson*, in *SELECTED POEMS* 262 (Charles Tomlinson ed., 1985)); the same year that Henry Ford's ghostwritten article *Mass Production* for the *Encyclopedia Britannica*. DAVID A. HOUNSHELL, *FROM THE AMERICAN SYSTEM TO MASS PRODUCTION, 1800-1932: THE DEVELOPMENT OF MANUFACTURING TECHNOLOGY IN THE UNITED STATES* 1 (1984). Of this historical convergence, Brown writes, "American poetry's best-known decree appears as the inverse (or perhaps the specular completion) of American industry's best-known managerial contribution." BROWN, *supra* note 58, at 8.

⁸⁵ LUKÁCS, *supra* note 83, at 93.

Yet, fixating on the emergent materiality resulting from mass production of commodities or, indeed, even going further to observe the ways in which the mass manufacturing of material goods necessitated a spatial and temporal remaking of social relations fails to adequately account for the ways in which such cultural transformations alter the formation of subjectivity. In short, such approaches leave unanswered the question of how such cultural reconfigurations account for a transformation of consciousness.

A far more fundamental account lies in the notion of “exchangist practices.” As Georg Simmel notes, “[e]xchange is the purest and most developed kind of interaction, which shapes human life when it seeks to acquire substance and content.”⁸⁶ A sense of self, after all, cannot emerge without a context within which that self is situated. Anthony Giddens underscores this point in his three-fold observation that “[a]ll social interaction is situated interaction—situated in space and time,”⁸⁷ that “[i]nteraction depends upon the ‘positioning’ of individuals in the time-space contexts of activity,”⁸⁸ and that “[s]ocial relations concern the ‘positioning’ of individuals within a ‘social space’ of symbolic categories and ties.”⁸⁹

The most immediate and therefore fundamental site at which such exchange transacts is, of course, one’s own body, the site at which it is no mischaracterization to say that one is bodily constituted. As Henri LeFebvre argues, “[t]he living organism has neither meaning nor existence when considered in isolation from its extensions, from the space that it reaches and produces,” and “[e]very such organism is reflected and refracted in the changes that it wreaks . . . in its space.”⁹⁰ It is, in other words, through bodily transactions of environment that one comes to know one’s self in coming to a comprehension. As these insights of Simmel, Giddens, and LeFebvre help bring to light, within the dynamics of bodily exchange one can recognize not only foundational dynamics of ontology, how given spatio-temporal cultural conditions prove to configure being, but also foundational dynamics of epistemology, how those same conditions also prove to configure meaning.

Proceeding with an awareness of these aforementioned dynamics allows one in turn to reconsider the concept of ‘value.’

⁸⁶ GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 82 (David Frisby ed., Tom Bottomore & David Frisby trans., 3rd ed., Routledge 2004) (1978) [hereinafter SIMMEL].

⁸⁷ ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY* 86 (1984) [hereinafter GIDDENS].

⁸⁸ *Id.* at 89.

⁸⁹ *Id.*

⁹⁰ HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* 196 (Donald Nicholson-Smith trans., Blackwell 2000) (emphasis omitted).

While a Marxist perspective helps us recognize (among other things) that exchange value quickly overwhelms and comes to dominate use value in a societal environment of industrial mass production of goods, an analytic focus on exchange practices, i.e. the dynamics of circulation, helps illuminate the ways in which being, at its most immediate and intimate of constitutive sites, is configured ontologically and epistemologically through an experience of one's spatio-temporal environment.⁹¹

It is precisely at this point that one can identify a transcoding of "value" across the realms of a given cultural configuration. Various studies in this vein have been undertaken in recent decades, theorizing in particular the commonalities to be found in the notion of 'value' across the sociological, economic, linguistic, and psychological realms.⁹² Jean-Joseph Goux, for example, utilizes the Aristotelian and economic concept of the "general equivalent" ("a standard measure 'which, by making things commensurable, renders it possible to make them equal'")⁹³ as a means to explore the "structural homology among the various registers of exchange [that can] aptly guide an analysis of the historical correlations between particular symbolic institutions."⁹⁴ Value, in this way, can be directly connected to, as it recognizably is constitutively emergent with, the social relations of exchange occurring within the spatio-temporal configuration of a given historical period. Likewise, alterations in the production of value recognizably will occur with alterations of the spatio-temporal configuration.

This returns us with greater insight to the historical period that informed the 1909 Copyright Act, a period of great ferment just on the threshold of the emergent modernist cultural condition. The last decades of the nineteenth century saw the breaking up of old ways of life in the United States as agrarian- and mercantile-based economic configurations rapidly gave way to an emergent industrial mass production.⁹⁵ It would take almost until the middle of the twentieth century for the massive upheaval that was unleashed during this period to achieve relative stability as a cultural economic system. This rising modernist phase,

⁹¹ SIMMEL, *supra* note 86, at 59-60.

⁹² JEAN-JOSEPH GOUX, *THE COINERS OF LANGUAGE* (Jennifer Curtiss Gage trans., 1994); JEAN-JOSEPH GOUX, *SYMBOLIC ECONOMIES AFTER MARX AND FREUD* (Jennifer Curtiss Gage trans., 1990) [hereinafter *SYMBOLIC*]; DAVID GRAEBER, *TOWARD AN ANTHROPOLOGICAL THEORY OF VALUE: THE FALSE COIN OF OUR OWN DREAMS* (2001); MARC SHELL, *MONEY, LANGUAGE AND THOUGHT: LITERARY AND PHILOSOPHICAL ECONOMIES FROM THE MEDIEVAL TO THE MODERN ERA* (1982); MARC SHELL, *THE ECONOMY OF LITERATURE* (1978).

⁹³ *SYMBOLIC*, *supra* note 92, at 3 (quoting ARISTOTLE, *THE NICHOMACHEAN ETHICS* 134 (J.A.K. Thompson trans., 1953)).

⁹⁴ *SYMBOLIC*, *supra* note 92, at 4.

⁹⁵ David Herbert Donald, *Foreword* to WIEBE, *supra* note 73, at vii-xiv.

termed “Fordism” by some (in reference to Henry Ford’s vision of “a new kind of rationalized, modernist, and populist democratic society,”⁹⁶ and identified as being initiated in 1914)⁹⁷ is seen as having reached its apex in 1944 at the conclusion of World War II with the instituting of the Bretton Woods Agreements,⁹⁸ an international political and monetary scheme that would hold sway until the early 1970s.⁹⁹ The stability of this modernist configuration was premised to some extent on the particular relational positions the system established for industry owners, management, labor, and the state, along with the position of U.S. industry in relation to the rest of the world.¹⁰⁰ In the broadest sense, these elements begin to suggest the cultural space within which social relations manifested through this historical period and, likewise, the emergence of a new and concordant cultural valuation.

However, once established after World War II, the stability of the modernist economic configuration of Fordism was fairly short lived. The rise of competing industrial economies of other nations in the 1950s and 1960s (initially aided by the United States following World War II largely to insure the existence of viable foreign markets to absorb the massive output of U.S. industry), along with the maturation of international banking and the development of foreign currency markets, brought challenge to the dominance of the United States within that system.¹⁰¹ The fissures that appeared in the system in these postwar decades by the early 1970s became full ruptures, and quite quickly the modernist economic configuration of Fordism gave way.¹⁰²

Since that time a new configuration has been emergent, a postmodernist, post-Fordist configuration some have termed “flexible accumulation”¹⁰³ but is more commonly recognized by the general term “globalization.”¹⁰⁴ In this period, production and consumption of goods has continued to expand even as they have become ever more adaptable, drawing more and more parts of the

⁹⁶ Harvey, *supra* note 13.

⁹⁷ Harvey, *supra* note 13, at 125.

⁹⁸ Articles of Agreement of the International Monetary Fund, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39; Articles of Agreement of the International Bank for Reconstruction and Development, July 22, 1944, 60 Stat. 1440, 2 U.N.T.S. 134.

⁹⁹ Harvey, *supra* note 13, at 125-40; See also BARRY EICHENGREEN, GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM 93-135 (1996) [hereinafter EICHENGREEN].

¹⁰⁰ *Id.*

¹⁰¹ MICHAEL MOFFITT, THE WORLD’S MONEY: INTERNATIONAL BANKING FROM BRETTON WOODS TO THE BRINK OF INSOLVENCY 42-92 (1983) [hereinafter WORLD’S].

¹⁰² WORLD’S, *supra* note 101, at 29-40; Harvey, *supra* note 13, at 140-45; EICHENGREEN, *supra* note 99, at 136-37.

¹⁰³ Harvey, *supra* note 13, at 147.

¹⁰⁴ DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE 2-31 (1999).

world into the market system, while the major bases of manufacturing have been relocated to cheaper labor markets around the globe. Labor in the United States in particular, but also in other fully-developed industrialized nations, increasingly has become information and service sector based, while the cultural experience in these countries increasingly has become one of consumption. The manufacture of goods occurs almost invisibly and the appearance of those goods infinitely arrayed on store shelves seems to happen almost magically. In addition, a massive expansion of the financial sector, finding its roots in the very developments that brought about the demise of the Bretton Woods Agreements and having grown to dwarf the value in manufactured goods,¹⁰⁵ has further contributed to a cultural experience of dematerialization in the United States and other fully-developed industrialized nations.¹⁰⁶

Yet, as the foregoing account makes clear, the cultural experience of dematerialization presently felt in some locations is the result of the global system's spatial configuration and distribution of production and consumption. There is no question that more material goods than ever before are being produced. While clear distinctions between Fordist and post-Fordist economic configurations can be drawn, both recognizably are spatio-temporal formations organized to manage mass production, and, as such, can be traced back to the transformations at the end of the nineteenth century when these activities were initiated. There is little doubt that the individual experience of cultural change occurring at the end of the nineteenth century must have been profound. The spatial redistribution of cultural activities coupled with the sudden and growing pervasiveness of material goods must have naturally led to a manifestation of value that was intricately bound up with material qualities. However, as subsequent historical spatial configurations through the twentieth century and up to the present show, what ultimately proves more fundamental than the material state of culture, even as material elements remain significant and influential, is a society's exchange practices, or its manner of circulation.

We contend that the important reformulation of copyright law that occurred at the turn into the twentieth century, made manifest in the 1909 Copyright Act, is marked by this misconception of valuation. This misconception has continued to be inscribed in the thinking and developments in this area of law

¹⁰⁵ RAMESH F. RAMSARAN, AN INTRODUCTION TO INTERNATIONAL MONEY AND FINANCE 3 (1998).

¹⁰⁶ Harvey, *supra* note 13, at 141-72.

through the twentieth century and up to the present, including the 1976 Copyright Act. To demonstrate the intrinsic nature of this thinking at the beginning of the twentieth century, we turn next to a reading of the 1909 Copyright Act in conjunction with Jack London's *Martin Eden*, a popular novel from the same historical moment that vividly renders the cultural influence of these transformative changes.¹⁰⁷

III. *MARTIN EDEN* EXPLAINS THE 1909 COPYRIGHT ACT

I have not changed, though my sudden apparent appreciation in value compels me constantly to reassure myself on that point. I've got the same flesh on my bones, the same ten fingers and toes. I am the same.

Jack London

Published the same year as the enactment of the 1909 Copyright Act, London's novel *Martin Eden* seems to capture the cultural moment—the fears, assumptions and expectations—upon which the Congress and interested parties who had weighed in during the 1909 Act operation. Jack London's title character in *Martin Eden* illustrates the basic transformation of a work in the minds of the early twentieth century, and it is this artificial transformation that Eden finds so troubling. He is not at all comfortable with the assumptions of the system, which for our purposes surround the legal transformation of a work upon publication.

Brad Sherman and Lionel Bently in *The Making of Modern Intellectual Property Law, The British Experience* identify a shift in thinking from a pre-modern world, focused on creative or intellectual labor as something to be legally protected, to a modern concept of creativity as embodied in the object.¹⁰⁸ They trace the shift in copyright law to the *Donaldson v. Becket* decision,¹⁰⁹ where they saw a shift from an ontological status of literary property to what impact or consequential reasoning if perpetual common law rights are granted in addition to the statutory protection under the Statute of Anne.¹¹⁰ The focus became on the resulting product; the notion that the object being created defined what was legally protected, rather than focusing on the creative labor that went into creating the work.¹¹¹ Sherman and Bently explain that “rather than valuing the labour embodied

¹⁰⁷ JACK LONDON, *MARTIN EDEN* (Penguin American Library 1984) (1909).

¹⁰⁸ SHERMAN & BENTLY, *supra* note 60, at 39; Statute of Anne, 1710, 8 Ann., c. 19, § 1 (Eng.). See generally *Donaldson v. Becket*, (1774) 1 Eng. Rep. 837.

¹⁰⁹ SHERMAN & BENTLY, *supra* note 60, at 39.

¹¹⁰ *Id.* at 47.

¹¹¹ *Id.* at 174.

within a particular object, the law came to focus on the macro-economic value of the object; on the contribution it made to learning and progress or, as we would now say, GNP or productivity."¹¹² In many ways, the character of Martin Eden can be seen as embodying this shift from value in the work as embodying the labor of the mind or creative labor, to one wherein value derives from its value as a commodity. It is this shift that is embodied in the 1909 Copyright Act.

Within the maelstrom of socio-spatial forces active at the turn into the twentieth century, the title character of Jack London's *Martin Eden* engages in a bodily struggle of subjective formation. Raised knowing only working class conditions laden with physical labor, Martin, as a young man, unexpectedly finds himself exposed to the emergent middle-class environment of professional work and domestic society. Entranced by the discourse of ideas he hears espoused by the individuals occupying this middle-class space, Martin resolves to educate himself so that he might cross the class divide and join middle-class ranks. Yet, even as he dedicates himself to the written word and the pursuit of a life of the mind, he finds himself continually confronted by economic crisis. In various instances, when Martin finds himself unable to meet his financial obligations, he returns to his more familiar working class means of support. These working class positions include laboring on board ship and in a professional laundry. Martin indefatigably strives throughout the novel, to make his newfound intellectual work yield compensation equal to what he is able to earn through his physical labor, demonstrating a belief on his part that both forms of work are of a like nature in terms of their economies. At this intersection, Martin's struggle proves itself bound up with the spatial dynamics of regimes of accumulation. This is especially recognizable through the novel's renderings of the nature of the labor Martin performs, the nature of the goods he acts upon or produces, and most importantly, the socio-structural valuation constitutively emergent as part of late nineteenth-century pre-Fordist spatial formations.

It was against the backdrop of cultural change occurring at the end of the nineteenth century and beginning of the twentieth that the 1909 Copyright Act was being debated and enacted. We see Martin's goals of wanting to be a writer are established as part of his initial encounter dining in a middle-class household. The special experience profoundly affects Martin. As the novel indicates,

[u]p to then he had accepted existence, as he had lived it with

¹¹² *Id.*

all about him, as a good thing. He never questioned it, except when he read books; but then, they were only books, fairy stories of a fairer and impossible world. But now he had seen that world, possible and real, with a flower of a woman called Ruth in the midmost center of it.¹¹³

As a result, he aspires to remake himself intellectually, believing that such transformation will grant him a subject position within the world of middle class commerce and, consequently, make him acceptable as marriage material for Ruth. This action is the central narrative arc of the novel. For our purposes, it provides a window into the world of writing and publishing at the time of the enactment of the 1909 Copyright Act.

In pursuit of his newly identified goals, Martin returns a short time after the dinner engagement to speak with Ruth in order to express his desires and seek her advice. He tells her that he “was never inside a house like this,” and that his exposure to it makes him “want to breath[e] air like you get in this house—air that is filled with books, and pictures, and beautiful things, where people talk in low voices an’ are clean, an’ their thoughts are clean.”¹¹⁴ Significantly, Martin equates what he wants not simply with a particular position within the workforce or level of economic remuneration; he conceives of it instead as a whole way of life and as a space that one bodily occupies and exists within, even to the extent of breathing in a particular sort of air. To achieve his new goals, Ruth offers Martin advice: “You should go back and finish grammar school, and then go through high school and university.”¹¹⁵ Between 1880 and 1900, the availability and accessibility of education had changed. College became the means through which “young people would qualify themselves through knowledge and skills for advancement in business or—after graduate study—in the professions.”¹¹⁶

Evident in this transformation of the educational spaces of culture is a process of socialization recognizably operating throughout the emergent pre-Fordist middle-class spatial environment: “children [of the professional managerial class] played in the same streets and parks, went to the same schools and Sunday schools, had their own social affiliations and organizations, grew into common habits of consumption and entertainment, went with parents to class-approved vacation sites, attended the same colleges.”¹¹⁷ These middle-class spatial environments played

¹¹³ LONDON, *supra* note 107, at 77.

¹¹⁴ *Id.* at 97.

¹¹⁵ LONDON, *supra* note 107, at 98.

¹¹⁶ OHMANN, *supra* note 71, at 118-23.

¹¹⁷ *Id.* at 161.

an essential role in socialization, and the construction of knowledge imparted within these contexts cannot be separated from the socializing function.¹¹⁸ Education, then, far more than simply an exposure to a “higher” body of knowledge was an advancement of embodied subjectivity. It was a socialization into the dynamics of the emergent middle-class environment that simultaneously functioned to produce an embodiment of subjectivity that inherently possessed a much greater opportunity to influence and shape the emergent formations of pre-Fordist social space going forward.¹¹⁹

Martin decides to pursue making a living as a writer, instead of pursuing education, as Ruth suggested, or, alternatively, apprenticing with her father’s business which would allow him to take a “position,” as in the case of Charles Butler, who works for Ruth’s father. Martin perceives his own efforts as distinct from Butler’s. Because Butler’s course was not undertaken “for love of a woman, or for attainment of beauty,”¹²⁰ Martin cannot accept Butler’s course of action because they lack what he perceives to be an objective element of value, an element Martin conceptualizes simultaneously as equivalent to the middle-class space, yet not governed by middle-class, socio-spacial, economic forces. As literary critic Chris Gair points out, “[t]he only differences [between Martin’s and Butler’s pursuits] lie in Ruth Morse’s inability to recognize the emergent middle-class status of the writer as self-employed professional, and Martin’s artificial division of his own occupation into the ‘attainment of beauty’ and the pursuit of a career.”¹²¹ Both perspectives underscore the significance of the changing role of the writer within the emergent configurations of the economy.

As literary historian Christopher P. Wilson explored elsewhere, “at the turn of the century, a new combination of market forces had come into operation, and the literature produced for that market was directly shaped by it.”¹²² While Ruth’s dismissal of Martin’s pursuits demonstrates the uneven development of professionalizing forces occurring at the turn into the twentieth century, Martin’s division of thinking is even more significant as it reveals the spatial nature of the conflict in value exhibited by his struggle for an embodiment of subjectivity within the dynamic forces of the emergent middle-class environment.

This spatial conflict of value is displayed in Martin’s

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ LONDON, *supra* note 107, at 112.

¹²¹ Chris Gair, “A Trade Like Anything Else”: *Martin Eden and the Literary Marketplace*, in 19.2 *ESSAYS IN LITERATURE* 246-59, 248 (Fall 1992).

¹²² *Id.* at 246.

frustration over the publishing industry's consistent rejection of his serious written work, which he believes is objectively of superior aesthetic quality.¹²³ The rejection of his serious work compels Martin to examine his "hack-work."¹²⁴ He utilizes a formula to create an assembly line process where "in the course of a half an hour [Martin is able] to frame up a dozen or so storiottes" which he knows will satisfy the demands of the reviewing editors.¹²⁵ Martin employs these means in order to generate sustaining income. Of course, he applies this "mechanical" process only to his "hack-work," while his devotion to his serious writing remains as committed as ever. In this division of work lies the distinction between Ruth's statement of writing being "a trade, like anything else," a belief that Martin largely shares and acts upon, and the valuation Martin simultaneously holds of it as beyond the scope of mere commerce, finding it instead an objectively measurable aesthetic value.

In sum, Martin acknowledges the existence of a social economy and he recognizes that valuation results from the processes of a social system of exchange (certainly recognizable in this historical period's dramatically increased circuits of finance, production, distribution, marketing and consumption). Yet, he simultaneously insists on maintaining a conceptualization of objective value premised on the foundation untouched by social or market forces, a foundation that localizes the exchange between laborer and others and thereby substantially constrains capital's ability to determine socio-spatial configurations. It is this duality of value that underpins the central narrative action of the novel as Martin's objective valuation increasingly comes into tension with the pre-Fordist dynamics of value generated through social circulation. As Sherman and Bently found, "[w]ith the move away from the labour embodied in the creation towards the object itself, [the difficulty of labor and creation being not readily susceptible to quantification] were resolved; while it was difficult to place labour in a form for it be calculated, the close work and the contribution that it made to the economy could be calculated."¹²⁶

It is with this background that the 1909 Copyright Act was being debated and enacted. Martin finally succeeds in having his serious work published and, as a result, he quickly becomes both well known and well off. In response to his sudden success, Martin

¹²³ LONDON, *supra* note 107, at 300.

¹²⁴ *Id.*

¹²⁵ *Id.* at 301.

¹²⁶ SHERMAN & BENTLY, *supra* note 60, at 180 (referring to J. WAGGETT, LAW AND PRACTICE RELATING TO THE PROLONGATION OF THE TERM OF LETTERS PATENT FOR INVENTIONS (1887)).

finds that the middle-class society that shunned him for his ways of thinking now come to embrace him fully.¹²⁷ Yet Martin cannot understand this reversal in his reception because the work that acquired him fortune and accolades was “work performed” during the time when middle-class society shunned him for expressing those same views.¹²⁸ Martin wonders how his written work at one point makes him a pariah and at another point makes him socially desirable when the content of that work has not changed.¹²⁹ It is this point that bears so critically in reading the 1909 Copyright Act, for we posit, that the 1909 Copyright Act legally mimics the relationship Martin finds himself in with society, and it is this short-sidedness that is its undoing.

Martin’s confusion in this respect comes to center on a dinner invitation he receives from Judge Blount, a respected society member who Martin has met through the Morses.¹³⁰ This invitation is a “little thing” that Martin’s inability to come to terms with soon starts “to become a big thing” for him. On an earlier occasion, Judge Blount had ridiculed Martin’s thinking, and in return, Martin had insulted him. It makes no sense to Martin, therefore, why the Judge would invite him to dinner when he “had not changed” and was still “the same Martin Eden.”¹³¹ The only difference of this “work performed” is that it had since “appeared inside the covers of books,” which is to say that it had successfully circulated socially.¹³² We believe it is this distinction—successful circulation of a work socially that created value: so, too, with the 1909 Copyright Act.

The 1909 Copyright Act premised protection on the publication of books—the free circulation to a general public of a work. Until that point, a work was protected by state common law, which carried with it the legal right of “first publication.” The worth only attached at publication—the work transformed into something legally worthy of protection. The reproduction for sale was what created value, and not the aesthetic content. For Martin,

¹²⁷ LONDON, *supra* note 107, at 437.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Martin acknowledges the existence of a social economy and he recognizes that valuation results from the processes of a social system of exchange (certainly recognizable in this historical period’s dramatically increased circuits of finance, production, distribution, marketing and consumption). Yet, simultaneously, he insists on maintaining a conceptualization of objective value premised on the foundation untouched by social or market forces, a foundation that localizes the exchange between laborer and others and thereby substantially constrains capital’s ability to determine socio-spatial configurations. It is this duality of value that underpins the central narrative action of the novel as Martin’s objective valuation increasingly comes into tension with the pre-Fordist dynamics of value generated through social circulation.

¹³² LONDON, *supra* note 107, at 437.

he can see no rationale in the Judge's accrediting him with intellectual or social standing because of this shift from a private work to one publicly circulating, and therefore finds Judge Blount's invitation to dinner to be "not for any real value, but a pure fictitious value."¹³³ It is interesting to note that it was a judge that placed central importance on the transformation of the work into the public—for it was the law itself that made this transformation fully legitimate.

The only way Martin can conceptualize Judge Blount's valuation is by means of defining it as "fictitious" and by setting it in opposition to another valuation he defines as "real." As Martin's division between his "hack-work" and his serious work demonstrates, Martin holds out against the notion of a purely market-determined valuation. It is only his "hack-work," writing he himself identifies as of lesser value, that he is willing to subject to pure market forces, largely because he is able to conceive of that process as nearly mechanical in its operations. It is to him akin to a simple exchange of labor for designated compensation. And in fact, as the Patterson quote that began this Part expressed, many believed the 1909 Copyright Act had succumbed to just such "trivializations of copyright"—to the protection of industry beyond aesthetics, and that this shifted the nature of authorship to a property-based, rather than a regulatory system. But with the reliance on a product-focused mentality, much that was not conceived as fungible products were left out of the definition—even for Martin.

Martin presumes that the "work performed"—his previously accomplished serious work—is an identifiable product and should transact in a similar manner, albeit with a recognized objective value. Yet, just as the transformations within the sphere of manufacturing by way of massive infusions of capital and spatial reconfigurations of social structures functioned to produce a huge expansion of surplus value within the circuit of production, so too did these processes massively expand the market and circulation of goods produced by these transformations.¹³⁴ In short, as finance capital became socialized, the market for consumption did as well, and with it the laws that protect consumption, including the 1909 Copyright Act.¹³⁵ It is this transformative spatial dynamic of pre-Fordist space that Martin struggles against, and within which the 1909 Copyright Act was born.

Martin's writings as products take on a fictitious quality when

¹³³ *Id.*

¹³⁴ WILLIAM ROY, *SOCIALIZING CAPITAL: THE RISE OF THE LARGE INDUSTRIAL CORPORATION IN AMERICA* 4-5 (1997); Braverman, *supra* note 74, at 281.

¹³⁵ *Id.*

it circulates in a wider and more diffused manner than is possible in a localized and immediate exchange of physical labor for payment. Unable to comprehend the increasingly extended social context within which his written work is consumed and the value it accrues there, Martin is left “puzzled” and the “small thing” soon becomes a “big thing,” namely Martin’s disillusionment with spatial conditions.¹³⁶ Ironically, the embracing of the consumption of goods—a concept embraced in the 1909 Copyright Act—would be its undoing, when consumption required no physical embodiment of a good to sell.¹³⁷ Thus, we see from the beginning, an acknowledgment of a gap in the form of “works not reproduced for sale,” but the 1909 Copyright Act would never quite be able to fit nonconsuming goods easily within its law. We argue this is because, like the middle-class society surrounding Martin Eden, they could only imagine a world where books, art and other goods were consumed in the same manner as food. Where Martin saw the value of his “serious” work long before its publication, in this world, publication was the marker to entry into a system of value.

Martin’s success occurs as a consequence of reproduction and social circulation—two key elements for receiving federal protection under the 1909 Copyright Act. Though the substance of his ideas and his literary artistry are not insignificant, they are clearly secondary to the promotion of his name and persona once he is established. The disconnect between these two worlds ultimately is Martin’s undoing, as he commits suicide by drowning.¹³⁸ London’s novel, most simply, portrays Martin’s quest to move from the working class to the middle class and his concomitant discovery that middle-class values are not, as he believed, grounded in an object foundation. London’s novel, however, portrays far more. When one situates the novel and Martin’s progression more fully within the context of the historical moment, one can see that Martin stands at a cultural intersection of economic forces, as industrialized capital formations in the late nineteenth century strove to dominate the socio-spatial environment and eliminate vestiges of prior regimes of accumulation.

Jack London’s novel *Martin Eden* in many ways exemplifies both the world before and in the midst of mass industrialized cultural protection, for he sees some of his writings as serious, literary masterpieces and others as “hack-work,” harkening to an industrialized process in their very creation. As Bently and

¹³⁶ LONDON, *supra* note 107, at 437.

¹³⁷ For example, radio is not circulated as a physical good.

¹³⁸ LONDON, *supra* note 107, at 480-482.

Sherman found, “[w]ith the move away from the labour embodied in the creation towards the object itself, [the difficulty of labor and creation . . . [being] not readily susceptible to quantification] were resolved; while it was difficult to place labour in a form for it be calculated, the close work and the contribution that it made to the economy could be calculated.”¹³⁹ Ironically, the focus on the consumption of goods—a concept embraced in the 1909 Copyright Act—would be the law’s undoing when consumption required no physical embodiment of a good to sell. We argue this is because, like the middle-class society surrounding *Martin Eden*, the legislators drafting the 1909 Act could only imagine a world in which books, art, and other goods were consumed in the same manner as food. Where Martin saw the value of his “serious” work long before its publication, in this world, publication was the marker to entry into a system of value.

What the novel renders, then, is not merely a character’s attempt to move from a working-class space to a middle-class space, but a character’s struggle with subjectivity and structural valuation in a cultural environment undergoing fundamental transformation. It was within this environment of fundamental transformation that the 1909 Copyright Act attempted to modify and address the emergent valuation of the day. But, in doing so, the Act placed value on what proved to be Martin’s undoing—the social circulation of the “work performed” as the moment of value.

In effect, the kind of before and after moments rendered in *Martin Eden* receive full expression in Walter Benjamin’s essay *The Work of Art in the Age of Mechanical Reproduction*.¹⁴⁰ Writing twenty-five years later within the full bloom of the modernist cultural condition, this Frankfurt school theorist observes mass industrialization causing a “liquidation of the traditional value of the cultural heritage” and a “tremendous shattering of tradition,” the tradition of which Bently and Sherman wrote, and a replacement of that world with something entirely distinct.¹⁴¹ The new world is the “hack-work” of *Martin Eden* and the “trivialization of copyright” of Patterson and Lindberg made fully manifest. We call it the modernist traditional contours.

As locked in the struggles of the moment as *Martin Eden* was, Benjamin seems forward-thinking to us today, and yet, he too was writing about his historical moment: “that which withers in the age of mechanical reproduction is the aura of the work of art.”¹⁴² Benjamin begins with the notion that art, in principle, has always

¹³⁹ SHERMAN & BENTLY, *supra* note 60, at 180.

¹⁴⁰ See generally, Benjamin, *supra* note 2.

¹⁴¹ SHERMAN & BENTLY, *supra* note 60, at 180.

¹⁴² Benjamin, *supra* note 2, at 221.

been reproducible, but mechanical reproduction “represents something new” from the printing press through to lithography.¹⁴³ He then explains, “[a]round 1900 technical reproduction had reached a standard that not only permitted it to reproduce all transmitted works of art and thus to cause the most profound change in their impact on the public; it also had captured a place of its own among the artistic processes.”¹⁴⁴

What Benjamin is expressing in his essay is specifically characteristic of the modernist cultural configuration of exchange practices embedded in industrialized mass production. This was a distinct break from the cultural configuration that had preceded the modernist moment, and would again be broken up with the transition into a postmodernist cultural condition. Each of these cultural configurations intrinsically gives rise to their own construction of valuation in their constitutive element of their respective exchange practices.

We contend that the important reformulation of society and culture that occurred at the turn of the twentieth century was made manifest in the 1909 Copyright Act. This forms the historical underpinnings of our current traditional contours. The 1909 Act reflects the product of an industrialized, modernist configuration. It is only when that cultural configuration increasingly failed to contain emergent dynamics, such as new forms of culture like radio, film, and television that these new forms of culture contained different forms of circulation that the modernist 1909 Act could not elegantly adapt.

IV. THE EARLY-MODERN DRAMATISTS’ PRESIDENT UNDERSTANDING OF VALUE

Martin Eden might give one the impression that the world of 1909 was not ready for change. We have evidence, however, that some individuals already understood that the value of a cultural work lay not in its distribution of physical copies, but in the circulatory nature of the economy providing context for the object and the experience of the object. The legislative testimony of the dramatists presents one such example of the awareness of the world beyond copies of the work itself that circulation held value.¹⁴⁵

The 1909 Act was emblematic of its time period. The Act focused on protecting tangible goods that circulated to the

¹⁴³ Benjamin, *supra* note 2, at 218.

¹⁴⁴ LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT, Vol. 5, p. 21 (E. Fulton Brylawski & Abe Goldman eds., 1976) [hereinafter HISTORY].

¹⁴⁵ This is evident from the addition of the category, “works not reproduced for sale,” under Section 12 of the 1909 Copyright Act.

general public.¹⁴⁶ But even in the hearings leading up to its enactment, we see a conversation that brings home the point that not all works circulate as tangible goods, yet they still merit federal protection from copyright infringement. We turn to the testimony of the producers of dramas, who came before Congress with particular concerns. Mr. Ligon Johnson, representing the National Association of Theatrical Managers (“which embraces practically all the producing managers of America”),¹⁴⁷ explained that within the industry of theatrical productions, ordinarily the play is not published.¹⁴⁸ Representative Currier could not understand: “The people whom you represent do not publish these plays?” Mr. Johnson, responded, “No; they do not.”

Representative Currier: They do not multiply copies of them?

Mr. Johnson: No, sir.

Representative Currier: They do not sell them?

Mr. Johnson: No, sir.

Representative Currier. They do not receive royalties from the copies, but the royalty comes from the production of the unpublished play. . . .

Mr. Johnson: That is sometimes done abroad, but I have never known of an instance of it in America. I think the dramatists desire to reserve the right to publish, but from the producer’s end of it we know nothing about the publishing of any manuscript nor am I now familiar with a single instance of it.

The Chairman: You recognize the fact, however, that if it were published it would occupy an entirely different position as far as the law is concerned than if not published.¹⁴⁹

The disconnect continued. The industry felt a tremendous need to have federal legal tools to prevent “initial play piracy,”¹⁵⁰ where someone sits in the audience taking notes on not only the dialogue but also the stage direction, the costumes scenery, etc. The problem was solved by the creation of Section 12, “works not reproduced for sale,” which would allow certain kinds of unpublished works to be registered for federal copyright protection.¹⁵¹

This article suggests that the failure of the 1909 Copyright Act can be pinpointed to Section 12. The failure comes in not being

¹⁴⁶ HISTORY, *supra* note 144, at 23.

¹⁴⁷ *Id.* at 32.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 31.

¹⁵⁰ 17 U.S.C. §12 (1947), available at <http://law.copyrightdata.com/index.php> (select July 30, 1947 to May 26, 1948).

¹⁵¹ WILLIAM S. STRAUSS, STUDY NO. 29: PROTECTION OF UNPUBLISHED WORKS 1 (Comm. Print 1961) [hereinafter STRAUSS].

able to adjust easily to the change in what the popular culture began to value—movies, broadcasting, and television, and other works that had not been envisioned in the pre-Fordist mindset. These works did not fit into the traditional definition of publication, and therefore, did not fit into a scheme which valued circulation of copies to the general public as the threshold of entrance into the federal statutory system. Before the passage of the Act, the drafters were confronted with this problem—that some works might need protection even without circulation of published copies—and so included for the first time the concept of a category of “works not for sale” that still would receive federal protection.

Works not for sale was a limited category of works that did not fit into the general scheme of the Copyright Act, but nevertheless in their unpublished, unpurchasable form, were allowed federal protection.¹⁵² These works could be registered at the Copyright Office, even in their unpublished state—where no reproductions were made for sale. These works could also be registered as published works, but these had different requirements.¹⁵³ Section 12 was made for the pre-publication state, where a work might still need federal legal protection.¹⁵⁴ This article argues that the distinction between “works for sale” and “works not for sale” can help us to understand why the 1909 Copyright Act struggled to meet the needs of the twentieth century.

As the century continued, the question of what counted as publication became problematic, as the courts struggled to determine when a radio show, movie, broadcast, or television series was “published” because none of these new kinds of works circulated in the same manner as, say, a book.¹⁵⁵ There was no tangible item that the public could actually purchase. The trigger for protection was the new availability of an item for sale. The crisis would be felt in many legal cases, including the Martin Luther King, Jr. “I Have a Dream” speech that was deemed by two courts, thirty years apart, not to be a general publication, because public performance did not count as publication, nor did copies given to the news media for purposes of news reporting. The problem became so acute that the 1976 Copyright Act reflects the impossibility of the system—the published/unpublished distinction for purposes of federal protection was abolished, and

¹⁵² 17 U.S.C. §12 (1947), *available at* <http://law.copyrightdata.com/index.php> (select July 30, 1947 to May 26, 1948).

¹⁵³ DAVID NIMMER, 1-2 NIMMER ON COPYRIGHT § 2.04(4) (2010).

¹⁵⁴ 17 U.S.C. §12 (1947), *available at* <http://law.copyrightdata.com/index.php> (select July 30, 1947 to May 26, 1948).

¹⁵⁵ 17 U.S.C. § 102(a) (2009).

in its place, a work obtained federal protection automatically upon creation, as long as the work was fixed in a tangible medium of expression with the minimum degree of creativity and independent creation.¹⁵⁶

The new definition—fixedness and originality—was supposed to solve the problems of the 1909 Copyright Act.¹⁵⁷ But, strangely, the late-modernist legislation still could not let go of the “thingness”—the need now to be fixed in a tangible medium. The object was still at the center of the system. Being published or being fixed somehow transformed the object into something requiring legal protection. Under the 1976 Copyright Act, nearly every cultural work (with the required minimum creativity and fixation) became worthy of federal protection, creating new problems of overprotection.¹⁵⁸ Why did the 1909 Copyright Act place such importance on the published/unpublished distinction, and why does the 1976 Copyright Act by and large marginalize this distinction? We see a misplaced confidence in the “thingness” under the 1909 Copyright Act. These were the same problems that plagued the 1909 Copyright Act.

Producers also worried about the future—a dimension which the 1909 Act had some trouble with. One could argue that the emergence of industrialized mass production was such a substantial cultural transformation that it was difficult for the legislators to imagine the future. And yet, the future was already upon them in 1909. The producers of dramas worried about “talking pictures” reproducing their works without authorization, stealing not only their work but perhaps their audience through the mechanical reproduction of their art, to use Benjamin’s term. Of course, they had good cause, given the recent 1908 *White-Smith* decision,¹⁵⁹ in which the U.S. Supreme Court had ruled that piano rolls were not covered under the previous copyright act, and therefore, use of any music contained in the piano rolls was not infringement: “it is intimated that the failure of Congress to act with relation to new conditions or an existing state of affairs is to be viewed as denial of copyright protection in that connection.”¹⁶⁰ While the piano roll case was resolved through the enactment of compulsory licenses for music, the dramatists recognized that the introduction of new technology might threaten their livelihood.¹⁶¹

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *White-Smith Music Publ’g Co. v. Apollo Co.*, 209 U.S. 1 (1908).

¹⁵⁹ HISTORY, *supra* note 144, at 24.

¹⁶⁰ Copyright Act of 1909 §1(e), Pub. L. No. 60-349, 35 Stat. 1075 (1909), *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976), Copyright Act of 1976, 90 Stat. 2541 (1978).

¹⁶¹ STRAUSS, *supra* note 151, at 2.

The 1909 Copyright Act would eventually breakdown. William Strauss, writing in 1963, explained:

In earlier days when the public dissemination of copyrightable works usually meant the reproduction and distribution of copies, it may have been logical and practical to define publication in those terms, to protect unpublished manuscripts against unauthorized publication under the established common law, and to limit the copyright statute to published works. Today, when copyrightable works are disseminated widely by public performance to audiences of millions over radio and television and by sound recordings and audiovisual films, the dichotomy of common law and statutory copyright based on the historic concept of publication may be thought to be outmoded.¹⁶²

The 1976 Copyright Act sought to eliminate the problem by having federal protection begin from the moment a work is fixed into a tangible form, i.e. the moment of creation.¹⁶³ But, now in the new state of Internet/user-generated crisis, where the focus is not on gaining protection but on the unauthorized use and dissemination of works, the dramatists' concerns seem quite forward-thinking: they wished to protect the industries surrounding the experience of the object. The question was and still is how to accomplish the task.

The changes brought about by the 1976 Copyright Act were not only a reaction to international pressures to adopt the Berne Standards of protection,¹⁶⁴ but also to the troubled waters of misplaced confidence in the materiality of goods under the 1909 Copyright Act. If no distinction between an unpublished and a published photograph was required under the 1976 Act, presumably, legislators seemed to believe that the problems of "what counts" would dissolve. Unfortunately, this did not address the underlying concept of value, arising constitutively from the cultural configuration of circulation. If "what counts" was based on the notion of value derived from the manner of circulation, the *Golan* court would have had its explanation of how this significant change does not alter the traditional contours of copyright law in its formulation. We find continuity in the concept of circulation.

In 1996, the WIPO Copyright Treaty, adopted by many, including the European Union, would include a "right to

¹⁶² 17 U.S.C. § 102(a) (2009); Elizabeth Townsend Gard, *Conversations with Renowned Professors on the Future of Copyright*, 12 TUL. J. TECH. & INTELL. PROP. 35, 55 (2009) (interviewing Prof. Diane Zimmerman of New York University School of Law).

¹⁶³ See Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y OF U.S.A. 19, 22-23, 42-43 (2001); see also Bruce A. Lehman & Andrew Pike, *Beyond Napster: Debating the Future of Copyright on the Internet: Introductory Remarks*, 50 AM. U.L. REV. 355, at 358 (2000).

¹⁶⁴ WCT, *supra* note 56, at 7.

communicate the work to the public,” a right focused on the posting of a work on the Internet.¹⁶⁵ The United States would adhere to the treaty, but claim that the right was incorporated already in the existing rights of Section 106 of the Copyright Act—vestiges of the 1909 Act.¹⁶⁶ The right, however, if it had been written more broadly, and without the restrictions of dissemination “by wire or wireless,” could have covered the kinds of value and concerns of the dramatists and, moreover, the concerns of the present crisis. The 1996 WIPO Copyright Treaty created a new right—the right to communicate the work to the public. We suggest, however, that this is as present-sighted as the 1909 Act.

CONCLUSION

The 1909 Copyright Act, the 1976 Copyright Act, and even the late-twentieth century amendments like the Digital Millennium Copyright Act and the Copyright Term Extension Act, are trying to affix ownership interests in works. Each text grapples with perception of changing notions of copyright, particularly the impact of new technology both on exactly what is copyrightable and how to protect copyrightable works. While technology plays an important driving force in copyright law, what underpins any notion of configuring ownership is the ability to control the thing of value, and value is most directly related to exchange and circulation, not to fixation of or publication of works. Thus, as modes of exchange change, a variety of conceptualizations of routing or rooting the ownership interests are introduced. The transformation throughout the twentieth century of the dynamics of exchange inherently introduced problems into these ownership interests that the 1976 Copyright Act tried to address, and yet, we found ourselves once again in a crisis where the law does not keep up with the cultural needs of the times, as value and concepts of circulation and exchange changed in ways that the 1976 Copyright Act had not been designed to address.

Neither the 1909 nor the 1976 Copyright Acts focus on this article’s posited more fundamental principle—that value itself is derived from cultural systems of exchange. To ignore the dynamic systems of exchange is to misconceive the foundation on which one is constructing a legal regime. We read these texts as embodiments of cultural configurations, with all the dynamics of valuation. These texts are, in effect, “DOA,” or at least problematic upon their enactment, because they fail to take into

¹⁶⁵ Peter Jaszi, Presentation at the Tulane *Future of Copyright* Speaker Series (Spring 2009); Peter Jaszi, *Is There a Post-Modern Copyright?*, 12 TUL. J. TECH. & INTELL. PROP. 105 (2009).

¹⁶⁶ Gard, *supra* note 162, at 55.

account the fundamental foundation creating the problems they seek to address.

The incorporation of value into the sequence of traditional contours allows for an embedding of and moving beyond the cultural object itself, and enters a dialogue as to the meaning of the object's relationship within society—what legal protection is necessary for the cultural object to function within a system that at once protects the original creator—through an incentive system to create, but is ideally designed for the benefit of the public, both in the creation of the culture as well as its reuse. We must situate the law within a socio-economic space, and analyze “traditional contours” within the regime(s) of accumulation. For it is the cultural, economic, and historical coordinates that allow the mapping of “tradition,” and allow us to see “contours” that otherwise might not be seen.

We are currently struggling again with new sets of technology and circulation-related problems, namely the ability of all users to create and circulate versions of copyrighted works. Using the tools suggested in this article, with a particular emphasis on value stemming from circulation, we might approach solving the problem by investigating what kind of circulation matters. Is it circulation of any derivative work? Or is it, as many are starting to suggest, including Diane Zimmerman, that there may be a distinction between non-commercial and commercial uses—that circulating a home movie of one's child dancing to a Prince song does not somehow violate the law.¹⁶⁷ We situate the moment within the condition of modernity, and suggest that this postmodern moment of user-created content is an outgrowth and explosion of the problems that began to arise even during the drafting of the 1909 Act.

In the twenty-first century, the anxieties over the shift in subject position of the public can be felt in the court's decisions in *Eldred*, *Golan* and other cases wherein average users were copying, or wanting to copy and use, versions of movies, books, art, and music in a way that only traditional publishers had been able to in the past. Could, as Peter Jaszi suggests, copyright law eventually catch up to the new culture that believes creating derivative works of others' works is merely personal expression?¹⁶⁸ Should we resist the “abolitionist movement” to do away with copyright law entirely, and instead, as Lawrence Lessig suggests, look to a new generation of “sensible copyright law . . . with rich, diverse culture?”¹⁶⁹ How,

¹⁶⁷ See generally Diane Zimmerman, *Finding New Paths through the Internet: Content and Copyright*, 12 Tul. J. Tech. & Intell. Prop. 145 (2009).

¹⁶⁸ Gard, *supra* note 162, at 41.

¹⁶⁹ Charlie Rose, *Lawrence Lessig warns against abolishing copyright* (PBS television broadcast

in law, do we face this shift, as people begin to talk about the need to reform the 1976 Copyright Act?¹⁷⁰

We suggest that we must begin with a historical and theoretical construction of the “traditional contours of copyright law” as a foundational step for evaluating contemporary culture and the law. In recognizing the distinctly modernist formulation of what copyright law protects, we are able to reconceptualize how we might approach the relations of individuals to cultural objects—those producing them and those wanting to use them—within a postmodernist condition. “Traditional contours” becomes a theoretical tool for understanding the nature of social relations between people about things. In doing so, the flexibility of the concept of “circulation” will help us more effectively address conflicts arising in the present and into the future. We think that “circulation” mediates this by focusing on the social relations surrounding the object, rather than the object itself, and is, therefore, a more flexible concept for dealing with as-yet-unknown technological innovations and social situations.

The struggles of Martin Eden, Walter Benjamin, and the dramatists continue to resonate today and are embedded in modern legal struggles like that of the mom who posted a YouTube video of her baby dancing to a Prince song. We, as a society, are once again conceiving of and defining new spaces of culture. To understand what values are at stake, we must understand the interaction of cultural production and the law. We must understand our past—the condition of modernity—to begin to fully address our present postmodern state.

Nov. 21, 2008), available at <http://www.charlirose.com/view/clip/9649>.

¹⁷⁰ Pamela Samuelson, *Copyright Principles Project: Directions of Reform*, BERKLEY TECH. L.J., available at http://www.law.berkeley.edu/files/bclt_CPP.pdf.