FREE SPEECH INSTITUTIONS AND FAIR USE: A NEW AGENDA FOR COPYRIGHT REFORM♦

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INTRODUCTION

This article analyzes copyright law as a growing burden on free speech institutions such as newspapers, television stations, websites, and software platforms. Free speech institutions, including websites, allow residents of the United States to engage in a variety of activities: read, watch, access, write, perform, display, transform what has been written, and publish what is written or transformed.[1] Some of these activities—for example, making a video commentary on a recent political speech out of popular film clips—make up "remix" or "read-write" culture.[2] Copyright law potentially outlaws the unauthorized reading, watching, performing, transforming, or publishing of existing work.[3] Unless fair use reliably allows people to remix our culture

[1] *See* INTERNET POLICY TASK FORCE, U.S. DEP'T OF COMMERCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY 1 (July 2013), *available at* http://www.uspto.gov/sites/default/files/news/publications/copyrightgreenpaper.pdf (concluding that U.S. industries that make "music, movies, television shows, computer software, games, writings and works of art have changed the world . . . [and] are at the core of our cultural expression and heritage," and recognizing "the innovative information-disseminating power of the Internet.").

[2] *See id.* at 28; Lawrence Lessig, *Laws That Choke Creativity*, TED Talks (Mar. 2007), http://www.ted.com/talks/larry_lessig_says_the_law_is_strangling_creativity?language=en.

[3] *See* 17 U.S.C. § 106; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, at arts. 6–14, *quoted in* CRAIG JOYCE, ET AL., COPYRIGHT LAW: 2012 CUMULATIVE

without risk of liability, it will stand in need of reform.

Emerging copyright norms could harm the freedom and diversity of the Internet. In an era of supposed overregulation of business by Washington, a surprisingly large number of corporations and trade associations are proposing restrictive copyright norms.[4] In this way, groupings of media and Internet corporations have become prolific sources of proposed norms governing Internet speech and communication. Among other efforts, the Motion Picture Association of America and the Recording Industry Association of America have led a coalition of "creative community organizations" asking the Obama administration to pressure websites such as YouTube to agree to a series of Principles for User-Generated Content Services (UGC Principles),[5] which were negotiated between the Microsoft Corporation and a series of media conglomerates including NBC Universal and Viacom.[6] Among other things, the UGC Principles call for automatic deletion (or filtering) of quotations of media content in audio or audiovisual form, without consistent regard to fair use or other exceptions to copyright.[7] While some users may be on notice and willing to tolerate such deletions, other users would prefer a hearing in court as movie studios and book publishers receive in cases of alleged plagiarism of screenplays, novels, or background art. Several publisher associations and an Open Book Alliance made up of Amazon.com, Microsoft, Yahoo!, and various partner organizations filed briefs in federal court arguing that Google should be restricted from contracting with publishers to create digital libraries of books.[8] The Media Bloggers

SUPPLEMENT 346–52 (LexisNexis, 8th ed., 2013); WIPO Copyright Treaty, arts. 2–8, signed Dec. 20, 1996, CRNR/DC/94, quoted in *id.* at 438–39; WIPO Performances and Phonograms Treaty, arts. 1–14, signed Dec. 20, 1996, CRNR/DC/95, quoted in *id.* at 446–49; E.C. Directive 2001/29/EC, arts. 1–4, ratified Feb. 14, 2001 and May 22, 2001, quoted in *id.* at 464–66.

[4] Although there are no doubt too many regulations and many are too confusing and unnecessary, there are also cases of underregulation (of derivatives trading, proprietary trading with bank deposits insured by the government, deadly air and water pollution, medical and pharmaceutical malpractice, outsourcing, etc.). The point is that while many corporations and trade associations complain of overregulation of business, others—and often the same ones—plead for copyright regulations aimed at protecting their business models and revenues from harm.

[5] *See* Letter from American Federation of Radio and Television Artists et al., to the Honorable Victoria A. Espinel, United States Intellectual Property Enforcement Coordinator at 19 (Mar. 24, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/CreativeCommunityOrganizations.pdf.

[6] *See* Annemarie Bridy, *Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement*, 89 OR. L. REV. 81, 125 n.202 (2010).

[7] *Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement*, USER GENERATED CONTENT PRINCIPLES (Oct. 18, 2007), *available at* http://www.ugcprinciples.com; Note, *The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance*, 121 HARV. L. REV. 1387, 1407 (2008).

[8] *See* Supplemental Memo of Amicus Curiae Open Book Alliance in Opp. to the Proposed Settlement, The Authors Guild v. Google, Inc., Case. No. 05 CV 8136-DC (S.D.N.Y. brief filed Jan. 28, 2010); Brewster Kahle, *Announcing the Open Content Alliance*, YAHOO! SEARCH BLOG

Association, Newspaper Association of America, and other groups have made various proposals that fair use or the public domain of facts and ideas be restricted online in ways that are contrary to established customs in print and on television, as well as online.[9] Media corporations asked the Federal Communications Commission to enact a National Broadband Plan that would allow Internet filters to prohibit the use of fair use clips.[10] These corporations want universities to use "in-house methods of blocking infringing [Internet] transmissions and/or blocking and filtering technologies offered in the marketplace[.]"[11]

Prepublication licensing of previews or other uses, coupled with automatic deletion of alleged copyright infringements from user-generated content sites such as Facebook or YouTube, may be inimical to free speech, innovation, and fair competition. Bloggers could be barred from quoting as few as five words of the news without a license. Google could be prevented from helping Internet users find library or used copies of books for their research by searching the books' full text.[12] This would leave Internet users to buy e-books at high prices with little or no sense of what is in them, on platforms such as Amazon.com or Apple iBooks Store. In this fight, Google's potential price-cutting competition to reduce e-book prices may be the real issue.[13] Users of Facebook and YouTube could find their profiles and

(Oct. 2, 2005), http://www.ysearchblog.com/archives/000192.htm.

[9] *See* Jennifer Leggio, *The Associated Press Plays Role of Metallica in Napsteresque War with Bloggers*, ZDNET (June 18, 2008), http://www.zdnet.com/blog/feeds/the-associated-press-plays-role-of-metallica-in-napsteresque-war-with-bloggers/111; Newspaper Ass'n of Am., In the Matter of Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan at 12–13 (2010), http://www.whitehouse.gov/sites/default/files/omb/IPEC/frn_comments/NewspaperAssociationofAmerica.pdf (citing with approval the suggestion of a federal judge that it "may be necessary to amend the copyright law to bar linking without consent to copyrighted material, to the extent necessary to prevent 'free riding' from impairing the incentive to engage in costly news-gathering operations," and the ruling of a federal court—subsequently reversed—that the act of "collecting and redistributing portions of financial firms' timely investment reports . . . was subject to permanent injunction requiring publication delay") (citing Richard Posner, *The Future of Newspapers* (June 23, 2009), becker-posner-blog.com/archives/2009/06/the_future_of_newspapers--posner, and Barclays Capital Inc. v. Theflyonthewall.com, No. 06-4908 (S.D.N.Y. March 18, 2010), *rev'd*, 650 F.3d 876 (2d Cir. 2011)).

[10] *See* David Kravets, *MPAA Wants Congress to 'Encourage' 3 Strikes, Filtering*, WIRED THREAT LEVEL BLOG (Nov. 4, 2009), http://www.wired.com/2009/11/mpaa-filtering/ ("The FCC letter is the second time the studios have publicly embraced internet filtering. But it's the first time Hollywood has officially endorsed a "graduated response" policy, more commonly referred to as a three-strikes program."). The advocacy group Public Knowledge pointed out that such filtering ignores the fair use interests of Internet users. *See id.*

[11] American Federation of Radio and Television Artists et. al., *supra* note 5, at 19.

[12] *See* Supp. Memo of Amicus Curiae Open Book Alliance, *supra* note 8.

[13] *See* DANIEL J. GERVAIS, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 375 (2010) (Google would have set "optimal" price by algorithm for books not claimed by respective copyright holders).

channels deleted without a fair process or respect for rights otherwise enjoyed under the Copyright Act by authors, filmmakers, publishers, and television producers. The pressure to lock down the Internet in copyright's gray areas extends to proposed treaties and legal reforms mandating the taking down of websites based on the presence of some infringing material.

Coordinated corporate interests may upend the careful balance erected by Congress and the federal courts between users and owners of intellectual property. This balance has featured increasingly rigorous pleading standards, an occasionally generous fair use doctrine, demanding tests for injunctive relief, and the like.[14] Industry-drafted norms may reduce the output of works, increase prices, reduce user choice, and facilitate concentration of digital media. Users and innovators therefore continue to resist them.[15]

My thesis is that negotiations between copyright industry trade associations and online services present a risk to free speech institutions. Specifically, the norms advanced by the associations are often framed so as to preserve their other revenue streams at the expense of Internet users' freedom of expression. Industry groups frequently characterize as "piracy" what courts or legislators would regard as First Amendment-protected speech, transformative fair use, outside the scope of copyright or trademark rights, or a violation of competition law to prevent. Moreover, corporate-led private negotiations concerning Internet services may increase the price of information works while reducing the quality of the services delivering the works, including their interactivity and uninhibitedness. This Article therefore describes the risk of non-price-related restraints on upstart Internet and social media companies such as a requirement to filter out quotations. Such restraints do not burden incumbents like the Associated Press, Comcast-NBCU, or Viacom, which do not confront prepublication filtering of their newspaper articles, television programs, or motion pictures.

Antitrust cases and constitutional doctrine are slow to evolve. For this reason, the Article calls for reform of the fair use privilege of free speech institutions in four key areas: burden of proof, due process, liability standards, and injunctive relief. The reforms are intended to serve core constitutional values: liberty of expression, the right to petition the government for redress of grievances, communicative privacy, separation of powers, and the rule of law. Other scholars have proposed reforms to the fair use doctrine; some of them are procedural in nature, focused on quantitative thresholds or a narrow subset of free

[14] *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 SPG LAW & CONTEMP. PROBS. 33, 41 n.33 (2003).

[15] *See* Lessig, *supra* note 2.

speech institutions' activity.[16] These proposed reforms may not adequately protect the freedom of those who intend to make fair use of significant portions of another's work, but who are unable to afford a lawyer. This Article proposes reforming the statute to shield fair users from liability if they do not harm the copyright holder, and to fix evidentiary problems they face in proving this.

The argument proceeds from an analysis of the present legal landscape, to a survey of the dangers on the horizon, to a drawing of appropriate borders between private rights in content and the public interest in freedom of speech and uninhibited technological innovation. In Part I, this Article will analyze the rise of free speech institutions in terms of markets, legal change, and evolving social norms. In Part II, it describes recent litigation supported by associations of media corporations against Web companies such as news aggregators, digital libraries, and online video sites, as well as the potential censorious effect of coupling litigation with private agreements not to compete in specific ways relating to the licensing of intellectual property. Part III contrasts contemporary industry-led initiatives to restrict copying in derivative and transformative contexts with traditional legislative and judicial norms governing constitutional, statutory, and economic rights of free speech institutions. Courts applying the norms codified in the First Amendment, the Copyright Act of 1976, the Digital Millennium Copyright Act of 1998, and the Sherman Act have drawn important boundaries between industry-implemented norms and the preservation of public markets and platforms. Economists have derived similar boundary lines from the analysis of negative externalities that may flow from corporate-designed and agreed-upon limitations on competition. Part IV outlines the needed reforms to copyright law. The proposed reforms will amend the fair use statute to prevent free speech institutions from confronting an impossible standard, *i.e.*, a burden of disproving *potential* harm in the aggregate.

[16] *See, e.g.*, Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1090–91 (2007) (proposing administrative agency activity focused in the Copyright Office to immunize users of copyrighted work from liability if they seek a prepublication opinion as to fair use); Thomas F. Cotter, *Fair Use and Copyright Overenforcement*, 93 IOWA L. REV. 1271, 1312–14 (2008) (proposing quantitative thresholds below which copyright infringement would be a statutory fair use); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395, 396, 405–12, 433 (2009) (proposing administrative agency activity to clarify the fair use defense to news reporters and others, in advance of litigation); David Nimmer, *A Modest Proposal to Streamline Fair Use Determinations*, 24 CARDOZO ARTS & ENT. L.J. 11, 12–14 (2006) (proposing fair use arbitration scheme in cases in which user of copyrighted work is unable to secure favorable license terms); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 587 (2004) (proposing raising the quantitative and qualitative amount of copying that may be deemed consistent with fair use).

I. THE RISE OF FREE SPEECH INSTITUTIONS AND FAIR USE

A. *Theory*

Some theories of free speech institutions are "architectural" by analogy to the spaces and boundaries of building and park design. As Marvin Ammori writes, the "architecture" of "a democracy generally requires institutions of free speech and education that better inform a citizenry of options in making its political and life decisions, thereby serving autonomy."[17] Ammori looks to Yochai Benkler for the idea that "a concentrated speech system controlled by a few speakers and few open spaces empowers government to manipulate a few outlets and suppress critical news, including during wartime."[18] Open access to institutions that make political expression possible accelerates the transmission of the information required for informed political participation.[19] As both the Supreme Court and the Federal Communications Commission have observed, the Internet is the ultimate free speech institution, one that enables uninhibited expression that grows exponentially.[20]

Other theories focus on evolutionary or linear theories of societal organization. In 1973, the visionary American sociologist Daniel Bell famously predicted a transition to a "post-industrial society" based on creativity and knowledge rather than strength behind the plow or endurance on the assembly line.[21] Bell viewed pre-industrial or agricultural society as a somewhat brutish and brutalizing "game against nature," largely played with "raw muscle power."[22] Industrial society, as a game against machines, dehumanizes its members as fungible units in mass production, and alienates them from one another in class struggle and the economizing logic of "creative destruction."[23] As the productivity gains of rationalization and automation depopulate agriculture and industry while increasing output, society enjoys greater independence over nature. The economic base shifts to servicing the

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[17] Marvin Ammori, *First Amendment Architecture*, 2012 WIS. L. REV. 1, 66 (2012).

[18] *Id.* at 82.

[19] *See id.* at 72.

[20] *See* Reno v. ACLU, 521 U.S. 844 (1997); *In re* Formal Complaint of Free Press & Pub. Knowledge Against Comcast Corp., 23 F.C.C. Rcd. 13028, 13024, 13040 n.94, 13053 n.203 (2008), *rev'd*, Comcast Corp. v. F.C.C., 600 F.3d 642 (D.C. Cir. 2010). *See also* H.R. REP. NO. 109-541 (2006); Net Neutrality: Hearing Before the S. Comm. On Commerce, Sci., & Transp., 109th Cong. 2 (2006) (statement of Vinton G. Cerf, Vice President and Chief Internet Evangelist, Google, Inc.), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:30115.pdf; Net Neutrality: Hearing Before the S. Comm. on Commerce, Sci., & Transp., 109th Cong. 17-19 (2006).

[21] DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY 148–49 (Basic Books 1973).

[22] *Id.*

[23] *Id.*

proliferating needs of a wealthier society, and life becomes a "game between persons."[24] The terrain of political struggle in postmodern societies increasingly shifts from the field and the factory to language ("political correctness"), education ("knowledge gap"), health ("affordable care"), communication ("digital divide"), the mass media ("diversity in media," "concentration of ownership" and "fairness doctrines"), and finance ("growing inequality").

The information society is bringing forth a new birth of freedom, as machines and computers perform manual labor, and the human workforce retools towards achieving the proliferating emotional and symbolic goals of a wealthier society. It is an encouraging scenario, and there may be a lot of truth to it. But hardly anyone disputes that capitalism will lie at the foundation of this new information society, and with capitalism the iron law of supply and demand. Therefore, as others have recognized, the birth of the information society portends not so much the end of political struggle as it does a redirection. With the transition from an economy grounded in the land and machines towards one increasingly grounded in inventions, ideas, and entertainment, struggles shift from the allocation of the soil or the regulation of manufacturing to the control of the dissemination of information.

To the extent that these conflicts are not insoluble paradoxes, some balance between scarcity and abundance may be achieved. A complete lack of control over information by its producers may result in underproduction, whether the information involves advertising and brand identity, or works of authorship. Perfect control over information may result in inadequate access for purposes of informed economic and political decision-making, whether in the form of unfavorable information about a manufacturer or brand, or form of improvements upon or critiques of a work of authorship.[25] Lines must be drawn.

B. *Free Speech Institutions*

1. The Press and the Media Industry

Despite modern aspirations for a universal, publicly-funded dissemination of culture and enlightenment, the production of popular culture in modern societies generally remained an oligopolistic and oligarchical affair. Book and newspaper publishing necessarily began as a concentrated industry, given the newness of the technology of printing.

In England, France, and parts of Germany, among other kingdoms, the precursors of modern copyright and patent law dictated that printing

[24] *See id.*; FRANK WEBSTER, THEORIES OF THE INFORMATION SOCIETY 36 (Routledge 1997).
[25] *See* Boyle, *supra* note 14.

presses required a license from the Crown or the Church to be operated lawfully.[26] Pre-publication licensing persisted in England from the reign of Henry VIII in 1538 to that of William of Orange in 1694.[27] Nevertheless, publishers released a very broad variety and enormous quantity of works in the 200 years after the invention of printing.[28] In 1621, journalists founded the first weekly newspaper in London, followed by a daily newspaper in 1702, a weekly newspaper in colonial Boston in 1704, and a daily newspaper in Philadelphia in 1784.[29]

Propelled by telegraphically-transmitted news, scandal-mongering, and the invention of cheaper methods of printing, the number of daily newspapers published in the United States expanded from only twenty in 1800 to more than 2,300 in 1900.[30] After the Copyright Act of 1909 dramatically expanded the scope of copyright liability, the ownership and control of printed works of authorship became much more concentrated in the 20th century. By the end of the century, no more than a dozen large companies controlled most of the American book publishing business.[31] Likewise, the percentage of U.S. newspapers that had a local competitor declined from more than 60% in the nineteenth

[26] *See* John Sutherland, *Can Anyone Control the Flow of Ideas in the Modern Age?*, THE INDEPENDENT, Jan. 30, 1999, at 7 ("When it appeared in the 15th century the printing press was subjected to immediate regulation. Initially in Britain it was applied by the Star Chamber, Stationers' Hall, and the Lord Chamberlain. In France a complex system of 'privileges' or licenses was imposed. Traditionally only two potentially dangerous books, the Bible and Hansard, have been subjected to long-term control by license in Britain.").

[27] *See* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 106 n.84 (1984). Licensing lapsed for a time after the death of Henry VIII, but was reinstituted in 1586 by a Star Chamber decree that prohibited all printing outside of a select number of printing presses in London, Oxford and Cambridge, monitored by the Stationers' Company, which licensed all books before publication. It lapsed again briefly in 1679. *See id.*

[28] Perhaps 40,000 distinct works were printed in ten million copies from 1455 to 1500. *See* Thomas F. Cotter, *Gutenberg's Legacy: Copyright, Censorship, and Religious Pluralism*, 91 CALIF. L. REV. 323, 326 (2003) (citing JAMES THORPE, THE GUTENBERG BIBLE: LANDMARK IN LEARNING 13 (2d ed. 1999)). With the Cromwellian or bourgeois revolution against British monarchical absolutism, printing spread even more rapidly throughout society, with 30,000 political pamphlets or "News Papers" being published in Britain alone from 1640 to 1660. *See* Berrow's Worcester Journal, A Brief History of Newspapers (2004), *available at* http://www.berrowsjournal.co.uk/history/chapter7.htm.

[29] *See* Berrow's Worcester Journal, *supra* note 28; Microsoft Encarta Online Encyclopedia, Newspaper (2005), *available at* http://encarta.msn.com/encyclopedia_761564853_3/Newspaper.html; Microsoft Encarta Online Encyclopedia, Boston News-Letter (2005), *available at* http://encarta.msn.com/encyclopedia_761552914/Boston_News-Letter.html.

[30] *See* Microsoft Encarta Online Encyclopedia, Newspaper (2005), *available at* http://encarta.msn.com/encyclopedia_761564853_3/Newspaper.html

[31] C. Edwin Baker, *Media Concentration: Giving up on Democracy*, 54 FLA. L. REV. 839, 880 n.193 (2002); Steve Goldstein, *Cover to Cover*, THE PHILADELPHIA INQUIRER, June 28, 2003 (describing "sea change" of concentration in publishing, as only "five major publishing houses now control scores of imprints," many of which "used to be independent," and all five "publishing houses are owned in turn by giant media conglomerates," three of which are foreign-owned and four of which regard book publishing as peripheral to their core businesses).

century to less than 2% by 1986.[32] New York City's twenty daily newspapers of legend had declined to only eight daily newspapers by 1940.[33] By 2000, more than 90% of American cities had only one local newspaper to read, as well as those like *USA Today* that were distributed more widely.[34]

The American film and broadcast industries, unlike print, have been very concentrated almost from the beginning. Six or seven large movie studios have produced most films since the 1930s, including films claiming 90% of the U.S. box office as of the late 1990s.[35] Meanwhile, beginning with the Radio Act of 1927, the federal government has repeatedly "given away radio and TV licenses . . . exclusively and preferentially to too few people."[36] In the 1990s, three companies controlled 60% of the stations in the top 100 U.S. radio markets,[37] while four companies have determined what two-thirds of listeners to radio news get to hear.[38] Initially, there were only three major television companies (NBC, ABC, and CBS).[39] For decades, the three television networks "exclusively" exercised the "power to determine form and content" of the images and words broadcast to the public.[40] The three networks had a combined 70% market share in

[32] C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2115–16 (1992). While 689 cities had two or more newspapers competing for the attention of the public in 1910, only twenty-eight cities did by 1986. *See id.* at 2115. Newspapers' profitability in the twentieth century was legendary, with their return on investment being double or sometimes multiple times returns in more competitive industries. *See id.* at 2120 n.66 (citing BEN BAGDIKIAN, THE MEDIA MONOPOLY 265 n.119 (3d ed. 1990)); Baker, *Media Concentration*, *supra* note 31, at 880–81 & nn. 198, 200 (describing a "pattern of one paper cities where, despite high 'monopoly' profits, potential competing papers find it virtually impossible to challenge the local monopolist") (footnote omitted).

[33] *See* Microsoft Encarta Online Encyclopedia, Newspaper (2005), *available at* http://encarta.msn.com/encyclopedia_761564853_3/Newspaper.html.

[34] *See* Eli M. Noam, Testimony Before the Commerce Committee of the United States Senate (July 17, 2001), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-107shrg89019.html.

[35] *See* Robert W. McChesney, *Oligopoly: The Big Media Game Has Fewer and Fewer Players*, The Progressive (1999), *available at* http://www.lehigh.edu/~jl0d/J246-02/oligopoly.html. In 2004, the top five companies appear to have accounted for over 80% of the domestic box office, by themselves or through subsidiaries. *See Studio Market Share: 2004*, BOX OFFICE MOJO (Jan. 17, 2005), http://www.boxofficemojo.com/studio.

[36] Rev. Jesse L. Jackson, Sr., *The Challenge of Our Time* (May 23, 1998), http://www.rainbowpush.org/speeches/1998/speechtxt/05-23-97/05.23.97.html. For details on how the government excluded all but a minority of potential broadcasters from the airwaves, *see* the Radio Act of 1927, 47 U. S. C. §§ 81–119 (1928); the Communications Act of 1934; 47 U.S.C. § 309(a) (1958); the Telecommunications Act of 1996, 47 U.S.C. § 1302 (1996); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

[37] Eric Boehlert, *Pay for Play*, SALON.COM (Mar. 14, 2001), http://www.salon.com/2001/03/14/payola_2/.

[38] Alexandra Marks, *Media Future: Risk of Monopoly*, CHRISTIAN SCI. MONITOR (Sept. 19, 2002), http://www.csmonitor.com/2002/0919/p02s02-usju.html.

[39] *See* Noam, *supra* note 34.

[40] Ted Turner, *My Beef with Big Media*, THE WASHINGTON MONTHLY (July/Aug. 2004), http://www.washingtonmonthly.com/features/2004/0407.turner.html (quoting decision of Federal

1986.[41] Cable television, lauded as a 500-channel alternative, took away only 20% of the three networks' market share by 2001.[42] The vast majority of television markets, about 70%, had four or fewer networks producing original news as of 2003.[43] One-half of broadcast television networks were "tight oligopolies," while most of the rest were either local monopolies or duopolies.[44]

By 2004, the ownership of major media companies was more concentrated than at any time since the early 1960s.[45] Both liberals and conservatives decried the continued concentration of media ownership in oligopolies.[46] In the mid-2000s, a "broad coalition" of Democrats and Republicans in Congress fought proposed reforms of media ownership regulations that might have further accelerated media concentration.[47]

Like the unholy alliance between the publishing industry and the British crown in the sixteenth and seventeenth centuries, the concentration of the American mass media had important political effects.[48] In the 20th century, American newspapers, broadcast networks, and movie studios reached an understanding with politicians in Washington to the effect that certain forms of discourse would be denied effective access to the public. During World War I and II there was explicit censorship of the Hollywood cinema and the dispatches of the Associated Press.[49] More recently, former and current U.N. weapons

Communications Commission).

[41] *See* Noam, *supra* note 34.

[42] *See id.*

[43] *See* 149 Cong. Rec. H4179-07 (daily ed. May 15, 2003) (Statement of Congressman Bernie Sanders on "The Growing Concentration of Media Ownership").

[44] Christa Corrine McLintock, Comment, *The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 582 (2004) (citing Rachel Coen, *Media Giants Cast Aside Regulatory "Chains": FCC Should Resist Attempt to Gut Ownership Restrictions* 8, FAIRNESS AND ACCURACY IN REPORTING, http://www.fair.org/activism/fcc-giants.html (accessed Feb. 15, 2013)).

[45] *See* Turner, *supra* note 40.

[46] *See* McChesney, *supra* note 35; Bruce Bartlett, *The Fall of the News Oligopoly*, NATIONAL REVIEW ONLINE (Sept. 20, 2004), http://www.nationalreview.com/nrof_bartlett/bartlett200409200822.asp.

[47] Stephen Labaton, *White House Drops Effort to Relax Media Ownership Rules*, N.Y. TIMES (Jan. 27, 2005), http://www.nytimes.com/2005/01/27/business/27cnd-media.html.

[48] *See* Mayton, *supra* note 27 at 104–08.

[49] *See* Michael S. Sweeney, *Secrets of Victory: The Office of Censorship and the American Press and Radio in World War II*, CIA (June 27, 2008, 7:15 AM), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol46no3/article10.html; Stephen Vaughn, *Espionage Act of 1917*, *in* ENCYCLOPEDIA OF AMERICAN JOURNALISM 154–55 (Stephen L. Vaughn ed., 2008); *Propaganda*, *in* 2 ENCYCLOPEDIA OF MEDIA AND PROPAGANDA IN WARTIME AMERICA 443–46 (Martin J. Manning & Clarence R. Wyatt eds., 2011); *see also* Facts on File History, OFFICE OF WAR INFORMATION (2014), http://tinyurl.com/owi1940; *cf.* DAVID PIETRUSZA, 1920: THE YEAR OF THE SIX PRESIDENTS (2009), *available at* http://books.google.com/books?id=Uia4A04q8dMC&pg=PT71 (fictional representation of these events).

inspectors were excluded from, buried in, or savaged by the major newspapers and television outlets when they dared question assertions that Iraq had nuclear or biological weapons.[50] Disney refused to distribute the antiwar documentary film *Fahrenheit 9/11*, purportedly because it was "not in the interest of any major corporation to be dragged into a highly charged partisan political battle,"[51] an explanation that made no sense given the same company's extensive promotion of highly partisan political commentators such as Rush Limbaugh and Bill O'Reilly.[52]

2. The Internet and Social Media

Connecting computers with telecommunications infrastructure gives rise to electronic libraries. The potential of the universal digital library may be almost limitless. Such an enterprise may rival or surpass the Library of Congress or the New York Public Library in gathering the recorded wisdom of the world in one treasure house. It rolls back the digital divide sustained by lack of access to high-priced sources of information, and thereby wages war on information poverty. It preserves the world's literature by shielding books from wars, freak accidents, and other threats.[53]

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[50] *See* Michael Massing, *Now They Tell Us*, N.Y. REV. BOOKS (Feb. 26, 2004), http://www.nybooks.com/articles/archives/2004/feb/26/now-they-tell-us/. For example, while major newspapers plastered their covers with Bush administration assertions that Iraq had active nuclear weapons programs, they frequently failed to report on, or buried their reporting of, the conclusions of U.N. weapons inspectors that there was no evidence to support such assertions. *See, e.g.*, *The Times and Iraq*, N.Y. TIMES (May 26, 2004), http://www.nytimes.com/2004/05/26/international/middleeast/26FTE_NOTE.html?ex=1108270800&en=1ac452bb51b112ea&ei=5070&pagewanted=all&position=. *Compare, e.g.*, Michael R. Gordon & Judith Miller, *Threats and Responses: The Iraqis; U.S. Says Hussein Intensifies Quest for A-Bomb Parts*, N.Y. TIMES (Sept. 8, 2002), http://www.nytimes.com/2002/09/08/world/threats-responses-iraqis-us-says-hussein-intensifies-quest-for-bomb-parts.html, *with Threats and Responses; Report on Nuclear Quest: 'Clarification' Is Needed*, N.Y. TIMES (Jan. 10, 2003), http://www.nytimes.com/2003/01/10/world/threats-and-responses-report-on-nuclear-quest-clarification-is-needed.html. USA Today never quoted the inspectors' report that "no evidence of ongoing prohibited nuclear or nuclear-related activities has been detected," after reporting on page one that Iraq's nuclear threat was "growing." Massing, *supra*; Andrea Stone, U*.S.: Iraq Nuclear Threat Is Growing*, USA TODAY, Sept. 9, 2002, at 1A.

[51] Jim Rutenberg, *Disney Forbidding Distribution of Film That Criticizes Bush*, N.Y. TIMES (May 4, 2004), http://www.nytimes.com/2004/05/05/national/05DISN.html.

[52] *See* Jeff Cohen, *Media and the Election*, COMMON DREAMS (Nov. 22, 2004), http://www.commondreams.org/views04/1122-31.htm.

[53] The legendary Roman libraries of the emperors Augustus and Vespasian were lost to the flame in the century and a half after 50 of the Common Era (CE), as the Library of Constantinople was in 476–77 CE. The Library of Alexandria was universal in that it cut across cultures and religious traditions, including the Greek, the Egyptian, and the (Mesopotamian and Hebrew) Semitic. Moustafa El-Abbadi, *The Universal Library*, INTERNET ARCHIVE (1998), https://web.archive.org/web/20070127063807/http://www.greece.org/alexandria/library/library1.htm. The library's collection ranged from the masterpieces of Greek civilization—Homer, Plato, Sophocles, and Euclid—to a "comprehensive history of Egypt," a history of the world written by a Chaldean priest starting with the creation of the world 432,000 years before the Great Flood, a

In the 1970s, the Defense Department funded a project to connect computers, mostly located in California's Stanford Research Institute and the University of Southern California. Universities and scientific institutions adopted standards and built applications that expanded the capabilities and improved the efficiency of the new computing network. As military use of this early Internet, called the ARPANET, declined in the 1980s, university and federal research networks proliferated across the U.S.[54] The network of these networks is the Internet.[55]

The Netscape Navigator browser attracted millions of new users to the Internet, and accelerated the growth of Internet publishing and

"voluminous" account of the Zoroastrian religion comprising two million lines of text, Buddhist scriptures, and a Greek translation of the Torah of the Hebrews. *See* LUCIANO CANFORA, THE VANISHED LIBRARY 21, 24 (1990); MOSTAFA EL-ABBADI, LIFE AND FATE OF THE ANCIENT LIBRARY OF ALEXANDRIA 98–99 (1992); JAMES RAVEN, *Introduction: The Resonances of Loss*, LOST LIBRARIES: THE DESTRUCTION OF GREAT BOOK COLLECTIONS SINCE ANTIQUITY 21 (James Raven ed., 2004). After the Arab conquest of Egypt in 641 A.D., the general Amr ibn al-As ordered up to 54,000 books in the revived libraries of Alexandria, including treasures from as far away as Babylonia and India, to be burned as superfluous to the books of his religion. *See* EL-ABBADI, *supra*, at 168–70; MICHAEL H. HARRIS, HISTORY OF LIBRARIES IN THE WESTERN WORLD 66 (1999). The swords and flames of invasion and civil strife consumed most of the great ancient libraries of Greece and Rome, the Christian libraries of the Eastern Roman Empire, and the Islamic libraries of Egypt, Iraq, and Spain. *See* HARRIS, *supra*, at 67, 84–85. When Constantinople fell to the Crusaders in 1204 CE, most of the manuscripts in its great libraries were lost in an unquenchable fire, with only a minority captured and sold in the European markets. *See* HARRIS, *supra*, at 75; GEOFFREY DE VILLEHARDOUIN, MEMOIRS OR CHRONICLE OF THE FOURTH CRUSADE AND THE CONQUEST OF CONSTANTINOPLE 51 (Frank T. Marzials trans., 1908) (1213), *available at* http://www.fordham.edu/halsall/basis/villehardouin.html. The remnants of the Imperial Library of Constantinople were stolen or destroyed after the Turkish conquest of Constantinople in 1453 CE. *See* HARRIS, *supra*, at 71, 76. Within a century after the Turkish sack of Constantinople, the Mongols under Hulagu, grandson of Genghis Khan, sacked Baghdad and burned its great library down. *See* RAVEN, *supra*, at 1–2, 10–11. The Spanish Inquisition and various European monarchs left the ruins of libraries in their wake. *See* HENRI-JEAN MARTIN, THE HISTORY AND POWER OF WRITING 270 (trans. Lydia Cochrane, 1994). In England, the largest libraries at the outset of the Renaissance were in monasteries in Canterbury, but many such libraries were plundered or damaged in the sixteenth century CE. *See* Nigel Ramsay, *"The Manuscripts flew about like Butterflies": The Break-Up of English Libraries in the Sixteenth Century*, *in* RAVEN, *supra*, at 125. The deadly Lisbon earthquake of 1755 CE, which claimed a number of lives, did not spare the Royal Library, planned as one of the greatest in the world. *See* RAVEN, *supra*, at 7–10. Thomas Jefferson drew on a substantial library of philosophical, scientific and literary works, which eventually also suffered from the elements. Two-thirds of the thousands of books sold by Thomas Jefferson to the Library of Congress were burned in a fire on Christmas Eve of 1851. *See* RAVEN, *supra*, at 10. Many Chinese libraries, among the richest in the world, were lost in the anti-imperialist Boxer rebellion in Beijing and in the Japanese occupation from 1937–1945. *See* HARRIS, *supra*, at 22. World War II consumed dozens of libraries and more than 100 million volumes in the Soviet Union, Germany, and Japan. *See* RAVEN, *supra*, at 23–42. The Chinese communists purged the nation's libraries of thousands of "reactionary" works between 1949 and 1976, and destroyed the vast majority of Tibet's religious and historical literature. *See id.* at 15, 254–55. After the Anglo-American invasion of Iraq, the Iraqi National Library and Archives, among other buildings, were looted and burned, consuming thousands of years' worth of artifacts in the history of human civilization. *See id.* at 1–2.

[54] *See* Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1, 41–42 (1999).

[55] *See* Reno v. ACLU, 521 U.S. 844, 844 (1997).

reading.[56] The late 1990s saw a boom in private investment in electronic commerce that would supercharge the Internet, while driving the U.S. stock market to unprecedented heights. As the "fastest-growing software company in history,"[57] Netscape went public in 1995 with a market capitalization of over $2 billion.[58] Many people accessed the Internet using the Netscape or Internet Explorer browser and a dial-up Internet service provider (ISP), such as American Online. By 1996, America Online had five million subscribers, CompuServe about four million, Prodigy two million, and the Microsoft Network one million.[59] AOL pulled far ahead in the late 1990s, with more than 20 million subscribers by 1999.[60] By then, Prodigy (a venture of IBM and Sears), CompuServe (a venture of H&R Block which became a unit of AOL in 1999), Microsoft, AT&T Online, and Earthlink/Mindspring all lagged at about two to three million subscribers each.[61] By 2005, AOL had lost the majority of its dial-up subscribers to broadband cable or cheaper dial-up services, retaining only three million dial-up subscribers.[62]

Social media are varied, but include Web 2.0 companies that date back to the 1990s such as Classmates.com; the contemporary social media giants such as Facebook, LinkedIn, Pinterest, Twitter, and YouTube;[63] and newer arrivals from Silicon Alley/Beach/Valley such as Snapchat, Tumblr, and Whatsapp.[64] Social media are more free and open than other free speech institutions such as the mainstream press or television.[65] Legacies of past racial and ethnic discrimination and ongoing ideological and partisan exclusion characterize the mainstream press and television. For example, something like 75% of young African-Americans used a social media account, whereas African-Americans of any age exercise majority control of only 2.2% of major

[56] *See* Bickerstaff, *supra* note 54, at 41–42.

[57] Testimony of Jim Barksdale, U.S. v. Microsoft Corp., 84 F. Supp. 2d 9 (D.D.C. 1999) (Findings of Fact), 87 F. Supp. 2d 30 (D.D.C. 2000) (Conclusions of Law), *aff'd*, 253 F.3d 34 (D.C. Cir. 2001) (No. 98-1232), at ¶ 21, http://www.justice.gov/atr/cases/f1900/1999.htm.

[58] *See* Molly Baker, *Technology Investors Fall Head Over Heels For Their New Love*, WALL. ST. J., Aug. 10, 1995, http://www.wsj.com/articles/SB108203965398683708.

[59] *See* Kara Swisher, *Sears to Sell Its Stake in Prodigy,* WASH. POST, Feb. 22, 1996, at D11.

[60] *See* Bickerstaff, *supra* note 54, at 43.

[61] *See* Ariana Eunjung Cha, *AOL 5.0 Unplugs Other Internet Providers*, WASH. POST, Dec. 24, 1999, at E01; David Kalish, *Two Firms Merge to Take on AOL: EarthLink Will Rank as Second-largest Web Access Provider*, OTTAWA CITIZEN, Sept. 24, 1999, at D4.

[62] *See* David A. Vise, *AOL and Cable Sibling Form Partnership*, WASH. POST, Feb. 1, 2005, at E05.

[63] *See* Hannibal Travis, *Opting Out of the Internet in the United States and the European Union*, 84 NOTRE DAME L. REV. 331, 336–37 (2008).

[64] *See* Ashwin Seshagiri, *In the Spirit of the Valley, It's Silicon This and Silicon That*, N.Y. TIMES BITS BLOG (Dec. 11, 2013), http://bits.blogs.nytimes.com/2013/12/11/in-the-spirit-of-the-valley-its-silicon-this-and-silicon-that/.

[65] *Cf.* LiveUniverse, Inc. v. MySpace, Inc., 2007 U.S. Dist. LEXIS 43739 (C.D. Cal. June 4, 2007).

television stations.[66]

Many initial public offerings of Internet companies took place in the late 1990s, creating an enormous stock market bubble until the valuations of many Internet stocks plunged by 90% or more in 2000.[67] In 1998, two former graduate students in computer science at Stanford University formed Google, Inc. Google's ubiquity and ease of use prompted speculation that the company would mount a browser-based "strategy to eliminate the need for Microsoft Windows."[68] In 2005, Microsoft launched MSN Search to compete with Google, hoping to "claw back" leadership of the Web, as it had reclaimed lost ground from Netscape in browsers, with a $100 million investment in developing search algorithms.[69] Both Google and Microsoft then began investing in mass book digitization.[70]

Like the great national book libraries, digital libraries may fulfill the ancient promise of the universal library by preserving cultural treasures from destruction, and displaying them freely to all.[71] Like the modern public library, they enhance democratic participation, facilitate informed speech, and guarantee the human right to a basic minimum level of access to information, culture, and communications services.[72] Like the Internet in general, digital libraries exponentially increase the

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[66] Aaron Smith, African-Americans and Technology Use, PEW RESEARCH CENTER (Jan. 6, 2014), http://www.pewinternet.org/2014/01/06/african-americans-and-technology-use/; FCC, Media Bureau Chief, Report on the Ownership of Commercial Radio Stations, MB Docket No. 09-182 (Nov. 14, 2012), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db1114/DA-12-1667A1.pdf.

[67] *See In re* Initial Pub. Offering Sec. Litig., 21 MC 92 (SAS), 2004 U.S. Dist. LEXIS 20497, at *51–52 (S.D.N.Y. Oct. 13, 2004); Greg Ip, et al., *The Color Green: The Internet Bubble Broke Records, Rules and Bank Accounts*, WALL ST. J. (July 14, 2000), *available at* http://wwwpub.utdallas.edu/~liebowit/knowledge_goods/bigwsjbubble.htm.

[68] John C. Dvorak, *A Google-Microsoft War*, PC Magazine (Nov. 16, 2004), http://www.pcmag.com/article2/0,2817,1682902,00.asp.

[69] *Gates v. Google*, DAILY TELEGRAPH (U.K.) (Feb. 6, 2005), *available at* http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2005/02/06/ccgoog06.xml&menuId=242&sSheet=/money/2005/02/06/ixcoms.html.

[70] *See* Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761, 762.

[71] Ruth Rikowski, *The Corporate Takeover of Libraries*, *in* 14 INFORMATION FOR SOCIAL CHANGE (2001/2002), *available at* http://www.libr.org/ISC/articles/14-Ruth_Rikowski.html (British Library Act of 1850 embraced the idea of "free libraries available to all"); HARRIS, *supra* note 53, at 243 (founders of Boston Public Library envisaged making sure that "the largest possible number of persons should be induced to read and understand questions going down to the very foundations of social order, which are constantly presenting themselves, and which we, as a people, are constantly required to decide, and do decide, either ignorantly or wisely.") (quoting TRUSTEES OF THE PUBLIC LIBRARY OF THE CITY OF BOSTON, UPON THE OBJECTS TO BE ATTAINED BY THE ESTABLISHMENT OF A PUBLIC LIBRARY: REPORT OF THE TRUSTEES OF THE PUBLIC LIBRARY OF THE CITY OF BOSTON (1852)).

[72] *Cf*. Shalini Venturelli, *Information Liberalization in the European Union*, NATIONAL INFORMATION INFRASTRUCTURE INITIATIVES: VISION AND POLICY DESIGN 464 (Brian Kahin & Ernest J. Wilson, III eds., 1996).

availability of printed or recorded materials that would otherwise be locked behind library doors, unavailable for lending on a particular day, or out of print altogether. At their best, digital libraries will create the cultural common ground that is the basis for a vibrant civil society and the informed exercise of popular sovereignty.[73]

Individual federal agencies built useful digital libraries of scientific, statistical, and public policy resources. The federal government made rudimentary medical information widely available to the public free of charge. The National Library of Medicine provided free searchable access to abstracts of 10 million biomedical research articles, and information on thousands of clinical trials.[74] The websites of other federal agencies provide basic information on common medical conditions, and the benefits and risks of foods, drugs, and popular medical procedures.[75] Other federal and state government websites offered data, documentation, propaganda, and other information on jobs, the economy, stocks, government benefits, consumer issues, foreign affairs, education, housing, etc.[76] State universities such as Virginia Tech made large amounts of digitized text available; for example, Virginia Tech sponsored the Networked Digital Library of Theses and Dissertations, which made 17,000 doctoral dissertations in a variety of fields available to the public by 1998.[77]

European public libraries have been leaders in the digital library movement, just as European governments funded some of the first physical libraries. By 2005, the Bibliothèque Nationale de France's "Gallica" project had reportedly scanned around 100,000 volumes touching on French civilization, writing, and history.[78] The Biblioteca

[73] *See* Nancy Kranich, *Libraries Create Social Capital*, LIBRARY J., Nov. 15, 2001, at 40.

[74] *See* P. Greg Gulick, *E-Health and the Future of Medicine: The Economic, Legal, Regulatory, Cultural, and Organizational Obstacles Facing Telemedicine and Cybermedicine Programs*, 12 ALB. L.J. SCI. & TECH. 351, 355–56 (2002); Mary Fitzgerald, *Advocate for Access to Medical Data; Linguist Wants Patients to Understand*, WASH. POST, July 28, 2004, at A17. *See also* Mark Terry, *Spanish Scientists Develop Supercharged Search Engine for Genes and Proteins*, BIOSCIENCE TECH. (July 12, 2004), http://www.biosciencetechnology.com/ShowPR~PUBCODE~090~ACCT~9000000100~ISSUE~0407~RELTYPE~PR~ORIGRELTYPE~RLSN~PRODCODE~00000000~PRODLETT~F.html; *United States National Library of Medicine, Fact Sheet: Information Resources*, U.S. NAT'L LIBRARY OF MEDICINE (June 6, 2003), http://www.nlm.nih.gov/pubs/factsheets/infores.html.

[75] *See, e.g.*, *Health Information*, U.S. NATIONAL LIBRARY OF MEDICINE (2005), http://health.nih.gov; *Hot Topics*, U.S. FOOD AND DRUG ADMINISTRATION (2005), http://www.fda.gov/oc/opacom/hottopics/default.htm.

[76] *See, e.g.*, *Official US Executive Branch Web Sites*, LIBRARY OF CONGRESS (2005), http://www.loc.gov/global/executive/fed.html; *Welcome to California*, STATE OF CALIFORNIA, (2005), http://www.ca.gov/state/portal/myca_homepage.jsp.

[77] *See* Michael Lesk, *The Future Value of Digital Information and Digital Libraries*, DEVELOPMENT OF DIGITAL LIBRARIES: AN AMERICAN PERSPECTIVE 329; Pamela Mendels, *Paper-Bound Thesis Dusted Off, Digitally*, N.Y. TIMES (Sept. 5, 1998), http://www.nytimes.com/library/tech/98/09/cyber/articles/05thesis.html.

[78] *See* MICHAEL LESK, UNDERSTANDING DIGITAL LIBRARIES 329 (2d ed. 2005); GALLICA,

Nationale of Spain has also offered an impressive digital library of literature in Spanish since the mid-2000s.[79] These two libraries alone had more than 320,000 documents in them by 2013.[80]

Unfortunately, a complicated architecture of barriers, tripwires, and structural sabotage is evolving, which may prevent the universal digital library from coming into being. A variety of forces have banded together to mandate this architecture, erect it in computer code, and persuade the world that it is inevitable. These forces include technophobes, the owners of massive stables of copyrighted works, and privatizers of public works. Uniting them is the neoliberal vision that a marketplace of ideas will ensure diversity, freedom, and truth.[81]

The neoliberal consensus of the entertainment industries and government agencies is that the proliferation and extension of private property rights in creative content will ensure that the optimal level of social resources is dedicated to the substantial works of authorship.[82] Without copyright expansion, any library, physical or virtual, will be sterile and unwanted for lack of content. Opposed to this consensus are the increasingly influential views of the hacker elite, many young people, authors and musicians disgruntled with large media companies, and large swaths of the Third World. Activists from these groups often emphasize that giving undue moral or legal deference to intellectual property is a mistake, copyright claims are frequently based on theft,[83]

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http://gallica.bnf.fr/ (last visited Oct. 17, 2015).

[79] *See* BIBLIOTECA VIRTUAL MIGUEL DE CERVANTES, http://www.cervantesvirtual.com/portales/clasicos_en_la_biblioteca_nacional/ (last visited Oct. 17, 2015).

[80] *See* JOSÉ-ANTONIO CORDÓN-GARCÍA, JULIO ALONSO-ARÉVALO, RAQUEL GÓMEZ-DÍAZ, & DANIEL LINDER, SOCIAL READING: PLATFORMS, APPLICATIONS, CLOUDS AND TAGS 262 (2013).

[81] *See* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 SPG L. & CONTEMP. PROBS. 33, n.33 (2003) (citing "a neo-liberal view of economic policy that puts its faith in deregulation, privatization, and the creation and defense of secure property rights as the cure for all ills.") (citing Joseph Stiglitz, *The World Bank at the Millennium*, 109 ECON. J. 577, 577–97 (1999)).

[82] Thus, in 1983 the Reagan administration and West Publishing Co. collaborated to turn over a federal database of case law to West, which has proven to be a "cash cow" ever since, with judicial chambers and government agencies buying thousands of copies of the Federal Reporter and other paginated case law collections. *See* Eriq Gardner, *Lord of the Public Domain: Digital Activist Carl Malamud Wants to Pry U.S. Case Law From the Copyright Grip of Thomson West*, IP LAW & BUSINESS 34 (2008). *See generally* Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 799 (2006).

[83] Emerson v. Davies, 8 F. Cas. 615, 618–19 (C.C.D. Mass. 1845) ("In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. . . . If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times."); Kirby Ferguson, *Everything Is a Remix (Full Film)* (June 25, 2012), http://www.youtube.com/watch?v=coGpmA4saEk ("[A]nybody can remix anything, using videos, photos, whatever, and distribute globally pretty much instantly. You don't need expensive tools. You don't need a distributor . . . . These techniques: collecting material, combining and transforming it, are the same ones used at any level of creation. You could even say, that

making information free to all best promotes equal and widespread access,[84] and loosening restrictions on the use of cultural works promotes innovative forms of creative production.[85] Refusing to tighten copyright rules will aid the rapid digitization of the world's print materials, and their compilation into universally-accessible online libraries. The mainstream liberal school of thought most often recommends balanced theoretical and doctrinal approaches to Internet and digital-library construction that will ensure authorial rights, vigorous innovation, widespread access, real competition on price and terms of use, preserved privacy rights, and freedom of speech. The mainstream liberal pundits on intellectual property in cyberspace may be somewhat more realistic and more forward-looking than the more radical views of either the total privatizers or the liberators of information. The Internet polity, which does exist, is split along ideological and cultural lines into these principal camps.

A powerful confluence of interest groups has ensured that commons-based peer production of digital libraries has been unnecessarily frustrated. Rants against Internet technology and "cyberpirates" persuaded many large corporations that the informational and cultural commons was a mortal threat to their existence, and that it had to be curbed by confining it within very narrow bounds.[86] Lobbyists have persuaded governments that with strict intellectual-property rights, information and communications companies will contribute to rapid economic growth by generating hundreds of billions of dollars in sales and boosting productivity by up to 40%.[87] The premise is that without copyright, the very low marginal cost of making second and third-generation copies will make the production of new works at a high fixed cost uneconomical, due to the impracticability of recoupment. The digitization of printed or recorded works makes them much easier and faster to copy. It enhances the quality of each copy, especially second- and third-generation copies, facilitates the improvement or transformation of the work, and creates the possibility of rapid distribution of copies to the public over computer networks.[88] In the neoliberal vision, limits on certain private property rights are conceived

everything is a remix.").

[84] *See* Arewa, *supra* note 82, at 833–34.

[85] *See* Lessig, *supra* note 2.

[86] *See* WILLIAM F. PATRY, MORAL PANICS AND THE COPYRIGHT WARS (2009); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 3 UTAH L. REV. 537, 537–38 (2009); Hannibal Travis, *Myths of the Internet as the Death of Old Media*, 43 AIPLA Q.J. 1 (2014).

[87] National Information Infrastructure Task Force, *Benefits and Applications of that National Information Infrastructure*, IBIBLIO, http://www.ibiblio.org/nii/NII-Benefits-and-Applications.html (last visited Oct. 17, 2015).

[88] *See id.* at 12.

as unfair taxes, while limits on other persons' speech rights are praised for promoting "smooth" and "predictable" commerce.[89]

The promise of bringing more diversity to free speech institutions in the Internet age has not been fully realized. Despite the uninhibited and widely distributed character of the Web, the early commercial Internet borrowed the concentrated market structure of the print and broadcast industries from which a great deal of its most popular content derives. The Internet industries include the physical fiber optic networks that serve as the Internet's backbone, Internet service providers, Web browsing and media playing software, and Internet search engines and Web portals.[90] By the economic methodology utilized by the U.S. Department of Justice (*i.e.*, the Herfindahl-Hirschman Index), the Internet sector was moderately or highly concentrated for decades.[91] As Internet companies become more concentrated, economists observed that "the Internet might, in the long term, move from an entrepreneurial and libertarian model to one of market power and of regulation resembling or even exceeding that of other electronic media."[92] In December 2012, visits to websites were more evenly distributed outside the top four brands, but two-thirds of Web searches were done on Google, while 83% of social networking happened on Facebook.[93]

The U.S. government's content regulation of the information industry, once it has been allocated the fruits of federally-funded research, has been minimal compared to European nations.[94] In Europe, democratic socialist policies with respect to information provide an illuminating contrast with American neoliberal policies.[95] Under this European model, information and communication are too central to political participation and economic development to be entrusted to

[89] *See id.* at 84.

[90] Eli Noam, *The Internet: Still Wide Open and Competitive?*, Telecommunications Policy Research Conference (Aug. 2003), at 2, *available at* http://www.oii.ox.ac.uk/resources/publications/IB1all.pdf.

[91] *See id.* at 3–6. The level of concentration plummeted by almost half from 1984 to 1994, but it has been highly concentrated since 1998 or 1999. *See id.* at 5. The top ten Internet companies claimed 90–100% of industry revenue from 1984 to 1992; their share was down to 50% by 1996, but was back up to 65% by 2002. *See id.* at 9. In 2001, Internet users spent at least half of their time on Websites controlled by only four brands. *See* Norman Solomon, *Denial and the Ravaging of Cyberspace*, FAIRNESS AND ACCURACY IN REPORTING (Aug. 23, 2001), http://fair.org/media-beat-column/denial-and-the-ravaging-of-cyberspace/.

[92] Noam, *supra* note 90, at 13.

[93] *See* Samuel Weigley, *10 Web Sites Where Surfers Spend the Most Time*, USA TODAY (Mar. 9, 2013), http://www.usatoday.com/story/money/business/2013/03/09/10-web-sites-most-visited/1970835/.

[94] *See* Shalini Venturelli, *Information Liberalization in the European Union*, *in* NATIONAL INFORMATION INFRASTRUCTURE INITIATIVES: VISION AND POLICY DESIGN 470 (Brian Kahin & Ernest J. Wilson, III eds., 1996).

[95] *See id.* at 464.

market forces alone or even predominately.[96] Instead, the state and its laws are charged with ensuring the "rights of citizens" to a basic minimum level of access to information, culture, and communications services.[97] Like higher education, public libraries, universal health care, and public utilities, information and communications services are financed by tax revenue, rather than user fees, more often than in the United States. The success of the democratic socialist model of the information society in achieving its objectives is sometimes remarkable. A consumer in Paris, France, for example, pays about a third to a fourth as much each month as an American for a bundle of high-speed Internet access, basic cable television, and a landline telephone plan.[98]

C. *Fair Use*

Copyright doctrine in the early decades of the American republic was clear and easy to obey. From the perspective of our century, it was remarkable mainly for the freedom that it allowed. The first American copyright law was passed in 1790 as "[a]n Act for the Encouragement of Learning, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned."[99] Copyrights in works of authorship lasted for a scant fourteen years, however, or for twenty-eight if the author lived to renew his or her rights.[100]

The law limited the purpose, duration, and scope of copyright. Until 1909, writers could abridge or translate other writers' books freely. The Copyright Revision Act of 1831 did not restrict "abridged or translated versions" of books, or novelizations.[101] As one court said, characters by American authors were "as much public property as those of Homer or Cervantes."[102] This sweeping statement was typical of the monopoly-suspicious era in which it arose, but is no longer true of copyright law in the age of *Star Wars*. The Copyright Act of 1909 provided for independent and severable exclusive rights to copy a work,

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[96] *See id.*

[97] *Id.*

[98] *See* Hannibal Travis, *The FCC's New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417, 503 (2011).

[99] COPYRIGHT ACT OF 1790, *available at* http://earlyamerica.com/earlyamerica/firsts/copyright/index.html (last visited Oct. 17, 2015).

[100] *See* William F. Patry, *The Copyright Term Extension Act of 1995: Or How Publishers Managed to Steal the Bread From Authors*, 14 CARDOZO ARTS & ENT. L.J. 661, 669–70 (1996).

[101] Judith L. Marley, *Guidelines Favoring Fair Use*, 25 J. OF ACADEMIC LIBRARIANSHIP 367, 368 (1999). *See also* Fitch v. Young, 230 F. 743, 743–45 (S.D.N.Y. 1916); G. Ricordi & Co. v. Mason, 201 F. 184 (S.D.N.Y. 1912), *aff'd*, 210 F. 277 (2d Cir. 1913); Stowe v. Thomas, 23 F. Cas. 201 (C.C.E.D. Pa. 1853). *But see* Falk v. T.P. Howell & Co., 37 F. 202 (S.D.N.Y. 1888); Folsom v. Marsh, 9 F. Cas. 342, 345–49 (C.C. Mass. 1841).

[102] *Stowe*, 23 F. Cas. at 208 (brackets in original) (parentheses added) (the bracketed sentence is attributed in a footnote to 2 AM. LAW REG. 210).

arrange or adapt it, compile it, distribute it, and publicly perform it for profit.[103] As one court explained in applying the 1909 Act:

> The right to publish and sell copies of the copyrighted musical work and the right publicly to perform the work for profit are separate and distinct rights separately granted by the Copyright Act. The separate rights thus exclusively granted to the copyright owners are distinct in character and differ widely in value. There is nothing in the Act which makes the exercise of one right dependent upon the abandonment of the other. The copyright owner may exercise either right or both as its interest may dictate.[104]

As another court said of the 1909 Act, it was no longer an excuse how much of a work another author "did not pirate," as long as a wrongful adaptation of the work had occurred.[105] Under the Copyright Act of 1976, Section 106 gives a copyright owner the exclusive right, among others:

> (1) to reproduce the copyrighted work . . . ; [¶] (2) to prepare derivative works based upon the copyrighted work; [¶] (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, . . . ; [¶] (4) to perform the copyrighted works publicly; and [¶] (5) to display the copyrighted work publicly.[106]

Some norms of copyright law are contrary to what people actually do or expect to be done. Despite the language of the 1909 Act and the 1976 Act, movie and television studios continue to rip off screenwriters' treatments for new films and TV programs,[107] musicians continue to

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[103] *Compare* COPYRIGHT ACT OF 1909, ch. 320, § 1(a), 35 Stat. 1084 (right to vend copies), *with id.* § 1(b), (e), 7 (adaptation, compilation, arrangement, and performance rights). *See also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 154 n.3 (1975) (confirming 1909 Act's right to vend copies).

[104] Interstate Hotel Co. of Nebraska v. Remick Music Corp., 157 F.2d 744, 745 (8th Cir. 1946).

[105] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936), 106 F.2d 45, *aff'd*, 309 U.S. 390 (1940).

[106] 17 U.S.C. § 106 (2002).

[107] *See* Walker v. Time Life Films, Inc., 784 F.2d 44, 53 (2d Cir. 1986) (concerning taking of plot from plaintiff's book, which author challenged as unfair competition and breach of a confidential relationship); Entous v. Viacom Int'l, Inc., 151 F. Supp.2d 1150 (C.D. Cal. 2001) (concerning taking of content from two-page written treatment for television show that fell within subject matter of copyright, which plaintiff challenged as breach of an implied contract to pay him); Metrano v. Fox Broadcasting Co., No. CV-00-2279, 2000 WL 979664, *1–2, 4 (C.D. Cal. 2000) (concerning taking of content from written treatment for proposed television series, which plaintiff challenged as breach of an implied contract to credit his work and pay him for it); Worth v. Universal Pictures, Inc., 5 F.Supp.2d 816, 819–22 (C.D. Cal. 1997) (concerning taking of content from a screenplay registered with the Writers' Guild of America, which plaintiff challenged as breach of an implied contract); Anderson v. Stallone, 11 U.S.P.Q.2d 1161, 1162,

imitate and sample other songs, computer programmers continue to imitate or reverse engineer software and produce competing versions of popular programs,[108] teachers continue to display or distribute copyrighted materials for classroom use,[109] magazines and blogs continue to reproduce extracts from the works of prominent persons,[110]

1164 (C.D. Cal. 1989) (concerning taking of content from thirty-one page treatment for motion picture to be entitled "Rocky IV," which plaintiff challenged as copyright infringement among other things).

[108] *See* Oracle America, Inc. v. Google, Inc., 750 F.3d 1339 (Fed. Cir. 2014) (smartphone operating system software used plaintiff's copyrighted software many thousands or even millions of times without permission); DSC Commc'ns v. Pulse Commc'ns, Inc., 170 F.3d 1354, 1365 (Fed. Cir. 1999) (involving "misappropriation" of software secrets by person who knew or had reason to know that information was derived from or through a person who owed a duty not to reveal it, or by accident or mistake); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1549 (11th Cir. 1996) (concerning misappropriation of software code); Lotus Dev. Corp. v. Borland Int'l, Inc., 49 F.3d 807, 815–18 (1st Cir. 1995) (concerning copying of spreadsheet command menus and submenus); Data Gen. Corp. v. Grumman Sys. Support Group, 36 F.3d 1147, 1165 (1st Cir. 1994) (concerning software imitation under circumstances alleged to amount to "breach of a duty of confidentiality" and "unfair competitive conduct qualitatively different from mere unauthorized copying."); Apple Computer, Inc. v. Microsoft Corp., 35 F. 3d 1435, 1444 (9th Cir. 1994) (cataloguing extensive similarities between Apple and Microsoft interfaces, but holding that most similarities had either been licensed, represented abstract ideas, or were determined by efficiency and so had to be ignored or discounted in assessing infringement); Gates Rubber Co. v. Bando Chem. Ind., Ltd., 9 F.3d 823, 836–45 (10th Cir. 1993) (holding that "design algorithms" in a program that fitted industrial belts might be a "process" unprotectable under copyright law); Sega Enter. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1526 (9th Cir. 1993) (holding that very limited copying of computer code to achieve interoperability with game console, after more extensive intermediate copying, was fair use); Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 716–17 (2d Cir. 1992) (another software infringement case, involving similarities between the "parameter lists and macros" of two interface programs); Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1238 (3d Cir. 1986) (concerning imitation of plaintiff's "idea or concept of a computerized program for operating a dental laboratory"); Atari, Inc. v. North Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 616 (7th Cir. 1982) (concerning imitation of Pac-Man arcade game by home console game K.C. Munchkin); *cf.* Marci Hamilton & Ted Sabety, *Computer Science Concepts in Copyright Cases: The Path to a Coherent Law*, 10 HARV. J. L. & TECH. 239 (1997); John Ogilvie, *Defining Computer Program Parts Under Learned Hand's Abstractions Test in Software Copyright Infringement Cases*, 91 MICH. L. REV. 526 (1992).

[109] *See, e.g.*, Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012) (describing how coalition of American universities worked with Google to digitize books en masse from libraries for teaching and research purposes); Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (describing how university faculty provide e-reserves access to excerpts from books to their students for teaching purposes), *rev'd*, Cambridge U. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014) (remanding for reconsideration of fair use doctrine); U.S. DEP'T OF COMMERCE, *supra* note 1, at 24–25 (addressing same issue).

[110] *See, e.g.*, HarperCollins Publishers LLC v. Gawker Media, 721 F. Supp. 2d 303 (S.D.N.Y. 2010) (posting of extracts from former vice presidential candidate Sarah Palin's autobiography to Internet); Associated Press, *Sarah Palin's 'Going Rogue' Touches on Couric, Gibson*, U.S. NEWS & WORLD REPORT (Nov. 13, 2009), www.usnews.com/news/articles/2009/11/13/sarah-palins-going-rogue-touches-on-couric-gibson-johnston-and-mccain-aides (Associated Press posted extracts from Palin's previous autobiographical book to Internet); Emily Schultheis, *Scott Walker Knocks Mitt Romney in Book*, POLITICO (Oct. 18, 2013), www.politico.com/story/2013/10/scott-walker-knocks-mitt-romney-in-book-98530 (Associated Press posted extracts from autobiography of potential vice presidential candidate in 2012 to Internet in 2013, which Politico in turn apparently summarized, rewrote, and posted with some commentary to its own site).

and websites continue to post newspaper articles to discussion forums[111] and upload the works of dead or retired authors to the global electronic library that is the Internet.[112]

Large sectors of the publishing, movie, record, software, advertising, and other industries have lobbied for more numerous and more robust copyright and trademark rights, and had a string of phenomenal successes in the 1990s. Some of the more prominent examples are the Federal Trademark Dilution Act of 1996, the Sonny Bono Copyright Term Extension Act of 1998, and the Digital Millennium Copyright Act of 1998.[113] Advocacy for such provisions typically entails an account of how the incentive to produce and disseminate information is being undermined by a number of gaps in intellectual property law, and by the Internet.[114] The exclusive rights of owners, the argument goes, must be expanded to encompass uses for which authors or distributors are not being compensated.[115]

Expanded copyrights negatively affect research, teaching, and other fair uses. For example, requiring digital libraries to seek permission prior to scanning, indexing, displaying portions of, or analyzing collections of books or press content is not practical. First, licensed digital libraries will be too expensive for most people to use. Second, licensed digital libraries feature very limited access to the collection. Third, licensed digital libraries often have very frustrating interfaces.[116] Finally, licensed digital libraries resist interactivity by means of hyperlinking, modification, transformation, or social tagging of content.[117]

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[111] *See infra* note 205 and accompanying text (citing Righthaven cases).

[112] *See* Eldred v. Ashcroft, 537 U.S. 186, 193 (2003); Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 282–84 (S.D.N.Y. 2013).

[113] *See* 15 U.S.C. § 1125(c) (Federal Trademark Dilution Act); 17 U.S.C. §§ 301–305 (Copyright Term Extension Act), 17 U.S.C. §§ 512, 1201–1204 (Digital Millennium Copyright Act).

[114] *See* INTERNET POLICY TASK FORCE, *supra* note 1, at 42–74, 102–03; National Information Infrastructure Task Force, *supra* note 87.

[115] *See, e.g.*, INTERNET POLICY TASK FORCE, *supra* note 1, at 10–16, 28–29, 33–35, 85–86, 100–01; National Information Infrastructure Task Force, *supra* note 87; H.R. 2441, 104th Cong. (1995); S. 1284, 104th Cong. (1995); *see also* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557 (1985); Maria Pallante, Register of Copyrights, Statement Before the House Committee on the Judiciary, *quoted in* JOYCE, ET AL., *supra* note 3, at 307–15; Digital Audio Recording: Hearing Before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce, 102d Cong., 2d Sess. 88 (1992) (statement of Jason Berman, president of Recording Indus. Ass'n of Am.); Home Recording of Copyrighted Works: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 97th Cong., 2d Sess. 23 (statement of Jack Valenti, president of Motion Picture Ass'n of Am.); World Intell. Prop. Org., Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to Be Considered by the Diplomatic Conference (1997), www.wipo.int; 1 PAUL GOLDSTEIN, COPYRIGHT §§ 1.1 (2d ed. 1996).

[116] *See infra* note 160 and accompanying text.

[117] *C.f.* United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1118 (N.D. Cal. 2002).

II. TRADE ASSOCIATION NORMS FOR INTERNET CONTENT AND INTELLECTUAL PROPERTY

A. *Regulating Trade Associations*

Jessica Litman has shown that industry-led statutory copyright reform can impede competition and freedom of expression in the digital environment, with particular reference to the lobbying process that led to the Digital Millennium Copyright Act of 1998 (the DMCA).[118] Likewise, Jennifer Rothman has shown that industry-initiated reinterpretations of existing intellectual property law may have a similar impact.[119] Rothman argues that when intellectual-property owners join together in associations to prevent uses of their work that they do not like or want to control, new authors find their work banned.[120] Thus, the National Association of Book Publishers persuaded the American Library Association to limit the photocopying of both uncopyrighted and copyrighted works.[121] Publishers persuaded Congress to announce nonbinding restrictions on educational photocopying, restrictions never adopted in advance by any court or administrative agency.[122]

More recent contributions have extended the discoveries of Litman and Rothman to new areas. Pamela Samuelson and Jason Schultz contend that private ordering and collective self-regulation may restrict the use of computers and the Internet in ways that go beyond what copyright law requires.[123] Privately-mandated filters and the like may

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[118] We have built into the process a mechanism for the cable television industry, or the software publishers' association, or the manufacturers of digital audio tape to insist that the law include a provision privileging this or that use that that party deems essential. We have never had a mechanism for members of the general public to exert influence on the drafting process to ensure that the statute does not unduly burden private, non-commercial, consumptive use of copyrighted works.

Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 23 (1996). *See* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 48–53 (2010) (arguing that beneficiaries of copyright legislation have obtained virtual veto power over reforms that could reduce cost and improve operation of copyright system); *see also* Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 312 n.206 (1989); Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870–79 (1987). *Cf.* Lloyd L. Weinreb, *Custom, Law and Public Policy: The INS Case as an Example for Intellectual Property* 78 VA. L. REV. 141, 146–47 (1992).

[119] *See* Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1931–37, 1950–65 (2007) (arguing that using industry custom to interpret Copyright Act of 1976 has had the effect of restricting commentary and criticism of public figures and a suboptimal production of "fair use" works); Jennifer E. Rothman, *Why Custom Cannot Save Copyright's Fair Use Defense*, 93 VA. L. REV. *IN BRIEF* 243 (Feb. 2007), *available at* http://www.virginialawreview.org/inbrief/2008/02/18/rothman.pdf.

[120] *See* Rothman, *supra* note 119, at 1911–24.

[121] *See id.* at 1916–22.

[122] *See id.* at 1916–22, 1940 (citing Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, H.R. Rep. No. 94-1476, at 70–71 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5684).

[123] Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice of Their*

degrade the efficiency of the Internet itself, introducing laggy and unwanted software.[124] Extending upon these findings, Sonia Katyal concludes that the uncritical delegation of copyright infringement analysis to corporate actors threatens the freedom of expression, which relies upon fair use, as well as user privacy, which depends upon nondisclosure of network logs to corporate trade associations or government agencies.[125]

Users must resist trade association norms in order to preserve the welfare gains which they enjoy from the Internet, as well as their basic freedoms. Ruth Okediji argues that some private industry proposals for Internet regulation would "convert all the gains of the digital environment into surplus rent for copyright owners."[126] The idea is that the creative works contributed by the public to the Internet in an unending stream are at risk for appropriation and control by large collectors of rights over content due to the need for quoting and imitating existing works to create new ones.[127] Jeremy de Beer and Christopher Clemmer point out that enhancing the liability of websites to content owners could fundamentally degrade their freedom and openness, making them inaccessible to many users by increasing their costs and reducing their revenues, and inducing them to prioritize the speech of large paying customers over that of their individual or small business users.[128] Finally, Lital Helman draws upon James Gibson's theory of overcompliance to argue that innovative Internet firms, facing the prospect of a company-killing injunction, will rationally comply with demands to prohibit forms of expression and competition permitted by law.[129]

Use of Technical Protection Measures?, 6 J. TELECOMM. & HIGH TECH L. 41, 42–43, 45–49, 73 (2007–2008); Pamela Samuelson, *The Generativity of Sony v. Universal*: *The Intellectual Property Legacy of Justice Stevens*, 74 FORDHAM L. REV. 1831 (2006).

[124] *See* Pamela Samuelson, *Three Reactions to* MGM v. Grokster, 13 MICH. TELECOMM. TECH. L. REV. 177, 188–94 (2006).

[125] *See* Sonia K. Katyal, *Filtering, Piracy Surveillance and Disobedience*, 32 COLUM. J.L. & ARTS 401, 421–25 (2009).

[126] Ruth L. Okediji, *The Regulation of Creativity Under the WIPO Internet Treaties*, 77 FORDHAM L. REV. 2379, 2387, 2398–99 (2009).

[127] *See id.* at 2385–87, 2398–99.

[128] *See* Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role For Network Intermediaries?*, 49 JURIMETRICS J. 375, 399–400, 406–09 (2009).

[129] Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 TEX. INTELL. PROP. L.J. 111, 119–24, 138–41, 146–48 (2010) (citing, *inter alia*, James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887–906 (2007); Matthew Africa, *Comment, The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88 CAL. L. REV. 1145, 1172 (2000)).

B. *The War on E-books*

E-books have risen in importance because more than "two-thirds of US workers are in information-related jobs, and the rest are in industries that rely heavily on information."[130] The U.S. Department of Commerce has emphasized that the "broad public interest in promoting the dissemination of information to our citizens must be balanced with the need to ensure the integrity of intellectual property rights and copyrights in information and entertainment products."[131] In an important report, one of its task forces wrote that all Americans should enjoy "affordable access to advanced . . . information services, regardless of income . . . or location," because: "As a matter of fundamental fairness, this nation cannot accept a division of our people among . . . information 'haves' and 'have nots.'"[132]

For many young people in particular, "the use of books for research is becoming an archaic concept. If scholarly books are not on the Web, they are invisible to anyone using the Internet as a substitute for in-depth investigation."[133] Even for researchers and writers who do read books, digital versions enable the efficient searching of the "texts of works that may be decades old . . . for those few morsels of insight that may enhance a research paper or help prove an argument."[134]

The Open Book Alliance is a relatively new trade association whose activities may result in increased price-fixing when it comes to online content, due to its intervention in federal court to halt the construction of a new institution stocked with fair use works.[135] It took a position against the settlement for tens of millions of dollars of the copyright claims against Google for scanning books. It conceded, in doing so, that this would only perpetuate a situation in which the "vast majority of in-copyright books are unavailable for digital licensing on the open market, according to an important Carnegie Mellon University study reported to the Copyright Office in 2005."[136]

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[130] National Information Infrastructure Task Force, *The Administration's Agenda for Action*, IBIBLIO, http://www.ibiblio.org/nii/NII-Agenda-for-Action.html (last visited March 18, 2015).

[131] *Id.*

[132] *Id.*

[133] Lisa Guernsey, *The Library as the Latest Web Venture*, N.Y. TIMES (June 15, 2000), http://www.nytimes.com/library/tech/00/06/circuits/articles/15book.html.

[134] *Id.*

[135] *Google Faces Antitrust Investigation for Agreement to Digitize Millions of Books Online*, DEMOCRACY NOW! (Apr. 30, 2009), http://www.democracynow.org/2009/4/30/google_faces_antitrust_investigation_for_agreement; Brewster Kahle, *Announcing the Open Content Alliance*, YAHOO! SEARCH BLOG (Oct. 2, 2005), http://www.ysearchblog.com/archives/000192.html; Brewster Kahle, *At End of Act II: Are We Being Played for Fools OR Building an Enlightened Digital World?*, OPEN CONTENT ALLIANCE (Sept. 20, 2009), http://www.opencontentalliance.org/.

[136] Brief for the Open Book Alliance as Amici Curiae Supporting Pl. at 9, The Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 686 (S.D.N.Y. 2011) (No. 05 CV 8136-DC). The court,

Google has scanned millions of library books and was poised to offer them for sale as a result of the outcome of a class-action settlement with the Author's Guild and several publishers, who were named plaintiffs representing thousands of authors and copyright holders.[137] If these millions of e-book licenses had been combined with the public domain books Google has scanned and made available, the result would have surpassed in utility any library or bookstore by miles. Unlike the iTunes or Kindle services, against which few publishing associations complain, there may not have been uniformly high price set above competitive levels for the e-books on Google Books.[138]

Therefore, the publishers and booksellers faced a tsunami of competition, and organized themselves against it. The Japanese and Scandinavian publishers' associations and the British booksellers' association opposed the Google Book Search settlement allowing entire pages, chapters, and volumes of out-of-print books to be viewed for a price set by a registry with competitive pricing like YouTube. The most famous journalists and writers in the United States, and those selling or licensing their work, may benefit from these exorbitant prices.[139]

concerned by such submissions including one by the Department of Justice echoing the Open Book Alliance's arguments, rejected the settlement and found that Google could only provide snippets from the books as fair use. *See* Authors Guild v. Google, Inc., 770 F. Supp. 2d 666, 682-86 (S.D.N.Y. 2011), subsequent proceedings at 954 F. Supp. 2d 282 (S.D.N.Y. 2013), aff'd, 804 F.3d 202 (2d Cir. 2015). *See also* Hannibal Travis, *The Economics of Book Digitization and the Google Books Settlement*, *in* RESEARCH HANDBOOK ON E-COMMERCE (John Rothchild ed., forthcoming 2016).

[137] *See* Press Release, Debevoise & Plimpton LLP, Debevoise Advises Worldwide Class of Publishers and Association of American Publishers in Landmark Settlement with Google, Nov. 25, 2008, http://www.debevoise.com/newseventspubs/news/RepresentationDetail.aspx?exp_id=a3dba5c6-7e25- 4b70-a9c7-0156917fee0d.

[138] *See id.*

[139] Book prices are high compared to their cost of production and to the prices (often $0) of book-like Internet content such as Wikipedia. Each Wikipedia article is worth about $2 (willingness to pay) to $300 (replacement value) but is offered free of charge. *See* Jonathan Band & Jonathan Gerafi, *Wikipedia's Economic Value*, INFOJUSTICE (2013), http://infojustice.org/wp-content/uploads/2013/10/band-gerafi10032013.pdf. Hardcover books cost about $3 to print but are sold on average for more than $18, although mass market paperbacks, which cost even less to distribute, sell for about $8-9 on average. *See* Narasu Rebbapragada, UPDATED: E-BOOK PRICES FUEL CONSUMER OUTRAGE, PCWORLD (Mar. 8, 2012), http://www.techhive.com/article/228688/ebook.html. Hardcover book prices have risen faster than the minimum wage, for example, from about three to four hours' worth of work at minimum wage in 1961 (three hours of work at $1.15 per hour being worth $3.45, four hours $4.60), to about seven hours of work in 1991 (seven hours of work at $4.25 per hour being worth $29.75), and to six hours of work in 2003 (six hours of work at $5.15 per hour being worth $30.90). *See* ALBERT N. GRECO, CLARA E. RODRIGUEZ, & ROBERT M. WHARTON, THE CULTURE AND COMMERCE OF PUBLISHING IN THE 21ST CENTURY 7 (2007) ("In 2005 publishers released 25,184 new fiction titles in hardcover, with an average suggested retail price [SRP] of $27.52. . . . Mass- market paperback books retailed for an average of $6.79."). Mass-market paperbacks used to cost only $0.25. *See id.* at 26. Although back catalog titles often cost less than SRP, bringing down the average cost, bestsellers in hardcover cost about $30 to $40 in our century. *See* Dennis Loy Johnson, *Who's Responsible For High Book Prices?*, ALTERNET (Apr. 13, 2002), http://www.alternet.org/story/12860/who%27s_responsible_for_high_book_prices/. For

Amazon, Microsoft, and the American journalists and writers associations therefore joined the foreign publishers in opposing the settlement.

One of the principal participants in the Open Book Alliance is Microsoft, which has long planned to team up with content owners to charge for content and take a percentage cut, as Apple is now successfully doing.[140] The famous Internet strategy of Bill Gates in 1995 reflected this, as did the bundling of Windows Media Digital Rights Management technology with Windows, and the losses Microsoft incurred setting up the Xbox Live platform.[141] Neither Microsoft nor Adobe always insists on fair use, their products and licenses make clear. Microsoft's licenses frequently purport to restrict criticism of Microsoft's works.[142] Adobe's licenses for eBooks are protected by its Advanced E-Book Reader format, which purports to restrict users' from copying, annotating, or printing out passages from the E-Books.[143]

Libraries licensed under trade association norms are quite expensive. Some of the first electronic libraries of up-to-date news and opinion were the LexisNexis and Westlaw services, which were too expensive for most people to use. Their main customers were large law firms and law schools, which were able to benefit from expensive

minimum wage rates, *see View the Minimum Wage from 1938 to 2012 Data*, UNITED STATES DEPARTMENT OF LABOR (2015), http://www.dol.gov/minwage/chart1.htm.

[140] John J. Kafalas, *For Microsoft, The World Is Not Enough*, KAFALAS (Apr. 25, 2001), http://www.kafalas.com/urbcol67.htm. E-book prices saw a sharp drop after the U.S. Department of Justice halted an alleged price-fixing conspiracy with a consent decree in 2012-2013. *See* Michael R. Baye, Babur De los Santos, Matthijs R. Wildenbeest, *Searching for Physical and Digital Media: The Evolution of Platforms for Finding Books, in* ECONOMIC ANALYSIS OF THE DIGITAL ECONOMY 161–162 (Avi Goldfarb et al. eds., 2015).

[141] For the strategy of Bill Gates in 1995, *see* Kafalas, *supra* note 140. For the effects of bundling Windows Media Digital Rights Management, *see* Charlie Demerjian, *Microsoft Media Player Shreds Your Rights*, THE INQUIRER (Sep. 21, 2006), http://www.theinquirer.net/inquirer/news/1027669/microsoft-media-player-shreds-rights. For Microsoft's plans for the Xbox Live platform, *see* John Herrman, *Microsoft, It's Time to Stop Charging for Other Companies' Content on Xbox*, GIZMODO (Jan. 13, 2010), http://gizmodo.com/#!5447248/microsoft-its-time-to-stop-charging-for-other-companies-content-on-xbox.

[142] *See* Hannibal Travis, *The Principles of the Law of Software Contracts: At Odds with Copyright, Consumer, and European Law?*, 84 TUL. L. REV. 1557, 1567 (2010). Microsoft digital rights management in Windows allegedly impedes fair use of video content. *See* Cory Doctorow, *Microsoft Abandons Its Customers AND Copyright to Kiss Up to Hollywood*, BOINGBOING (Aug. 30, 2005), http://boingboing.net/2005/08/30/microsoft-abandons-i-html. More recently, Microsoft and Google have agreed to revive aspects of the notorious Stop Online Piracy Act aimed at pretrial punishment of websites "primarily dedicated" to copyright infringement, this time aimed at taking away the ad revenue or search results for such sites. See Ben Woods, Google and Microsoft Sign Up to US Ad Network Guidelines on Fighting Piracy and Counterfeiting, The Next Web News (July 15, 2013), http://thenextweb.com/google/2013/07/15/google-and-microsoft-sign-up-to-us-ad-network-guidelines-on- fighting-piracy-and-counterfeiting/academy. See generally Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011) (proposed 17 U.S.C. §§ 506(a)(1)(B), (b)(1)-(4)).

[143] *See* United States v. Elcom Ltd., 203 F. Supp. 2d 1111, 1118 (N.D. Cal. 2002).

investments in improving the quantity of information available at a moment's notice.[144] It has remained unduly costly and difficult to access many forms of data and information generated by government agencies but controlled by conglomerates such as Reed Elsevier and Thomson Reuters.[145] Similarly, reference works such as the *Encyclopedia Britannica* and *Oxford English Dictionary* initially sold access to their tomes for $120 to $550 per year, which over the years probably exceeded the couple of thousand dollars the printed versions cost.[146]

Libraries that purchase physical books are very expensive to build and maintain due to, among other reasons, the high cost of books intended for library acquisition. The cost of maintaining public libraries runs into the tens of millions of dollars per year.[147] In New England, expenditures per capita on libraries approached $26 in the late 1990s.[148] Towards the end of the twentieth century, the cost of building new libraries rose from $20 per to $60 per book in the United States, and from $75 to $100 in London and Paris.[149]

The Open Book Alliance's position in the Google Book Search case may have made hundreds of thousands of books virtually invisible to members of the public. Unlike Google Book Search, traditional libraries do not make every book ever printed—regardless of initial cost or language—free for citizens to retain and read indefinitely, at their

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[144] *Cf.* CHRISTINE L. BORGMAN, FROM GUTENBERG TO THE GLOBAL INFORMATION INFRASTRUCTURE 123 (2000).

[145] JOHN AZZOLINI, LAW FIRM LIBRARIANSHIP: ISSUES, PRACTICE AND DIRECTIONS 1, 165 (2012), *available at* http://books.google.com/books?id=_GFEAgAAQBAJ&pg=PT67; *see also* Alyssa Altshuler, *An Overview of Five Internet Legal Research Alternatives*, Virginia Lawyer (Oct. 2001), www.vsb.org/publications/valawyer/oct01/altshuler.pdf?; Travis, *Building Universal Digital Libraries*, *supra* note 70, at 773 ("Access to Lexis/Nexis costs anywhere from around $175 to almost $ 900 per hour, while per-page access costs up to $ 9 for legal materials and $ 3 for news.") (footnotes omitted).

[146] *See* Henry Kisor, *Making E-books; And Other Forecasts for the Literary Year Ahead*, CHICAGO SUN-TIMES, Jan. 2, 2000, at 16; Rosemary Herbert, *Word Processor; Oxford English Dictionary Steps Into New Era with On-Line Edition*, THE BOSTON HERALD, Mar. 24, 2000, at 45; Leslie Walker, *Spreading Knowledge, The Wiki Way*, WASH. POST, Sept. 9, 2004, at E01.

[147] *See* DENISE GLOVER, PUBLIC LIBRARY TRENDS ANALYSIS: FISCAL YEARS 1992–96 (2001), at 24, Table 9, *available at* http://nces.ed.gov/pubs2001/2001324.pdf. The two-thirds figure derives from dividing the $12.6 per person operating expenditure in the southeast by the national average of $18.7. *See id.*

[148] *See id.* (reporting increase in operating expenditures per capita from $12.6 to $15.2 in Southeast from 1992–96, and from $12 to $14.1 in the Southwest, compared to from $21.4 to $25.9 in New England and $18.4 to $23.1 in the Rocky Mountains region).

[149] *See* Michael Lesk, *The Future Value of Digital Information and Digital Libraries*, *in* DEVELOPMENT OF DIGITAL LIBRARIES: AN AMERICAN PERSPECTIVE 65 (Deanna B. Marcum ed., 2001) [hereinafter Lesk, *Future Value of Digital Libraries*]. It may cost $37 per book to build an academic library collection, and even more to build a new library. *See* K.J. Anderson, R.S. Freeman, J.P.V.M. Hérubel, Lawrence Mykytiuk, & Judith Nixon, *Buy, Don't Borrow: Bibliographers' Analysis of Academic Library Collection Development Through Interlibrary Loan Requests* 27 COLLECTION MGMT. 1, 3 (2002).

leisure.[150] Physical libraries restrict access and destroy books, in order to limit copying, save costs, and keep up appearances. Many American public libraries and libraries in public universities once allowed the general population to enter, read the books on the shelves, and access the computer terminals.[151] Now, however, most books are locked behind library doors, unavailable for lending on a particular day or to a particular person, or are out of print altogether.[152] Only two-thirds of Americans had library cards at the end of the twentieth century, even though there were 16,000 public libraries in the U.S.,[153] and only one-third of Americans used the library to access multimedia materials such as videos or CDs.[154] Borrowing rights and special services such as interlibrary loan or access to rare books are typically reserved for residents of the city where the public library was located, or students of the public university for which the library was created.[155] Perversely, digital libraries established by institutional subscriptions or provided to select users only may be even *less* open to the public than many physical libraries were in the past.[156]

In addition, access rights and reading habits are closely policed in copyright-protected digital libraries. Shielded by the first sale doctrine and the doctrine of fair use, many physical libraries permit books to be read and even copied without tracking users' actions in detail.[157] By contrast, commercial digital libraries maintain detailed purchase records, "even to the level of what parts are read or used and how much time is spent with each."[158]

Many users also find licensed digital libraries' interfaces to be maddening. One legal scholar describes his experience using WestlawNext, the portal of the Thomson Reuters corporation for business, legal, and current events news and data, as using an "the anti-Google -- I'd type in search terms or even a case name, and I'd get

[150] *See* Jason Epstein, *Books@Google*, N.Y. REV. OF BOOKS, Oct. 19, 2006, http://www.nybooks.com/articles/19436.

[151] *See* BORGMAN, *supra* note 144, at 241.

[152] *Cf.* BORGMAN, *supra* note 144, at 80.

[153] *See* Dennis McLellan, *Local 'Cybraries' Power Up Technology: Bytes Increasingly Augment Books As More Facilities Go Online*, L.A. TIMES, Nov. 9, 1998, at A1.

[154] *See id.*

[155] *See* BORGMAN, *supra* note 144, at 80–81.

[156] *See id.*

[157] *See Questions and Answers on Privacy and Confidentiality*, AMERICAN LIBRARY ASSOCIATION, http://www.ala.org/Template.cfm?Section=Interpretations&Template=/ContentManagement/ContentDisplay.cfm&ContentID=15347 (last visited Oct. 17, 2015) ("In a library, the right to privacy is the right to open inquiry without having the subject of one's interest examined or scrutinized by others.").

[158] BORGMAN, *supra* note 144, at 242 (citing Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace,* 28 Conn. L. Rev. 981 (1996)).

everything other than the case or article I was looking for."[159] A commenter to his blog post wrote that when he searched for judicial opinions on "heart failure," the first case retrieved did not refer to "heart failure" at any point.[160] Such a result is unlikely on any Google service.

C. *Gouging the Blogosphere*

Conflicts over blogging highlight the nexus between denial of fair use in court and price-fixing for media content. On January 14, 2008, in the Southern District of New York, the Associated Press ("AP") sued All Headline News ("AHN"), claiming that AHN was illegally copying and rewriting stories by AP reporters. The complaint specifically identified six articles, claiming that AHN "copied some or all of the expression contained within" the articles, and then displayed the articles.[161] The AP claimed that these practices also violated their quasi-property right in breaking news under the New York common law tort of hot-news misappropriation. The AP also alleged that the failure to give credit was a wrongful altering or removing of copyright management information under the DMCA.[162] The complaint also alleged breaches of contract regarding AP's website terms of service.[163]

In the summer of 2008, bloggers began to publicize the new guidelines established by the Associate Press for quotation of news. The AP's price list for quoting was: free for four words, $12.50 for 5-25 words; $17.50 for 26-50 words, $25.00 for 51100 words, $50.00 for 101250 words, and $100.00 for 251 words and up. The AP also stated that it reserved the right to terminate an agreement at any time if the licensed content is deemed by the AP or its agents to be "offensive and/or damaging" to its reputation.

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[159] Matt Bodie, *I Want My Westlaw Classic*, PRAWFSBLAWG (Apr. 16, 2014), http://prawfsblawg.blogs.com/prawfsblawg/2014/04/i-want-my-westlaw-classic.html.

[160] Marty Witt, *Comment to Matt Bodie, I Want My Westlaw Classic*, PRAWFSBLAWG (Apr. 16, 2014), http://prawfsblawg.blogs.com/prawfsblawg/2014/04/i-want-my-westlaw-classic.html/comments.

[161] The Assoc. Press v. AllHeadline News Corp. 608 F. Supp. 2d 454 (S.D.N.Y. 2009). *See also* Complaint, The Assoc. Press v. AllHeadline News Corp. 608 F. Supp. 2d 454 (S.D.N.Y. 2009) (No. 08 Civ. 323), 2008 WL 887245; Memorandum and Order, The Assoc. Press v. AllHeadline News Corp. 608 F. Supp. 2d 454 (S.D.N.Y. 2009) (No. 08 Civ. 323) (denying, in part, defendant's motion to dismiss), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-02-17-Order%20Granting%20in%20Part%20AHN's%20Motion%20to%20Dismiss.PDF.

[162] *See* Memorandum and Order, The Assoc. Press v. AllHeadline News Corp. 608 F. Supp. 2d 454 (S.D.N.Y. 2009) (No. 08 Civ. 323) (denying, in part, defendant's motion to dismiss), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-02-17-Order%20Granting%20in%20Part%20AHN's%20Motion%20to%20Dismiss.PDF.

[163] Specifically, it alleged that defendants unlawfully copied and altered AP news stories in violation of the federal Copyright Act, 17 U.S.C. § 106, the DMCA, 17 U.S.C. § 1202, the Lanham Act, 15 U.S.C. §§ 1114 & 1125(a), and New York common law. *See The Associated Press*, 608 F. Supp. 2d at 454.

On February 17, 2009, Judge P. Kevin Castel dismissed the AP's claim of unfair competition under the Lanham Act under a missing attribution of authorship theory. He found that AP's hot news misappropriation class was still recognized under New York law. On June 15, 2009, the court announced that the parties reached a settlement. AHN paid an unspecified sum to settle the case and "agreed that [it] would not make competitive use of content or expression from AP stories."[164] AHN also acknowledged that "there were many instances in which AHN improperly used AP's content without AP's consent."[165]

Perhaps emboldened by this ruling, the AP's 2010 price schedule for "for profit" quotation of news demanded $17.50 for up to 50 words, $25.00 for 51-100 words, $50.00 for 101-250 words, and $100.00 for 251 words and up.[166] The fee schedule for both "education" and "non profit" sought $12.00 for up to 50 words, $25.00 for 51-100 words, $50.00 for 101-250 words, and $75.00 for 251 words and up.[167]

The AP asked the "Drudge Retort" blog to remove seven items from the site that contained quotations from AP articles ranging from thirty-nine to seventy-nine words.[168] The strategy director of AP said in an interview that AP was rethinking its policies towards bloggers.[169] It approached the Media Bloggers Association, which was helping Drudge Retort in its dispute with AP, about endorsing the AP's restriction on quoting more than four words without paying.[170] Several well-known bloggers began criticizing the AP's licensing policy, claiming it would "undercut the active discussion of the news."[171] The AP defended its action against the Drudge Retort and stated that it would challenge blog postings containing excerpts of AP articles "when we feel the use is

[164] DMLP Staff, Assoc. Press v. All Headline News, DIGITAL MEDIA LAW PROJECT (Apr. 7, 2009), http://www.citmedialaw.org/threats/associated-press-v-all-headline-news#description.

[165] *Id.*

[166] Wendy Davis, *iCopyright Sues Associated Press for Breach of Contract, Unfair Competition*, MEDIAPOST (Dec. 7, 2010, 8:02 PM), http://www.mediapost.com/publications/article/140842/icopyright-sues-associated-press-for-breach-of-con.html. For the 2008 price schedule, *see* Jennifer Leggio, *The Associated Press Plays Role of Metallica in Napsteresque War with Bloggers*, ZDNET (June 18, 2008, 8:18 GMT), http://www.zdnet.com/article/the-associated-press-plays-role-of-metallica-in-napster-esque-war-with-bloggers/?.

[167] *See* Leggio, *supra* note 166.

[168] *See* Leggio, *supra* note 166*; see also* WAYNE OVERBECK & GENELLE BELMAS, MAJOR PRINCIPLES OF MEDIA LAW 1, 285 (2012 ed.) (2011); Roger Cadenhead, *AP Files 7 DMCA Takedowns Against Drudge Retort*, CADENHEAD.ORG (June 12, 2008), http://workbench.cadenhead.org/news/3368/ap-files-7-dmca-takedowns-against-drudge; Assoc. Press v. Drudge Retort, DIGITAL MEDIA LAW PROJECT, (June 16, 2008), www.dmlp.org/threats/associated-press-v-drudge-retort [hereinafter DMLP]; Saul Hansell, *The Associated Press to Set Guidelines for Using Its Articles in Blogs*, N.Y. TIMES (June 16, 2008), http://www.nytimes.com/2008/06/16/business/media/16ap.html?pagewanted=print&_r=0.

[169] *See* DMLP, *supra* note 168.

[170] *See id.*

[171] Hansell, *supra* note 168.

more reproduction than reference, or when others are encouraged to cut and paste."[172]

Ironically, in 2009 the Associated Press and *U.S. News and World Report* quoted and summarized Sarah Palin's autobiographical reflections in detail and in a seeming attempt to scoop the story from other publications rather than to criticize her arguments, which would not pass muster under a narrow interpretation of fair use.[173] More recently, the AP quoted from excerpts—leaked by Buzzfeed and the Huffington Post—of a confidential report by *The New York Times* on the state of its website and competition with websites like Buzzfeed and the Huffington Post.[174] U.S. News did not comment directly on the excerpt, but did "paste" it.[175]

New business models face considerable barriers to entry under guidelines for the use of copyrighted work such as those announced by the AP. Facebook News Feed is communication for millennials because it is unnecessary to search for anything (*i.e.*, it automatically updates you with all the information you need). How might such services fare under the AP's policy of requiring license fees for headlines? If the policy is enforceable, the services could be illegal unless the headlines or news snippets users quote from are licensed prior to publication.

D. *Prepublication Licensing of Online Videos and Mashups*

Online video and Internet user mashups of movies and television shows have evolved into the preferred medium of expression for Americans and other residents of developed nations.[176] Free online video sites such as YouTube are more efficient than their licensed counterparts such as iTunes or MySpace Video because they do not prevent the online use of works that are forgotten or are without

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[172] *Id.*

[173] *See* Mark Kennedy, *Sarah Palin Elects to Play It Soft in 'Going Rogue'*, ASSOCIATED PRESS, Nov. 17, 2009, http://www.newsday.com/entertainment/books/sarah-palin-elects-to-play-it-soft-in-going-rogue-1.1595467; Kenneth T. Walsh, *Sarah Palin's 'Going Rogue' Touches on Couric, Gibson, Johnston, and McCain Aides*, U.S. NEWS & WORLD REPORT, Nov. 13, 2009, http://www.usnews.com/news/articles/2009/11/13/sarah-palins-going-rogue-touches-on-couric-gibson-johnston-and-mccain-aides.

[174] *See* Associated Press, *Jill Abramson Ousted from New York Times*, OREGON LIVE, (May 15, 2014, 9:27 AM) http://www.oregonlive.com/today/index.ssf/2014/05/jill_abramson_ousted_from_new.html. The quotation in the AP report about the New York Times not moving with enough urgency to compete with Buzzfeed and the Huffington Post is from the leaked report. *Id. See also* Myles Tanzer, *Exclusive: New York Times Internal Report Painted Dire Digital Picture*, BUZZFEED (May 15, 2014, 11:06 AM), http://www.buzzfeed.com/mylestanzer/exclusive-times-internal-report-painted-dire-digital-picture#.icAKrllY5q; Myles Tanzer, *Times Internal Report Painted Dire Digital Picture*, HUFFINGTON POST (May 15, 2014, 11:23 AM), http://www.huffingtonpost.com/2014/05/15/times-internal-report-pai_n_5331146.html.

[175] *C.f.* Walsh, *supra* note 173.

[176] *See* Lessig, *supra* note 2.

economic value, such as clips aired many years ago on *Saturday Night Live*, the *Arsenio Hall Show*, the *Ed Sullivan Show*, or C-SPAN. Many people look to YouTube as a haven for fair use, shielded by the DMCA.[177] Sites such as YouTube improve access to political speeches, cultural performances, music and lyrics, and parodies of every possible description. Unlike the owners of a television channel, YouTube's administrators need not monitor every host's work in detail and make close calls about the possibility of offensiveness or legal issues such as potential copyright infringements.

Viacom's campaign to mandate automated filtering of YouTube and other online video services is therefore yet another prime example of how a potential norm might be reinforced by law in a way that will harm free speech institutions and promote price-fixing by the mass media. In *Viacom International v. YouTube, Inc.*, the media conglomerate—formed by the merger of Paramount, Viacom Media Networks ("VMN"), and Dreamworks SKG—sought statutory or actual damages in excess of a billion dollars under the Copyright Act.[178] In 2010, the court found that plaintiffs had the full array of remedies (including statutory damages) available to them, but Viacom was unsatisfied and sought common-law punitive damages on top of that, which were denied. Plaintiffs have won huge punitive damages in hip-hop sampling cases, no doubt inspiring a way to make YouTube less open to sampling.[179] Other plaintiffs filed a putative class action against YouTube on behalf of thousands of copyright owners.[180] Both their suit, and the one filed by Viacom, sought injunctions of the type that shut down Napster completely in 2001, because the courts' zero tolerance orders could not be complied with.[181]

Viacom also joined at about the same time with News Corp., Microsoft, and Disney in developing the User Generated Content Principles ("UGCP"). In adopting the UGCP, these four conglomerates may have limited competition among themselves in the provision of user-friendly online video services. The UGCP outsource copyright

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[177] *See id.*

[178] Viacom International, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012).

[179] *See, e.g.*, Bridgeport Music, Inc. v. Combs 507 F.3d 470 (6th Cir. 2007) (instructing district court to award punitive damages of closer to $369,000 to $738,000 on remand, as more proportionate to compensatory damages for unauthorized sampling of record, or to order a new trial).

[180] *See* First Am. Complaint at ¶ 145, The Football Ass'n Premier League, Ltd. v. YouTube, Inc., No. 07 Civ. 3582-UA (C.D. Cal. First amended complaint filed Nov. 6, 2007), *available at* http://tinyurl.com/6b7rk3.

[181] *See id.*; Seth Sutel, *Viacom Sues YouTube for $1 Billion*, ASSOCIATED PRESS, Mar. 13, 2007, http://forums.eog.com/showthread.php/76795-Viacom-Sues-YouTube-for-1-Billion (Viacom sought injunction against further infringements); *Napster Forced to Shut Down*, BBCNEWS.COM, July 3, 2001, http://tinyurl.com/5mf35o (Napster shut down by injunction against further infringements).

complaints from lawyers sending letters to so-called Identification Technology, specifically in section 3(c): "If the Copyright Owner . . . wishes to block user-uploaded content that matches the reference data, the UGC Service should use the Identification Technology to block such matching content before that content would otherwise be made available on its service."[182]

This kind of automatic preemption of copyright infringement disregards user's fair use interests.[183]

Federal statutes and case law require fair use evaluations of user-generated content on a case-by-case basis. In another YouTube case, Universal Music ("Universal") argued that copyright owners may lose the ability to respond rapidly to potential infringements if they are required to evaluate fair use. Yet federal law states that Universal must make a fair use determination to avoid being liable for copyright misrepresentation under 17 U.S.C. § 512(f).[184] In the 2008 case of *Lenz v. Universal Music Corp.* the court stated, with respect to a demand that a homemade video with copyrighted music playing in the background be removed, that the owner should make a particularized determination not just of use, but of unfair use.[185]

The Obama administration has disregarded the lessons from *Lenz* and other cases, in which bad-faith or groundless copyright claims have threatened the Internet accounts of ordinary citizens. In a 2013 report on copyright reform, the administration opined:

> In some contexts, licensing mechanisms have been developed as a less risky alternative to relying on fair use. Particularly promising are those that rely on commercial intermediaries to enable remixes by their individual users. One model is YouTube's Content ID system, which allows users to post remixes that may be monetized by the relevant right holders. Under this system, however, it is the right holder's decision whether to allow the posting . . . . In addition, best practices and industry-specific guidelines have been developed to help artists looking to use existing works make informed choices, including a code of best practices specifically for creating online videos.[186]

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[182] CBS, et al., *Principles for User Generated Content Services: Foster Innovation. Encourage Creativity. Thwart Infringement* (2007), http://ugcprinciples.com; *see also* CBS Corp. et al., Press Release, *Internet and Media Industry Leaders Unveil Principles to Foster Online Innovation While Protecting Copyrights* (Oct. 18, 2007), http://ugcprinciples.com/press_release.html.

[183] *See* Lessig, *supra* note 2.

[184] 17 U.S.C. § 512(f) (2014).

[185] Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008), *aff'd* 801 F.3d 1126 (9th Cir. 2015).

[186] INTERNET POLICY TASK FORCE, *supra* note 1, at 29 (citing YouTube – Content ID, http://www.youtube.com/t/contentid; AMERICAN UNIVERSITY, *Code of Best Practices for Fair Use in Online Video*, CENTER FOR SOCIAL MEDIA, http://centerforsocialmedia.org/fair-

Internet copyright filtering technology such as Content ID and Audible Magic CopySense threatens to frustrate the potential of the Internet.[187] Although the Internet has broadened political speech to many more participants, Internet copyright filtering will squelch this development by denying to bloggers and online "channels" the same rights enjoyed by media corporations to engage in fair use quotation, commentary, parody, pastiche, and satire. Peter Yu argues that the termination of user accounts due to trade association or individual firm pressure against YouTube or similar services has "major shortcomings that will raise significant concerns among civil liberties groups, consumer advocates, and academic commentators."[188] By automatically deleting quotations of audio and video content, Internet copyright filtering makes Internet versions of the network news and radio and television talk shows illegal and impossible. No one can have a show like *The Daily Show* or *The Glenn Beck Show* with the UGCP, because most major news sources would delete clips used by the host to criticize or mock the persons portrayed in the clip.

When backed by federal regulations or international treaties, such copyright filtering will prevent large investments from being made in uninhibited political discourse over the Internet. An oligopolistic situation in online video may emerge as the largest players restrain competition among themselves, and as the smaller players lose their domain names to increasingly restrictive U.S. and foreign laws.[189] This reconcentrates political speech in facilities controlled by media corporations based in New York or Hollywood, such as Disney, NBC, and Viacom.

The only measure potentially more disastrous for YouTube and other free speech institutions utilizing video protocols would be so-

use/related-materials/codes/code-best-practices-fair-use-online-video; American University, Center for Social Media, Remix Culture, http://www.centerforsocialmedia.org/fair-use/videos/podcasts/remix-culture).

[187] Audible Magic is probably the world's most productive copyright court, although it does not insist on fair use or some other exceptions to copyright. It "scans online files for copyrighted material, checking against a vast database of audio and video content provided by recording, movie and TV studios," and against another database of authorized uses, in order to "stop" uses that recording, movie, and TV studios do not like. *See* Michael Liedtke, *Audible Magic Emerging as Top Copyright Cop in Digital Revolution*, USA TODAY, Mar. 23, 2007, http://usatoday30.usatoday.com/tech/news/techinnovations/2007-03-25-magic-police_N.htm. The technology, like ContentID, could be criticized for ignoring fair use and other exceptions to copyright. *See* Rebecca Tushnet, *All of This Has Happened before and All of This Will Happen Again: Innovation in Copyright Licensing*, 29 BERKELEY TECH. L.J. 1447 (2014).

[188] Peter K. Yu, *Promoting Internet Freedom Through the Copyright System*, U.S. EMBASSY (July 29, 2010), http://iipdigital.usembassy.gov/st/english/publication/2010/07/20100727141034enelrahc5.498904e-02.html.

[189] *See* Ben Sisario, *Piracy Fight Shuts Down Music Blogs*, N.Y. TIMES, Dec. 13, 2010, http://www.nytimes.com/2010/12/14/business/media/14music.html.

called "moral rights" for audiovisual performers.[190] These rights threaten to make a criminal of anyone who makes obscure musical or music video footage available on a platform such as YouTube. In 2012, in signing the Beijing Treaty for Audiovisual Performances, the Obama administration agreed to precisely that. In the name of performers controlling their work and being paid for it, the treaty purports to inflict a harsh regime of censorship on the Internet.[191] The Trans-Pacific Partnership would build on this to criminalize the making available of audiovisual performances to others unless no significant revenue is lost, the preparation of derivative works for purposes of indirect commercial gain, and the recording performances and using them for purposes of noncommercial Internet speech where some incidental commercial gain by the user is possible.[192] This is not only unconstitutional but unnecessary, because the United States government is aware of several less restrictive means of offering to actors and other performers strong control over and real compensation for their performances. These include the right of publicity, common-law trademark rights in celebrity names, and unfair competition or misappropriation doctrines in the

[190] Moral rights, prohibit the intention modification of a work to deny attribution or interfere with the integrity of a work. *See* Visual Artists Rights Act of 1989: Hearing Before the Subcommittee on Courts, Intellectual Property, and the Admin. of Justice of the Comm. on the Judiciary, H.R. 2690, 101st Cong. 66 (1989) (statement of Ralph Oman, Register of Copyrights), *quoted in* Christopher J. Robinson, *The "Recognized Stature" Standard in the Visual Artists Rights Act*, 68 FORDHAM L. REV. 1935, 1946 n. 93 (2000). While not a feature of U.S. copyright law, they arguably flow to authors from state common and statutory law. *See* Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 93 (1961), http://www.copyright.gov/history/1961_registers_report.pdf ("In the United States the moral rights of authors have never been treated as aspects of copyright. But authors hare been given much the same protection of personal rights under general principles of the common law such as those relating to implied contracts, unfair competition, misrepresentation, and defamation.").

[191] "Article 16 of the WIPO Audiovisual Treaty requires parties to provide civil remedies against those who negligently facilitate the distribution, importation for distribution, communication or making available to the public, 'performances or copies of performances fixed in audiovisual fixations knowing that electronic rights management information has been removed or altered without authority.'" Carolina Rossini, Mitch Stoltz & Yana Welinder, *Beijing Treaty on Audiovisual Performances: We Need to Read the Fine Print*, EFF DEEPLINKS BLOG (July 24, 2012), https://www.eff.org/deeplinks/2012/07/beijing-treaty-audiovisual-performances (internal quotation marks and citation omitted). "This would appear to prohibit, for example, the use of clips of news, films, or television shows with the copyright notices, credits, or contractual use terms intentionally omitted, even when the clips are used in transformative works such as documentary films, news reports, parodies, lip-synching videos, etc." *Id.*

[192] *Id.* ("[Canada's Copyright Bill] C-11 distinguishes between commercial and non-commercial infringement. TPP requirements apply to both."). Aaron Bailey, *TPP: The Secretive Agreement That Could Criminalize Your Internet Use*, OPENMEDIA (May 14, 2012), https://openmedia.ca/blog/tpp-secretive-agreement-could-criminalize-your-internet-use ("Currently, Canada's Copyright Act criminalizes certain types of copyright infringement for profit. TPP would expand this to cases without any direct or indirect motive of financial gain, as well as cases of aiding and abetting, which could be applied to internet service providers."). *See also* Beijing Treaty on Audiovisual Performances, arts. 2-3, 7-17, WIPO Doc. No. AVP/DC/20, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=208966.

common law of tort.

What distinguishes the common-law doctrines that protect performers from the new bootlegging and performance laws is the solicitude of the former for the freedom of speech, the fate of free speech institutions, and the future of the public domain. The public domain in copyright is a series of common use rights. A public domain equivalent to the one envisioned by the Framers would place works created as recently as the 1970s in the commons for free use and reuse. It would also liberate free speech institutions in many instances in which derivative and transformative works are created and disseminated to the world. We need to reconsider how the law treats the intersection between the public domain and industry-drafted norms such as the UGCP.

III. THE FIRST AMENDMENT AS A BULWARK AGAINST CORPORATE CENSORSHIP

The First Amendment as construed by the courts has generated a number of norms that may serve as a bulwark against industry combinations that threaten to control Web speech. First, legal prohibitions upon speech should be granted to intellectual property owners against those quoting their work only sparingly and after a full consideration of statutory defenses. Second, vague and overbroad laws should not be permitted to chill protected cultural, scientific, or political commentary. Third, the noncommercial use of copyrighted or trademarked content to criticize or make fun of that content, its author, or affiliated authors should be lawful because it harms no one.

A. *Prepublication Licensing of Free Speech Institutions*

First, free speech institutions should not be subject to prepublication licensing, a duty to monitor and censor third-party expression, or summary proceedings. The Internet was framed with certain built-in protections for this principle in mind. The UGCP sponsors suggest that audio fingerprinting should automatically delete videos with samples of other works inside them, but they have not agreed to apply similar technology to their own documentaries, news programs, and talk shows. Courts should reject any attempt by the federal government to endorse such burdensome and anticompetitive norms.

As the Supreme Court stated in *Ashcroft v. American Civil Liberties Union*, a preliminary injunction against a federal law is warranted when "the statute was likely to burden some speech that is protected for adults."[193] Among other reasons, the print and televised

[193] Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 670–73 (2004).

press are not subject to such automatic deletion, and "an exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.'"[194] Through the combined operation of a general speech restriction and exemptions for print and television as favored speakers or regulators of speech, the government might seek to "select the 'permissible subjects for public debate' and thereby to 'control . . . the search for political truth.'"[195] This was the very defect of the Stationers' Company system of prepublication licensing that led to the First Amendment and gave meaning to its guarantee of "the freedom of speech and of the press." The Supreme Court and lower federal courts have repeatedly invalidated statutes that seize speech before trial.[196]

B. *Burdens on Free Speech Institutions that Are Void for Their Vagueness*

A second First Amendment norm is that vague and censorious rules are suspect. This was the principal defect of the Stop Online Piracy Act, which would have criminalized the use of YouTube to transmit film clips "willfully" if the resulting "total retail value" of such transmissions could be shown to be more than $1,000.[197] It is also a key problem with blanket rules advanced by trade associations to limit unlicensed quotations on blogs to six words or less, or to remove all unlicensed clips of news or television from the Web. A First Amendment right to be protected from vague enforcement and standards to which other industries are not subjected could save sites like YouTube and Blogspot as avenues for free expression—avenues which, unlike television channels, are open to most people with Internet access. Media conglomerates hope to use Internet corporations like Microsoft and Google to control the conduct of their users, and to prohibit the unauthorized posting of Associated Press, CBS, VMN, or CNN footage for purposes of criticism or commentary. They hope that very lax procedures may be used by copyright holding associations to warn Google or Microsoft of their copyright interests, and then threaten a claim for infringement in the event that warnings fail. User access to entire services like the next YouTube may be sharply curtailed due to

[194] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 785–86 (1978).

[195] Consol. Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y., 447 U.S. 530, 538 (1980).

[196] *See* Fort Wayne Books v. Indiana, 489 U.S. 46 (1989); Vance v. Universal Amusement Co., 445 U.S. 308 (1980); Universal Amusement Co. v. Vance, 587 F.2d 159, 165–66 (5th Cir. 1978) (en banc).

[197] *See* H.R. 3261, Sec. 201, 112th Cong., 2d Sess. (Oct. 26, 2011), *quoted in* JOYCE ET AL., *supra* note 3, at 296–97; Maria Pallante, Register of Copyrights, Statement Before the House Committee on the Judiciary, *quoted in* JOYCE ET AL., *supra* note 3, at 307–15.

copyright lawsuits and concerted action. Only Google's wealth and independence may have saved YouTube from the sorry fate of MySpace Video or Napster.

The First Amendment should save bloggers and YouTubers from such treatment. It is void for vagueness to criminalize the transmission of valuable clips as such, to prohibit the preparation of derivative works for purposes of indirect commercial gain, or to restrain the capturing of performances and their transmission for purposes of noncommercial Internet speech where some incidental commercial gain is possible.[198]

The definition of derivative works does not put an ordinary person on adequate notice of what is permitted for purposes of utilizing a blog site, Facebook, or YouTube. All courts can tell defendants and juries is that one work "based on" another, but with "substantial variation" from the original, is an infringing derivative.[199] *Every* work is based on another, with substantial variations from it, according to literary theorists and judges.[200]

Under the "substantial variation" standard, many works of journalism, commentary, criticism, and parody based upon the works of others would be infringing derivative works, and criminalized in many cases under anti-streaming laws, ACTA, or the TPP, unless the fair use doctrine applied. That doctrine, in turn, is now so unclear as to amount to little more than a right to hire a lawyer.[201] For example, art works that

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[198] *See supra* notes 191–192 and accompanying text (describing such proposals).

[199] *See* O'Well Novelty Co. v. Offenbacher, Inc., 225 F.3d 655 (Table), 2000 WL 1055108, at *3 (4th Cir. 2000) (affirming jury instructions: "A derivative work is a work based upon one or more preexisting works. The copyright in a derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material in creating the work."). "To support a copyright, there must be at least some substantial variation from any preexisting work, not merely a trivial variation such as might occur in translation to a different medium. The author of a derivative work does not acquire an exclusive right to or in the preexisting material merely by authoring the derivative work." *Id.*

[200] *See* Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 966–1011 (1990); Kirby Ferguson, Everything Is a Remix (Full Film) (2012), www.youtube.com/watch?v=coGpmA4saEk.

[201] *See* H.R. Rep. No. 83, 90th Cong., 1st Sess. 29-30 (1967) (House Judiciary Committee admitted that it could not really define fair use because "the endless variety of situations and combinations of circumstances that can arise in particular cases precludes the formulation of exact rules in the statute"); U.S. Copyright Office, General Guide to the Copyright Act of 1976, at 42 (1977) (legislative history of Copyright Act of 1976 indicates that there are no "specific tests by which one can determine with much certainty whether or not a particular use is fair" and that "no real definition of this concept has ever emerged"); *see also* William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659 (1988). To provide an example other scholars have discussed at length, copying a work for educational or teaching purposes is both fair and unfair, even when a less than verbatim copy is used and the defendant adds significant value to the work rather than simply redistributing it. *Compare, e.g.*, Greenberg v. National Geographic Society, 244 F.3d 1267, 1274–75 (11th Cir. 2001) (holding that use for educational purposes was not fair because product containing use was sold for profit by subsidiary of non-profit educational organization); Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1386 (6th Cir. 1996) (rejecting argument that educational benefit of

include smaller versions of other art works have been found both to be fair and unfair.[202] Meanwhile, biographies and documentaries that quote

instructor-directed preparation of anthologies of academic writing by copyshop was fair use); Ass'n of Am. Med. Colleges v. Cuomo, 928 F.2d 519, 523–26 (2d Cir. 1991) (rejecting argument that making medical college admission test questions available for copying by test takers as a matter of state law served fair use educational purpose, because testing service might want to reuse questions, even though transformative and non-exploitative or non-commercial purpose of use was undisputed); Educ. Testing Services v. Katzman, 793 F.2d 533 (3d Cir. 1986) (rejecting argument that for-profit test preparation company made fair use of tests by reproducing them to teach students how to take and succeed on the tests); Marcus v. Rowley, 695 F.2d 1171 (9th Cir. 1983) (rejecting argument that teacher made fair use of cooking pamphlet by making copies for classroom use); Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of Univ. Sys. of Georgia, 86 U.S.P.Q.2d (BNA) 1683, 703–04 (M.D. Ga. 2008) (teaching test takers how to perform well was not fair use because defendants offered substantially similar or near verbatim test questions for sale in large numbers); Newport-Mesa Unified Sch. Dist. v. State of Cal. Dept. of Educ, 371 F. Supp. 2d 1170, 1178–79 (C.D. Cal 2005) (fair use for state department of education to provide parents with copies of test questions taken by their children where only children in special education could receive their services); Antioch Co. v. Scrapbook Borders, Inc., 291 F. Supp. 2d 980, 982–83, 988–90 (D. Minn. 2003) (downplaying educational and non-profit uses as fair uses and concluding that teaching use in books was unfair); Dahlen v. Michigan Licensed Beverage Ass'n, 132 F. Supp. 2d 574, 574–75, 584–588 (E.D. Mich. 2001) (downplaying idea that educational uses are fair uses and concluding that using plaintiff's poster on driver rights as "starting point" to make new poster was not fair use) (citing Princeton Univ. Press, 99 F.3d at 1386); and Educ. Testing Serv. v. Simon, 95 F. Supp. 2d 1081 (C.D. Cal. 1999) (not fair use to prepare potential teachers for teaching exams by providing them with potential questions that were substantially similar to past questions copyrighted by testing service), *with* Compaq Computer Corp. v. Ergonome, Inc., 387 F.3d 403 (5th Cir. 2004) (computer firm's education of users with copyrighted illustrations of ergonomic hand positions was fair use); Weissmann v. Freeman, 684 F. Supp. 1248, 1250–51, 1260–64 (S.D.N.Y. 1998), *aff'd*, 868 F.2d 1313, 1324 (2d Cir. 1989) (fair use to use copyrighted syllabus for teaching assignment as result of which defendant received $250 honorarium); Higgins v. Detroit Educ. Tel. Found, 54 F. Supp. 2d 701, 703–05 (E.D. Mich. 1998) (fair use for PBS to sell videos including copyrighted song of plaintiff due to educational purpose of videos and noting: "The fact that a charge is made for a work, or that a profit is anticipated, however, does not convert the [educational] use into a commercial one."); Coates-Freeman Assocs., Inc. v. Polaroid Corp., 792 F. Supp. 879, 879–81, 886–87 (D. Mass. 1992) (fair use to lecture on leadership using copyrighted chart of management styles); and Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973) (holding National Institutes of Health and National Library of Medicine not liable for copyright infringement where they facilitated photocopying of medical journal articles as part of their mission of spreading medical knowledge, where they did not directly profit or gain financially from copying), aff'd by an equally divided court, 420 U.S. 376 (1975). *See also* Mulcahy v. Cheetah Learning LLC, 386 F.3d 849 (8th Cir. 2004) (triable issue on fair use was presented in situation similar to Educational Testing Service or National Association of Boards of Pharmacy).

[202] *Compare, e.g.*, Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014) (fair use to display photograph of another on t-shirt that altered coloring, size, and prominence of original work's subject); Seltzer v. Green Day, 725 F.3d 1170, 1177 (9th Cir. 2013) (fair use to display art of another in new art); Cariou v. Prince, 714 F. 3d 694 (2d Cir. 2013) (fair use to reproduce, display and distribute artistic photographs taken by another in new art); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006) (fair use to display art of another in new art), *with* Gaylord v. United States, 595 F.3d 1364 (Fed. Cir. 2010) (not fair use to display sculpture on postage stamp depicting photograph of sculpture that juxtaposed it with snow and other elements); Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc., 109 F.3d 1394 (9th Cir. 1997) (unfair to use artistic elements from children's book in cartoon parody book about infamous murder trial); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (unfair to reproduce and display photograph of another author embedded in new sculptural work); Amsinck v. Columbia Pictures Indus. Inc., 33 U.S.P.Q.2d 1131 (S.D.N.Y. 1994) (unfair to display stills from motion picture in art work in

from the works of their subjects are both fair and unfair.[203] Creating films and television programs that display copyrighted work incidentally is likewise both fair and unfair.[204] Posting excerpts of copyrighted work to the Internet for purposes of commentary or

form of mobile); Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706 (S.D.N.Y. 1987) (unfair to display artistic elements from magazine cover art in poster for motion picture, despite different imagery and wording on poster). *See also* Pet'n for Cert. at 10–32, Kienitz v. Sconnie Nation LLC, No. 14-815 (Sup. Ct. petition filed Jan. 12, 2015) (arguing that there is a circuit split on transformative uses of art in new art works, with Second, Ninth, and Eleventh Circuit permitting wide scope of fair use in *Blanch*, *Cariou*, *Seltzer*, and *Cambridge University Press*, but Seventh Circuit confining it more narrowly in *Kienitz*, 766 F.3d 756 (7th Cir. 2014)).

[203] *Compare, e.g.*, Harper & Row Publishers Inc. v. Nation Enter., 471 U.S. 539, 564–65 (unfair use to quote from and paraphrase too many important passages from former U.S. president's memoirs in magazine article about his memoirs and political career); Elvis Presley Enters., Inc. v. Passport Video, 349 F.3d 622, 628–29 (9th Cir. 2003) (unfair use to show too many musical video clips in context of a television or VHS/DVD biography); Castle Rock Entm't, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132 (2d Cir. 1998) (unfair use to quote from or paraphrase television show too extensively in nonfiction book about show); New Era Publ'n Intern. v. Henry Holt & Co., 873 F. 2d 576 (2d Cir. 1989) (similar); Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 213 (1987) (unfair use to quote extensively from and paraphrase unpublished letters in biographical work); Toho Co., Ltd. v. William Morrow and Co., Inc., 33 F. Supp. 2d 1206, 1217 (C.D. Cal. 1998) (not fair use to summarize motion picture plots in nonfiction book about movies and their cultural impact); Folsom v. Marsh, 9 F. Cas. 342 (C.C. Mass. 1841) (unfair to quote too many letters in biographical work), *with* Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 742 F.3d 17, 28 (2d Cir. 2014) (fair use to reproduce corporate earnings call with paid subscribers to information service); Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1153 (9th Cir. 1986) (fair use to copy content from magazine in publication of nonprofit group that criticized the magazine); Roy Export Co. Estab. of Vaduz v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1100 (2d Cir. 1982) (fair use to use clip from actor's performance in news reporting on occasion of actor's death); Arrow Productions, Ltd. v. The Weinstein Co. LLC, Case 1:13-cv-05488-TPG (S.D.N.Y. Aug. 25, 2014) (fair use to recreate scenes from adult film in biopic about starring actress); Warren Publ'g Co. v. Spurlock d/b/a Vanguard Productions, 645 F. Supp. 2d 402 (E.D. Pa. 2009) (fair use to reproduce and display magazine covers in nonfiction biography of artist who created them); Hofheinz v. A & E Television Networks, Inc., 146 F. Supp. 2d 442, 446–47 (S.D.N.Y. 2001) (fair use to show film clips in biographical film); Monster Commc'ns, Inc. v. Turner Broad. Sys., Inc., 935 F.Supp. 490, 491–93 (S.D.N.Y. 1996) (fair use to show clips of another's work in biographical film about person portrayed in clips). *See also* Rosemont Enter., Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966); WILLIAM F. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 436–41 (1985).

[204] *Compare, e.g.*, *Swatch Grp.*, 742 F.3d at 17 (fair use to distribute sound recordings of corporate earnings call to computer terminals of subscribers); Bouchat v. Baltimore Ravens Ltd. P'ship, 737 F.3d 932 (4th Cir. 2014) (fair to use art in nonfiction film played on NFL Network and on websites such as NFL.com and Hulu.com); SOFA Entm't, Inc. v. Dodger Productions, Inc., 709 F.3d 1273 (9th Cir. 2013) (fair use to include seven seconds from television show in biographical work about musical group that appeared on the show); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006) (fair use to use artistic poster designed to promote rock group's concert in nonfiction book about the group); Mura v. Columbia Broad. Sys. Inc., 245 F. Supp. 587 (S.D.N.Y. 1965) (fair to use art on television program), *with* Ringgold v. Black Entmt. Television, 126 F.3d 70 (2d Cir. 1997) (not fair use to display art of another in background of television scene containing new dialogue, acting, and other artistic elements). *Cf. Elvis Presley Enters.*, 349 F.3d at 628–29 (unfair to perform copyrighted work in documentary film even though the film is about the copyright owner); Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997) (unfair to use copyrighted news footage in comprehensive coverage of incident filmed); Walt Disney Prods. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978) (unfair to use images of cartoon characters from film in cartoon parody of characters).

criticism could theoretically also be unfair, although most cases find it fair.[205]

The arbitrary decisionmaking that results from the derivative work right and the Supreme Court's fair use jurisprudence threatens our civil liberties and human rights.[206] Such arbitrariness renders the derivative work right, the anti-bootlegging laws, and anti-streaming laws like SOPA and the TPP unconstitutionally vague.[207] Unduly vague laws also violate international human rights, because the International Covenant on Civil and Political Rights mandates that laws be "formulated with sufficient precision for individuals to know how to regulate their conduct" and clearly specify "how the law limits . . . conduct . . . ."[208]

C. *Banning Efforts to Inhibit Communications Markets*

Third, the First Amendment undergirds the fair use doctrine and other legal principles that shield free speech institutions from engaging in harmless expression on matters of public concern.[209] Fair use, the public domain, and common-use rights such as Section 108 and Section 110(2) rein in copyright law in ways that would otherwise place it at

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[205] *Compare, e.g.*, Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (fair use to reproduce and distribute stories and passages about Harry Potter on Internet encyclopedia on the topic); Righthaven LLC v. Jama, No 2:2010-cv-01322, 2011 WL 1541613 (D. Nev. Apr. 22, 2011) (fair use to post newspaper article to Internet); Righthaven LLC v. Realty One Group, Inc., No. 2:10-cv-LRH-PAL, 2010 WL 4115413 (D. Nev. Oct. 19. 2010) (fair use to post significant portion of newspaper article to blog); Field v. Google Inc., 412 F. Supp. 2d 1106 (D. Nev. 2006) (creating Internet cache of copyrighted works was fair use); Religious Technology Center v. F.A.C.T.NET, Inc., 901 F. Supp. 1519, 1526 (D. Colo. 1995) (possible fair use to post religious scriptures to Internet newsgroup as part of discussion of the religious sect), *with* Video Pipeline, Inc. v. Buena Vista Home Entm't Inc., 342 F.3d 191, 200 (3d Cir. 2003) (posting excerpts of popular films to Internet in brief trailers to promote rental was not fair use); Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc., 166 F.3d 65 (2d Cir. 1999) (aggregating and translating news articles for subscribers of news service was not fair use); Capitol Records Inc. v. Alaujan, 78 BNA's PTCJ 407, Nos. 03cv11661-NG, 07cv11446-NG, 2009 WL 5873136 (D. Mass., July 27, 2009) (not fair use to circulate copyrighted music over Internet); Los Angeles Times v. Free Republic, No. CV 98-7840 MMM (AJW), 2000 U.S. Dist. LEXIS 5669 (C.D. Cal. Apr. 5, 2000) (unfair to post newspaper articles to Internet for purposes of commentary, criticism, or news reporting); Religious Tech. Center v. Lerma, 40 U.S.P.Q. 2d 1569 (E.D. Va. 1996) (not fair use to post religious scriptures to Internet); Netcom On-Line Commc'n Services, Inc., 923 F. Supp. 1231, 1247 (N.D. Cal. 1995) (not fair use to post religious scriptures and related material to Internet); Religious Tech. Ctr. v. Pagliarina, 908 F. Supp. 1353 (E.D. Va. 1995) (not fair use to post religious scriptures to Internet).

[206] *See* Vance v. Ball State, 133 S. Ct. 1434 (2013), for usage.

[207] *See* Hannibal Travis, *Myths of the Internet as the Death of Old Media*, 43 AIPLA QUARTERLY J. 1 (2015); Hannibal Travis, *WIPO and the American Constitution: Thoughts on a New Treaty Relating to Actors and Musicians*, 16 VANDERBILT J. OF ENTMT. AND TECH. L. 45, 89 (2013).

[208] Amnesty International, *Safer to Stay Silent: The chilling effect of Rwanda's laws on 'genocide ideology' and 'sectarianism'* 14–18 (Aug. 2010), http://web.archive.org/web/20110603023848, http://www.amnesty.org/en/library/asset/AFR47/005/2010/en/ea05dff5-40ea-4ed5-8e55-9f8463878c5c/afr470052010en.pdf.

[209] *See Harper & Row*, 471 U.S. at 539; Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 16–21 (2002).

odds with the growth of the Internet. Courts, Congress, other nations' parliaments, and the European Parliament have adopted a set of norms that should impede trade association efforts to overextend copyright rules. Under both international and domestic law, copyright infringement is defined so as to exclude infringement by snippets or short clips.[210] Section 512(f) of the DMCA prohibits misrepresentations designed to suppress fair uses that represent a socially beneficial contribution with a limited negative impact on the market for the work used.[211] Instead of requiring websites to monitor and technologically filter out any quotations or clips, principles of secondary liability and noncommercial use often require the copyright owner to identify the location of a specific infringing copy on the Internet. Principles of secondary liability and noncommercial use often require copyright owners to identify the infringement with adequate detail to permit an Internet service provider to respond by removing the copy from its website rather than disabling the site's features, links or interactive technology completely.[212] Famous cases applying this principle in the United States include the cases of *Arriba Soft*, *eBay*, *Google Image Search*, *Napster*, *Veoh*, and *YouTube*.[213]

The European case law, particularly regarding Web 2.0 services like MySpace or Wikipedia, reasons that Internet services are like other

[210] *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 13, *in* JOYCE, ET AL., *supra* note 3, at 405 (member states of the World Trade Organization and General Agreement on Tariffs and Trade Uruguay Round agreement may limit copyright protection so that it does not apply to special cases that do not conflict with normal licensing of work or unreasonably harm copyright holders); Uruguay Round Amendments Act, Pub. L. No. 103-465 (1994) (same); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, *in* JOYCE ET, AL., *supra* note 3, at 467 (member states of the European Union may provide exception to copyright applicable to quotations for purposes of criticism or review of a published/performed work to the extent consistent with "fair practice"); Copyright, Designs and Patents Act 1988, ss. 30-30A (United Kingdom), http://www.legislation.gov.uk/ukpga/1988/48/section/29/data.pdf (quotation, review, pastiche, or parody that reproduces a published work not an infringement if it constitutes "fair dealing"); Code de la Propriété Intellectuelle, art. L. 122-5(3) (France), http://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069414&idArticle=LEGIARTI000006278917&dateTexte=20081211 (short quotations for use in subsequent critical, polemic, educational, scientific or informatory works not an infringement of copyright under domestic French law); Act on Copyright and Related Rights of 1965 as Amended 1998 and 2013, art. 51 (Germany) (Ute Reusch trans., 2014), http://www.gesetze-im-internet.de/englisch_urhg/print_englisch_urhg.html (reproduction, distribution, and communication to public of prior work in new scientific work as illustration, or in new literary work as a quoted passage, or in new musical work as a subsidiary clip, lyric, or melody).

[211] 17 U.S.C. § 512(f) (2014).

[212] Rita Lewis, *DCMA: Is It a Muzzle or Security?*, FREELANCESWITCH (Nov. 4, 2009), http://freelanceswitch.com/freelancing-essentials/dmca-is-it-a-muzzle-or-security.

[213] *See, e.g.*, UMG Recordings, Inc. v. Veoh Networks, Inc., 718 F.3d 1006 (9th Cir. 2013); Viacom International, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012); Travis, *supra* note 63, at 337–57.

communicative facilities that could be used to infringe but typically are not held liable for infringement, such as telephone equipment. Most European institutions have declined to impose a proactive obligation to monitor and selectively delete user content without clear standards. In Europe, it is well-understood that this issue is bound up with the fate of free speech institutions.[214]

IV. ANTITRUST PRINCIPLES FOR RESTRICTIVE INDUSTRY NORMS

The Sherman Act is the ultimate statutory weapon against trade associations. Antitrust law recognizes that jointly setting prices, tying intellectual property rights together, and inhibiting the growth of rivals are obstacles to the proper functioning of a market economy. The Sherman Act restores the price mechanism—not trusts or committees—as the true arbiter of the viability of new products and services, whether online or on the streets.

A. *Unjust or Discriminatory Licensing as an Assault on Competition*

Both unilateral and multilateral efforts to control free speech institutions should be closely scrutinized for violation of antitrust and competition law norms. A unilateral refusal to license a copyright may be exclusionary conduct in violation of Section 2 of the Sherman Act. In the *Microsoft* and *Data General* cases, the courts held that wielding a copyright in a manner that restricts competition by non-infringing products may violate the Sherman Act.[215] The Ninth Circuit also rejected a copyright defense to an antitrust claim in the *Kodak* case, which involved copyrighted software and patented copier parts.[216] The Sherman Act showed surprising resilience in the *American Needle* case in which the Roberts Court bucked its pro-business trend to reject a copyright defense to an antitrust theory premised upon a refusal to license trademarks to a disfavored user.[217]

These principles from the computer era are ripe for application to Internet services. For example, a district court has allowed an antitrust lawsuit to proceed on the theory that Apple supported the prices of music downloads on its dominant iTunes platform by purposefully making the iPod and iPhone noncompliant with lower-priced Rhapsody or Napster downloads.[218] Apple allegedly protected its iPod and iPhone from competition with those trying to set up competing platforms like

[214] *See* Travis, *supra* note 63, at 337–57.
[215] United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).
[216] *See* Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997).
[217] American Needle, Inc. v. National Football League, 560 U.S. 183 (2010).
[218] *See* Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 151–60 (2006).

Zune by making iTunes songs unplayable on Zune devices.[219] Apple blamed the recording industry for forcing it to sell songs at a loss even at 99 cents, and to adopt a copy-protected format to halt further online distribution.[220]

The DOJ argued that the settlement between Google and the Association of American Publishers—involving most books published in the United States after 1930 and prior to 2000—threatened price-fixing by setting up a publisher-influenced entity to control download prices.[221] The DOJ earlier brought, but prematurely dropped, inquiries into price-fixing for the prices of music and movies online, even though the joint ventures controlling these online offerings were prohibited from selling low-priced MP3s, movies, and other digital rights management- or DRM-protected content.[222] These sorts of tactics are ripe for more thorough investigation, as occurred in the *Microsoft* case.[223]

There is a long history of fixing music and movie prices by package licensing, block booking, concerted refusals to deal, denying music or movies to low-priced movie theaters or download services, and minimum advertised prices.[224] The marginal cost of burning another CD

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[219] *See In re* Apple iPod iTunes Antitrust Litig., 796 F. Supp. 2d 1137 (N.D. Cal. 2011); Tucker v. Apple Computer, Inc., 493 F. Supp. 2d 1090 (N.D. Cal. 2006); Eddy Hsu, Comment, *Antitrust Regulation Applied to Problems in Cyberspace: iTunes and iPod*, 9 INTELL. PROP. L. BULL. 117 (2005).

[220] MARK W. JOHNSON, SEIZING THE WHITE SPACE: BUSINESS MODEL INNOVATION FOR GROWTH AND RENEWAL 1, 180 (2013); Saul Hansell, *The iTunes Store: Profit Machine*, NYTIMES.COM BITS BLOG (Aug 11, 2008, 3:27 PM), http://bits.blogs.nytimes.com/2008/08/11/steve-jobs-tries-to-downplay-the-itunes-stores-profit/?_r=0; Andrew Orlowski, Your 99c Belong to the RIAA – Steve Jobs, THE REGISTER (Nov. 7, 2003), http://www.theregister.co.uk/2003/11/07/your_99c_belong/.

[221] Statement of Interest of the United States of America Regarding Proposed Class Settlement for The Authors Guild, Inc., et al. v. Google, Inc., 282 F.R.D. 384 (S.D.N.Y. 2012) (No. 05 CV 8136-DC), *available at* http://www.usdoj.gov/atr/cases/f250100/250180.pdf. *See* Objections of Open Content Alliance to Proposed Settlement, *Authors Guild*, 282 F.R.D. 384 (S.D.N.Y. 2012) (No. 05 CV 8136 DC) (referencing U.S. government objections to settlement); Objections of Microsoft Corp. to Proposed Settlement, *Authors Guild*, 282 F.R.D. 384 (S.D.N.Y. 2012) (No. 05 CV 8136-DC) (similar).

[222] *See* Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 155–56 (2006).

[223] Apple Computer, Inc. v. Microsoft, 35 F.3d 34 (D.C. Cir. 2001).

[224] *See, e.g.*, Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979) (holding that blanket licensing of copyright licenses to publicly perform musical compositions could be challenged under rule of reason and section 1 of the Sherman Act); United States v. Paramount Pictures, Inc., 334 U.S. 131, 140–41, (1948) (upholding complaint which "charged that [Warner Brothers, Fox, Columbia, Paramount, United Artists, Universal Pictures, and] all the defendants, as distributors, had conspired to restrain and monopolize and had restrained and monopolized interstate trade in the distribution and exhibition of films"); PrimeTime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 102–04 (2d Cir. 2000) (allowing claim based on concerted refusal to license copyrighted material to proceed to discovery and summary judgment motions); Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp., 312 F. Supp. 2d 379 (E.D.N.Y. 2004) (plaintiff validly stated claim concerning discriminatory refusal to deal in licensing and sale of

or licensing an additional user of an online music service is very low, creating a strong motive to fix prices jointly.[225] In 2004, the *Napster* court found that the music labels "formed a joint venture to distribute digital music and simultaneously refused to enter into individual licenses with competitors," a move "designed to allow plaintiffs to use their copyrights and extensive market-power to dominate the market for digital music distribution."[226] One of Napster's expert witnesses, antitrust economist Dr. Roger Noll of Stanford University, had opined that MusicNet and Pressplay appeared to "facilitate . . . retail price-coordination."[227] The economics of associations of leading firms in digital download markets therefore provide courts and regulators with cause for concern that price-fixing will occur.

The motion picture industries also developed joint ventures to exploit digital preview and download markets while pursuing litigation against Grokster, Kazaa, and Scour.[228] Disney and News Corp. developed Movies.com as a joint venture to offer their films prior to

copyrighted motion pictures); Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F. Supp. 2d 301 (S.D.N.Y. 2003) (plaintiff stated claim for refusing to deal in licenses to exhibit first-run blockbuster motion pictures); United States v. Columbia Pictures Industries, Inc., 507 F. Supp. 412 (S.D.N.Y. 1980) (noting that scheme to grant exclusive music video rights to a joint venture controlled by copyright owners may be a group boycott that transgresses the antitrust laws); Supp. Mem. of Pl. in Supp. of Mot. to Enforce Civil Investigative Demands, United States v. Time Warner Inc., No. 94-338 (D.D.C. brief filed Jan. 26, 1995) (alleging that major music labels engaged in "conspiracy to fix prices, conspiracy to monopolize, and concerted refusal to deal"); Kathryn Harris, *Pay-TV Movie Network Threatened by Antitrust Suit*, PITTSBURGH POST-GAZETTE (Apr. 26, 1990), at 3, *available at* https://news.google.com/newspapers?nid=1144&dat=19800426&id=c44qAAAAIBAJ&sjid=SVwEAAAAIBAJ&pg=5061,4921119&hl=en (Home Box Office Inc. alleged a conspiracy to fix prices and concerted refusal to deal in television licensing of movies by Columbia Pictures, Universal Pictures/MCA, and Twentieth-Century Fox Corp.); *see also* Constantine Cannon LLP, Cable Companies Facing Antitrust Investigation of Video Streaming Limits (June 15, 2012), http://www.antitrusttoday.com/2012/06/15/cable-companies-facing-antitrust-investigation-of-video-streaming-limits/ ("Both Netflix and Hulu argue that Internet data caps on cable company service plans limit the amount of video that can be streamed, and ultimately deter consumers from ditching the traditional channel bundle and switching to online video."); Memorandum of Law in Support of Defendants/Counter-Plaintiff's Opposition to Plaintiffs/Counter-Defendants' Motion to Dismiss the First Amended Counterclaims and, Alternatively, Motion for Leave to Replead for at 10–26, Arista Records LLC v. Lime Group, LLC, 784 F. Supp. 2d 398 (S.D.N.Y. 2011) (No. 06 Civ. 05936), *available at* http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2006cv05936/288038/15 (alleging that major record labels conspired to fix prices and refused to deal with startup online music distribution companies); Complaint at 3–6, Sirius XM Radio Inc. v. SoundExchange, Inc., 2012 WL 1031756 (S.D.N.Y. 2012) (No. 12 CV 2259), *available at* https://www.scribd.com/doc/87049319/Sirius-XM-v-SoundExchange-Antitrust-Complaint (alleging conspiracy to fix prices and exclude competition from digital transmission of musical recordings to consumers' portable devices).

[225] *See* Hansell, *supra* note 220; Travis, *supra* note 218, at 155–56.

[226] *In re* Napster, Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1107–09 (N.D. Cal. 2002).

[227] *Id.* at 1108.

[228] *See* Travis, *Google Book Search*, *supra* note 218, at 155–56; Travis, *Building Universal Digital Libraries*, supra note 70, at 790–91, nn. 199–200.

cable or satellite TV showings.[229] Paramount (owned by Viacom), Sony, MGM, Universal, and Warner Bros set up Movielink to sell streams and downloads. The Movielink founders settled a case alleging that they colluded to fix prices in digital downloads.[230] Hulu is a joint venture between NBC, Disney, 21st Century Fox, and other content providers that may come under its control someday.[231] The CEO of Hulu tried to pressure ABC not to release a free app for the iPad that would interfere with Hulu's plans to charge $10 per month.[232] The practices of major firms entering digital-download or streaming markets confirm the intuitions of economists like Dr. Noll that low-price options could eventually be seen as a threat rather than an opportunity.

Intellectual property licensing on an industry-wide scale is a natural monopoly in that a single, one-stop shop for licenses will have insurmountable advantages over disparate operations with small holdings of licenses to offer licensees.[233] Courts have often noted that combinations of intellectual property rights threaten competition by users of such rights, with some examples being smaller newspapers competing with AP members, television producers trying to compete with ASCAP and BMI, and booksellers attempting to contend with the Association of American Publishers.[234] These intellectual-property market-makers have the opportunity and the cost advantage that may be needed to erect barriers to independent entry.

In recent years, it has seemed like Apple and the music and film

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[229] *See* Travis, *Google Book Search*, *supra* note 218, at 157.

[230] *See* PricewaterhouseCoopers LLP, Report of Independent Auditors [Movielink, LLC] (Jan. 31, 2007), *available at* http://www.pwc.com/sg/en/illustrative-annual-report-2011/assets/9-IndependentAuditorReport.pdf; *see also id.* at 6 (Sony Pictures Digital Entertainment formed Movielink in 2001 and "sold 80% of its membership interest . . . in equal shares, to single-purpose subsidiaries of Metro-Goldwyn-Mayer Studios, Inc. ('MGM"), Paramount Pictures Corporation ('Paramount'), Universal Studios ('Universal'), and Warner Bros. ('WB'), which" controlled Movielink as its LLC "Members.")

[231] *See* Todd Spangler, *Hulu's Pay-TV Play: Networks Realize They Should Try to Work with Their Biggest Customers*, VARIETY (Nov. 12, 2013), http://variety.com/2013/digital/news/hulus-pay-tv-play-networks-realize-they-should-try-to-work-with-their-biggest-customers-1200824094.

[232] *See* Sam Oliver, *Hulu Fears ABC iPad App Could Hurt Its $9.95 Subscription Plans*, APPLE INSIDER (Apr. 22, 2010), http://appleinsider.com/articles/10/04/22/hulu_fears_abc_ipad_app_could_hurt_its_9_95_subscription_plans.

[233] *Cf.* United States v. W. Elec. Co., 673 F. Supp. 525, 537–38 (D.D.C. 1987), *aff'd in part, rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990) (noting that a "natural monopoly" may exist where reconstructing a service to compete with its provider "would require an enormous and prohibitive capital investment"); Mark Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 490, 546–49 (1998) (noting that "natural monopoly" may exist where there is a "cost advantage of [a large] market share," so that "it is most efficient for one producer to serve the entire market[,]" and when "property rights created by legal rules" restrict consumers from switching back and forth among producers).

[234] *See, e.g.*, Francesco Parisi, *The Market for Intellectual Property: The Case of Complementary Oligopoly*, GEORGE MASON UNIV. SCHOOL OF LAW LAW & ECONOMICS WORKING PAPER SERIES, http://www.law.gmu.edu/faculty/papers/docs/02-19.pdf (last visited Oct. 17, 2015).

industries have converged on a set of standardized prices for digital downloads that present a stark contrast with CD and DVD prices ordered by mail, at Wal-Mart or on Amazon.com. The standardized prices for digital downloads may reflect consumer demand but without the heavy discounting of older music albums or DVDs in Wal-Mart discount bins or Amazon Marketplace accounts, with music at $0.99, television shows at $1.99 or $2.99, new-release film rentals at $3.99, $4.99 or $5.99, and new-release film purchases at $7.99, $9.99, and $14.99 in 2006, rising to $16.99, $19.99, or $21.99 in 2013.[235] The same problems have cropped up with uniform e-book pricing for Kindles and iPads, and bans on high-definition new-release films from streaming or rental by Netflix and Redbox until four to nine weeks after they are released by higher-cost streaming options like Apple TV or by higher-priced DVD or Blu-ray sales outlets.[236]

[235] Brooks Barnes, *NBC Will Not Renew ITunes Contract*, N.Y. TIMES (Aug. 31, 2007), http://www.nytimes.com/2007/08/31/technology/31NBC.html?_r=2&oref=slogin& ("The iTunes service has sold songs for 99 cents each since its beginning four years ago, except for the recent introduction of songs without copy protection. Episodes of television shows sell for $1.99, with movies priced at $9.99."); Christopher Breen, *All About Apple TV Movie Rentals*, MACWORLD (Feb. 22, 2008), http://www.macworld.com/ article/1132223/rentals.html (on Apple TV in 2008: "Current movies in standard-def cost $3.99. If the movie is also available in high-definition, that option will appear as well. HD movies cost $3.99 for library titles and $4.99 for current titles."); *Captain America: The Winter Soldier (Plus Bonus Features)*, AMAZON (last visited March 15, 2015), http://www.amazon.com/Captain-America-Winter-Soldier-Features/dp/B00KNOXB7M/ref=sr_1_1?s=instant-video&ie=UTF8&qid=1410729051&sr=1-1 ($14.99 for standard definition new-release movie download, or $19.99 for high-definition download); Arnold Kim, *Amazon's 'Unbox' Video Service Opens*, MACRUMOURS (Sept. 7, 2006), http://www.macrumors.com/2006/09/07/amazons-unbox-video-service-opens/ ("The service offers television shows, movies and other videos from over [thirty] studios and networks. TV shows will sell for $1.99 while Movies range from $7.99 – $14.99. If you prefer to rent, Movies can be rented for $3.99 each."); Staci Kramer, *Apple TV: $99 Device; $4.99 First-Run Movies; 99-Cent TV*, GIGAOM (Sept. 1, 210), http://gigaom.com/2010/09/01/419-apple-tv-people-want-hollywood-not-amateur-hour/ ($0.99 rentals of television shows and $4.99 new-release film rentals as of 2010); Ryan Lawler, *Hands on with Redbox Instant by Verizon: Not Really a Netflix Killer. But Then, What Is?*, TECHCRUNCH (Jan. 6, 2013), http://techcrunch.com/2013/01/06/hands-on-redbox-instant-by-verizon/ (noting similar prices on "Amazon, Vudu, Google Play, and iTunes" because: "New release purchases typically cost $16.99 or $21.99, depending on whether they're available in SD or HD. Not all purchases are available in HD, and it's not clear why or why not.) New release rentals typically cost $4.99 in SD or $5.99 in HD.").

[236] *See* United States v. Apple Inc., 952 F. Supp. 2d 638, 691–94 (S.D.N.Y. 2013) (holding that United States proved that five major publishers of e-books had conspired with Apple to simultaneously raise e-book prices using "an agency model"); *In re* Coinstar Inc. Secs. Litig., No. C11-133, 2011 WL 4712206 (W.D. Wis. Oct. 6, 2011). By mid-2010, Redbox agreed to a plan by Universal Studios Home Entertainment, Twentieth Century Fox Home Entertainment, and Warner Home Video, which proved disastrous to its earnings prospects, to resolve litigation alleging that denial of access to DVDs and Blu-rays until twenty-days days after DVD/Blu-ray release. It initially filed suit against the plan. *Id.*; Elissa Nelson, *Windows into the Digital World*, CONNECTED VIEWING: SELLING, STREAMING, & SHARING MEDIA IN THE DIGITAL AGE 62, 66 (Jennifer Holt & Kevin Sanson eds., 2013) (describing evidence that theater owners successfully pressured Universal to delay availability of films to period longer than three weeks after theatrical release, and that Warner Brothers led process in 2010 of studios prohibiting rental by low-cost options like Redbox or Netflix of DVD or video on demand streams to twenty-eight days after

B. *Guaranteeing Consumer Choice in Information Markets*

A norm internal to copyright that resembles antitrust norms on this topic is the prevention of the use or licensing of copyrights to obtain overextended copyright interests or other rights that would undermine public policy. The doctrine of copyright misuse forbids "copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly."[237] One need not establish the elements of an antitrust violation to make out a copyright misuse defense.[238] The doctrine is well adapted to prevent the aggregation of copyright licenses into industry-wide control over the terms of digital distribution.[239] It is also ripe for application to instances in which copyrights are used to prevent commentary, criticism, parody, or scholarship, including by blogging or creating video mashups.[240]

When the Sherman Act was passed, members of Congress recognized that foreign imports could provide relief from high prices charged by American trusts. In the same way that goods manufactured abroad evade American labor, environmental, and safety regulations, Internet services hosted abroad may evade U.S.-based norms regarding copying, remixing, and commenting upon copyrighted work. Recording Industry Association of America leaders Universal Music Ltd., Sony BMG and Warner Music sued Chinese search engine Baidu for deep linking to hundreds of thousands of MP3 music files. The labels lost the case against Baidu and Sohu, however, based on Chinese doctrines.[241] In this way, Chinese Internet services could soon have an advantage over U.S. ones.[242] Much of the world's copyright infringement, including over the Internet, already occurs outside the U.S. or the E.U.[243] Companies' services that implicate copyrights have sprouted up

high-cost rental outlets, which Warner Brothers attempted to extend in 2012 to fifty-six days, although Universal would not agree to follow suit).

[237] A&M Records v. Napster, Inc., 239 F.3d 1004, 1026 (9th Cir. 2001).

[238] *See id.*

[239] *See id.*

[240] *See* Video Pipeline v. Buena Vista Home Entertainment, 342 F. 3d 191, 204 (3d Cir. 2003) ("The misuse doctrine extends from the equitable principle that courts 'may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest.'") (quoting Morton Salt Co. v. G.P. Suppiger Co., 314 U.S. 488, 492 (1942)); Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 979 (4th Cir. 1990) (under copyright misuse doctrine, "[t]he question is whether Lasercomb is using its copyright in a manner contrary to public policy.").

[241] Helen H. Chan, *PRC's Baidu/Sohu Judgments Set Copyright Precedent- But For How Long?*, WESTLAW BUSINESS (Mar. 22, 2010), http://currents.westlawbusiness.com/Article.aspx?id=153eb187-f1f5-45f4-a8c3-5e77d35152bd.

[242] Chinese auction and streaming content site Alibaba is now among the highest valued technology companies. *See Meet Billionaire Alibaba Founder Jack Ma*, BLOOMBERG BUSINESS (Sept. 8, 2014), http://www.bloomberg.com/video/jack-ma-how-billionaire-alibaba-founder-is-worth-22b-pGn3fJ5~Q2eOW~MhQKO46w.html.

[243] *Russia, China Once Again Top USTR List of Piracy Hot Spots*, RECORDING INDUSTRY ASS'N OF AMERICA (Apr. 2007), http://riaa.org/news_room.php?resultpage=6&news_year_filter=2007.

in various jurisdictions that offer differing levels of copyright protection, ranging from the quite strict to the very weak, from Norway and Russia to South Africa and South Korea.[244] Free trade, in this way, may protect free speech institutions from censorship, even if the First Amendment and antitrust principles fail.

V. NEW COPYRIGHT NORMS TO PROTECT FREE SPEECH INSTITUTIONS

Although the First Amendment, the Sherman Act, and free trade may protect free speech institutions from some of the worst abuses of copyright, statutory reform is also needed. It will be some time before the Supreme Court revisits its rulings in 1984 and 2003 that the First Amendment does not permit uses of copyrighted expression outside of fair use or abstract ideas. Antitrust actions are also slow to resolve and may depend at times on the positions of the DOJ, which can shift and be reversed as witnessed in the *Microsoft* case.

For this reason, the remainder of this article explores potential amendments to section 107 of the Copyright Act, amendments designed to shield free speech institutions from anticompetitive and censorious norms developed by oligopolies or trade associations. There was an amendment of this kind to the fair use statute in 1990, which reversed the effect of judicial decisions that would have nearly curtailed fair use in the case of unpublished works.[245] These amendments to section 107 are modeled on the 1990 amendment to the statute, regarding unpublished works.[246] The 1990 amendment altered the application of the second and fourth fair use factors, and of judicial decisions placing the burden of proof on the infringer to establish that the factors favored it.[247] A similar amendment is necessary to reform the fair use doctrine to

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[244] *See id.*; Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, *in Intellectual Property, Trade, and Development: Strategies to Optimize Economic Development in an TRIPS Plus Era* 173 (2007), *available at* http://www.law.drake.edu/clinicsCenters/ip/docs/ipResearch-op1.pdf; *Online Pirates Forced to Walk the Plank*, ECONOMIST.COM (June 27, 2005), http://www.economist.com/node/4124724; *SA Embraces Social Networking*, MY DIGITAL LIFE (SOUTH AFRICA) (2007), http://www.mydigitallife.co.za/index.php?option=com_content&task=view&id=2499&Itemid=37; Victoria Shannon, *P2P Starts to Mature*, N.Y. TIMES, July 9, 2005, at 16, http://www.nytimes.com/2005/07/08/technology/08iht-ptend09.html; Jung-a Song, *Korean Court Acquits Music Swap Service*, FINANCIAL TIMES (Jan. 13, 2005), http://www.ft.com/intl/cms/s/0/9b04f9f0-6508-11d9-9f8b-00000e2511c8.html#axzz3UUPmEnO3.

[245] New Era Publ'ns Int'l v. Henry Holt & Co., Inc., 873 F.2d 576, 583 (2d Cir. 1989) ("Where use is made of materials of an 'unpublished nature,' the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here.").

[246] *See* 17 U.S.C.A. § 107 (1992) ("The fact that a work is unpublished shall not itself bar a finding of fair use if such a finding is made upon consideration of all the above factors.").

[247] The fair use factors are: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the

protect our online freedoms.

A. *The Burden Should Be on a Copyright Holder to Rebut Fair Use, Particularly at the Preliminary or Permanent Injunction Stage*

Some courts have suggested that infringers may bear the burden of rebutting fair use.[248] Referring to fair use as an affirmative defense, courts have looked to defendants to establish that the fair use factors are satisfied.[249] This creates a great deal of uncertainty in cases in which the plaintiff alleges that it could obtain licensing revenue from defendant's conduct, whose status as fair use is unclear.[250] Where a fair use aggregates small amounts of numerous works from around the world, the uncertainties can only multiply.[251] This is particularly questionable when the plaintiff bears the burden of showing likelihood of success on the merits to obtain a preliminary injunction, yet a defendant bears the burden on fair use.[252] The solution to this dilemma is to amend the fair use statute to state clearly: "The fact that a plaintiff is unable to establish that three or more out of the fair use factors weigh in its favor shall result in a finding of fair use."

B. *Noncommercial Use, for Example for Criticism, Comment, Education, Parody, Research, Satire, Scholarship, or Teaching, Should Be Presumed to Be a Fair Use*

Some courts have treated noncommercial uses like commercial uses for purposes of fair use determinations.[253] This treatment of fair use

copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." *Id.*

[248] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586 (1994); *see also* Stewart v. Abend, 495 U.S. 207, 237–38 (1990); Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563–64 (1985).

[249] *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 n.3 (9th Cir. 2001); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1542 n.22 (11th Cir. 1996); Am. Geophysical Union v. Texaco, 60 F.3d 913, 918 (2d Cir. 1994).

[250] *See, e.g.*, Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445 (S.D.N.Y. 2012), *aff'd*, 755 F.3d 87 (2d Cir. 2014).

[251] Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 284 (S.D.N.Y. 2013).

[252] *See, e.g.*, Dr. Seuss Enters. v. Penguin Book USA, Inc., 924 F. Supp. 1559, 1562 (S.D. Cal. 1996), *aff'd*, 109 F.3d 1394 (9th Cir. 1997); Religious Tech. Ctr. v. Netcom On-Line Commc'n. Servs., 923 F. Supp. 1231, 1243 n.12 (N.D. Cal. 1995).

[253] *See, e.g.*, *Harper & Row*, 471 U.S. at 562 (although "the purpose of news reporting is not purely commercial, . . . [t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."); *Am. Geophysical Union*, 60 F.3d at 922 ("courts will not sustain a claimed defense of fair use . . . when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material" or when it "makes unauthorized use of copyrighted material to capture significant revenues as a direct consequence of copying the original work") (citing *Harper & Row*, 471 U.S. at 562); Bridge Publ'ns v. Vien, 827 F. Supp. 629, 635 (S.D. Cal. 1993) (copying of religious texts for use in classroom teaching was "commercial" because teacher earned a salary in connection with her

law may reduce the incentive of blog sites, search engines, news aggregators, and online video sites to serve as platforms for the public's noncommercial uses of copyrighted material. Justice William Brennan appealed unsuccessfully to his fellow justices to focus on the statute's distinction between a commercial and a noncommercial use, and to place criticism, comment, and news reporting on the noncommercial side of the ledger.[254] Congress recognized in 1976 that commercial is not the same as for-profit, so that a for-profit institution may engage in noncommercial commentary or criticism.[255] The solution is to amend the fair use statute to state clearly: "A work that engages in criticism, comment, education, parody, research, satire, scholarship, or teaching should be presumed to be a fair use, and the fact that such a use is engaged in for profit shall not itself bar a finding of fair use if all the above factors are considered."

C. *A Public Figure Plaintiff Should Bear the Burden of Coming Forward With Clear and Convincing Evidence of Substantial Similarity and Market Harm in Order to Rebut the Presumption that a Noncommercial Use is a Fair Use*

Public figures inject themselves into the political process or positions of power and influence in the economy.[256] Public figures such as political candidates, public officials, and celebrities have increasingly looked to copyright law to prevent criticism or parody of their actions or works.[257] In other areas, plaintiffs must provide clear and convincing

teaching).

[254] *Harper & Row*, 471 U.S. at 592 (Brennan, J., dissenting) (footnote omitted).

[255] H.R. REP. No. 94-1476, at 75 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5689.

[256] *See, e.g.*, Nw. Airlines v. Astraea Aviation Servs., Inc., 111 F.3d 1386, 1393 (8th Cir. 1997) (in addition to politicians, candidates, and celebrities, a corporation may be a public figure that must show that a defamatory statement was made with actual malice to overcome interests of free speech institutions in avoiding censorship); Bose Corp. v. Consumers Union of U.S., Inc., 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984) (describing district court's ruling that corporation was public figure, and background law).

[257] *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994) (analyzing parody of famous singer's work for how "excessive" it is and what its "potential" effects are, and remanding for further proceedings rather than finding fair use); *Harper & Row*, 471 U.S. at 559 (analyzing commentary and criticism based on president's memoirs for whether they "scoop" his serialized excerpts in popular magazine); New Era Publ'ns Int'l v. Carol Publ'g Group, 904 F.2d 152, 154 (2d Cir. 1990) (controversial religious leader's successors in interest sued over criticism and commentary using quotations of him); New Era Publ'ns Int'l, APS v. Henry Holt, Co., 884 F.2d 659, 662–64 (2d Cir. 1989) (Newman, J., dissenting) (criticizing outcome in similar case); Fisher v. Dees, 794 F.2d 432, 437–38 (9th Cir. 1986) (noting that plaintiff seemed to be attempting to prevent criticism, and that: "Copyright law is not designed to stifle critics. . . . [Yet] [b]iting criticism suppresses demand; copyright infringement usurps [demand]."); Brave New Films 501(c)(4) v. Weiner, 626 F. Supp. 2d 1013 (N.D. Cal. 2009) (rejecting lawsuit against critic of popular radio host, despite critic's reproduction and performance of one-minute clip from his talk show); Savage v. Council on American-Islamic Relations, Inc., 87 U.S.P.Q.2d (BNA) 1730 (N.D. Cal. 2008) (rejecting lawsuit against critics of popular radio host, after critics had used several minutes of his talk show); Religious Tech. Ctr. v. Netcom On-Line Commc'n. Servs., 923

evidence that the defendant intended to violate the plaintiffs' rights under a civil statute, by making falsehoods for example.[258] Parity between copyright and other causes of action, and avoidance of the chilling effect that this rule is intended to avoid, warrant applying a similar rule to copyright cases against free speech institutions. The solution is that section 107 should be amended to state that: "A use of copyrighted work to discuss a matter of public concern should be presumed to be a fair use, and a public figure plaintiff bears the burden of coming forward with clear and convincing evidence of substantial similarity and market harm to rebut this presumption."

D. *A Public Figure Plaintiff's Apparent Desire to Inhibit Criticism of His or Her Prior Actions, Record in Public Office, and/or Public Statements Should Weigh Heavily in Favor of a Finding of Fair Use*

This reform is a corollary of the point regarding clear and convincing evidence of unfair use in cases brought by public figure plaintiffs. A useful limiting principle in copyright cases, one that would shield free speech institutions from the chilling effect of varying rulings and trade associations' reliance on them, would be to look upon a desire to inhibit criticism or commentary with disfavor.[259] The Supreme Court, however, has declined to impose a heightened burden on plaintiffs seeking to suppress criticism or condemnation.[260] Thus, section 107 should be amended to state that: "A public figure plaintiff's expressed

F. Supp. 1231 (N.D. Cal. 1995) (religious organization's attempt to suppress criticism on Internet that quoted its works); JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 140–41 (2008) (famous radio host Michael Savage attempted to stifle critics that used one- to four-minute clips of his radio show to object to his statements); *cf.* Joseph P. Bauer, *Copyright and the First Amendment: Comrades, Combatants, or Uneasy Allies?*, 67 WASH. & LEE L. REV. 831 (2010); Bruce P. Keller & Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979 (2004); Jason Mazzone, *Copyfraud*, 81 N.Y.U.L. REV. 1026 (2006); Susan Park, *Unauthorized Televised Debate Footage in Political Campaign Advertising: Fair Use and the DMCA*, 33 SOUTHERN L.J. 29 (2013).

[258] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974) (First Amendment requires actual malice for public figure to recover damages based upon false statements against a media defendant); Kasky v. Nike, Inc., 45 P.3d 243, 119 Cal. Rptr. 2d 296, 317 (Cal. 2002) (although plaintiffs sued under California's false advertising and unfair competition statutes, court held that when a lawsuit involves "expression of opinion or points of view on general policy questions . . . [,] damages may be awarded only upon proof of both falsehood and actual malice.").

[259] *See Campbell*, 510 U.S. at 591–92 (holding that harm to the market for work due to "biting criticism" or "scathing . . . review" is not cognizable under fair use four-factor analysis).

[260] *See id.* at 581 ("Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioners' suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair . . . ."); *Harper & Row*, 471 U.S. at 592 (Brennan, J., joined by Marshall, J., dissenting) (rejecting majority opinion for "render[ing] meaningless the congressional imprimatur placed on such uses" as criticism or journalism by "negat[ing] any argument favoring fair use based on news reporting or criticism because that reporting or criticism was published for profit.").

desire to inhibit criticism of the plaintiff's prior actions, record in public office, and/or public statements on a matter of public concern should weigh heavily in favor of a fair use."

E. *A Use of a Copyrighted Work That Has No Direct Negative Effect on the Actual Market for the Work Should Be Favored as a Fair Use*

Some courts have chilled the exercise of the fair use privilege by declaring that harms in a "potential" market weigh against a fair use, and that this is "undoubtedly the single most important" element of all the fair use elements.[261] Courts are "eliminating fair use" when licensors or owners of copyright "ask for prices greater than zero for virtually any use" and "invent[] methods of collecting fees for each and every use, no matter how trivial."[262] This tends to destroy fair use because "it is a given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar."[263] Scholars have pointed out that "the speculative nature of potential uses could be discounted by an appropriate formula reflecting the relative (un)likelihood of their development."[264] While a "copyright owner could always argue that she has suffered some market harm because the defendant could have paid a fee for the very use at issue in the case," the better view is that "if the defendant's use is a fair use, then the copyright owner had no right to compensation from the defendant in the first place and there would be no harm to a legally recognized market."[265] The solution to this conundrum is to amend the fair use statute to make clear: "The fact that a use has a potentially negative effect on the licensing of the work shall not itself bar a finding of fair use if the use does not directly harm the market for the work." This amendment will shield journalists, biographers, teachers, scholars, and the institutions that host or aggregate their works or activities from excessive licensing demands.[266]

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[261] *Harper & Row*, 471 U.S. at 566; *see also Symposium: The Road To Napster: Internet Technology & Digital Content*, 50 AM. U.L. REV. 363, 377–78 (2000) (statement of Shuba Ghosh, University of Buffalo Law School).

[262] Hannibal Travis, *Pirates of the Information Infrastructure*, 15 BERKELEY TECH. L.J. 777, 823 (Spring, 2000).

[263] MELVILLE B. NIMMER & DAVID NIMMER, 4 NIMMER ON COPYRIGHT § 13.05[A][4] (2005).

[264] *See, e.g.*, Frank Pasquale, *Toward an Ecology of Intellectual Property: Lessons from Environmental Economics for Valuing Copyright's Commons*, 8 YALE J. L. & TECH. 78, 91 n.46 (2006).

[265] Christina Bohannan, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 597 (2006).

[266] *Cf. Harper & Row*, 471 U.S. at 593, 603 (Brennan, J., joined by Marshall, J., dissenting) (arguing that a presumption against a finding of fair use on the basis that a news report has a negative impact on the market for the plaintiff's copyrighted information in literary form was improper because journalistic outlets earn renown and larger audiences by scooping their rivals, and that a journalist's "stated purpose of scooping the competition should under those circumstances have no negative bearing on the claim of fair use . . . . [The copyright

CONCLUSION

To the extent that recent conflicts concerning the scope of action for free speech institutions are not intractable, a balance between governance and abundance may be achievable. A campaign to eliminate copyright could result in reduced cultural investment, whether it involves news, television, or movies. At the same time, coordinated industry action to inhibit the freewheeling character of the Internet will foster economic and political ignorance and marginalization. Today, the public informs itself of the world by consulting blogs, mashups, e-books, and other forms of expression mediated by online free speech institutions.

The proper dividing line between literary freedom and copyright abuse has historically been the ability of the copyright owner to prove real harm as a result of a follow-on work that takes so much of the original as to reduce the incentive to produce works like it. Amending section 107 of the Copyright Act to tighten the requirement that the copyright owner show substantial harm from the particular conduct of the defendant will guarantee the future of free speech institutions. In the long-term, antitrust law and the First Amendment's proscriptions on prepublication licensing and vague regulations will shield free enterprise.

owner] . . . has no right to set up copyright as a shield from competition in that market because copyright does not protect information.").

APPENDIX 1:
A SURVEY OF PROPOSALS FOR FAIR USE REFORM OVER THE LAST TWO DECADES

Author(s)	**Title**	**Citation Information**	**Position on Fair Use Reform**
Nicole Casarez	Deconstructing the Fair Use Doctrine: The Cost of Personal and Workplace Copying After *American Geophysical Union v. Texaco, Inc.*	6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 641 (1996)	The author argues that when a use may expand the accessibility of a work for purposes of education, research, scholarship, or other purposes, it should qualify as a fair use unless it imposes a cost or loss on copyright holders, with a resulting reduction of the incentive to produce new works. In measuring loss, she argues that the photo-copying of copyrighted work for a personal, noncompetitive research use should be found fair, despite the availability of copies in the marketplace, or via photocopying licenses.

Mark Lemley	The Economics of Improvement in Intellectual Property Law	75 TEX. L. REV. 989 (1997)	The author contends that fair use decisions should be made more consistent by denying copyright holders the right "to capture the value of . . . significant improvements made by others." *Id.* at 1022. He believes that the social value of the additional content or improved contribution to knowledge offered by an otherwise infringing work must be weighed against the harm to the market for the original work, and result in a fair use finding unless the harm to the plaintiff outweighs the benefit of the fair use to the public and to subsequent authors.
Rebecca Tushnet	Legal Fictions: Copyright, Fan Fiction, and a New Common Law	17 LOY. L.A. ENT. L.J. 561 (1997)	The author proposes that creative uses of copyrighted work, accompanied by disclaimers of association with the original author, should be considered to be fair uses that increase the space for literary freedom while preventing plagiarism and economic harm. Drawing a line at for-profit direct copying, or a copier suing the original author for imitating the copier's improvements to the original work, rather than at indirect or nonliteral imitation of any kind, protects the market for derivative works without establishing "total corporate control" over literary themes or worlds. *Id.* at 679.

Michael Carroll	One for All: The Problem of Uniformity Cost in Intellectual Property Law	55 AM. U. L. REV. 845 (2005)	The author argues that when copyright protects works that would have been made without it, the public is harmed. He suggests that fair use be applied flexibly, along with the scenes a faire doctrine and de minimis/insubstantial similarity defenses, to reflect the varying investments and incentives needed to produce works.
Marjorie Heins & Tricia Beckles	Will Fair Use Survive: Free Expression in the Age of Copyright Control (A Public Policy Report)	Brennan Center for Justice at the NYU School of Law (2005), www.fepproject.org/policyreports/WillFairUseSurvive.pdf	The authors oppose the punitive application of copyright law to good-faith attempts at fair use. They advocate a copyright system that provides clear, practical guidance and education to members on the public on fair use and free speech. They propose a system that does not penalize an adjudicated infringer who wrongly believed that he or she was making a fair use.
Hannibal Travis	Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?	61 U. MIAMI L. REV. 87 (2006)	The author proposes that fair use be made more available when a use increases sales of the plaintiff's work, or has no effect on it. He also argues that the doctrine should be reformed so that courts will not elevate the effect on the market for licensing a work to a level that would outweigh the creativity of a use, and will not require a fair user to prove a negative, *i.e.*, that if their use becomes widespread, it will not adversely affect the value of or potential market for a work.

Christina Bohannan	Copyright Harm, Foreseeability, and Fair Use	85 Wash. U. L. Rev. 969 (2007)	The author proposes that "copyright harm" is a concept that may add precision to the fourth fair use factor by requiring a copyright owner to show that a particular use of a copyrighted work is likely to have an adverse effect on a reasonable copyright owner's likely revenue streams, measured at the time the work is created. This "foreseeability" test would reform the fair use doctrine as applied by some courts to return to its articulation in *Sony Corp. of America v. Universal City Studios, Inc.*
Warren Chik	Better a Sword Than a Shield: The Case For Statutory Fair Use Right in Place of a Defence	1 INT'L J. PRIV. L. 157 (2008)	The author argues that fair use should be a legal right, not an exception. As a right, a user could assert fair use against a copyright owner seeking to silence the user, and enjoy a shield from abuse by the original copyright holder.
Lawrence Lessig	Remix: Making Art and Commerce Thrive in the Hybrid Economy	(THE PENGUIN PRESS, 2008)	The author contends that there should be a clear statutory defense for noncommercial creative use or "remix" of copyrighted work, in addition to the fair use doctrine for professionally distributed remixes and remixes produced professionally but distributed by amateur means such as Flickr or YouTube.

Joseph Liu	Two Factor Fair Use	31 COLUM. J.L. & ARTS 571 (2008).	The author proposes a fair use analysis that relies on a balancing of two factors: (1) purpose and character of the use; and (2) the use's impact on the market for the work. The other two factors traditionally used in the fair use analysis would be consigned to a secondary status, if considered at all.
Pamela Samuelson	Unbundling Fair Uses	77 FORDHAM L. REV. 2537 (2009)	The author disputes whether a defendant should bear the burden of showing that a use of copyrighted work is a fair use under section 107. She argues that the burden must shift to the plaintiff, after the defense of fair use is pled, to prove harm to the market and the other fair use factors. She concludes: "At the very least, copyright owners should bear the burden of proving unfairness in free speech/expression, personal use, and litigation use cases." *Id*. at 2618.

Christina Bohannan	Taming the Derivative Works Right: A Modest Proposal for Reducing Over-breadth and Vagueness in Copyright	12 VAND. J. ENT. & TECH. L. 669 (2010)	The author advocates for more bright-line rules regarding fair use, criticizing the "vagueness" of the fair use doctrine, particularly in regards to how courts define the "market" for a copyrighted work. The author argues that, as an affirmative defense, the fair use doctrine problematically places a burden upon the user of a copyrighted work to show that his or her speech is protected, and has a chilling effect on the creation of new works. By limiting the scope of copyright protection and the derivative work right, the fair use doctrine must clarify harm to the market for or value of the work under the fourth prong of the fair use analysis.
Warren Chik	Paying it Forward: The Case For a Specific Statutory Limitation On Exclusive Rights For User-Generated Content Under Copyright Law	11 J. MARSHALL REV. INTELL. PROP. L 240 (2011)	The author suggests that Congress consider creating supplementary statutory protections that would complement or add to the fair use doctrine. These safeguards would protect users against copyright owners who issue cease and desist/take-down notices regardless of the character of the use. He proposes that user-generated content should be presumed noninfringing, subject to a showing of a "net infringement".

Wendy Gordon	Fair Use Markets: On Weighing Potential License Fees	79 GEO. WASH. L. REV. 1814 (2011)	The author is a proponent of a broad fair use doctrine and argues in favor of reviving the Second Circuit's category of "fair use markets" in order to reduce the risk that emerging markets and attempts to demand licensing fees will narrow the scope of the fair use doctrine.
William Fisher III et al.	Reflections on the Hope Poster Case	25 HARV. J.L. & TECH. 243 (2012)	The author proposes reducing the extent to which the first fair use factor is "manipulable" by recasting a transformative work as a consumptive or exploitative work on another level. He contends that works that apply "creative engagement" to other works should be considered transformative and immunized from copyright liability because they add "social value" thereby.
David Fagundes	Efficient Copyright Infringement	98 IOWA L. REV. 1791 (2013)	The author argues that the optimal level of copyright protection is a balance between encouraging creativity and expanding the public's benefit received from the creation. In this regard, the author supports expanding the scope of fair use in an effort to make copyright law more efficient.

Stephen Merrill & William Raduchel, Eds. Committee on the Impact of Copyright Policy on Innovation in the Digital Era, Board on Science, Technology, & Economic Policy	Copyright in the Digital Era: Building Evidence for Policy	NATIONAL ACADEMIES PRESS (2013)	This report's fair use discussion suggests that empirical research is necessary to understand the doctrine and develop better public policy.
Mark Bartholomew & Mark Tehranian	An Intersystemic View of Intellectual Property & Free Speech	81 GEO. WASH. L. REV. 1 (2013)	The authors argue that judges, not legislators, are in the best position to implement changes to the current application of the fair use doctrine. Specifically, judges are in a better position to determine whether a potentially narrow application of the doctrine threatens the protections provided to free speech, and decide how to remedy this problem.
Brad Greenberg	Copyright Trolls and Presumptively Fair Uses	85 U. COLO. L. REV. 53 (2014)	The author proposes that when a copyright owner never distributed copies, transmissions, or phonorecords containing his or her expression, or stopped doing so, there should be a presumption of fair use, and the burden should be shifted to the copyright holder to show that (1) there is market harm to a sales or licensing market other than lawsuits; (2) the allegedly infringing use is for the same purpose as the plaintiff's business and is not transformative; and (3) a damages or injunction remedy would further the progress of science.

Taylor Bartholomew	The Death of Fair Use in Cyberspace: YouTube and the Problem with Content ID	13 DUKE L. & TECH. REV. 66 (2015)	The author calls for reform of YouTube's Content ID program in order for the fair use doctrine to apply neutrally instead of creating a presumption against the content uploader. He argues that the presumption against use of copyrighted work currently in force due to YouTube's copyright filters threatens "the death of fair use in cyberspace."