

# ESCAPE FROM COPYRIGHT: MARKET SUCCESS VS. STATUTORY FAILURE IN THE PROTECTION OF EXPRESSIVE WORKS

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## ABSTRACT

*Copyright law, originally excused as a necessary evil, threatens now to become an inescapable burden. Because state and common law rights seemed inadequate to protect expressive works from unrestricted copying, the Founders expressly authorized federal copyright legislation. Lawmakers have read that constitutional mandate liberally. Each new version of the Copyright Act has embodied longer, broader, and more powerful legal protections. Meanwhile, private initiatives have developed increasingly effective means of safeguarding copyrighted works. Alarmed that these dual trends benefit copyright owners at too great an expense to the public interest, many commentators argue that the Copyright Act should limit and preempt non-statutory alternatives. But that puts matters exactly backwards. Besieged by lobbyists and bloated by public choice pressures, the Copyright Act has fallen into statutory failure. Insofar as common law and self-help technologies unite to secure exclusive rights in expressive works, in contrast, they succeed in overcoming the market failure that originally justified the Copyright Act. If legislative and private protections prove too powerful in combination, therefore, copyright owners should have the right to choose between the two. Rather than automatically nullifying private efforts, courts should allow the owners of expressive works to abandon the Copyright Act's protections and rely once more on non-statutory ones. Because the idea has only just begun to draw scholarly attention, this paper offers a comprehensive analysis of such an exit option. It finds that principles of law, equity, and policy favor opening an escape from copyright and describes both potential and currently functioning means of putting that theory into practice.*

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## I. INTRODUCTION

Copyright law,<sup>1</sup> originally excused as a necessary evil, now threatens to become an inescapable burden. It arose as a response to market failure.<sup>2</sup> Because the Founders regarded state and common law rights

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1. Here and elsewhere, this paper impliedly focuses on U.S. copyright law. Much of the discussion will, however, apply to copyright law generally.

2. This paper defines as "market failure" those instances when civil mechanisms, most notably institutions operating under common law rules, function suboptimally. See Joseph E. Stiglitz, *On the Economic Role of the State*, in THE ECONOMIC ROLE OF THE STATE 11, 38 (Arnold Heetjje ed., 1989) (explaining that market failure always asks, "[W]hen will voluntary organizations not work effectively?"); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 343 (3d ed. 1986) (criticizing overly-narrow views of market failure on grounds that "[t]he failure is ordinarily a failure of the market and of the rules of the market prescribed by the common law"). As should (but cannot) go without saying, no mere finding of market failure will

as inadequate "[t]o promote the Progress of Science and useful Arts,"<sup>3</sup> they gave explicit constitutional authority to federal legislation "securing for limited Times to Authors . . . the exclusive Right to their . . . Writings."<sup>4</sup> Lawmakers have read that mandate liberally. Each new version of the Copyright Act<sup>5</sup> has awarded longer, broader, and more

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justify state action. Because neither civil nor political mechanisms work perfectly, to respond to market failure requires a choice between "the common law system of privately enforced rights and the administrative system of direct public control—and should depend upon a weighing of their strengths and weaknesses in particular contexts." *Id.*; accord Stiglitz, *supra*, at 38-39 ("[T]he issue becomes one not of identifying market failures, for these are pervasive in the economy, but of identifying large market failures where there is scope for welfare-enhancing government interventions.").

This paper analyzes market failure in terms generous enough to accommodate the concern of some commentators that narrower, purely monetary analyses risk slighting vital aspects of copyright law. See, e.g., Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997) (offering a comprehensive argument for viewing market failure broadly in the context of copyright's fair use doctrine); Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 129 n.59 (1999) (arguing that market failure analyses of fair use doctrine should extend beyond consensual licensing). The use of "market failure" herein also effectively conveys a central aspect of the Founders' views on justifying state action, though of course without implying that they employed "market failure" itself, a term that arose only much later under neoclassical economics.

3. U.S. CONST. art I, § 8, cl. 8. The implication here that U.S. copyright law may constitutionally promote both science and the useful arts merits a brief explanation. The clause in full grants congress power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* Some authorities argue that "respective" imposes on the clause a comprehensively parallel construction under which congress has power "[t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings." See, e.g., *In re Bergy*, 596 F.2d 952, 958 (C.C.P.A. 1979) (quoting H.R. REP. NO. 82-1923 (1952), reprinted in 1952 U.S.C.A.N. 2394, 2396) ("The purpose of the first provision is to promote the progress of science[,] . . . the word 'science' in this connection having the meaning of knowledge in general . . ."); Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 UCLA L. REV. 1, 7 n.21 (1995) ("The copyright portion pairs 'Science' with 'Authors' and 'Writings' . . ."); Loren, *supra* note 2, at 3 n.2 ("The clause should be read distributively with 'Science,' 'Authors,' and 'Writings' representing the copyright portion . . ."); William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 910 n.18 (1997) ("Structurally, the Constitution couples 'Science' with 'Authors' and 'writings' . . ."). I have quoted the clause in such a fashion, albeit reflexively. See Tom W. Bell, *Fair Use Vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 585 n.130 (1998).

It seems more plausible, however, to read "respective" as imposing a parallel construction not on the clause's justificatory preamble but on only the types of creators and creations listed in the last two sub-clauses. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8.) ("The primary objective of copyright is . . . '[t]o promote the Progress of Science and useful Arts.'"); Malla Pollack, *Unconstitutional Incontestability? The Intersection of the Intellectual Property and Commerce Clauses of the Constitution: Beyond a Critique of Shakespeare Co. v. Silstar Corp.*, 18 SEATTLE U. L. REV. 259, 282-83 (1995) (applying a parallel reading to only last two sub-clauses on grounds of legislative history and canons of construction). This more generous reading comports with good grammar, makes more clear that "limited Times" applies to both the copyright and the patent power, and slightly reduces (but certainly does not eliminate) suspicions that the extraordinarily broad scope of contemporary copyright law transgresses constitutional limits. See *infra* Part III.E.1 (contrasting the Copyright and Patent Clause's plain language with the expansion of copyright law).

4. U.S. CONST. art I, § 8, cl. 8.

5. Copyright Act of 1976, as amended, 17 U.S.C.A. §§ 101-1332 (1994 & Supp. V 1999).

powerful legal protection<sup>6</sup> to expressive works.<sup>7</sup> At the same time, private parties have developed increasingly effective means of protecting copyrights by combining their common law property, contract, and tort rights with technological self-help tools.<sup>8</sup> Alarmed that these dual trends benefit copyright owners at too great an expense to the public interest, many commentators have argued that the Copyright Act, or perhaps even the Constitution, should limit and preempt the private protection of expressive works.<sup>9</sup> But to so favor statutory law over private protections puts the matter exactly backwards. Courts should instead allow owners of expressive works to escape from copyright.

Insofar as common law and self-help technologies unite to secure exclusive rights in expressive works, they overcome the market failure that justifies the Copyright Act. All else being equal, therefore, such private protections ought to trump statutory ones. Commentators who embrace the contrary view, one that would trap us within the confines of the Copyright Act, do so because they fear the power of statutory and private rights in combination. Their fear may engender our sympathy, but it does not necessitate the response. There remains a third option—one that has only just begun to attract scholarly attention—of abandoning copyright's legislative protections and relying once more on common law's.<sup>10</sup>

This paper explores the theory and practice of opening such an exit from copyright to common law. The fundamental idea, in very brief: If copyright and common law prove too powerful in combination, copyright owners should have the right to choose between these two means of protecting expressive works.<sup>11</sup> The escape route, in other

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6. See *infra* Part III.E.

7. The Act does not define "work" and uses the term inconsistently, sometimes implying that a work must be fixed, see, e.g., 17 U.S.C. § 101 (1994) ("A work is 'created' when it is fixed . . ."), and other times implying that a work may be unfixed, see, e.g., *id.* (defining "derivative work" without reference to fixation). It thus bears noting that this paper uses "expressive works" as shorthand for "original works of authorship fixed in any tangible medium of expression," *id.* § 102(a) (defining the subject matter of copyright).

8. See *infra* Part II.A. Because the development and use of such self-help tools involves common law rights—such as the right to own a computer, contract with a programmer, or forbid trespass to a research lab—this paper refers to the combination of common law and technological protections as "private" or "common law" protections.

9. See *infra* Part II.B-C.

10. See *infra* Part IV. By way of clarification, it bears noting that mere appeal to the unfortunately mislabeled "common law copyright" cause of action will by no means resurrect an author's statutory rights in common law guise. See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1129-33 (1983) (arguing that "common law copyright" does not accurately describe the limited rights that authors have to prevent publication of their works).

11. I first briefly raised the idea of offering an exit from copyright in Bell, *supra* note 3, at 614-18.



words, opens a new way out of preemption and other federal limits on private rights.<sup>12</sup> If we regard a license as invalid in whole or part on grounds that it secures rights disallowed under copyright law, for instance, we ought to give the licensor a choice between: 1) abandoning suspect terms of the license and falling back on copyright protection; or 2) abandoning copyright and relying on contract law to secure the interests in question. A parallel argument applies to private protections that combine property or tort rights with technological self-help tools developed to safeguard—and, given that technological innovation itself relies on property, contract, and tort law, developed thanks to—common law rights.<sup>13</sup> If for instance we regard as excessive, when combined with copyright law, the technological protections that a company develops, owns, and protects from trespass and tortious interference, we ought to give that company a choice between: 1) limiting the effect of those non-statutory protections and exploiting the Copyright Act's; or 2) abandoning copyright and relying on technological tools and the common law rights affiliated with them.

Letting copyright owners rely solely on their common law rights, both as defended by and used in defense of technological self-help tools, might sound like a modest and reasonable proposal. This paper, at any rate, finds that offering such an exit from copyright would probably promote both equity and efficiency. But it first bears reviewing why many commentators worry about the power of copyright and common law in combination—and why they advocate limiting the latter in such cases. Part II thus surveys the views of those who would put copyright before common law. For the most part, those concerned about the

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The present Article represents my attempt at a more comprehensive treatment of the concept. *See also* Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161, 182-83 (1997) (criticizing escape option on grounds that "allowing unlimited numbers of copyright owners to opt out of the system as it suits them is bad law and bad policy"); *Open Discussion*, 17 U. DAYTON L. REV. 839, 839-45 (1992) (discussing utility and desirability of avoiding copyright misuse claims by dedicating work to public domain and relying on common law rights); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1273-74 (1995) (conjecturing that copyright owners would prefer to avoid choosing between copyright and contract rights); Lemley, *supra* note 2, at 149-50 (arguing that U.C.C. 2B might make abandoning copyright to rely solely on contract law an attractive option); *see also* 1 MELVILLE NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1][a], at 1-16 n.69.5 (2000) (criticizing a court for preempting a contract term and suggesting that instead it should have allowed an election of remedies).

12. Regarding those other types of federal limits, *see* Lemley, *supra* note 2, at 151-63 (describing effects of copyright misuse doctrine and various federal rules affecting intellectual property contracts).

13. At the margin of technological advance, of course, the proper shape of common law remains subject to debate and refinement. *See, e.g.*, Dan L. Burk, *The Trouble With Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000) (critiquing courts' use of trespass to chattles as a means of restricting access to computer networks and proposing a new theory of digital nuisance). The present paper does not attempt to settle such theoretical disputes; it suffices to note that they arise relatively rarely and that they should prove just as susceptible to resolution by courts and commentators as other questions about common law do.

over-powerful protection of expressive works do not even consider the exit option described in these pages. Some few commentators do, however. Their arguments naturally merit careful attention.

Part III explains why refusing to open an escape from copyright would unjustly imprison the owners of expressive works within the confines of the Copyright Act. Case law, commentary, and the historical record all confirm that copyright represents a statutory response to market failure. To the extent that common law and technological self-help protections of expressive works fulfill the constitutional mandate "[t]o promote the Progress of Science,"<sup>14</sup> they undercut the very reason for the Copyright Act. In such instances, therefore, an owner of an expressive work should have the right to opt out of copyright and rely on common law rights, both as secured by and used to secure technological self-help tools.

Claiming that copyright aims to cure not just an overabundance of copying but also a shortage of public discourse does not alter that conclusion. The Constitution by no means creates a "welfare" right<sup>15</sup> to expressive works. Even if the public were empowered to force open access to copyrighted works, moreover, it would not thereby enjoy a similar power over works protected solely by private means. Letting the owners of expressive works exit into private protections would make sense even if the Copyright Act really did, per the aphorism, strike "a delicate balance" between public and private interests. In fact, however, it does no such thing. Thanks to their inevitable ignorance of the pertinent variables, legislators could not strike such a balance if they wanted to; thanks to the influence of copyright lobby, they may not even care to try. Only opening an escape from the Copyright Act offers the hope of freeing us from that distressing case of degenerative statutory failure.

Granted that legal and policy considerations favor the exit option, will practical considerations permit it? Taking up that question, Part IV identifies both potential and currently functioning means of opening an escape from copyright into private rights. There of course remain serious hurdles to reaching an "open" copyright system—a system that respects and encourages movement across copyright's porous border. Fully recognizing and enabling the exit option represents merely the first step. More fundamentally, those who shape copyright policy must

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14. U.S. CONST. art I, § 8, cl. 8.

15. The substitution herein of "welfare" and "liberty" for what some commentators respectively call "positive" and "negative" rights follows the suggestion of RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 67 n.11 (1998) (crediting Loren E. Lomasky for that usage and praising its "moral neutrality").

understand that in a liberal society as in a packet-switched network, information flows most freely when directed by only a few simple rules.

## II. THE COPYRIGHT TRAP

What once seemed like a haven will turn into a trap if in trying to escape you find the way barred. As this Part explains, copyright law now threatens to undergo just that sort of cruel transformation. Copyright law arose as a response to the market's failure to protect expressive works, a failure that in digital contexts private innovation looks increasingly likely to cure. As Part A relates, many commentators thus worry that copyright, common law, and technological self-help have begun to combine to give expressive works too much protection. Facing what they regard as a choice between copyright with or without additional, excessive protections, such commentators unsurprisingly call for limiting the private protection of expressive works. Part B analyzes that false choice, explaining that it fails to consider letting the owners of expressive works escape from copyright law's reach. As Part C observes, however, some commentators consciously consider and reject letting private parties rely solely on private protections. Subsequent Parts of this paper argue, in contrast, that however well it sheltered us from former market failures, copyright law will become a prison if we cannot escape it for newer and better legal regimes.

### A. *The Alarming Combination of Copyright, Common Law, and Technology*

Commentators largely agree that the combination of copyright, common law, and technological self-help has begun to give copyright owners unprecedented control over their works.<sup>16</sup> The result—call it automated rights management (ARM)<sup>17</sup>—employs various and fluctuating methods. To speak generally and in functional terms, however, ARM allows the owners of intellectual property to limit access to, regulate use or reuse of, obtain payment for, and imbed identifying information in their works.<sup>18</sup> Though ARM remains imperfect, consideration of financial incentives alone suggests that ARM will see

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16. See generally Bell, *supra* note 3, at 563-79 (describing relevant technology and commentary).

17. Alternative terms, too narrow or broad for present use, for the technological enforcement of intellectual property rights include "trusted systems" and "copyright management systems." See Bell, *supra* note 3, at 560 n.7 (cataloging various usages). But see Kenneth W. Dam, *Self-Help in the Digital Jungle*, 28 J. LEGAL STUD. 393, (1999) (preferring "self-help systems" on grounds that terms incorporating "rights" needlessly implicate legal judgments).

18. See Bell, *supra* note 3, at 564-67 (describing ARM technologies in greater detail).

wider use and continued improvement.<sup>19</sup> Newly-enacted laws levying civil and criminal penalties against the circumvention of copyright protection and management systems encourage the same conclusion.<sup>20</sup>

Not all commentators bemoan the trend towards increasingly powerful ARM. Some regard it as almost an unmitigated good.<sup>21</sup> Others, foreseeing both peril and promise in ARM, regard it with a bit more equanimity.<sup>22</sup> Here as elsewhere, though, commentators who worry the most write the most. So much the better; we all benefit from dispassionate and foresighted warnings of impending disaster. Such service in the public interest does, however, give the academic literature on ARM a predominately dark cast.<sup>23</sup>

Professor Neil Weinstock Netanel, for instance, sees in ARM "the specter of all-consuming copyright owner control."<sup>24</sup> That prospect, he claims, "threatens to upend copyright's already uneasy accommodation

19. But see Esther Dyson, *Intellectual Value*, WIRED, July 1995, at 136 (arguing that ARM will have little impact on the trend toward widespread and free copying of digital works); John P. Barlow, *The Economy of Ideas: Rethinking Patents and Copyrights in the Digital Age*, WIRED, Mar. 1994, at 84 (same).

Stephen King's recent publication of RIDING THE BULLET in an electronic book format put ARM to a real-world test. Thanks in part to the legacy of U.S. export regulations on encryption (since relaxed), the "eBook" issued with insufficient protection and soon suffered piracy. See Glen Sanders & Wade Roush, *Cracking the Bullet: Hackers Decrypt PDF Version of Stephen King eBook* (visited Mar. 23, 2000) <<http://www.ebooknet.com/prINTERVersion.jsp?id=1671>>. Still, eBook publishers foresee, with some equanimity, always losing some sales to unauthorized copying. "The reality is there's no such thing as an invincible copy protection system. . . . It's impractical to make it both invincible and usable." Margaret Kane, *Stephen King e-book Pirated* (visited Mar. 29, 2000) <<http://www.zdnet.com/zdnn/stories/news/0,4586,2487101,00.html>> (quoting Len Kawell, president of Glassbook). It matters most that RIDING THE BULLET probably earned a great deal more as an eBook, even a pirated one, than it would have as a traditional book. See Mike Godwin, *Is Stephen King's New eBook Riding the DMCA Bullet?* (visited Mar. 31, 2000) <<http://lawnewsnetwork.com/stories/A20129-2000Mar30.html>> (estimating King would earn \$450,000 for the eBook versus \$10,000 for an equivalent hardcopy version).

20. See 17 U.S.C.A. §§ 1201-1205 (Supp. V 1999) (codifying the Digital Millennium Copyright Act (DMCA)). These provisions have already been brought to bear against parties who allegedly facilitated the DeCSS crack. See, e.g., *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) (granting injunction on grounds it violates DMCA to publish program designed to circumvent DVD encryption).

21. See, e.g., Paul Edward Geller, *Copyright History and the Future: What's Culture Got to Do With It?*, 47 J. COPYRIGHT, SOC'Y 209, 241-45 (2000) (analyzing the extent to which online contracting and "program rules" should supersede copyright); Dam, *supra* note 17 (describing and praising technological trends that reduce the cost of protecting intellectual property rights); Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 242-47 (1996) (same); PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 224 (1994) (same).

22. See, e.g., Bell, *supra* note 3, at 618-19 (reviewing the costs and benefits of the trend toward "fared use" and predicting that it will generate net benefits but calling for further empirical study); Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53 (1997) (defending as expedient if not ideal the enforcement of standard form agreements that demand rights more extensive than those allowed under copyright).

23. See generally Bell, *supra* note 3, at 573-79 (describing and classifying dystopian views of ARM).

24. Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 285 (1996).

of public access with private ownership."<sup>25</sup> Professor Dennis J. Karjala projects a world where to access a copyrighted work a consumer will have to promise "not to use the underlying ideas to create a competing work, not to further distribute the work or anything contained in the work, not to download any of the factual information contained in the work, not to quote from the work, and so forth."<sup>26</sup> Enforce such promises, he concludes, and "all of the users' rights of copyright will soon disappear."<sup>27</sup> Professor Michael J. Madison argues that trends in the law and practice of regulating access to information "increasingly mean that no open space exists save that which information producers choose explicitly to provide."<sup>28</sup> Professor Julie E. Cohen worries that ARM ultimately "will allow content owners to insist on greater protection than copyright law would afford."<sup>29</sup> That result, she claims, would "fundamentally alter the social welfare equation."<sup>30</sup>

This paper addresses those sorts of general concerns about the combined power of copyright, common law, and ARM. It does not attempt to resolve facially similar but fundamentally different concerns that statutory measures like the Digital Millennium Copyright Act (DMCA)<sup>31</sup> and the Uniform Computer Information Transactions Act<sup>32</sup> threaten to give ARM greater protection than common law alone would allow.<sup>33</sup> Such legislative actions call for separate treatments—and separate justifications—than the actions of private parties exercising

25. *Id.*

26. Dennis S. Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 513 (1997).

27. *Id.*

28. Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1031.

29. Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 472 (1998).

30. *Id.* at 550.

31. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in relevant part at 17 U.S.C. §§ 1201-04) (creating civil and criminal penalties for the use or distribution of devices primarily designed or produced to circumvent copyright protection systems and for tampering with copyright management information).

32. The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved a draft of the Uniform Computer Information Transactions Act (UCITA), successor to a failed attempt to draft a new Article 2B of the Uniform Commercial Code, in July 1999. See *Drafts of Uniform and Model Acts* (visited Aug. 11, 2000) <[http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm)>. UCITA has since been adopted by the states of Virginia and Maryland. See NCCUSL, *Introductions & Adoptions of Uniform Acts: Uniform Computer Information Transactions Act* (visited Aug. 11, 2000) <[http://www.nccusl.org/uniformact\\_facsheets/uniformacts-fs-ucita.htm](http://www.nccusl.org/uniformact_facsheets/uniformacts-fs-ucita.htm)>.

33. See, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999) (criticizing the DMCA's anti-circumvention provisions as unnecessary and over-broad); David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999) (criticizing proposed Article 2B of the Uniform Commercial Code on grounds, in part, that it changes extant contract law).

their traditional common law rights. One can support the freedom to protect expressive works with technological self-help, licenses, and tort claims without further demanding that such efforts get special statutory treatment.<sup>34</sup> In fact, because the DMCA imposes new limits on the research and development of devices that might be used to infringe copyrights,<sup>35</sup> it violates common law rights to the peaceable enjoyment of one's property and person.<sup>36</sup> More generally, clumsy attempts to legislatively amplify common law rights threaten to stifle a vital discovery process, trigger unintended consequences, create public choice problems, and, in sum, do more harm than good.<sup>37</sup>

*B. The False Choice Between Copyright With or Without Common Law*

Most commentators who worry about the combined power of copyright law and private protections of expressive works reflexively attack the latter source of rights. Because they do not address the exit option set forth in these pages, it remains uncertain how such commentators would regard the alternative possibility of limiting copyright and relying solely on common law rights, both as defended by and used in defense of technological self-help tools. That those commentators frequently appeal to collective deliberation perhaps hints that they would not favor a world where private parties decide how to allocate rights to expressive works. But at any rate, intentionally or not, to counter the combined power of copyright and private protections solely by negating the latter poses a falsely limited choice. Whether ultimately attractive or not, the option of escaping copyright at least merits consideration.

Professor Netanel offers a good example of commentary that, without expressly addressing the exit option, sounds rather unlikely to embrace it. He argues for a "democratic paradigm" under which copyright law protects not only expressive works but also—and affirmatively—the public domain. Netanel concludes that "the limits to copyright's duration and scope represent the outer bounds not only of copyright protection, but also of other forms of private control over

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34. See, e.g., Bell, *supra* note 3, at 561-62 (arguing that lawmakers should avoid premature meddling with the evolution of the common law relating to ARM).

35. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in relevant part at 17 U.S.C.S. §§ 1201-04).

36. In that regard, the DMCA provides a particular example of how copyright law in general violates common law rights. See *infra* Part III.B.1.

37. See Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1752 (1995) (proposing that until we achieve a better understanding of the Internet "we follow the meandering development of the common law").

publicly disseminated expression.”<sup>38</sup> Because copyright law carefully balances the rights of owners and users, claims Netanel, the protection of expressive works “cannot be subordinated to market vicissitudes and the vagaries of private contract.”<sup>39</sup>

Similarly, Professor Karjala argues that “copyright cannot be simply a ‘default position’ against the background of which copyright owners and users should be fully free to make variations by contract.”<sup>40</sup> He justifies limiting contract in such cases largely because he regards access to copyrighted works as part of “the quid pro quo that benefit[s] the public in exchange for the public’s recognition of the exclusive rights of copyright.”<sup>41</sup> Would Karjala furthermore object to common law and technological protection of works that have escaped copyright? He does not address that question directly, but he does object to common law protections that seem “copyright-like” because they cover publicly distributed works even absent bargaining.<sup>42</sup> He thinks that shrinkwrap licenses clearly fall afoul of that standard,<sup>43</sup> suspects that clickwrap licenses do,<sup>44</sup> and does not address whether purely technical self-help protections, effective regardless of user assent, would.

Interestingly, Professor Mark A. Lemley isolates from the exit option most—but not all—of his critique of contract law’s impact on copyright.<sup>45</sup> He admits that § 301 of the Copyright Act offers little hope of voiding contracts that interfere with federal policy<sup>46</sup> and presents implied conflicts preemption under the Supremacy Clause as a more powerful, albeit unruly, cure.<sup>47</sup> In neither case does Lemley discuss whether the owners of expressive works might avoid preemption by abandoning their copyrights.<sup>48</sup> Intriguingly, however, he surmises that “a plaintiff who truly does ‘opt out’ of copyright in favor of contract

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38. Netanel, *supra* note 24, at 363.

39. *Id.* at 385 (footnote omitted).

40. Karjala, *supra* note 26, at 521.

41. *Id.*

42. *Id.* at 540.

43. *See id.* at 531-32, 540.

44. *See id.* at 532-33.

45. *See* Lemley, *supra* note 2, at 117-36. While proposed Article 2B of the Uniform Commercial Code apparently heightened Lemley’s concern about contract law’s interference with copyright policy, his article also expresses general wariness about standardized form and shrinkwrap contracts. *See id.*

46. *See id.* at 139-41.

47. *See id.* at 141-44.

48. His discussion of the limits of preemption does invoke the exit option, but only to wonder whether it might serve to draw a more sharp distinction between contracts and statutory law. *See id.* at 149-50; *see also* Lemley, *supra* note 11, at 1274 (surmising that copyright owners would regard the exit option as “an unattractive alternative” to enjoying a full panoply of rights).

presumably would not be bound by the limits of the copyright misuse defense."<sup>49</sup>

The influence of ends-oriented positivism, under which final results outweigh prior rights, can make it difficult to discern exactly which half of the copyright and common law combination most worries a commentator. Professor Cohen, for instance, has recently attacked the distinction between statutory and common law rights, claiming that all "[d]eclarations of entitlement are definitional, *public* acts and should be understood as such."<sup>50</sup> Unsurprisingly, she does not take great pains to distinguish between copyright bolstered by common law rights and common law rights acting alone. With regard to all, it seems, "we must reach a considered, *collective* decision about what social welfare means."<sup>51</sup> As argued below, however, common law rights generally merit greater deference than those created by the Copyright Act.<sup>52</sup> It thus does not suffice to claim, as does Cohen, that "it is impossible to say with certainty that the market would be better at promoting access and progress than the existing system of public ordering via the legislative process."<sup>53</sup> The advocate of legislative ordering bears a heavy burden of proof, one that, in this context, she will find quite hard to carry.

Notwithstanding that her recent scholarship does not clearly distinguish between statutory and common law rights, Professor Cohen

49. Lemley, *supra* note 2, at 157.

50. Cohen, *supra* note 29, at 495 (footnote omitted).

In equating statutory and common law rights, Cohen perhaps underappreciates the importance that distinguishing it holds for other commentators. For instance, she clumps me among the "cybereconomists," *id.* at 464, and claims that, as such, I "neglect to note that the existing copyright regime . . . is itself a product of the legislative process." *Id.* at 494. To the contrary, the sole paper that Cohen cites as evidence of my views clearly contradicts her allegation that I ignore the legislative origins of copyright. See Bell, *supra* note 3, at 582 ("Lawmakers enacted the Copyright Act to cure an alleged case of market failure . . ."); *see id.* at 590-91 (criticizing limitations in the legislative processes that shape copyright law). Cohen likewise errs in claiming that I "posit[] the current distribution of ownership and bargaining power as natural." Cohen, *supra* note 29, at 494-95; *see* Bell, *supra* note 3, at 562 (expressly disavowing any analysis of the justifiability of copyright); *see id.* at 582 (noting the legislative origins of copyright).

In thus wrongly assuming that I share her own sort of statist legal positivism, Cohen can at least boast of distinguished company. See Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1265 n.38 (1998) (arguing that I advocate a view that "almost invariably falls back on the authority of the state to enforce . . . private rules as if they were public ones"). Contrary to Lemley, one might well advocate the primacy of consensual ordering without supposing that it "almost invariably" relies on state coercion. *See generally* Tom W. Bell, *Polycentric Law*, HUMANE STUD. REV., Winter 1991-92, at 1 (surveying law's nonpolitical origins and operations). In fact, their brash talk to the contrary notwithstanding, statist positivists themselves typically (if covertly) rely not on raw coercion to justify legal obligations but rather on respect for natural (or, as they might say, "human," "universal," or "fundamental") rights. See BARNETT, *supra* note 15, at 18-22. Few people really believe that law issues from the barrel of a gun.

51. Cohen, *supra* note 29, at 559.

52. *See infra* Part III.

53. Cohen, *supra* note 29, at 482.



deserves credit for having elsewhere consciously considered the option of escaping from copyright. Granted, and as set forth in the next subpart, she disparages that option for questionable reasons. But Cohen can at least claim to have avoided the false choice, apparent in other commentary, between copyright with common law rights and copyright without them.

### C. Commentary Consciously Rejecting the Exit Option

Of the few commentators who have consciously addressed the exit option, most have treated it with detached curiosity.<sup>54</sup> Professor Lemley, for example, said in passing, "I suspect that copyright owners would find this an unattractive alternative, however, and that in fact they would prefer to 'pick and choose' only the copyright rules that benefit them."<sup>55</sup> He recently explained and amended that assessment in light of new legal developments:

Until recently, copyright owners would probably have found [exiting from copyright] an unattractive alternative, precisely because there were some types of conduct that copyright could reach but contract could not, and because the remedies for copyright infringement were so much stronger. The proposed expansion of contract in Article 2B [of the U.C.C.] . . . may make those differences disappear.<sup>56</sup>

Professor Jerome H. Reichman reflected that attempts to escape copyright law might trigger new limits on freedom of contract<sup>57</sup> and doubted that, at any rate, common law protections would prove effective.<sup>58</sup> In apparent reference to the exit option, Professor Niva Elkin-Koren said,

The ability of copyright owners to license a use and thus to establish an additional market and prospective profits, does not call for

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54. Myself excepted, of course; I briefly raised the exit option in Bell, *supra* note 3, at 614-18, and alluded to it again in Tom W. Bell, *The Common Law in Cyberspace*, 97 MICH. L. REV. 1746, 1774 (1999) (reviewing PETER HUBER, *LAW AND DISORDER IN CYBERSPACE* (1997)).

55. Lemley, *supra* note 11, at 1274.

56. Lemley, *supra* note 2, at 150. He goes on to emphasize, however, that proposed U.C.C. Article 2B would by no means require copyright owners to make such a choice: "Article 2B is *not* an opt-out statute. Rather, it permits intellectual property owners to pick and choose a combination of copyright and contractual rules and remedies. By adding its contract-enforcement regime to existing federal intellectual property rights, Article 2B distorts the balance that exists with contract alone." *Id.*; see also *id.* at 157 (suggesting that a plaintiff who exited copyright would thereby void copyright misuse defenses).

57. See *Open Discussion*, *supra* note 11, at 841 (comments of Professor Reichman) ("[O]ne need not assume that the state will continue to allow unlimited freedom of contract in this area.").

58. See *id.* at 843 (comments of Professor Reichman) ("Empirically is it going to turn out like that, anybody else can just up and do it? I doubt the market would be as open as that.").

copyright protection of that power. It is conceivable that in some cases the law should not allow copyright owners to exercise both their monopoly under copyright law and under licenses.<sup>59</sup>

In candid response to the question of what would actually transpire were the exit option widely pursued, Professor David Lange offered perhaps the most accurate of any commentary on the topic: "I do not know the answer, but then I have never lived under anything but a copyright dominant regime."<sup>60</sup>

Alone among commentators who directly address opening an escape from copyright, Professor Cohen forcefully denounces it. She begins by critiquing not the *right* to exit copyright but the *duty* to do so, wondering whether "if copyright owners prove determined to implement [Copyright Management Systems (CMS)] that comprehensively augment the rights afforded them under the Copyright Act, perhaps Congress should consider whether these individuals and entities should be required to elect only contract remedies, and to abandon their claims to copyright protection."<sup>61</sup> She immediately dismisses that proposal, however: "I hope that most readers will think this suggestion absurd—and will react that way because they recognize that the semi-permeable barrier of copyright promotes the public interest."<sup>62</sup>

Perhaps most people would indeed think it absurd to require copyright owners to abandon their statutory rights in such cases, but perhaps not.<sup>63</sup> Nobody should judge that question on the mere

59. Niva Elkin-Koren, *Cybertaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT L.J. 215, 294 (1996); see also *id.* at 291 n.302 (describing a perspective under which "the inability to contract serves to justify copyright law, and the ability to contract may undermine the justification for copyright protection altogether").

60. *Open Discussion*, *supra* note 11, at 843 (comments of Professor Lange).

61. Cohen, *supra* note 11, at 94 (footnote omitted). The quote's indiscriminate reference to "rights" and "remedies" perhaps bears clarification. Courts already allow copyright owners to augment their statutory *rights* with common law ones and to elect freely between overlapping statutory and common law *remedies*. See *infra* Part IV.A. Courts do not require any sort of abandonment in such cases. See *infra* Part IV.A. Cohen's usage on that count—"abandon their claims to copyright protection"—also confuses. Cohen, *supra* note 11, at 94. Does she mean abandonment of copyright or suspension of copyright claims during misuse? Regarding the former, see *infra* Part IV.B; the latter, *infra* Part IV.C.

Interestingly, the quoted passage continues along a line of argument that might well appear in the present paper: "After all, copyright was created to correct market failures arising from the public good characteristic of original expression. If CMS provide a more reliable method of correcting market failure, who needs copyright?" Cohen, *supra* note 11, at 182-83. Unlike the present paper and as its quotes from her work indicate, however, Professor Cohen ultimately concludes that copyright should trump common law rights.

62. Cohen, *supra* note 11, at 183 (footnote omitted).

63. More people would probably think it absurd—or at least oxymoronic—to suggest that copyright owners "should be required to elect only contract remedies," *id.* Election implies choice. Properly understood, then, election would here imply that copyright owners might choose statutory remedies. See *infra* Part IV.B.

allegation that copyright promotes the public interest. Protecting expressive works through private methods surely promotes the public interest, too. It might even do a better job of it than copyright does. In all likelihood, though, no attempt to measure "the public interest"—even if we could agree on what that term means—would ever give us sufficient data to choose between requiring copyright or forbidding it.<sup>64</sup> We can set aside the alleged absurdity of *requiring* an exit from copyright law, at any rate, since this paper concerns whether or not to *allow* one.<sup>65</sup>

As Professor Cohen continues her critique, however, she shifts her aim toward the very exit option at issue here: "[I]f the copyright system is necessary, then allowing unlimited numbers of copyright owners to opt out of the system as it suits them is bad law and bad policy."<sup>66</sup> Though she offers no additional defense of that claim, her conclusion indicates that she remains concerned about the public interest: "At the very least, a CMS regime should be subject to an analogous set of restrictions designed to balance the affected interests."<sup>67</sup>

In fairness to Professor Cohen, it bears noting that her more recent scholarship devotes a great deal of attention to the general question of copyright's relationship to the public interest. Analytical flaws limit the utility of these later works, however. For instance, Professor Cohen claims that her intellectual counterparts, "cybereconomists" whom she blames for favoring private rights over public policy,<sup>68</sup> rely on unrealistically static and formal economic models.<sup>69</sup> In fact, however, Austrian economists appreciate the merits of market ordering while recognizing that the case for it "does not rest on the conditions that would exist if it were perfect."<sup>70</sup> Notwithstanding Cohen's attempt to define away the problem,<sup>71</sup> there remain sharp and, insofar as her argument goes, highly significant differences between Austrian and other types of neoclassical economics.<sup>72</sup> Apart from any other problems

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64. See *infra* Part III.E.2.

65. For a brief discussion of the impracticability of expecting legislators or courts to drive copyright owners into statutory exile, see *infra* Part III.A.

66. Cohen, *supra* note 11, at 183.

67. *Id.* (footnote omitted).

68. Cohen, *supra* note 29, at 464; Julie E. Cohen, *Copyright and the Jurisprudence of Self-Help*, 13 BERKELEY TECH. L.J. 1089, 1118 (1998).

69. See Cohen, *supra* note 29, at 482-83, 491; Cohen, *supra* note 68, at 1119.

70. FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 104 (1948).

71. See Cohen, *supra* note 29, at 475 n.36 (asserting without explanation that she intends to include Austrian economics in her critique of neoclassical economics).

72. See Israel M. Kirzner, *Austrian School of Economics*, in 1 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 145, 149 (John Eatwell et al. eds., 1998) (emphasizing the significance of "the differences between the Austrian understanding of markets as processes, and that of the equilibrium theorists whose

in her critique—and Cohen's critique *does* have other problems<sup>73</sup>—it thus overlooks a unique and powerful defense of market processes.

In any case, regardless of the soundness of Professor Cohen's arguments, we must ask how in practice she or anyone else could know which copyright policy best promotes the public interest.<sup>74</sup> As observed below, it looks quite unlikely that any process—much less a legislative one—could ever compute such an imponderable.<sup>75</sup> And even apart from utilitarian fantasies about perfect information and completely disinterested deliberation, there remain nettlesome questions about rights. Can one who would have copyright law trump alternative, private means of protecting expressive works justify the concomitant violations of property, contract, and First Amendment rights? As I will argue below, one cannot.<sup>76</sup>

### III. WHEN COPYRIGHT CONSTITUTES UNJUST IMPRISONMENT

This Part explains why refusing to open an escape from copyright would unjustly imprison the owners of expressive works within the confines of the Copyright Act. Subpart A observes that the right to exit copyright follows quite directly from the consensus view that copyright represents a statutory response to market failure. To the extent that the

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work has dominated much of modern economic theory"); ISRAEL M. KIRZNER, *PERCEPTION, OPPORTUNITY, AND PROFIT* 3 (1979) ("A characteristic feature of the Austrian approach to economic theory is its emphasis on the market as a *process*, rather than as a configuration of prices, qualities, and quantities that are consistent with each other in that they produce a market equilibrium situation."); LUDWIG VON MISES, *HUMAN ACTION* 250 (3d rev. ed. 1966) (criticizing economists who "devote all their efforts to describing, in mathematical symbols, various 'equilibria,' that is, states of rest and the absence of action. They deal with equilibrium as if it were a real entity and not a limiting notion, a mere mental tool. What they are doing is vain playing with mathematical symbols, a pastime not suited to convey any knowledge."); HAYEK, *supra* note 70, at 94 ("[C]ompetition is by its nature a dynamic process whose essential characteristics are assumed away by the assumptions underlying static analysis.").

73. Consider, for example, Cohen's vacillation about the power of intellectual property licensors. Although she employs rhetoric suggesting that they risk forcing contracts on helpless consumers, *see, e.g.*, Cohen, *supra* note 68, at 1117 (worrying that licensors will make "a unilateral decision" about how consumers use their products); *id.* at 1121 ("[I]nformation providers cannot be the ones to decide when certain uses may be restricted . . ."); *id.* at 1126 (consumers have "lack of consent and inability to affect the options" offered by licensors), she admits that consumers "can refuse to buy, or hold out for a lower price," *id.* at 1125. Predicting unhappily that consumers will exercise those rights to accept tighter licensing for lower prices, *id.* at 1126, and thereby effectively admitting that licensors cannot, after all, dictate their terms, Cohen proposes an Orwellian cure: Entirely forbid consumers from agreeing to bargains of which she disapproves, *id.* at 1128.

74. After spending the bulk of her paper criticizing the alleged failings of private ordering, Professor Cohen addresses the public choice problems with political ordering only in part of a footnote, and even then offers as a remedy only the observation that "looking for ways to improve it would seem a better route than abandoning entirely attempts to respond collectively." Cohen, *supra* note 29, at 553 n.345.

75. *See infra* Part III.E.2.

76. *See infra* Part III.C.

market succeeds in protecting expressive works, it undercuts the very reason for the Copyright Act. At the least, therefore, if courts find public and private protections too powerful in combination, they ought to give the owners of expressive works the right to opt out of copyright and rely solely on common law, both as defended by and deployed in defense of technological self-help tools.

One might reply that copyright represents more than simply a response to market failure or, rather, that it would if courts heeded the original meaning of the Constitution's copyright clause. Subpart B addresses that claim and finds it both irrelevant and unconvincing. The case for allowing owners of expressive works to opt for common law would remain strong even if copyright did not represent a response to market failure. At any rate, we have ample reason to reject the natural rights defense of copyright today and ample evidence that the Founders felt likewise.

One might also critique the market success justification of the exit option on grounds that it ignores the persistence of a peculiar type of market failure: the failure to promote public discourse. Subpart C addresses that argument and finds it wanting on several counts. Although the Constitution's copyright clause invokes the public interest, it by no means authorizes the creation of a generic welfare right to expressive works. Subpart D adds that even if the public can force open access to copyrighted works (already a controversial claim), it by no means follows that the public has a similar right to expressive works protected solely by private means. Advocates of forced access, because they face contrary principles of copyright law, federal policy, and the Bill of Rights, bear an insupportably heavy burden of proof.

Letting the owners of expressive works exit into common law would make sense even if the Copyright Act offered sound and attractive shelter. As subpart E details, however, the Act suffers from degenerative statutory failure. Far from striking a delicate balance between public and private interests, the Copyright Act appears to have fallen into a vicious cycle, creating beneficiaries who use their clout to lobby for still greater benefits. Opening an escape from the copyright would help to relieve such public choice pressures, whereas trapping the owners of expressive works within the bounds of the Copyright Act would save neither them, nor it, nor us.

### A. Copyright: A Response to Market Failure

Courts and commentators agree that copyright law represents a statutory response to market failure.<sup>77</sup> As Justice Holmes explained, copyright "restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit."<sup>78</sup> Why bother limiting the unrestrained copying of expressive works? "To promote the Progress of Science and useful Arts,"<sup>79</sup> the Constitution explains.<sup>80</sup> Even the few academics who would justify copyright law as something other than a response to market failure must admit that they find scant comfort in modern U.S. jurisprudence.<sup>81</sup> As Lord Macaulay

77. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (describing copyright as a response to market failure and analyzing it in cost/benefit terms); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (same); Bell, *supra* note 3, at 582-83 (same); Elkin-Koren, *supra* note 59, at 287 (same); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1610-14 (1982) (same); David McGowan, *Free Contracting, Fair Competition, and Article 2B: Some Reflections on Federal Competition Policy, Information Transactions, and "Aggressive Neutrality,"* 13 BERKELEY TECH. L.J. 1173, 1228-34 (1998) (same). See generally Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970) (applying economic analysis to copyright law); Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853 (1992) (same); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (same).

78. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

79. U.S. CONST. art I, § 8, cl. 8. Regarding the implication here that U.S. copyright law may constitutionally promote both science and the useful arts, see *supra* note 3.

80. See *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare."); see also Mark A. Lemley, *Book Review: Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 879-95 (1997) (reviewing JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS (1996)) (collecting cases, statutes, and commentary describing the instrumentalist philosophy underlying copyright).

81. See, e.g., Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 517 (1990) (criticizing the economic justification of copyright law as incomplete and misleading but admitting that "modern copyright jurisprudence tends to view copyright strictly as a means of achieving economic efficiency. This approach finds support in United States Supreme Court pronouncements which state that copyright exists solely to provide economic incentives for the production of useful works.") (footnotes omitted); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1437 (1989) (arguing for basing copyright law on principles of restitution, but admitting that "[t]he relevant Constitutional clause exhibits an instrumental approach" and that "the Supreme Court has consistently stressed copyright's economic role"). Although Professor Gordon observes with hope that, "The Supreme Court has indicated an openness to arguments based on the notion that creative persons deserve a fair return for their labor," *id.* at 1469, she apparently refers to *International News Service v. Associated Press*, 248 U.S. 215, 239-40 (1918), a case concerning not copyright but rather misappropriation.

See also Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 351-52 (1988) (advocating a Hegelian "personality theory" of copyright but admitting that U.S. courts rely on different reasoning). Professor Hughes might find it consoling that subsequent to the publication of his article, the Copyright Act, in order to conform with the Berne Convention, came to recognize moral rights in a very minor regard. See 17 U.S.C. § 106A (1994) (providing authors of limited-edition visual arts with rights of

famously said of copyright, "For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good."<sup>82</sup>

Copyright law thus represents a notable exception to the default rule that a free people, respecting common law rights and engaging in market transactions, can copy expressive works at will.<sup>83</sup> The Founders, in fact, regarded copyright as an exception so notable that it required explicit constitutional authorization.<sup>84</sup> Contrasting it with the more tangible rights protected by common law, Holmes described copyright as "a right which could not be recognized or endured for more than a limited time, and therefore . . . one which hardly can be conceived except as a product of statute, as the authorities now agree."<sup>85</sup> The Copyright Act thus offers emergency shelter for expressive works that, but for its protection, would have fallen between common law's cracks and been left wandering homeless through the market economy.

The right to exit copyright follows quite directly from this, the consensus view of copyright's justification. If copyright represents an extraordinary response to market failure, and advances in publishing models and technology overcome that failure, courts ought not imprison the owners of expressive works within the obsolete confines of copyright. At the least, if courts find the combination of copyright, common law, and technological self-help too powerful, they ought to give the owners of expressive works the right to opt out of copyright and rely solely on private means of protection.<sup>86</sup>

Indeed, perhaps we ought to withdraw copyright as even an *option* in such cases. Why, after all, should we continue to offer the owners of expressive works the benefits of an intellectual property welfare program that they no longer need? One might reply that rather than creating a welfare right by statute, copyright recognizes a pre-existing liberty right to enjoy authorship free of copying. The next subpart, subpart B,

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attribution and integrity). Even 106A represents a response to market failure, however, since it merely aims to equalize bargaining power between fledgling artists and dealers by initially vesting waivable moral rights in the former. *See id.* § 106A(c); Request for Information: Study on Waiver of Moral Rights in Visual Artworks, 57 Fed. Reg. 24,659 (1992) (discussing the origins of § 106A in general and its waiver provision in particular).

82. Thomas Macaulay, Speech Before the House of Commons (Feb. 5, 1841), in 8 *THE WORKS OF LORD MACAULAY* 195, 199 (Lady Trevelyan ed., 1866) (opposing a bill which would have extended the duration of copyright protection).

83. *See* L. Ray Patterson, *Copyright and the "Exclusive Right" of Authors*, 1 J. INTEL. PROP. L. 1, 22 (1993) ("Copyright is an intrusion upon the common-law public domain.").

84. *See infra* Part III.B.2.

85. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 19 (1908) (Holmes, J., concurring).

86. *See infra* Part IV.

considers and dismisses that argument. In theory, then, we might go beyond requesting an *escape* from copyright to boldly demand an *exile* from it.

The practical and legal challenges to creating an exile from copyright, however, put detailed consideration of it beyond the bounds of the present paper. Because the Copyright Act does not clearly allow copyright owners to abandon their statutory rights even on a voluntary basis,<sup>87</sup> it scarcely authorizes courts to compel the same result. But the public choice pressures that so evidently shape copyright legislation<sup>88</sup> make it unrealistic to expect lawmakers to add a banishment clause to the Act. That leaves it up to courts—or at least commentators—to find a constitutional basis for imposing an exile from copyright. The free speech clause of the First Amendment offers the most plausible argument: Copyright law, as a content-based restriction on unoriginal expressive speech, should have to face strict scrutiny,<sup>89</sup> a test under which non-statutory means of protecting expressive works offer alternatives to state action rendering the Copyright Act unconstitutional as more restrictive than necessary.<sup>90</sup> But to call that the most plausible argument for creating an exile from copyright is hardly to call it uncontroversial,<sup>91</sup> and to give the matter a complete hearing would unnecessarily tax the present effort. It proves challenging enough, in this paper, to describe and defend the relatively modest proposal that we open an escape from copyright.

### B. The Natural Copyright Argument

Because the argument for allowing an escape from copyright follows from regarding copyright as a statutory response to market failure, one might think that regarding copyright as a natural right would somehow lead to a counter-argument. That strategy would fail on two counts,

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87. See *infra* Part IV.B.

88. See *infra* Part III.E.2.

89. Cf. Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 165-198 (1998) (arguing against exempting preliminary injunctions on copyright infringement from First Amendment limits on prior restraint of speech); Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2445-51, 2462-63 (1998) (arguing that general principles of First Amendment law call for subjecting "substantial-similarity-of-expression" determinations in copyright infringement cases to independent appellate review).

90. For an analysis of how the same sort of argument has functioned with regard to restrictions on indecent or harmful-to-minors Internet speech, and an argument for applying it to restrictions on speech within or by commercial entities and about Internet users, see Tom W. Bell, *Pornography, Privacy, and Digital Self-Help*, 18 J. MARSHALL J. COMP. & INFO. J. (forthcoming 2000).

91. See, e.g., Cohen, *supra* note 11, at 183 (dismissing a copyright exile policy as "absurd" on grounds that it would violate the public interest).



however. As section one explains, to open an exit from copyright would remain useful and even necessary regardless of whether natural copyrights made sense. Moreover, as section two explains, they do not. The only hope of legal viability for a natural right to copyright lies in reinterpreting the original meaning of the Copyright and Patent clause, a scheme that ill survives careful scrutiny of the applicable evidence. In sum, then, both irrelevance and implausibility dog the counter-argument from natural copyrights.

### 1. Irrelevance of the Natural Rights Argument

The case for opening an escape from copyright would remain strong even if—contrary to current jurisprudence,<sup>92</sup> common sense,<sup>93</sup> and the Constitution's original meaning<sup>94</sup>—copyright did qualify as a natural right. In that event, copyright would merely join a panoply of other natural rights, including our rights to person and property. Nothing about a natural copyright would dictate that it always trump other rights, such as our rights to protect our expressions through property and contracts. Priority alone suggests that copyright should generally cede ground in such cases.

Original meaning likewise argues against giving copyright the power to preempt common law protections of expressive works. State copyright laws from the Founding era did not include preemption clauses.<sup>95</sup> To the contrary, the statutes often took care to constrain copyright from unduly interfering with common law rights.<sup>96</sup> More importantly, the Founders regarded statutes as legislative attempts to remedy salient defects of common law and, hence, interpreted statutes against the backdrop of that general aim.<sup>97</sup> It thus seems very unlikely

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92. See *supra* Part III.A.

93. See *infra* Part III.B.2.

94. See *infra* Part III.B.2.a.

95. See COPYRIGHT OFFICE, LIBRARY OF CONGRESS, BULLETIN NO. 3 (REVISED), COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 1-21 (reprinting state copyright statutes) [hereinafter COPYRIGHT ENACTMENTS].

96. See, e.g., Connecticut Copyright Act, § 7, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 1, 3 (providing that "nothing in this act shall extend to affect, prejudice or confirm the rights which any person may have to the printing or publishing of any book, pamphlet, map or chart, at common law, in cases not mentioned in this act"); Georgia Copyright Act, § IV, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 18 (same but for minor grammatical differences); New York Copyright Act, § IV, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 19, 21 (same but for minor grammatical differences).

97. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 898-99 (1985).

that the Founders would have understood copyright to preempt common law protections of expressive works.

Because it embraces that same canon of statutory interpretation that the Founders did, the Supreme Court would presumably regard common law rights to expressive works with similar solicitude. The Court has long held that "statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."<sup>98</sup> Congress legislates against a background of common-law principles;<sup>99</sup> it "does not write upon a clean slate."<sup>100</sup> The Supreme Court has consequently held that common law doctrines "ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose."<sup>101</sup> The Copyright Act of course offers no exception to that general principle of interpretation.<sup>102</sup>

Elevating copyright to a natural right therefore would hardly render it inviolate. Courts and legislatures would still need a rule for settling conflicts between copyright and natural rights of the more traditional sort, presumably as embodied in constitutional and common law.<sup>103</sup> They would have little reason to automatically favor copyright-*qua*-natural right over other natural rights, and ample reason to instead favor the former, but at any rate every reason to let the owners of expressive works choose which rights to exercise. Readers who by dint of such observations conclude that the ontological status of copyright has no bearing on the desirability of opening an escape from it may find the next sub-section unnecessary. Others, however, may find probative its critique of the notion of natural copyrights.

## 2. The Unnatural Origins of Copyright

The instrumentalism that pervades cases, legislation, and commentary on U.S. copyright law leaves scant room for a natural right

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98. *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)) (omission in original).

99. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

100. *United States v. Texas*, 507 U.S. at 534.

101. *Norfolk Redevelopment and Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983) (quoting *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813)).

102. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1996) (interpreting § 505 of the Copyright Act against the backdrop of the American rule that litigants generally bear their own attorneys fees).

103. See BARNETT, *supra* note 15, at 20-22, 25-26 (explaining how an appreciation of natural rights illuminates and legitimizes constitutional principles); *id.* at 108-31 (describing how common law processes discover, refine, and make concrete natural rights).

to copyright.<sup>104</sup> The Supreme Court has, for instance, described copyright as “the creature of the Federal statute” and observed that “Congress did not sanction an existing right but created a new one.”<sup>105</sup> That has by no means prevented some few commentators from arguing that copyright law could and should rely on a Lockean labor-desert justification on grounds that an author mixes herself, through her creative effort, in her expressions.<sup>106</sup>

That facially plausible extension of Locke’s theory does not, however, withstand close scrutiny. His labor-desert justification of property gives an author clear title only to the particular tangible copy in which she fixes her expression—not to some intangible plat in the noumenal realm of ideas.<sup>107</sup> Locke himself did not try to justify intangible property.<sup>108</sup> Modern commentators who would venture so far beyond the boundaries of Locke’s thought and into the abstractions of intellectual property thus ought to leave his name behind.

More pointedly, copyright contradicts Locke’s justification of property. He described legislation authorizing the Stationers’ Company monopoly on printing—the nearest thing to a Copyright Act in his day—as a “manifest . . . invasion of the trade, liberty, and property of the subject.”<sup>109</sup> Even today, by invoking government power a copyright owner can impose prior restraint, fines, imprisonment, and confiscation on those engaged in peaceful expression and the quiet enjoyment of physical property.<sup>110</sup> By thus gagging our voices, tying our hands, and

104. See *supra* Part II.A. See generally Alex Kozinski & Christopher Newman, *What’s So Fair About Fair Use?*, 46 J. COPYRIGHT SOC’Y 513, 519-20 (1999) (arguing that copyright does not protect “property” as traditionally understood); Lemley, *supra* note 80, at 879-95 (criticizing the “romantic” view that intellectual property draws its justification from creators’ rights to their creations). But see *id.* at 894-903 (describing in cautionary terms a trend toward “propertyization” of copyright and other types of intellectual property).

105. *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); see also Patterson, *supra* note 83, at 5 (“There is . . . no reason for confusion as to either the source or the nature of copyright. The authoritative pronouncements that copyright is the grant of a limited statutory monopoly are too many and too clear.”).

106. See Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993); Yen, *supra* note 81; see also Hughes, *supra* note 81, at 296-331 (exploring the uses and limits of the Lockean justification of intellectual property).

107. See Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J.L. & PUB. POL’Y 817, 851-55 (1990) (distinguishing rights to tangible property from claims to intangibles).

108. For an argument from irony, consider this: The text that allegedly inspired a natural rights view of copyright among the Founders, John Locke, *The Second Treatise of Government*, in JOHN LOCKE, TWO TREATISES OF GOVERNMENT 299 (Laslett rev. ed. 1963) (1690), appears not to have enjoyed copyright protection itself. See Tom W. Bell, *What Copyright in Locke Says About Locke on Copyright: An Argument from Irony* (unpublished draft manuscript on file with the author).

109. John Locke, *Observations on the Printing Act Under Consideration in Parliament in 1694*, reprinted in 1 PETER KING, THE LIFE OF JOHN LOCKE 373, 386 (1830).

110. See Copyright Act of 1976, 17 U.S.C.A. §§ 501-511 (Supp. V 1999) (describing remedies for copyright infringement).

demolishing our presses, copyright law would violate the very rights that Locke defended.<sup>111</sup> As Tom G. Palmer explains, "a system of intellectual property rights is not compossible with a system of property rights to tangible objects, especially one's own body, the foundation of the right to property in alienable objects."<sup>112</sup>

We need not dwell on that modern philosophical debate here, though. Whether and to what extent Locke's theory of property applies to copyright certainly merits academic consideration, but it runs little risk of convincing contemporary legislators or courts to forsake the market failure view of copyright. The Lockean labor-desert theory has only one viable road to practical and present influence—via original meaning.<sup>113</sup> Many judges find appeals to the original meaning of constitutional language, such as that embodied in the Copyright and Patent Clause,<sup>114</sup> quite persuasive.<sup>115</sup> It thus suffices for present purposes to investigate the claim that the Founders understood copyright not only to cure market failure but also to secure authors' natural rights against unauthorized duplication. A careful review of the historical record indicates that they almost certainly did not.

111. See Bell, *supra* note 53, at 1763 (arguing that copyright contradicts common law rights because it "undeniably limits our rights to use our printing presses or voices in echo of others' or to contract toward similar ends" (footnote omitted)); Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 414 (1983) ("[G]ranting individuals exclusive rights to . . . information . . . conflicts with other rights in a way that granting exclusive rights to tangible property does not.").

112. Tom G. Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 HAMLINE L. REV. 261, 281 (1989); see also Palmer, *supra* note 107, at 827 (critiquing the Lockean argument for intellectual property rights on grounds that they "restrict others' uses of their own bodies in conjunction with resources to which they have full moral and legal rights"). But see Gordon, *supra* note 81, at 1423 (responding to Palmer's argument with the Hohfeldian and positivist argument that, "All entitlements limit each other.").

113. Though originalists do not always take care to do so, one ought to distinguish between original meaning and original intent. Justice Antonin Scalia explains, "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended." ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 38 (1997). Scalia's focus on original meaning naturally broadens the range of materials that he consults when interpreting the Constitution. He considers the writings of Founders who attended the Constitutional Convention, like Madison and Hamilton, only "because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. Thus I give equal weight to Jay's pieces in *The Federalist* and to Jefferson's writings," even though neither of them attended the Convention. *Id.*

What about original intent? Our untrustworthy records of what transpired in the Constitutional Convention and in the states' ratifying conventions, not to mention the incoherence of ascribing intentions to deliberative bodies, should alone discourage attempts to divine the Constitution's original intent. But with regard to copyright in particular, a near-vacuum of recorded debate utterly frustrates the search for original intent, see Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 23-54 (1994) (describing historical record of debates).

114. U.S. CONST. art. I, § 8, cl. 8.

115. See, e.g., SCALIA, *supra* note 113, at 37-41.

Only meager and faint evidence has ever suggested that the Founders understood the Constitution to endorse a natural right to copyright. On close scrutiny, moreover, that evidence proves fairly phantasmal. Citing rhetoric in the preambles of some states' copyright acts and Madison's brief plea to supplant those laws with a single national one, Professor Alfred C. Yen concludes that "early American copyright theorists did not share the modern view that copyright is motivated solely by economic considerations. Instead, early Americans saw copyright as a matter of both economic policy and natural law."<sup>116</sup> But even so qualified a claim arguably goes too far in ascribing to the Founders a natural rights view of copyright. Subsection a offers proof that the state copyright acts invoked natural rights only as a matter of rhetoric—not substance. Subsection b surveys Madison's views on copyright to show that he, too, declined to regard it as a natural right.

*a. Original Meaning via State Copyright Acts*

Start with the copyright acts passed by twelve of the thirteen states under the Articles of Confederation.<sup>117</sup> Granted, seven of those acts had preambles that invoked natural rights.<sup>118</sup> The historical context of those

116. Yen, *supra* note 81, at 529.

117. See COPYRIGHT ENACTMENTS, *supra* note 95, at 1-21 (reprinting state copyright statutes). Delaware was the only state to have no such statute. See *id.* at 21.

118. See An Act for the encouragement of literature and genius, passed at January session, 1783 [hereinafter Connecticut Copyright Act], Preamble, Acts and Laws of the State of Connecticut 133-34 (Sherman & Law) (repealed 1812), reprinted in COPYRIGHT ENACTMENTS, *supra* note 85, at 1, 1 (1973) (justifying act in part on grounds that "it is perfectly agreeable to the principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works."); An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years, passed March 17, 1783, [hereinafter Massachusetts Copyright Act], Preamble, Acts and laws of the Commonwealth of Massachusetts 236 (Edes & Sons), reprinted in COPYRIGHT ENACTMENTS at 4, 4 (justifying act in part on grounds that "the legal security of the fruits of . . . study and industry . . . is one of the natural rights of all men."); An Act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions, for twenty years, passed Nov. 7, 1783 [hereinafter New Hampshire Copyright Act], Preamble, The Perpetual Laws of the State of New-Hampshire, from July 1776, to the session in December, 1788, continued into 1789, 161-162 (Melcher) (repealed 1842), reprinted in COPYRIGHT ENACTMENTS at 8, 8 (same); An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years, passed at December session, 1783 [hereinafter Rhode Island Copyright Act], § 1, At the general assembly of the governor and company of the State of Rhode Island and Providence-Plantations, begun and holden at East-Greenwich on the 4th Monday of December, 1783, pp. 6-7 (Carter), reprinted in COPYRIGHT ENACTMENTS at 9, 9 (same); An Act for securing literary property, passed November 19, 1785 [hereinafter North Carolina Copyright Act], Preamble, Laws of the State of North-Carolina, pp. 563-64 (Edenton, Hodge & Wills), reprinted in COPYRIGHT ENACTMENTS at 15, 15 (justifying act in part on grounds that "nothing is more strictly a man's own than the fruit of his study."); An Act for the encouragement of literature and genius, passed February 3, 1786 [hereinafter Georgia Copyright Act], Preamble, A Digest of the Laws of the State of Georgia, pp. 323-25 (Watkins & Watkins),

statutes, however, gives their rhetoric more the air of apology than philosophy.

State legislators must have realized that they were contradicting the view, pervasive during the Founding era, that such statutory monopolies favored special interests over common liberties.<sup>119</sup> The Maryland Declaration of Rights, for example, had decreed in 1776 "[t]hat monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered."<sup>120</sup> State legislators almost certainly realized, furthermore, that they had indeed enacted copyright statutes to appease a special interest—a small but influential lobby of authors.<sup>121</sup> By invoking the rhetoric of natural rights,

reprinted in COPYRIGHT ENACTMENTS at 17, 17 (justifying act in part on grounds of "principles of natural equity and justice"); An Act to promote literature, passed April 29, 1786 [hereinafter New York Copyright Act], Preamble, Laws of the State of New York, passed by the legislature of said State at their ninth session, pp. 99-100 (Loudon & Loudon), reprinted in COPYRIGHT ENACTMENTS at 19, 19 (same). See also An Act for the promotion and encouragement of literature, passed May 27, 1783 [hereinafter New Jersey Copyright Act], Preamble, Acts of the seventh general assembly of the State of New Jersey, at a session begun at Trenton, on the 22d day of October, 1782, and continued by adjournments, being the second sitting, ch. 21, p. 47 (Collins) (repealed 1799), reprinted in COPYRIGHT ENACTMENTS at 6, 6 (justifying the act in part on grounds that "it is perfectly agreeable to the principles of equity.").

119. See generally Mary Helen Sears & Edward S. Irons, *The Constitutional Standard of Invention—The Touchstone for Patent Reform*, 1973 UTAH L. REV. 653, 667-73 (reviewing historical evidence that the Founders had a strong aversion to monopolies). Similar concerns evoked widespread objection to the inclusion, in the Constitution, of the Copyright and Patent Clause. See Walterscheid, *supra* note 113, at 54-56.

Although copyright may not qualify as a monopoly as modern economists use the word, see Bell, *supra* note 3, at 588 n.142 ("Regardless of how one characterizes their statutory rights, copyright owners do not necessarily enjoy monopoly power in the market for expressive works."), it certainly qualified as such in the usage of the Founding era. As Sir Edward Coke defined it, "A monopoly is an institution, or allowance by the king . . . to any person . . . for the sole buying, selling, making, working, or using of any thing, whereby any person or persons . . . are sought to be restrained of any freedom [sic], or liberty that they had before . . ." 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 181 (1986 reprint ed.) (1797).

120. MARYLAND DECLARATION OF RIGHTS art. XXXIX (1776), quoted in SOURCES OF OUR LIBERTIES: DOCUMENTARY ORIGINS OF INDIVIDUAL LIBERTIES IN THE UNITED STATES AND BILL OF RIGHTS 346, 350 (Richard L. Perry ed., revised ed. 1978) [hereinafter SOURCES OF OUR LIBERTIES]; see also NORTH CAROLINA DECLARATION OF RIGHTS art. XXII (1776), quoted in SOURCES OF OUR LIBERTIES, *supra*, at 355, 356 ("That perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed").

121. Noah Webster, author of the famed speller, grammar book, and dictionary, stood foremost among these. See GOLDSTEIN, *supra* note 21, at 51 (crediting the origins of U.S. copyright law to Webster's lobbying); HARRY R. WARFEL, NOAH WEBSTER: SCHOOLMASTER TO AMERICA, 55-58, 132-35, 184-85 (1966) (describing Webster's lobbying efforts and observing that "Webster unquestionably is the father of copyright legislation in America"); Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 115 (1929) (crediting the state statutes to "the efficient urging of Noah Webster").

Webster also played an important role in lobbying the Continental Congress to pass a resolution encouraging the states to pass copyright laws. See Walterscheid, *supra* note 113, at 21. Though the committee that recommended the resolution cited, among other reasons, "that nothing is more properly a man's own than the fruit of his study," *id.* at 20, that justification merits even less weight than the similar language of some states' copyright statutes. It not only shared their dubious reasoning and origins; it represented mere legislative history to a nonbinding resolution.

state legislators discouraged criticism that they had, after less than a decade of independence, disinterred statutory monopolies of the sort that earlier sparked the Revolution.

That the states invoked natural rights merely as rhetoric appears on the face of their copyright statutes, none of which actually treated copyright as a natural right. A natural right would last indefinitely and cover all expressions; state copyrights lasted only a few years<sup>122</sup> and covered just a few types of expressions.<sup>123</sup> A natural right would protect all authors; state copyrights generally protected only U.S. authors.<sup>124</sup> A natural right would disregard publication dates; most states denied copyright to any pre-printed work, regardless of its originality, as a general matter.<sup>125</sup> A few states even discriminated against original

122. See Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC'Y 11, 21-23 (1975) (reviewing maximum state maximum copyright terms that varied between fourteen and twenty-eight years).

123. See *id.* at 18-21 (summarizing the types of works protected by the state copyright laws). No state copyright statute covered paintings, prints, sheet music, or sculpture. See *id.* The broadest of them covered only "literary" works. *Id.*; see Massachusetts Copyright Act, § 2, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 4, 4; New Hampshire Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8; Rhode Island Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 9, 9.

124. See Connecticut Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 1, 2 (limiting protection to works authored by inhabitants or residents of U.S.); New Jersey Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 6, 7 (same); Georgia Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 17 (same); New York Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 19, 19 (same); Massachusetts Copyright Act, § 2, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 4, 4 (limiting protection to works authored by "subjects" of U.S.); New Hampshire Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8 (same); Rhode Island Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 9, 9 (limiting protection to works authored by citizens); Pennsylvania Act of 1784 for the encouragement and promotion of learning by vesting a right to the copies of printed books in the authors or purchasers of such copies, during the time therein mentioned, passed March 15, 1784 [hereinafter Pennsylvania Copyright Act], § III, Laws enacted in the second sitting of the eighth general assembly of the Commonwealth of Pennsylvania, which commenced the 13th day of Jan., 1784, ch. 125, pp. 306-308 (Bradford), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 10, 10 (same); An Act securing to authors of literary works an exclusive property therein for a limited time, passed October 1785 [hereinafter Virginia Copyright Act], § I, Acts passed at a General Assembly of the Commonwealth of Virginia, pp. 8-9 (Dunlap & Hayes), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 14, 14 (same); North Carolina Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 15 (same).

Maryland and South Carolina, the notable exceptions to this list of states limiting protection to inhabitants, residents, or citizens, made no claims to copyright's natural status. See An Act respecting literary property, passed April 21, 1783 [hereinafter Maryland Copyright Act], Laws of Maryland, made and passed, at a session of assembly, begun and held at the city of Annapolis on Monday the 21st of April, 1783, ch. 24 (Green), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 5; An Act for the encouragement of arts and sciences, passed March 26, 1784 [hereinafter South Carolina Copyright Act], Acts, Ordinances, and Resolves of the General Assembly of the State of South Carolina, passed in the year 1784 pp. 49-51 (Miller), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 11.

125. See Maryland Copyright Act, § II, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 5, (limiting protection to works "already composed and not printed or published, or that shall be hereafter composed"); New Jersey Copyright Act, § 1, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 6, 7

expressive works by denying copyright protection to pre-printed books and pamphlets, while granting it to maps and charts.<sup>126</sup> A natural right would not censor; Connecticut, Georgia, and New York barred copyright protection of works "prophane [sic], treasonable, defamatory, or injurious to government, morals or religion."<sup>127</sup>

A natural right would arise, well, *naturally*. In contrast, no state allowed copyright protection as a matter of course. New Hampshire and Rhode Island demanded that authors identify themselves<sup>128</sup> and all the other state copyright acts imposed registration requirements of one sort or another.<sup>129</sup> North Carolina demanded that copyright owners forfeit a copy to the secretary of state<sup>130</sup> whereas Massachusetts demanded that two copies go to "the library of the University of Cambridge."<sup>131</sup> Several states went so far as to demand that copyright owners provide works at reasonable prices and in sufficient numbers.<sup>132</sup> No true natural right would admit all the many sharp, artificial, and arbitrary limitations seen in the state copyright statutes. Despite their

(limiting protection to works "not yet printed"); Pennsylvania Copyright Act, § III, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 10, 10 (same); North Carolina Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 15 (limiting protection to works "not hitherto printed"); *see also* Massachusetts Copyright Act, § 3, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 4, 4 (limiting remedies to works "not yet printed"); New Hampshire Copyright Act, § 2, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8 (same); Rhode Island Copyright Act § 2, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 9, 9 (same).

126. *See* Connecticut Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 1, 2 (limiting copyright protection of books and pamphlets—but not maps and charts—to those "not yet printed"); Georgia Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 17 (same).

127. Connecticut Copyright Act, § 7, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 1, 3; Georgia Copyright Act, § IV, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 19 (same but for a extra comma; to wit: "morals, or religion."); New York Copyright Act, § IV, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 19, 21 (same as Georgia Copyright Act); *see also* North Carolina Copyright Act, § III, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 17 (barring copyright protection of works "which may be dangerous to civil liberty, or to the peace or morals of society").

128. *See* New Hampshire Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8; Rhode Island Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 9, 9.

129. *See generally* Crawford, *supra* note 122, at 23-25 (reviewing registration requirements).

130. *See* North Carolina Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 16.

131. Massachusetts Copyright Act, § 3, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 4, 4; New Hampshire Copyright Act, § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8.

132. *See* Connecticut Copyright Act, § 5, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 1, 2 (providing penalties for neglecting "to furnish the public with sufficient editions" or selling "at a price unreasonable" a copyrighted work); South Carolina Copyright Act, § 4, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 11, 13 (same); Georgia Copyright Act, § III, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 18 (same); New York Copyright Act, § III, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 19, 20 (same); *see also* North Carolina Copyright Act, § II, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 16 (providing penalties for setting "an unreasonable price" on a copyrighted work).



invocation of natural rights rhetoric, the states in fact treated copyright purely as a utilitarian tool for advancing the arts and science in general, and special interests in particular.<sup>133</sup>

At any rate, every iota of faith that one invests in the view that some state legislatures embraced a natural rights view of copyright ultimately ends up weighing *against* the view that the Constitution embodies the same philosophy. Those taking part in the Constitutional Convention almost certainly had state copyright practices in mind as they crafted the Copyright and Patent clause.<sup>134</sup> The absence of any reference to natural rights in the Constitution's Copyright and Patent clause thus suggests that the Framers considered and rejected the natural rights defense of copyright.<sup>135</sup> It will not do to claim, in that regard, that the Constitution's terse language precluded such justifications. The clause's command that Congress use copyright to "promote the Progress of Science and the useful Arts"<sup>136</sup> plainly retains the utilitarian rhetoric of the state copyright statutes.<sup>137</sup> Even apart from the *expressio unius*

133. One might argue, as has Professor Yen in correspondence with the author, that regardless of the sincerity behind such rhetoric, it influenced those who ratified the Constitution and, thus, the original meaning of the Copyright and Patent Clause. To that I offer the *expressio unius* counterargument set forth immediately below.

134. See Walterscheid, *supra* note 113, at 10, 37 (citing the practices of the various states as an influence on the Constitutional convention). Although the secretive nature of the Constitutional convention obscures his influence, *id.* at 38-41, circumstantial evidence strongly suggests that Noah Webster, primary lobbyist for then-extant copyright legislation, also successfully lobbied the Philadelphia delegates to add a copyright clause to the Constitution. See RICHARD M. ROLLINS, *THE LONG JOURNEY OF NOAH WEBSTER* 51-52 (1980) (detailing Webster's proximity to the convention, close and continuing contact with many of the delegates, and reputation as an authority on matters of public concern).

135. Much the same conclusion follows from interpreting the natural rights language that appeared in the report of the committee that the Continental Congress charged with considering "the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works." 24 JOURNALS OF THE CONTINENTAL CONGRESS 180 (1783). As mere legislative history, the claim of the committee's May 10, 1783 report that "nothing is more properly a man's own than the fruit of his study," *id.* at 326, carried even less legal weight than similar rhetoric appearing within the statutes passed by the states. More to the point, that James Madison and Hugh Williamson served both as members of the committee and delegates to the subsequent Constitutional Convention leaves very little doubt that those who drafted the Constitution must have considered and impliedly rejected justifying copyright on similar grounds.

136. U.S. CONST. art. I, § 8, cl. 8.

137. See Connecticut Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 1, 1 (copyright protection "may encourage men of learning and genius to publish their writings"); Georgia Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 17, 17 (same); Massachusetts Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 4, 4 ("the efforts of learned and ingenious persons in the various arts and sciences"); Maryland Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 5, 5 ("encouragement of learned men"); New Jersey Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 6, 6 ("embellishment of human nature, the honour of the nation, and the general good of mankind"); New Hampshire Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 8, 8 ("the efforts of ingenious persons in the various arts and sciences"); Rhode Island Copyright Act, Preamble,

argument, moreover, that plain language supports only the utilitarian justification of copyright.<sup>138</sup>

*b. Original Meaning via Madison on Copyright*

Finding no record of substantive discussions about copyright in the Philadelphia Convention or in the state ratification debates, commentators intent on reconstructing how Founders understood the Constitution's Copyright and Patent clause have largely relied on Madison's brief analysis of it in the *Federalist Papers*.<sup>139</sup> Madison's defense of the power granted to Congress in that clause reads, in full:

The utility of the power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most have

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*reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 9, 9 ("the efforts of learned and ingenious persons, in the various arts and sciences"); Pennsylvania Copyright Act, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 10 (entitled in part "AN ACT for the encouragement and promotion of learning"); South Carolina Copyright Act, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 11 (entitled "AN ACT for the encouragement of arts and sciences"); North Carolina Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 15, 15 ("to encourage genius, to promote useful discoveries, and to the general extension of arts and commerce"); New York Copyright Act, Preamble, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 19, 19 ("encourage persons of learning and genius to publish their writings").

138. See H.R. REP. NO. 52-1494, at 2 (1892) ("There is nothing said [in the Constitution's Copyright and Patent clause] about any desire or purpose to secure to the author or inventor his 'natural right to his property.'").

Professor Yen argues that although the language of the intellectual property clause "certainly supports economic visions of copyright, it does not eliminate natural law from copyright jurisprudence. In particular, the clause implies that Congress is not empowered to create a new right, but is instead empowered to secure for authors a preexisting right." Yen, *supra* note 81, at 530 n.91. But if the Constitution's call for legislation "securing" copyrights, U.S. CONST. art. I, § 8, cl. 8, implies anything, it most likely implies that such federal legislation should render more secure the rights formerly protected, in piecemeal fashion, under the various states' laws. That reading would comport with Madison's defense of the clause: "The States cannot separately make effectual provision for" copyright protection. THE FEDERALIST NO. 43, at 272 (J. Madison) (Clinton Rossiter ed., 1961).

139. See Patry, *supra* note 3, at 912 (discussing paucity of evidence from sources other than Madison's comments); Walterscheid, *supra* note 113, at 23-54 (describing paucity of evidence from the Convention); *id.* at 56 (citing absence of debate in state ratifying conventions); 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 23-24 (1994) (commenting that we have no evidence of the Convention's deliberations about copyright and relying on the *Federalist Papers*); Fenning, *supra* note 121, at 114 (reviewing the evidence and concluding that the clause "apparently aroused substantially no controversy either in the Convention or among the States adopting the Constitution").

anticipated the decision of this point, by laws passed at the instance of Congress.<sup>140</sup>

Like the oratorical preambles that some states added to their copyright acts,<sup>141</sup> however, Madison's defense of copyright sounds more in rhetoric than logic.<sup>142</sup>

Intentionally or not, Madison misrepresented copyright's standing at common law. He presumably relied on the 1769 decision of the King's Bench in *Millar v. Taylor*, which read the Statute of Anne not to abrogate common law's protection of copyrights.<sup>143</sup> But the House of Lords overruled that case five years later, in *Donaldson v. Becket*<sup>144</sup>—some thirteen years before Madison published FEDERALIST PAPER NO. 43.<sup>145</sup> His claim that copyright "has been solemnly adjudged, in Great Britain, to be a right of common law," therefore had as much truth as the modern claim that "slavery has been solemnly adjudged constitutional."<sup>146</sup> In neither case would old bad law justify new bad law.

Notwithstanding Madison's reference to solemn adjudications at common law and the "claims of individuals" to copyrights, moreover, he appears not to have held a natural rights view of copyright. The telling evidence appears in what he said—or rather what he did not say—in his correspondence with Thomas Jefferson about the Copyright and Patent clause. Jefferson wrote from Paris critiquing the proposed Constitution for failing to include a Bill of Rights, advocating in particular that it "abolish . . . Monopolies, in all cases . . ."<sup>147</sup> Jefferson

140. THE FEDERALIST NO. 43, at 271-2 (J. Madison) (Clinton Rossiter ed., 1961).

141. See *supra* Part III.B.2.a (analyzing rhetoric of state copyright acts).

142. Any argument that Madison's rhetoric, regardless of its sincerity, shaped the original understanding of the Constitution must face the same *expressio unius* counterargument set forth above with regard to the influence of the rhetoric of the state copyright acts. See *supra* Part III.B.2.a.

143. 98 Eng. Rep. 201 (1769). Common law copyright in this context refers not to the generally recognized (and unfortunately mislabeled) right of authors to prevent publication of their unpublished manuscripts, but rather to rights allegedly retained at common law even after publication. See Abrams, *supra* note 10, at 1129-33 (arguing that "common law copyright" does not accurately describe the limited rights that authors have to prevent publication of their works).

144. 98 Eng. Rep. 257 (H.L. 1774). The U.S. Supreme Court later reached a similar conclusion, holding that no federal common law copyright existed and that all federal copyright protection "originated, if at all, under the acts of Congress." *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 663 (1834).

145. See Clinton Rossiter, *Introduction to THE FEDERALIST PAPERS*, at vii, vii (Clinton Rossiter ed., 1961) (giving publication history of THE FEDERALIST PAPERS).

146. Compare *Scott v. Sanford*, 60 U.S. 393, 451 (1856) ("[T]he right of property in a slave is distinctly and expressly affirmed in the Constitution."), with U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

147. Letter from Thomas Jefferson to James Madison (July 31, 1788), reprinted in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1790, at 543, 545 (James Morton Smith ed., 1995).

explained that "saying there will be no monopolies lessens the incitements [sic] to ingenuity . . . but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."<sup>148</sup> Madison's remarkable reply merits a lengthy quote:

With regard to Monopolies they are justly classed among the greatest nuisances [sic] in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it? Is there not also infinitely less danger of this abuse in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power, as with us, is in the many not in the few, the danger can not be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.<sup>149</sup>

Madison said three things here that bear notice. Firstly, contrary to his claim in FEDERALIST NO. 43 that the "utility of the power" granted to Congress in the Copyright and Patent clause "will scarcely be questioned," in private Madison takes Jefferson's concerns quite seriously. Secondly, note that Madison appears never to have followed up on his suggested remedy for abuse of the monopoly power; namely, reserving "a right to the public to abolish the privilege at a price to be specified" in its grant.<sup>150</sup> Thirdly, Madison's assessment of the relative power that the many, who suffer monopolies, hold over the few, who enjoy them, ignores what public choice theory would predict and what experience has amply confirmed: The few who enjoy copyright protection have in practice more power to determine the scope of their monopoly rights than do the many who live under them.<sup>151</sup>

Madison's reply to Jefferson's critique of the Copyright and Patent clause most bears noting, however, for what it does *not* say. Madison nowhere defends the clause as a measure necessary to protect the natural rights of authors and inventors (much less to protect their rights at common law). Madison's silence on that point would prove

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148. *Id.*

149. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), reprinted in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1790, at 562, 566.

150. Interestingly, Madison appears to have intuited that seizure of copyright rights in the name of the public interest would call for just compensation—a principle later embodied in the Fifth Amendment. See *infra* Part III.D.

151. See *infra* Part III.E.2.

remarkable in any context.<sup>152</sup> Here, though, writing to one of the foremost advocates of natural rights, in reply to his call for a bill of rights, and in defense of the Copyright and Patent clause, Madison's silence speaks tomes. Could any context cry out more loudly for an appeal to the supposed natural right to copyright? Madison instead treated copyright as nothing more than an admittedly dangerous tool for advancing industrial policy, and one of dubious efficacy at that.<sup>153</sup>

Madison later made more clear and public his views on the proper subject matter for property rights. Speaking in terms that presaged Palmer's complaint against copyright,<sup>154</sup> Madison explained,

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations which not only constitute their property in the general sense of the word, but are the means of acquiring property strictly so called.<sup>155</sup>

By restricting what free people do with their voices, pens, and presses, copyright plainly falls afoul of Madison's indictment of government monopolies.

Before closing this exploration of Madison's thought, it bears noting that a thorough-going originalist—one devoted to following the Founders in matters both of substance and process—might question the propriety of interpreting the Constitution's Copyright and Patent clause by light of the original understanding of "copyright." The Founders generally agreed that extrinsic evidence of legislative intent ought not shape statutory language; they demanded fidelity to the plain meaning of the text.<sup>156</sup> In this particular case, however, it proves imminently

152. That Jefferson did not raise a natural rights argument bears noting, too.

153. Subsequent copyright legislation and practice bore out Madison's view on both counts by trying to promote American authors over foreign ones and, in the process, achieving exactly the opposite effect. See Thomas Bender & David Sampliner, *Poets, Pirates, and the Creation of American Literature*, 29 N.Y.U.J. INT'L L. & POL. 255 (1997).

154. See Palmer, *supra* note 112, at 281.

155. James Madison, *Property*, in THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 186-87 (Marvin Meyers ed., rev. ed. 1981); *id.* at 179 (relating that Madison's essay originally appeared in the NATIONAL GAZETTE, on March 29, 1792).

156. See Powell, *supra* note 97, at 888-94. For reactions to Powell's analysis, compare Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENTARY 77 (1988), reprinted in INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 117 (Jack N. Rakove ed., Northwestern U. Press 1990) (faulting Powell for misusing historical evidence and for ignoring the interpretive understandings of the members of the state ratifying conventions), with Jack N. Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENTARY 159 (1996) (arguing that historical evidence does not demonstrate that the Founders thought the intent of the ratifying conventions counted, either, and agreeing with Powell that the members of the Constitutional Convention gave no sign that they thought their intentions should aid in interpreting the Constitution).

appropriate to observe that the Founders regarded copyright as an infringement, albeit perhaps a necessary one, on common law rights to person and property. Because the Founders viewed statutes as attempts to remedy the defects of common law, they thought it proper to construe ambiguous statutory language against the backdrop of that general purpose.<sup>157</sup> Questions about the original understanding of copyright thus neatly join with questions of how to interpret the constitution's language on copyright. The Founders regarded copyright as an exception to common law rights and would have interpreted the Constitution to treat it exactly as such.

### *C. The Public Discourse Argument*

It takes extraordinary circumstances to justify copyright law's transgression of the background assumption that a free people, exercising their common law rights to person and property, can copy others' expressions at will.<sup>158</sup> It takes, that is, a market failure.<sup>159</sup> But what sort of market failure? The majority view emphasizes a looming risk that authors and publishers, dispirited by unrestrained copying, would underproduce expressive works were it not for copyright protection. By correcting that deficiency in the common law, the argument goes, copyright creates a system of incentives that, when pursued by private parties, ultimately promotes the public good.<sup>160</sup>

Some commentators offer an alternative market failure analysis, one that emphasizes copyright's role in promoting public discourse.<sup>161</sup> Professor Lydia Pallas Loren, for example, argues that copyright protection and licensing "does not cure the market failure that exists when there are diffuse external benefits that cannot be efficiently internalized in any bargained-for exchange."<sup>162</sup> She cites research, scholarship, and education as particularly likely to give rise to such externalities. "These kinds of non-transformative uses that have significant external benefits represent the enhancement of the core goal

157. See Powell, *supra* note 97, at 898-99.

158. See Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, *supra* note 77, at 869 ("It is expensive to grant new legal rights. It should be done only when common-law rights, physical fences and the like are inadequate means of providing the necessary incentives.").

159. See *supra* Part III.A (describing the market failure justification of copyright); Part III.B (criticizing alternative justifications based in natural rights).

160. See *supra* at Part III.A.

161. See generally Madison, *supra* note 28, at 1093-96 (contrasting the standard market failure analysis with various alternative views).

162. Loren, *supra* note 2, at 33.

of copyright by furthering the progress of knowledge and learning.”<sup>163</sup> Similarly but more broadly, Professor Netanel argues that copyright forestalls not just market failure but social failure.<sup>164</sup> He presents a “democratic paradigm” that “views copyright law as a state measure designed to enhance the independent and pluralist character of civil society.”<sup>165</sup>

The problem with such commentary lies not in its content but rather its intended effect. The Constitution’s stipulation that copyright “promote the Progress of Science and useful Arts”<sup>166</sup> certainly speaks generously enough to embrace the public interest writ large. But it by no means follows that the public has any affirmative right to access copyrighted works. Although the promotion of public discourse “surely underlies the institution of copyright, it is not clear that it means that the copyright owner should be under a greater obligation to facilitate copying or even to avoid steps to make copying harder just because some user may be a fair user.”<sup>167</sup> Under the conventional and quite plausible view of copyright (and of property generally), the public gets benefit enough from the aggregate effect of private parties pursuing their various individual interests. As Professors Melville and David Nimmer observe,

there is nothing to indicate that the Framers in recognizing copyright intended any higher standard of creation in terms of serving the public interest than that required for other forms of personal property. We may assume that the men who wrote the Constitution regarded the system of private property *per se* as in the public interest.<sup>168</sup>

It may of course turn out that lawmakers have vested too much power in copyright owners; indeed, the analysis below argues exactly that.<sup>169</sup> But the Copyright Act’s all-too-salient statutory failure should hardly encourage reformers to lobby congress for bluntly pro-public amendments. Political realism alone suggests that the effort would come to little good and might unintentionally cause great harm. Here, as always, commentators must not compare actual—and thus inevitably imperfect—markets with impossibly ideal political schemes.

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163. *Id.*

164. *See* Netanel, *supra* note 24.

165. *Id.* at 291.

166. U.S. CONST. art. I, § 8, cl. 8.

167. Dam, *supra* note 17, at 409; *see also* Douglas Y’Barbo, *On Legal Protection for Electronic Texts: A Reply to Professor Patterson and Judge Birch*, 5 J. INTELL. PROP. 195, 204-06 (1997) (arguing that copyright law does not remove texts from the public domain and, thus, does not harm the public by so doing).

168. 1 NIMMER & NIMMER, *supra* note 11, § 1.03[A], at 1-66.9 to 1-66.10 (footnote omitted).

169. *See infra* Part III.E.

More to the point, even if the "public discourse" lobby did manage to shoulder aside the special interests that now shape copyright legislation, it ought not try to recast the Copyright Act to pry open access to works protected solely by common law rights and the self-help tools that defend and are defended by such rights. Whatever the merits or flaws of the public discourse justification of copyright, it applies only to works protected by copyright. It does not justify a generic welfare right to access expressive works. That much should appear on the face of the Copyright and Patent clause, which empowers Congress only to secure "for limited Times to Authors . . . the exclusive Right to their . . . Writings." Congress thereby wins no power over expressive works generally, and indeed faces an implied bar on any more aggressive attempt "[t]o promote the Progress of Science and useful Arts."<sup>170</sup> Should such an *expressio unius* interpretation not suffice to make the point, and as the next subpart explains, the Bill of Rights plainly limits congressional power to force open access to expressive works.

#### D. The Unconstitutionality of Forced Access

The First Amendment does not require the owners of expressive works to abandon their private rights in the name of public access. The First Amendment does, of course, rightly limit the scope of copyright. The Bill of Rights postdates and trumps<sup>171</sup> the Constitution's grant to Congress of power to secure "for limited Times to Authors . . . the exclusive Right" to their works.<sup>172</sup> But that hardly justifies breach of contract or trespass to chattels in the name of subsidizing the public's enjoyment of expressive works. To the contrary, such forced access would itself run the risk of violating the First Amendment.

Suppose, for example, that Congress and the President amended the Copyright Act to create exclusive rights not merely in *expressions* but in *ideas*. The wrong would lie in the Act's unconstitutional breadth and the remedy in judicial review. To attack the statute by violating the private rights of owners of expressive works would prove not only futile (since it would treat mere symptoms of the constitutional disease) but facially improper.<sup>173</sup> More pointedly, awarding the public forced access to

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170. U.S. CONST. art. I, § 8, cl. 8.

171. See Lemley & Volokh, *supra* note 89, at 190 ("The Copyright and Patent Clause grants power to Congress, but the point of the Bill of Rights is to restrain the federal government in the exercise of its enumerated powers.").

172. U.S. CONST. art. I, § 8, cl. 8.

173. See Henry H. Perritt, Jr., *Access to the National Information Infrastructure*, 30 WAKE FOREST L. REV. 51, 58 (1995) (observing that to deny authors the right to refuse or limit access to their works would implicate property and contract rights).



expressive works, even if in response to a clearly unconstitutional Copyright Act, would arguably violate the First Amendment rights of the owners of expressive works.<sup>174</sup>

The Copyright Act might properly condition the grant of its privileges on the sacrifice of certain common law rights. In some few respects it already plainly does, as with regard to authors' non-waivable rights to terminate transfers of rights in their works<sup>175</sup> or the nontransferable nature of certain rights of visual artists.<sup>176</sup> More generally but less predictably, the Copyright Act preempts common law claims that fail to allege any elements other than those required for a claim of copyright infringement.<sup>177</sup> Federal lawmakers might go still farther and require, for instance, that anyone enjoying copyright's privileges put all licenses in bold print or give copies of protected works to public schools.<sup>178</sup> Courts should so abrogate common law rights only if and when the Copyright Act clearly demands it.<sup>179</sup> But at any rate such limitations do not and should not automatically apply to all expressive works; only works that partake of copyright's benefits should bear its burdens.

Regardless of whether the Copyright Act demands common law rights as the price of its protection, the First Amendment exacts no such quid pro quo. To the contrary, it recognizes freedom of speech as one of many rights that the state simply shall not abridge.<sup>180</sup> Among the rights thereby automatically protected by the First Amendment, we enjoy "the right not to speak as well as the right to speak."<sup>181</sup> When we do speak, moreover, the right of "expressive association" lets us choose those with whom we join in exercising our First Amendment

174. As Professor Kmiec succinctly put it, "property not only sustains political participation, but also the conscious choice to be insulated from politics." Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 759 (1999) (reviewing *PROPERTY RIGHTS IN AMERICAN HISTORY* (James W. Ely, Jr. ed., 1997)).

175. See 17 U.S.C. § 203(a)(5) (1994); see also *id.* § 304(c)(5) (establishing similar rule with regard to works created before 1978).

176. See *id.* § 106A(e).

177. See *id.* § 301(a); *infra* Part IV.A.

178. Note, however, that applying such demands retroactively would almost certainly require the federal government to provide just compensation, per the Fifth Amendment, to copyright owners. See Gordon, *supra* note 81, at 1404-05.

179. See *supra* text corresponding to notes 89-93.

180. See U.S. CONST. amend. I.

181. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 492 (1995) (Stevens, J., concurring); see also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 16 (1986) (plurality opinion))).

freedoms.<sup>182</sup> "Effective advocacy of both public and private points of view . . . is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly," the Supreme Court has explained.<sup>183</sup> The Court moreover had recent occasion to explain that, "The First Amendment's protection of expressive association is not reserved for advocacy groups."<sup>184</sup> It seems reasonable to conclude, therefore, that owners of expressive works "refusing access and opposing imposition of access duties may assert property rights in their systems and the privilege of free expression under the First Amendment."<sup>185</sup>

It makes no difference that copyright represents a government subsidy in favor of authors and publishers.<sup>186</sup> The public does not thereby win the right to a counter-subsidy. The Supreme Court has by its own account "soundly rejected" the proposition "that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights."<sup>187</sup> Copyright therefore does not

182. *Boy Scouts of Am. v. Dale*, 120 S. Ct. 2446, 2451 (2000) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express."); *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984) ("[T]he [Supreme] Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment . . ."). Like other First Amendment rights, the right of expressive association of course has limits. See *Board of Dirs. of Rotary Int'l. v. Rotary Club*, 481 U.S. 537 (1987) (upholding ban on gender discrimination by private organization); *New York State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1 (1988) (upholding ban on discrimination on the basis of race, creed, sex, or national origin by private organizations).

183. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (citing *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

184. *Boy Scouts of America*, 120 S. Ct. at 2451; see also *Griswold v. Connecticut*, 381 U.S. 479, 483 (explaining that Bill of Rights protects "forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members").

185. *Perritt*, *supra* note 173, at 57. Professor Perritt's subsequent reference to "the right to exclude," *id.*, strongly suggests that by "property rights" he means rights to not intellectual property but rather tangible property.

See also *Y'Barbo*, *supra* note 167, at 215 n.51 ("Would not a legal rule that compels disclosure to the public of the author's works violate her First Amendment rights?"). But cf. *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (invalidating on antitrust grounds Associated Press bylaws prohibiting service to non-members and rejecting First Amendment defense in view of that amendment's interest in fostering "the widest possible dissemination of information"); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386-90 (1969) (upholding FCC fairness doctrine in view of relative scarcity of broadcast frequencies); Jerome Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (advocating welfare right to access mass media); Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998) (arguing that courts should on First Amendment grounds deny enforcement of contracts of silence when the public interest in access to the suppressed information outweighs any legitimate interest in contract enforcement).

186. See *supra* Part III.A.

187. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (upholding statutory prohibition on using federal funds to advocate abortions); see also *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983) ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right.");

impliedly give the public a right to pry open access to protected works. Even if it did, moreover, the owners of expressive works would still deserve, for reasons set forth throughout this paper, the right to exit from copyright and rely on private protections.

To deny owners of expressive works their common law rights would arguably violate not only the First Amendment, but other provisions of the Bill of Rights. Would not an author forced to make her work publicly available justly complain that she had been denied the right "to be secure in [her] . . . papers, and effects, against unreasonable searches and seizures"<sup>188</sup> or, more generally, that she had suffered an unconstitutional violation of her "zone of privacy"?<sup>189</sup> Although our constitutional right to privacy has of necessity somewhat vague borders, it certainly extends beyond a claimant's intimate family relations<sup>190</sup> or property rights.<sup>191</sup> An author might thus enjoy a privacy right to distribute her work to only a small, select group of subscribers.

To violate contract rights in the name of public access would give rise to a claim that private property had been "taken for public use, without just compensation."<sup>192</sup> As the Supreme Court has observed, "A contract is property, and, like any other property, may be taken under condemnation proceedings for public use. Its condemnation is of course subject to the rule of just compensation . . ."<sup>193</sup> Furthermore, courts should not think that their disposition of such constitutional questions exhausts the rights of an author subjected to forced access. The Bill of

Harris v. McRae, 448 U.S. 297, 317 n.19 (1980) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.").

188. U.S. CONST. amend. IV.

189. *Griswold*, 381 U.S. at 484 (finding right to privacy emanating from penumbra of Bill of Rights).

190. See *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 465 (1977) (recognizing that Bill of Rights protects from violation "a legitimate expectation of privacy in . . . personal communications"); *Denius v. Dunlap*, 209 F.3d 944, 958 (7th Cir. 2000) (agreeing with "overwhelming majority" view that "some types of financial information involve the degree and kind of confidentiality that is entitled to a measure of protection under the federal constitutional right of privacy"); *Quinones v. Howard*, 948 F. Supp. 251, 254 (W.D.N.Y. 1996) (collecting cases upholding "a qualified constitutional right to the confidentiality of medical records and medical communications" (citations omitted)).

191. See *Warden v. Hayden*, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited.").

192. U.S. CONST. amend. V.

193. *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 690 (1897) (citation omitted); see also RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 88-92 (1985) (analyzing case law in support of proposition that takings clause covers contract rights).

The somewhat bald statement of the Court in *Long Island Water Supply Co.* that "[a] contract is property," 166 U.S. at 690, perhaps merits explanation. The Court did not mean to equate those two very different legal concepts, of course, but rather merely to delineate the scope of the eminent domain clause. See also *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1923) ("The contract in question was property *within the meaning of the Fifth Amendment* . . . and if taken for public use the Government would be liable." (emphasis added) (citations omitted)).

Rights demands that courts not read it to "deny or disparage" rights—such as, surely, common law rights predating the Constitution—"retained by the people."<sup>194</sup>

### *E. The Statutory Failure of the Copyright Act*

Courts and commentators routinely claim that the Copyright Act strikes a delicate balance between public and private interests.<sup>195</sup> This subpart offers a contrary view. A careful review demonstrates that the term, scope, and power of copyright law has steadily increased over the years. A public choice analysis readily explains that trend and, disturbingly, predicts its continuation. At best, then, the Copyright Act represents a political bargain between the various special interests that lobby Congress. But the Act does not, will not, and cannot strike a delicate balance between all the public and private interests that it affects profoundly.<sup>196</sup> Even if legislators wanted to strike such a balance, they would necessarily lack the information to do so. The Copyright Act has, in short, fallen prey to statutory failure.

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194. U.S. CONST. amend. IX.

195. See, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (claiming that Copyright Act "involves a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand"); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 917 (2d Cir. 1994) (referring to "delicate balances established by the Copyright Act"); *Morseburg v. Baylon*, 621 F.2d 972, 977 (9th Cir. 1980) ("careful balance struck by Congress between those matters deserving of protection and those things that should remain free"); *Recording Indus. Ass'n v. Copyright Royalty Tribunal*, 662 F.2d 1, 17 (D.C. Cir. 1981) ("delicate balance" that Congress decreed in the Copyright Act"); *Nimmer*, *supra* note 33, at 19 (1999) ("delicate balance" between the rights of copyright owners and copyright users"); *Netanel*, *supra* note 24, at 385 ("careful balance of owner right and user access"); *Karjala*, *supra* note 26, at 518 ("carefully honed balances between owners' and users' rights"); Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 584 (1997) ("delicate balance"); Niva Elkin-Koren, *Copyright Law and Social Dialogue on the Information Superhighway: The Case Against Copyright Liability of Bulletin Board Operators*, 13 CARDOZO ARTS & ENT. L.J. 345, 388 (1993) ("delicate balance").

196. Consider Professor Jessica Litman's description of the origins of copyright legislation:

Although a few organizations showed up at the conferences purporting to represent the 'public' with respect to narrow issues, the citizenry's interest in copyright and copyrighted works was too varied and complex to be amenable to interest group championship. Moreover, the public's interests were not somehow approximated by the push and shove among opposing industry representatives.

Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 312 (1989) (footnote omitted).

### 1. Copyright's Indelicate Imbalance

The term of copyright has steadily expanded under U.S. law. The first federal copyright legislation, the 1790 Copyright Act, set the maximum term at fourteen years plus a renewal term (subject to certain conditions) of fourteen years.<sup>197</sup> The 1831 Copyright Act doubled the initial term and retained the conditional renewal term, allowing a total of up to forty-two years of protection.<sup>198</sup> Lawmakers doubled the renewal term in 1909, letting copyrights run for up to fifty-six years.<sup>199</sup> The 1976 Copyright Act changed the measure of the default copyright term to life of the author plus fifty years.<sup>200</sup> Recent amendments to the Copyright Act expanded the term yet again, letting it run for the life of the author plus seventy years.<sup>201</sup> Table 1, below, illustrates the growth of the general U.S. copyright term over time, including the retroactive effects of various statutory extensions.<sup>202</sup>

The subject matter covered by copyright has steadily expanded, too. The plain language of the Constitution authorizes legislation protecting only "Writings."<sup>203</sup> Lawmakers began almost immediately to read that grant broadly, protecting in the 1790 Copyright Act not only books but also maps and charts.<sup>204</sup> Subsequent legislation stretched copyright protection, bit by bit, to include: prints,<sup>205</sup> musical compositions,<sup>206</sup> per-

197. See Copyright Act of 1790, § 1, 1 Stat. 124 (1790), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 22, 22. For a discussion of the subtleties in the terms provided under this and subsequent copyright acts, see Patry, *supra* note 2, at 915-23.

198. See Act of Feb. 3, 1831, §§ 1-2, 4 Stat. 436, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 27, 27. The Act retroactively extended by 14 years copyrights still in their first term as of its effective date. See *id.* § 16.

199. See Copyright Act of 1909, 17 U.S.C. § 23 (1909) (repealed 1978). The Act retroactively extended by 14 years copyrights extant at its effective date. See *id.* § 24.

200. See 17 U.S.C. § 302(a) (1994). The act gave works authored anonymously, pseudonymously, or for hire a term the lesser of publication plus 75 years or creation plus 100 years. See *id.* § 302(c). It retroactively extended to 75 years copyrights extant at its effective date. See *id.* § 304(a), (b).

201. Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C.A. § 302(a)-(b) (West Supp. 1999)). Works made anonymously, pseudonymously, or for hire get the lesser of publication plus 95 years or creation plus 120 years. See *id.* § 302(c). The amendment applies retroactively to copyrights that originated under the 1976 Act. See *id.* § 302(a)-(c). It retroactively extends to 95 years copyrights extant at its effective date that had originated under the 1909 Act. See *id.* § 304(a)-(b).

202. Figures for the table come from the statutes cited *supra* notes 133-37. In calculating copyright terms based on the life of the author, the table conservatively assumes that authors create their works at age 35 and live for 70 years.

203. U.S. CONST. art. I, § 8, cl. 8.

204. See Copyright Act of 1790, § 1, 1 Stat. 124 (1790), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 22, 22.

205. See Act of April 29, 1802, ch. 15, § 2, 2 Stat. 171, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 24, 25.

206. See Act of Feb. 3, 1831, § 1, 4 Stat. 436, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 27, 27.

formance rights in dramatic compositions;<sup>207</sup> photographs and negatives thereof;<sup>208</sup> paintings, drawings, chromos, statuettes, and models or designs intended to be perfected as works of the fine arts;<sup>209</sup> motion pictures;<sup>210</sup> for-profit public performances of nondramatic literary works;<sup>211</sup> sound recordings;<sup>212</sup> computer programs;<sup>213</sup> and architectural works.<sup>214</sup> A search of extant laws relating to copyright uncovers only one instance in which a statute arguably reduced the subject matter covered by copyright: with regard to publications of the federal government.<sup>215</sup> The Copyright Act has expanded even beyond the bounds of copyright, protecting artists' moral rights,<sup>216</sup> new designs of vessel hulls,<sup>217</sup> and

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207. See Act of Aug. 18, 1856, 11 Stat. 138, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 33, 33.

208. See Act of Mar. 3, 1865, § 1, 13 Stat. 540, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 34, 34.

209. See Act of July 8, 1870, § 86, 16 Stat. 212, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 36, 36-7.

A subsequent act temporarily moved from the Copyright Office to the Patent Office registration of engravings, cuts, or prints not connected with the fine arts. Act of June 18, 1874, § 3, 18 Stat. 78, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 47, 48. This purely administrative move apparently had no effect on whether such works could be copyrighted, however. See *id.* (charging the Commissioner of Patents with registration of such works "in conformity with the regulations provided by law as to copyright of prints"); see also Act of July 31, 1939, 54 Stat. 51, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 99, 99 (repealing Act of June 18, 1874 and referring throughout to copyrights registered in the Patent Office).

210. See Act of Aug. 24, 1912, ch. 356, 37 Stat. 488 (1912), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 87, 87.

211. See Act of July 17, 1952, Pub. L. No. 82-575, 66 Stat. 752 (1952), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 127, 127.

212. See The Sound Recording Act, Pub. L. No. 92-140, 85 Stat. 391 (1971), § (a), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 135-M, 135-M (amending 17 U.S.C. § 102).

213. See Act of Dec. 12, 1980, Pub. L. No. 96-517, 94 Stat. 3015, 3028 (1980) (amending 17 U.S.C. § 101).

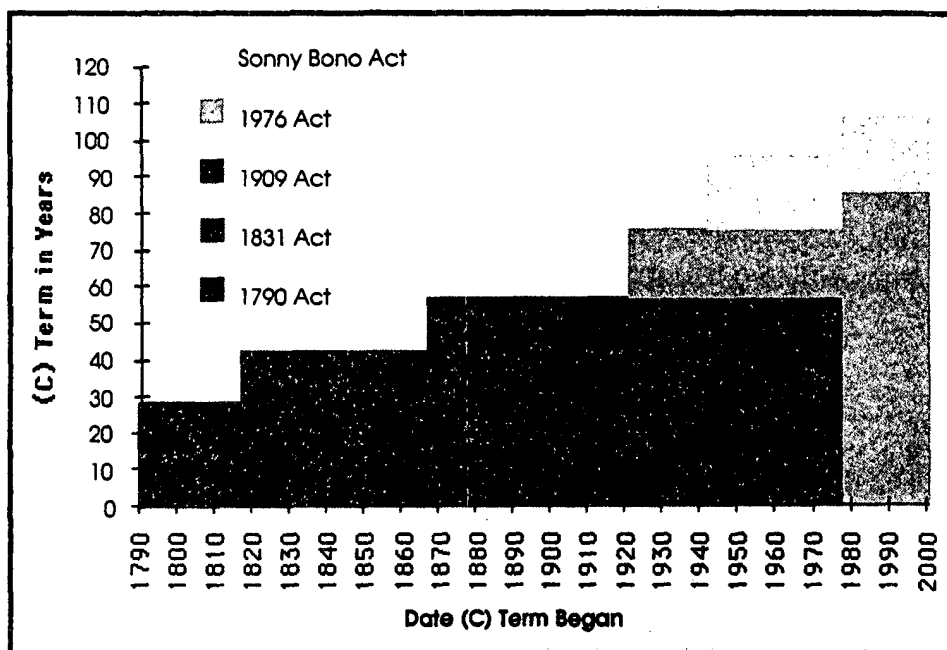
214. See The Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 701-706, 104 Stat. 5089, 5133 (1990) (amending 17 U.S.C. § 102(8)).

215. See Act of Jan. 12, 1895, § 52, 28 Stat. 608, reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 55, 55. A subsequent act modified but did not clearly expand the scope of this exception. See Act of Jan. 27, 1938, 52 Stat. 6 (providing in § 1 that United States might secure copyrights in black-and-white illustrations of its postage stamps and exempting in § 2 criminal sanctions for reproduction for philatelic purposes of such illustrations of U.S. and foreign stamps).

216. See 17 U.S.C. § 106A (1994) (protecting attribution and integrity rights of authors of works of visual arts).

217. See 17 U.S.C.A. §§ 1301-32 (West Supp. 1999). Given that the act claims to protect "original" designs, *id.* § 1301(a)(1), one might argue that such protections belong within the scope of copyright law. Two embarrassing questions dog that claim, however: Why did federal lawmakers feel compelled to add a whole new chapter of the Copyright Act giving vessel hulls special protection? And why did *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), overturn comparable state legislation on grounds that it conflicted not with federal copyright law but with federal patent law? At any rate, though, the act's definition of "original," because it requires "a distinguishable variation over prior work," 17 U.S.C.A. § 1301(b)(1), more closely resembles patent law's novelty requirement than copyright law's customary originality requirement, which requires merely that an author show independent creation. As Judge

technological systems that themselves protect copyrights.<sup>218</sup>



**Table 1: Trend of General U.S. Copyright Term**

The exclusive rights granted by copyright law have expanded, as well. The 1790 Copyright act covered merely the reproduction and distribution of protected works.<sup>219</sup> The present statute gives copyright owners exclusive rights to the reproduction, distribution, preparation of derivative works, public performance, and public display of protected works.<sup>220</sup> Remedies for infringement have grown from the mere

Learned Hand put it, "[I]f by some magic a man who had never known it were to compose anew Keat's Ode on a Grecian Urn, he would be an 'author,'" for purposes of the Copyright Act. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936); see also 1 PAUL GOLDSTEIN, COPYRIGHT § 2.2.1.1, at 2:12 (2d ed. 2000) ("Courts in copyright cases do not require novelty of the sort required in patent cases . . ."); 1 NIMMER & NIMMER, *supra* note 11, § 2.01[A], at 2-7 ("[T]he originality necessary to support a copyright merely calls for independent creation, not novelty." (footnote omitted)).

218. See 17 U.S.C.A. §§ 1201-05 (Supp. V 1999) (providing civil and criminal penalties for a variety of acts that might interfere with the effectiveness of copyright management systems).

219. See Copyright Act of 1790, § 1, 1 Stat. 124 (1790), reprinted in COPYRIGHT ENACTMENTS, *supra* note 95, at 22, 22 (granting to copyright owners "the sole right and liberty of printing, reprinting, publishing and vending" protected works). But see *id.* § 2, at 23 (providing remedy against unauthorized printing, reprinting, publishing, or importation of copyrighted works).

220. See 17 U.S.C.A. § 106 (Supp. V 1999).

destruction of infringing works and payment of statutory damages,<sup>221</sup> to vesting copyright owners with a broad panoply of powers. Current remedies include: impounding of infringing articles and devices used in infringement;<sup>222</sup> statutory damages or actual damages and profits;<sup>223</sup> costs and attorneys fees;<sup>224</sup> bars on the importation of infringing articles;<sup>225</sup> the power to subpoena digital service providers to disclose the identity of an alleged infringer;<sup>226</sup> and criminal sanctions including fines and imprisonment.<sup>227</sup>

The Copyright Act itself has exploded in size and complexity over the years. The Copyright Act of 1790 had just seven sections, was organized in zero chapters, and had no subsections.<sup>228</sup> It ran some 1224 words.<sup>229</sup> The current version of the Copyright Act includes eleven chapters, 122 sections, and a superabundance of subsections, sub-subsections, and so forth.<sup>230</sup> It lumbers along at about 70,400 words.<sup>231</sup>

It bears noting, in all fairness, that the Copyright Act has come to include a number of limitations on the exclusive rights that it establishes. Most of these limitations, such as those that excuse secondary transmission of superstations and network stations for private home viewing,<sup>232</sup> reproduction and distribution of works adapted for disabled persons,<sup>233</sup> and automated or innocent infringement by Internet service

221. See Copyright Act of 1790, § 2, 1 Stat. 124 (1790), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 22, 23 (providing for forfeiture of infringing copies to the copyright owner, "who shall forthwith destroy the same," and for payment "of fifty cents for every [infringing] sheet which shall be found in his or their possession," payable in equal halves to the copyright owner and the United States).

222. See 17 U.S.C.A. § 503 (Supp. V. 1999) (providing civil remedies of impounding and disposition of infringing articles and devices used in infringing works); *see also id.* §§ 506(b), 509 (providing for similar remedies in criminal cases).

223. *See id.* § 504.

224. *See id.* § 505.

225. *See id.* §§ 601-03.

226. *See id.* § 512(h).

227. *See id.* § 506 (calling for criminal punishments in certain cases as provided under 18 U.S.C.S. § 2319 (Lexis Supp. 2000)); 18 U.S.C. § 2319 (Supp. V 1999) (setting forth applicable fines and prison terms); *see also* 17 U.S.C. §§ 506(b), 509 (providing in criminal cases for the seizure and forfeiture to the United States of infringing items and devices used to infringe). For a detailed analysis of the causes and potentially worrisome effects of one recent expansion of criminal liability under the Copyright Act, *see* Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835 (1999).

228. See Copyright Act of 1790, 1 Stat. 124 (1790), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note 95, at 22, 22-24.

229. *See id.* (by the author's estimate).

230. See 17 U.S.C.A. §§ 101-803 (1996); *id.* §§ 1001-1332 (Supp. V 1999) (word count by author's estimate).

231. *See id.* (by the author's estimate).

232. *See id.* § 119.

233. *See id.* § 121; *see also id.* § 110(8)-(9) (allowing under certain conditions performance of literary works for disabled persons).



providers,<sup>234</sup> undoubtedly mean far more to the special interests that they favor than they do to the citizenry as a whole.<sup>235</sup> A few limitations benefit the public more generally, although only in circumstances so narrowly defined as to aggrieve few copyright owners and, indeed, to qualify in most cases as fair use.<sup>236</sup> Other limitations merely specify means of administering compulsory licenses.<sup>237</sup> But the legislative process deserves little credit for the most general and powerful of the Copyright Act's limitations—the fair use doctrine<sup>238</sup> and the first sale doctrine<sup>239</sup>—because they originated not in Congress, but in the courts.<sup>240</sup> With regard to the first sale doctrine, moreover, federal lawmakers have repeatedly trimmed back the judicial exception that they earlier codified.<sup>241</sup>

234. See *id.* § 512. Note that, strictly speaking, § 512 does not limit rights under the Act but rather the remedies for infringement.

235. See also *id.* § 111(a)-(b), (c) (allowing under certain conditions secondary transmissions embodying performances or displays of a work); *id.* § 112 (allowing under certain conditions transmitting organizations to make ephemeral recordings); *id.* § 113(c) (allowing advertisements, commentaries, and news reports distributing or displaying useful articles embodying copyrighted works); *id.* § 114(a)-(c) (limiting rights in sound recordings so as to safeguard copyrights in underlying works thus recorded); *id.* § 114(d) (defining rights in sound recordings so as to allow under certain conditions performance via digital audio transmission); *id.* § 120(b) (allowing alterations of buildings embodying copyrighted works).

236. See *id.* § 108 (allowing under certain conditions reproduction by libraries and archives); *id.* § 110(1)-(4), (6), (10) (allowing under certain conditions nonprofit entities to perform or display works); *id.* § 110(7) (allowing performance of nondramatic music works to promote sales); *id.* § 117 (excusing functionally necessary or archival copying of computer programs); *id.* § 120(a) (allowing representations of architectural works constructed in public places and alterations of buildings embodying copyrighted works); see also *id.* § 513 (providing for determination of reasonable license fees charged by performing rights societies). Note that, strictly speaking, § 513 does not limit rights under the Act but rather the remedies for infringement.

237. See *id.* § 111(c)-(d) (specifying compulsory licensing of secondary transmissions by cable systems); *id.* § 112(c) (providing for the compulsory licensing of certain ephemeral recordings); *id.* § 114(d)(2), (c)-(f) (relating to compulsory licensing of performance of sound recordings publicly via digital audio transmissions); *id.* § 115 (describing compulsory licensing for the making and distribution of phonorecords); *id.* § 118(b)(3), (d) (providing that Librarian of Congress may establish a binding schedule of rates and terms for use of certain copyrighted works by public broadcasting entities).

238. See *id.* § 107 (codifying the fair use doctrine).

239. See *id.* § 109 (codifying the first sale doctrine).

240. With regard to codification of the fair use doctrine, see *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 549 (1985) (stating that § 107 was “intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way”) (quoting H.R. REP. NO. 94-1476, at 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5680) (alteration in original); see also S. REP. NO. 94-473, at 62 (1976) (making same statement as House Report).

With regard to the codification of the first sale doctrine, see 2 GOLDSTEIN, *supra* note 217, § 5.6.1, at 5:106-108, which credits *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), the leading case in a long line of decisions, as the holding that Congress codified in the Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075, 1084 (1909). The Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, replaced § 41 with 17 U.S.C. § 109, the current codification of the first sale doctrine, without substantially altering it.

241. See The Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (1984) (codified as amended at 17 U.S.C. § 109(b)) (excluding sound recordings from scope of first sale doctrine); The

Federal legislation has steadily increased the term of copyright, the subject matter covered by copyright, and the remedies for infringement of copyright. Even the Copyright Act itself has swollen over the years. The Act's few, narrow, and judicially-created limitations do very little to counteract the clear message in such trends: Federal lawmakers favor expanding the rights of copyright owners over all else—including, a skeptic might easily conclude, the public interest.

## 2. A Public Choice Tragedy

Public choice theory offers a ready explanation for copyright's steady growth.<sup>242</sup> Those who create, own, and distribute expressive works know who they are, what they want, and how badly they want it. Unsurprisingly, such copyright protectionists approach Congress as a well-defined, highly-motivated, and apparently effective lobby.<sup>243</sup> In contrast, those who might benefit from a less expansive Copyright Act typically have disparate, inchoate, slight, or non-monetized wishes. Such anti-protectionists thus have relatively little impact on the legislative process. In sum, copyright policy combines all the elements of a public choice tragedy: concentrated benefits, diffuse costs, and pervasive state power.

It does not take excessive skepticism to conclude that the Copyright Act has fallen prey to statutory failure; mere realism compels the same result. The Act's record of expansion under the influence of special interests proves worrying enough.<sup>244</sup> Matters may now have passed the point of no return, however. The Copyright Act has created an immensely wealthy and, through its control of the mass media, potent class of beneficiaries. Citizens have little hope of countering such a

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Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, Tit. VIII, § 804, 104 Stat. 5136 (1990) (codified at 17 U.S.C. § 109(b)) (excluding computer programs from scope of first sale doctrine).

242. Seminal works on public choice theory include JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965).

243. See Jessica Litman, *Copyright and Information Policy*, 55 *LAW & CONTEMP. PROBS.* 185, 187-195 (1992) (describing the interest group dynamics affecting copyright legislation); Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 *CORNELL L. REV.* 857, 865-79 (1987) (describing legislative processes through which commercial interests shaped the 1976 Copyright Act); L. Ray Patterson, *supra* note 83, at 27 (1993) (arguing that the copyright industry "plays a dominant role in shaping copyright legislation with small-minded concerns, weighted as they are by the desire for control and profit" (footnote omitted)). See generally Litman, *supra* note 196 (examining critically the considerable influence of industry representatives on copyright legislation); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 *MICH. L. REV.* 1197 (1996) (arguing that interest-group power, together with the stake that the "elite" have in copyright rhetoric, explains the expansion of copyright law).

244. See, e.g., Loren, *supra* note 2, at 537-38 (reviewing the expansion of copyright law and concluding that "copyright law has evolved into a profit maximizing tool for the powerful content industry").

lobby because few politicians have ample incentive to do so. The Copyright Act may have thus fallen into a vicious cycle, empowering special interests to lobby for still more power, over and over again.

Copyright does not strike a delicate balance between public and private interests. It will not and indeed cannot. The problem runs deeper than the Act's public choice afflictions, such that no amount of open, sincere, and disinterested discourse would set copyright law into delicate balance.<sup>245</sup> Political authorities cannot measure even the economic factors that would have to go into such a calculation,<sup>246</sup> much less the myriad fluctuating and intangible ones.<sup>247</sup> Even if they could *measure* all the relevant economic, legal, technological, and cultural factors, moreover, politicians could not *balance* such incommensurable values.<sup>248</sup>

Does "delicate balancing" rhetoric merit any place in copyright jurisprudence? The Copyright Act does reflect compromises struck between the various parties that lobby congress and the administration for changes to federal law. As noted above, however, such a truce among special interests does not and cannot delicately balance all the interests affected by copyright law. To hold otherwise confounds politics with truth. Not even poetry can license the "balance" metaphor, which aggravates the public choice problem by endowing the legislative process with more legitimacy than it deserves. Worse than committing a jurisprudential fiction, to claim that copyright law strikes a delicate balance between private and public interests aids and abets a statutory tragedy.

245. See Bell, *supra* note 3, at 590-592 (discussing the impossibility of calculating the proper quid pro quo for copyright's fair use doctrine); Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 HARV. J.L. & PUB. POL'Y 867, 906 (1990) (describing questions about the optimality of copyright's quid pro quo as "vacuous").

246. See Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 997-8 (1990) (characterizing as an "unruly brawl" debate among economists about copyright's effects and concluding that in general "empirical data is not only unavailable, but is also literally uncollectible"); Yen, *supra* note 81, at 542-43 ("[T]he empirical information necessary to calculate the effect of copyright law on the actions of authors, potential defendants, and consumers is simply unavailable, and is probably uncollectible."). See generally HAYEK, *supra* note 70, at 77-78 (1948) (the knowledge essential for central planning does not exist in concentrated form).

247. See Hardy, *supra* note 21, at 257 (arguing that in the face of rapid technological change, "the high costs of group decision making ensure that the Copyright Act will be long out of date before it can be revised appropriately").

248. See George Priest, *What Economists Can Tell Lawyers About Intellectual Property*, in 8 RESEARCH IN LAW AND ECONOMICS: THE ECONOMICS OF PATENTS AND COPYRIGHTS 19, 21 (1986) ("[E]conomists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property."); see also LUDWIG VON MISES, *LIBERALISM IN THE CLASSICAL TRADITION* 70-75 (3d ed. 1985) (1962) (economic calculation cannot proceed absent price signals).

## IV. EXITING COPYRIGHT GRACEFULLY

This paper has argued on a variety of legal and policy grounds for opening an escape from copyright into private protections of expressive works. Even if those arguments prove convincing, however, they will matter little if practical problems block the way forward. This Part thus analyzes whether and how courts and litigants can in fact exit from copyright. Subpart A finds the election of remedies doctrine to represent something of a divagation, inviting but ultimately immaterial. Abandonment, discussed in subpart B, offers a much more promising tool for prying open copyright, particularly if copyright owners have sufficient incentives to "preempt preemption" by relying solely on common law and technological self-help protections of their works. Somewhat surprisingly, subpart C reveals that courts applying the doctrine of copyright misuse already effectuate a type of escape from copyright, albeit perhaps inadvertently. In sum, the practical problems with opening an escape from copyright, while serious, do not rise to the level of impossibility. Subpart D thus concludes that achieving an open copyright system looks like both a desirable and attainable goal.

*A. Election of Remedies*

The mildest sort of escape from copyright invokes the doctrine of election of remedies to allow copyright owners to choose between inconsistent statutory and common law protections of expressive works. It relies on quite conventional, if underutilized, legal tools to help ensure that the Copyright Act does not completely displace private protections of expressive works. The doctrine cannot forestall preemption, however, which generally favors copyright over coincident common law rights. Furthermore, commentators who worry about the power of copyright and common law in combination would probably find that election of remedies offers too forgiving an exit from copyright.

The election of remedies doctrine both liberates and constrains parties found to have suffered multiple legal wrongs. As a general matter, the doctrine grants a wronged party freedom to choose "one out of several means afforded by law for the redress of an injury" while at the same time providing that if a party "having two coexistent but inconsistent remedies chooses to exercise one . . . [it] loses the right to thereafter exercise the other."<sup>249</sup> Copyright owners can of course plead

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249. BLACK'S LAW DICTIONARY 518 (6th ed. 1990). Note, however, that in general no similar doctrine bars a party from obtaining overlapping types of intellectual property protection. See *In re Yardley*, 493 F.2d 1389 (C.C.P.A. 1974) (allowing design patent in copyrighted article); *Apple Computer, Inc. v.*

common law causes of action along with their infringement claims.<sup>250</sup> Where a party claims violations both of copyright and common law, the election of remedies doctrine suggests, at a minimum, that a court should *allow* that party to enforce the rights of its choosing.<sup>251</sup>

Moreover, the doctrine should *require* a party to choose between copyright and common law remedies to the extent that they contradict one another. Courts have found such a contradiction to arise when, for instance, copyright and contract provide overlapping and redundant remedies.<sup>252</sup> Exactly when copyright and common law remedies contradict so as to require an election remains a matter of some uncertainty and dispute.<sup>253</sup> For present purposes, it suffices to observe

Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983) (holding that software program may enjoy both patent and copyright protection); 37 C.F.R. § 202.10(a) (2000) (providing that patentability does not bar copyright registration); *id.* § 202.10(b) (providing that trademark protection does not bar copyright registration). *But see* *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 121 S. Ct. 1255 (2001) (holding that party making trade dress claim to elements also claimed in utility patent bears heavy burden of proving alleged trade dress not barred as functional).

250. Under the Federal Rules of Civil Procedure, plaintiffs can plead in the alternative quite liberally. *See* 5 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE: CIVIL 2D* § 1219—THEORY OF THE PLEADINGS DOCTRINE 189-191 (1990 & Supp. 1999) (describing how Federal Rules of Civil Procedure effectively abolish the theory of pleadings doctrine that formerly restricted pleas in the alternative). Copyright claims generally end up in federal court, *see* 3 NIMMER & NIMMER, *supra* note 11, § 12.01[A][1] (describing scope of federal jurisdiction over claims involving copyright), while those raising preemption issues do so almost as a matter of certainty, *see id.* § 12.01[A][1][d], at 12-13 to 12-14.1 (describing operation of “complete preemption” doctrine providing for removal to federal court). At any rate, though, “virtually all courts today permit inconsistent allegations, whether separately pleaded or not, if they are made in good faith.” JOHN J. COUND ET AL., *CIVIL PROCEDURE* 496 (5th ed. 1989).

251. *See MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265, 1276 (11th Cir. 1999), *reh’g en banc denied*, 182 F.3d 938 (11th Cir. 1999) (implying a right to freely choose between inconsistent copyright and common law remedies by holding that the plaintiff had, by ratifying the contract in its pleadings, elected to recover under it and it alone); *Costello Publ’g Co. v. Rotelle*, 670 F.2d 1035, 1045 (D.C. Cir. 1981) (remanding with instructions to allow election, in the event that infringement was found, between suit for breach of contract or for copyright infringement arising from use of copyrighted works outside the scope of the license); *Twentieth Century-Fox Film Corp. v. Peoples Theatres, Inc.*, 24 F. Supp. 793, 795 (D. Ala. 1938) (asserting that plaintiff had the right to elect between contract and copyright remedies); *Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66, 74 (D. Mass. 1933) (same); *see also* 3 NIMMER & NIMMER, *supra* note 11, § 10.15[A], at 10-116 (“Conduct that constitutes both a breach of covenant and the failure of a condition will permit an election of remedies based either upon breach of contract or copyright infringement.” (footnote omitted)).

252. *See MCA Television Ltd.*, 171 F.3d at 1276; *Bieg v. Hovnanian Enters., Inc.*, Civ. No. 98-5528, 1999 U.S. Dist. LEXIS 17387, at \*18-19 (E.D. Pa. Nov. 9, 1999) (holding that plaintiff must elect between contract and copyright remedies where they overlap, but need not do so where they do not); *Williams & Co. v. Williams Co.-East*, 377 F. Supp. 418, 429 (C.D. Cal. 1974) (awarding separate damages for breach of contract and copyright infringement arising after contract repudiated), *aff’d*, 542 F.2d 1053 (9th Cir. 1976).

253. *Compare* *Paramount Pictures Corp. v. Metro Program Network, Inc.*, 962 F.2d 775, 780 (8th Cir. 1991) (affirming award for both breach of contract and copyright infringement on grounds they were entirely separate injuries), *with MCA Television Ltd.*, 171 F.3d at 1274-75 (criticizing *Paramount* for failing to address election of remedies doctrine barring double recovery); *see also* *Joseph J. Legat Architects, P.C. v. United States Dev. Corp.*, No. 84-C-8803, 1991 U.S. Dist. LEXIS 3358, \*28-32 (N.D. Ill. Mar. 20, 1991)

that no court has disclaimed the doctrine as utterly inapplicable to inconsistent copyright and common law remedies. Getting courts to recognize and apply the doctrine of election of remedies in copyright cases sometimes poses a distinctly different problem, but one that thoughtful commentary and artful pleading should rectify.<sup>254</sup>

One might counter that federal law should void common law causes of action that overlap copyright ones, disqualifying the former as even an option in such cases.<sup>255</sup> Both that premise and conclusion merit sharp qualification, however. In the first place, because § 301(a) of the Copyright Act preempts only "legal or equitable rights that are equivalent" to those established by the statute,<sup>256</sup> a common law cause of action that alleges an element not required for a showing of copyright infringement will escape preemption under that section.<sup>257</sup> A contract claim that alleges the "extra element" of privity, for example, should suffice to defuse § 301 preemption.<sup>258</sup> Courts applying § 301 will thus

(rejecting magistrate's report on grounds that damages for copyright infringement, as measured by "value of use," may be recovered in addition to damages for breach of contract); see also *id.* at \*20 n.7 (indicating that courts following a different theory of the measure of damages for copyright infringement might reach a different conclusion).

254. See, e.g., 1 NIMMER & NIMMER, *supra* note 11, § 1.01[B][1][a], at 1-16 n.69.5 (criticizing the court in *Wolff v. Institute of Electrical and Electronics Engineers, Inc.*, 768 F. Supp. 66 (S.D.N.Y. 1991), on grounds that it "could have required the plaintiff to adopt an election of remedies to the extent that the copyright and contract causes of action were deemed inconsistent"); *MCA Television Ltd.*, 171 F.3d at 1274-75 (criticizing sister circuit for overlooking election of remedies doctrine).

255. See R. Ross Vignet, *Casnote: National Car Rental System, Inc. v. Computer Associates International, Inc.: A Hole in Software Copyright Protection You Can Drive a Rental Car Through*, 49 ARK. L. REV. 93, 116-17 (1996) (criticizing on grounds that it ignores congressional intent behind § 301 Nimmer's analysis of *Wolff*). Reliance on § 301's notoriously cloudy legislative history and failure to address the widespread acceptance of the "extra element" exception to § 301's scope render the casenote's criticism suspect, however. See *Architectronics, Inc. v. Control Systems, Inc.*, 935 F. Supp. 425, 440-41 (criticizing reliance on § 301's legislative history); *infra* text accompanying notes 242-45 (discussing prevalence and effect of "extra element" test).

256. 17 U.S.C. § 301(a) (1994) (emphasis added); see also *id.* § 301(b) ("Nothing in this title annuls or limits any rights or remedies under the common law . . . with respect to . . . (3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of [the statute].").

257. The Act's provision of nonwaivable termination rights represents the one other, albeit very narrow way in which the Copyright Act preempts a particular type of contract. See *id.* §§ 203, 304(c). For consideration of how those provisions affect the exit option, see *infra* Part IV.B.

258. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1454-55 (7th Cir. 1996) (holding contract claim not preempted because it reflects private ordering of parties); *Architectronics, Inc.*, 935 F. Supp. at 439-41 (noting and following consensus among courts and commentators that the extra element of promise saves a breach of contract claim from preemption, and criticizing cases to the contrary); *Meyers v. Waverly Fabrics*, 479 N.E.2d 236, 237-38 (1985) (concluding from legislative history that § 301 does not preempt contract claims); *Ronald Litoff, Ltd. v. American Express Co.*, 621 F. Supp. 981, 986 (S.D.N.Y. 1985) (asserting without analysis that contract claim concerning rights to copyrighted works not preempted); see also 3 GOLDSTEIN, *supra* note 217, § 15.2.1, at 15:12 ("Contract law is a good example of a state law that will be immune from preemption under the extra element test . . . [because] contract law requires the plaintiff to

preempt a contract claim only if it alleges nothing more than an act of copyright infringement.<sup>259</sup>

Consequently, and in the second place, careful pleading can often save a common law claim from preemption under § 301. Case law indicates that copyright owners can escape § 301 preemption, for instance, merely by alleging contract rights *greater* than, and thus not *equivalent* to, those specified by the Act.<sup>260</sup> A similar policy applies in the

prove the existence of a bargained-for-exchange—something it need not prove in a cause of action for copyright infringement.”).

Less controversially, the “extra element” saving a contract claim from § 301 preemption can come from facts more particular than the bargained-for-exchange common to all contracts. *See Lennor v. Seaman*, 63 F. Supp. 2d 428, 438 (S.D.N.Y. 1999) (finding contract claim alleging non-disclosure right not preempted); *Law Bulletin Publ'g Co. v. LRP Publications, Inc.*, 98-8122-CIV-RYSKAMP, 1998 U.S. Dist. LEXIS 11345, \*14-15 (S.D. Fla. June 18, 1998) (finding contract claim alleging breach due to conveyance to third party not preempted); *National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 431-33 (8th Cir. 1993) (holding contract claim alleging prohibition on processing data for third parties not preempted); *Michael Nobel v. Bangor Hydro-Elec. Co.*, 584 A.2d 57, 58 (Me. 1990) (holding contract claim alleging promise to pay not preempted); *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488, 1501 (5th Cir. 1990) (holding contract claim alleging prohibition on use of copyrighted works as sales material not preempted); *Acorn Structures, Inc. v. Swantz*, 846 F.2d 923, 926 (4th Cir. 1988) (holding contract claim alleging duty to either buy copyrighted plans or purchase building materials not preempted); *Brignoli v. Balch Hardy and Scheinman, Inc.*, 645 F. Supp. 1201, 1205 (S.D.N.Y. 1986) (holding contract claims alleging breach of duty to pay not preempted); *Smith v. Weinstein*, 578 F. Supp. 1297, 1307 (S.D.N.Y. 1984) (stating that contract claim alleging nothing more than copyright infringement should be preempted but holding contract claim alleging breach of confidentiality not preempted), *aff'd*, 738 F.2d 419 (2d Cir. 1984).

259. *See Ballas v. Tedesco*, 41 F. Supp. 2d 531, 536-37 (D.N.J. 1999) (finding contract claim preempted as equivalent to rights under Copyright Act); *American Movie Classics Co. v. Turner Entertainment Co.*, 922 F. Supp. 926, 931-32 (S.D.N.Y. 1996) (holding contract claim preempted because it alleged no rights other than those protected by copyright law); *Benjamin Capital Investors v. Cossey*, 867 P.2d 1388, 1391 (1994) (same); *Wolff v. Institution of Elec. and Elecs. Eng'rs, Inc.*, 768 F. Supp. 66, 69 (S.D.N.Y. 1991) (holding contract claim preempted where infringement of copyright was sole breach alleged); *see also* 3 GOLDSTEIN, *supra* note 217, § 15.2.1, at 15:13 (“Simply casting a claim as one for contract breach will not save it from preemption.”).

260. *See Lennor*, 63 F. Supp. 2d at 438 (finding non-disclosure duty in contract provided an extra element protecting contract claim from preemption); *Law Bulletin Publ'g Co.*, 1998 U.S. Dist. LEXIS 11345, at \*14-15 (duty to not convey copyrighted materials to third party); *National Car Rental Sys., Inc.*, 991 F.2d at 431-33 (duty to not process data for third parties); *Michael Nobel*, 584 A.2d at 58 (duty to pay); *Taquino*, 893 F.2d at 1501 (duty to not use copyrighted works as sales material); *Acorn Structures, Inc.*, 846 F.2d at 926 (duty to either buy plans or purchase materials from plaintiff); *Smith*, 578 F. Supp. at 1307 (duty of confidentiality); *see also Tavormina v. Evening Star Prods., Inc.*, 10 F. Supp. 2d 729, 734 (S.D. Tex. 1998) (mem.) (preempting portion of contract claim citing the allegations identical to those that would support a copyright infringement claim while declining to preempt portion of contract claim citing broader rights).

Some authority reads § 301's reference to “equivalent” rights very loosely. *See* 1 NIMMER & NIMMER, *supra* note 11, § 1.01[B][1], at 1-12 (“The fact that the state-created right is either broader or narrower than its federal counterpart will not save it from pre-emption.”); 3 GOLDSTEIN, *supra* note 217, § 15.2.1, at 15:9 (same). But even granting such deviance from the plain language of § 301, a contract claim—as opposed to, say, a claim under a state statute—alleging rights in excess of those specified in the Copyright Act will of necessity allege more than mere infringement, thus satisfying even courts that have found contract claims preempted under § 301(a). *See infra* note 245.

context of the first sale doctrine,<sup>261</sup> allowing copyright owners to assert contract claims beyond the statutory limits set on infringement claims. The Supreme Court, when it initially recognized the first sale doctrine, hinted at its willingness to uphold contract claims on the post-sale disposition of particular copies of copyrighted works notwithstanding its holding that the Copyright Act allowed no similar cause of action.<sup>262</sup> Other courts have confirmed the effectiveness of contracts that go beyond the limits of the Act<sup>263</sup> and, to judge from legislative history, Congress has embraced the same view.<sup>264</sup> In sum, a common law claim will probably escape § 301 preemption if it asserts rights more extensive than those allowed under the Copyright Act, a circumstance from which, through their election of remedies, copyright owners can fully benefit.<sup>265</sup>

Commentators who worry about the power of copyright and common law in combination might well prefer that § 301 preemption do more to curtail the election of remedies doctrine. Allowing copyright owners to elect common law remedies to the exclusion of overlapping statutory ones can hardly discourage aggressive licensing practices or impenetrable technological fences, after all. To the contrary, it might encourage copyright owners to leverage their already considerable statutory rights to win extra-statutory contractual remedies, the enforceability of which the doctrine of election would sustain. Preemp-

261. See 17 U.S.C. § 109 (1994) (specifying conditions under which the Act does not prevent the owner of a particular copy or phonorecord from selling or otherwise disposing of it at will).

262. See *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350-51 (1908).

263. See *Platt & Munk Co. v. Republic Graphics, Inc.*, 315 F.2d 847, 851-55 (S.D.N.Y. 1962) (holding that if on remand the trial court finds title to copyrighted works properly vested in defendant case should be resolved under contract law); see also *Quality King Distrib. v. L'Anza Research Int'l*, 523 U.S. 135, 143 n.10 (1998) (quoting *Bobbs-Merrill* so as to indicate that breach of contract suit might have proceeded even though copyright infringement claim barred by first sale doctrine); *Microsoft Corp. v. Harmony Computers & Elecs.*, 846 F. Supp. 208, 214 (E.D.N.Y. 1994) ("[E]ven assuming that Microsoft sells its software to its licensees on a stand-alone basis, this does not change the fact that . . . the licensees . . . are restricted by the license agreement in a way that the copyright holder itself is not."); *American Int'l Pictures, Inc. v. Foreman*, 576 F.2d 661, 664 n.3 (5th Cir. 1978) (observing that the first sale doctrine does not bar contract suits); *United States v. Wise*, 550 F.2d 1180, 1187 n.10 (9th Cir. 1977) (same); *Independent News Co. v. Williams*, 293 F.2d 510, 516 (3d Cir. 1961) (quoting *Harrison v. Maynard, Merrill & Co.*, 61 F. 689, 691 (2d Cir. 1894) (saying of defendant having good title to copies of plaintiff's copyrighted works, "If he has agreed that he will not sell it for certain purposes or to certain persons, and violates his agreement, and sells to an innocent purchaser, he can be punished for a violation of his agreement; but neither is guilty, under the copyright statutes, of an infringement.")).

264. See H.R. REP. NO. 94-1476, at 62, reprinted in 1976 U.S.C.A.N. 5659, 5693 (first sale doctrine set forth in § 109 "does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright").

265. See Lemley, *supra* note 2, at 141 ("[S]ection 301 does not seem to preempt most contractual provisions . . .").



tion under § 301 looks like the wrong tool to combat that problem, however, as it speaks to the equivalency of *rights* rather than of *remedies*. Perhaps implied conflict preemption via the Supremacy Clause or copyright misuse doctrine could help to correct overpowering combinations of statutory and common law protections.<sup>266</sup> That, however, remains a separate—and difficult—question.<sup>267</sup>

Certainly, at any rate, the election of remedies doctrine will do nothing to curtail statutory rights. Although it calls on copyright owners to step outside of the Act to assert any inconsistent common law remedies, they continue to enjoy the benefits of copyright law in all other respects. Far from casting them out of the statute's sanctuary, in other words, the election of remedies doctrine offers copyright owners a revolving door that opens onto a covered patio. The problem with the election of remedies doctrine lies in the Copyright Act's generosity to copyright owners. The solution lies in making copyright owners exit the statute more finally.

### B. Copyright Abandonment

Courts<sup>268</sup> and commentators<sup>269</sup> agree that a copyright owner can reject the Copyright Act's protections and abandon an expressive work

266. Compare *id.* at 141-44, 151-58 (emphasizing the potential of Supremacy Clause preemption and copyright misuse doctrine, respectively, in limiting contract law), with Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827, 864-66, 867-73 (1998) (emphasizing the deficiencies of Supremacy Clause preemption and copyright misuse doctrine, respectively, in limiting contract law).

267. See *infra* Part IV.B-C (discussing implied conflicts preemption and copyright misuse, respectively).

268. See *Pacific & S. Co. v. Duncan*, 572 F. Supp. 1186, 1196 (N.D. Ga. 1983) (finding that television station abandoned copyright in news broadcasts because evinced intent to do so by destroying copies thereof), *aff'd in relevant part*, 744 F.2d 1490, 1500 (11th Cir. 1984); *Hadady Corp. v. Dean Witter Reynolds, Inc.*, 739 F. Supp. 1392, 1399 (C.D. Cal. 1990) (finding that notice limiting copyright to a two-day period effectuated abandonment after that time); see also *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594, 598 (2d Cir. 1951) (asserting in dicta that copyright's owner may abandon it "by some overt act which manifests his purpose to surrender his rights in the 'work,' and to allow the public to copy it"), *modified*, 198 F.2d 927 (2d Cir. 1952).

269. U.S. DEPT. OF COMMERCE, INFORMATION INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT ON THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 16 (1995) ("Those creators who wish to dedicate their works to the public domain may, of course, do so notwithstanding the availability of protections under the Copyright Act."); Robert A. Kreiss, *Abandoning Copyrights to Try to Cut Off Termination Rights*, 58 MO. L. REV. 85, 92 (1993) ("[A]bandonment of copyright can be done explicitly or implicitly.") (footnotes omitted); Henry H. Perritt, Jr., *Property and Innovation in the Global Information Infrastructure*, 1996 U. CHI. LEGAL F. 261, 292 n.119 ("Copyright owners may relinquish their property interest and put their works in the public domain."); see also 2 GOLDSTEIN, *supra* note 217, § 9.3 (describing how abandonment functions as a defense to copyright infringement); 4 NIMMER & NIMMER, § 13.06 (same).

to the public domain.<sup>270</sup> Because such an abandonment of copyright happens only rarely—and sees defining litigation even less frequently—some interesting questions remain unresolved. Can a copyright's owner abandon only some of the Act's protections and, to divide things still more finely, abandon them for only a certain period of time?<sup>271</sup> Do the Copyright Act's termination provisions<sup>272</sup> limit the effectiveness of an abandonment made prior to the vesting of any contingent reversionary rights?<sup>273</sup> But how one answers those questions

270. Notwithstanding that consensus, it bears noting that the Copyright Act nowhere specifically permits abandonment and perhaps even impliedly disavows it. See Kreiss, *supra* note 269, at 98. Professor Kreiss offers five powerful arguments, however, why no one can reasonably take the Act to forbid abandonment, *see id.* at 98-101, 117-18, one of which proves especially relevant to the present argument for allowing an exit from copyright: "[P]ersonal freedom, including the freedom to control or dispose of one's own property . . . underlies the notion that an author can abandon his copyrights." *Id.* at 100.

271. Compare *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Coop. Prod., Inc.*, 1981 Copyright L. Dec. (CCH) ¶ 25,314 (N.D. Ga. 1981) (rejecting concept of "limited abandonment" of copyright), *Paramount Pictures Corp. v. Carol Publ'g Group*, 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998) (quoting *Showcase*), *Richard Feiner & Co. v. H.R.I. Indus.*, 10 F. Supp. 2d 310, 313 (S.D.N.Y. 1998) (quoting *Showcase* and *NIMMER & NIMMER*), and 4 *NIMMER & NIMMER*, *supra* note 11, § 13.06, at 13-274 ("The law does not recognize a limited abandonment, such as an abandonment only in a particular medium, or only as regards a given mode of presentation."), with *Micro Star v. Formgen*, 154 F.3d 1107, 1114 (9th Cir 1998) (suggesting that copyright rights may be partially abandoned), 2 GOLDSTEIN, *supra* note 217, § 9.3, at 9:12-1 (citing *Micro Star*), and Kreiss, *supra* note 269, at 96 (arguing for allowing abandonment of select copyright rights and for select periods). See also *id.* at 96 n.44 ("The court in *Showcase* rejected the idea of a limited abandonment because no authority had been cited for such a proposition. Such a 'reason' is really no reason at all.")

272. See 17 U.S.C. § 203 (1994) (providing that any grant, other than by will, of a transfer or license made on or after January 1, 1978 of a copyrighted work not made for hire may be terminated by the author upon certain conditions notwithstanding any agreement to the contrary); *id.* § 304(c) (providing much the same with regard to any grant of a transfers or license of a renewal of copyright or any right under it executed prior to January 1, 1978). In effect, these provisions make it impossible for an author to give an enforceable promise to not terminate a transfer or license of copyright.

273. Professor Kreiss gives that question extensive consideration, *see Kreiss, supra* note 269, at 111-23, and answers it with a qualified, "Yes." But at the same time he defends abandonment in general as a matter of personal freedom and autonomy, *see id.* at 100-01, principles with which the Act's termination provisions, embodying as they do a paternalistic restraint on authors' freedom of contract, directly conflict. Kreiss admits that abandonment of contingent reversionary rights does not conflict with the literal language of the Act, *see id.* at 113, but defends his interpretation on grounds that in particular circumstances the termination provisions protect authors from the hazards of imbalanced negotiations with copyright grantees, *see id.* at 114-15.

Policy considerations in fact argue against extending termination's scope, however. Firstly, whatever the benefits of termination in traditional contexts, it generally proves useless to authors considering abandonment. The public to whom such authors "grant" their works does not, after all, enjoy overwhelming bargaining power. Kreiss would, in all fairness, bar only abandonment of contingent reversionary rights effectuated under bargaining pressure and in conjunction with a grant of present rights. *See id.* at 121-23. But even that goes too far because, secondly and more fundamentally, termination in fact hurts most authors by decreasing the present value of their grants and erodes their bargaining power by denying them the right to credibly offer non-terminable grants. Kreiss apparently has a zero-sum view of bargains between authors and grantees: "If a copyright grantee receives a grant and also negotiates for the abandonment of other copyrights, one can presume that the abandonment is designed for the benefit of the grantee." *Id.* at 123. But we can also presume that such an abandonment benefits the grantor!

at most affects only the means by which copyright owners abandon their works—not whether they can abandon them at all.<sup>274</sup> Abandonment remains an option.

Granted that copyright owners can *choose* to abandon their statutory rights and rely solely on common law, both as defended by and used in defense of technological self-help tools, could courts *force* them to so exit copyright? As a practical matter, yes. If courts consistently nullified private protections of copyrighted works as too powerful when combined with statutory protections, and the works' owners preferred the former protections over the latter, courts would give self-interested copyright owners a nearly irresistible incentive to save their private rights by sacrificing their statutory ones. In other words, the owners of expressive works might abandon copyright to preempt preemption.<sup>275</sup>

Would a court respect the choices of such former copyright owners and uphold their private rights? The claimants would of course have to frame their common law causes of action so as to avoid preemption under § 301 of the Copyright Act, but that should pose a relatively easy task.<sup>276</sup> Nor does the doctrine of copyright misuse appear likely to negate an abandonment of statutory rights, given that the doctrine aims to limit the power of statutory and common law rights acting in concert.<sup>277</sup> Indeed, courts have invoked copyright misuse to limit statutory rights even as they let stand coincident common law ones.<sup>278</sup>

Termination makes no economic sense even in traditional contexts, much less in the context of abandonment. We should thus as a matter of policy strongly disfavor it.

274. On the arguments above, *supra* note 273, a copyright owner should be able to effectuate complete, immediate, and permanent abandonment—even prior to the vesting of any contingent reversionary rights—by placing into the public domain both all copyright rights and any contingent reversionary rights.

275. To speak more broadly, copyright owners might abandon copyright to avoid not only preemption but also the doctrine of copyright misuse. See *Open Discussion*, *supra* note 11, at 839-45 (analyzing abandonment as a strategy for avoiding claims of copyright misuse); Lemley, *supra* note 2, at 157.

276. See *supra* Part IV.A.

277. See Lemley, *supra* note 2, at 157 (“[A] plaintiff who truly does ‘opt out’ of copyright in favor of contract presumably would not be bound by the limits of the copyright misuse defense.”).

278. See *PRC Realty Sys., Inc. v. National Ass’n of Realtors*, No. 91-1125, 1992 U.S. App. LEXIS 18017, at \*38 (4th Cir. Aug. 4, 1992) (“[T]hough the aspects of the district court’s opinion allowing for damages for breach of contract are affirmed, any order allowing for an award for violation of copyright, or continued enforcement of the licensing agreement through injunction, must be reversed.”); *Tamburo v. Calvin*, No. 94 C 5206, 1995 U.S. Dist. LEXIS 3399, at \*15-19 (N.D. Ill. Mar. 17, 1995) (granting motion to dismiss copyright infringement claim on grounds of misuse but granting leave to amend contract and other claims).

It remains a bit uncertain exactly how broad an impact the court in *PRC Realty Systems* intended copyright misuse to have on the contract in question. The passage quoted above suggests that damages based solely on breach of contract would remain available even prospectively. But the court also claimed, more broadly, “The licensing agreement between parties . . . which now controls interests and obligations concerning copyrighted material, following PRC’s copyright filing, is invalid as an instance of misuse of

How a court would apply Supremacy Clause preemption to common law claims left standing after abandonment of copyright looks less certain.<sup>279</sup> In all likelihood, the question would never arise. Content to rely on § 301,<sup>280</sup> courts have apparently never invoked implied conflicts preemption under the Supremacy Clause to determine the scope of preemption of a common law claim in such instances,<sup>281</sup> much less to strike one down.<sup>282</sup> Courts prefer to avoid those sorts of abstract constitutional questions.<sup>283</sup> Suppose, however, that a court overcame that aversion and tested against the Supremacy Clause a common law claim to a work in which its owner had abandoned the copyright. Rather than finding that common claim preempted, the court should, in returning to fundamental constitutional principles, recognize that copyright represents an extraordinary exception to common law's default rules<sup>284</sup> and that to favor the former over the latter would violate

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copyright." *PRC Realty Sys.*, 1992 U.S. App. LEXIS 18017, at \*37-38. Principles of law and policy support the narrower holding. Firstly, a mere copyright filing cannot suffice to distinguish the two stages of the contract. Copyright originates at the fixation of an expressive work, 17 U.S.C. § 102(a) (1994), a question of law that the court apparently misunderstood. *See PRC Realty Sys.*, 1992 U.S. App. LEXIS 18017, at \*36-37 (claiming that agreements made before filing did not involve or concern copyrighted material). Secondly, since the court affirmed damages for breach of contract that arose absent the threat of copyright infringement, it should affirm similar damages arising after and as long as the misuse defense keeps such threats in check.

Other courts that left undisturbed contracts that combined with copyrights to give rise to a misuse defense did so for less probative reasons. *See Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990) (neglecting to rule on contract between plaintiff and third party); *Practice Management Info. Corp. v. American Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997) (same); *Alcatel USA, Inc. v. DGI Techs., Inc.* 166 F.3d 772, 792-94 (5th Cir. 1999) (same); *Qad., Inc. v. ALN Assoc., Inc.* 770 F. Supp. 1261, 1266 n.13 (N.D. Ill. 1991) (granting summary judgment on copyright misuse claim but leaving contract claim unresolved), *aff'd*, 974 F.2d 834 (7th Cir. 1992).

279. *See Bell*, *supra* note 3, at 610-11 (saying of the claim that the implied conflicts preemption might void some copyright licenses, "A paucity of relevant case law and the subtleties inherent to Supremacy Clause preemption leave the supposition unresolved . . ." (footnotes omitted)).

280. *See* 1 NIMMER & NIMMER, *supra* note 11, § 1.01[B], at 1-8 (explaining that courts have had little need to refer to the Supremacy Clause because they "may simply turn to the explicit statutory language"); 3 GOLDSTEIN, *supra* note 217, § 15.3.3, at 15:35-36 ("Arguably, section 301 has entirely displaced constitutional preemption doctrine under the supremacy clause in cases involving state protection of copyright subject matter.").

281. The Court's discussion in *Goldstein v. California*, 412 U.S. 546, 567-71 (1973), of Supremacy Clause preemption proves unhelpful, as that case concerned solely a California criminal statute and not a common law claim.

282. *But see* *Fantastic Fakes, Inc. v. Pickwick Int'l, Inc.*, 661 F.2d 479, 483 (5th Cir. 1981) (dictum) ("It is possible to hypothesize situations where application of particular state rules of [contract] construction would so alter rights granted by the copyright statutes as to invade the scope of copyright or violate its policies.").

283. *See* Lemley, *supra* note 2, at 145 (noting that courts have refused to explore implied conflicts preemption because it "seems like an awfully big hammer").

284. *See supra* Part III.A.

not only principles of statutory interpretation<sup>285</sup> but also the Bill of Rights.<sup>286</sup>

Even granted that courts could give copyright owners powerful incentives to abandon their statutory rights, and that courts would uphold common law rights to works the owners of which have abandoned copyright, it remains a separate question whether courts could directly demand a copyright owner to choose between statutory and common law protections of expressive works. Doubtless, no court prepared to preempt a common law claim under § 301 would be so bold as to offer escape from copyright as an alternative. Section 301 plainly forbids that option, providing both that "all legal or equitable rights" within its scope "are governed exclusively by" the Copyright Act and expressly denying protection to any "equivalent right in any such work under the common law."<sup>287</sup> To re-open an exit from copyright in that context would require lawmakers to amend § 301 by adding something like the following: "(g) Nothing in this title annuls or limits any person's legal or equitable right to a work under the common law of any state if that party permanently abandons with respect to that work all rights and remedies under this title."<sup>288</sup>

Would Congress pass, and the President sign, a bill amending § 301 to guarantee an exit from copyright in such cases? To do so would, for reasons set forth above, bring the Act into greater conformity with the Constitution's original meaning<sup>289</sup> and with current copyright policy.<sup>290</sup> But, as also set forth above, public choice factors evidently have far greater influence over copyright legislation than mere rectitude does.<sup>291</sup> How the "indelicate balance" of lobbyists would unfold remains unclear. On the one hand, copyright industries might welcome the proposed § 301(g) as a way to open, without apparent cost to their extant rights and remedies under the Act, new options for protecting their expressive works.<sup>292</sup> On the other hand, they might worry that courts

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285. See *supra* Part III.B.1.

286. See *supra* Part III.D.

287. 17 U.S.C. § 301(a) (1994).

288. Cf. Bell, *supra* note 3, at 616-17 (proposing an amendment to § 301 designed to effect a similar reform with regard solely to contract claims).

289. See *supra* Part III.B.

290. See *supra* Parts III.A, C.

291. See *supra* Part III.E.

292. Professor Lemley has correctly observed that copyright owners would prefer to avoid choosing between statutory and common law rights. See Lemley, *supra* note 11, at 1274 (noting that, rather than facing an all-or-nothing choice like the one between trade secret and patent protection, copyright owners "would prefer to 'pick and choose' only the copyright rules that benefit them"). But cf. Lemley, *supra* note 2, at 150 (suggesting that proposed U.C.C. Article 2B might obviate the distinction between statutory and common law rights). A court that has gone so far as to invoke § 301 preemption, however, will already have

would more readily threaten preemption under § 301 if (g) stood ready to soften the impact of (a). Far-seeing federal officials might disfavor the proposed § 301(g), too, calculating that it would decrease their political rent-seeking opportunities by removing some expressive works from the scope of the Copyright Act.

Ultimately, though, § 301(g) could remain hypothetical without having too great an impact on whether courts open an escape from copyright. Because careful copyright owners should find it fairly easy to avoid having their common law claims preempted by § 301(a),<sup>293</sup> courts would seldom hear its call to close the exit option. That leaves two other options for directly confronting a copyright owner with the choice between statutory and private protections of expressive works: implied conflicts preemption under the Supremacy Clause and copyright misuse. The former remains wholly theoretical; research uncovers no case in which a court has struck down a common law right as impliedly preempted by federal copyright law.<sup>294</sup> Nor should any court do so.<sup>295</sup> More to the point, however, no court is likely even to consider the question. The defense of copyright misuse offers a more proven, moderate, and incremental way to mitigate potentially harmful combinations of copyright and private rights. Interestingly, it has also come to offer something like an escape from copyright.

### *C. Copyright Suspension*

The doctrine of copyright misuse will bar enforcement of a copyright if its owner leverages rights afforded under the Copyright Act in an attempt to achieve particular types of wrongs.<sup>296</sup> Created fairly recently by courts applying general principles of equity, copyright misuse remains a somewhat exceptional defense.<sup>297</sup> Circuits have split on whether it can arise independent of an antitrust violation.<sup>298</sup> Perhaps

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decided to withdraw one half of that double benefit. The proposed § 301(g) would at least then allow a copyright owner to choose which benefit remains.

293. See *supra* Part IV.A.

294. See Bell, *supra* note 3, at 611-13 (discussing implied conflicts preemption of contracts regulating access to copyrighted works).

295. See *supra* text accompanying notes 266-73.

296. See 2 GOLDSTEIN, *supra* note 217, § 9.6; 4 NIMMER & NIMMER, *supra* note 11, § 13.09[A].

297. See 2 GOLDSTEIN, *supra* note 217, § 9.6, at 9:34; 4 NIMMER & NIMMER, *supra* note 11, § 13.09[A], at 13-284.

298. Compare *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) ("The question is not whether the copyright is being used in a manner violative of antitrust law . . . but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright."), *Practice Management Info. Corp. v. American Med. Ass'n*, 121 F.3d 516, 521 (9th Cir. 1997) ("[A] defendant in a copyright infringement suit need not prove an antitrust violation to prevail on a copyright

the trend runs toward recognizing copyright misuse for violations of public policy generally; the theory has certainly proven popular in, well, theory.<sup>299</sup> Suffice it to say, then, that copyright misuse holds potential for correcting abusive combinations of statutory and common law rights.

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misuse defense.”), *amended by* 133 F.3d 1140 (9th Cir. 1998), and *Alcatel USA, Inc. v. DGI Techs., Inc.* 166 F.3d 772, 792-94 (5th Cir. 1999) (reversing on grounds of copyright misuse injunctive relief for copyright infringement despite also affirming dismissal of antitrust claim), with *Columbia Broad. Sys., Inc. v. American Soc’y of Composers, Authors & Publishers*, 562 F.2d 130, 141 n.29 (2d Cir. 1977) (finding misuse on grounds coextensive with antitrust violation), *rev’d on other grounds*, 441 U.S. 1 (1978), *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1200 (7th Cir. 1987) (“We hold that a no-contest clause in a copyright licensing agreement is valid unless shown to violate antitrust law.”), and *BellSouth Adver. & Publ’g Corp. v. Donnelley Info. Publ’g, Inc.*, 933 F.2d 952, 961 (11th Cir. 1991) (declining to find copyright misuse absent antitrust violation), *vacated and reh’g en banc granted*, 977 F.2d 1435 (11th Cir. 1992), and *rev’d on other grounds*, 999 F.2d 1436 (11th Cir. 1993). See also *Coleman v. ESPN, Inc.*, 764 F. Supp. 290, 295 (S.D.N.Y. 1991) (allowing defendant to proceed to trial on copyright misuse defense based on unreasonable restraint of trade); *Reliability Research Inc. v. Computer Assoc. Int’l, Inc.*, 793 F. Supp. 68, 69 (E.D.N.Y. 1992) (declining to strike copyright misuse defense on grounds its availability absent antitrust offense remains “an open and disputed question of law”); 2 GOLDSTEIN, *supra* note 217, § 9.6.1, at 9:38-1 through 9:40 (discussing availability of defense absent showing of antitrust violation); 4 NIMMER & NIMMER, *supra* note 11, § 13.09[A], at 13-292 (same).

299. See *Vogue Ring Creations, Inc. v. Hardman*, 410 F. Supp. 609, 615-16 (D.R.I. 1976) (stating that material misstatements in copyright registration could give rise to copyright misuse) (dictum); *Broadcast Music, Inc. v. Moor-Law, Inc.*, 527 F. Supp. 758, 772 n.24 (D. Del. 1981) (“Copyright misuse and antitrust analysis in this area are not necessarily coextensive.” (dictum)), *aff’d*, 691 F.2d 490 (3d Cir. 1982); *National Cable TV Assoc., Inc. v. Broadcast Music, Inc.*, 772 F. Supp. 614, 652 (D.D.C. 1991) (claiming that violation of antitrust laws not a prerequisite to showing copyright misuse) (dictum); *Budish v. Gordon*, 784 F. Supp. 1320, 1336-37 (N.D. Ohio 1992) (suggesting same) (dictum); *Broadcast Music Inc. v. Hampton Beach Casino Ballroom Inc.*, Civ. No. 94-248-B, 1995 U.S. Dist. LEXIS 13103, at \*16-17 (D.N.H. Aug. 30, 1995) (claiming that violation of antitrust laws not a prerequisite to showing copyright misuse) (dictum); *In re Independent Serv. Org. Antitrust Litig.*, 85 F. Supp. 2d 1130, 1175-76 (D. Kan. 2000) (same) (dictum); *Religious Tech. Ctr. v. Lerma*, Civ. No. 95-1107-A, 1996 U.S. Dist. LEXIS 15454, at \*33-34 (E.D. Va. Oct. 4, 1996) (suggesting same) (dictum); see also *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1547 (11th Cir. 1996) (suggesting in dictum that a finding of copyright misuse might be appropriate to ensure compatibility of computer software).

The Seventh Circuit seems particularly conflicted over the legitimacy of a copyright misuse defense unsupported by an antitrust claim. Notwithstanding the derogation of such claims in *Saturday Evening Post Co.*, 816 F.2d at 1200, the circuit’s district courts have embraced them. See *Qad., Inc. v. ALN Associates, Inc.* 770 F. Supp. 1261, 1266 n.13 (N.D. Ill. 1991) (granting summary judgment to defendant alleging copyright misuse and violation of antitrust law, and thereby denying relief on copyright infringement claim, but expressly basing opinion on finding that misuse violated public policy underlying copyright law), *aff’d on other grounds*, 974 F.2d 834 (7th Cir. 1992); *Tamburo v. Calvin*, No. 94 C 5206, 1995 U.S. Dist. LEXIS 3399, at \*15-16 (N.D. Ill. Mar. 17, 1995) (granting motion to dismiss copyright infringement claim on grounds of misuse despite absence of antitrust claims but granting leave to amend contract and other claims). Such independent thinking appears to have inspired a reminder, see *Reed-Union Corp. v. Turtle Wax, Inc.*, 77 F.3d 909, 913 (7th Cir. 1996) (stating that availability of any sort of copyright misuse defense remains “an open issue in this court”), *reh’g en banc denied*, 37 U.S.P.Q.2d (BNA) 1718 (1996). Curiously, the Seventh Circuit also generated one of the earliest and broadest statements about copyright misuse. See *F.E.L. Publications, Ltd. v. Catholic Bishop*, 214 U.S.P.Q. (BNA) 409, 413 n.9 (7th Cir. 1982) (“[I]t is copyright misuse to exact a fee for the use of a musical work which is already in the public domain.” (dictum)).

It does so, moreover, by forcing copyright owners to choose between those two means of protecting expressive works.

In contrast to courts considering preemption under § 301 or the Supremacy clause, courts finding copyright misuse show no particular favoritism for statutory over common law rights. To the contrary, they suspend enforcement of the copyright in question unless and until the misuse ends,<sup>300</sup> while leaving coincident common law rights standing.<sup>301</sup> Copyright misuse thus effectuates a contingent sort of exit. It requires a copyright owner who has violated public policy by combining statutory rights and common law rights to either forsake the former and rely on the latter, or reform any associated practices so as to end the misuse. A copyright owner could conceivably find exile comfortable enough to compensate for the loss of his statutory rights and happily choose to remain there. Notably, however, and in contrast to someone who has abandoned her copyright,<sup>302</sup> he could presumably reclaim extant statutory rights at will.<sup>303</sup> Copyright misuse nonetheless has bite; in contrast to an election of remedies,<sup>304</sup> it sharply reduces the sum of rights enjoyed by copyright owners.

Although the doctrine of copyright misuse has opened an escape from copyright, it bears noting that it has done so only in a somewhat fragile and even accidental fashion. The doctrine remains controversial—especially as invoked for generic violations of public policy—and wholly the creature of equity.<sup>305</sup> Because courts apparently did not have opening an escape from copyright in mind when they first recognized copyright misuse, they risk developing the still-nascent doctrine in ways that derogate common law protections of expressive works. Further and more fundamentally, because courts measure misuse against public policy as expressed in the Copyright Act, the scope of misuse shrinks

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300. See *Lasercomb America, Inc.*, 911 F.2d at 979 n.22 ("This holding, of course, is not an invalidation of Lasercomb's copyright. Lasercomb is free to bring a suit for infringement once it has purged itself of the misuse."); *Practice Management Info. Corp.*, 121 F.3d at 520 n.9 ("Copyright misuse does not invalidate a copyright, but precludes its enforcement during the period of misuse."); *Alcatel USA, Inc.*, 166 F.3d at 793 n.81: ("A finding of misuse does not . . . invalidate plaintiff's copyright."); *Qad, Inc.*, 770 F. Supp. at 1271 n.23 ("It may be possible for qad to purge itself of copyright misuse and then defend its copyright in another cause of action . . ."); *Tamburo*, 1995 U.S. Dist. LEXIS 3399, at \*22 ("Under Illinois law, the valid parts of a partially unlawful contract are enforceable.").

301. See *supra* note 278.

302. See *supra* Part IV.B.

303. At least insofar as allowed by countervailing principles of estoppel, see 4 NIMMER & NIMMER, *supra* note 11, § 13.07, at 13-275 to 13-277 (describing scope and effect of estoppel defense); 2 GOLDSTEIN, *supra* note 217, at § 9.5.2 (same), or laches, see 3 NIMMER & NIMMER, *supra* note 11, § 12.06 (describing scope and effect of laches defense); 2 GOLDSTEIN, *supra* note 217, § 9.5.1 (same). See also 2 GOLDSTEIN, *supra* note 217, § 9.5 (describing relationship between laches and estoppel defenses).

304. See *supra* Part IV.A.

305. See *supra* text accompanying notes 232-35.



each time lawmakers expand the statutory powers afforded to copyright owners. Legislative trends thus suggest that the exit option opened by the doctrine of copyright misuse will shrink over time.<sup>306</sup> However much that conclusion discourages, who would wish it otherwise? Unless and until courts find the Copyright Act unconstitutional, they will quite understandably read it as an official statement of public policy with regard to expressive works.

#### *D. Toward an Open Copyright System*

A variety of paths lead toward an exit from copyright. In addition to the effects of copyright owners "preempting preemption"<sup>307</sup> and of courts enjoining copyright misuse,<sup>308</sup> authors can find themselves former copyright owners because the term of their statutory rights has expired,<sup>309</sup> or simply because they choose to dedicate their works to the public domain. An "open" copyright system, one that respects and encourages movement across the Act's porous border, ought to provide for the clear demarcation of works that have exited from statutory protections. For better or (more likely) worse,<sup>310</sup> copyright now inheres by default in fixed works of expression.<sup>311</sup> Copyright owners no longer need to register<sup>312</sup> or to attach copyright notices to their works<sup>313</sup> in

306. See *supra* Part III.E (describing and explaining the expansion of the Copyright Act's scope, rights, and remedies).

307. See *supra* Part IV.B.

308. See *supra* Part IV.C.

309. Assuming that the term ever does expire. As illustrated in Figure 1, *supra* Part III.E.1, the general term of copyright under U.S. law has in recent decades been expanding so quickly as to afford effectively permanent protection.

310. See Dane S. Ciolino, *Reconsidering Restitution In Copyright*, 48 EMORY L.J. 1, 44 (1999) (observing that copyright law suffers from fuzzy boundaries in part due to lax notice requirements); Perritt, *supra* note 269, at 292 n.119 (observing that "it was easier to reach a public-domain conclusion [when] the author of a work established or maintained a statutory copyright only by complying with certain formalities, such as including a copyright notice on any published versions of the work"); Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, *supra* note 77, at 1612 (praising on grounds that it "facilitates identification of those works that are not in the public domain and cannot be used without purchase of a copyright license, and also facilitates identification of the works' owners," the former requirement that publicly distributed works include a copyright notice).

311. The copyright notice requirement was largely struck from the Copyright Act by the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (effective March 1, 1989).

312. See 17 U.S.C. § 408(a) (1994) ("[R]egistration is not a condition of copyright protection."). But see *id.* § 411(a) (providing that copyright owner cannot in general bring suit for infringement before having at least applied for registration); *id.* § 412 (limiting some remedies in some cases to registered works).

313. See *id.* § 401(a) (providing merely that such notice "may be placed on publicly distributed copies" of a work).

order to qualify for protection under the Copyright Act.<sup>314</sup> Absent some sort of notice, then, the public will often not know when a work lies outside of the Act's scope.

Common law or technological self-help protections might limit the use of certain uncopyrighted works, of course, but even then users would benefit from knowing that copyright does not lurk in the background.<sup>315</sup> More importantly, someone who comes across a work unprotected by copyright, common law, or technological tools—just lying about the commons, as it were—would want very much to know that fact. The rest of us would want her to know it, too, so that she might fearlessly pick up the work and put it to good use. Attaching an uncopyright notice to such works would helpfully clarify the public's rights.

What might an uncopyright notice look like? A "©" overlaid with a backslash, per the international iconography of things forbidden, would have done nicely back in the days of typewriters. Contemporary word processing programs do not generally allow double-struck characters, however, and the hypertext markup language standard that applies to the world wide web allows such tricks only grudgingly and indirectly.<sup>316</sup> Fortunately, notice practices under copyright law suggest some ready fixes for this typographical problem. The Act expressly provides that a notice may employ "Copyright" or "Copr." in lieu of "©",<sup>317</sup> suggesting obvious parallels like "Uncopyright" or "Uncopr." Similarly, the ASCII "(c)" by custom suffices when the "©" character

314. *But see id.* §§ 401(d), 402(d) (providing that attaching notice of copyright on published works will generally bar a defense of innocent infringement in mitigation of actual or statutory damages); *id.* § 405(b) (describing limits to liability of innocent infringer of a copyrighted work published before March 1, 1989 without an attached copyright notice).

315. Granted, an uncopyright notice might lead to confusion if attached to a work that reenters copyright due to the vesting of an contingent reversionary interest, *see supra* Part IV.B., or due to the curing of copyright misuse, *see supra* Part IV.C. That argues against using uncopyright notices little more than the marginal problem of expired copyrights argues against using copyright notices, however, and good faith reliance on an erroneous uncopyright notice might go towards mitigating the penalties for infringement. *See* 4 NIMMER & NIMMER, *supra* note 11, § 13.08, at 13-279 to 13-282 (describing scope and effect of innocent infringement defense); *see also id.* § 12.06, at 12-125 to 12-126 (describing how innocent infringer might have laches defense).

316. A web page designer might, for instance, create the appearance of a double-struck character by putting one character as a transparent image in front of the other, text character. For that matter, of course, a designer could simply create an image of an anti-copyright character as a whole and link to it as necessary. *See generally* the various standards defined and published by the World Wide Web Consortium, <www.w3.org>.

317. 17 U.S.C. § 402(b)(1) (1994).

cannot be had, suggesting that “(¢)”<sup>318</sup> would suffice to put the public on notice that a work comes free of the Copyright Act’s limitations.<sup>319</sup>

An open copyright system would ideally do more to promote public discourse—on some accounts the fundamental justification for the Copyright Act<sup>320</sup>—than simply providing clear notice of uncopyrighted works. By encouraging, and sometimes forcing, exit from copyright, it would drive the development of private protections of expressive works.<sup>321</sup> That would in turn decrease the relative importance to copyright owners of securing favorable treatment under the Act, perhaps mitigating the statutory failure that now afflicts copyright legislation. More fundamentally, however, a market success in creating effective common law and technological protections of expressive works would finally obviate the original, exceptional, and only viable justification for copyright.

## V. CONCLUSION: THE PACKET-SWITCHED SOCIETY

Although copyright arose as a necessary but sharply limited evil, it has grown into a pervasive and potent tool of federal information policy.

318. That many uncopyrighted works will come with common law and technological protections that require payment prior to access or use of the works makes use of a monetary symbol all the more (critics would no doubt say “all too”) appropriate.

319. “Uncopyright” would of course signify, per the Old English roots of its prefix, something not copyrighted. “Anticopyright” offers an acceptable substitute, though a purist might object to its mixture of the Greek prefix “anti-”, “copy” from the Medieval Latin, and “right” originating in Old English. Popular usage, which should ultimately prevail over pedantry in such matters, has yet to settle on a uniform noun. Compare Jessica Litman, *Reforming Information Law in Copyright’s Image*, 22 U. DAYTON L. REV. 587 *passim* (1997) (using “un-copyright”), and David A. Rice, *Sega and Beyond: A Beacon for Fair Use Analysis . . . at Least as Far as It Goes*, 19 U. DAYTON L. REV. 1131, 1199 (1994) (“uncopyright”), with Ralph Oman, *Comments at Franklin Pierce Law Center’s Seventh Biennial Intellectual Property System Major Problems Conference: Digital Technology and Copyright: A Threat Or A Promise?* 39 J.L. & TECH. 291, (1999) (“anti-copyright”), Robert C. Cumbow, *Cyberspace Must Exceed Its Grasp, or What’s a Metaphor? Tropes, Trips and Stumbles on the Info Highway*, 20 SEATTLE UNIV. L. REV. 665, 666 (1997) (“anticopyright”), Anthony L. Clapcs, *Confessions of an Amicus Curiae: Technophobia, Law, and Creativity in the Digital Arts*, 19 U. DAYTON L. REV. 903, 925 (1994) (“anti-copyright”), Gordon, *supra* note 81, at 1404 n.273 (“anticopyright”), and Pamela Samuelson, *Creating a New Kind of Intellectual Property: Applying the Lessons of the Chip Law to Computer Programs*, 70 MINN. L. REV. 471, 484 (1985) (“anti-copyright”). No court or commentator appears to have made an adjective out of “anticopyright” or “anti-copyright,” however, exclusively preferring “uncopyrightable,” “uncopyrighted,” and so forth. See, e.g., *Feist Publications v. Rural Tel. Serv.*, 499 U.S. 340, 345 *passim* (1991) (using “uncopyrightable”). One might consider “ex-copyright” another suitable term, though its roots suggest a narrow meaning—“out of or from copyright”—peculiarly suited to works that have fallen out of copyright protection.

320. See *supra* Part III.C.

321. The difficulty of enforcing copyrights on the Internet has already encouraged exploration of such methods. See, e.g., Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15 (1997) (describing and evaluating methods other than copyright law to encourage the production and dissemination of expressive works).

At the same time, market-driven innovation has led to increasingly effective private means of protecting expressive works. Commentators rightly worry that copyright and common law combine to give too much power to the owners of expressive works. The problem, however, lies with copyright law. This paper has thus explored the theory and practice of opening an escape from copyright.

If copyright and private protections prove too powerful in combination, the exit option described in these pages would allow copyright owners to choose either route toward safeguarding their expressive works. To offer that choice wholly comports with fundamental copyright policy, because insofar as common law and self-help technological methods suffice to protect an expressive work they overcome the very market failure that justifies copyright law. To imprison the owners of expressive works within the confines of the Copyright Act, conversely, would do little good and much harm. Congress could not delicately balance public and private rights to expressive works even if it wanted to; it faces powerful incentives to not even try. Nor can federal lawmakers force the owners of expressive works to sacrifice their common law rights without also putting basic constitutional rights at risk. Fortunately, courts have both good reasons and good ways to start implementing a better, more open copyright system.

Comparing the sharply contrasting views described in this paper demonstrates that, as a general matter, two models of society drive the debate over copyright policy. In one, collective deliberation guides central authorities who, after a delicate balancing of competing interests and in the name of the general welfare, define iron-clad terms of access to expressive works. In this model, politicians invoke State power to override private rights, laying down unbreakable lines of communication between copyrighted works and the public. It strongly recalls how the power of eminent domain violates private rights so as to build telecommunications infrastructure and how regulators define the public obligations of common carriers. Call it, then, the circuit-switched model of information policy.

An alternative model inspires the present call for opening an escape from copyright: packet switching. A packet-switching protocol drives Internet communications, of course, making them flexible, robust, scalable, and resistant to central control. But packet switching also explains the success of yet another vital network—the network we call the liberal society.<sup>322</sup>

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322. True to its roots and its meaning everywhere but in contemporary mass U.S. media, "liberal" here means not "left-wing" but rather "free."

Persons in a liberal society pursue countless different goals, some shared and some unique. Each person chooses his, her, or its<sup>323</sup> own route through a web of consent-rich relationships. No one authority directs all these countless various pursuits of happiness. Nor could it, given the complexity of the system. Our packet-switched society instead relies on a few simple rules—based in common courtesy and common law—to define a protocol universal in form, but local in application.<sup>324</sup> Order arises spontaneously, the result of conscious action but not conscious design.<sup>325</sup>

As wire-bound parts of the Internet demonstrate, a packet-switched network may sometimes rely on a circuit-switched infrastructure. Similarly, liberal societies typically rely on some measure of State intervention to help patch the gaps where private means fail. But in neither case should one confuse an old fix for a necessary feature. Thanks to open-access<sup>326</sup> and packet-switched radio communications,<sup>327</sup> the Internet can—and probably should—escape from the circuit-switched bottlenecks so susceptible to seizure and censorship.<sup>328</sup>

Similarly, private means stand ready to finally cure the market failure that alone justifies copyright, a political kludge. It would thus prove unfortunate, indeed, if courts trapped the owners of expressive works within the confines of copyright law. Once rendered superfluous, a necessary evil becomes simply an evil.

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323. In the case of legal persons such as corporations.

324. See generally RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

325. For descriptions of spontaneous orders, see BARNETT, *supra* note 15, at 44-62; FRIEDRICH A. HAYEK, *I LAW, LEGISLATION, AND LIBERTY* 35-54 (1973).

326. See, e.g., Eli M. Noam, *Beyond Auctions: Open Spectrum Access*, in *REGULATORS' REVENGE: THE FUTURE OF TELECOMMUNICATIONS DEREGULATION* 113 (Tom W. Bell & Solveig Singleton eds., 1998).

327. See, e.g., David R. Hughes & Dewayne Hendricks, *Spread-Spectrum Radio*, *SCIENTIFIC AMERICAN*, Apr. 1998, at 94.

328. See David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, 1995 J. ONLINE L. art. 3, ¶¶ 25-31 (June 1995) <<http://warthog.cc.wm.edu/law/publications/jol/post.html>> (discussing how network bottlenecks facilitate control by third parties).