

Globalization and Democratization: The Reclaiming of Copyright

Joshua S. Bauchner*

I.	INTRODUCTION	93
II.	THE BASTARDIZATION OF COPYRIGHT.....	95
	A. <i>The Democratic Society</i>	95
	B. <i>The Copyright Monopoly</i>	96
	C. <i>The Commodization of Copyright</i>	100
III.	A NEW BEGINNING	103
	A. <i>Smashing the Presses: The Fall of Gutenberg</i>	104
	1. Leading the Way: The United States	105
	2. Circling the Wagons: The International Effort	108
	B. <i>Technological Innovation: You Can't Stop a Good Idea</i>	111
IV.	GLOBALIZATION: THE DEATH OF THE LEVIATHAN	114

I. INTRODUCTION

Copyright has evolved into a commodity enabling monopolistic control over creative works. James Madison concluded that copyright represented a unique nexus wherein the public good coincided with the interests of the individual.¹ The Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) further recognized that “authors’ rights had to be limited in order to assure public access to important information.”² Unfortunately, this vision is corrupted as economic motivations dominate the use of copyright to protect investment in works without regard for the public interest. Copyright permits a few entities to control a vast amount of works, considered beneficial to the public good, yet out of its reach. This domination over

* B.A., Wheaton College; J.D., Brooklyn Law School. The author dedicates this Article to EAK for reasons she knows.

1. THE FEDERALIST NO. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961). One conception of copyright recognizes that society is benefited by original efforts. To promote original works, it establishes a limited property right, in a certain way, conveying specific statutory rights to the author. However, it requires a balance between promoting original works and preventing a monopoly upon them—hence, copyright is for a limited duration.

2. Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 16 (1988).

creative works is sanctioned by legislatures and courts through copyright infringement actions and other significant legal consequences.

Copyright should serve to promote a democratic ideology fostering the dissemination of individual expressive works. Copyright protection became necessary to remedy a society dominated by an elite class who elected to offer their patronage in promoting the works of others.³ The first Parliamentary English copyright act was an egalitarian force, endowing authors with certain exclusive rights.⁴ The purpose of the Act was to promote the dissemination of works in the interest of society, while preventing a monopoly and affording some protection against piracy.⁵

The provision of an economic benefit to authors is secondary to the true purpose of promoting original works.⁶ However, copyright has significantly deviated from its original purpose of promoting the development of creative works necessary to the public good. No longer serving this end, business interests have instead commandeered copyright protection in line with profit seeking motivations.

In the face of emerging technologies, the need for copyright is no longer evident. However, in an effort to maintain its utility, courts and legislatures persistently have attempted to adapt copyright to ensure maintenance of the status quo in support of deviant business interests. The result is an ever expanding range of protections, far greater than necessary to promote the arts and sciences, and contrary to the public good.

Part II of this Article illustrates the benefits of copyright's legitimate use in promoting a democratic society and then delineates the dramatic expansion of the copyright monopoly and its resultant commodization, using the United States' misguided efforts as an example. Part III addresses the confrontation between copyright and emerging technologies—detailing aggressive efforts to extend copyright protection into the digital arena. Part IV concludes that the globalizing effect of the Internet, supported by a true, democratic copyright, should serve to stem the copyright assault.

3. See Paul Edward Geller, *New Dynamics in International Copyright*, 16 COLUM.-VLA J.L. & ARTS 461, 465 (1992).

4. See LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 12 (1968) (discussing the history of the Statute of Anne).

5. See *id.* at 14.

6. *Mazer v. Stein*, 347 U.S. 201, 219 (1954); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding the purpose of copyright is not to provide economic benefit to the copyright owner but to provide an incentive to create original works for the benefit of society).

II. THE BASTARDIZATION OF COPYRIGHT

The bastardization of copyright is contrary to the public interest for three reasons. First, modern copyright violates the principles and ideals of a democratic society. Second, copyright permits monopolistic control over original works of expression. Third, commodization does not serve as an inducement to creativity.

A. *The Democratic Society*

Copyright is an essential element of a democratic society and may serve to promote global democratization. “By according creators of original expression a set of exclusive rights to market their literary and artistic works, copyright fosters the dissemination of knowledge, supports a pluralist, nonstate communications media, and highlights the value of individual contributions to public discourse.”⁷

Professor Neil Weinstock Netanel defines three means by which copyright promotes a democratic ideology. First, in a democracy, creative expression and information should be treated as public goods.⁸ However, authors need an instrument to recover costs as an incentive for production and dissemination. Copyright provides authors with a right to exclude permitting them to “recover their costs by selling access to their works on the market.”⁹ Second, copyright “underwrites the conditions for expressive activity required for a thriving democracy by enabling authors and publishers to create and disseminate cultural works without undue reliance on government patronage.”¹⁰ Third, it cultivates democratic culture by emphasizing individual creativity.¹¹ Copyright, therefore, fosters individual expressive activity necessary to the promotion of diverse ideas integral to a democracy.

The combination of these forces serves to promote political and social debate, education, cultural diversity and, perhaps most important to a democratic society, individual autonomy.¹² The success of a democracy is contingent upon the advancement of these principles. It is

7. Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 217, 220 (1998).

8. *See id.* at 227.

9. *Id.*

10. *Id.* at 228.

11. *See id.*

12. Even works without an apparent political or social message promote democratic ideals. Netanel supports this conclusion arguing that totalitarian regimes have sought to proscribe artistic endeavors in order to stifle creativity and the individuality it fosters. Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 350 (1996). At the very least, most all creative works are of value to society as evidence of our culture.

a democratic government's responsibility to restrict copyright protections to serve this limited ideal. Unfortunately, as this paper will explain, such a limited copyright has been egregiously expanded, stifling, rather than supporting, such a democratic ideology. Copyright need not and should not be governed by market principles. Rather, it should be scaled back to serve its original purpose. However, this reconfiguration must take place in the light of emerging technologies.¹³

B. *The Copyright Monopoly*

The modern copyright monopoly expands the protections governing use of a work and extends protections to a broader array of works.¹⁴ This is exacerbated by the persistent lengthening of the duration of copyright protection. Further, the curtailment of the requirements to establish copyright protection and extension of established rights has augmented the range of monopoly protection:

The international TRIPS Agreement¹⁵ exemplifies this expansion by single-mindedly protect[ing] copyright owners' rights without providing the necessary limitations on copyright protection that make it an engine for change and originality rather than a one-sided anticompetitive mechanism. To the detriment of all, TRIPS transforms a copyright monopoly from one that serves the public interest into one that benefits only the copyright industries.¹⁶

The enlargement is further highlighted by the Berne Convention which "has remained relatively unchanged throughout each of the five revisions and two additional acts; [although] the scope of authors' rights has, however, increased markedly."¹⁷ This bastardized copyright solely

13. See discussion *infra* Part III.B.

14. Historically, the copyright monopoly meant

the exclusive right to reproduce a work for sale; and in this limited sense, it protected the form of the work. Gradually, however, it came to protect the content of the work, as well. In terms of copyright, this meant that protection came to be against plagiarism as well as piracy The fundamental distinction between protecting a work against piracy and protecting it against plagiarism, however, is the difference between protecting the form of a work and protecting its content, between protecting the particular form of expression of ideas and protecting the ideas themselves.

To give one the exclusive right to reproduce a given work is to give him one kind of monopoly; to give him the exclusive right to the use of ideas is to give him another, clearly less compatible with the public interest.

PATTERSON, *supra* note 4, at 215-16.

15. See discussion *infra* Part III.A.2.

16. Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Overprotective*, 29 VAND. J. TRANSNAT'L L. 613, 625 (1996).

17. Burger, *supra* note 2, at 15.

endows copyright owners with the privilege of promoting, distributing, and developing works. However, because owners are protected from competition, there is little incentive for improvement. As in any monopoly, the lack of competition results in stagnation. Clearly, this is in opposition to copyright's intended effects.

By keeping works from the public domain, copyright holders continue to maintain their monopoly thereby extracting huge prices from consumers. The Statute of Anne originally provided protection for a term of fourteen years (with a similar renewal term) and specifically was intended not to exist in perpetuity.¹⁸ In the United States, protection initially extended for twenty-eight years with an option for renewal for another twenty-eight years.¹⁹ This period has been steadily increased by the United States Congress to the current seventy years plus the life of the author.²⁰ The Berne Convention also has been amended augmenting the duration of protection to life plus fifty years.²¹ Interestingly, it took forty years for Berne conferees to achieve this goal after failures at two earlier conferences.²² The incentive to create new works for the public good is not benefited by this extension. Exclusive control over a limited period provides the necessary catalyst for authors to create works while also balancing a democratic society's interest in a work and its ultimately entering the public domain. The current extensive duration is simply a

18. See PATTERSON, *supra* note 4, at 13.

19. Copyright Duration Under the 1909 Act:

§ 24. Duration, Renewal and Extension—The copyright secured by this title shall endure for twenty-eight years from the date of first publication . . . the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years

17 U.S.C. § 24 (1976), *amended by* 17 U.S.C. § 302 (Supp. 1999).

20. Copyright Duration Under the 1976 Act, as amended in 1998 under the Sonny Bono Copyright Term Extension Act:

§ 302. Duration of copyright: Works created on or after January 1, 1978:

(a) in general—Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death.

(b) Joint Works—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death.

(c) Anonymous Works, Pseudonymous Works, and Works Made for Hire. In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first.

17 U.S.C.A. § 302 (1978).

21. Brussels Act of 1948, Berne Convention for the Protection of Literary and Artistic Works, June 26, 1948 art. 7(1).

22. See Burger, *supra* note 2, at 23.

means by which copyright holders maximize their earnings over the greatest period of time.

The expansion of the derivative work right provides another example. Traditionally, authors of works maintained a copyright in the preexisting work and could license the creation of derivative works.²³ Derivative work authors were granted copyright in any “editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.”²⁴ Importantly, derivative work authors were still subject to the originality requirement necessitating a substantial variation evidencing a degree of artistic skill.²⁵ The substantial variation distinguished between the creation of derivative works as opposed to mere reproductions of the original.²⁶

However, the derivative work right has been corrupted. For example, in *Maljack Productions, Inc. v. UAV Corp.*, the copyright on a film fell into the public domain.²⁷ A producer simply edited the film to fit a television screen and digitized the soundtrack. The court held these minor changes satisfied the minimal creativity requirement, warranting copyright protection in the remake.²⁸ The minor technical editions to the film permitted the producer to obtain a copyright in the totality of the work as the copyright in the preexisting work had fallen into the public domain.²⁹

The depletion of the originality requirement also has served to expand the scope of copyright protection. Some courts have held that text bearing the slightest modicum of creativity may receive protection.³⁰ Other courts have created “thin copyright” granting protection against an exact rendition of the precise wording on forms.³¹ Historically, forms did not evidence enough originality to merit copyright protection and were

23. 17 U.S.C. § 106(2) (1994).

24. *Id.* § 101 (Supp. 1999); *id.* § 103 (1994).

25. “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression.” *Id.* § 102(a) (1994). Originality requires (1) independent creation (intellectual effort), exhibiting; (2) some minimal degree of creativity to make it recognizably his own. *Magic Mktg., Inc. v. Mailing Servs. of Pittsburgh, Inc.*, 634 F. Supp. 769 (W.D. Pa. 1986); *see L. Batlin & Son v. Snyder*, 536 F.2d 486 (2d Cir. 1976) (en banc).

26. *See L. Batlin & Son*, 536 F.2d at 490.

27. *See Maljack Prods., Inc. v. UAV Corp.*, 964 F. Supp. 1416 (C.D. Cal. 1997).

28. *See id.*

29. *See id.*

30. *See Sebastian Int’l, Inc. v. Consumer Contacts (PTY) Ltd.*, 664 F. Supp. 909, 913 (D.N.J. 1987), *rev’d on other grounds*, 847 F.2d 1093 (3d Cir. 1988).

31. *Cont’l Cas. Co. v. Beardsley*, 253 F.2d 702, 704-05 (2d Cir. 1958), *cert. denied*, 358 U.S. 816 (1958).

subject to the merger doctrine.³² Wherein the merger doctrine once prevented the application of copyright, the emergence of thin copyright provides a new level of protection. This broad application of copyright protection permits the expansion of monopolistic control while reducing the public's accessibility to works.

Copyright's protection of compilations also has been detrimentally augmented by legislation.³³ The copyright in a compilation protects the incremental, creative contribution, and not the underlying facts or preexisting work.³⁴ The additional contribution may manifest itself as an original arrangement of preexisting material. However, consistent with the depletion of the originality requirement, only a modicum of originality is required.³⁵ This allows for a permissive application of copyright to compilations.³⁶ The "total concept and feel" test is another example of expansive copyright protection in the realm of compilations.³⁷ This analysis permits compilations to receive protection for any originality embedded in the whole, even if the component parts do not exhibit sufficient originality to warrant protection.³⁸

Finally, copyright now serves to protect even nonliteral elements of works by strictly limiting transformative uses and preventing further development.³⁹ This results from the broad application of copyright in combination with an abridgment of the requirements establishing its protection. Accordingly, a greater range of activity may now give rise to claims of infringement—further protecting the copyright holder's

32. The merger doctrine applies when certain subject matter in the form of an idea merges with the form of expression such that copyright can no longer apply. *See* *Morrisey v. Proctor & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967) (stating that in order to protect the immunity of ideas from private ownership, when the expression is essential to the statement of the idea, the expression also will be unprotected, so as to insure free public access to the discussion of the idea); *see also* *Baker v. Seldon*, 101 U.S. 99 (1879) (establishing the idea/expression dichotomy in copyright law).

33. "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works." 17 U.S.C. § 101 (Supp. 1999).

34. *See* *Rockford Map Publishers, Inc. v. Directory Serv. Co. of Colo., Inc.*, 768 F.2d 145 (7th Cir. 1985).

35. *See* *Sebastian*, 664 F. Supp. 909; *Rockford*, 768 F.2d at 148.

36. *See* *West Publ'g Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1223-25 (8th Cir. 1986) (holding a low threshold of creativity in compilations permitted copyright protection for West's arrangement of court cases, even though such government works fall into the public domain pursuant to 17 U.S.C. § 105); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 67 (2d Cir. 1994) (holding that the mere arrangement of data to logically respond to market needs is an exhibition in originality meriting protection).

37. *See* *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1109-10 (9th Cir. 1970).

38. *See* *Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851, 855 (6th Cir. 1991).

39. *See* *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

monopoly. The emergence of the comprehensive nonliteral similarity test for infringement illustrates the expansion of copyright as a monopoly. The test prohibits copying the essence or structure of a work, similarities in plot line, sequence of incidents, or other nonliteral elements.⁴⁰ The test takes two forms: the “total concept and feel” test constructed by the Ninth Circuit,⁴¹ and the “abstraction” test promulgated by the Second Circuit.⁴² The former, detailed above, permits copyright protection for a compilation as a whole even if its elements do not warrant protection.⁴³ The latter extends further, requiring courts to conduct an extensive three-part inquiry to ensure protection of nonliteral elements of works.⁴⁴ The greater number of works afforded protection, in combination with an expansion of that protection, increases the prospects for infringement thereby limiting the development of new transformative works.

C. *The Commodization of Copyright*

As the scope of copyright protection has increased, so has its value. This has led to the treatment of copyright rights as a commodity. However, the primary purpose of copyright is not to serve economic ends.⁴⁵ Copyright only should ensure limited protection for certain creative works of expression in order to provide an incentive for creative effort and to promote the dissemination of works necessary to a free and democratic society.⁴⁶ As the scope of that protection steadily expands (resulting in its increased value and commodization), it no longer serves this purpose. Instead, the rights have become a commodity to be bought and sold in the marketplace.

The transformation of copyright into a commodity is evident from the legislatively sanctioned divisibility of the exclusive rights granted to the holder.⁴⁷ Originally, holders of a copyright possessed all the exclusive

40. *See id.*

41. *See Roth*, 429 F.2d at 1110.

42. *See Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

43. *See Roth*, 429 F.2d at 1110.

44. *See Computer Assocs.*, 982 F.2d 693.

45. *See Mazer v. Stein*, 347 U.S. 201, 219 (1954); *see also Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

46. *See supra* Part II.A.

47. The 1976 Act permits transfer of ownership as follows:

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the

rights and could transfer none or all of the rights as a whole.⁴⁸ However, because the focus of copyright has shifted, the economic value of these rights has become paramount. Accordingly, copyright holders are now permitted to license and transfer each of the exclusive rights individually.⁴⁹ This permits derivation of economic gain from multiple parties wherein each pays for the use of a single, defined right. This ability constitutes a further extension, permitting copyright holders to narrowly define the extent of each granted right.⁵⁰ For example, owners may grant one person the right to make a movie, another the right to make a computer game, a third, the right to distribute, and so on. The owners can determine almost any price for these rights, as the licensees will be subject to infringement if they do not bargain for, and pay, the demanded price. The benefit to the public is lost in this market driven model.⁵¹

Copyright holders can issue exclusive and non-exclusive licenses which further enable the maximization of earnings from creative works.⁵² An exclusive license vests in one transferee any of the exclusive Section 106 rights, in whole or in part, and gives the licensee standing to sue per Section 501(b) as a legal owner of an exclusive right. A nonexclusive license vests in any number of transferees any of the exclusive Section 106 rights, in whole or in part, but does not give standing to sue. These licensing schemes optimize the number of opportunities copyright owners have to derive economic gain from a single work.

The concept of beneficial ownership provides another commodization example. Beneficial owners merely possess an economic interest in

extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

17 U.S.C. § 201(d) (1994).

48. *Id.* § 106. The Berne Convention first prescribed the concept of exclusive rights which served to promote minimum standards of protection.

49. *Id.* § 201(d).

50. *See* *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851 (9th Cir. 1988) (holding the grant of a license to use a musical composition in a film and on television did not extend to permit the distribution of the work on video).

51. Some commentators argue that the divisibility of the exclusive rights creates greater distributional opportunities in furtherance of a democratic society. While it may promote a broader distribution model, the incentive remains economic gain. Greater distribution is better served through a limited copyright, as proposed by this paper, preventing monopolistic pricing, and decreasing the duration and breadth of protection. The proposed distribution paradigm calls for egalitarian access to works, based upon democratic principles, not economic incentives.

52. *See generally* *Effects Assocs. v. Cohen*, 908 F.2d 555 (9th Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991) (holding implied, nonexclusive license to moviemaker to use company footage).

works.⁵³ While beneficial owners can bring an action to protect their economic interest, they also can infringe, unlike joint owners.⁵⁴ Therefore, authors, upon conveying an exclusive right in a work, can retain beneficial ownership through the receipt of royalties, but also may infringe upon the transferees' exclusive right.⁵⁵ The concept is solely driven by market considerations.

Works made for hire and the consolidation of copyright ownership are additional manifestations of the commodization of copyright. As a result, owners of copyright are often not authors of the work. The provision of exclusive rights no longer serves as an incentive for the creation of original works ensuring a reward for creative effort. Instead, the incentive is payment from third parties who have stripped creative authors of their rights.

Works made for hire treat authorship as an economic concept. Normally, initial ownership vests in the author who creates a work.⁵⁶ By contrast, works made for hire are created by one party endowing copyright ownership to another.⁵⁷ In fact, in the United States, the statutory language strips creators of authorship status and instead vests it immediately in the third-party.⁵⁸ This concept has been extended to reverse the presumption that creative persons initially hold the copyright.⁵⁹ As a result, the burden is on the creators to prove they deserve the benefits of their effort.⁶⁰

Finally, commodization has resulted in consolidation of ownership. Because copyright rights are a commodity, they may be bought and sold.⁶¹ Because rights to works are exclusive, they are a scarce resource with significant value. However, their value is seized from the hands of the author and centralized in the hands of a few.⁶² Entities consolidating

53. *Fantasy, Inc. v. Fogerty*, 654 F. Supp. 1129, 1131 (N.D. Cal. 1987).

54. *Id.*; 17 U.S.C. § 201(d)(2) (1994).

55. *See Fantasy*, 654 F. Supp. at 1132.

56. 17 U.S.C. § 201(a).

57. *Id.* § 201(b).

58. "In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright." *Id.*

59. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

60. *Id.* at 750.

61. The United States Income Tax Code confirms this point treating copyright as a capital asset when purchased or consolidated by a buyer. 26 U.S.C. § 1221(3)(A) (1994).

62. In light of consolidation's effects, the European Publishers Council asserted "that new media involve too many creators and technologies for authors' rights to prevail over publishers" arguing for such a revision in E.U. copyright law. Virginie L. Parant, *Copyright Harmonization in the European Union: The Digital Alibi*, 16 ENT. & SPORTS LAW. 22, 34 (1998).

copyright ownership obtain monopolistic power to establish the price of works without fear of competition.⁶³ These entities may buy and sell creative works of others without regard for their free dissemination among the public.

The music industry represents a definitive example. The cost of a compact disc is approximately forty-eight cents.⁶⁴ Mass production lowers this cost significantly. The market value of an average music CD is approximately fifteen U.S. dollars. Thus, the focus is not on disseminating the music but on making money from its dissemination. Further, performers are often not copyright holders, receiving only royalties for their efforts. Music publishers receive the bulk of the wealth generated from sales. While both make a healthy profit, the incentive for creativity is lost in the process. Because of the commodization of copyright, a few major labels control a majority of the music industry, having bought the copyright to entire record catalogs.

III. A NEW BEGINNING

In the modern day, copyright's protection of expression is confronted by revolutionary changes in the ability of individuals to create and disseminate their own original works of authorship. The exponential growth of the Internet serves to achieve this end. It permits virtually anyone to become an author of a creative work and has sparked unprecedented creativity and discourse—often without any economic incentive—in support of the public good. Nevertheless, it is impeded by constraining forces:

In order to solve the contradictions that are arising from the development of a global information space, what is needed are not prohibitive measures but laws that are set up to defend the interests of users and researchers. But their interests are essentially opposed to those of large Western firms that are monopolizing the information market.⁶⁵

63. Bill Gates' purchase of the Bertlesman Collection of historic photographs—well-known works perhaps best appropriate for the public domain—exemplifies the inequities of commodization. Seizing upon the monopolistic opportunities U.S. copyright law offers, Gates purchased the collection intending to distribute the photos in digitized form through Corbis, one of his wholly owned subsidiaries. Corbis' business model is simply to take works of art—images, pictures, paintings, etc.—and sell them to the public. Without copyright protection, these works could be disseminated freely. However, the commodization of copyright permits Corbis to obtain a vast collection of works and regulate their reproduction and distribution, at a significant price. Again, the creative inducement is lost.

64. The approximated cost is solely for the media.

65. Boris Kargalitsky, *Costs and Benefits of Intellectual Piracy*, MOSCOW TIMES, June 6, 1997, at <http://www.themoscowtimes.com/stories/1997/06/06/036.html>.

First, new legislation supporting commercial copyright holders is stifling the egalitarian, democratizing effects of the Internet. Second, a market-oriented copyright serves to frustrate technological advances.

A. *Smashing the Presses: The Fall of Gutenberg*

The Internet allows anyone with access to become a publisher. In the context of copyright, the emergence of this incredible power is not to be taken lightly by a democratic society. Individuals are endowed with the ability to foster their own expressive works and disseminate them at minimal cost. As evidenced by the millions of Web sites currently in existence, an economic incentive is not always required to spark creativity.

Musicians, filmmakers and authors are now selling their works online.⁶⁶ This trend promotes lower costs and increased efficiency. First, and most obviously, the middlemen (such as the publisher, the printer, the wholesaler, and the retailer) have been extricated from the distribution process. Second, production and distribution costs are decreased drastically. Third, digital media allows for rapid, if not instant, distribution of works to consumers. Fourth, this distribution model limits waste since the quantity of a work placed in the market can be optimized to the exact number of consumers wishing to obtain it.

This new empowerment is not lost on commercial copyright holders who fear its encroachment upon their monopoly.⁶⁷ The Internet's threat to the entrenched market model threatens their "perfect control" over content.⁶⁸ Corporate publishers are rapidly "moving online" in an effort to secure and maintain their role.⁶⁹ Further, they have recognized the ease

66. Stephen King is the most commercially successful author to date to release a novel entirely online, at a cost of \$2.50. Musicians also are distributing their wares online, particularly those who haven't "signed" with a label and still maintain control over their efforts. Often, users can download a single track at no cost and return to pay a minimal fee for the balance of the "record."

67. A public domain assault on the publishers' monopoly is evidenced by Project Gutenberg. Even without copyright protection, publishers still are able to reap large profits from the sale, in hard copy form, of works in the public domain. Project Gutenberg is comprised entirely of volunteers who scan public domain works which are then provided free for download from the Project's Web site. The site hopes to include 10,000 titles by the end of 2001. See *Project Gutenberg*, at <http://www.gutenberg.net/history.html> (Mar. 23, 2000).

68. Lawrence Lessig, *Cyberspace Prosecutor*, THE INDUSTRY STANDARD, at <http://www.thestandard.com/article10,1902,10885,00.html> (Feb. 21, 2000) ("In every context that it can, the entertainment industry is trying to force the Internet into its own business model—the perfect control of content.")

69. Hon. Marybeth Peters, *The National Infrastructure: A Copyright Office Perspective*, 20 COLUM.-VLA J.L. & ARTS. 341, 351 (1996) ("Copyright owners see [the Internet as providing]

with which reproduction and distribution are now possible.⁷⁰ Accordingly, they are taking bold steps to stifle the democratizing effects of the technology.

The steadfast adherence to the market paradigm has demanded additional and expanded copyright protections which are detrimental to the public interest. This resiliency is particularly egregious in light of the beneficial nature of the technology. There is considerable irony in the reality that copyright, essential in promoting the interests of a democratic society, is now being used to suppress those interests.

1. Leading the Way: The United States

The United States continues to compel the imposition of a restrictive intellectual property regime. The Copyright Term Extension Act of 1998 provides an illustration.⁷¹ Prior to the Extension Act, works published on or after January 1, 1978, had a copyright term of the life of the author plus fifty years.⁷² Publishers recognized the copyright clock was ticking on many of these works such that they were at risk of falling into the public domain. Not to be deterred, publishers simply lobbied Congress to again extend the duration of copyright protection—in this instance adding another twenty years to the original term.⁷³ The effects were immediately realized. A Web site dedicated to freely distributing public domain books shut down in protest.⁷⁴ The site's founder lamented that, “[i]f everything is private property forever, which is the way things are going, then there can't be a growing, global, free public library.”⁷⁵ Authors of these works have long since deceased—negating any need for an economic incentive to spark further creativity—evidencing another example wherein the interests of the public are subjugated to those of commercial copyright owners.

The No Electronic Theft (NET) Act of 1997 represents another threat to a democratic, global society.⁷⁶ Recognizing the increased distribution of copyrighted material online, lobbyists forced this

new potential audiences and markets of tremendous size; they also see the threat of loss of control over the exploitation of their works.”).

70. *See id.*

71. 17 U.S.C. § 302 (Supp. 1999).

72. *Id.* § 302(a) (1994).

73. *Id.* § 302(a) (Supp. 1999) (stating “life . . . and 70 years after author's death”).

74. Carl S. Kaplan, *Free Book Sites Hurt by Copyright Law*, CYBERLAW JOURNAL, at <http://www.nytimes.com/library/tech/98/10/cyber/cyberlaw/30law.html> (Oct. 30, 1998) (discussing an editor's decision to shut down his website, <http://www.eldritchpress.org>, after duration of copyright extended an additional twenty years).

75. *Id.*

76. 18 U.S.C. § 2319 (Supp. 1999).

legislation through Congress to promote additional criminal penalties for infringement.⁷⁷ The legislation highlights the concerns of businesses who fear the dissolution of their market model. Prior to the Act, individuals who did not profit from copyright infringement were not subject to criminal sanctions. The NET Act criminalizes the willful distribution of at least \$1000 worth of copyrighted material in any 180 day period.⁷⁸ Interestingly, the amendment focuses on copyright holders' commercial losses, rather than the infringers' financial gains; illustrating the pervasive effect of the market-model. In addition to civil remedies, the furnishing of criminal sanctions also dramatically increases the government's role in copyright enforcement.⁷⁹

In 1999, Congress passed the Digital Theft Deterrence and Copyright Damages Improvement Act.⁸⁰ This effort increases statutory damages for copyright infringement, further promoting commercial copyright holders' perfect control over content.⁸¹ The amendment raises damages for nonwillful infringement from a minimum of \$500 and a maximum of \$20,000, to \$750 and \$30,000, respectively.⁸² Similarly, the

77. A twenty-two-year-old University of Oregon student was the first to be convicted under the NET Act. The student, Jeffrey Levy, "pleaded guilty to a felony count of criminal infringement of a copyright [in U.S. District Court.]" Levy posted software, music, games, and movies to his site. Elinor Mills Abreu, *Student First to Be Convicted Under E-Theft Act*, THE INDUSTRY STANDARD, at <http://www.thestandard.com/article10,1902,6045,00.html> (Aug. 23, 1999).

In a recent case, a Florida man was convicted for trafficking in counterfeit software. He was sentenced to two and a half years in jail and subject to two years probation during which he is prohibited from owning or having computers in his home. Drew Cullen, *Florida software pirate sent to jail for 30 months*, THE REGISTER, at <http://www.theregister.co.uk/content/archive/9866.html> (Mar. 20, 2000).

78. 18 U.S.C. § 2319 (Supp. 1999).

79. The Department of Justice has created an entirely new computer crimes unit whose purpose is to investigate and prosecute instances of copyright infringement and "unveiled a new Intellectual Property Rights Initiative last summer designed to combat software piracy and promote the domestic and international prosecution of intellectual property crimes." BSA United States, *Software Pirate Receives 2½ Year Jail Sentence*, BUSINESS SOFTWARE ALLIANCE, at <http://www.bsa.org/usa/press/newsreleases//2000-03-17.193.phtml> (Mar. 17, 2000). The F.B.I. also has created a unit to protect against online copyright infringement and actually has conducted raids of computer users' homes in an effort to stem this apparent threat to national security.

The extensive nature of intellectual property enforcement, as compared to firearms enforcement, epitomizes the demands commercial copyright holders have made upon government, as well as government's acquiescence to those demands. For example, in 1999, 81,008 prospective gun buyers were rejected pursuant to the National Instant Criminal Background Check System. The ATF forwarded 31,292 cases to the FBI for further investigation. Of that number, the FBI opened only 380 cases while another 16,000 still await review. Hans H. Chen, *4,600 of the Wrong People Got Guns, Feds Say*, APBNEWS.COM, at http://www.apbnews.com/cjsystem/findingjustice/2000/03/16/guns0316_01.html (Mar. 16, 2000).

80. Act of Dec. 9, 1999, Pub. L. No. 106-160, 1999 U.S.C.A.N. (113 Stat.) 1774.

81. See Lessig, *supra* note 68.

82. 17 U.S.C.A. § 504(c)(1) (Supp. 2001).

cap on damages for willful infringement is increased from \$100,000 to \$150,000.⁸³ Importantly, these amounts may be applied for each copyright infringement.⁸⁴ Therefore, individuals who provide copyrighted material for downloading may suffer damages in these amounts for each distributed copy.⁸⁵ Finally, Section 505 also permits the imposition of court costs and attorney's fees.⁸⁶ Professor Lawrence Lessig explains that

[n]o doubt 'thieves' should be punished and content should not be 'stolen.' But 'theft' is defined relative to the law and the First Amendment, not to an ideal of perfect control. And when the law grants a right to speech, that right is ordinarily defended even if control over that speech is not perfect.⁸⁷

The most egregious legislative example is the Digital Millennium Copyright Act (DMCA).⁸⁸ The DMCA incorporates copyright protection and management systems (CPMS) into digital content to protect against infringement and proscribes their circumvention.⁸⁹ According to Alex Fowler of the Electronic Frontier Foundation, "The anti-circumvention clauses fundamentally change the balance of copyright. Now we're not just talking about rights to the work, but about tying it to the system it is displayed on, or plays on, or is distributed by. That's one level deeper into control [than] copyright has been associated with."⁹⁰ The DMCA is part of enabling legislation "for an international digital copyright treaty drafted last December [1996] by the United States and 160 member nations of the World Intellectual Property Organization (WIPO)."⁹¹ Accordingly, the legislation marks a significant achievement by commercial copyright holders' to maintain monopolistic control over content in detriment to the democratizing effects of the technology.

Additional legislation is now before Congress to protect databases, traditionally believed to lack the necessary modicum of creativity

83. *Id.* § 504(c)(2).

84. *Id.* § 504(c)(1).

85. *Id.* § 504(c).

86. *Id.* § 505 (1996).

87. Lessig, *supra* note 68.

88. 17 U.S.C. §§ 1201-1205 (1994). For a discussion on the DMCA's prohibitive effects on technology, see discussion *infra* Part III.B.

89. The E.U. Directive also includes anti-circumvention prohibitions. European Copyright Directive Proposal, OJ 98/C/108/03 (E.U. Directive); see discussion *infra* Part III.A.2.

90. Bruce Haring, *Protected or Locked Out?*, USA TODAY, at <http://www.usatoday.com/life/cyber/tech/cth461.htm> (June 7, 2000).

91. Margie Wylie, *Copyright bill splits PC industry*, CNET, at <http://www.cnet.com/news/0-1005-200-321760.html?tag=rltdnws> (Aug. 29, 1997); see WIPO Copyright Treaty, *infra* Part III.A.2.

required for copyright protection.⁹² The rationale for additional protections is not to promote the creation of databases as necessary to the public good. Rather, the legislation is arguably intended to ensure the maintenance of copyright as a commodity by protecting database owners' monopolistic control over the information contained therein.⁹³ The implications of such protection can have severe consequences. For example, a private company recently has mapped the human genome storing this information within an array of high speed computers.⁹⁴ Database copyright protection legislation permits this information to be controlled and sold, which is in obvious contravention to the public good.

The focus of all of this legislation is ensuring monopolistic, perfect control in the exploitation of copyrighted works. In fact, the United States Register of Copyrights has stated that the fundamental question behind new copyright protections is, "how control may be maintained over the primary forms of exploitation in order to assure the continued existence of a meaningful market for copyrighted works."⁹⁵ Any interest in the public good has been extinguished.

2. Circling the Wagons: The International Effort

The General Agreement on Trade and Tariffs (GATT) on Trade Related Aspects of Intellectual Property (TRIPS) represents the most significant, modern attempt towards a global, protectionist regime. The GATT negotiations constitute an aggressive effort by developed countries to promote the commodization of copyright and to safeguard the maintenance of a copyright monopoly.⁹⁶ The passage of TRIPS, in 1986, established internationally accepted minimum standards for intellectual property protection and enforcement.⁹⁷ The Agreement "obligates all Members of the World Trade Organization to make provisional measures

92. H.R. 354, "Collections of Information Antipiracy Act," introduced Jan. 19, 1999.

93. Perhaps, most interestingly, the information is often related to consumers and used for marketing purposes. The treatment of information as property has led to the emergence of a billion dollar market for information. However, the entitlement to consumer information rests with the collector, not the consumer. As a result, collectors, particularly in the face of this new legislation, can generate revenue by obtaining personal information about others (often resulting in the invasion of a privacy interest) and then seek monopolistic copyright protection for that data.

94. See Michael D. Lemonick, *Victory for Venter*, TIME, Apr. 17, 2000, at 71.

95. Peters, *supra* note 69, at 347 (emphasis added).

96. Article XX of GATT permits measures "necessary to secure compliance with laws or regulations including those relating to the protection of patents, trademarks, and copyrights and the prevention of deceptive trade practices." September 26, 1986, Ministerial Declaration officially launching Uruguay Round of the Multilateral Trade Negotiations.

97. More than 120 signatory nations negotiated over the seven-year-long Uruguay Round of GATT.

available in the context of civil proceedings involving intellectual property rights.”⁹⁸ Not surprisingly, developed countries united to ensure the perpetuation of a restrictive model—under the guise of fostering and promoting international trade.

Interest by certain developed countries in using GATT as a forum to address intellectual property issues arose primarily as a result of the perceived inability of existing international conventions to resolve the global trade problems posed by an explosion in international trafficking of counterfeit and pirated goods in the late 1970s. The international proliferation of pirated and counterfeit products can be directly attributed to, inter alia, the advent of new technology which such made counterfeiting cheaper and, therefore, more economically feasible, and the absence of an effective international mechanism for requiring other nations to prohibit the manufacture, importation, or sale of such counterfeit goods.⁹⁹

The developed countries’ consolidation of copyright ownership presents a significant threat to developing countries which lack norms and procedures to protect indigenous property. These countries also have insufficient resources to effectively compete in the global market against entrenched owners. The polarizing effect of the negotiations pitted developed against developing countries.¹⁰⁰ These two camps fiercely debated the “jurisdictional role of GATT in the development of international intellectual property norms and procedures and the impact of such norms and procedures on the ability of developing countries to compete effectively in the world market.”¹⁰¹

TRIPS ensures the maintenance of broad copyright protections in furtherance of Western interests.¹⁰² Worse, TRIPS was not crafted in view

98. WTO, *Measures Affecting the Enforcement of Intellectual Property Rights, 1998*, at <http://www.wto.org/wto/ddf/ep/public.html> (last visited Nov. 12, 1998); see also Karl F. Jorda, WIPO and WTO: WIPO Treaties and the TRIPS Agreement: Implementation of the TRIPS Agreement, Address Before the WIPO-UNITAR Academy (Aug. 26, 1999).

99. Doris E. Long, *Copyright and the Uruguay Round Agreements: A New Era of Protection or an Illusory Promise?*, 22 *AIPLA Q.J.* 531, 535 (1994).

100. This conflict should not have come as a surprise; a similar division occurred when countries met to address the Berne Convention at the Stockholm Revision Conference of 1967. “These developing countries needed literary and artistic resources from developed countries and, as a result, demanded special concessions from the developed countries such as compulsory licenses for translation and broadcasts and shorter terms of protection.” Burger, *supra* note 2, at 38.

101. Long, *supra* note 99, at 543; see also Rekha Ramani, *Market Realities v. Indigenous Equities*, 26 *Brook. J. Int’l L.* 1147 (2001).

102. See Hamilton, *supra* note 16, at 614 (“TRIPS attempts to remake international copyright law in the image of Western copyright law. If TRIPS is successful across the breathtaking sweep of signatory countries, it will be one of the most effective vehicles of Western imperialism in history.”).

of the emerging online world, thereby ignoring the numerous benefits of emerging technologies:

This silence could transform a troubling treaty into a weapon of extortion by the publishing industry, which has already succeeded in crafting TRIPS as a blunt instrument for copyright protection . . . the on-line era raises the possibility that the publishing industry can track every minuscule use of a work and thereby turn the free use zone into a new opportunity for profit. TRIPS' silence threatens to make it both outdated and overprotective.¹⁰³

The World Intellectual Property Organization (WIPO) symbolizes another effort toward an international law of copyright. WIPO was established in 1996 to oversee the Berne Convention and has since promulgated two treaties of its own: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.¹⁰⁴ The former heavily influenced the drafting of the European Union Copyright Directive and served as the impetus behind the DMCA, detailed above, requiring the enactment of anti-piracy laws that prohibit the circumvention of copy blocking measures that control access to copyrighted works.¹⁰⁵ The Treaty also extends Berne protections to computer programs and compilations of data in databases, stopping just short of extending copyright protection to the content itself.¹⁰⁶ Accordingly, it too represents an extension of the commodization and monopolistic model subjugating both authors' and users' rights.

The E.U. Copyright Directive incorporates WIPO's anti-circumvention prohibitions more egregiously than the United States' DMCA. In fact, the Directive includes broader language than the WIPO mandate against such technologies.¹⁰⁷ The law proscribes all facilitating and enabling activities intended to circumvent copyright management and protection systems, regardless of their necessity or benefit.¹⁰⁸

103. *Id.* at 615.

104. WIPO Copyright Treaty, Dec. 20, 1996; WIPO Performances and Phonograms Treaty, Dec. 20, 1996.

105. *See* Parant, *supra* note 62, at 22; WIPO Copyright treaty, *supra* note 21, art. 11 ("Obligations concerning Technological Measures," stating, "Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention. . . .").

106. *Id.* arts. 4-5.

107. *See* Parant, *supra* note 62, at 33.

108. Council Directive 108/03, 1998 O.J. (C 108) 3, requires Member States to:

provide adequate legal protection against any activities, including the manufacture or distribution of devices or the performance of services, which have only limited commercially significant purpose or use other than circumvention, and which the person concerned carries out in the knowledge, or with reasonable grounds to know, that they will enable or facilitate without authority the circumvention of any effective

International database protection legislation further exemplifies the copyright contagion. Pending legislation in the United States is outmatched by the aggressive efforts of the European Union. The E.U. Database Directive affords copyright protection for databases, granting database owners the right to restrain the use of material embodied in the database.¹⁰⁹ In fact, the Directive “provides for a dual system of protection for databases: (i) copyright, with as broad a definition of originality as possible (any of ‘the author’s own intellectual creations’ will satisfy the originality requirement), and (ii) a *sui generis* right concurrent to, but broader than, copyright.”¹¹⁰ Not to be outdone, WIPO has since proposed a Draft Database Treaty modeled after the E.U. effort.¹¹¹

B. Technological Innovation: You Can’t Stop a Good Idea

Technological advances incessantly are hindered by copyright concerns. Development of new technologies is impeded by constant demands to limit their usefulness and convenience to conform with an outdated, perverted concept of copyright. The development of recordable compact discs presents an example. The advent of the compact disc represented a milestone for the music industry. Unlike cassette tapes, compact disc users originally could not reproduce or arrange and record their own musical compilations. Further, recording from CD to tape resulted in a significant degradation in quality.¹¹² The quality of digitized sound recordings is not to be dismissed. However, it also effectively stopped the unauthorized reproduction of copyrighted music, if only for a short time.

The industry joined forces to prevent the emergence of a technology which would permit digital sound reproduction by consumers—apparently dismissing consumers’ right to make an archival copy.¹¹³

technological measures designed to protect any copyright or any rights related to copyright as provided by law. . . .

109. Council Directive 96/9, 1996 O.J. (L 77) 20.

110. Parant, *supra* note 62, at 34 n.9.

111. Memorandum Prepared by the Chairman of the Committee of Experts, *WIPO Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to Be Considered by the Diplomatic Conference*, at http://www.wipo.org/eng/diplconf/6dc_all.htm (Aug. 30, 1996); see also J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997).

112. The same benefit was afforded the software industry by virtue of its transition from floppy discs to CD-ROM technology. Not to be left behind, the movie industry is now aggressively marketing DVD technology to alleviate video cassette recording.

113. Not to pick on the music industry, the movie industry collectively opposed similar technological advancements such as double deck VCRs. These VCRs allowed consumers to play

Fortunately, greed prevailed. Electronics manufacturers recognized a substantial market and decided to provide recordable CD devices. However, the music publishers had the last word. As part of the Digital Millennium Recording Act, publishers receive a royalty from each blank CD sold. The assumption is that these blank CDs will be used to infringe publishers' copyrighted recordings, requiring the royalty to offset any theoretical losses. However, technological advances also permit a garage band to record and distribute its own creative works on CD. This "legitimate" recording effort is still subject to the royalty fee when purchasing a blank CD. Here again, the commodization of copyright serves to impede technological advances while stifling individual creativity.

In another example, there was once tremendous debate as to whether loading a software program into computer RAM was sufficiently fixed to represent an unauthorized reproduction. Both the European Union and United States were forced to draft exceptions to permit this type of copying.¹¹⁴ By extension, everyday Internet use produces innumerable copies:

Obviously, each act of uploading or downloading makes a RAM copy in the recipient's computer, but that is only the beginning. When a picture is downloaded from a Web site, the modem at each end will buffer each byte, as will the router, the receiving computer, the Web browser, the video decompression chip, and the video display board. Those seven copies will be made on each such transaction. Further, since most Internet transmissions do not travel directly between the sender and receiver, more copies will be made of the individual packets at each node they pass through on their way to the end point.¹¹⁵

Currently, there are no exceptions to permit Internet copying necessary to view a Web site. Ironically, the E.U. Copyright Directive, intended to address copyright concerns in the digital arena, has instead extended the reproduction right providing authors with "the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part."¹¹⁶ By contrast, the Directive remains silent as to the permitted extent of private copying which would enable such use.¹¹⁷

a movie while recording it on a second tape—with significant ease and minimal degradation in quality.

114. Council Directive, *supra* note 109, art. 2; 17 U.S.C. § 117 (1994).

115. Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 555 (1997).

116. Council Directive, *supra* note 109, art. 2 (emphasis added).

117. See Parant, *supra* note 62, at 32.

Technology continues to provide new tools promoting efficiency, cost savings, and convenience. However, because these advances are in contravention of commercial copyright holders' perfect control paradigm, they continue to be restricted. Once in digital form, data can be reproduced, transformed, and distributed with significant ease and little cost. Users may transfer downloaded files from their computer. MP3 music files may be transferred to portable players. Electronic books may be loaded onto a Palm Pilot. A recently released product called TIVO permits users to instantly record broadcast and cable transmissions in a digital, and therefore, readily copyable format. Video clips are now broadcasted over the Internet and full-length movies will be soon to follow.

To counter digital reproduction technology, commercial copyright owners developed copyright management systems (CMS). As discussed above, these systems recently have been incorporated into law under the E.U. Copyright Directive, Berne Convention, and Digital Millennium Copyright Act.¹¹⁸ CMS is incorporated into technologies to track and limit consumers' uses of copyrighted material. Often, the technology involves encryption, preventing users from gaining the degree of access necessary to make copies. Unfortunately, CMS then denies users their right to make an archival copy. Further, it contradicts the first-sale or exhaustion doctrine by relinquishing copyright owners of their exclusive distribution right upon sale of a work. Finally, the tracking of consumers' uses of works raises serious privacy concerns. While copyright owners aggressively promoted CMS legislation, they, along with Congress, appear unaffected by the significant privacy intrusion the technology represents.

Additionally, convergence has prevented the delineation of various media of expression serving to reduce the value of copyright protection. Concurrently, convergence has resulted in an unprecedented ability to provide and access information. Telephony, broadcast, cable, and Internet services are now accessible as one. It is impractical to force a market-based theory of copyright upon this new telecommunications paradigm. For example, one day a device may be able to receive radio broadcasts, as well as Internet radio. This same device may permit users to download and read books, access the Internet, play DVDs, and it may even work as a digital camera. Commercial copyright owners should not be permitted to stifle these advances.

118. See discussion *supra* Part III.A.2.

IV. GLOBALIZATION: THE DEATH OF THE LEVIATHAN¹¹⁹

Copyright protection is dependant upon the ability of copyright owners to enforce their rights. The Internet prevents successful enforcement ventures for three reasons. First, because the Internet does not succumb to territorial limitations, it is exceedingly difficult for copyright holders to effectively enforce their rights abroad.¹²⁰ Second, copyrighted material readily may be distributed from countries with weak protections providing convenient access to users with little or no fear of legal retribution.¹²¹ Finally, in direct contravention to copyright's unwieldy prohibitions, the Internet's success has been premised upon the democratic belief that "[i]nformation wants to be free."¹²²

The practical infeasibility of protecting copyrighted works in the international realm is demonstrated by some industrialized nations' continued efforts to impose intellectual property regimes on a global scale. Ironically, because copyright has been transformed into a commodity, they fail. The centralization of copyright ownership promotes a disincentive for nations to subscribe to such a restrictive regime with limited benefit to its own populace. Even in industrialized countries, intellectual property enforcement is often not a priority in the face of more pressing concerns.

The Berne Convention of 1886 signified an attempt toward the "dissolution of the territoriality' of copyright."¹²³ Through the principle of national treatment, "the law of each Berne country applies when copyright in a Berne-protected work is infringed on its national territory."¹²⁴ The cornerstone for copyright enforcement and protection, however, remains the nation-state, which regulates copyright pursuant to a territorially based paradigm. While the objective of the Berne

119. THOMAS HOBBS, *LEVIATHAN* (John Plamenatz ed., The Fontana Library 1967) (1651).

120. See Peters, *supra* note 69, at 343 ("On the international level, problems are created by the lack of physical borders between countries in cyberspace.").

121. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION, at http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration (Feb. 8, 1996) ("Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.").

122. STEVEN LEVY, *HACKERS: HEROES OF THE COMPUTER REVOLUTION* (1984); see discussion Part II.A (discussing the treatment of information as a public good).

123. Geller, *supra* note 3, at 463 (quoting Gyorgy Boytha, *Fragen Der Entstehung des Internationalen Urheberrechts in Whoes Kommt Das Urheberrecht und Wohin Geht Es?*, 181, 182 (Robert Dittrich ed., 1988)).

124. *Id.*

Convention was to evolve toward a uniform, if not universal, international copyright law, competing sovereign interests threaten this ideal.¹²⁵ The European Union, for example, has established its own supranational copyright law which supplants the Berne Convention's protections between Member States.¹²⁶

Furthermore, the principal of national treatment does not ensure "substantive equivalence" as individual nation-states remain responsible for the development and implementation of their own copyright law.¹²⁷ Jean M. Dettman explains the problem:

Thus, according to [national treatment] principles, a country with a high level of protection must grant this higher protection even to foreigners of countries with a lower level of protection. However, when citizens from the country with a higher level of protection visit the country with a lower level of protection, they must settle for the lower protection of that country. In many situations, [national treatment] only provides a foreigner with inadequate protection from the host country's municipal laws. Thus, municipal law coupled with [national treatment] does not offer an effective solution to the distortions of intellectual property trade.¹²⁸

Ironically, countries are receding from an international copyright regime in light of the globalizing force of the Internet.¹²⁹

Fortunately, a territorially founded copyright enforcement model is inapplicable to the Internet. It takes little effort to place a server loaded with copyrighted material in a country with little or no enforcement mechanisms or interest. Jurisdictional limitations will often place the server out of the reach of the copyright owner, preventing a suit for infringement.

While commercial copyright owners continue to develop technological mechanisms to prevent reproduction and distribution, these mechanisms are easily and consistently hacked by users.¹³⁰ The

125. See Burger, *supra* note 2, at 16 ("The basic strategy of the Convention was to establish certain minimum standards which all contracting countries were required to recognize and later to expand these minimum requirements to achieve the ultimate objective of a uniform international law of copyright.").

126. See Council Directive, *supra* note 109.

127. See Jean M. Dettman, *GATT: An Opportunity for an Intellectual Property Rights Solution*, 4 *TRANSNAT'L LAW* 347, 355 (1991) ("National treatment . . . requires signatory countries to treat individuals from a foreign country as they treat their own nationals.").

128. *Id.*

129. See Geller, *supra* note 3, at 473 ("[T]he media are making any territorial regime, with all its accompanying habits of thought, increasingly obsolete.").

130. "For copyright owners, technological protection can never be more than half the answer. Technology can always be matched and surpassed by technology; the most ingenious anti-copying system will eventually be circumvented by the development of ingenious *anti*-anti-copying systems." Peters, *supra* note 69, at 343.

adulterated work is then freely distributable. Again, copyright owners are forced to seek a legal remedy for the persistent circumvention of copyright protection technologies.¹³¹ A simple Internet search reveals unlimited access to any number of hacked works.¹³² In sum, the nature of the technology makes the continued protection and enforcement of copyrighted works a fool's game.

The principles of a democratic society and the essence of emerging technologies are in fierce opposition to the restrictive model of modern copyright law. The power of the Internet rests "in its capability to decentralize the production and dissemination of knowledge. The vision of democracy that cyberspace may promote is one that is based on participation and decentralization of power."¹³³ This theory for democratization is bolstered by the technological ease of information dissemination and knowledge sharing available to users. The democratic ideal that information should be treated as a public good is congruent to the Internet community's ideal that "information wants to be free."¹³⁴ Accordingly, an over-expansive copyright regime, founded upon market motivations, ultimately will fail when confronted by the effects of global democratization strengthened by the power of the Internet.

131. See discussion *supra* Part III.B.

132. For example, a search for "warez," a term used to denote hacked software, resulted in 24,870 sites providing links to hacked, copyrighted software programs ready for download. Interestingly, the World Wide Web is the most superficial Internet locale to obtain unauthorized copyrighted works. Usenet and IRC represent a virtual haven for users committed to freely trading copyrighted works.

133. Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 *CARDOZO ARTS & ENT. L.J.* 215, 217-18 (1996).

134. See discussion *supra* Part II.A; LEVY, *supra* note 122.