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## Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information

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## Fulfilling the Copyright Social Justice Promise: Digitizing Textual Information

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## I. INTRODUCTION

The advent of commercially viable digitizing of text for mass distribution through the Google Books Library Project (“Google Books Project”)<sup>1</sup> and other text-digitizing projects and developments like Europeana<sup>2</sup> and Amazon’s Kindle Reader,<sup>3</sup> places new demands on intellectual property regimes, particularly with respect to author/creator property right incentive mechanisms. While the full contours of the impact of these developments cannot yet be fully appreciated, digitizing in other fields, including music, video, and photography, has shown that there are many possible effects arising from digitization, including the creation of new types of works as well as the creation of new methods and channels for the distribution of creative works. An additional impact, albeit sometimes overlooked and generally undervalued, is that the new technologies provide new raw material and even new types of material that can be used to create more new works, often more easily.<sup>4</sup> Music and videos made by sampling and remixing are these sorts of works.<sup>5</sup> Indeed, there are even significant sociological aspects to the digital revolution and the social networking revolution that it has enabled that are only beginning to be understood.<sup>6</sup> Along with the social boons presented by the new technological applications for copyrighted material, however, come the inevitable concerns regarding the attendant creation of new modes of infringement.

While such concerns can be legitimate, the impact of digitizing textual works on copyright law must be evaluated from the broader perspective of copyright law’s

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1. The Google Books Project is intended to make it easier for people to find and have access to books, including books that are out of print, by creating digital copies of the world’s printed texts. To this end, Google has partnered with libraries through its Library Project and with publishers through its Partner Program. “[The Project’s] ultimate goal is to create a comprehensive, searchable, virtual card catalog of all books in all languages.” *Google Books Library Project*, GOOGLE BOOKS, <http://books.google.com/googlebooks/library.html> (last visited Oct. 15, 2010). See also *Google Books Settlement Agreement*, GOOGLE BOOKS, <http://books.google.com/googlebooks/agreement/> (last visited Oct. 15, 2010).
  2. Europeana is a project of the European Commission to make “European information resources easier to use in an online environment. It will build on Europe’s rich heritage, combining multicultural and multilingual environments with technological advances and new business models.” *About us*, EUROPEANA, <http://www.europeana.eu/portal/> (last visited Oct. 15, 2010).
  3. *Kindle Wireless Reading Device*, AMAZON, <http://www.amazon.com/dp/B0015T963C> (last visited Oct. 15, 2010).
  4. See generally LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 255 (2008); JESSICA LITMAN, DIGITAL COPYRIGHT 15–16 (2006); WILLIAM PATRY, MORAL PANICS AND COPYRIGHT WARS 7, 36 (2009). Of course, these changes concern the traditional publishing houses. Randall Stross, *Will Books Be Napsterized?* N.Y. TIMES, Oct. 4, 2001, [http://www.nytimes.com/2009/10/04/business/04digi.html?\\_r=1](http://www.nytimes.com/2009/10/04/business/04digi.html?_r=1).
  5. COPYRIGHT CRIMINALS (Copyright Criminals, LLC 2009). “Long before people began posting their homemade video mashups on the Web, hip-hop musicians were perfecting the art of audio montage through sampling. Sampling—or riffing—is as old as music itself, but new technologies developed in the 1980s and 1990s made it easier to reuse existing sound recordings.” *Copyright Criminals, The Film*, PBS, available at <http://www.pbs.org/independentlens/copyright-criminals/film.html> (last visited Oct 28, 2010).
  6. See Michael Wesch, *An Anthropological Introduction to YouTube*, YOUTUBE (July 26, 2008), [http://www.youtube.com/watch?v=TPAO-IZ4\\_hU](http://www.youtube.com/watch?v=TPAO-IZ4_hU).

social utility and social justice function, and not merely from a myopic view of the copyright law's property rights incentives.<sup>7</sup> The constitutional mandate that copyright law serve societal progress<sup>8</sup> requires more than maximizing protection of the commoditization interests of those responsible for the generation of new works. There are other obligations of social utility and social justice that must also be satisfied, including the broad dissemination of copyrighted works and the opportunity for others to build from those earlier works. This is not merely theory. The creation of broader access to information by many people with various backgrounds and perspectives can be critical to effective problem solving<sup>9</sup> and, indeed, helps to produce more and better information, knowledge, and aesthetic expression than limiting access to information to individuals working alone.<sup>10</sup> Consequently, as more material becomes available through the Google Books Project and other initiatives for mass-digitization of text, care must be taken to optimize the law to promote cultural progress as a whole, and not simply to protect the prosaic, secular aspects of the authors' incentive mechanism.

Let us hasten to add that we are not copyright iconoclasts; in our judgment, protecting authors' interests is important because doing so provides a valuable and proper motivation for the creation and dissemination of new works and, indeed, can provide important opportunities for inclusion and empowerment of marginalized groups within our society. We thus believe that the protection afforded to the copyright property interests of authors should be vital and strong. However, we also believe that balance is required and that the grant of a copyright should be only as strong as needed to incentivize authors to create and disseminate works.

At present, the balance of interests between author and user often seems skewed in favor of the former, and far beyond what is needed to incentivize the creation of works. Copyright should be an engine of progress in the creation and dissemination of information, not a brake on it. Moreover, copyright should not be manipulated to maintain particular business models, but rather should focus on furthering dynamism in society, including its economic aspects. Accordingly, new technological applications for copyrighted works should be incorporated into the copyright regime with these principles in mind.

This article explores the evolving copyright landscape in the Digital Information Age and places the Google Books Project and the Google Books Settlement Agreement (the "Settlement")<sup>11</sup> within that terrain. We attempt to demonstrate how this initiative—the mass-digitization of the nation's storehouse of printed texts with the goal of making them available to anyone who has access to the Internet—fits squarely within that terrain. Briefly, we contend it does so because it serves copyright

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7. See generally PATRY, *supra* note 4.

8. U.S. CONST. art. I, § 8, cl. 8.

9. See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

10. See generally CASS R. SUNSTEIN, *INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE* (2006).

11. See generally *Google Books Settlement Agreement*, *supra* note 1.

law's central purpose of advancing knowledge and culture by furthering copyright's social utility and social justice goals through inclusion of those who have been excluded. The Google Books Project furthers these goals by using an accepted copyright mechanism (i.e., a private, court-supervised settlement) to address the novel copyright problems presented by the new technologies, while still preserving the rights of copyright holders. In sum, the incorporation of this new technology and the works generated through it into the copyright regime achieves the social utility balance mandated by the U.S. Constitution and helps fulfill the social justice promise of copyright law.

## II. COPYRIGHT PURPOSE AND SOCIAL JUSTICE

Serving social justice is an integral aspect of U.S. copyright law and has been from the beginning. In drafting the Copyright Clause, our Constitution's framers penned a broad directive of social utility: "Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their Writings . . ." <sup>12</sup> Thus the Constitution empowers Congress to adopt and revise laws providing for copyright protection <sup>13</sup> as a social engineering mechanism <sup>14</sup> for advancing and shaping American culture.

American copyright law affords specific, exclusive property rights to authors through the Copyright Act as a means by which to spur artistic endeavors. <sup>15</sup> At the same time, however, corollary rights and privileges for making use of copyrighted material are granted to the public, including users of all types, from passive observers or listeners to

12. U.S. CONST. art. I, § 8, cl. 8.

13. See generally Stacy F. McDonald, Comment, *Copyright for Sale: How the Commodification of Intellectual Property Distorts the Social Bargain Implicit in the Copyright Clause*, 50 HOW. L.J. 541, 542–43 (2007) (providing background information about laws adopted by Congress under the U.S. Constitution's Copyright Clause); Edward T. Saadi, *Sound Recordings Need Sound Protection*, 5 TEX. INTELL. PROP. L.J. 333, 335–36 (1997) (providing background information about laws adopted by Congress under the U.S. Constitution's Copyright Clause).

14. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("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 through the talents of authors and inventors in 'Science and useful Arts.'") (quoting *Mazer v. Stein*, 347 U.S. 201, 209 (1954)); PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 1.14 (3d ed. Supp. 2010); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 299, 291 (1988) (discussing economic theories underlying copyright law); Scott L. Bach, Note, *Music Recording, Publishing, and Compulsory Licenses: Toward a Consistent Copyright Law*, 14 HOFSTRA L. REV. 379, 383 (1986); Jason S. Rooks, Note, *Constitutionality of Judicially-Imposed Compulsory Licenses in Copyright Infringement Cases*, 3 J. INTELL. PROP. L.J. 255, 257 (1995); cf. 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 8.01[A] (2010).

15. See 17 U.S.C. (2006 & Supp. 2010); e.g. *Harper & Row, Publishers, Inc.* 471 U.S. at 546–47; *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); see also, e.g., GOLDSTEIN, *supra* note 14; cf. NIMMER & NIMMER, *supra* note 14, § 14.03 (discussing the copyright owner's remedies with respect to the infringer's profits); Lateef Mtima, *Tasini and Its Progeny: The New Exclusive Right or Fair Use on the Electronic Publishing Frontier?*, 14 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 369, 396–97 (2004); Michael G. Anderson & Paul F. Brown, *The Economics Behind Copyright Fair Use: A Principled and Predictable Body of Law*, 24 LOY. U. CHI. L.J. 143, 158–59 (1993).

active creators using ideas and elements from prior works.<sup>16</sup> Together, the recognized rights and interests of authors and of the public are intended to form a synergistic framework to effectuate the social utility objectives of the Copyright Clause.<sup>17</sup>

Indeed, the first American copyright law, enacted by the First Congress as the 1790 Copyright Act, was entitled “An Act for the Encouragement of Learning.”<sup>18</sup> Until the 1976 Copyright Act became effective in 1978, publication of the work was required as a condition of obtaining federal copyright under the 1909 Act.<sup>19</sup> The 1976 Copyright Act changed the basis of copyright from publication to fixation.<sup>20</sup> However, the 1976 Copyright Act still required compliance with the formalities of notice, registration, and deposit.<sup>21</sup> The deposit of copies of the works with the Library of Congress helped build the vast storehouse of information the Library of Congress has become. Thus, the socio-utilitarian purpose of copyright law has been at its core since the beginning, though this purpose has at times been eroded by certain changes in the law.<sup>22</sup>

In keeping with the constitutional mandate, both Congress and the courts have determined that, unlike natural law intellectual property regimes, the primary objective underlying American copyright law is to engender the broadest possible production and dissemination of creative works for society’s benefit. Widespread

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16. *E.g.*, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003) (“A claim of copyright infringement is subject to certain statutory exceptions, including the fair use exception.”); *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997) (“[The fair use doctrine] permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”). *See generally* I. Fred Koenigsberg, *Lines of Defense: An Analytic Framework for the Defense of Copyright Infringement*, 1 *LANDSLIDE* 36, 39–40 (2009) (discussing potential defenses to claims of copyright infringement).
  17. We have each separately addressed aspects of this idea from different perspectives in prior works, *e.g.*, Lateef Mtima, *Copyright Social Utility and Social Justice Interdependence: A Paradigm for Intellectual Property Empowerment and Digital Entrepreneurship*, 112 *W. VA. L. REV.* 97 (2009); Steven D. Jamar, *Copyright and the Public Interest from the Perspective of Brown v. Board of Education*, 48 *How. L.J.* 629, 639 (2005).
  18. Copyright Act of 1790, ch. 15, § 1, 2 Stat. 124 (1790) (current version at 17 U.S.C. (2006 & Supp. 2010)).
  19. Copyright Act of 1909, ch. 329, § 1, 35 Stat. 1075 (1909) (current version at 17 U.S.C. (2006 & Supp. 2010)).
  20. Copyright Act of 1976, 17 U.S.C. §§ 101–810 (1976) (current version at 17 U.S.C. (2006 & Supp. 2010)).
  21. *Id.* Prior to the establishment of the Library of Congress in 1800, deposits were made to the Secretary of State. These formalities (notice, registration, and deposit) were dropped when the 1976 Act was amended in 1988 in order to bring the United States into compliance with international standards, especially with the Berne Convention. The Berne Convention is the principal multilateral treaty governing the protection of copyrights in the international arena; by bringing U.S. copyright law into compliance with Berne, the United States gained protection for its copyrighted works in all of the other countries that are also signatories to the Convention. *See Berne Convention for the Protection of Literary and Artistic Works* art. 5, § 2, Sept. 28, 1979, S. TREATY DOC. NO. 99-27.
  22. *See* L. RAY PATTERSON & STANLEY F. BIRCH, JR., *A UNIFIED THEORY OF COPYRIGHT* (Craig Joyce ed., 2009), *printed in* 46 *HOUS. L. REV.* 215 (2009); PATRY, *supra* note 4.

production and dissemination of creative works benefits the recipients directly by their use of and exposure to the works, and benefits society indirectly by the recipients in turn building upon those ideas. Thus the production of additional works by the first order recipients benefits not only those recipients, but also the next order of recipients who continue the cycle, igniting and perpetuating a chain reaction of cultural advancement and ultimately advancing society as a whole.

In short, the aim of the copyright law is progress; the means is the granting of limited copyright property rights. As the Supreme Court stated in *Feist*, “[t]he primary objective of copyright is not to reward the labor of authors, but “[t]o promote the Progress of Science and useful Arts.”<sup>23</sup> The Court continued, “[t]o this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed in the work.”<sup>24</sup>

Furthermore, as the Court explained in *Eldred*, “copyright’s limited monopolies are compatible with free speech principles,”<sup>25</sup> “[i]ndeed, copyright’s purpose is to promote the creation and publication of free expression.”<sup>26</sup> The ends sought are the protection of the public interest, progress, and the public good. The means of doing so is the granting of a limited property right, a so-called limited monopoly to encourage the creation of works. Copyright is therefore not about profit for the person—it is about “profit” for society.

However, some legal scholars and commentators have questioned whether copyright law can truly be said to fulfill its function of social utility if, in advancing the societal culture, it fails to achieve an adequate measure of social justice as well.<sup>27</sup> Does a civilization or culture genuinely advance when significant segments of its populace remain bereft of the benefits of societal progress and achievements? As

23. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. Const. art. I, § 8, cl. 8); *accord* *Eldred v. Ashcroft*, 537 U.S. 186, 187, 212 (2003); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154 (1975); *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 5–6 (1966).

24. *Feist*, 499 U.S. at 349–50 (citing *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556–57 (1985)); *see also* *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (stating that the purpose of copyright is to promote wide dissemination of information, literature, music, and other arts); *Twentieth Century Music Corp.*, 422 U.S. at 156. *See generally* PATTERSON & BIRCH, *supra* note 22, at 256–58, 284–86; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (“We have often recognized the monopoly privileges that Congress has authorized . . . are limited in nature and must ultimately serve the public good.”).

25. *Eldred*, 537 U.S. at 190.

26. *Id.* at 219.

27. *See, e.g.*, Keith Aoki, *Distributive and Syncretic Motives in Intellectual Property Law (with Special Reference to Coercion, Agency, and Development)*, 40 U.C. DAVIS L. REV. 717, 721 (2007); Anupam Chander & Madhavi Sunder, *Is Nozick Kicking Rawls’s Ass? Intellectual Property and Social Justice*, 40 U.C. DAVIS L. REV. 563, 564–65 (2007); Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2912 (2006); Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1204–05 (2007); K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate Over African-American Reparations*, 25 CARDOZO ARTS & ENT. L.J. 1179, 1227 (2008); Mtima, *supra* note 17, at 151; Ruth Okediji, *Givers, Takers, and Other Kinds of Users: A Fair Use Doctrine For Cyberspace*, 53 FLA. L. REV. 107, 153–54 (2001); Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761, 832 (2006); McDonald, *supra* note 13, at 543–44.

philosophers and statesmen have urged, we should measure a society by its treatment of those on the lowest rungs of the ladder.<sup>28</sup>

Social justice is part of the progress that copyright law intends to advance. Social justice is a protean concept that varies with circumstances. It includes the aspirational ideal of substantive equality as well as the relatively easily addressable procedural equality.<sup>29</sup> Social justice includes at least some aspects of individual liberty (e.g., autonomy) as well as incorporating some communitarian liberty values such as religious association, pursuit of legitimate group interests, and civic virtues such as voting. Social justice includes not only access to, but also inclusion in, the social, cultural, and economic life of the country. Indeed, it extends beyond inclusion in social, cultural, and economic life to full participation in and ability to affect the direction of civil society in all its manifestations. Social justice thus rests upon the core values of equality, liberty, and advancing the general welfare enshrined in the Declaration of Independence<sup>30</sup> and Preamble to the U.S. Constitution.<sup>31</sup>

These very same principles are echoed in the grant of power to Congress over copyrights and patents: the power is granted for the progress of all, not for the benefit of a few.<sup>32</sup> When Congress exercises its grant of power, the resulting law becomes the supreme law of the land to ensure that the benefits are distributed widely and fairly, and not burdened by or hoarded by each state.<sup>33</sup>

In the field of intellectual property, social justice includes the ability to enjoy the fruits of others at some base level of procedural equality (equal access to the works of others) and, to a lesser but important extent, the ability to have some base level of substantive equality in the beneficial impact of intellectual property created by others. Even more importantly, social justice in the area of intellectual property extends

28. JAMES BOSWELL, *THE LIFE OF SAMUEL JOHNSON*, LL.D. 130 (1791) (quoting Samuel Johnson as saying, “[a] decent provision for the poor is the true test of civilization”); JOHN EMERICH EDWARD DALBERG-ACTON, *THE HISTORY OF FREEDOM AND OTHER ESSAYS* 4 (John Neville Figgis & Reginald Vere Laurence eds., Dodo Press 2008) (1907) (“The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities.”); DANIEL B. BAKER, *POLITICAL QUOTATIONS* 213 (Daniel B. Baker ed., Gale Research Inc., 1990) (quoting Senator Hubert H. Humphrey, addressing the 1976 Democratic National Convention) (“[T]he moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of life, the elderly; those who are in the shadows of life; the sick, the needy and the handicapped.”).

29. See, e.g., Carla D. Pratt, *Way To Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 *FORDHAM L. REV.* 1409 (2009).

30. See *DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness.”).

31. See U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”) (emphasis added).

32. See U.S. CONST. art. I, § 8 (“The Congress shall have power . . . To 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 . . .”) (emphasis added).

33. U.S. CONST. art. VI, cl. 2.



beyond mere access and beyond mere passive observation or enjoyment of others' works (e.g., listening to a recording or seeing a movie): it includes the ability to participate in the creation and exploitation of intellectual property both in a procedurally fair way and a substantively significant way.<sup>34</sup> Viewed from this perspective, the copyright law (and the Constitution as a whole) directs policymakers to act affirmatively to advance the cause of social justice through copyright.<sup>35</sup>

This obligation to consider social justice implications of copyright law extends to the digital environment. Indeed, the advent of the Digital Information Age is in part responsible for refocusing scholarly, political, and professional attention toward the social utility and social justice obligations of the copyright law.<sup>36</sup> A brief diversion to discuss some attributes of the Digital Information Age will make clear the importance of considering social justice and social utility in fashioning and applying copyright law.

Digital information technology has provided unexpected and unforeseen opportunities for the development, dissemination, and exploitation of individual creative expression. Technological advances provide unprecedented access to copyrighted material through the Internet and a variety of digital media formats. In addition, these advances have enabled end users of copyrighted materials to engage in new forms of creative expression, not only with respect to their own original expression, but through the reuse or "remix" of pre-existing (and previously static) copyrighted material.<sup>37</sup> In the context of global culture, digital information technology presents attractive possibilities for heretofore marginalized groups and cultures to share their indigenous creative expression, not only to help educate outsiders about their aesthetic customs and cultural beliefs, but also to help them gain economic independence and socio-political empowerment.<sup>38</sup>

Concomitant with this plethora of artistic and educational boons, digital information technology also exposes weaknesses in the social utility/social justice effects of copyright law. Perhaps foremost among the deleterious effects is the Digital Divide: while many Americans now enjoy greater access to the national (and multi-national) store of copyrighted works, other citizens remain isolated from such benefits through their lack of access to information technology and/or the skills to utilize

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34. See generally PAGE, *supra* note 9; SUNSTEIN, *supra* note 10.

35. See Chander & Sunder, *supra* note 27, at 578 ("No human domain should be immune from the claims of social justice. Intellectual property, like property law, structures social relations and has profound social effects."); Charles H. Norchi, *The Legal Architecture of Nation Building*, 60 ME. L. REV. 281, 290 (2008) ("Ensuring the human dignity of the beneficiary population is one of the foundational justifications for nation-building products. As a practical matter, this is also a precondition for progress on any other reconstruction front.").

36. See Travis, *supra* note 27, at 763–64; Chander & Sunder, *supra* note 27, at 565; Chon, *supra* note 27, at 2831–32; Okediji, *supra* note 27, at 126–28; David Cook, Comment, *Searching for Answers in a Digital World: How Field v. Google Could Affect Fair Use Analysis in the Internet Age*, 11 SMU SCI. & TECH. L. REV. 77, 83–84 (2007). At least equally responsible is the rise of voices raising perspectives that grow out of the civil rights movement. See, e.g., Greene, *supra* note 27, at 1194–99; Lateef Mtima, *Intellectual Property and Social Justice*, 48 HOW. L.J. 571, 572–77 (2005); Jamar, *supra* note 17, at 639.

37. LESSIG, *supra* note 4, at 255–56.

38. COPYRIGHT CRIMINALS, *supra* note 5.

such technology effectively. Indeed, in some cases, access to copyrighted works for some has actually diminished as digital formats have become the dominant medium for creative expression.<sup>39</sup> And while digital information technology proffers new avenues for the socially beneficial exploration and use of marginalized indigenous cultural expression, it also presents new methods for cultural pillaging and other unwelcome and inequitable intrusions upon sacred and otherwise revered cultural practices and belief systems.<sup>40</sup>

The proliferation of digital information technology (as well as the resultant Digital Divide) has often spawned polarized and polarizing rhetoric by and on behalf of authors and users. The tension between authors and users is often portrayed in absolute and vitriolic terms, indeed, even as a war between the proponents of the copyright social benefits that digital information technology can bestow upon society as a whole,<sup>41</sup> and those who favor the commoditization interests of individual copyright owners, particularly the commercial copyright industries.<sup>42</sup>

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39. See, e.g., Janet Thompson Jackson, *Capitalizing on Digital Entrepreneurship for Low-Income Residents and Communities*, 112 W. VA. L. REV. 187, 189–92 (2009).

40. See Thekla Hansen-Young, *Whose Name Is It Anyway? Protecting Tribal Names From Cybersquatters*, 10 VA. J.L. & TECH. 6 (2005) (examining the remedies available to tribes seeking to protect their tribal name from cybersquatting); Danielle Conway-Jones, *Safeguarding Hawaiian Traditional Knowledge and Cultural Heritage: Supporting the Right to Self-Determination and Preventing the Co-modification of Culture*, 48 HOW. L.J. 737 (2005) (supporting the proposition that Western intellectual property law and its protections should not extend to native Hawaiian cultures and traditions for the purpose of preservation); R. Hokulei Lindsey, *Responsibility and Accountability: The Birth of a Strategy to Protect Kanaka Maoli Traditional Knowledge*, 48 HOW. L.J. 763 (2005) (discussing how intellectual property has not aided in protecting Kanaka Maoli traditional knowledge, but is actually facilitating in the misappropriation of the traditional indigenous knowledge and further discussing how that knowledge can be protected).

41. This point is made with particular force by William Patry, who describes both the phenomena and the deleterious impacts of using such strident metaphors in the dispute. PATRY, *supra* note 4. One attribute of the posturing is the use of unsupportable claims of losses due to copying without permission for copyrighted materials, *id.* at 30–36, and unsupportable claims of losses due to counterfeit products being sold. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-423, REPORT TO CONGRESSIONAL COMMITTEES, OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 27 (2010). The major conclusion of the GAO is:

While experts and literature we reviewed provided different examples of effects on the U.S. economy, most observed that despite significant efforts, it is difficult, if not impossible, to quantify the net effect of counterfeiting and piracy on the economy as a whole. For example, as previously discussed, OECD attempted to develop an estimate of the economic impact of counterfeiting and concluded that an acceptable overall estimate of counterfeit goods could not be developed. OECD further stated that information that can be obtained, such as data on enforcement and information developed through surveys, “has significant limitations, however, and falls far short of what is needed to develop a robust overall estimate.” One expert characterized the attempt to quantify the overall economic impact of counterfeiting as “fruitless,” while another stated that any estimate is highly suspect since this is covert trade and the numbers are all “guesstimates.”

*Id.*

42. See Neil Weinstock Netanel, *Impose a Commercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 77–78 (2004); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 462.

Both the erstwhile war and vitriol are misguided, as becomes clear upon remembering the overarching social utility goals of the copyright law, including the social justice aspects of inclusion and the empowerment of disadvantaged groups. The rhetoric of absolutist entrenchment of rights is misguided, both substantively and practically. Accommodating the competing interests in exploiting and using copyrighted works can best be accomplished by revisiting the social utility purpose of the copyright law including the social justice effects. Indeed, even broader questions regarding digital and other dissemination and exploitation of creative cultural expression outside the protection of the copyright regime can be addressed through empathic invocation of the social utility goals of the copyright law. That is, the social justice focus can help improve not only copyright law, but also can help address related development and information dissemination issues.

Consistent with the constitutional mandate of the Copyright Clause and the specific social utility and social justice objectives of the copyright law, the Digital Divide and related copyright social inequities should be addressed as something other than an issue of the allocation of limited resources. These intertwined problems can be seen instead as matters of constitutional stature that warrant affirmative steps to address the concerns. The constitutional principles of justice, progress, equality, and liberty are directly applicable when they arise in the intellectual property context: everyone is to be included; none should be excluded; the common welfare and progress are the foci; and, although the individual should be able to benefit from his or her own creation, societal advancement is the paramount goal.

Developing an appropriate social justice/authors' rights equipoise that conforms to the fundamental aim of copyright law in the Digital Information Age requires a confluence of various copyright constituencies' interests, ideas, and initiatives. Congress, the courts, copyright owners, and the public each have a critical role to play in shaping the contours of copyright in response to the new challenges—and new opportunities—afforded by advances in technology for the generation of, access to, and use of creative expression.

### III. COPYRIGHT DEVELOPMENT: THE ROLES OF CONGRESS, THE COURTS, AND PRIVATE PARTIES IN FURTHERING THE CONSTITUTIONAL PURPOSE

Congress, the courts, and private parties each play an important role in assuring that the law's overarching objectives of societal progress are achieved. For example, in enacting the Copyright Act, Congress included provisions that promote progress of society in manifold ways, including the grant to authors of a limited monopoly to incentivize the creation and dissemination of works, the grant to users of the fair use right to enable the use of protected elements of works in socially beneficent ways, the grant of compulsory licenses in various circumstances to promote commercial exploitation of works (e.g. by recording a cover of a song), as well as many more.<sup>43</sup>

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43. *See, e.g.*, 17 U.S.C. §§ 106, 107, 115 (2006 & Supp. 2010). *See generally* 17 U.S.C. §§ 108–122 (2006 & Supp. 2010).

The courts also play a vital role in furthering the constitutional purpose of the Copyright Clause by interpreting and applying the Copyright Act appropriately, keeping it within constitutional bounds. For example, courts created the fair use doctrine and have safeguarded it to protect things like parodic uses of copyrighted works.<sup>44</sup> At the same time, when the courts get the balance wrong, Congress has stepped in to correct it. For example, when the courts did not allow software users to make random access memory copies in connection with the maintenance and repair of their computer systems, Congress amended the Copyright Act to expressly allow users to do so.<sup>45</sup>

Private parties can also substantially affect the social utility and social justice aspects of copyright by making works available that might otherwise not be readily available to some populations. Private parties can also cooperate to employ the law creatively to advance the public's interest by creating mechanisms to manage distribution of some types of works in ways that both compensate copyright holders and disseminate the works more broadly.<sup>46</sup>

Throughout the history of American copyright law, Congress, the courts, and private parties have embraced opportunities to advance the law, sometimes proceeding individually but often acting in concert. Reviewing some of the salient efforts by each of these actors to address new challenges to the copyright regime can provide insight into similar opportunities in the Digital Information Age.

#### *A. The Role of Congress*

Congress and the courts set the general rules concerning the scope of copyright protections in a variety of ways. As the Supreme Court properly notes, "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives,"<sup>47</sup> and "the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause."<sup>48</sup>

In furthering the goal of cultural progress through the dissemination of knowledge, Congress has limited its grant of the copyright exploitation monopoly in a number of important ways. It has enacted limits on protectable subject matter (e.g., under 17 U.S.C. § 102(b) facts are not copyrightable, which is essentially a codification

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44. *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 574–77 (1994).

45. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, § 301, 112 Stat. 2860, 2886 (1998).

46. *See, e.g.*, private collective rights organizations such as The American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the Harry Fox Agency (HFA), which facilitate exploitation of musical compositions and sound recordings in economically efficient ways that also serve the public purpose of copyright by effectuating broad dissemination of works. *About ASCAP*, ASCAP, <http://www.ascap.com/about/> (last visited Oct. 25, 2010); *About BMI*, BMI, <http://www.bmi.com/about/?link=navbar> (last visited Oct. 25, 2010); *What does HFA do?*, HFA, <http://www.harryfox.com/public/WhatdoesHFAdo.jsp> (last visited Oct. 25, 2010).

47. *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003).

48. *Id.* at 222.

of the constitutional requirements of originality and authorship) and has enacted various exceptions and limitations to the copyright monopoly, including codifying the judicially created doctrine of the right of fair use.<sup>49</sup> Congress has also enacted numerous other specific limitations for particular types of works (e.g., § 113 limiting rights in pictorial, graphic, and sculptural works, and § 117 limiting rights in software); for particular types of uses (e.g., § 109, the “first sale doctrine,” limiting the right of distribution, and §§ 114 and 119 limiting rights in secondary transmissions); and for particular types of users (e.g., § 108 for libraries and § 121 for reproduction for use by the blind).<sup>50</sup>

As new challenges and opportunities arise, it is the responsibility of Congress to respond with appropriate legislation to assure the continued achievement of the constitutional copyright mandates of copyright social utility and social justice. Congress has a wide range of options it can pursue in maintaining the balance. For example, Congress can limit the scope of an author’s rights, such as it did when extending copyright to architectural works.<sup>51</sup>

Congress can also choose to maintain the authors’ exclusive rights to specific uses of their works, but mandate terms upon which the works must nonetheless be licensed to the public through a copyright compulsory license. In the right circumstances a compulsory license both reaffirms author incentives and also helps achieve widespread public engagement in a particular use of copyrighted material. In adopting a copyright compulsory license, Congress is making the determination that, insofar as a particular use for copyrighted material is concerned, the traditional “author-versus-public” allocation is inadequate to effectuate the overarching copyright social utility goals.

Congress most typically resorts to the compulsory license mechanism in response to the introduction of a new technological use for copyrighted material. New technological uses often present socially complex opportunities for promoting literary and artistic advance. The new technology may replicate an existing exclusive right, but it might also present new social utility considerations such that automatic relegation of the new technological use to authors would be inconsistent with the underlying purpose of copyright protection. Consequently, in order to preserve the copyright social utility balance, Congress instead engages in an ad hoc apportionment of the use between authors and the public. In this way, the author retains the right to receive compensation in connection with the use. Yet, in setting the amount of that compensation, Congress effectively places control over the right to engage in the use in the hands of the copyright-using public.

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49. WILLIAM F. PATRY, *PATRY ON FAIR USE*, §§ 1:2–1:3 (Thomson/West 2009); *Folsom v. Marsh*, 9 F. Cas. 342, 344–45, 348 (C.C.D. Mass. 1841) (stating that “fair and bona fide abridgment of an original work, is not a piracy of the copyright of the author”).

50. 17 U.S.C. §§ 108, 109, 113, 114, 117, 119, 121 (2006 & Supp. 2010).

51. *See* 17 U.S.C. § 120 (2006 & Supp. 2010); Architectural Works Copyright Protection Act, tit. VII, § 703, Pub. L. No. 101-650, 104 Stat. 5089 (1990).

*B. The Role of the Courts*

Whereas Congress has the responsibility for enacting and amending appropriate copyright law, it is the role of the courts to assure its proper interpretation and application. For more than two hundred years, the courts have developed a body of copyright jurisprudence that, with mixed success, seeks to ensure that the copyright law remains faithful to its constitutional underpinnings.<sup>52</sup> For example, the Supreme Court has explicitly stated that originality is a constitutional requirement of copyright protection and has set the threshold for what level of originality is required: “Even a slight amount will suffice,” provided the works possess some “creative spark ‘no matter how crude, humble or obvious’ it might be.”<sup>53</sup>

In addition to preserving the constitutional constraints on Congress, the courts also play a variety of affirmative roles in fashioning, administering, and adapting the copyright regime. Through judicial interpretation and application of copyright law to specific disputes and controversies, the courts clarify the legal rights and interests created under the Copyright Act and help adapt the law to contemporary challenges.<sup>54</sup> And, of course, courts resolve individual copyright disputes.

But the role of the courts is more than this. The courts have an independent responsibility that is complementary to the powers and obligations of Congress to ensure that the copyright law serves to promote the development, use, and exploitation of artistic expression, and to thereby satisfy the copyright social engineering directive set forth in the Constitution.<sup>55</sup> To this end, courts have developed a variety of doctrines, some prudential and some constitutionally required, that limit the reach of a copyright owner’s monopoly.

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52. *Compare* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340 (1991) (eliminating the “sweat of the brow” theory), *and* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 574–77 (1994) (recognizing parody as fair use), *with* *Eldred*, 537 U.S. at 186 (allowing expansion of the “limited time” of copyright unquestionably to a point far greater than needed to insure the creation and dissemination of new works).

53. *Feist*, 499 U.S. at 369. One right that has not been considered as a limit on copyright is the right to equal protection under the law. Although it would be merely an academic exercise at this point, one can craft a good argument that the values of equality, and of inclusion to achieve equality, can inform interpretation of the Copyright Act and could, in some circumstance, act as limits on ever-expansive readings of the rights granted to authors. This equality right and the equality principle both fit tightly with the social justice impetus of the copyright constitutional provision of promoting progress: Society includes (or should include) everyone.

54. *See* Dennis S. Karajala, *Harry Potter, Tanya Grotter, and the Copyright Derivative Work*, 38 ARIZ. ST. L.J. 17, 34–35 (2006); 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, 888–89 (1999); Michael Spink, *Authors Stripped of Their Electronic Rights in Tasini v. New York Times Co.*, 32 J. MARSHALL L. REV. 409, 420 (1999); Sarah Deutsch, *Fair Use in Copyright Law and the Nonprofit Organization: A Proposal for Reform*, 34 AM. U.L. REV. 1327, 1351 n.170 (1985).

55. *See, e.g.*, Marci A. Hamilton, *Copyright at the Supreme Court: A Jurisprudence of Deference*, 47 J. COPYRIGHT SOC’Y U.S.A. 317, 319 (2000) (“Elements of the [Supreme C]ourt’s . . . interpretation of the Copyright Clause . . . include an emphasis on the public good that forces [authors’ rights] to be conditioned by the public . . . From the first case, through the present, the Court has treated copyright law as positive law, the parameters of which are determined by Congress ([as] limited by the Constitution’s strictures).”).

Many examples exist of the active and important role of the courts in furthering the constitutional mandate of serving the greater public good through the broadest dissemination and use of creative works, and in a manner consistent with the incentivizing copyright monopoly over certain rights in the work.<sup>56</sup> The most prominent example of the courts fulfilling this role is the judicial creation, development, and application of the doctrine of fair use.<sup>57</sup> Fair use ensures that the incentive mechanism of granting an author a property interest does not subordinate important social utility needs of society as a whole.<sup>58</sup>

For 188 years, from the enactment of the Copyright Act of 1790 until the 1976 Copyright Act went into effect in 1978, Congress did not provide explicit statutory protection for fair use.<sup>59</sup> In 1841, in deciding whether a user infringed another's copyright, Judge Story wrote:

In short, we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.<sup>60</sup>

Over the ensuing years, the courts recognized an inherent public privilege to make fair use of copyrighted works, and thus to intrude upon a copyright owner's exclusive exploitive rights for the purpose of educational and literary discourse and comment.<sup>61</sup>

Fair use developed into an "equitable doctrine [which] permits other people to use copyrighted material without the owner's consent in a reasonable manner for certain purposes."<sup>62</sup> It enables the copyright law to account for certain situations,

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56. See, e.g., *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398–400 (1968); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549 (1985); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).
57. See *Folsom*, 9 F. Cas. at 342, 344–45, 348; Sharon Appel, *Copyright, Digitization of Images, and Art Museums: Cyberspace and Other New Frontiers*, 6 UCLA ENT. L. REV. 150, 167 (1999).
58. See, e.g., Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).
59. See 17 U.S.C. § 107 (2006 & Supp. 2010) (codifying fair use).
60. *Folsom*, 9 F. Cas. 342, 344–45, 348; see also *Lawrence v. Dana*, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (quoting *Folsom*).
61. See WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 52–55 (2d ed. 1995); *Folsom*, 9 F. Cas. at 349; Leval, *supra* note 58, at 1105 ("Not long after the creation of the copyright law by the Statute of Anne of 1709, courts recognized that certain instances of unauthorized reproduction of copyrighted material, first described as 'fair abridgment,' later 'fair use,' would not infringe the author's rights.").
62. *Rogers v. Koons*, 960 F.2d 301, 308 (1992); see *Field v. Google, Inc.*, 412 F. Supp. 2d 1106, 1117 (D. Nev. 2006); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575–77 (1994); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448–51 (1984); *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1521–22 (9th Cir. 1992); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001); see also PATRY, *supra* note 49, at 3–5; I. Fred Koenigsberg, *Copyrights, in UNDERSTANDING BASIC COPYRIGHT LAW* 2002 147–48 (PLI Patents, Copyrights, Trademarks, and Literary Prop. Practice, Course Handbook Ser. No. G-710, 2002); NIMMER & NIMMER, *supra* note 14, at § 13.05; Leval, *supra* note 58, at 1127–28.

among others, in which a specific unauthorized use of copyrighted material will have little to no impact upon the author's overall incentive and compensation interests, and the social utilities to be achieved in permitting the use warrants a limited intrusion upon the copyright holder's exclusive rights.<sup>63</sup>

Somewhat more difficult in terms of getting the balance right are uses that can have a more significant impact on a copyright holder's interests, such as in the creation of works based on, or incorporating parts of, the underlying work. Parodies are of this type,<sup>64</sup> as are some forms of commentary, which may in fact adversely and even significantly affect the copyright holder's compensation; a devastating review of a play, for example, can have this effect.<sup>65</sup>

Today, the judicially created fair use doctrine remains the predominant juridical tool for limiting an author's property rights in deference to the social utility demands of the copyright law. As Professor Goldstein puts it:

The social judgment in these cases is that, even if transaction costs do not systematically disable negotiated licenses, these users are not only so important but also so characteristically underfunded that they deserve a free ride or, at least, should be required to compensate the copyright holder with no more than a reasonable fee. These social judgments presuppose that the copyright owner will be able to earn returns in other markets that are sufficient to provide it with the incentives it needs to produce copyrighted works in the desired quantity and of the desired quality.<sup>66</sup>

Even after Congress codified fair use in 1976 in § 107, the equitable nature of the doctrine means that the most important developments in the doctrine of fair use are still found in the courts which are constrained only loosely by the language of the statute.<sup>67</sup>

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63. See, e.g., GOLDSTEIN, *supra* note 14, § 10.2.1, at 10:19–10:22; NIMMER & NIMMER, *supra* note 14, § 13.05[A][1]; Pamela Samuelson, *Fair Use for Computer Programs and Other Copyrightable Works in Digital Form: The Implications of Sony, Galoob and Sega*, 1 J. INTELL. PROP. L. 49, 56–57 (1994); Sharon Appel, *supra* note 57, at 174–75.

64. See *Acuff-Rose*, 510 U.S. at 574–77 (“Oh! Pretty Woman” parody by 2 Live Crew allowed as fair use without permission of copyright holder).

65. *Broadway Shows Big Flops: Some Broadway Shows Close Early, Close on Opening Night, or Don't Even Make It To Opening Night*, NEW YORK SHOW TICKETS, [www.nyitix.com/Links/Broadway/Articles/broadwayflops.html](http://www.nyitix.com/Links/Broadway/Articles/broadwayflops.html) (last visited Oct. 17, 2010) (“Recent Broadway flop shows that closed on opening night include *Moose Murders* in 1983, *The Oldest Living Confederate Widow Tells All* in 2003, and *Glory Days* in ‘08.”).

66. GOLDSTEIN, *supra* note 14, § 7.0.2, at 7:7; see also, e.g., Samuelson, *supra* note 63, at 51; Leval, *supra* note 58; *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 387 F. Supp. 2d 521, 535–37 (2005); *Sega v. Accolade*, 977 F. 2d at 1520–27.

67. While 17 U.S.C. § 107 sets forth four factors that courts must consider in deciding whether an unauthorized use of a copyrighted work should be permitted as a fair use, the courts are free to consider other factors as well. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (finding that use of a critical section of Gerald Ford's memoirs printed prior to book publication or licensed magazine syndication was not a fair use); *Acuff-Rose*, 510 U.S. at 579 (finding that creation of a derivative work parodying original work was permissible as a fair use).



Ultimately, fair use determinations are extremely fact sensitive, and decisions somewhat more unpredictable than more tightly defined limits or exclusions would be.<sup>68</sup>

The fair use doctrine can be pivotal in maintaining the social utility balance of copyright in the context of new technological uses for copyrighted works. When a new technological use for copyrighted material is introduced, it can obscure the boundary between authors' exclusive rights and the rights and privileges reserved for the public.<sup>69</sup> This blurring sometimes arises because the relationship of the new technological use to the enumerated exclusive rights is unclear, e.g., whether posting content on a website on the Internet is a transmission, a distribution, a publication, a public performance, or something qualitatively different.<sup>70</sup> Even where the new use would likely be an exercise of an established exclusive right, however, the overarching social utilities that underlie copyright protection may warrant a public privilege to participate in the new use, free of permission constraints.<sup>71</sup> In many copyright disputes arising from new technological uses, the courts are called upon to clarify or delineate the contours of the copyright owner's property rights, or to otherwise balance the competing social utilities in the first instance, before Congress has responded to the "brave new world." In these situations, courts often rely on the fair use doctrine to realign the respective rights and expectations of authors and the public in connection with a particular new use for copyrighted material.<sup>72</sup>

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68. *See, e.g.,* *New Era Publ'ns Int'l v. Carol Publ'g Grp.*, 904 F.2d 152 (2d Cir. 1990) (holding that a published critique on Scientology, which included some of the writings of Scientology's creator, L. Ron Hubbard, constituted fair use); *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (finding that the reproduction of "coursepacks" assembled from portions of copyrighted works did not constitute fair use).

69. *See* Jamar, *supra* note 17, at 649–51; Wendy M. Pollack, Note, *Tuning in: The Future of Copyright Protection for Online Music in the Digital Millennium*, 68 *FORDHAM L. REV.* 2445, 2445 (2000).

70. *See, e.g.,* *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398–400 (1968) (holding that re-transmission of captured signal was not a performance and therefore not a violation of copyrights); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974) (discussing whether unauthorized cable transmission of copyrighted broadcasts violated the reproduction and distribution rights); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (loading software onto RAM is a violation of copyright); *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 717–18 (9th Cir. 2007) (holding that thumbnail displays are direct infringement on copyright display right); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552, 1556–57 (M.D. Fla. 1993) (discussing whether unauthorized computer screen displays violate display rights); *Sega Enters. v. MAPHIA*, 948 F. Supp. 923, 931–34 (N.D. Cal. 1996) (providing internet users with protected software was contributory infringement); *Religious Tech. Ctr. v. Lerma*, 1996 U.S. Dist. LEXIS 15454, at \*2–5 (E.D. Va. 1996) (holding that unauthorized posting of copyrighted material on the internet for protest purposes was not fair use); *Michaels v. Internet Entm't Grp., Inc.*, 5 F. Supp. 2d 823, 830–31 (C.D. Cal. 1998) (distributing tape on the internet would conflict with public distribution rights under Copyright Act); *1-800 Contacts, Inc. v. Whenu.com*, 309 F. Supp. 2d 467, 485–86 (S.D.N.Y. 2003) (finding that pop-up ads did not infringe on website's copyrights); *Advance Mag. Publishers Inc. v. Leach*, 466 F. Supp. 2d 628, 637 (D. Md. 2006) (holding that unauthorized posting of copyrighted materials on a website is infringement); *Mtima*, *supra* note 15, at 401–15 (discussing effect of Supreme Court decision on publishing contracts).

71. *See, e.g.,* *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820 (9th Cir. 2003) (discussing the public interest in developing an effective search engine index for use in locating copyright images on the Internet); *Mtima*, *supra* note 15.

72. *Arriba Soft Corp.*, 336 F.3d at 820.

For example, *Sony Corp. of America v. Universal City Studios* involved a classic copyright challenge to a new technology, but from an atypical posture.<sup>73</sup> In *Sony*, the movie industry sought to bar all video-cassette recorders (VCRs) from the marketplace because VCRs could be used to make copies of copyrighted works (i.e., movies and TV shows) directly from the television broadcasts. Thus Sony, through the manufacture and marketing of its VCRs, was a contributory infringer. Sony and VCR users argued that copying the broadcasts for later viewing (that is, “time shifting”) was fair use. The posture of *Sony* was thus atypical both insofar as it was directed not at the person doing the copying, the putative direct infringer, but rather at the person making that erstwhile infringement possible, the putative contributory infringer.

In a typical fair use case, a finding that an authorized use qualifies as a fair use applies only to the parties and activity specifically before the court. Subsequent users can invoke the court’s prior decision as precedent, but given the fact-sensitive nature of most fair use decisions, precedent can be of limited value. In *Sony*, however, instead of being asked to assess a particular instance of unauthorized activity, the court was effectively asked to generally categorize an activity (i.e., recording a program for later viewing—time shifting) as either an author’s exclusive right to control or as a fair use. In *Sony*, as in *Acuff-Rose*,<sup>74</sup> the Court carved out a type of conduct as categorically protected by fair use. The result of *Sony* is that members of the public who engage in time shifting are shielded from infringement by the fair use doctrine.

In this respect, the decisions to protect time shifting (*Sony*) and parody (*Acuff-Rose*) are analogous to the availability of a legislative compulsory license, insofar as they privilege an entire category of conduct that might otherwise infringe. The underlying reasons for these doctrines are similarly strongly analogous insofar as the type of use in question (not just the particular individual use) is evaluated from the perspective of the importance of that type of use to the social utility objectives of copyright as a whole. As discussed above, in many situations, Congress makes the determination about the appropriate balance between the rights granted to the author and the limits on those rights in order to both function as an incentive for the author as well as to encourage widespread engagement with the works or types of works to support cultural advancement. In cases such as *Sony* and *Acuff-Rose*, the courts undertake a similar role.

### C. *The Role of Private Parties*

Like Congress and the courts, private parties can be a positive force for promoting social justice through copyright. Congress and the courts enact, develop, interpret, and enforce copyright law. Private parties also construct and implement the law, both normatively and experientially. Private agreements not only shape the copyright reality, but their effectiveness can also chart the course for judicial and legislative adaptation of the law to modern demands. An important past and ongoing example

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73. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

74. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (holding that the whole class of parodies of copyrighted works is generally protected as fair use).

of this shaping is the private creation of collective rights organizations (CROs) such as the American Society of Composers, Authors, and Performers (ASCAP); Broadcast Music, Inc. (BMI); and the Harry Fox Agency (HFA) in the music world. These CROs facilitate exploitation of musical compositions and sound recordings in economically efficient ways that also serve the public purpose of copyright by effectuating broad dissemination of works. Similarly, the proposed Settlement—through its creation of mechanisms to widely disseminate digital copies of books while providing remuneration to authors, often for works that are effectively unavailable to most people since they are out of print—exemplifies private parties (Google, authors, and publishers) working to include and empower others, i.e., working for social justice through the copyright regime.

Private parties have played, and continue to play, a vital role in the realization of the constitutional aim of “promoting progress in Science and useful Arts.” This is an important point that bears repeating because it is too often invisible or ignored: Private parties drive copyright law and practice.<sup>75</sup> Private parties shape copyright law through a variety of means, specifically by:

1. Creating new technologies that enable the creation of new types of works, with photographs, movies, phonorecordings, radio shows, television programs, and software being perhaps the most prominent “new” types of works created after 1790;
2. Creating new means of disseminating information and expressive content, such as radio, television, records, reprography, MP3 files, and the Internet;
3. Creating new works, especially by using new technologies, e.g., computer programs, video games, and social networking sites like YouTube and Facebook;
4. Disseminating works through various arrangements, essentially creating private law under agency, contract, and property law (which is how copyright holders get paid for their works);
5. Lobbying Congress and, indeed, collectively drafting major portions of the Copyright Act and amendments to it; and
6. Enforcing (and declining to enforce) rights (both the monopoly right and the limitations and exceptions to it) through court action, thereby influencing the development of the law (e.g., parodic works held as fair use by the Supreme Court).<sup>76</sup>

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75. Cf. Edward Lee, *Developing Copyright Practices for User-Generated Content*, 1 J. INTERNET L. 1 (2009) (problematically describing copyright holder practices of “forbearing suing” for known infringing uses as “informal copyright”).

76. See *Acuff-Rose*, 510 U.S. at 574–83.

*1. New Works from New Technologies*

Private parties develop the law of copyright through invention of new technologies that allow the creation of new works. While maps and other graphical works were covered under the earliest versions of the U.S. Copyright Acts (maps, charts, and books were covered in 1790<sup>77</sup> with engravings, etchings, and prints added in 1802),<sup>78</sup> some other types of works known at the time were not protected, including musical compositions (added in 1831),<sup>79</sup> plays (added in 1856),<sup>80</sup> and paintings, drawings, and sculptures (added in 1870),<sup>81</sup> though they had been around for millennia. The then “newish” technology of photography was added in 1865<sup>82</sup> (five years before paintings were included), forty years after the first permanent photographic image was made on glass, and twenty-three years *before* modern film photography (Eastman Kodak’s dry film and the camera to go with it) were first marketed.<sup>83</sup>

Private technological advances force copyright law to confront new questions of rights allocation and the preservation of the copyright social utility balance. In 1790, no one could have foreseen the coming of photography, phonorecording, movies, radio, television, and software. The chemical understanding needed for photography was in its infancy and the electricity needed for radio, television, and computers had not yet been harnessed (the electric motor was invented in 1821).<sup>84</sup> At that time, the electromagnetic spectrum used for radio and television was unknown. Also, the transistor<sup>85</sup> and the semiconductor chip<sup>86</sup> (both of which were necessary for modern computers) were invented one and a half centuries later.

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77. Copyright Act of May 31, 1790, ch. 15, § 1, 2 Stat. 124 (current version at 17 U.S.C. § 101 (2006 & Supp. 2010)).
78. Copyright Act of Apr. 29, 1802, ch. 36, §§ 2–3, 1 Stat. 171–72 (current version at § 101). Act of Apr. 29, 1806, ch. 36, §§ 2, 3, 2 Stat. 171–172.
79. Copyright Act of Feb. 8, 1831, ch. 16, §§ 1, 7, 2 Stat. 436, 438 (current version at § 101).
80. Copyright Act of Aug. 18, 1856, ch. 169, §1, 1 Stat. 138–139 (current version at § 101).
81. Copyright Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (current version at § 101).
82. Copyright Act of Mar. 3, 1865, ch. 126, § 1, 13 Stat. 540 (current version at § 101).
83. See *Analyzing the World’s First Photograph*, NATIONAL PUBLIC RADIO (Apr. 7, 2002), <http://www.npr.org/programs/watc/features/2002/mar/photograph/>; *About Kodak*, KODAK, <http://www.kodak.com/global/en/corp/historyOfKodak/buildingTheFoundation.jhtml?pq-path=2217/2687/2690> (last visited Oct. 26, 2010).
84. Scientist Michael Faraday published his work on the principle behind the electric motor in 1821. *Historic Figures*, BBC, [http://www.bbc.co.uk/history/historic\\_figures/faraday\\_michael.shtml](http://www.bbc.co.uk/history/historic_figures/faraday_michael.shtml) (last visited Oct. 26, 2010).
85. See Dipak L. Sengupta & Tapan K. Sarkar, *Early History of Electromagnetic Waves*, 45 IEEE ANTENNAS AND PROPAGATION MAG., No. 2, Apr. 2003, at 17, available at [http://www.physics.princeton.edu/~mcdonald/examples/EM/sengupta\\_ieeeapm\\_45\\_2\\_13\\_03.pdf](http://www.physics.princeton.edu/~mcdonald/examples/EM/sengupta_ieeeapm_45_2_13_03.pdf) (The first electromagnetic waves were transmitted and received in 1887); Tun-Jen Chiang, *Fixing Patent Boundaries*, 108 MICH. L. REV. 523, 537 (2010) (explaining that the transistor was invented in 1947).
86. The Semiconductor chip was invented in 1959. Robert W. Kastenmeier & Michael J. Remington, *The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?* 70 MINN. L. REV. 417, 431 (1985).

In response to increasingly rapid technological advance (though it moved at what seems a snail's pace by today's standards), the copyright law was reworked in 1909 with a shift from protecting a narrow, prescribed list of works to a more general provision that purported to protect "all writings of an author."<sup>87</sup> Nonetheless, it still listed types of works that could be copyrighted, retaining the list from the previous law, thereby somewhat inhibiting its generality. Motion pictures were added to the list in 1912<sup>88</sup> and sound recordings were not added until 1971.<sup>89</sup>

The Copyright Act of 1976 marked a major step away from a limited-list approach to one that purported to protect all original authored works that were fixed in a tangible medium of expression. Although a list of protectable works is still included, the Copyright Act expressly states that the list is not intended to be exhaustive—that is, that the things to which copyright protection applies are not limited to the items on the list. Whatever the merits of the justifiable argument that the very presence of a list continues to limit the scope of copyrightable subject matter, much as lists did in prior versions of the Copyright Act, the list is undeniably very important in another way: the rights an author has, the scope of protection for those rights, and the way the rights are protected, in practice, still depend in large part upon which type of listed work it is. Software, for example, is treated as a literary work along with poems, history books, and employee manuals, and consequently, the scope of copyright for software is often controlled by its status as an erstwhile literary work.<sup>90</sup> This varied treatment creates difficulties of application for certain newer types of works such as interactive video games, which are part literary work (because of the software and story) and part audiovisual work, with different rights and limits attached to each part.

In the Digital Information Age, digital formats for music, pictures, and movies allow the creation of new works through the use of existing works as raw material. This creation of digital collages through remixing is the result of the re-envisioning of traditional works as source material and the proliferation of technologies that allow relatively easy, quick, and affordable remixes to be made.<sup>91</sup> Society's interest in encouraging these new forms of creative expression while preserving the author-incentive interests in traditional works compels new judicial and legislative approaches

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87. Copyright Act of 1909, Pub. L. No. 60-349, § 4, 35 Stat. 1075.

88. Copyright Act of 1912, Pub. L. No. 62-303, § 5, 37 Stat. 488.

89. Sound Recording Act of 1971, Pub. L. No. 92-140, § 5, 85 Stat. 391.

90. *See, e.g.*, *Wall Data Inc. v. L.A. Cnty. Sheriff's Dep't*, 447 F.3d 769, 776–77 (9th Cir. 2006); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 533 (6th Cir. 2004); *General Universal Sys. Inc. v. Lee*, 379 F.3d 131, 142–43 (5th Cir. 2004); *Graham v. James*, 144 F.3d 229, 235–39 (2d Cir. 1998); *Gates Rubber Co. v. Bando Chem. Indus. Ltd.*, 9 F.3d 823, 838–43 (10th Cir. 1993).

91. Remixing, especially in audio recordings, can use analog as well as digital media, but the existence of digital formats makes remixing or making collages easier. *See* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 103–29 (2002–03). Photoshop allows digital modification of photographs in ways not really possible in the age of the Monty Python Flying Circus moving collages of forty years ago.

toward maintaining the copyright infrastructure.<sup>92</sup> This sort of ability to create new works from aspects of existing works is an important aspect of social justice empowerment through intellectual property law.

## 2. *New Means of Disseminating Works*

Copyright law is also shaped by the creation, development, and exploitation of new means of disseminating copyrightable works. Once-new means for disseminating works that have changed copyright law include radio, television, movies, records, reprography, MP3 files, and, perhaps most prominently and problematically, the Internet, with its protean manifestations. Whether a broadcast on radio or television constituted a publication or public performance was not always clear.<sup>93</sup> When copyright moved from publication to fixation as the critical event, special rules had to be made for live broadcasts.<sup>94</sup> The rules for Internet posts, which implicate the exclusive rights of reproduction, distribution, and public display, are still being developed.

At one time, the owner, the existence, and the scope of the copyright for a work may have been relatively easy to determine. But with the large number of people potentially involved in all creative aspects of making a movie or sound recording, the problem of who owns (and thus who profits from) the copyright can be more problematic.<sup>95</sup> If copyright only protects the screenplay or the composition, then there is no copyright for the movie or sound recording, respectively. But if the film or sound recording is protected, who should be included as an owner of the work and thus entitled to property rights under the copyright law?

The move to digital formats, with the ability to make perfect copies and distribute them cheaply and easily through compact disks, DVDs, flash drives, and the Internet, creates a host of new problems for copyright law. Congress and the courts have addressed these challenges to some degree, but the rules are also being developed by private individuals through standardized contracts and licensing schemes, which shape copyright owners' and users' expectations and options for exploitation.

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92. *See, e.g.*, *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in various sections of Title 17 of the U.S. Code). *See generally* Menell, *supra* note 91, at 133–38.

93. *See, e.g.*, *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 398–400 (1968).

94. Pursuant to 17 U.S.C. § 102, a creative work must be fixed, i.e., written down, recorded, or filmed in order to be eligible for copyright protection. As the act of fixation became easier for the public to engage in (for example the advent of hand held video cameras) Congress passed the Anti-Bootlegging Act, to provide performing artists with the exclusive right to fix (i.e., record) their live performances. *See* 17 U.S.C. § 1101; *see also* 18 U.S.C. § 2319A.

95. The work made for hire doctrine provides a solution, but under that doctrine the creative input of all collaborators in the project seems to skew the rights away from the artists. “A work made for hire is (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” 17 U.S.C. § 101 (2006 & Supp. 2010).

### 3. *Creating New Kinds of Works Using New Technologies*

Private parties also shape copyright law by creating works, especially when using new technologies. Creating digital works such as computer programs and video games challenge and shape copyright law by pressing it into service in areas it has not previously been called upon to address. Using new technologies to create even well-established types of works—including musical compositions and sound recordings through sampling music, digital photography, and programs such as Photoshop, and more recently digital film—also presents new challenges. In addition, the copyright issues surrounding social networking sites have yet to be worked out. Creating digital copies of books and making them available online create similar challenges.

### 4. *Private Transactions*

Without dissemination of works, the constitutional objective of advancing knowledge and art is unmet. One of the problems of distribution, however, is how to generate sufficient remuneration for the authors of works in order to induce the creation of new works while still ensuring wide dissemination and use.

The remuneration problem is particularly acute for works and uses of works that are low in value on a per-unit basis. The distribution and the performance of music and sound recordings are examples of such low-value-per-unit works (especially the performance of the music).<sup>96</sup> The creation of works for which each transaction yields only a small reward will be stymied by high transaction costs, unless an efficient system of broad distribution is developed.

The primary solution to the remuneration problem has been the creation of private law through various licensing and transfer arrangements under agency, contract, and property law. The development of the collective rights organization-based transaction system for the commercial distribution of music is a good example of the problem and a solution to it. The core of the solution came from, and is still based upon, private actors. But both Congress and the courts ultimately acted to improve and legitimize the private solution through amendments to and interpretation and application of the Copyright Act and antitrust law.<sup>97</sup>

Prior to 1909, copyright in music extended only to musical compositions; even for compositions there was no general public performance right until 1897, when Congress statutorily granted this right to the copyright holder. Thus, prior to that time, and until the 1909 Copyright Act, the copyright law essentially protected only the sale of sheet music; thus, making a sound recording of a composition did not

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96. For example, a single song can be downloaded from iTunes for 99¢. *Music*, iTUNES, <http://www.apple.com/itunes/whats-on/#music> (last visited Oct. 25, 2010). CDs are sold for around \$10.00 to \$15.00. *Music to Our Ears from EMI, POGUE'S POSTS* (April 3, 2007, 9:55 AM), <http://pogue.blogs.nytimes.com/2007/04/03/music-to-our-ears-from-emi/?scp=9&sq=iTunes%20album%20cost&st=cse>. The costs of writing and producing a song are much greater than the costs of a single copy.

97. *See, e.g.*, *Herbert v. Shanley Co.*, 242 U.S. 591, 594–95 (1917) (holding that performance of copyrighted material in a hotel for the pleasure of its guests did infringe on the public performance right and ultimately the rightsholder's monopoly as intended under the Constitution).

infringe as a copy or as a public performance of the work.<sup>98</sup> In the 1909 Copyright Act, Congress expanded the copyright in musical compositions to include “mechanical reproductions” (i.e., recordings) of the works, and concomitantly provided a compulsory license, such that once a composer had licensed the recording of the work by one recording company, any other company had the right to record and distribute the recording of the work upon paying the statutory license fee. Section 115 of the Copyright Act still contains the compulsory license fee, which covers not only physical recordings but also digital formats and formats that can be transferred online (e.g., MP3 files).<sup>99</sup>

Although the enactment of the compulsory license balanced the social good with the private interest by ensuring public access to recorded musical performances, it did not by itself solve the transactional cost problem; that was left to private parties to resolve. The solution was the creation of a number of CROs to administer licensing of the works, including getting licenses from the copyright holders; licensing certain uses to users; collecting license fees; and distributing the proceeds to the copyright holders. For example, ASCAP was formed in 1914 by nine music businesses.<sup>100</sup> On behalf of composers, lyricists, and record companies, ASCAP sued restaurants and nightclubs that performed music on the grounds that they were public performances. In 1917, the Supreme Court agreed with ASCAP.<sup>101</sup>

The CROs thereafter administered both recording rights (e.g., the Harry Fox Agency) and public performance rights (e.g., ASCAP and BMI). Eventually the CROs became so successful that in 1941 they were sued by the United States under antitrust law, on the grounds that just a few CROs controlled the licensing of all musical compositions and works. Ultimately, the cases were settled under consent decrees which are still in place and are reviewed from time to time.<sup>102</sup>

Today numerous statutory provisions limit the rights of music copyright holders while the consent decrees contain provisions that help ensure that the CROs meet the constitutional purpose of serving the public interest. As noted by Professor Julie Cohen:

[B]oth societies operate under antitrust consent decrees that govern their membership, internal governance, and licensing practices. The decrees require ASCAP and BMI to make membership available on a nondiscriminatory

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98. *White-Smith Music Publ'g. Co. v. Apollo Co.*, 209 U.S. 1 (1908); *see also infra* note 102.

99. 17 U.S.C. § 115 (2006 & Supp. 2010). The intricacies and exceptions with respect to digital transmissions of musical works and sound recordings are beyond the scope of this article.

100. *ASCAP History*, ASCAP, [www.ascap.com/about/history/](http://www.ascap.com/about/history/) (last visited Oct. 16, 2010).

101. *Shanley*, 242 U.S. at 594–95.

102. *United States v. Broad. Music, Inc.*, 275 F.3d 168, 171–72 (2d Cir. 2001) (“In 1941, the United States brought separate antitrust suits against BMI and its main competitor, the American Society of Composers, Authors and Publishers . . . for unlawfully monopolizing the licensing of performing rights. Both suits were settled by consent decree. In 1950, the ASCAP consent decree was amended to establish a ‘rate court’ mechanism, which enabled the court to set fees for licenses when license applicants and ASCAP could not come to agreement. The government brought the instant suit against BMI in 1964, and the parties entered into a consent decree two years later.” (citations omitted)).



basis, to issue licenses to all who request them, and to accept a judicially-determined reasonable fee (ASCAP) or a fee determined by an arbitrator (BMI) in the event of a dispute. Most significantly, the decrees prohibit ASCAP and BMI from holding or licensing any rights in copyrighted musical compositions other than the public performance rights. These provisions suggest that the government and the respective courts believed that allowing collective organizations control over the entire bundle of rights in copyrighted works would be detrimental to competition.<sup>103</sup>

Thus, the core of the solution for reducing transaction costs of low-value-per-unit musical works and facilitating broad dissemination to the public came not from Congress or the courts, but from private parties. In concert with particular statutory provisions (some of which were themselves the product of negotiations among private parties), this privately created mechanism continues to promote the widespread distribution of copyrighted music to the general public.<sup>104</sup>

##### 5. *Private Parties' Impact on Copyright Legislation*

Private parties have also affected copyright law by lobbying Congress, and even by drafting provisions of and amendments to the Copyright Act. The Copyright Act itself is not purely the product of members of Congress or congressional staff. Rather, many of the rights, limitations, and exceptions to copyright protections—especially for “new” problems like satellite transmissions and cable systems—are the product of private multi-party negotiations.<sup>105</sup> Essentially, these amendments represent the results of identified interest groups sitting down and hammering out compromises.<sup>106</sup> But not everyone has been invited to the table. The omission of certain groups creates a concern for copyright social justice interests because the failure to include all interest groups in these discussions heightens the risk that socio-economic empowerment interests will not be fully considered or addressed in the legislation.

##### 6. *Selective Enforcement of Rights*

Private parties also shape copyright reality by enforcing or declining to enforce rights (both the monopoly right and the limitations and exceptions to it) through court action. For example, in 2009 when the National Football League attempted to enforce its video broadcast rights in the Super Bowl against churches, the public

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103. Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management,”* 97 MICH. L. REV. 462, 500–01 (1998).

104. Yet another area of private parties influencing copyright by transactions arises in the employment setting. Universities typically do not treat scholarly and creative pieces such as articles, books, and artistic works as works made for hire, though faculty job descriptions require the creation of such pieces. On the other hand, employee and independent contractor contracts of commercial businesses often, and probably typically, treat employee work-products as works made for hire in accordance with the statute or require assignment of the rights in the pieces to the employer.

105. See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 23 (1996).

106. *Id.*

outcry resulted in it choosing not to enforce its rights, thereby in essence granting a blanket license to churches to show the Super Bowl.<sup>107</sup> J. K. Rowling does not enforce all of her rights in her Harry Potter works; she allows fan fiction to flourish online and allows the creation of certain online Harry Potter resources.<sup>108</sup> On the other hand, when one person attempted to publish a “Harry Potter Encyclopedia,” and commercially exploit Rowling’s derivative work rights in hard copy, she sued.<sup>109</sup>

Copyright social utility and social justice, in both their procedural forms (a seat at the table when copyright rights and limits are determined) and their substantive forms (access to copyrighted works and inclusion and empowerment through the creation and exploitation of works), are thus furthered by Congress, the courts, and private parties.<sup>110</sup> These obligations remain paramount in the Digital Information Age and, arguably, the responsibility to satisfy them is heightened by the availability of new methods through which to achieve them. Thus, innovative applications of digital information technology in the cause of addressing these goals, whatever their genesis, should be encouraged by the courts and by Congress as the primary caretakers of the copyright regime.

#### IV. THE GOOGLE BOOKS PROJECT: A PRIVATE SECTOR COPYRIGHT DEVELOPMENT INITIATIVE FOR THE DIGITAL INFORMATION AGE

Notwithstanding the revolutionary advances in digital information technology (not to mention the constitutional mandates of copyright law), limited physical access remains a barrier to the use of many books for millions of Americans and for most people throughout the world. Many books are directly available only to those who are privileged enough to attend or to be employed by a major research institution, where copies of particular volumes are physically housed. Generally, the vast majority of individuals must rely on public libraries, which provide limited access because of

107. Charlie Butts, *Super Bowl Parties Legal, Says NFL*, ONE NEWS NOW, Jan. 22, 2009, <http://www.onenewsnow.com/Culture/Default.aspx?id=392860>; Jacqueline L. Salmon, *NFL Pulls Plug on Big-Screen Church Parties for Super Bowl*, WASH. POST, Feb. 1, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/31/AR2008013103958.html>; Bob Unruh, *Church ‘Super Bowl’ Festivities May Go On*, WORLD NET DAILY, Feb. 2, 2007, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=40004>.

108. See, e.g., HARRY POTTER WIKI, [http://harrypotter.wikia.com/wiki/Main\\_Page](http://harrypotter.wikia.com/wiki/Main_Page) (last visited, Oct. 27, 2010).

109. Plaintiff’s First Amended Complaint ¶ 1, Warner Bros. Entm’t, Inc. v. RDR Books, No. 07-CV-9667-RPP (S.D.N.Y. Jan. 15, 2008); Anemona Hartocollis, *Sued by Harry Potter’s Creator, Lexicographer Breaks Down on the Stand*, N.Y. TIMES, April 16, 2008, [http://www.nytimes.com/2008/04/16/nyregion/16potter.html?\\_r=2](http://www.nytimes.com/2008/04/16/nyregion/16potter.html?_r=2).

110. The executive branch also plays an important role through its enforcement policies, especially through antitrust actions and internationally through trade agreements and enforcement at the border. The authors have submitted formal comments through Institute for Intellectual Property & Social Justice (IIPJSJ) to the Obama administration on the social justice implications of intellectual property enforcement. Lateef Mtima & Steven D. Jamar, Comment, *IIPJSJ Comments on IP Enforcement by the Federal Government*, INST. OF INTELL. PROP. & SOC. JUSTICE, INC. (Mar. 24, 2010), in response to Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan, 75 Fed. Reg. 8137 (Feb. 23, 2010).

the limited number of books they contain due to their space and funding limitations. Moreover, the problem of limited physical access is compounded by legal and practical difficulties stemming from the copyright law—including, in particular, the challenges of licensing works that are out of print but still in copyright, and “orphan works” for which comprehensive ownership rights are difficult or expensive to ascertain. Even in those instances where the author and publisher of a work can be found, the transaction costs of finding them and licensing the work may exceed the expected current and future commercial market value of the work.<sup>111</sup>

When the commercial market has abandoned certain books, the segment of the public still interested in these works is underserved by the limited or non-existent access to them. While the number of people interested in many out-of-print books can sometimes be relatively small, the central purpose of copyright law—the advancement of knowledge and culture—is frustrated to the extent that these people are underserved. Furthermore, many of the authors of such works very much want their works to be widely accessible once again. Authors write books to have their voices heard, not stifled by physical and legal impediments. In the absence of distribution methods that solve the problems of both physical and legal access, the creative and expressive goals of many authors are stymied.

The Google Books Project is an example of private parties employing digital information technology to address these issues and the Settlement is an example of private parties working through the courts to develop a system that will allow both broad dissemination of digital forms of works and compensation of the copyright holders. While the initial idea was to prepare digital copies solely for use by the libraries and, through a search engine indexing system, to provide only “snippets” of the texts to the general public,<sup>112</sup> the Project has since evolved into a more ambitious endeavor. In response to litigation claims by various copyright holders that the Project infringed upon certain of their exclusive rights, Google entered into negotiations with the rightsholders and it soon became apparent that, by working together, the parties could construct one of the most important applications of digital information technology in the information age.<sup>113</sup> With the permission of the rightsholders (and in exchange for certain licensing fees), Google would not only digitize the texts but would make its entire digital library, including complete copies of the digitized texts,

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111. Specifically, once the public loses interest in a book, commercial publishers cease to print new copies because it is not profitable to run copies of a book that almost no one is going to purchase.

112. The purpose in providing the public with text snippets was to enable users to identify books that might contain content of interest to them, similar to the subject categorizations and summaries typically found in library catalogues and indices. See *Library Project—An Enhanced Card Catalog of the World’s Books*, GOOGLE BOOKS, <http://books.google.com/googlebooks/common.html> (last visited Oct. 27, 2010). Google contended that the preparation of digital copies for private use, as well as the preparation and dissemination of text snippets constituted a fair use of copyrighted works. See *Perspectives: Facts & Fiction*, GOOGLE BOOKS, <http://books.google.com/googlebooks/facts.html> (last visited Oct. 27, 2010). Various rightsholders disagreed, however, and filed copyright infringement litigation. See *Complaint, Authors Guild, Inc., v. Google, Inc.*, No. 05-CV-8136-JES (S.D.N.Y. filed Sept. 20, 2005).

113. See *Google Books Settlement Agreement*, *supra* note 1.

available to the general public.<sup>114</sup> In short, rightsholders and users would collaborate in the creation of the most comprehensive—and most widely accessible—library in the history of the world.

The Google Books Project can achieve unprecedented levels of copyright social utility and social justice. Upon implementing the Project, Google will make vast numbers of public domain, out-of-print, and hard to find books available online to essentially everyone with Internet access. Google Books thus exemplifies private party action that furthers the inclusion and empowerment aspects of the copyright law by including people who would otherwise not have access to the national storehouse of books.

The Settlement similarly exemplifies a social justice-conscious approach to copyright social utility. It is a private party mechanism that, under court supervision, provides for payments to copyright holders in ways that will reduce transaction costs while still ensuring that the overarching purpose of copyright law—furthering the public good through the progress of science and the arts—is met. At the Settlement's core are the private parties who determine the terms of the deal. But due to the nature, scope, and social significance of the deal, it is appropriate that a court supervise its implementation, as courts have done and are doing in the context of CRO lawsuits involving copyrighted musical works.<sup>115</sup>

Virtually all copyright scholars, commentators, and activists agree that mass-digitization of the world's books is the answer to many copyright social utility dilemmas.<sup>116</sup> Collecting and compiling the world's store of printed knowledge into exhaustive digital libraries available to everyone who can access the Internet is an undeniable step toward unparalleled scholarly cross-fertilization and artistic and utilitarian exchange, not to mention a step toward leveling the world's educational and informational playing fields. Indeed, even those who have raised concerns about, and objections to, the Settlement and other current proposals for mass-digitization of text concede that they take umbrage only with respect to particular details relating to the implementation of certain proposals, and not to the prospect of the mass-digitization of text itself.<sup>117</sup>

The principal objection to the Settlement is the potential impact on the traditional copyright licensing paradigm. Specifically, the objection is that, as an “opt-out” system, the Settlement turns copyright on its head by permitting intrusion upon the copyright holder's property rights without her explicit permission, and places the burden on the copyright holder to withdraw her work from the pool of mass-digitized

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114. *Id.*

115. *See supra* note 102 and accompanying text.

116. *See, e.g.*, Travis, *supra* note 27.

117. *See, e.g.*, Letter from Pamela Samuelson, Professor of Law & Info., Univ. of Cal., Berkeley Law, to The Hon. Denny Chin, S.D.N.Y., (Sept. 3, 2009), *available at* <http://thepublicindex.org/docs/letters/samuelson.pdf> (agreeing that the creation of a “universal digital library” is an inspiring goal, but that the terms of the Amended Settlement Agreement are not likely to achieve that goal).

works.<sup>118</sup> However, this objection distorts the constitutional copyright balance between the author-incentive mechanism and the public interest. While American copyright is to some extent an author-permission regime, author property interests are neither inviolable nor even paramount.<sup>119</sup> Unlike European law, American copyright law is not based upon natural rights but rather it is positive law premised on principles of social utility. And, in actuality, American copyright law favors neither the author nor the individual user of aesthetic works, but rather holds paramount the interest of society in developing a thriving, vibrant culture.<sup>120</sup> As discussed above, both Congress and the courts have repeatedly sanctioned public intrusion upon the author's exclusive right in furtherance of the goal of overarching copyright social utility,<sup>121</sup> and that option remains available in the digital information context.

Indeed, the problem of the mass-digitization of so-called "orphan works," presents a nigh-perfect opportunity for the application of paradigmatic copyright social utility. In the absence of the Settlement, the public would be denied access to millions of works, not because the copyright holders have objected to their digital distribution, but based upon the irrational presumption that the authors of these works would prefer that their ideas not be disseminated nor any remuneration be paid to them until it can be positively confirmed that this is their preference. Even if this could somehow be construed as a rational presumption of copyright behavior, to allow such socially pernicious obduracy to take precedence would be the choice that turns American copyright law on its head.

Concededly, a better argument against implementation of the Settlement is that, while affirmative action must be taken to reconcile author autonomy with the opportunities of the Digital Information Age, the initial groundwork for such an undertaking might best be left to governmental and/or scholarly institutions in the public sector, which would (at least in theory) implement a broad and inclusive construction process. Albeit a rational argument, it fails to account for the historical realities of copyright's adaptation to new technological challenges.

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118. Under the terms of the Settlement, Google is permitted to proceed with the digitization of the works of American authors unless or until a copyright holder objects to the inclusion of her particular work in the Project. Amended Settlement Agreement §1.134, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-5136-DC (S.D.N.Y. Nov. 13, 2009), *available at* [http://thepublicindex.org/docs/amended\\_settlement/Amended-Settlement-Agreement.pdf](http://thepublicindex.org/docs/amended_settlement/Amended-Settlement-Agreement.pdf). Critics argue that this approach is contrary to the traditional expectation of rightsholders, specifically, that their works cannot be used by others until they grant express permission; consequently, these critics maintain that the Project should only be permitted to proceed as an "opt-in" system, such that no book can be included until the rightsholder grants her express permission.

119. *See* U.S. CONST. art. I, § 8, cl. 8.

120. *See id.*

121. *See supra* Part III.

As discussed above, the courts have effectively addressed this kind of “new technological use problem” in the past, in cases such as *White-Smith*,<sup>122</sup> *Fortnightly*,<sup>123</sup> *Teleprompter*,<sup>124</sup> *Sony*,<sup>125</sup> and, specifically in the digital information context, *Arriba Soft Corp.*<sup>126</sup> Indeed, it has often been the judicial interpretation and application of the law in this context that has provided a guide for eventual legislative action, after sufficient time has passed to observe the effects of judicial intervention and disposition.

Moreover, there is no reason to presume that private party initiatives are inherently inimical to the public good. As repeatedly demonstrated throughout the history of copyright law, new technological developments and the attendant controversies that spark new interpretations of, and often improvements to, copyright law in order to secure and promote its overarching goals, are the legitimate province of all copyright stakeholders, i.e., they all have roles to play in responding to such challenges. While Congress and the courts are bound by the constitutionally articulated responsibility to promote the public benefit purposes of copyright law, private copyright owners and users also have a significant role to play in this endeavor, as indeed they have played throughout the development of copyright law. A mechanism that provides a socially propitious resolution to new technological use-challenges should be assessed on its merits, irrespective of its origins.

Finally, there is simply no guarantee that a public sector initiative will in fact produce superior results from the perspective of social utility or social justice. Quite to the contrary, the lack of action or even consensus among public sector actors (e.g., Congress and lobbyists), and their pervasive failure to recognize the Digital Divide dilemma as a problem of copyright social utility, has reinforced the obstacles to meaningful progress in this area for almost a quarter of a century. Now that a meaningful mechanism for bridging the Digital Divide at least with respect to textual material and related copyright deficiencies has arisen from the private sector, it would be not only counterproductive but simply unfair to halt this progress after the digitally disenfranchised have been overlooked for so very long.

The Google Books Project and the Settlement constitute a private initiative that is poised to fill the vacuum of institutional inaction in response to specific copyright social utility deficiencies and injustices of the Digital Information Age. By combining the digitization of text with widespread access to it, Google Books could be a boon to those who heretofore have had little or no access to such materials. In short,

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122. *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908) (treating the then-new technology of making, selling, and playing piano rolls of musical compositions as not infringing on the sheet music copyrights).

123. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (finding that antennas used to transfer television signals do not infringe on programming copyrights).

124. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974).

125. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding Sony's manufacturing and selling of VCRs used to record broadcast television programs for later viewing not contributory infringement because time shifting by users is fair use and thus not direct infringement).

126. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003).

Google Books could be the technological bridge traversing the Digital Divide: books would be available not only to those who enjoy the privilege of access to elite libraries, e.g., Harvard University's library, but to anyone with access to a computer and the Internet. Many people would have access through public libraries in their communities, while others would gain access through schools as well as through outreach by various organizations that seek to aid particular historically and currently marginalized groups.<sup>127</sup> Furthermore, the blind and visually impaired would have dramatically expanded access to books through technologies that can vocalize digital text and expand the font size to more easily readable sizes. And as automated translation improves and develops, even more material will become available in languages other than that in which the work was originally expressed.

In addition to the obvious copyright social justice benefits, Google Books could also further the more general goals of copyright social utility. Google Books could help to serve the public interest simply by making it easier for everyone to acquire books that are still under copyright but that are out of print or otherwise unavailable.<sup>128</sup> Digitizing out-of-print books gives them a second life. The Settlement also proposes to eliminate the problems surrounding access to orphan works by providing mechanisms to make these works available and eschewing the legal limbo typically encountered by many who seek to use these works.<sup>129</sup>

And, of course, Google Books will make available many books which are in the public domain but that are physically inaccessible to nearly everyone. At the same time, it will provide a method for distributing books that are in copyright and still in print to those who want to take advantage of digital distribution (as opposed to traditional, "brick and mortar" booksellers or Internet channels for locating and purchasing hard copy versions of texts).

Finally, just as Google Books serves the copyright social utility and social justice interests of the using public, it must also respect copyright's author-incentive mechanisms, which ensure a growing store of creative expression. To this end, the Settlement proposes meaningful mechanisms for compensating copyright holders and other stakeholders.<sup>130</sup> By also addressing these interests, Google Books exemplifies the optimum copyright balance, achieving a copyright equipoise appropriate to the Digital Information Age.

## V. CONCLUSION

While it would be disingenuous to attempt to characterize any mass-digitization effort as flawless, it cannot be gainsaid that this copyright initiative must begin

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127. *Google Books Library Project*, *supra* note 1.

128. *Id.*; Miguel Helft, *It's Not Just Microsoft Balking at Google's Book Plans*, N.Y. TIMES BITS BLOG (Apr. 4, 2009, 4:18 PM), <http://bits.blogs.nytimes.com/2009/04/04/its-not-just-microsoft-thats-balking-at-googles-book-plans/>.

129. Amended Settlement Agreement, *supra* note 118, §§ 3.8, 7.2(b)(v).

130. *See id.* art. IV.

somewhere.<sup>131</sup> The Google Books Project and the Settlement embody a way to address the copyright social justice interests of the public while preserving, and even enhancing, the proprietary interests of copyright holders in digitized text. Rather than permitting the marvel of digital information technology to serve as the source of a Digital Divide in American society and throughout the globe, Google Books provides the most important opportunity to date through which to close the existing gap and enable this technology to fulfill its ultimate copyright potential. To forego or even delay this achievement would be an affront to the most cherished goals that underlie copyright law as an engine for learning and the advancement of culture in American society.

Early in the proliferation of digital information technology, copyright scholars such as Julie Cohen, Jessica Litman, and Pamela Samuelson identified the opportunities proffered by the new technologies to restore the primacy of the public interest and importance of the public domain in the structure, implementation, and understanding of modern copyright law.<sup>132</sup> Others, such as Lawrence Lessig and William Patry have addressed the necessity of weighing the constitutional values of progress and social utility in developing the copyright law and, in particular, in creating and promoting mechanisms that help private parties serve those values while pursuing their own interests.<sup>133</sup> Their contributions include promoting user-generated content and the creation of creative commons licenses, among others.<sup>134</sup> To these positive, important developments in the understanding of, and use of, copyright law, and indeed intellectual property protection as a whole, we seek to add another dimension: the achievement of copyright social justice, especially in its inclusion and empowerment manifestations, as a vital part of the constitutional values and other social utilitarian mandates underpinning our copyright law.

The exclusion or inequitable exploitation of certain groups from the full intellectual property franchise is more than an ecumenical malaise of the social welfare; it is an intellectual property deficiency of constitutional dimensions. Copyright and other intellectual property regimes are not inherently antithetical to

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131. Transcript of Record at 8–9, *Authors Guild, Inc. v. Google, Inc.*, No. 05-CV-8136-DC (S.D.N.Y. Feb. 18, 2010) (Testimony of Lateef Mtima, on behalf of the Institute of Intellectual Property and Social Justice), available at [http://thepublicindex.org/docs/case\\_order/fairness-hearing-transcript.pdf](http://thepublicindex.org/docs/case_order/fairness-hearing-transcript.pdf).

Now we recognize that the proposed settlement will not cure all of the deficiencies of the digital divide, but to those who say that this will provide only trivial improvement, we humbly suggest that they may be unfamiliar with what the disenfranchised can do with only a little. Give a slave pig intestines and she will make chitlins. Seek to provide Frederick Douglass with a few books and he will provide our nation with insight into its very character. And literally, toss peanuts to George Washington Carver and he will produce scientific marvels from which we can benefit for generations.

*Id.*

132. See Cohen, *supra* note 103; Litman, *supra* note 4; Samuelson *supra* note 63.

133. See LESSIG, *supra* note 4; PATRY, *supra* note 4.

134. Creative commons licenses permit others to use and build upon preexisting copyrighted works automatically, without the need to seek specific permission. *About*, CREATIVE COMMONS, <http://creativecommons.org/about/> (last visited Oct. 18, 2010).



social justice interests. Quite the contrary. We contend that intellectual property regimes can and should be crafted and administered so that marginalized and disadvantaged groups, “the others,” can participate more fully in the social, cultural, and economic contributions and benefits that flow from intellectual property protection. That is the core objective of intellectual property law, and the intended benefit to the societal good. Initiatives such as Google Books Project that further these objectives and promote such benefits in the Digital Information Age must be encouraged, embraced, and built upon to the benefit of society as a whole.