

# **Musings on Infringement in the Modern World**

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By Robert A. Baron, P.O. Box 93, Larchmont, NY 10538

Email: [robert@studiolo.org](mailto:robert@studiolo.org)

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## **Welcome**

I wish to thank Arthur Zegelbone and the State Department for offering me this unique opportunity to address you on copyright issues. I know that this is a delicate moment in the relations between the United States and China with respect to trade and copyright. I hope that what I have to say will add something constructive to the discussion.

I don't think I'll be repeating what, no doubt, you have heard time and time again during your visit. I know you are near the culmination of your trip, which certainly must have been busy and hectic. Please feel free to relax and to interrupt to ask questions. And of course, let me join the many others who have welcomed you to the United States.

Don't worry if I can't finish my presentation. Your questions will be more important. Anyway, in a few days I expect to place this paper on the web, in English, using a private URL: <http://www.studiolo.org/IP/infringement.htm>

I know you are here to learn something about how to control infringement. I hope you are not too disappointed when you discover that my response may be circuitous. My plan is to deconstruct the problem, and discuss infringement as a phenomenon that stems from cultural and economic issues.

I will also talk about the way the administration of copyright operates (or is supposed to operate) in the United States – in particular about the so-called "Copyright Bargain" imposed upon copyright users and creators, by the US Constitution.

## Short Biography

A bit about me: My background is academic – I am trained as an Art Historian and have taught art history in the university system. As you will soon discover, I know precious little about international economics and world trade.

As for copyright, my personal concerns are two-fold. On one hand I want to enjoy unimpeded access to the scholarly resources I need for research and want to feel confident that I can publish my work in an accepting atmosphere.

On the other hand, professionally, I am a photographer, and want the support of a legal structure that will protect my work from infringement and provide safe and responsible markets for their distribution. But as a creator of intellectual properties, I often have to use the work of others. In that regard, I also need to secure reasonable access to the sources upon which I must rely – be they in copyright or not.

Unfortunately, in recent years we have witnessed a dramatic change in a copyright environment that has been demanding ever tighter control over copyrights. The copyright world has been becoming more and more restrictive, and bit by bit has been losing its traditional elasticity. For me, as an individual, this manifests as making it harder to find and use the on-line tools needed for research, teaching and scholarship. The same applies to educators, artists and scholars all over.

[Some of my copyright activities:

For five years I chaired the Copyright Committee of the College Art Association – a professional organization for Art Scholars and Artists who teach in universities.

I've helped organize the opposition to passage of the Copyright Term Extension Act in which US copyrights were extended by 20 years – thus keeping works from entering the public domain in a timely manner.

I've argued against aspects of the Digital Millennium Copyright Act, which substituted an on-line licensing environment for one based upon open access to analog documents.]

My writings and publications focus on the rights of scholars and teachers and on the so-called exceptions to copyright that have been carved out for those who teach, research and comment on works that are still under copyright.

I'm opposed to the way the copyright industry has attempted to make all uses of copyright materials “pay-as-you-go.” I call them the “copyright cartels.” And I

object to their language of intimidation and defamation that they employ to stigmatize anyone who disagrees with them.

### **Disclaimers:**

The opinions stated here are not necessarily those of the US Government, the State Department (our gracious hosts), ASCAP, RIAA, The Motion Picture Association of America, or any similar industry group whose function it is to maximize financial gain received from the administration of copyrighted materials.

[While what I say today might represent my personal opinion, I must admit that it might not do so tomorrow. The world of intellectual property is in continual flux. Every moment offers something new to consider.]

What follows is offered with no intent to describe US copyright law completely. I am not an attorney, and for that reason you must not assume that I'm giving legal advice or that I know every convolution of the US Copyright code.

[Article from the NY Times on how the US Fashion industry thrives without copyright protection for its designs.]

The most important question before us – as I see it – is not to figure out how to make copyrights “air-tight,” and to enforce universal compliance, but to distinguish between those materials that might best be protected loosely, for the benefit and welfare of society and other creators, and those that ought to be protected tightly enough to guarantee the copyright owner his rightful commissions and royalties.

To begin, we must acknowledge that nearly every new work, in some way, depends upon the work and inventions of others. In this sense nobody's work is wholly his own. The English 17th-century poet John Donne tells us that “no man is an island” – meaning that all mankind is interconnected and is in debt to each other. As a member of a civilized society, I acknowledge that I owe a debt to those who came before me, and feel obliged to pass what I've learned down to those who will follow.

Today there are alternate ways to protect and distribute your work besides hard copyright. The Creative Commons, offers a variety of contracts to which users must adhere that parses the rights and privileges of copyright so that some uses will be understood to be free and others in exchange for remuneration. [See [creativecommons.org](http://creativecommons.org)]

## Politics of Intellectual Property

I understand that you've visited the New York District Attorney's office to learn about prosecuting copyright infringers and have probably surveyed some of the techniques used by organizations like ASCAP and RIAA.

If they spoke to you like they speak to us, here in America, doubtlessly they told you about the copyright "thieves," "pirates," and perhaps even the so-called "copyright terrorists" who engineer massive efforts to ignore the copyrights they administer.

Let there be no doubt, indeed, there are criminal activities, here at home and abroad that seek to publish and sell copyrighted materials, movies, music, books, etc., without paying just dues to the copyright owners. And the same applies to trademarked items. In this talk I'll be focusing mostly on copyright issues, and hopefully will bring some degree of nuance to the above observation.

Because infringement is so easy, copyright debts, perhaps more than other kinds, are obligations of honor. The extent to which copyrights are respected is a measure of a society's level of self-esteem. When countries prosecute flagrant copyright violators in their midst, it gives them the moral authority to expect to be treated in the marketplace with respect and as fairly as they treat others.

Perhaps ASCAP and RIAA told you about the substantial sums of lost revenue they suffer at the hands of these so-called unscrupulous copyright infringement practitioners.

I've often wondered how these copyright administrators calculate their claimed losses, and what purpose their calculations serve in their quest to plug all the leaks in their ship of copyrighted properties.

Certainly, they want their figures to be as commanding and shocking as they can be – to alert both infringers and the governmental authorities of the magnitude of their losses and their iron will to bring alleged infringers to the bar of justice.

In this, we are witness to a public relations campaign. I suspect, therefore, that their claimed figures are skewed. I may be wrong, of course, but I suspect that they are reporting an estimate of the sum of what their losses might be **if** copyright control were perfectly tight, and, more importantly, **if** each claimed infringing act were to be counted as lost revenue.

They probably do not calculate the number of current infringers who, under different circumstances, would not turn their illegal purchases into legal ones. With perfect enforcement, therefore, I suspect their presumed market would shrink. Quite conceivably, in this way their figures are exaggerated – manifestations, at best, of thinking the worst. Such exaggerations exist to serve

their own ends – to increase the sympathetic response of the public. Whatever the statistical truth may be, it is their well-known practice to fabricate their own demons.

Moreover, their figures may well include the number of works that ordinarily would be used without compensation under US and international codes of “Fair Use.” “Fair Use” covers the uses by newspapers and the press, by teachers, scholars and commentators of all sorts, and by ordinary people in their daily course of life. (We’ll touch upon this later.)

They also don’t acknowledge that some degree of “infringement” actually helps increase sales and builds their market – both their current market and future markets. As with so many things, people must be given an opportunity to learn how crucial and/or significant the use of copyrighted materials is to their work and life-style before they will invest in their purchase. They must have faith in the transaction and feel secure that they are getting their money’s worth. Infringement plants seeds for future growth.

Two short examples:

When I was young, tobacco companies used to give out free samples – little packs of four cigarettes ostensibly to introduce new products, but it is more likely that this tactic served to generate more “hooked” smokers. That’s not infringement, exactly, but it was unethical and insidious.

When personal computers first appeared, one of the leading word-processing programs was one called “Word-Star.” Copy protection was still in its infancy and relied primarily upon honor. Accordingly, stolen copies of Word-Star were ubiquitous. Like all such early programs, there was a big personal investment in the effort to learn it – it had a steep “learning-curve,” as we say. The investment in effort that people made just learning how to use illegal copies paid off well when the Word-Star company began to crack down on infringements. Had Word-Star not been so easy to copy, and had not so many people been using it, I doubt it would have gained the market share it had in its prime years.

These days, the benefits of the “Word Star effect,” as I call it, have been converted into a useful marketing ploy. Makers routinely give away simple striped-down versions of complex programs, or sell them inexpensively to convert entry users into a market for full-fledged versions. If you go to the trouble of learning how to use a free program, chances are you’ll buy it when you want to upgrade.

The above analysis is less true when applied to entertainment items, like movies and music, but distributors have begun to institute ways by which prospective purchasers may view or listen to samples of items in the marketplace. The

purpose in this, of course, is to give the purchaser confidence in his purchase and to offer a ready way to consummate a sale. It is hoped that other services available to purchasers of copyrighted materials will help tip the consumer toward making a legal, rather than an illegal transaction.

Just about everyone who has a special interest in copyright has read one or several histories of the subject, and knows copyright as a series of conflicts between established industries that want to keep their profit centers for themselves in the face of challenges from new technologies.

Copyright conflicts are akin to turf wars. As each new technology is invented, new possibilities arise for marketing. These are well-known stories, so I'll omit them in this talk.

[But I will suggest a wonderful book by Jessica Litman called "Digital Copyright." I'm afraid it is in English.]

Rather, let's look briefly at what I'd like to call the "Culture and History of Infringement."

For the moment, let's forget about the financial interests of copyright ownership and ask what are the social causes and consequences of massive infringement.

My first observation (None of this is new.) is that infringement generally tracks along lines of age, social standing and economic class:

Generally, the younger you are, the less regard and understanding you will probably have for the social, political and economic institutions of society. The more impoverished you are (up to a point) the more likely it is that you will take advantage of opportunities to use the results of other people's works without securing permission or without paying a royalty. You can't teach respect for intellectual property to children – they are born believing they own everything.

In addition, there are cultures where creative works belong to the people as a whole and no protective copyright is claimed in their behalf. These works evolve and are distributed without any transactional basis such as barter or exchange for their use. In particular, I'm thinking of intangible properties like folk, religious, tribal and other insular musical expressions, but also oral traditions of story, song and poetry.

Copyrighted works, such as images or characters, often merge into the cultural vernacular and are used as personal expressive symbols – as if there are no rules that might apply to such non-transactional applications. In effect, they've become integrated into a folk tradition and are viewed as independent of the local economy.

[For more on this, I highly recommend a book by Siva Vaidhyanathan: "Copyrights and Copywrongs: The Rise of Intellectual Property and how it Threatens Creativity."]

These factors manifest on national or geopolitical levels too. Countries that are suffering economically may be more prone to ignore the distribution of unlicensed products. But so will newly founded countries, or countries in or emerging from third-world status.

It is no surprise, then, to discover that during the 19th century one of the more flagrant infringers of European intellectual properties was the United States. At that time no international treaty existed between them to regulate commerce in intellectual property, so the infringement went both ways. In Europe, for instance, American writers were published without permission. People were quick to take advantage of this loop-hole in international law.

Everything humans do has significance, use and meaning. Just because illicit commerce in intellectual property is common, it does not follow that nothing of intellectual or cultural significance transpires because of it.

Through this process the United States was absorbing (importing – if you will) the cultural values, fashions and mores of Europe. Europe, in turn, was absorbing American themes, many of which were those romanticized fabrications of the challenges (and adventures) settlers met in cultivating the “Wild West” and of the heroic figures who imprinted the outlines of civilization there. It seems likely that these exchanges of ideas and visions helped stimulate the massive waves of immigration that poured into the United States and aided our evolution into the commercial and manufacturing giant that we became.

Another factor may apply: Copyright and its nemesis, infringement, are products of cultures that value the rights and creativity of individuals. Many recent commercialized societies are built upon foundations based on the Western Enlightenment, upon the building bricks of Individualism and its child, the Corporation, and rely on those systematic economic theories where ownership is crucial.

This notion of ownership, key to the western ethos and to the proselytizing ethic that is so closely associated with its colonial history, may not have been absorbed equally by all levels of society in all places. Infringement in these places may well be an idea that has no meaning or is not well understood. On this level were I to take your gold ring, I'd have it and you wouldn't. But were I to copy your DVD, though I might have it, so would you. Where is the loss?

I imagine you already know where I'm going with this thread. When I told my friends and colleagues what was on my agenda for today, to a man they all thought it peculiar inasmuch as China, as they said, is reputed to be especially lax in controlling their more notorious resident infringers.

On one level I find this an odd observation; I know there are many people in the US who don't think twice about copying and using software and other intellectual properties. As a distant observer, abstractly, I find myself not especially bothered by small-time infringement. I attribute these phenomena to what I call "market imbalance" – where copyright owners have not successfully been able to capture potential markets. But when offered an opportunity to receive a "free" (infringed) copy of an expensive piece of software, it makes me very uncomfortable and I always refuse it. I've asked myself why I do this, and think it is because I have advocated stronger user rights – Fair Use, and so forth. If I expect owners to honor the rights of users, one must expect the converse – users must honor the legitimate rights of owners. But what path is to be followed when copyright owners never want to acknowledge the rights of users? That is a question I cannot answer.

For one thing, historically, trends in infringement may well testify to an unequal balance in the nature of production and consumption of intellectual property. All things being equal, like water, such properties want to seek their own levels of saturation. If demand and prices are high when the cost of production is relatively low, we should expect to see infringed produces appear in secondary markets.

Another thought: If we are so committed to reducing infringement outside of the United States, why is it that there is no strong corresponding effort to achieve the same goal in the US? As I've already suggested, perhaps infringement is the "grease" that helps turn the gears of invention, and we'd prefer to have it work at home rather than elsewhere.

Enough of my musings: For this talk, I promised myself not to be especially concerned with dollars and cents, or about the "bottom line" of ASCAP and similar commercial interest societies.

Instead, let's project what the cultural and economic consequences might be when so many American-produced products – including software, movies, books, and music, find their way into the world's market places.

From the American perspective (the only one I have), I see several consequences:

American ways, fashion, themes and values will become much more familiar entities abroad – even if they are exported in heavy doses of fictionalized fantasies – maybe even because of it.

By example, American movies and related works may more likely inspire young musicians and artists and film makers to absorb or react to American models. This, I understand, is already beginning to happen. In this way production of intellectual properties will seek and find world-wide markets. Creativity may no longer be so tightly bound by national or ethnic boundaries so that new production centers and markets will thrive. When royalties are expected to be paid on the use and sale of local products, the mechanism and ethic of copyright will spread to protect imported works. In a word, countries that began (one way or the other) as importers of intellectual properties may evolve into exporters.

Until then Americanisms will be implicit in these imports. As you know, we have a tradition that values self-criticism (perhaps also a product of our inherited individualism), unfettered access to information (well, almost) and a press, which when at its best, is free from government interference. These values often emerge as leitmotifs in high-draw movies about love, sex, history, conquest and heroic valor, among other standard-fare items.

Of course this culture-trade simultaneously works in multiple directions: Just the other day I read two articles in the New York Times about how Western Classical music instruction is becoming increasingly popular in China. Accordingly, more and more Chinese musicians are coming to the West for professional training. Perhaps in the face of this example, American public elementary schools once again can be coaxed into making music an essential part of their curriculum.

### **Constitutional Basis for Copyright in the United States**

I'm told that one of your tasks here is to learn something about how to control infringement of intellectual properties that occur on-line. I can't provide techniques to help you; all I can do is to give you a point of view.

I don't want you to leave with the impression that I support infringement. The copyright scheme and its obligations are crucial to our national welfare and to our status as a creative country. The above notwithstanding, I do want you to know that there are beneficial "unintended consequences" that accompany the presence of secondary markets for infringement, and that it is incumbent upon copyright owners to decide what to control and what to ignore.

Many would have you think that the question of managing infringement is painted in the stark shades of black and white. In reality, it is a tapestry knit together of many tones and hues.

Strategic thinking is sometimes needed to decide upon useful copyright policies. The more industries close down infringement and clamp controls on the use of copyrighted materials, the more they tend to inhibit the creative spirit that is

prerequisite to producing meaningful new works. In effect, to some extent managing intellectual properties too tightly can choke off potential sources of inspiration and creation.

Mechanisms intended to keep this balance alive and dynamic are written into the US system of copyright management, and find their proximate roots in the Constitution of the United States that was signed in 1787. So let's take a brief look at what was set up back in the 18th century.

I'm going to quote the one passage in the Constitution that refers to copyright:

"The Congress shall have the 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."

Here are some basic questions:

Why does copyright deserve a place in the founding document of a new country?

--Because it promotes growth and creativity: It promotes the "progress of science and useful arts," as it is said.  
--Because copyright exists primarily to benefit the country, subsequent laws and judicial determinations at times have placed the national interest above those of particular industries. In so doing, our legislature has carved out several exceptions to the "exclusive right" authors and creators were given in the Constitution.

The first such "exception" is in the Constitution itself. It says that the "exclusive right" authors receive will last for a limited time. It is not perpetual.

Why is this right limited in its duration? I see two important reasons:

It provides creators incentive to continue creating. If copyrights expire, authors will keep themselves busy creating new works.

When the exclusive right expires, the creation goes into the public domain. There, it may be used by anyone who wants it, and it is presumed that eventually it might be recast and changed into a newly copyrighted work that starts the stream of earnings all over again. As far as I know, if a work is in the Public Domain in the United States, it is in the Public Domain world-wide.

What is the nature of the “right” given to writers and creators?

This is important: it is a license. It does not signify ownership of the sort that people may have in tangible property, like a diamond ring, which can be perpetual.

Some people claim that making copyright expire is an unjust “taking of property” because it is done without judicial review. But copyright is not “property” – despite our term “intellectual property.” It is a right granted by the government.

Without that exclusive right given by the Constitution, and if not covered by state copyright laws, once released, a work would be freely available to anyone. You may think of such works as being born into the Public Domain, but immediately transferred to their authors who were given rights to claim (or not to claim) their copyright. That’s how it worked originally. (Now, in conformity with the World Intellectual Property Organization (WIPO), authors no longer need declare their copyright interest in their creations. It is theirs automatically.

What kinds of works qualify for copyright in the United States?

Copyrighted works have to be “original.” As I understand it, “originality” is a requirement only in the US and in the United Kingdom. Originality means that the copyrighted works must be significantly different from other works. “Originality” is not the same as “Creativity” – a calling that is always the result of a subjective judgment.

Works must be fixed in form – written on paper, recorded on tape or disc, formed in some material substance like stone, metal or clay, or, if ephemeral, then documented somehow.

A work can be a compellation of other works – even if these other works are already copyrighted – as long as they are used with permission. It is the structure of the compellation that is the new work, not its component parts.

An authorized revision of a copyrighted work, like a movie or a translation, or an annotated edition can be copyrighted.

What works don’t qualify for copyright in the US?

It is important to know the difference between works that may be copyrighted and those that may not.

Here are some types of work that cannot be copyrighted in the US.

Works that are already in the Public Domain.

(But new adaptations of public domain works are suitable – like so many of Disney’s classic animated features.)

Works authored by the US government.

(But not those parts that reproduce copyrighted works by others.)

Facts are excluded, such as sports scores, stock exchange records, and telephone directories --

-- when they are merely alphabetical lists of names and numbers.

(But not the advertising sections, the so-called “yellow pages,” because their indexing schemes qualify as satisfying the originality criteria.)

Recipes, procedures, and works that are not fixed in form, like lectures, live performances, etc.

(Unless they are transcribed or recorded – and therefore, fixed.)

Works we call “sweat of the brow,” that contain no originality but may be difficult to make or reproduce.

A style or an aesthetic. You can’t copyright Cubism, or North-West Coast Indian, or, for that matter the style of Chinese art. You can, however, copyright specific works done in this or that style. While copyright may not be used to protect a “style,” Trade Mark or Trade Dress might.

Ideas, by themselves, cannot be copyrighted: This is most important: Listen to Thomas Jefferson (our 3<sup>rd</sup> president) on this. I paraphrase:

An “idea” cannot be exclusive property because everyone can possess it at the same time. Ideas should freely spread from one to another over the globe. Like the air in which we breathe, Ideas are incapable of confinement or exclusive appropriation.

How does one protect an idea? The recipe for Coca Cola is not copyrightable. It is an idea. To protect it you must keep it confidential. Because they have commercial value, such ideas are known as “Trade Secrets.”

## **The Copyright Bargain**

As already mentioned, the US theory of copyright was built to balance the interests of the public with those of copyright holders. This balance theory exists to insure that our mission to promote the progress of science and useful arts is fulfilled. In the early years the period of copyright lasted only 14 years, renewable for another 14 years. The waiting period for a work to enter the Public Domain therefore was reasonably short, so the public had relatively quick access.

But, as time passed, and the period of copyright was lengthened, the most recent works one could use from the Public Domain became ever more distant. Consequently it became increasingly important to over-ride the exclusivity of author copyrights. The notion of Fair Use was finally codified in the Copyright Act of 1976. (We'll discuss "Fair Use" soon.)

### **Copyright vs. Trademark: Rock and Roll Hall of Fame**

Sometimes it is difficult to draw the line between an excused use and an illegal use of copyrighted materials. Here is one vexing example:

A photographer named Gentile took a picture of the I.M. Pei building erected for the Rock & Roll Hall of Fame in Cleveland, Ohio and sold posters bearing his photograph. (In the United States it is legal to claim copyright of photographs of works of architecture even though no permission was requested or received.)

The Rock and Roll Hall of fame claimed that the photographer was violating their trademark which was vested in their building and its design. They won an injunction permitting them to seize Gentile's stock of posters.

A trademark, as you know, identifies a firm and the works produced by that firm. It offers a guarantee to consumers that the products they buy are being offered by the trademark owner. To the Hall of Fame, the photograph, as a trademark, implied that the photograph in question was a commercial offering sanctioned by the Hall of Fame – and thus they maintained that it violated its trademark in the building.

Eventually, the court, found for the photographer. They reasoned that not every use of a trademark automatically translates as a claim to assert that a product is the creation of the owner of the trademark. Moreover, the court found that the photographer had no intent to misrepresent the origin of the photograph, and

acknowledged that the public did not think that the photograph was representing itself as a trademark or product of the museum.

In “Trade Mark” and “trade dress” cases the distinction between commercial signage and the right to copy, when not obvious, tends to be subtle.]

Our copyright laws define two main areas that offer relatively clear exceptions, or limitations to copyright. But, now that many works are being distributed on-line, digitally, new opportunities for confusion and new ways to interfere with the public’s right of access are emerging.

### **The First Sale Doctrine and our Digital Future**

The first of the exceptions I’ll discuss is covered by what is called the “First Sale Doctrine.” It is a limitation on copyright that was defined by the US Supreme Court in 1909 and codified in the copyright law of 1976. (Section 109)

The First Sale doctrine is a clear limitation on the copyright holder’s exclusive privilege to control what happens to his work. When a copyrighted work is published and offered for sale – a book, a record, a tape, a DVD disk, etc., according to the First Sale Doctrine the owner has the right to lend it, or exhibit it, or just give it away – as long as he does not reproduce it for sale or license.

Even so, there are some occasions when the user has the right to reproduce a work for personal use – as when he copies it or parts of it for further or future study, as when someone might copy an article out of a journal in the library to take home. [check this]

[Another example, decided by the Supreme Court is known as the Betamax Case. People are allowed to record movies and television broadcasts to “time shift” watching them. This gives them an opportunity to watch them later. They are not permitted to build up archives of recorded programs and movies however.]

[I own a relatively large collection of movies I recorded over the years to watch later, but I never did get around to watching them. Have I built an archive, or are they still there for time-shifting?]

Libraries depend on the First Sale doctrine to lend books to their patrons and to receive books as gifts; stores may rent books or video tapes in the same way.

Unfortunately, publishers – these days an aggressive lot – looking for new ways to increase their income – have begun to see First Sale as a strategy designed to cheat them out of potential sales. One director of a publishing interest group called library book lending a kind of “theft” because libraries allow more than one person to read the same copy of a book.

Perhaps it was the same director went so far as to call librarians a “bunch of copyright terrorists!”, a feeble attempt to stain them with a reference to 9/11 -- the day the World Trade Center Towers were bombed.

Public Libraries and the First Sale doctrine are crucial and powerful institutions of a democratic society. They’ve provided an inexpensive and an extensive means of offering access to education, to literature and to research materials.

Immigrants, especially, depend upon the public library to help them improve their status as new members of our society. Moreover, it instills in readers a respect for books and learning and for the promises and benefits they offer.

One would expect that publishers would realize that the library tradition turns today’s borrowers into tomorrow’s customers. Publisher associations might do themselves a favor were they not so short-sighted, greedy and temperamental.

It would not be difficult to imagine what kind of damage the loss of the First Sale Doctrine would cause. In a word, it would come near to disabling our tradition of universal access to the history of thought and to the published results of those who freely choose to express themselves in the arts, sciences and politics and who create so many self-help resources vital to emerging citizens.

### **The on-line environment. Site licensing.**

Today, anyone who walks into the New York Public Library, for instance – be he homeless or a millionaire – can read journals, newspapers and books of his choosing. In addition, he has free access to many on-line sources of information.

Public libraries have been quick to bring the information revolution to their clients. They have purchased site licenses to resources of key importance to their patrons, many of whom are still attending school. Often connections may be made from any internet portal.

But the sale of licensed resources, as convenient as they might be for their consumers, also serves as an end-run around the First Sale Doctrine. In thus subscribing, the library is ceding its management and curatorial responsibilities to outside authorities. In return they receive a broader selection of resources than they might otherwise have been able to manage, and receive the benefit of allocating their valuable shelf-space to other uses. In some cases, however, the cost of access is being shifted from the library, as an institution, to individual readers as patrons.

This is not altogether good news. In such an on-line environment – through contract – the copyright bargain may easily be altered. The entitlement of the public to free access may easily be changed to one that relies on permission and license instead of on the exercise and fulfillment of Constitutional rights. The “rights” model is being set up to be overtaken by a “transactional” model.

In this I can speak from personal experience and can tell you that the future is already here.

Despite the opportunities offered by the Internet and by search engines like Google, vast libraries of information – suitable for serious study and scholarship are kept from the public via a permission culture that requires that such resources be licensed for use and accessed only through institutions who have arranged to secure a site license for their patrons. As an alumnus of New York University, and a paying member of its alumni society, I am permitted to use its main library, a key scholarly research institution, only three times per year.

As I’ve mentioned, by profession I am an art historian, but am not associated with a university. I am what’s called an “independent scholar” and when I’m not writing about copyright or working on my photographs, I work on scholarly articles – mostly about European Art of the 16th and 17th centuries. Unfortunately, as an “independent” I don’t have automatic on-line access to the digitized bibliographic databases I need, and must either travel to inconveniently located libraries, or, if the request is simple

enough, depend upon the kindness of friends and colleagues in the universities to do research for me.

The same conditions apply to reading research literature and looking at image databases on line at home. While on-line databases are considered useful by people for whom access rights are paid by their employers, their use is encouraging the development of strata and enclaves of users who will have differing or preferential access rights – or just no rights at all.

In addition, the top-down nature of managed on-line resources tends to concentrate the power to manage and edit them into fewer and fewer hands. This way, it is easier to control the resources people want to use than it was when works were available principally on paper.

Preserving and archiving the records of the past is crucial to modern civilization. Analog records (be they on stone or paper), when left alone, tend to survive because either they are robust, or because there are so many distributed copies of them. Digital records, however, because of their relative uniqueness and fragility, if left alone, tend to self-destruct and disappear.

We can adapt this observation to suggest that digital information may more easily be manipulated to alter and revise the historical record and to encourage political conformity, while paper records will more likely preserve the historical diversity of opinion. The specter of George Orwell's 1984 haunts the future of on-line resources.

The future of on-line distribution may be an unfortunate one, in my view. No doubt, we will suffer the consequences of increased dependence upon hierarchical access rights – an aristocracy of access, if you will – and with it a continual diminution of the effectiveness and exercise of the First Sale Doctrine.

[Here is a curious, but telling example. You may have heard of e-books – digitized versions of popular and classical literature made to be carried around on small electronic readers. These are not “talking books,” but rather texts – for reading. Among the selections offered were copyrighted works still being sold in bookstores and works in the public domain – also sold in book stores.

[One of these offerings was the English classic “Alice's Adventures in Wonderland,” by Louis Carroll – a work in

the public domain. “Alice” is a perennial favorite, often read to children by their parents. But as an e-book it, was sold under license. You didn’t own the disk, you only received a bundle of rights that permitted you to use it in a limited number of ways. In this manner it was immune from the privileges of the First Sale doctrine.

[The license specifically prohibited the user from selling the disk, from lending it, and so on. The user was also prohibited from reading it aloud to anyone who could hear it. I’m certain that either it was not a popular item or readers routinely ignored their contractual obligations.

[The consequences of massive distribution of reading matter via the e-book not only discouraged inter-personal communication, but reduced access to literature in a stratified manner. Wealthier people, if they found some use for it, might be tempted to buy it, but poorer people might not acquire such works or players. If the selection offered works of great popularity that was otherwise inaccessible, no doubt some enterprising individual would crack the protective code and distribute illegal infringed copies.

[In this case, of course, all one need do is to find a copy of “Alice” on-line, since it is in the public domain. This story suggests that we keep in mind that respect for copyright, for better or worse, is a function of the degree of fairness by which it is administered.]

We have been speaking of the importance of public access to copyrighted materials. Ironically, broad public access ultimately results from our respect for the institution of copyright. But respect for copyright is fragile.

There is a tendency for copyright owners to abuse their privilege when demand increases and to extort fees that are far above the costs of production, distribution and expected profit. Earning respect then becomes a function of maintaining a reasonable market. Loss of respect for the market can become endemic, a cancer that spreads throughout similar markets where supply or costs are unbalanced.

For example, when re-licensing an image for a second edition of a book, the price for that image’s second appearance may well increase dramatically. In such cases,

licensors are taking advantage of their monopoly in that image and in the knowledge that the author's choice is limited.

Whenever supply or demand is radically unbalanced, a motive for infringement or counterfeiting exists. We have a saying: "Information wants to be free." Everyone has his or her own interpretation of its meaning; but in the current context let's take it to signify that when demand is high and accessibility is low, in one way or another, information (or just about anything under the constraint of artificial scarcity) will find ways to be distributed in secondary markets by replica or counterfeit.

Attempts to control such secondary markets ultimately prove futile when the real problem lies in the administration or fairness of the primary market.

The above comments probably apply equally to information resources and manufactured goods – especially those where the demand for them is a function of their branding or the popularity of a trademark emblem. In such cases the intangible value of the mark may overwhelm value derived from production, quality and other profit factors for the tangible item.

Turning to my own center of expertise, I suggest that rules of access to electronic media should not be so intolerant of users as to cause massive disrespect for those institutions that control it. It is important to understand and acknowledge the variety and depths, not only of the market, but also of societal needs. In the end, it is probably more effective to adopt a realistic attitude than to adhere steadfastly to an idealized one.

### **Exceptions to Copyright: Fair Use**

The other area of US copyright law that offers legal exceptions for the use of works under copyright is known in the US as "Fair Use."

Fair Use is written into our copyright law. It provides a broad or (depending upon how you interpret it) a narrow exception to copyright for the purposes of education and scholarship, commentary and parody, and reporting.

These are all areas in which we believe use of copyrighted materials without having to request permission may be more important to the good of the country or its need for knowledge than honoring the exclusive rights of copyright holders – which may, at times, mitigate against this mission and curtail the spread of important information.

Here is the nut of the statute:

... the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright... (Section 107)

Under Fair Use teachers may reproduce materials for use in the classroom, may create projection slides or digital images with which to teach.

Anyway, that's the way it was intended to be. These days Fair Use is being picked apart by attorneys representing copyright holders who are threatening educational institutions (and others) with potential infringement suits. To protect themselves, colleges and universities are closely monitoring how their departments use and collect copyrighted materials in class and elsewhere. Sometimes they have established budgets to pay for rights management and have abandoned the hope of claiming Fair Use, altogether.

I'm aware of one case in which a school feared that its archive of teaching images – decades in the making – would be confiscated or be a cause to be fined. To protect its valuable resource, the school transferred its ownership to a faculty member – presumably immune to suit because of her limited financial resources.

I tell you this, of course, because it exemplifies how the strict administration of copyright can be destructive – in our case, clearly destructive of our will to advance Science and Useful Arts. Fear of infringement prosecution, justified or not, puts a chill on exercising the freedom of expression that reporters, teachers and scholars formerly took for granted. In my field, teachers once could show and discuss anything they wanted and in the process build a picture archive for future use.

That is still true, hypothetically; but under the constraint of copyright, teachers may soon be prevented from choosing and designing their own curricula and selecting the works they want to show. Archives may have to be licensed. This kind of obstruction is largely based on price or upon unreasonable demands by the creators themselves, or,

more typically, by their heirs in copyright whose primary goal is to be paid.

[I'll spare you the details of the most egregious set of guidelines imposed upon an art history department. Just let it be said that if these rules were followed, the department could not exist and would have had to close. It didn't close down, so either an over cautious school attorney was fired or they just continued as they had in the past – all the while praying that nobody would notice or care. Chances are, nobody cared.]

The fault may be attributed to the tendency to commodify everything under the sun. Nothing has value except to the extent it can be treated as a commodity. Commodification drains value from all things and leaves them with ersatz merit, worthless empty shells of no use to anyone.

That said, in recent years efforts have been made to provide unobstructed access to many images and resources needed for teaching. An on-line consortium of image providers, under the guidance of a major non-profit foundation have dedicated what would have been fair use privileges to reputable institutes of higher education. I won't describe it in detail here, but will happily discuss it afterwards, if asked.

All this occurred because many copyright holders in the United States never really acknowledged that the claim of Fair Use was as a right. Copyright owners tend to view Fair Use as a loop-hole that must be closed. Copyright holders in general never viewed honoring Fair Use as a patriotic or Constitutional obligation, that is, as part of the so-called "copyright bargain" imposed on them as a condition for which they received, in return, their "exclusive" privileges as copyright holders.

[Fair Use is always difficult to claim. First, the user has to employ a work under copyright without securing permission. Then the copyright owner must sue him for infringement. Finally the user must mount an affirmative defense and prove in court that the use was fair and justified under the spirit and/or suggestions of the Fair Use statute.]

[Claiming Fair Use is always a gamble. "Would I be held accountable and be convicted of infringement," thinks the user. "Can this use be proven in court to be fair and by precedent applied to all similar uses to my unending loss," thinks the owner. The result, more often than not is a stalemate. Users tend not to use Fair Use freely, and owners tend to ignore minor instances. Everyone exercises extreme caution and Fair Use is dead in its tracks.]

Not willing to give it a name, owners tended not to view Fair Use as a legal exception to copyright. They refuse to call it a “right.” Rather, if anything, they call it “Market Failure.” That’s like calling “Global Warming” “Climate Change.” The “copyright cartels” (as I call them) think of all such exceptions as a kind of Wild West ripe for calls of “Eminent Domain,” that is, as territories to be conquered and absorbed under their hegemony.

As far as I know, not one single significant officer of a copyright industry – film, music, publishing, etc. has ever publicly acknowledged that honoring Fair Use was their national or any other duty. Nor have they accepted that Fair Use (and its sister, the Public Domain) was part of a “copyright bargain.” Rather, they view their lack of control in these areas as a “tragedy.”

[I think they want it all. Recently, there was even a call in Congress to change copyright so that it would last forever. To do that they’d have to amend the Constitution, itself.]

### **Absorbing the Public Domain**

The Public Domain, too, proved not to be immune to the voracious appetite for conquest – a kind of neo-colonial endeavor. A few years ago, under the inducement of the Walt Disney Company (and others) Congress approved a twenty-year extension to the period of copyright. [The Copyright Term Extension Act.]

How does an extension of copyright affect the Public Domain? Well, works in copyright scheduled to enter the Public Domain will now have to wait for another twenty years to pass into it. [It will take an extra twenty years beyond the previous term of copyright for new works to enter the Public Domain.]

[Most copyright holders believed, “That’s great; we have an extra twenty years with which to profit from our works.” The Walt Disney Corporation might have said, “Wonderful, we now have an extra twenty years to figure out how to make the copyright on Mickey Mouse last forever.”]

Many copyright holders approved, but they never considered that, at most, only a fraction of a percent of works under copyright actually produce a profit. The vast majority of copyrighted works just wallow away with no way for anyone to locate their authors. Now, unused and unusable, tragically, these works are unavailable to creative minds until they enter the Public Domain. In a way, the Copyright Term Extension Act may have stolen the birth-right to so many works that now will never be created.

So, what is the Public Domain? Copyright owners say that the Public Domain holds all those works they can no longer control. But, in truth, the Public Domain is the breeding ground for new works, where creators discover a potential for continued creativity. I presume that most people here are familiar with Walt Disney's great animated features. Well, nearly every one of them traces its roots to stories that had passed into the Public Domain where they were available at no cost and where nobody was going to interfere with how they put them to new uses.

[Under the first US copyright law, authors had only 14 years to profit from their works, but could renew their copyright for another 14 years. Unprofitable works – if they were ever registered – would enter the Public Domain in 14 years, while profitable ones would be renewed.

[We no longer have a registration system; but what if the term of copyright were shortened, and authors given the right to keep on renewing their works in generous increments for as many times as they liked, and were charged a minimal service fee? Authors could maintain the value of their useful holdings, and the remainder would be available to anyone who thinks they might find a use for them.]

Isaac Newton, whom everyone knows was the first to describe the workings of gravity scientifically, acknowledging his debt to the past, at one time famously said that if **he** had seen further than others, it was only because he had been standing on the shoulders of giants. The phrase, as famous as it is, as it turns out, dates back to the middle of the twelfth century.

Cutting twenty years off the Public Domain is like someone cutting off your toes: you can still walk, but it is unlikely you'll be able to dance.

### **All Stories End with a Moral**

No doubt you've guessed it already; there are morals to this story:

For intellectual property users:

This is the most uncomfortable place to be. We have an expression in the United States: "To be caught between a rock and a hard place," which means that there is precious little room in which to turn – you are stuck. My general advice is to respect the legal rights of others – to the best of your ability. Beyond that, work to make copyright laws friendlier and more convenient for you to use. Work in the direction leading to self-respect.

For intellectual property owners:

Acknowledge and respect the balance between the needs of society and the rights of owners in the use of intellectual property. Preserve and fortify the tradition of unfettered access to the arts, to literature, commentary and scholarship. Balance this access with a just enforcement of intellectual property policies in the knowledge that moderately gained benefits encourage creativity and creativity underlies the wealth of the nation. Take the long view. Remember: "A rising tide raises all ships."

Moreover, don't allow the terrible power of new technologies to upset this balance in favor of instant profits. Don't permit them to overwhelm the control of the knowledge-bases they manage. Technology is a tool, not an end in itself.

Don't suffer the creation of dynasties of ownership and colonial fiefdoms that aid owners at the expense of users.

In a word, be modest in your needs, gracious in your administration, and generous in your bequests to those upon whom the intellectual, cultural and scientific foundations of society rely, and, above all, do not forget the just needs of those who are about to inherit the future. In no time at all, they'll be managing the present.

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Robert A. Baron, P.O. Box 93, Larchmont, NY 10538

Email: [robert@studiolo.org](mailto:robert@studiolo.org)

Robert's Home Page: <http://www.studiolo.org/index.htm>

More papers on intellectual property: <http://www.studiolo.org/index01.htm>

