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在版權制度下處理戲仿作品的公眾諮詢

to: co_consultation@cedb.gov.hk 23/07/2013 01:26

From:

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局長：

本人修讀文藝學博士課程，對於文藝、政治及傳播理論素有研究。本人意見如下：

基本上，戲仿是世界前衛藝術其中一種被視為具有強烈文化批判力的藝術形式，其藝術及政治價值得 到肯定，著名女性主義者Judith Butler就曾在其著作最具影響力作品《性別麻煩》（Gender Trouble）裡論及並高度讚揚戲仿的價值。

再者，著名文藝理論家Roland Barthes及Kristeva等早在幾十年前已提出作者已死論以及互文性(Intertextuality)等文藝概念，指出藝術品意 義及價值不單在作者一方，而在受眾詮釋，以及任何文本都無法免於參照其他既有作品。從文藝理論來 看，世界甚至連所謂原創都沒有。從藝術文化觀點出發，版權條例是多餘，而且不符合文藝理論。所以，版權條例的立足點，不在文藝領域， 而在政治及經濟領域。

本文附件耶魯法學期刊Bracha文章亦指出版權概念在法律上的 演變，原初版權只是針對複印文本而已，現在版權條例建基於作者和原創兩個概念，本來保護作者，卻慢慢 變成了保護版權擁有人。問題是，版權概念在二百多年前，是為了保護言論流通而設，當時西方論者擔心沒有經濟收益，作者就不著書立 說，無法促進言論流通。所以，版權本是為了保護言論自由， 而進行的一種言論限制。現在，通過商業手段的壓榨，版權條例

保護的人，由原作者變成版 權擁有人，但版權擁有人往往不是原作者。基本上，整 個版權條例已淪為商戰的武器，而完全失去了其原 初的文化及道德意義。

試想想，今時今日，廣告商可用為材料的音樂，還有幾多？主要都 是作逝世五十年以上，版權順利流進公眾 領域（public domain）的少數古典作品，如莫扎達的鋼琴。原作者逝世而讓版權流進公眾領域，是讓版 權完成任務，讓言論和藝術回歸社會，造福社會的一種設計。然 而，在企業法例成立以後，企業成為可以擁有版權的法人，但企業法人不 會死，企業法與版權法變質的結合，是所有文藝創作一旦被企業擁有，就 無法再次進入公眾領域。企業如果破產，只會導致清盤，造成版權轉讓， 版權令文藝作品永遠不能回歸社會和造福社會。

然而，如果香港局方注重的是商業利益，修例 純屬為香港的世界競爭力考慮，這種修例也是無益於香港經濟，蓋因世界上擁 有最多版權資產的應是美國，其次為日本和歐洲等國，香港的版權資產如九牛 一毛，沒有保護價值。反而香港最蓬勃的二次創作和戲仿，有很大的文化意義 和價值，在政府民望低迷 之際，市民沒有湧上街發生大規模暴動，不能說與他們擁有網絡二次創作自由 無關。再者，二次創 作不只有網民需要，廣告商宣傳 商品亦得借助不同的文化資源，當中或 有需要倚賴一些模仿手段，或者二 次創作。另外，台灣網路文學如 九把刀小說的成功因素，其中一 點是書商善用了書迷的二次創 作。二次創作已有不少商業案例證明於文 化產業有利。而且，二次創作流通量大，自然就有可能產生商 機，對香港有利。

本人質疑局方是否有真正聽取業內人 士心聲，在貴局舉辦的動漫啟航座談會中，就有廣告業者表明「抄」效果是他們的主要工作。 現在無線推出的劇集衝上雲宵 2，亦有很重的日劇影子。如果修例成 功，恐怕將令無 線以及香港的廣告創作人的利益反受　貴局政策所害。

我相信政府修例，動機不會在保 護某些官員的面子，不讓其受到戲仿「攻擊」。即使真是如此， 禁止戲仿有可能令 市民因為失去無害的宣洩途徑而採取更激烈的行動，進一步動搖政府的管 治和施政，變成雙 輸的局面。

基本上，不修例，只有少數既得利益者投訴；修例，則窒礙 香港文化最具活力的一環， 並令更多市民積聚不滿。 敬請政府勿為在文化、政治和經濟三方面都對香港無益的事項上火上 加油，本人敬請政府立即全面撤消所有有關修定方案。

祝

市泰民安

學者
彭卓鋒　啟

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authorship ideology.pdf

THE YALE LAW JOURNAL

OREN BRACHA

The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright

ABSTRACT. The concept of the author is deemed to be central to copyright law. An important strand of copyright scholarship explores how the development of modern copyright law was intertwined with the rise of a new ideology of authorship as an individualist act of creation ex nihilo. This Article remedies two common shortcomings of this scholarship: implying that the process of embedding original authorship in copyright law was complete by the end of the eighteenth century, and presenting the relation between the ideology of authorship and copyright law as an exact correlation. These two shortcomings neglect the complexity of the interaction between authorship and copyright law and attract the criticism that much of modern copyright doctrine seems diametrically opposed to the presuppositions of original authorship. This Article focuses on copyright law and discourse in nineteenth-century America. It argues that much of the weaving of the ideology of authorship into copyright law took place during this later period and in three main contexts: originality doctrine, the emergence of the notion of copyright as ownership of an intellectual work, and the rules that allocate initial copyright ownership. The result was the modern structure of copyright-authorship discourse as a motivated distortion. Various parts of this discourse incorporate conflicting images and assumptions about authorship, which often stand in tension with the legal doctrines of copyright and their actual effects. These patterns, which still dominate copyright law today, are traceable to the history of the power struggles, economic interest motivations, and the ideological constraints that produced them.

AUTHOR. Assistant Professor of Law, University of Texas School of Law. For invaluable advice and criticism, I thank William Forbath and Talha Syed. For useful comments, I thank Michael Carroll, Anuj Desai, Chris Desan, Terry Fisher, Catherine Fisk, Mark Gergen, John Golden, Morton Horwitz, Douglas Laycock, Thomas Nachbar, Tony Reese, Mark Rose, Pamela Samuelson, and participants in the Harvard Law School graduate students colloquium and in the History of Copyright Workshop of the Berkeley Center for Law & Technology and the University of Wisconsin Institute for Legal Studies. For excellent research assistance, I thank Gretchen Harting.

ARTICLE CONTENTS

INTRODUCTION

Copyright in the West, we are often told, is deeply entangled with the modern notion of authorship.[1] Authorship is copyright's ghost in the machine. In American culture, too, the author—as the heroic creator of original intellectual works and as their rightful owner—looms large. The author plays an important role in popular understanding of copyright law. He even left his imprint on the U.S. Constitution, which vests in Congress the power of "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[2] Even in this postmodern era during which the "death of the author" has been proclaimed countless times,[3] we often continue to picture solitary authors creating original ideas ex nihilo through their intellectual labors. This picture lies at the normative heart of our vision of copyright.

Over the past few decades, however, legal and literary historians have joined the broader scholarly trend of "deconstructing" the myth of the author.[4]

1. THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 2-3 (Martha Woodmansee & Peter Jaszi eds., 1994).

2. U.S. CONST. art. I, § 8, cl. 8.

3. ROLAND BARTHES, *The Death of the Author*, *in* IMAGE MUSIC TEXT 142 (Stephen Heath trans., 1977); ANTOINE COMPAGNON, LITERATURE, THEORY, AND COMMON SENSE 31 (Carol Cosman trans., 2004) (writing that Barthes's *The Death of the Author* "became the antihumanist slogan of the science of the text, both for his partisans and his adversaries").

4. *See* COMPAGNON, *supra* note 3; Michel Foucault, *What Is an Author?*, *in* TEXTUAL STRATEGIES: PERSPECTIVES IN POST-STRUCTURALIST CRITICISM 141 (Josué V. Harari ed., 1979). The scholarship about copyright and original authorship is quite extensive. *See, e.g.*, JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996); THE CONSTRUCTION OF AUTHORSHIP, *supra* note 1; JOSEPH LOEWENSTEIN, THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT (2002); JOSEPH LOEWENSTEIN, BEN JONSON AND POSSESSIVE AUTHORSHIP (2002); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT (1993) [hereinafter ROSE, AUTHORS AND OWNERS]; PAUL K. SAINT-AMOUR, THE COPYWRIGHTS: INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION (2003); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain* (pts. 1 & 2), 18 COLUM.-VLA J.L. & ARTS 1, 191 (1993-1994); James D.A. Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, LAW & CONTEMP. PROBS., Spring 1992, at 139; Mark Rose, *The Author as Proprietor:* Donaldson v. Becket *and the Genealogy of Modern Authorship*, 23 REPRESENTATIONS 51, 76 (1988) [hereinafter Rose, *The Author as Proprietor*]; Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425, 429 (1984).

These scholars have analyzed the author as an ideological construct, traced the joint history of this construct and modern copyright, and exposed the many ways in which the myth of authorship as a solitary and individualist production of radically new ideas conflicts with the social realities of creation. They also have argued that modern copyright law and its fundamental structures rest heavily on the social construct of the author.

Is the construct of authorship the key for understanding modern American copyright law and its history? Yes and no! The myth of the author is indeed a central element in modern copyright law, but as a matter of legal doctrine, copyright does not directly rest on and, more importantly, never has directly rested on this myth. The relationship between the law of copyright and the myth of authorship is far more complex and interesting than recent history and theory suggest. The purpose of this Article is to supply a better and richer understanding of the relationship between American copyright and authorship. The Article revises existing accounts of copyright and authorship by describing the ways that concepts of authorship interacted with fundamental copyright doctrines in America within a specific historical and social context—the crucial, formative era of the nineteenth century.

The structure of my argument is as follows. Part I supplies a brief introduction to existing scholarship about the history of authorship and copyright. It argues that, alongside its important insights, this scholarship suffers from several shortcomings. Most importantly, many existing accounts assume that by the end of the late eighteenth century, copyright had become infused with a specific image of creative authorship that still dominates it today. The difficulty with this assumption is highlighted by the obvious discrepancies between many fundamental features of copyright law and the vision of original authorship that supposedly dominates it. I suggest that the difficulty may be resolved and a better understanding of the relationship between copyright and authorship may be gained by a close look at the nineteenth century. During this period, original authorship concepts were gradually embedded in the actual doctrinal structures of copyright in ways that fundamentally transformed both.

Turning to the account of copyright and authorship in nineteenth-century America, Part II begins by describing late eighteenth-century American copyright as in transition from being a publisher's privilege to being an author's right in her intellectual product. By the turn of the century copyright was formally bestowed on authors rather than publishers or printers. Copyright rhetoric flaunted original authorship and elevated it to the status of a fundamental principle and ultimate justification. Yet the basic institutional form of copyright remained unchanged. It was still the same limited economic privilege of making and selling reproductions of printed texts as it was in its

days as a publisher's privilege. During the nineteenth century, however, copyright underwent a fundamental transformation. It was gradually reshaped into a general right of ownership of creative works. While concepts of authorship played an important role in this process, it was by no means the unfolding or implementation of a preexisting theory of original authorship in copyright doctrine. The intellectual and doctrinal constructs that emerged during the nineteenth century were completely new.

The following Parts provide a detailed account of the development of three central areas of copyright during the nineteenth century and their interaction with the ideology of authorship. These Parts also explain the social context of these developments, including economic, ideological, and cultural changes characteristic of the emerging mass-market society.

Part III discusses the doctrine of originality. The legal requirement of originality first appeared in American copyright law during the 1820s. From the outset, competing understandings of the requirement appeared. In one line of cases, judges took originality seriously by imposing relatively demanding and meaningful requirements of novelty or aesthetic merit as a precondition for copyright protection. Another line of cases constructed originality quite differently as a very minimal and narrow requirement. By the late nineteenth century, two developments had occurred. The second line of cases was clearly triumphant, and an extreme version of the minimalist understanding of originality became the conventional wisdom among judges and commentators. At the same time, however, originality was elevated to an unprecedented rhetorical and formal status. Originality came to be seen as a defining principle of the field and as a constitutional requirement. The result was the paradoxical character of the modern originality requirement: the lower its practical bite as a substantive threshold for protection sank, the more dominant its status as a fundamental principle became.

Part IV describes the development of doctrines that define the character and scope of copyright ownership as well as the overarching concept of the intellectual work underlying them. It argues that at the end of the eighteenth century copyright was a very limited exclusive entitlement to making verbatim or near-verbatim reproductions in print. Gradually, the scope of protection was abstracted and expanded to encompass a growing sphere of uses. Complementing the expanded scope, a growing number of exclusive entitlements such as translation and dramatization were added during the second half of the nineteenth century. A new concept of copyright as general control of an intellectual work that could take a variety of concrete forms drove this process and in turn was fueled by it. As the traditional self-restrictive character of copyright dissolved, new, more limited, boundary-setting mechanisms appeared. In a society deeply committed to a political and moral

ideal of uninhibited access to information, these mechanisms—most importantly the fair use doctrine and the idea/expression dichotomy—purported to ensure the free flow of knowledge in society. Ironically, the broader and stronger copyright protection became, the more vocal grew the insistence that copyright left all knowledge free as the air.

Part V explores the development of rules that allocate initial copyright ownership. In contrast with the two other doctrinal contexts, the pattern here was closer to that of gradual erosion. A regime that initially expressed rather coherently the new eighteenth-century principle of the author's ownership of his intellectual product came under increasing strain from economic interests and the growing complexity of production patterns during the nineteenth century. The early American copyright regime was consistent with its new grounding in authorship in one basic but important way: authors were the original owners of the rights protected by copyright. The creators of texts were either the actual owners of legal rights in them or the source from which these rights were transferred to others. During the second half of the nineteenth century, the principle of authorial ownership gradually eroded. New precedents involving production in hierarchical or collaborative settings gradually allocated ownership away from the hands of actual creators. At the turn of the century, this process culminated in two developments. In the absence of an express contract to the contrary, a new judge-made default rule placed ownership in the hands of an employer or a commissioning entity, and the 1909 Copyright Act's work-for-hire doctrine explicitly vested ownership of employees' works in their employers. When this process was complete, the most basic imperative of the authorship-based understanding of copyright was clearly abandoned as an inadequate anachronism or was left as an empty rhetorical shell. In numerous cases, authors were no longer the owners of their intellectual product, not even as a formal matter. Still, even in this context there were some remnants of the dominant representation of copyright in terms of authorship. In some cases, individualist authorship tropes were applied to the corporate employer in order to justify its ownership. In others, authorial ownership was identified as a fundamental constitutional principle at the same time as it was ignored or bypassed.

I conclude by highlighting some of the insights that nineteenth-century history can teach about the relationship between copyright and authorship. Modern copyright was formed in an interaction between concepts taken from the myth of original authorship, material interests, and ideological influences within a society undergoing rapid economic and social changes. The result was an amalgam of conceptual structures at once heavily infused with notions of original authorship and nothing like the enactment into law of the abstract eighteenth-century theory. This enduring framework, I argue, is ideological in

the sense of being a motivated mystification. It is a set of conventions that constrains, shapes, and legitimates copyright discourse in ways that are traceable to the power relations that produced it.

I. ORIGINAL AUTHORSHIP AND COPYRIGHT LAW

According to the conventional wisdom, by the end of the eighteenth century a new concept of the original author took over copyright and has continued to shape it ever since. Despite the grain of truth in this proposition, accounts that follow it are often incomplete or even flawed. Such accounts tend to create the false impression that modern copyright is shaped in a direct and unproblematic manner by the late eighteenth-century tenets of original authorship. For the most part, they also tend to ignore the crucial period of the nineteenth century when the concept of authorship was embedded in actual copyright law. Filling in this historical gap is crucial for understanding the true nature of the relationship between modern copyright and authorship and the way it was created.

No brief summary can do justice to the rich, insightful, and diverse scholarship about the history of authorship and copyright, but the narrative is roughly as follows. During the seventeenth and eighteenth centuries,[5] there gradually appeared in Western cultures an ideological[6] framework that constructed a new representation of the creative process, the producers of texts, and the relationship between such texts and their producers. Three unique elements of this framework were individualism, originality, and ownership. Compared to earlier times, the new concept of authorship was highly

5. The timing of the rise of the new concept of authorship is a matter of some disagreement. Pamela Long, for example, has argued that "the fully developed concept" of "'intellectual property' . . . emerge[d] in the medieval period around the 12th or 13th centuries" and that the connection to individual authorship in regard to material inventions was made in the fifteenth century. Pamela O. Long, *Invention, Authorship, "Intellectual Property," and the Origin of Patents: Notes Toward a Conceptual History*, 32 TECH. & CULTURE 846, 847-48 (1991). Exact periodization aside, it appears that most scholars would agree that the roots of the new concept of authorship trace back to the Renaissance and that its gradual development and spread extended for centuries.

6. The claim that the understanding of authorship was ideological has two possible meanings. One meaning of the term alludes to the claim that authorship was a contingent social construct. It did not simply elaborate or reflect the order of things in the world—the "real" or the "natural" relationship between texts and their producers. Instead, it arbitrarily privileged certain attributes and relations, while excluding others. *See* Foucault, *supra* note 4, at 150. A second meaning of "ideological" is being false or deceptive. In this sense, the claim is that original authorship was a false, distorted, or mystifying representation of the realities of the creative process. *See infra* text accompanying notes 344-347.

individualistic in two related senses. First, it privileged to an unprecedented extent the status of one individual, who would become known as the "author." The individual writer of a text was singled out, sharply distinguished from all others involved in its production, and assigned the status of the ultimate origin of the text.[7] A new, unique, and privileged relationship came to be postulated between the work and its sole originator—the author. Second, the activity of authorship was reconceptualized in individualistic terms, ignoring or obscuring the collaborative and cumulative aspects of creation. At the extreme, the author was represented as creating in perfect isolation, and the work was seen as attributable to one direct personal origin.[8]

The ideal author was depicted in this scheme as radically original in two intertwined ways. First, the notion of originality involved a strong connotation of independence that was yet another incarnation of the idea that the author is the sole and ultimate origin of the work.[9] Second, originality also meant novelty. Original works were understood as being completely different from those already in existence. Originality in this sense was marked with a supposed total break with traditions and existing materials, as opposed to their reproduction, reworking, or development. The relation of the idealized author to his work was thus equalized to that of the Creator and his Creation. The ideal author was imagined as a creator ex nihilo of utterly new things.[10]

The concept of authorship was soon bundled with notions of ownership and claims to rights. During the late seventeenth and eighteenth centuries, interested parties in various European countries—usually book publishers—developed the new conception of authorship and employed it in their lobbying efforts for achieving governmental privileges or favorable legislation. In England the trope of authorship was used in the campaign that resulted in the first general copyright act—the 1710 Statute of Anne.[11] Behind the campaign were members of the powerful Stationers Company that dominated the book trade. The stationers, who tried to achieve a new protective framework, began to incorporate the concept of authorship into their arguments.[12]

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7. BOYLE, *supra* note 4, at 54; Woodmansee, *supra* note 4, at 429; Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, *in* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 1, at 15, 16.

8. BOYLE, *supra* note 4, at 54.

9. Woodmansee, *supra* note 4, at 427.

10. *See* BOYLE, *supra* note 4, at 56-57.

11. 8 Ann., c. 19 (1710).

12. *See* RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695-1775), at 31-50 (2004). Scholars disagree whether the figure of the author was used strategically by the stationers to preserve

The most powerful engine that produced authorship-ownership arguments was the literary property debate. In this three-decade long series of cases that started in the 1730s, the stationers tried to attain recognition of copyright as a perpetual common law property right.[13] The large volume of theorization generated by this conflict in the form of counsel arguments, judicial opinions, parliamentary speeches, and learned pamphlets was a powerful melting pot that fused together legal doctrine, theories of property, and representations of the creative process.[14] The image of the original author was combined with popular natural-rights theories of property in order to justify the notion of copyright as property.[15] Authors, whose mental labor created intellectual works, were presented as owners, and the intellectual works were presented as objects of property. As one contemporary writer put it, "Labour gives a man a natural right of property in that which he produces : literary compositions are the effect of labour ; authors have therefore a natural right of property in their works."[16] Despite the ultimate failure of the specific claim for perpetual common law copyright,[17] the image of the original author as an owner that was perfected during the literary property debate remained deeply engrained in Anglo-American copyright thought. As Mark Rose writes, "By 1774 . . . all the essential elements of modern Anglo-American copyright law were in place."[18]

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their traditional privileges in a changing world, or whether it was used as a rhetorical device for attacking the stationers and breaking their monopoly. For the former view, see JOHN FEATHER, PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN 61-63 (1994); and BENJAMIN KAPLAN ET AL., AN UNHURRIED VIEW OF COPYRIGHT REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS) 6, 9 (Iris C. Geik et al. eds., LexisNexis Matthew Bender 2005) (1967). For the latter view, see LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 143-44 (1968).

13. *See, e.g.*, DEAZLEY, *supra* note 12, at 115-210; FEATHER, *supra* note 12, at 69-96; PATTERSON, *supra* note 12, at 151-79; BRAD SHERMAN & LIONEL BENTLY, THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911, at 19-42 (1999); Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119 (1983).

14. *See, e.g.*, ROSE, AUTHORS AND OWNERS, *supra* note 4.

15. *See, e.g.*, DEAZLEY, *supra* note 12, at 149-67; ROSE, AUTHORS AND OWNERS, *supra* note 4, at 5-6; Rose, *The Author as Proprietor*, *supra* note 4, at 56.

16. William Enfield, *Observations on Literary Property* 21 (1774), *reprinted in* THE LITERARY PROPERTY DEBATE: EIGHT TRACTS, 1774-1775 (Stephen Parks ed., 1974).

17. After a brief period in which common law copyright was recognized in England under *Millar v. Taylor*, (1769) 98 Eng. Rep. 1378 (K.B.), the House of Lords rejected common law copyright in *Donaldson v. Beckett*, (1774) 1 Eng. Rep. 837 (H.L.).

18. ROSE, AUTHORS AND OWNERS, *supra* note 4, at 132.

With some notable exceptions,[19] historical accounts of the rise of the new ideology of authorship tacitly accept Rose's claim and usually conclude at the end of the eighteenth century. Nevertheless, legal scholars (and apparently literary scholars) writing about history are seldom content to let it remain just history. A common assumption in authorship scholarship is that the ideology of authorship still plays a central role in modern copyright law.[20] At this point, the difficulties with the standard accounts become apparent. Typically these accounts claim the continued relevance of original authorship by tracing the historical narrative roughly until the end of the eighteenth century and then shifting the discussion to late twentieth-century copyright law.[21] Martha Woodmansee provides an example:

> Our laws of intellectual property are rooted in the century-long reconceptualization of the creative process . . . . Both Anglo-American "copyright" and Continental "authors' rights" achieved their modern form in this critical ferment, and today a piece of writing or other creative product may claim legal protection only insofar as it is determined to be a unique, original product of the intellection of a unique individual (or identifiable individuals).[22]

One would never catch a lawyer making that argument. Unless heavily qualified, the last part of this quotation is simply dead wrong. No copyright regime whose border wars of copyrightability involve telephone directories[23] or guides of cable television companies[24] and whose default rules often vest initial copyright ownership in faceless business corporations[25] could be plausibly described as extending protection only to "a unique, original product of the intellection of a unique individual."

19. *See* Jaszi, *supra* note 4. Jaszi's account focuses on the nineteenth-century developments of authorship and copyright and in this respect is similar to mine. Jaszi writes, however, that by the early nineteenth century, authorship's "array of connotations and associations was essentially complete." *Id.* at 471.

20. *See, e.g.*, BOYLE, *supra* note 4; Aoki, *supra* note 4, at 191; Jaszi, *supra* note 4; Lange, *supra* note 4.

21. *See, e.g.*, Peter Jaszi & Martha Woodmansee, *Introduction* to THE CONSTRUCTION OF AUTHORSHIP, *supra* note 1, at 8.

22. Woodmansee, *supra* note 7, at 27-28.

23. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

24. Warren Publ'g, Inc. v. Microdos Data Corp., 115 F.3d 1509 (11th Cir. 1997).

25. *See* 17 U.S.C. § 201(b) (2000); *id.* § 101 (containing the definition of "work made for hire").

Contrary to the assumption that pervades authorship scholarship, many of the central doctrinal structures of contemporary copyright law may conflict with what are usually claimed to be the salient characteristics of authorship ideology.[26] It is especially troubling that those discrepancies occur in doctrinal areas where one would expect the strongest correlation, such as originality doctrine or rules that allocate initial ownership. If vital copyright doctrines eschew the gist of the original authorship framework, then what is left of the claim that this ideology still dominates current copyright law?

This difficulty is closely related to the gap in the historical account of copyright and authorship. Leaping from the late eighteenth century, a time when original authorship was supposedly completely victorious, to the present, when it is assumed to still occupy a dominant position, is, to a large extent, the source of the problem. When one discovers that the basic tenets of original authorship are not directly reflected in central parts of modern copyright, the natural reaction is to dismiss its relevance altogether. As for the historical account, two alternative conclusions might follow. One possibility is that authorship scholarship is simply wrong and that the ideology of authorship never played an important role in actual copyright law. The other is that there may have existed a golden age of authorship in late eighteenth-century copyright law, but later developments of copyright doctrine and thought eroded the importance of this element down to the point of insignificance.

Both of these conclusions are wrong. To see why and understand better the relation between copyright law and original authorship, it is necessary to fill the gap in the historical account between late eighteenth-century and present-day copyright. When one closely examines this relationship and brings into the picture the crucial period of the nineteenth century, what emerges is that there had been neither a golden age of authorship in copyright law nor a general erosion process. At the end of the eighteenth century, abstract conceptions of authorship came to dominate copyright discourse and supplied its underlying theoretical justification. Yet these abstract conceptions had almost no foothold in the doctrinal and institutional details of copyright. During the nineteenth century, elements of original authorship were gradually embedded in actual

26. *See* Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873 (1997) (reviewing BOYLE, *supra* note 4) (finding that explanations of copyright law based on "romantic authorship" tell us little about the legal doctrine they purport to explain, do not describe these doctrines accurately, and are incapable of explaining the change and development in copyright law). Lemley suggests abandoning authorship as a central explanatory device of the development of modern copyright law and replacing it with a concept of property rights based on economic theory. My account differs from Lemley's in that my aim is not to debunk authorship-based explanations, but rather to revise them and make them more adequate for explaining copyright's past and present.

copyright law but always in an incomplete, convoluted, and sometimes even contradictory way. This process produced the modern copyright framework, which simultaneously is pervaded by the ideology of authorship and has little to do with it. I turn now to a detailed description of this process in the context of nineteenth-century American copyright law.

II. THE PUBLISHER'S PRIVILEGE IN AUTHORIAL HANDS: AMERICAN COPYRIGHT AT THE END OF THE EIGHTEENTH CENTURY

Far from having all its essential elements in place, American copyright law was in a state of flux at the end of the eighteenth century. By 1790, American copyright had undergone important institutional transformation, and American public discourse about copyright was permeated with previously nonexistent concepts from the vocabulary of original authorship. At the same time, however, many of the institutional details of copyright remained unchanged. Copyright became the right of authors, justified in terms of authorship, yet still bore the traditional institutional form of a publisher's privilege.

The sporadic exclusive privilege grants occasionally given to colonial publishers as encouragement for undertaking specific publication projects[27] had nothing to do with authorship.[28] Authorship discourse appeared and quickly rose to dominance after independence. During this period, and for the first time in America, authors began agitating for legal rights in their own

27. On colonial grants, see Oren Bracha, Owning Ideas: A History of Anglo American Intellectual Property 251-56 (June 2005) (unpublished S.J.D. dissertation, Harvard Law School) (on file with author). There existed neither general statutory copyright nor common law copyright during the colonial period. Occasional scholarly references to common law copyright in colonial America are inaccurate or misleading. *See, e.g.*, 1 JOHN TEBBEL, A HISTORY OF BOOK PUBLISHING IN THE UNITED STATES 46 (1972) ("[I]t was theoretically possible to obtain an English common law copyright in the colonies . . . ."); Francine Crawford, *Pre-Constitutional Copyright Statutes*, 23 BULL. COPYRIGHT SOC'Y U.S. 11, 12 (1975) (stating that American publishers "were protected by English common law copyright and later by the British Copyright Act of 1710").

28. The exception of an author's claiming protection in his own work was William Billings's failed attempt to attain legislative protection in Massachusetts for his book of psalms. This episode, which came at the very end of the colonial period, marked the change that would become apparent after independence. *See* 1 RUSSELL SANJEK, AMERICAN POPULAR MUSIC AND ITS BUSINESS: THE FIRST FOUR HUNDRED YEARS 280-86 (1988); Rollo G. Silver, *Prologue to Copyright in America: 1772*, *in* 11 STUDIES IN BIBLIOGRAPHY: PAPERS OF THE BIBLIOGRAPHICAL SOCIETY OF THE UNIVERSITY OF VIRGINIA 259 (Fredson Bowers ed., 1958); Alan C. Buechner, Book Review, 33 NOTES (Second Series) 284, 285 (1976) (reviewing DAVID P. MCKAY & RICHARD CRAWFORD, WILLIAM BILLINGS OF BOSTON: EIGHTEENTH CENTURY COMPOSER (1975)).

works. These authors and their supporters, advocating individual privileges or general copyright regimes, gradually adopted the original authorship framework.

The image of an author as an individual who creates new ideas through the power of the intellect and the claim of authors' rights, often referred to as natural property rights, first appeared in the context of the state copyright statutes legislated in the 1780s.[29] In 1783, Joel Barlow—one of the first beneficiaries of author's copyright in America—wrote to convince Congress that "the rights of authors should be secured by law."[30] His main argument relied on the natural rights of authors. "There is certainly no kind of property, in the nature of things," he wrote, "so much his own, as the works which a person originates from his own creative imagination."[31] He concluded that "it is a principle of natural justice that he should be entitled to the profits arising from the sale of his works, as a compensation for his labor in producing them."[32] At the same time, Barlow made a utilitarian argument in favor of "giving a laudable direction to that enterprizing ardor genius" and warned that "we are not to expect to see any works of considerable magnitude . . . offered to the Public till such security be given."[33]

The same mix of imagery of authorship, natural property rights, and utilitarian arguments can be found in virtually all twelve state copyright statutes.[34] Not all of them were as enthusiastic as the preamble of the Massachusetts statute, which referred to the "learned and ingenious persons in the various arts and sciences" and to the importance of the "legal security of the fruits of their study and industry to themselves," concluding that "such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind."[35] Even the more conservative statutes, however, included variations on the same themes.[36]

29. For a survey of these statutes, see Crawford, *supra* note 27; and 1 WILLIAM PATRY, PATRY ON COPYRIGHT § 1:17, at 1-184 to 1-201 (2007).

30. IV PAPERS OF THE CONTINENTAL CONGRESS, 1774-1789, No. 78, at 370 (1783), *microformed on* Microcopy No. 247, Roll 92 (Nat'l Archives Microfilm Publ'ns).

31. *Id.*

32. *Id.*

33. *Id.* at 371.

34. The state copyright statutes are reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783-1906, at 11-31 (Thorvald Solberg ed., rev. 2d ed. 1906).

35. *Id.* at 14.

36. For an analysis of the state statutes' preambles, see Crawford, *supra* note 27.

By the time the U.S. Constitution empowered Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"[37] and the 1790 Copyright Act was enacted,[38] two important developments had occurred. First, in a very basic sense, copyright in the United States became the right of authors. Copyright transformed from an ad hoc publisher's privilege to a universal regime of rights bestowed on authors. Second, copyright discourse was firmly grounded within the conceptual world of authorship and saturated with its terminology. The author was singled out as a privileged individual with a unique connection to the work—a sharp contrast to the earlier colonial complete disregard of authors. Authorship was understood as the process by which an individual spirit served as the ultimate source of new original ideas. In the words of Barlow, the hallmark of authors was producing "works which a person originates from his own creative imagination."[39] This depiction of authorship was intimately connected to a proprietorship argument, according to which authors were entitled to property rights in the fruit of their intellectual labor, either on a natural-rights or a utilitarian basis.

At the same time that authorship came to dominate the theoretical and abstract discourse surrounding copyright law, the institutional-doctrinal details of copyright remained rooted in traditional pre-authorship patterns. The rift between the new official ideology and actual institutional forms was staggering. Original authors were celebrated as the raison d'être of the regime, but copyright had no mechanism whatsoever to identify either authors or works of authorship. The newly recognized author's rights were often described as "property rights," but copyright, far from bestowing general control or even generalized control over an object of property, remained the traditional printer's entitlement to print and sell copies of the product of the printing press. The 1790 Act described it as "the sole right and liberty of printing, reprinting, publishing and vending" a map, chart, or book.[40] Finally, the object of property, the "thing" owned, was understood to be the intellectual work created by the author, but copyright law lacked any mechanisms for conceptualizing such intellectual objects or for demarcating their boundaries. Instead of ownership of intellectual works, the notion embedded in the

37. U.S. CONST. art. I, § 8, cl. 8.

38. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802).

39. IV PAPERS OF THE CONTINENTAL CONGRESS, 1774-1789, *supra* note 30, No. 78, at 370.

40. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802).

traditional scheme adopted by the 1790 Act was that of an exclusive right of making verbatim copies of a particular text.

In short, at the end of the eighteenth century, copyright remained the old economic privilege of the publisher (now conferred on authors) wearing an official rhetorical mask of authorial property rights. The gradual embedding of authorship ideology in actual copyright doctrine took place only in the nineteenth century. The remaining three Parts describe this process.

III. CREATION EX NIHILO?: ORIGINALITY

The notion of originality was one of the most fundamental elements of the new concept of authorship. Thus, it is hardly surprising that one of the earliest aspects of instantiating the abstract concept within concrete copyright doctrine was a creation of a doctrinal originality requirement. It is widely known that by the early twentieth century the doctrinal requirement of originality became, in the words of Peter Jaszi, an image of the theoretical notion of originality seen in "fun-house mirrors."[41] *Bleistein v. Donaldson Lithographing Co.*,[42] decided in 1903, was the emblematic case in this respect.[43] In the Court's opinion, Justice Holmes drew upon notions of romantic authorship to uphold the copyright of a circus advertisement poster against a claim that such works lacked the requisite degree of originality to merit protection. He described the intellectual work as "the personal reaction of an individual upon nature . . . . [that] always contains something unique"[44] and invoked the figures of the great original masters.[45] At the same time, however, Justice Holmes reduced copyright's originality requirement to almost nothing. He combined a content neutrality argument, a market concept of value, and a stance of judicial abdication in order to find that copyright had no threshold requirement of objective aesthetic value.[46] Accordingly, a commercial circus advertisement poster—the antithesis

41. Jaszi, *supra* note 4, at 456.

42. 188 U.S. 239 (1903).

43. *See* BOYLE, *supra* note 4, at 55; William W. Fisher III, *Geistiges Eigentum-ein ausufernder Rechtsberein. Die Geschichte des Ideenschutzes in den Vereinigten Staaten* [*The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States*], *in* EIGENTUM IM INTERNATIONALEN VERGLEICH [PROPERTY IN INTERNATIONAL PERSPECTIVE] 265, 281 n.71 (Hannes Siegrist & David Sugarman eds., 1999); Jaszi, *supra* note 4, at 481-83.

44. *Bleistein*, 188 U.S. at 250.

45. *Id.* at 251-52.

46. *Id.*

of the image of an original work in the romantic sense—was found to satisfy copyright's originality requirement.[47]

Every student of American copyright is familiar with *Bleistein*. But how exactly did American copyright law get there? How did it transform from having no trace of any originality requirement in 1790 to a situation in which originality was recognized as a basic copyright doctrine but received a restrictive and technical meaning? In answering these questions, I first describe the gradual rise of originality doctrine in American copyright and then analyze the various social factors that shaped this process.

A. The Strange Career of Originality

Originality doctrine was shaped by the dialectical interaction between commercial interests and ideology. It appeared as a doctrinal concept starting in the late 1820s in various copyright disputes in which defendants argued lack of originality in order to deprive copyrighted works of protection and escape infringement charges. By that time, there existed a solid array of interests against a demanding threshold originality requirement.[48] Thus, the agents who fueled the process of development were mainly motivated by commercial purposes and probably had little concern for high theoretical ideals such as original authorship. Authorship, however, had already acquired a dominant position in the conceptual world of copyright law and its justifications. When such interested parties came to make their case in a public legal forum, authorship was one of the central sources of arguments on which they could and, indeed, had to draw. The result was that the preexisting ideology of authorship was reshaped by interested parties in order to fit their concerns. At the same time, the arguments developed by these parties were constrained by the need to use terms and concepts taken from the lexicon of authorship.

This process produced two different strands of originality cases. In the first strand of cases, courts strove to create a highly restricted originality doctrine. Arguments based on originality relied on the imagery of authorship. They presented originality as a requirement that the protected work be substantially novel, or as a minimal threshold of creativity and aesthetic merit. Judges in the first strand of cases did not reject such assertions altogether. Yet they took

47. *See generally* Diane Leenheer Zimmerman, *The Story of* Bleistein v. Donaldson Lithographing Company*: Originality as a Vehicle for Copyright Inclusivity*, *in* INTELLECTUAL PROPERTY STORIES 77 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006) (describing the background and significance of *Bleistein*).

48. *See infra* text accompanying notes 82-104.

pains to construct the originality requirement in such a way that left little of the romantic notion of originality as involving either novelty or merit.

The highly influential opinions written by Justice Joseph Story epitomized this approach to originality. Faced with the novel arguments that originality was a threshold requirement for copyright protection, Justice Story adamantly refused to condition copyright protection upon a requirement of novelty. While doing so he explicitly rejected the romantic vision of authorship as a total break with traditions and as creation ex nihilo. In fact, in the 1845 case *Emerson v. Davies*,[49] Justice Story produced a vivid anti-romantic manifesto:

> In truth, in literature, in science and in art, there are, and can be, few, if any, things, which, in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copy-right which was not new and original in the elements of which it is composed, there could be no ground for any copy-right in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence.[50]

This was quite the opposite of a naïve or uncritical acceptance of the romantic ideal of authorship. Juxtaposing Justice Story's prose and Woodmansee's claim that "a piece of writing or other creative product may claim legal protection only insofar as it is determined to be a unique, original product of the intellection of a unique individual"[51] is sobering. Add some gloss of literary theory to Justice Story's rhetoric about textual borrowing, and a version of the poststructuralist critique of original authorship emerges, complete with the relevant catch phrases.

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49. 8 F. Cas. 615 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4436).

50. *Id.* at 619.

51. Woodmansee, *supra* note 7, at 27.

Furthermore, it turns out that Justice Story engaged in another common poststructuralist maneuver of exposing the giant original authors of the past as free borrowers, lenders, and recyclers of texts. In the words of Justice Story,

> Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days. What is La Place's great work, but the combination of the processes and discoveries of the great mathematicians before his day, with his own extraordinary genius? What are all modern law books, but new combinations and arrangements of old materials, in which the skill and judgment of the author in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copyright? Blackstone's Commentaries and Kent's Commentaries are but splendid examples of the merit and value of such achievements.[52]

Justice Story was equally firm in rejecting the other aspect of the romantic version of originality: the latent assumption that real works of authorship had to be not only new but also meritorious. "[W]hether to be better or worse," he wrote in *Emerson*, dismissing an objection that the protected work lacked merit, "is not a material inquiry in this case." Instead of any aesthetic merit criterion, Justice Story turned to the market as the sole arbiter of value. "If worse," he explained, "his work will not be used by the community at large; if better, it is very likely to be so used. But either way, he is entitled to his copyright, 'valere quantum valere potest.'"[53]

Emerson and the 1839 case *Gray v. Russell*,[54] in which Justice Story used very similar prose, were highly influential and were frequently cited throughout the century in treatises and judicial opinions.[55] Their cold treatment of the dogma

52. *Emerson*, 8 F. Cas. at 619.

53. *Id.* at 621. "Valere quantum valere potest" roughly means "with as much value as he can get."

54. 10 F. Cas. 1035 (Story, Circuit Justice, C.C.D. Mass. 1839) (No. 5728).

55. *See, e.g.*, Boucicault v. Fox, 3 F. Cas. 977, 982 (C.C.S.D.N.Y. 1862) (No. 1691) (echoing Justice Story's rhetoric and writing that many of "the plays of Shakespeare are framed out of materials which existed long before his time, and were gathered by him from ancient chronicles, and other dusty receptacles of antiquated literature"); Atwill v. Ferrett, 2 F. Cas. 195, 198 (C.C.S.D.N.Y. 1846) (No. 640); GEORGE TICKNOR CURTIS, A TREATISE ON THE

of original authorship is particularly significant when one realizes that these early Justice Story decisions represent the first moments in which originality doctrine was introduced into American copyright law. Rather than with a fanfare of romantic authorship imagery, originality made its appearance in American copyright doctrine wrapped in arguments about the interdependent and the cumulative character of texts and about the market as the only criterion for assessing value.

Before one concludes that the ideological vision of authorship was simply rejected in this area of copyright law, we must turn to the second, very different, strand of originality cases that began to appear almost at the same time as the Justice Story opinions. These cases not only recognized an originality requirement, but also showed willingness to fill it with meaningful content. These interpretations of the originality doctrine, although obviously falling short of the ideal romantic vision, created substantial threshold requirements of either novelty or merit.

The 1850 case *Jollie v. Jaques*,[56] for example, involved copyright protection of sheet music of a composition named "The Serious Family Polka." The composition accompanied a play named *The Serious Family* and was an adaptation of a preexisting German tune. Justice Nelson held that "[t]he original air requires genius for its construction; but a mere mechanic in music, it is said, can make the adaptation."[57] The contrast of the "genius" of the real original author with the "mere mechanic in music" is a striking example of an interpretation, based on original authorship concepts, of the originality doctrine. Justice Nelson went on to phrase the originality requirement in robust novelty terms: "The musical composition contemplated by the statute must, doubtless, be substantially a new and original work; and not a copy of a piece already produced, with additions and variations, which a writer of music with experience and skill might readily make."[58]

LAW OF COPYRIGHT 173 (1847). Other cases employed the rationale of Justice Story's decisions without citing them. *See, e.g.*, Ladd v. Oxnard, 75 F. 703, 731 (C.C.D. Mass. 1896) (No. 707) ("[T]he quality and grade of original work required by the courts under the copyright statutes are very moderate."); Brightley v. Littleton, 37 F. 103, 104 (C.C.E.D. Pa. 1888) ("The originality, however, may be of the lowest order . . . .").

56. 13 F. Cas. 910 (Nelson, Circuit Justice, C.C.S.D.N.Y. 1850) (No. 7437).

57. *Jollie*, 13 F. Cas. at 913. Importantly, a year later in *Hotchkiss v. Greenwood*, 52 U.S. 248 (1851), Justice Nelson introduced to American patent law what later became the nonobviousness requirement. In *Hotchkiss*, Justice Nelson used terms very similar to those he used in his *Jollie* opinion, explaining that a patentable invention must be the work of a genius inventor rather than that of an "ordinary mechanic." *Id.* at 267.

58. *Id.* at 913-14.

While *Jollie* stressed independence and novelty, the 1829 case *Clayton v. Stone*, which denied copyright protection to a price catalog, emphasized substantive merit.[59] The opinion explained that "[t]he literary property intended to be protected by the act" should be determined by "the subject-matter of the work," and found that a "price-current cannot be considered a book within the sense and meaning of the act of congress."[60] It did not go as far as saying that the court had to evaluate the literary merit of a work in each specific case. Relying, however, on the constitutional and statutory reference to "author[s]" and the "promotion of science," the court singled out certain categories of works as outside the scope of copyright protection:

> The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them.[61]

The court further explained that "[t]he title of the act of congress is for the encouragement of learning, and was not intended for the encouragement of mere industry, unconnected with learning and the sciences."[62] A mere price list, it concluded "must seek patronage and protection from its utility to the public and not as a work of science."[63]

A long list of later cases continued to read some meaningful content into the originality requirement, drawing upon both the *Jollie* insistence on novelty and the *Clayton* demand for substantive merit.[64] Even the 1903 *Bleistein* case contained a dissent by Justice Harlan, who explained that being "unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error," he could not extend copyright protection to "a mere

59. 5 F. Cas. 999, 1000 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1829) (No. 2872).

60. *Id.*

61. *Id.* at 1003.

62. *Id.* (citation omitted).

63. *Id.*

64. *See, e.g.*, J.L. Mott Iron Works v. Clow, 82 F. 316, 319 (7th Cir. 1897); Lamb v. Grand Rapids Sch. Furniture Co., 39 F. 474 (C.C.W.D. Mich. 1889); Schumacher v. Schwencke, 25 F. 466, 467-68 (C.C.S.D.N.Y. 1885); Yuengling v. Schile, 12 F. 97, 100 (C.C.S.D.N.Y. 1882); Ehret v. Pierce, 10 F. 553, 554 (C.C.E.D.N.Y. 1880); Collender v. Griffith, 6 F. Cas. 104 (C.C.S.D.N.Y. 1873) (No. 3000); Scoville v. Toland, 21 F. Cas. 863 (C.C.D. Ohio 1848) (No. 12,553).

advertisement of a circus."[65] Nowadays, if the editor is generous, the *Bleistein* dissent makes it to the textbook version of the case, only to be regarded by copyright students as a strange curiosity from the past. When it was written, however, it represented a waning, but still important, line of precedents.

To mention just one other striking example, the 1867 case *Martinetti v. Maguire*[66] stands in stark contrast with the content neutrality stance espoused by both *Emerson* twenty-two years earlier and *Bleistein* thirty-six years later. The work at issue was a play named *The Black Rook*. The court described it as

> a mere spectacle—in the language of the craft a spectacular piece. The dialogue is very scant and meaningless, and appears to be a mere accessory to the action of the piece—a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called Paradise, and . . . [it] consists mainly "of women lying about loose"—a sort of Mohammedan paradise, I suppose, with imitation grottos and unmaidenly houris.[67]

"To call such a spectacle a 'dramatic composition,'" it concluded,

> is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of model artistes might as justly be called a dramatic composition. Like those, this is a spectacle, and although it may be an attractive or gorgeous one, it is nothing more.[68]

The court found that such a work was not "entitled to the protection of the copyright act."[69] Moreover, the court went a step further and reasoned that even if Congress wanted to extend copyright to such works, it had no power to

65. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 253 (1903) (Harlan, J., dissenting) (citation omitted).

66. 16 F. Cas. 920 (C.C.D. Cal. 1867) (No. 9173); *see also* Barnes v. Miner, 122 F. 480, 492 (S.D.N.Y. 1903) ("Society may tolerate, and even patronize, such exhibitions, but Congress has no constitutional authority to enact a law that will copyright them, and the courts will degrade themselves when they recognize them as entitled to the protection of the law.").

67. 16 F. Cas. at 922.

68. *Id.*

69. *Id.*

do so under the Intellectual Property Clause of the Constitution. The Court explained that "[t]he exhibition of such a drama neither 'promotes the progress of science or useful arts,' but the contrary. The constitution does not authorize the protection of such productions."[70]

The development of originality doctrine during the nineteenth century, leading to *Bleistein*, was characterized by a constant decline of the framework represented by *Clayton* and *Jollie* and a steady rise of Justice Story's approach. Eaton Drone's highly influential 1879 copyright treatise, for example, contained a forceful assault on the *Clayton* decision.[71] Drone explained that "a more liberal doctrine now prevails"[72] and that "the requirements of the law as to the importance or value of a production are so slight that valid copyright will attach to almost any publication, and to many that appear to be of little or no consequence."[73]

The originality requirement, however, was never completely abandoned. Drone, for example, in the same sentence in which he explained that copyright will attach to "any publication," was also careful to add that "not every collection of printed words or sentences is entitled to protection."[74] Rather, "[t]o be worthy of copyright, a thing must have some value as a composition sufficiently material to lift it above utter insignificance and worthlessness."[75] No one seemed to have noticed the tension between these two statements.

Even more curiously, as the actual bite of originality doctrine as a threshold requirement was sinking, its formal and rhetorical status in copyright discourse was soaring. The more judges and commentators emptied originality of any meaningful content, the harder they clung to originality and the more vocally they celebrated its role in copyright law. The most conspicuous examples of this rise in the status of originality were the *Trade-mark Cases*,[76] decided in 1879. In this decision, the Supreme Court struck down the first federal trademark statute as unconstitutional. Congress claimed that the Intellectual

70. *Id.*

71. EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES EMBRACING COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYWRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS 209-10 (photo. reprint 1979) (Boston, Little, Brown, & Co. 1879).

72. *Id.* at 210.

73. *Id.* at 211.

74. *Id.*

75. *Id.*

76. 100 U.S. 82 (1879).

Property Clause authorized it to legislate in the field.[77] The Court, however, seized upon the words "authors" and "writings" in the constitutional language, made originality the centerpiece of the constitutionally granted power, and invalidated the statute for creating protection irrespective of any originality requirement. "If we should endeavor to classify [the trademark] under the head of writings of authors, the objections are equally strong," Justice Miller wrote, because "[i]n this, as in regard to inventions, originality is required."[78] He explained that, "while the word *writings* may be liberally construed," it covers only works "such as are *original*, and are founded in the creative powers of the mind."[79] The conclusion was that its lack of any originality or novelty requirements took the trademark out of the constitutional scope of the federal copyright (and patent) legislative power:

> The writings which are to be protected *are the fruits of intellectual labor* . . . . The trade-mark may be, and generally is, the adoption of something already in existence as the distinctive symbol of the party using it. At common law the exclusive right to it grows out of its *use*, and not its mere adoption. By the act of Congress this exclusive right attaches upon registration. But in neither case does it depend upon novelty, invention, discovery, or any work of the brain. It requires no fancy or imagination, no genius, no laborious thought.[80]

Thus, the Supreme Court refused to dispense with originality, no matter how "liberally construed." Instead, it elevated originality to the status of a constitutional principle that defined and restricted Congress's power. In the following years, the trend of interpreting originality as a fundamental principle of copyright continued.[81]

What began as an implicit doctrinal tension at the moment that originality was introduced into copyright doctrine had grown into a full-fledged paradox by the end of the century. Copyright doctrine came to place originality at the

77. U.S. CONST. art. I, § 8, cl. 8.

78. 100 U.S. at 94.

79. *Id.*

80. *Id.*

81. Higgins v. Keuffel, 140 U.S. 428, 431 (1891); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57-60 (1884); Am. Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 F. 262, 265-67 (C.C.D.N.J. 1905); Courier Lithographing Co. v. Donaldson Lithographing Co., 104 F. 993, 994-95 (6th Cir. 1900); Falk v. City Item Printing Co., 79 F. 321 (C.C.E.D. La. 1897); Falk v. Donaldson, 57 F. 32, 34 (C.C.S.D.N.Y. 1893). The outcome, but not the premise that originality has a constitutional status, was reversed in *Bleistein*.

heart of the field, awarding it a privileged status, while, at the same time, reducing the reach of originality doctrine to negligible dimensions. Originality, in the romantic sense, became the foundation of copyright law. Yet copyright law had little to do with originality.

B. Originality in Context

What accounts for this paradox? The process that led to this structure of originality involved an interaction among various economic and ideological factors. Authorship, which by the end of the eighteenth century had become the official justification for copyright, was an important element of the process. As litigants, judges, or commentators came to articulate the boundaries of copyright protection, they naturally relied on concepts taken from that theoretical framework. These concepts, however, were manipulated as individual agents—motivated by economic interests and ideological commitments—used them to construct legal arguments that would fit their purposes.

An important part of the explanation is the influence of the rise of a new commercial society during the nineteenth century. The development of a national market, new patterns of economic activity, changing modes of production and marketing, and new industries created new interests, which, in turn, left a deep imprint on the framework of copyright. A strong array of economic interests that grew stronger throughout the nineteenth century exerted a constant force against the broad originality doctrine.

Historically, copyright could extend, in principle, to any text printed by a publisher. The majority of materials registered during the first decades of the American copyright regime were far from embodying the romantic ideal of originality. Consistent with traditional practices and with a strand of thought that viewed copyright as a tool for promoting "learning" or the "sciences and the useful arts," copyright was widely used to protect materials such as textbooks, dictionaries, and a host of other "useful" or didactic works.[82] Throughout the nineteenth century, the largest relative share of the publishing market continued to be occupied by such works.[83] This created an entrenched

82. *See* Joseph J. Felcone, *New Jersey Copyright Registrations 1791-1845*, 104 PROC. AM. ANTIQUARIAN SOC'Y 51 (1995); James Gilreath, *American Literature, Public Policy and the Copyright Laws Before 1800*, *in* FEDERAL COPYRIGHT RECORDS 1790-1800, at xv, xv (James Gilreath ed., 1987); Meredith L. McGill, *Copyright in the Early Republic*, *in* 2 A HISTORY OF THE BOOK IN AMERICA (Robert A. Gross & Marry Kelly eds., forthcoming 2009).

83. WILLIAM CHARVAT, *The Condition of Authorship in 1820*, *in* THE PROFESSION OF AUTHORSHIP IN AMERICA, 1800-1870: THE PAPERS OF WILLIAM CHARVAT 29, 34-35 (Matthew J. Bruccoli

interest group that relied on copyright protection extending well beyond the terrain that could be covered by any regime based on a substantial criterion of originality commensurate with the abstract ideology of authorship.

The economic changes of the nineteenth century—first in the book publishing industry and then beyond it—further consolidated the interests against heavy originality restrictions. Beginning in the second quarter of the nineteenth century, the publishing industry underwent fundamental changes, advancing dramatically during the century.[84] For the first time, conditions appeared for the emergence of a national mass market for books: broad demand, mass production capabilities, relatively cheap book commodities, and national patterns of production and marketing.[85] In the decades leading up to the Civil War, the organization of the industry was radically transformed. The traditional artisan-based printing craft was gradually replaced by a capitalist

ed., 1968) [hereinafter CHARVAT PAPERS]. It is estimated that, in 1860, textbooks constituted thirty to forty percent of the books published in the United States. In later times, this relative share increased. 1 TEBBEL, *supra* note 27, at 222.

84. HELLMUT LEHMANN-HAUPT, THE BOOK IN AMERICA: A HISTORY OF THE MAKING, THE SELLING, AND THE COLLECTING OF BOOKS IN THE UNITED STATES 122 (1939). In the 1830s, one hundred books on average were published each year in the United States. In 1859, the figure rose to 1350. In 1820, the value of books manufactured and sold in the United States was $2.5 million. In 1856, this value was $16 million. 1 TEBBEL, *supra* note 27, at 221.

Underlying this expansion were technological, economic, and social developments. Some of the most important developments were advances in printing and book-making technology such as the flatbed iron press and, later, the steam and electricity-powered cylinder presses; the transportation revolution, which first arose in the form of canals and later railroads; and the increased rates of literacy. For the role of technological developments, see LEHMANN-HAUPT, *supra*, at 71-83; JUDITH A. MCGAW, MOST WONDERFUL MACHINE: MECHANIZATION AND SOCIAL CHANGE IN BERKSHIRE PAPER MAKING, 1801-1885 (1987); 1 TEBBEL, *supra* note 27, at 257-62; and RONALD J. ZBORAY, A FICTIVE PEOPLE: ANTEBELLUM ECONOMIC DEVELOPMENT AND THE AMERICAN READING PUBLIC 5-11 (1993) [hereinafter ZBORAY, A FICTIVE PEOPLE]. For history of the transportation revolution, see GEORGE ROGERS TAYLOR, THE TRANSPORTATION REVOLUTION 1815-1860 (The Economic History of the United States vol. 4, 1951); 1 TEBBEL, *supra* note 27, at 204, 207; ZBORAY, A FICTIVE PEOPLE, *supra*, at 12-14, 55-68; and Ronald J. Zboray, *The Transportation Revolution and Antebellum Book Distribution Reconsidered*, 38 AM. Q. 53 (1986) [hereinafter Zboray, *Transportation Revolution*]. For history of the rise of literacy rates, see WILLIAM J. GILMORE, READING BECOMES A NECESSITY OF LIFE: MATERIAL AND CULTURAL LIFE IN RURAL NEW ENGLAND, 1780-1835 (1989); LEE SOLTOW & EDWARD STEVENS, THE RISE OF LITERACY AND THE COMMON SCHOOL IN THE UNITED STATES: A SOCIO-ECONOMIC ANALYSIS TO 1870 (1981); and 1 TEBBEL, *supra* note 27, at 207.

85. 1 TEBBEL, *supra* note 27, at 206-07; James Gilreath, *American Book Distribution*, 95 PROC. AM. ANTIQUARIAN SOC'Y 501 (1986). For a somewhat critical assessment of the common claim that the price of books significantly reduced, see ZBORAY, A FICTIVE PEOPLE, *supra* note 84, at 11-12.

commodity industry.[86] The older pattern in which the roles of the printer, the book seller, and the publisher were often blurred was replaced by a new one that included a stricter differentiation of these roles[87] and in which the publisher was dominant.

The outcome of all these changes was a new, extremely competitive, and commercialized publishing industry.[88] One scholar described it as follows:

> The publishing world in America, emerging from the provincial stage, was in the midst of a mechanical and economic revolution, which, despite the small notice given to it in orthodox histories, had a profound influence on the development of American literature. Like most periods of rapid and chaotic expansion, it was characterized by greed, ruthlessness, and small heed to the fundamental decencies of civilized business relations.[89]

The industry came to be characterized by an increasingly self-conscious commercial drive[90] and increasingly sophisticated strategies for creating and capturing market demand.

Many of these market strategies had little to do with copyright protection. Indeed, some of them, such as the extremely lucrative practice of reprinting popular British works, relied on the absence of copyright.[91] Other strategies for creating and exploiting market demand, however, relied in part on the

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86. *Id.* at 4. Accompanying the publishers' celebratory image of this shift were also the protests and complaints of its victims: journeymen and other artisans who were reduced to the level of wage laborers. On the metamorphosis of the printing craft into a publishing industry, see *id.* at 6-9.

87. 1 TEBBEL, *supra* note 27, at 212-13.

88. *Id.* at 207; ZBORAY, A FICTIVE PEOPLE, *supra* note 84, at 17-18.

89. LUKE WHITE, JR., HENRY WILLIAM HERBERT AND THE AMERICAN PUBLISHING SCENE 1831-1858, at 7-8 (1943).

90. *See* WILLIAM CHARVAT, *The Beginnings of Professionalism*, *in* CHARVAT PAPERS, *supra* note 83, at 5, 18-28. This is not to say, of course, that earlier publishers or authors had no profit motive. The point is that the industry was reshaped in a way that stimulated new patterns and strategies of market behavior, and a new self-consciousness grew in this respect.

91. International copyright protection was a recurring issue of fierce debate in the United States during the nineteenth century. Despite continuous lobbying and criticism, both foreign and domestic, it was only by 1891 that the tide had changed, and the United States began to recognize copyright in foreign works through the Chace International Copyright Act. Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106. In 1853, there were 733 works published in the United States. Two hundred seventy-eight of them were reprints of British works and thirty-five were translations of other foreign works. *See* ZBORAY, A FICTIVE PEOPLE, *supra* note 84, at 3.

exclusivity promised by copyright protection.[92] Many of the significant new products aimed at new markets could not clear any substantial originality bar that would have even come close to the romantic ideal.

As for the merit or creativity aspect of originality, in addition to the still-important traditional publications such as textbooks or dictionaries, there was an influx of new materials and formats whose ability to meet such criteria was questionable.[93] Magazines and journals of various kinds,[94] the "dime novel,"[95] the "penny paper,"[96] and the highly popular illustration books,[97] were all aimed to appeal to a mass audience at attractive prices. As one of the first advertisements for commodity literature of this sort read: "BOOKS FOR THE MILLION! A DOLLAR BOOK FOR A DIME! ! 128 pages complete, only Ten Cents! ! !"[98] These new cheap formats often received scorn and criticism from contemporaries who lamented the deficiencies and even the supposed pernicious effect of "cheap" literature.[99] But they tapped and created an unprecedented mass market, and they constituted a very lucrative opportunity for publishers.

The same principle applied to the novelty aspect of originality. Numerous new products and formats, the result of new marketing techniques, were the antithesis of the radical novelty notion.[100] Revised editions, serializations of existing works, and collected works volumes[101] were embodiments of existing

92. Other characteristics of nineteenth-century copyright, such as stringent registration, deposit, and notice requirements, as well as the cost of enforcement, often made reliance on copyright unattractive in the context of cheap publication formats. *See* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 502-28 (2004) (discussing the "filtering" function of nineteenth-century copyright). Nevertheless, it seems that at least in some of the strategies involved, publishers did try to rely on copyright protection.

93. *See generally* PUBLISHERS FOR MASS ENTERTAINMENT IN NINETEENTH CENTURY AMERICA (Madeleine B. Stern ed., 1980) (surveying various nineteenth-century publishers of popular and entertainment publications).

94. ISABELLE LEHUU, CARNIVAL ON THE PAGE: POPULAR PRINT MEDIA IN ANTEBELLUM AMERICA 59-75 (2000); ZBORAY, A FICTIVE PEOPLE, *supra* note 84, at 32-34.

95. 1 TEBBEL, *supra* note 27, at 248-51; ZBORAY, A FICTIVE PEOPLE, *supra* note 84, at 31-32.

96. LEHUU, *supra* note 94, at 36-58.

97. *Id.* at 76-101; 1 TEBBEL, *supra* note 27, at 252-54.

98. Advertisement, N.Y. TRIB., June 7, 1860, at 1.

99. LEHUU, *supra* note 94, at 126-55.

100. Henry Longfellow and his publishers were the pioneers of many of these new marketing techniques, including sophisticated price-discrimination strategies. 1 TEBBEL, *supra* note 27, at 211-12; WILLIAM CHARVAT, *Longfellow's Income from His Writings, 1840-1852*, *in* CHARVAT PAPERS, *supra* note 83, at 155, 162-63.

101. LEHUU, *supra* note 94, at 72-73; 1 TEBBEL, *supra* note 27, at 219, 240-51.

works with slight changes. To the extent that commercial actors wanted to rely on copyright protection in the context of such products, a substantial originality standard was out of the question.

In the later part of the century, economic developments expanded the constituency with a firm interest against a substantial originality threshold. Various industries outside of the traditional realm of the book trade began to discover copyright and attempted to use it strategically in order to achieve market advantages. Some of these fields later became part of what would be called the "content industries," whose products are considered to be part of the core of copyright protection.[102] Photography that appeared in the late nineteenth century is illustrative. In photography's early days many considered it a mechanical process or a technical craft that involved little creativity or originality in the romantic sense.[103] Other fields, in which actors discovered and tried to use copyright, had a more tangential relation to either the traditional book-trade or to the emerging content industries. The rising giant of advertisement,[104] makers of sale catalogs,[105] and users of labels on commodities[106] all tried, with varying degrees of success, to draft copyright into their service. Many of those new materials for which copyright protection was sought—both those that were later admitted to the core of creativity and those that remained at the fringe—were seen as lacking originality. In a copyright regime based on a substantial originality criterion, protection could not have been extended to such fields. This created another consistent set of interests that continuously applied pressure against a demanding originality doctrine.

The economic interests account is an important part of explaining the formation of originality during the nineteenth century. Yet it is inadequate as a sole explanation for three reasons. First, the interest group explanation alone seems indeterminate. It shows that there existed substantial and consistent

102. *See generally* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 233-384 (2004) (describing the appearance of the modern content industries around the turn of the twentieth century).

103. For the changing social conceptualization of photography and its relationship with copyright, see Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 395-415 (2004).

104. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); Mut. Adver. Co. v. Refo, 76 F. 961 (C.C.D.S.C. 1896); Yuengling v. Schile, 12 F. 97 (C.C.S.D.N.Y. 1882); Lawrence v. Cupples, 15 F. Cas. 25 (C.C.D. Mass. 1875) (No. 8135).

105. J.L. Mott Iron Works v. Clow, 82 F. 316 (7th Cir. 1897); Clayton v. Stone, 5 F. Cas. 999 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1829) (No. 2872).

106. Higgins v. Keuffel, 140 U.S. 428, 431 (1891); Scoville v. Toland, 21 F. Cas. 863 (C.C.D. Ohio 1848) (No. 12,553).

economic interests that favored a minimal originality requirement, but it does not show why these overcame countervailing interests. There were other significant actors who were just as interested in limiting the scope of copyright protection through a robust originality threshold. For most of the nineteenth century, there was a prospering and entrenched reprint industry in the United States[107] whose members appear to have been as organized, sophisticated, and informed as any other actor in the field. Yet the originality standard was a very low one from the moment it appeared and was further eroded during the century.[108] Second, the economic interests account provides no explanation for the ongoing clinging to originality, its rising rhetorical significance in copyright law, and its intricate paradoxical structure. If it was just the balance of power that doomed originality as a substantial limitation on copyrightability, why was it not simply rejected altogether at its first appearance or completely purged from copyright law in a later stage? Third, regardless of whether the economic interest explanation could be sufficient in and of itself, when one looks at the relevant texts it becomes clear that there were also other noneconomic forces at work.

One important factor that joined economic trends in shaping originality was a changing understanding of the legitimate role of government and of the proper procedures and institutions for carrying out that role. Historians described the dominant understanding of proper government during the late colonial era and in the first quarter of the nineteenth century as the "commonwealth" style of government.[109] Under this framework, government

107. MEREDITH L. MCGILL, AMERICAN LITERATURE AND THE CULTURE OF REPRINTING, 1834-1853, at 3-4 (2003).

108. Therefore, the common account of a collective action problem that consistently skews the politics of intellectual property in favor of protectionist trends does not seem to be conclusively applicable. For public choice and collective action failures as an explanation of the development of intellectual property law, see Fisher, *supra* note 43, at 277-80; Robert P. Merges, *Intellectual Property Rights and the New Institutional Economics*, 53 VAND. L. REV. 1857, 1875 (2000); Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187 (2000); and Yochai Benkler, *The Battle over the Institutional Ecosystem in the Digital Environment*, COMM. OF THE ACM, Feb. 2001, at 84, 89.

109. *See* CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890 (1960); OSCAR HANDLIN & MARY FLUG HANDLIN, COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861 (rev. ed. 1969); LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860 (1948). For a general survey, see Robert A. Lively, *The American System: A Review Article*, 29 BUS. HIST. REV., Mar. 1955, at 81, which is critical of the alleged commonwealth-scholarship tendency to neglect the empirical examination of actual governmental practices and their effects; and Harry N. Scheiber, *Government and the Economy: Studies of the*

enjoyed broad legitimacy for intervening in all aspects of economic and social life in order to promote the public good.[110] Additionally, commonwealth-style American government was characterized by particular institutional forms. The ideal of active promotion of the public good was put into practice through a variety of methods. Many of those were general regulations of various sorts.[111] More unique, however, was an eclectic group of techniques of ad hoc governmental involvement in economic life, such as bounties, special privileges, land grants, franchise, and special incorporation grants.[112] Underlying this extensive system of ad hoc privileges were several interlocking principles. First, these measures were particularistic rather than universal. The government would choose a specific private party on which to confer special powers or benefits that were not granted to others, even if they were similarly situated. Second, these privileges and the process of their creation were overtly political. Each grant and its specific terms were directly debated and authorized on a discretionary basis by the political representatives of the people, usually the legislature. The role of the political representative was to assess the benefit offered to the public by a particular private party and to allocate an adequate reward or encouragement. Third, these practices were based on a strong paternalistic assumption that the members of government know best how to promote the public welfare and which private party could best serve that goal. Fourth, this entire framework was based on a conception of the public good as an identifiable cohesive set of interests common to all members of society.[113]

Beginning in the 1830s, the commonwealth style of government and the ideological outlook in which it was grounded declined. It was gradually replaced by the new ideology of the liberal state.[114] In the antebellum liberal

"Commonwealth" Policy in Nineteenth-Century America, 3 J. INTERDISC. HIST. 135 (1972) (reviewing HANDLIN & HANDLIN, *supra*).

110. WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 84-105 (1996); Scheiber, *supra* note 109, at 135-36. Indeed, the very term "economy" had a meaning different than the modern one. As William Novak explained, by the late eighteenth century the word roughly meant "any society ordered after the manner of a family or, similarly, the general administration of the concerns of a community with a view to orderly conduct and productiveness." NOVAK, *supra*, at 87.

111. HANDLIN & HANDLIN, *supra* note 109, at 61-64; NOVAK, *supra* note 110, at 3.

112. HANDLIN & HANDLIN, *supra* note 109, at 51-86; Harry N. Scheiber, *Government and the American Economy: Three Stages of Historical Change, 1790-1941*, *in* ESSAYS FROM THE LOWELL CONFERENCE ON INDUSTRIAL HISTORY 1980 AND 1981, at 128-34 (Robert Weible, Oliver Ford & Paul Marion eds., 1981).

113. *See* HANDLIN & HANDLIN, *supra* note 109, at 51-52; Scheiber, *supra* note 109, at 136.

114. The Handlins called this new model "a humanitarian police state." HANDLIN & HANDLIN, *supra* note 109, at 203.

state, extensive governmental regulation of the economy still enjoyed broad legitimacy.[115] The commonwealth institutional forms, however, lost favor and were ultimately abandoned. Confidence in the existence of a cohesive set of interests common to all members of society—and in the ability of government to reflect it—waned.[116] A distinction gradually appeared between a public sphere and a private sphere in which government could not legitimately intervene.[117] Special privileges of various kinds became common targets of venomous attacks. These were increasingly considered the manifestation of corruption and of the hijacking of the republic by an aristocratic oligarchy. While government still enjoyed broad legitimacy to regulate in the name of public welfare, it was expected to do so through universal regulatory regimes that created general rights rather than ad hoc privileges. These were justified on the basis of the general utility of the regime rather than governmental evaluation of the merit of any specific case.[118]

The traces of this shift in the concept and practice of proper government can be found in copyright law. The colonial and state ad hoc copyright grants,[119] in which special privileges were granted to individual publishers or authors, were deeply embedded in the commonwealth special privileges tradition. The state copyright statutes of the 1780s[120] were a first step toward a universal regime of rights. The launch of the federal general copyright regime completed this shift on the primary level.[121] On a secondary level, however, the struggle between the two ideologies and institutional forms continued within copyright law during the nineteenth century.

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115. *Id.* at 213-44; Scheiber, *supra* note 112, at 136.

116. HANDLIN & HANDLIN, *supra* note 109, at 170-189; LAWRENCE FREDERICK KOHL, THE POLITICS OF INDIVIDUALISM: PARTIES AND THE AMERICAN CHARACTER IN THE JACKSONIAN ERA 133-44 (1989); Scheiber, *supra* note 109, at 136.

117. HARTZ, *supra* note 109, at 79-81; Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

118. JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970 (1970); KOHL, *supra* note 116, at 215; ARTHUR M. SCHLESINGER, JR., THE AGE OF JACKSON 23-26, 306-21, 334-39 (1945); HARRY L. WATSON, LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA 34-35 (1990); William Weston Fisher III, The Law of the Land: An Intellectual History of American Property Doctrine, 1776-1880, at 370 (Sept. 1991) (unpublished Ph.D. dissertation, Harvard University) (on file with author).

119. *See supra* text accompanying notes 27-28.

120. *See supra* text accompanying notes 29-36.

121. For an explanation of the early date of this shift from specific privileges to universal rights in the context of copyright and patents, in contrast to other fields, such as corporate charters, see Bracha, *supra* note 27, at 553-73.

Originality doctrine was the main doctrinal area in which this struggle took place and in which the liberal state framework displaced remnants of commonwealth thinking only gradually. The implication of a demanding originality standard as a prerequisite for copyright protection was entrusting judges or juries with a diluted version of the role played by the legislature in the commonwealth system. In order to apply such an originality requirement, courts would have had to assess the substantive merit of a specific copyrighted work and make an ad hoc determination whether the public interest justified granting a reward in the form of exclusive rights. In the early cases in which a relatively stringent originality standard was applied, judges did just that.[122] When Justice Thompson, for example, ruled in *Clayton v. Stone* that a price catalog was a work of "mere industry, unconnected with learning and the sciences,"[123] he was making a substantive assessment of the work before him which resulted in a decision to deny public protection.

The legitimacy of this approach, however, was in constant decline as the liberal state framework replaced the commonwealth. In 1825, one writer supplied an eloquent attack on the traditional privilege system in the context of intellectual works:

> In a free country where there exist no privileged orders, nor unequally protected institutions, it will generally happen that the value of every branch of human knowledge, as far as concerns such a community, will be very nearly indicated by the quantity of intellectual capital, to use the language of political economists, naturally determined to its cultivation.[124]

He concluded that "we consider the inference of all force whatever, in determining the channels through which physical or intellectual industry shall flow, as impertinent and oppressive."[125] This new aversion to special privileges and the rise of universal rights regimes informed the rising line of cases that refused to recognize a substantial originality requirement. The ideal became a general system, free from ad hoc judgments of substantive merit in which, as

122. *See supra* text accompanying notes 56-71.

123. 5 F. Cas. 999, 1003 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1829) (No. 2872).

124. ATLANTIC MAG., Feb. 1, 1825, at 272, 273 [hereinafter *Atlantic Mag. Essay*].

125. *Id.* at 280.

Justice Story put it in one of his originality decisions, any person would be "entitled to his copy-right, 'valere quantum valere potest.'"[126]

A second and related intellectual development that influenced copyright's understanding of originality was the appearance of a market conception of value characteristic of the new commercial market society.[127] Late in the eighteenth century it was common to see resources (the paradigmatic example was land) as having intrinsic value derived from their objective qualities and not dependent upon subjective human desires.[128] Even in 1853 Francis Wayland distinguished in his political economy treatise between "intrinsic value" and "exchangeable value," insisting that market prices and the "intrinsic value" of a thing were two fundamentally different things.[129] This notion was intertwined with a general willingness to measure the fairness of transactions[130] against a standard of exchange of equal values.[131] As market culture suffused all aspects of life, such tendencies were eroded and eventually disappeared. They were replaced by an understanding of value as synonymous with market demand and by a normative reluctance to challenge the outcomes or the prices produced by market exchanges.[132] As one writer on political economy put it, value "is not

126. Emerson v. Davies, 8 F. Cas. 615, 621 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4436); *see supra* note 53.

127. The literature about the rise of the market is vast. For general surveys, see Allan Kulikoff, *The Transition to Capitalism in Rural America*, 46 WM. & MARY Q. 120, 122-26 (1989); Michael Merrill, *Putting Capitalism in Its Place: A Review of Recent Literature*, 52 WM. & MARY Q. 315 (1995); and Gordon S. Wood, *The Enemy Is Us: Democratic Capitalism in the Early Republic*, 16 J. EARLY REPUBLIC 293, 293-98 (1996).

128. *See* George M. Armstrong, Jr., *From the Fetishism of Commodities to the Regulated Market: The Rise and Decline of Property*, 82 NW. U. L. REV. 79, 86-91 (1987).

129. FRANCIS WAYLAND, THE ELEMENTS OF POLITICAL ECONOMY 15-24 (1853).

130. The most detailed exploration of this outlook in early American law is Morton Horwitz's analysis of contract law and the equitable conception of contracts. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 161 (1977). For a skeptical analysis of Horwitz's argument in the context of contract law, see A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979). For a survey of the debate, see Robert W. Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 TULSA L. REV. 915, 918-19 (2002).

131. Thus, Benjamin Franklin could speak of "fair commerce" as the exchange of "equal values." BENJAMIN FRANKLIN, *Positions To Be Examined, Concerning National Wealth* (Apr. 4, 1769), *in* 4 THE COMPLETE WORKS OF BENJAMIN FRANKLIN 235, 236 (John Bigelow ed., New York, Putnam 1887).

132. Armstrong, *supra* note 128, at 91-96; Oren Bracha, *The Commodification of Patents 1600-1836: How Patents Became Rights and Why We Should Care*, 38 LOY. L.A. L. REV. 177, 230-39 (2004).

an inherent and invariable attribute, but is the relative power which one thing has of purchasing other things."[133]

Publishers and writers, who operated within the new commercialized market for books, exhibited similar tendencies. Books and other works were increasingly seen and spoken of as commodities whose values were synonymous with market demand.[134] In 1835 Washington Irving, one of the first American authors whose works utilized the new marketing techniques, wrote to John Pendleton Kennedy:

> [I] think honest Horse shoe will be a decided favorite with the public. . . . I was so tickled with some parts of it that I could not for the life of me help reading them to some of my cronies among the brokers and jobbers of Wall Street . . . . They think your work could not be "thrown into the market" at a better moment than the present, when money is plenty and "Fancy Stocks" of all kinds are "looking up."[135]

The rise of the new concept of market value was closely related to the demise of commonwealth-style government and the growth of the liberal state. The decline of the legitimacy of ad hoc evaluations of public value by government necessitated an alternative mechanism for assessing value and allocating reward. The market and its determinations of market values filled this gap. An 1825 essay in *Atlantic Magazine*, quoted earlier, made this connection between the liberal state and the market conception of value explicit in regard to intellectual works. The disdain for "privileged orders [and] institutions"[136] professed by the writer was accompanied by the following vision: "The supply of literature and science will be in proportion to their demand and their demand in proportion to their usefulness. The elements of

133. ARTHUR LATHAM, ELEMENTS OF POLITICAL ECONOMY (7th ed. 1872); *see also* WILLARD PHILLIPS, A MANUAL OF POLITICAL ECONOMY WITH REFERENCE TO THE INSTITUTIONS, RESOURCES, AND CONDITION OF THE UNITED STATES 29 (1828) (observing that a thing "can hardly be said to have an *intrinsic* value, since its value depends upon the desire of others to obtain it from the possessor by giving something in exchange").

134. Books as commodities, in the context of the new publishing industry, were one of the most striking examples of the dependence of value on market whims. *See* ZBORAY, A FICTIVE PEOPLE, *supra* note 84, at 17.

135. Letter from Washington Irving to John Pendleton Kennedy (June 5, 1835), *in* 2 WASHINGTON IRVING LETTERS 829 (Ralph M. Aderman, Herbert L. Kleinfeld & Jennifer S. Banks eds., 1979). Irving was referring to the novel JOHN PENDLETON KENNEDY, HORSE SHOE ROBINSON: A TALE OF THE TORY ASCENDANCY (1835).

136. *Atlantic Mag. Essay*, *supra* note 124, at 273.

really valuable information, the principles of serviceable, practical and necessary knowledge, will receive the largest share of cultivation, because they will be most in request."[137]

The decline of an inherent conception of value, its replacement by a market understanding, and the strong drive to assign all judgments of value to the market informed the resistance to a stringent originality requirement in copyright law. The line of cases in which judges showed willingness to engage in substantive originality inquiries and to assess the worthiness of works was rooted in the older pre-market outlook. Thus, in a late remnant of this view, a 1903 court explained in regard to a play that it found to be devoid of merit that "[s]ociety may tolerate, and even patronize, such exhibitions, but Congress has no constitutional authority to enact a law that will copyright them, and the courts will degrade themselves when they recognize them as entitled to the protection of the law."[138] Market demand and value were two different things from this perspective.

In contrast, the opposite line of cases, which eventually took over, rejected such judgments of inherent value. Thus, when he dismissed the originality challenge in *Emerson v. Davies*, Justice Story wrote that whether the author's work was "better or worse is not a material inquiry in this case," since "[i]f worse, his work will not be used by the community at large; if better, it is very likely to be so used."[139] In the crucial conclusion, he found that a work "may be more useful or less useful," but the only significance of that is to "diminish or increase the relative values of . . . works in the market."[140]

The drive to equate value with market demand and to see the market as the only legitimate way of allocating reward became the norm as the century progressed. One court phrased the new dominant view in 1894 when it claimed that the "box-office value" test was the only conceivable one.[141] It explained, "[W]ith reference to matters like this at bar, touching which there are no rules except in the unmeasured characteristics of humanity, their reception by the public may be the only test on the question of insignificance or worthlessness under the copyright statutes."[142] Originality, in the romantic sense, had no place in a worldview such as this.

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137. *Id.* at 274.

138. Barnes v. Miner, 122 F. 480, 492 (S.D.N.Y. 1903).

139. 8 F. Cas. 615, 621 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4436).

140. *Id.* at 620.

141. Henderson v. Tompkins, 60 F. 758, 763 (C.C.D. Mass. 1894).

142. *Id.* at 764.

A third ideological factor that influenced originality doctrine was the changing understanding of the judicial role. During the first half of the century, the dominant perception of law and the common mode of legal reasoning tended to be instrumentalist. Law was typically seen as a tool for advancing social goals and public welfare. Accordingly, legal questions were often argued in terms of their social consequences, and legal outcomes were justified by an appeal to underlying social policies and interests.[143] The ideal judge was seen as interpreting and shaping the law so as to promote social welfare, common interest, and substantive equity.[144]

The instrumentalism of the antebellum period declined after the war and was replaced by a very different set of attitudes. By the last decades of the century, these attitudes crystallized into an ethos of the legal field and of the judicial role that later came to be known as "legal formalism" or as "classical legal thought."[145] The former consequentialist modes of legal reasoning were replaced by increasingly formal ones based on abstraction, logical argumentation, and strict categorization. The ideal image of the judge as a prudent promoter of beneficial social policies was replaced by a different model. In this new model, the jurist was seen as the agent of an apolitical and neutral discipline. He was seen as a proficient professional who mastered a set of technical skills and based his decisions on the accurate employment of such skills.[146]

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143. On the rise of social instrumentalism in nineteenth-century American law, see generally HORWITZ, *supra* note 130, at 1-30; JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956); and William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974). For a much more skeptical view about the claim that the mid-nineteenth-century mode of judicial reasoning was overwhelmingly instrumentalist and that after the Civil War it was supplanted by a formalist higher law approach, see Harry N. Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1.

144. *See* Fisher, *supra* note 118, at 109-110. For a somewhat different account of the period's "legal consciousness" described as "pre-classical legal thought," see DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006).

145. HORWITZ, *supra* note 130, at 253-66; KENNEDY, *supra* note 144; WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937 (1998).

146. HORWITZ, *supra* note 130, at 9-19; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). The question of the extent to which late nineteenth-century American jurists were "formalists" in the strong sense—that is, the extent to which they believed in and advocated a theory of law as a "gapless" system of norms capable of producing one right answer in any case on the basis of strict logical deduction procedures—is a matter of some controversy. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 105 (1997) (arguing that this understanding of formalism as a gapless system was invented by later critics of late

The rise of a formalist conception of legal reasoning and of a dominant image of the judicial role as based on technical skill amplified the other two trends discussed above. In the new legal climate, judges no longer presented themselves as confident members of the elite making substantive judgments and allocating privileges in the name of the public good. They tended to turn instead to the alternative self-image of masters of a neutral, logic-based system of rules and a method of reasoning. In an ideological environment in which the notion of inherent objective value lost all coherence, it was natural for judges to present their role as restricted to the neutral operation of a general set of rules and principles while leaving all substantive judgments of value to the market.[147]

In copyright law, this meant that judges recoiled from the notion of substantive originality that would have required them to make regularly and overtly exactly the sort of substantive judgments they were claiming to abdicate.[148] The court that in the 1894 case *Henderson v. Tompkins* claimed that "box-office value" was the only value applicable to copyrighted works[149] also wove into this argument a view of the proper role of judges and juries and the sort of determinations they were qualified to make. "[N]either courts nor juries have any certain rule for valuing it," the court explained, "except such as comes from evidence of the effect which the composition in question has on masses of men."[150] Similarly, by the time of *Bleistein*, Justice Holmes[151] found it necessary

nineteenth-century legal thought); David Rabban, Law's History: Late Nineteenth-Century American Legal Scholarship and the Transatlantic Turn to History (Sept. 18, 2008) (unpublished manuscript, on file with author) (criticizing the assumption that dominant late nineteenth-century American jurists believed in a gapless legal system based on logical deduction); Brian Z. Tamanaha, *The Bogus Tale About the Legal Formalists* (St. John's Legal Studies Research Paper Series, Paper No. 08-0130, 2008), *available at* http://ssrn.com/abstract=1123498 (arguing that the conventional wisdom that late nineteenth-century American jurists were formalists and believed in deductive legal reasoning is false and was invented by later critics). The question of formalism in this strong sense aside, there is less controversy regarding the more modest contention that late nineteenth-century legal thought and reasoning in America were typically less openly instrumentalist and more formal than in the first half of the century.

147. For an argument that the rise of formalism was related to the legal profession's interests and self-image, see HORWITZ, *supra* note 130, at 258. Horwitz further claims that the rise of formalism was also related to the interest of mercantile and entrepreneurial groups in freezing a reallocation of wealth and power achieved through legal changes in the early nineteenth century. *Id.* at 259. My argument here is agnostic to this further claim.

148. Of course, the choice of the level and character of copyright's originality standard was itself a substantive policy choice with important social implications. It was, however, much easier to repress and ignore this fact, especially in comparison to overt judgments of substantive originality by judges.

149. 60 F. 758, 763 (C.C.D. Mass. 1894).

150. *Id.*

to explain that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[152]

At this point it becomes necessary to ask: why did originality survive at all in copyright law? If there was a solid and continuous array of economic interests set against it and a powerful combination of ideological forces pulling away from it, why was it not completely eradicated? Moreover, what accounts for the considerable rise in the rhetorical importance of originality in doctrinal copyright discourse during the late nineteenth century?

Original authorship had been the fundamental justification and the underlying myth of copyright in America since the late eighteenth century. It informed and supported both natural rights and utilitarian strands of copyright thought. Directly denying altogether the existence of an originality requirement or purging it from legal doctrine would have created a serious dissonance between practical legal discourse and the basic mythology of the field. It would have also created a dissonance between conflicting strong ideological commitments of the relevant actors.

One can imagine an alternative history in which the growing pressures on originality and the widening rift between doctrine and theory would have eventually led to a Kuhnian revolution.[153] In this hypothetical universe, the original authorship paradigm would collapse and be replaced by an alternative supporting myth or justification. The actual development of copyright in the United States, however, followed a different pattern. Instead of a paradigmatic shift, the system was gradually reshaped from the inside. It accommodated the pressures against originality without abandoning it altogether. One aspect of this process was the dilution of the theoretical image of originality as it was embedded in doctrine. As concepts taken from the abstract ideology of authorship were converted to actual legal doctrine, they were reshaped under the influence of external forces. At the same time, there appeared mechanisms for reducing and softening the dissonance between the prevailing ideology of the field and its actual institutional details.

The rise of the rhetoric of originality and the late nineteenth-century elevation of originality to an unprecedented status were such mechanisms for reducing the dissonance caused by the growing gap between doctrine and

151. Justice Holmes was no great subscriber to legal formalism. He strongly believed, however, in objective legal standards and objected to any trace of subjective moralism in the law. *See* HORWITZ, *supra* note 130, at 236-37.

152. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

153. *See* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

fundamental myth. They helped to maintain a thin crust of coherence that covered the obvious inconsistencies between the two. This was also the source of the strange inverse correlation between the increasing rhetorical importance of originality and its shrinking significance as a doctrinal requirement. The wider the gap between doctrine and myth grew, the more acute was the dissonance and the stronger became the mechanisms for its suppression. Thus, paradoxically, instead of bringing about the collapse of original authorship ideology, the social and doctrinal developments of the nineteenth century ultimately perpetuated it. By the end of the century, the ideology was embedded and reproduced in internal legal principles and it was awarded the status of a defining feature and a constitutional norm. The intricate doctrinal structure of originality, however, reflected the conflicting forces that shaped it. It contained arguments and concepts taken right out of the lexicon of romantic authorship alongside others that embodied its antithesis. It elevated originality to the status of a fundamental tenet of the field, while simultaneously emasculating it.

IV. OBJECTS OF PROPERTY: THE WORK

While originality doctrine embodied copyright's complex relationship with the image of the author as a creator ex nihilo, other doctrinal developments played a similar role in respect to his representation as a property owner. Within the late eighteenth-century conception of authorship, authors were envisioned as having property rights in their intellectual creations. Copyright was thus reimagined as ownership—that is to say, total control—over an intangible object of property. For a long period, however, copyright doctrine was completely oblivious to this notion and remained confined to the limited traditional economic entitlement to print a text. During the second half of the nineteenth century, this aspect of copyright underwent a fundamental doctrinal and conceptual change. The scope of copyright protection expanded, new entitlements were created, and a novel concept of copyright as ownership of intellectual works appeared.

Again, one emblematic case is usually remembered today of the early American approach to the character of copyright protection. In the 1854 case *Stowe v. Thomas*,[154] Justice Grier rejected an infringement suit against a German

154. 23 F. Cas. 201 (Grier, Circuit Justice, C.C.E.D. Pa. 1853) (No. 13,514); *see also* Melissa J. Homestead, *"When I Can Read My Title Clear": Harriet Beecher Stowe and the* Stowe v. Thomas *Copyright Infringement Case*, 27 PROSPECTS 201 (2002) (describing the case and its implications).

translation of *Uncle Tom's Cabin*. In his opinion he explained that the author's "exclusive property . . . cannot be vested in the author as abstractions, but only in the concrete form which he has given them, and the language in which he has clothed them."[155] The "only property" which the author has, Grier wrote, "is the exclusive right to multiply the copies of that particular combination of characters . . . . This is what the law terms copy, or copyright."[156]

Grier's reasoning in *Stowe* was not a mere curious view. Rather, it was well grounded in the common sense understanding of copyright that dominated American law for the first half of the nineteenth century. By 1854, however, the decision was behind the times. The view of copyright it represented was in decline. It was bitterly attacked by commentators,[157] and its outcome was overturned sixteen years later when Congress amended the Copyright Act explicitly to prohibit unauthorized translations of copyrighted works.[158] The decline of *Stowe* was a part of a broader transformation of the concept of copyright's character and scope of protection. I first describe this process and its relationship with authorship ideology on the level of copyright doctrine and then locate it within its broader social context.

A. The Rise of the Work

Pressures to expand the scope of copyright protection began to appear early on. Jedidiah Morse, in one of the earliest petitions for individual enactments received by Congress prior to passing the 1790 Copyright Act, complained, "it was an easy matter, by a few alterations & Additions, to destroy the identity of the Books & of the maps."[159] He therefore asked Congress to "secure him the exclusive benefit that may arise from said book & maps" and that the statute or law "might be so expressed as effectually to secure [him] against all mutilations, alterations & abridgments . . . as may operate to his injury."[160] At this point, however, the traditional framework of copyright firmly resisted

155. 23 F. Cas. at 206.

156. *Id.* at 206-07.

157. Anticipating *Stowe*'s holding, George Ticknor Curtis had launched, in his important 1847 copyright treatise, a fierce assault on the English precedents that exempted translations. CURTIS, *supra* note 55, at 293. Eaton Drone included in his 1879 treatise a whole subsection entitled "*Stowe v. Thomas* Criticised." DRONE, *supra* note 71, at 454-55.

158. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212.

159. 4 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: LEGISLATIVE HISTORIES 511 (Charlene Bangs Brickford & Helen E. Veit eds., 1986).

160. *Id.*

such expansion. A slew of English precedents established that the only form of copyright infringement was printing copies of a protected text. Accordingly, various forms of what would become known as derivative works, such as translations, abridgments, and adaptations, were considered independent, non-infringing works.[161]

Two principles dominated this early framework of copyright as the right of "printing copies." First, questions of infringement were framed in terms of exact identity. As Lord Chancellor Hardwicke put it in *Gyles v. Wilcox*, the question was "[w]hether this book . . . which the defendant has published, is the same with Sir *Matthew Hale's Histor. Placit. Coronce*, the copy of which is now the property of the plaintiff."[162] Second, a subsequent altered work was seen as a copy only as long as such alterations could be considered "colourable" changes introduced only in order to evade the prohibition on making copies. In the words of Lord Ellenborough in the 1802 case *Cary v. Kearsley*, the question was always "whether the publication . . . was to convey to the public the notes and observations fairly, or only to colour the publication of the original essay, and make that a pretext for pirating it."[163]

When nineteenth-century pressures to expand copyright protection intensified, the ideology of authorship supplied an important source of concepts for translating copyright interests into legal arguments. Two main authorship-based strategies were repeatedly employed to bring down the old structure of copyright. The first built on the notion that copyright was ownership of an intellectual object created by the author rather than an economic privilege to print. An elaborate representation of the author's intellectual creation as an intellectual essence that could take a manifold of concrete forms gradually developed. Copyright, in turn, was presented as a general control of this elusive intellectual essence, irrespective of form.

Second, drawing on the theme of originality, there appeared a categorical hierarchy between original works and derivative works. Traditional copyright thinking treated many such derivatives as meritorious works in their own right. In the new hierarchy, however, some works were presented as inherently

161. Tonson v. Walker, (1752) 36 Eng. Rep. 1017, 1019-20 (Ch.); Gyles v. Wilcox, (1740) 26 Eng. Rep. 489, 490 (Ch.); Cary v. Kearsley, (1802) 170 Eng. Rep. 679, 680 (K.B.); Sayre v. Moore, (1785) 102 Eng. Rep 139, 140 (K.B.). For an early American case following the same principles in defining infringement, see *Blunt v. Patten*, 3 F. Cas. 763, 765 (Thompson, Circuit Justice, C.C.S.D.N.Y. 1828) (No. 1580).

162. 26 Eng. Rep. at 490.

163. 170 Eng. Rep. at 680; *see* RICHARD GODSON, A PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTIONS AND OF COPYRIGHT 477 (2d ed. 1844).

superior due to their supposed originality, while others were relegated to the now, by definition, inferior status of derivatives.

The two original-authorship-based strategies were mediated through a growing tendency to identify the object of copyright protection with the market value of the intellectual work. These three ideas permeated George Ticknor Curtis's 1847 landmark treatise. Curtis defined the scope of copyright protection as follows: "[W]hile the public enjoys the right of reading the intellectual contents of a book, to the author belongs the exclusive right to take all the profits of publication which the book can, in any form, produce."[164]

This shift to protecting profits undermined the previous breathing space allotted for subsequent uses. The public policy, which admits "some use of all antecedent literature," Curtis wrote, "will not sanction direct and palpable injuries to the author, in whom the law has vested the sole right to take the profits of his own book and every part of it."[165] The "most material inquiry" in each case came to be "whether the author has sustained or is likely to sustain any injury by the publication of which he complains."[166] He concluded,

> It is easy to imagine cases, where the use which a subsequent writer makes of a previous publication is apparently within the limits of the general right of selection, or citation or tacit adoption; but if an injury can be proved to be the effect, I know of no law, by which, consistently with the strict right of the previous author, such use can be pronounced to be admissible.[167]

The new hierarchy between original works and derivative uses bolstered this view. An abridgment, for example, was for Curtis the taking of "the property of the original author" that could not be justified by "any amount of learning, judgment or invention, shown in the act by him who thus appropriates the property of another."[168] Curtis combined the concepts of a protected intellectual work, market profits, and a hierarchy between an original and a derivative in order to doom the abridgment: "When we consider the incorporeal nature of literary property, it will be apparent that no writer can

164. CURTIS, *supra* note 55, at 237-38.

165. *Id.* at 240.

166. *Id.*

167. *Id.* at 240-41.

168. *Id.* at 271.

make and publish an abridgment, without taking to himself profits of literary matter which belong to another."[169]

The conceptual counterpart of the rising concern about protecting profits from derivative markets was a notion of the work as a mysterious intellectual essence that kept its identity despite ephemeral changes of form. The protection was, after all, for "all the profits of publication which the book can, in any form, produce."[170] From the "profit in all forms" argument emerged the modern notion of the work as a shape-shifter—an elusive intellectual entity that could assume an infinite number of concrete forms. In the words of Curtis,

> The property of the original author embraces something more than the words in which his sentiments are conveyed. It includes the ideas and sentiments themselves, the plan of the work, and the mode of treating and exhibiting the subject. In such cases, his right may be invaded, in whatever form his own property may be reproduced. The new language in which his composition is clothed by translation affords only a different medium of communicating that in which he has an exclusive property . . . .[171]

This mutually reinforcing relationship would continue to haunt modern copyright law. The urge to protect all market value in ever-expanding derivative markets informed the definition of the work as a permanent essence that could assume many forms. In turn, the notion of multiple forms considered to be instances of the same intellectual essence fueled the process of defining an increasing number of markets as derivative markets for the original work.

The reflection of this conceptual change in copyright doctrine was gradual. It began in the 1830s, and Justice Joseph Story was again one of the most influential figures behind it. Justice Story subtly attacked the traditional rules shielding secondary uses of copyrighted works. In his 1836 *Commentaries on Equity Jurisprudence*, he repeated the English rule that "bona fide quotations . . . or a bona fide abridgment . . . or to make bona fide use of the same common materials in the composition of another work"[172] was not an infringement.

169. *Id.* at 275-76.

170. *Id.* at 237-38.

171. *Id.* at 292-93.

172. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 214 (1836).

Nevertheless, he observed that what constitutes a bona fide use of this kind was "often a matter of most embarrassing inquiry."[173]

Justice Story began to elaborate his new vision of copyright in the 1839 case *Gray v. Russell*.[174] In his opinion, Justice Story undermined the old rules by holding that "[a]lthough the doctrine is often laid down in the books, that an abridgment is not a piracy of the original copyright; yet this proposition must be received with many qualifications."[175] This holding pushed the outer limit of copyright protection beyond verbatim reproduction by subjecting the strong rule shielding secondary uses to qualifications and uncertain inquiries. The decisive development came a few years later in the 1841 holding in *Folsom v. Marsh*.[176] In *Folsom*, Justice Story introduced into American copyright law the concept of fair use. Ironically, the fair use doctrine is commonly celebrated today as one of the major safeguards against overexpansion of copyright protection. At the time it was introduced by Justice Story, however, it was a vehicle for a radical enlargement of the scope of copyright.[177] The introduction of fair use fundamentally changed copyright's baseline. Formerly, infringement was limited to near-verbatim reproduction and all other subsequent uses were considered legitimate. In the new fair use environment, all subsequent uses became presumptively infringing unless found to be fair use.

With Justice Story skillfully undertaking this transformation, one hardly notices that he was radically changing the framework of copyright, as he was citing old precedents. Yet Justice Story was obviously quite aware that he was expanding the scope of copyright well beyond the traditional right of printing copies. "So, in cases of copyright," Justice Story explained, "it is often exceedingly obvious, that the whole substance of one work has been copied from another, with slight omissions and formal differences only, which can be treated in no other way than as studied evasions."[178] His interest, however, was in another brand of cases where "the question of piracy, often depend[s] upon a nice balance."[179] Justice Story replaced the per se rule, which protected

173. *Id.*

174. 10 F. Cas. 1035 (Story, Circuit Justice, C.C.D. Mass. 1839) (No. 5728).

175. *Id.* at 1038.

176. 9 F. Cas. 342 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4901). *See generally* R. Anthony Reese, *The Story of* Folsom v. Marsh*: Distinguishing Between Infringing and Legitimate Uses*, *in* INTELLECTUAL PROPERTY STORIES, *supra* note 47, at 259 (describing the background of *Folsom* and its significance).

177. *See* John Tehranian, *Et Tu, Fair Use? The Triumph of Natural-Law Copyright*, 38 U.C. DAVIS L. REV. 465, 481 (2005); Bracha, *supra* note 27, at 326-29.

178. *Folsom*, 9 F. Cas. at 344.

179. *Id.*

secondary uses with a complex inquiry that became the basis of the modern fair use doctrine. Where formerly a use which was not a copy was not infringing, now courts had to consider

> the comparative use made in one of the materials of the other; the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.[180]

Justice Story's fair use rule fundamentally changed the baseline of copyright protection. Contrary to the traditional approach, now it became unnecessary "to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, in form or in substance."[181] Instead it was enough that "so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another."[182]

In the decades that followed, this new broader understanding of copyright protection gradually took over.[183] After the Civil War, three overlapping developments intensified this trend. First, through a combination of judicial decisions and legislative amendments, the traditional rules that sheltered subsequent uses, such as abridgments[184] or translations,[185] gradually declined and were abolished. Second, the scope of copyright protection and the tests for infringement were expanded well beyond verbatim copying and came to cover

180. *Id.*

181. *Id.* at 348.

182. *Id.*

183. *See* Drury v. Ewing, 7 F. Cas. 1113, 1166 (C.C.S.D. Ohio 1862) (No. 4095) (holding that "the true inquiry undoubtedly is, not whether the one is a facsimile of the other"); Greene v. Bishop, 10 F. Cas. 1128, 1134 (Clifford, Circuit Justice, C.C.D. Mass. 1858) (No. 5763); Webb v. Powers, 29 F. Cas. 511, 519 (Woodbury, Circuit Justice, C.C.D. Mass. 1847) (No. 17,323); Emerson v. Davies, 8 F. Cas. 615 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4436).

184. The final formal reversal of the safe haven for abridgments occurred in *Lawrence v. Dana*, 15 F. Cas. 26 (Clifford, Circuit Justice, C.C.D. Mass. 1869) (No. 8136).

185. An exclusive translation right was added by a statutory amendment in 1870. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212.

increasingly abstract and remote zones of similarity to the protected work.[186] Third, statutory amendments gradually added new entitlements to copyright protection that had little to do with the traditional right to print. The right of dramatization was recognized in 1870.[187] A public performance right first appeared in a limited form that protected only dramatic compositions, but gradually extended to other works.[188]

Two interrelated elements that were completely absent from copyright's doctrine at the beginning of the nineteenth century were embedded in these massive doctrinal changes. First, copyright was no longer a limited commercial privilege to engage in a specific economic activity—the printing of a text. Instead, it moved much closer to the ideal of ownership as general control over an object of ownership. In practice, copyright would never reach this ideal of ownership as absolute control over the object of property (no property right creates such absolute control). Yet copyright increasingly approached the status of generalized control. Copyright came to confer on the owner a broad set of powers to dominate numerous aspects and uses of the intangible object of property. By the dawn of the twentieth century, the accumulation of specific entitlements and the expanding scope of protection would lead to the emergence of a general logic of derivative works in copyright thinking. Under this mode of thinking, copyright would be conceived of as the right to control any aspect of the intellectual work, irrespective of medium, format, or form.[189]

Second, underlying the new doctrine was an understanding of copyright's object of property—a postulated intellectual object that would become known as the "work." The concept of the work combined the two authorship-based strategies introduced earlier in the century in order to justify expansion of protection.

The first strategy was the increasingly rigid hierarchical distinction between originals and derivatives. The early tendency to accord works based on others a status of independent beneficial works in their own right consistently declined. As one court remarked in 1869, "[I]t is difficult to acquiesce in the

186. *See, e.g.*, Maxwell v. Goodwin, 93 F. 665 (C.C.N.D. Ill. 1899); Gilmore v. Anderson, 38 F. 846, 849 (C.C.S.D.N.Y. 1889); Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552).

187. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212.

188. The 1909 Copyright Act protected not only the public performance of dramatic and musical compositions, but also the public delivery of a "lecture, sermon, address, or similar production." The already existing prohibition on dramatization blocked another avenue for public performance, although a public reading of a non-dramatic work was arguably still permissible. *See* Act of Mar. 4, 1909, ch. 320, § 1(b)-(e), 35 Stat. 1075, 1075.

189. Bracha, *supra* note 27, at 354-73.

reason sometimes given, that the compiler of an abridgment is a benefactor to mankind, by assisting in the diffusion of knowledge."[190] The new attitude was to reduce the secondary work to a mere derivative that does not share the all important virtue of originality. No one captured this new attitude better than Eaton Drone. "[T]he translator," Drone wrote, "creates nothing" but merely "takes the entire creation of another, and simply clothes it in a new dress."[191] Similarly,

> [t]he dramatist invents nothing, creates nothing. He simply arranges the parts, or changes the form, of that which already exists. . . . [I]n making this use of a work of which he is not the author, he avails himself of the fruits of genius and industry which are not his own, and takes to himself profits which belong to another.[192]

The second strategy was based on the disappearance of the notion of the "copy" and the rise of its replacement: a concept of the intellectual work as an intellectual essence that could assume a manifold of forms. Again, Drone supplied the most eloquent elaboration of this outlook:

> The definition that a copy is a literal transcript of the language of the original finds no place in the jurisprudence with which we are concerned. Literary property, as has been shown, is not in the language alone; but in the matter of which language is merely a means of communication. It is in the substance, and not in the form alone. That which constitutes the essence and value of literary composition . . . may be capable of expression in more than one form of language different from that of the original.[193]

This notion of the work as an intellectual essence capable of being expressed in a manifold of "dresses" can be found everywhere in late nineteenth-century copyright law. The *American Law Review*, for example, wrote in 1869 that the case of *Daly v. Palmer* "may be said to advance in literary law the doctrine of romantic equivalents, analogous to the doctrine of

190. Lawrence v. Dana, 15 F. Cas. 26, 59 (Clifford, Circuit Justice, C.C.D. Mass. 1869) (No. 8136).

191. DRONE, *supra* note 71, at 451.

192. *Id.* at 464.

193. *Id.* at 451.

mechanical equivalents of the patent or mechanical law."[194] In *Daly*, Judge Blatchford ruled that "[t]he original subject of invention, that which required genius to construct it and set it in order, remains the same," even when an adapted play is "performed by new and different characters, using different language."[195] In *Maxwell v. Goodwin*, the court explained that "the author of a literary composition may claim it as his own in whatever language or form of words it can be identified as his production."[196] Drone offered the most lucid account of the new concept of the work:

> So an intellectual production may be expressed in any number of different languages. The thing itself is always the same; only the means of communication is different. The plot, the characters, the sentiments, the thoughts, which constitute a work of fiction, form an immaterial creation . . . . The means of communication are manifold; but the invisible, intangible, incorporeal creation of the author's brain never loses its identity.[197]

These developments in copyright law stood in considerable tension with a former explicit premise of the field, according to which the unique contribution of an author and therefore the focus of copyright protection was the specific form or language in which he clothed his abstract ideas. The upshot of this premise was not just the limited scope of protection, but also an explicit principle that copyright protection extended only to concrete texts rather than to the knowledge or ideas embodied in them. In Britain, this argument appeared in the cases and literature of the eighteenth-century literary property debate.[198] The argument was imported into the United States intact when the country experienced its own literary property conflict in the 1834 case *Wheaton v. Peters*.[199]

This general premise of copyright conflicted with the doctrinal trends of the late nineteenth century and the concepts underlying them. The former

194. 3 AM. L. REV. 453, 453 (1869) (citing Daly v. Palmer, 6 F. Cas. 1132 (C.C.S.D.N.Y. 1868) (No. 3552)).

195. 6 F. Cas. at 1138.

196. 93 F. 665, 666 (C.C.N.D. Ill. 1899).

197. DRONE, *supra* note 71, at 97-98, 384-85.

198. Bracha, *supra* note 27, at 202-29.

199. *Id.* at 296-304 (discussing Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834)); Meredith L. McGill, *The Matter of the Text: Commerce, Print Culture, and the Authority of the State in American Copyright Law*, 9 AM. LITERARY HIST. 21, 28 (1997).

envisioned copyright's object of property as concrete and stable forms of expression. The latter constructed the protected work as a shape-shifter that could assume an infinite number of concrete forms. The striking fact is that these two opposing images continued to coexist within copyright law. When Curtis, for example, discussed the question of common law copyright in his treatise, he employed a version of the familiar notion of copyright's limited scope:

> The author of every original literary composition creates both the ideas and the particular combination of characters which represents those ideas upon paper. . . . As soon as publication takes place, it is no longer his object or intention to retain to himself the intellectual appropriation and enjoyment of the ideas themselves. What he does seek to reserve, is the exclusive multiplication of copies of the particular combination of characters, which exhibits to the eye of another the ideas that he intends shall be received.[200]

By the time he arrived at discussion of the actual doctrines that defined the scope of copyright protection, Curtis provided a radically different picture. Here, the relevant object of property in which rights subsisted was the ever-expanding work that encompassed many forms:

> However imperfectly the subject may have been regarded in former times, it is now, I think, to be regarded as settled, that whatever is metaphysically part or parcel of the intellectual contents of a book, if in a just sense original, is protected and included under the right of property vested by law in the author; and it is very material to observe, that the arrangement, the method, the plan, the course of reasoning, or course of narrative, the exhibition of the subject, or the learning of the book, may be, according to its character, as much objects of the right of property, as the language and the ideas.[201]

The dominant trend in copyright doctrine was toward the second vision of copyright protection. As in the case of originality, however, this is only half of the story. The other half is that at the same time the premise that copyright was limited to concrete expressions survived and thrived. In fact, the more the protected work was unmoored from any concrete form, the more the principle

200. CURTIS, *supra* note 55, at 11-13.

201. *Id.* at 273-74.

that copyright protection was limited to concrete expressions and did not extend to any ideas or knowledge was invoked.

The principle that the object of property in copyright was the concrete language of the protected text had been circulating in the United States since *Wheaton v. Peters* and had a lineage that extended back to the eighteenth-century English literary property debate. In the last quarter of the nineteenth century, a new variant of this principle appeared. It was expressed in a set of rules that denied the protectability of knowledge or ideas, acquired new meaning, and achieved an unprecedented status.

In 1879 the seminal case *Baker v. Selden* expressed the new version of the principle that copyright does not extend to knowledge.[202] The plaintiff in the case had published a book explaining a new bookkeeping system. He argued that defendant's reproduction of certain blank forms that closely resembled examples supplied in his book constituted a copyright infringement. Justice Bradley rejected this claim. He declared that "the truths of a science or the methods of an art are the common property of the whole world, an author has the right to express the one, or explain and use the other, in his own way."[203] Bradley went on to explain that "there is a clear distinction between the book, as such, and the art which it is intended to illustrate."[204] The essence of "the teachings of science and the rules and methods of useful art," he wrote, "as embodied and taught in a literary composition or book . . . consists only in their statement. This alone is what is secured by the copyright."[205] The "knowledge" itself, on the other hand, is not part of the protected work.

The 1899 case of *Holmes v. Hurst*[206] involved a rather idiosyncratic application of what would be later known as the idea/expression dichotomy, but it supplied one of the most eloquent articulations of this rising rule. The court used the distinction between ideas and expression as a means to find that

202. 101 U.S. 99 (1879). *See generally* Pamela Samuelson, *The Story of* Baker v. Selden*: Sharpening the Distinction Between Authorship and Invention*, *in* INTELLECTUAL PROPERTY STORIES, *supra* note 47, at 159 (describing the background and significance of *Baker*). As Pamela Samuelson explains, the heart of the *Baker* decision was not identical to the modern idea/expression dichotomy. While the latter is based on the notion of levels of abstraction, *Baker* is premised on the principle that copyright does not extend to functional knowledge or subject matter. *See* Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921 (2007). Despite this important distinction, for my purposes *Baker* and the idea/expression dichotomy are members of the same family of rules and cases that express the claim that copyright does not monopolize knowledge, information, or ideas.

203. *Baker*, 101 U.S. at 100-01.

204. *Id.* at 102.

205. *Id.* at 104.

206. 174 U.S. 82 (1899).

a monthly publication in a newspaper of *The Autocrat of the Breakfast-Table*, written by Oliver Wendell Holmes (the father of Justice Holmes), constituted a prior publication that invalidated any subsequent attempts to meet the statutory formalities and obtain a copyright in the book as a whole. It defined the scope of copyright protection in the following way:

> The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight; nor is it the right to ideas alone, since in the absence of means of communicating them they are of value to no one but the author. But the right is to that arrangement of words which the author has selected to express his ideas.[207]

The emerging idea/expression dichotomy and other late nineteenth-century decisions that declared that copyright protection did not extend to knowledge were probably inspired by the older principle limiting protection to concrete expressions—a principle that had been stated occasionally since the literary property debate. There were, however, important differences between the two. The two principles operated in the context of a very different set of assumptions about copyright. The meaning of each component in a semantic system is determined by, inter alia, its relations to the other components in the system,[208] and the semantic environment of American copyright underwent a radical change between 1800 and 1900.

The early version of the idea/expression dichotomy developed in a context that was still rooted in the traditional notion of copyright as the limited right to print a copy. Thus, the early claim that the object of property was specific language could rely upon the background assumption that copyright merely prevented others from reprinting verbatim the exact language and did not restrict any other uses.[209] Moreover, this early distinction between ideas and expression was not primarily preoccupied with the social circulation of

207. *Id.* at 86.

208. *See, e.g.*, ROLAND BARTHES, THE FASHION SYSTEM 26 (Mathew Ward & Richard Howard trans., 1983) ("[A] system of signs is not founded on the relation of a signifier to a signified . . . but on the relation among the signifiers themselves . . . ."); FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 113 (Charles Bally, Albert Sechehage & Albert Riedlinger eds., Roy Harris trans., 1986) ("A language is a system in which all the elements fit together, and in which the value of any one element depends on the simultaneous coexistence of all the others.").

209. *See supra* text accompanying notes 160-162.

knowledge. Instead, the main focus both in England and the United States was the adequacy of a newly postulated intangible object to serve as an object of property like any other. Identifying copyright's object of property with specific language endowed it with a concrete semimaterial character that could be squared with dominant notions of property.[210] While the separate concern about the threat copyright might pose to the free circulation of knowledge in society did begin to emerge in this early stage, especially in England,[211] the use of the idea/expression dichotomy as a cure for this rising threat was secondary. When Justice Wiles explained in *Millar v. Taylor* that "all the knowledge, which can be acquired from the contents of a book, is free for every man's use . . . but multiplying copies in print is a quite distinct thing from all the book communicates,"[212] it was a secondary issue to the question of intangibles as objects of property. When Justice Thompson pointed out in *Wheaton v. Peters*, more than sixty years later, that "[t]he purchaser of the book has a right to all the benefit resulting from the information or amusement he can derive from it,"[213] it appeared almost an afterthought.

The new insistence of the late nineteenth century on copyright's limited scope was very different in exactly these two respects. It asserted that copyright was limited to control of specific forms without being able to rely on the obsolete notion of copyright as the right to multiply copies. It insisted that copyright did not extend to ideas or knowledge in a conceptual environment

210. McGill, *supra* note 199, at 28.

211. *See* Donaldson v. Beckett, (1774) 1 Eng. Rep. 837, 840 (H.L.) ("Public utility requires, that the productions of the mind should be diffused as wide as possible; and therefore the common law could not, upon any principle consistent with itself, abridge the right of multiplying copies."); *Information for John Robertson Printer in Edinburgh, Defender; Against John Mackenzie of Delvin Writer to the Signet, and Others, Surviving Trustees Appointed by the Widow of Mr Thomas Ruddiman, Late Keeper of the Advocate's Library in Edinburgh, for Behoof of the Daughter of the Said Mr Ruddiman and Her Husband, Pursuers* (1771), *reprinted in* THE LITERARY PROPERTY DEBATE: SEVEN TRACTS 1747-1773, at 11 (Stephen Parks ed., 1974) ("The diffusion of learning is a matter of general concern; and it might be a means of obstructing this, if any person who has bona fide acquired as his own property either a written or printed copy of a book, might not transcribe, print and circulate such book at his pleasure."); Lord Camden, Speech to the House of Lords Regarding *Donaldson v. Beckett* (Feb. 22, 1774), *in* 17 PARL. HIST. ENG. (1774) 999, 1001 ("If there be any thing in the world common to all man kind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water" and "are not things to be bound in such cobweb chains."); James Boswell, *The Decision of the Court of Session upon the Question of Literary Property in the Cause Hinton against Donaldson, etc.* (1774), *reprinted in* THE LITERARY PROPERTY DEBATE: SIX TRACTS 1764-1774, at 25-26 (Stephen Parks ed., 1975).

212. (1769) 98 Eng. Rep. 201, 216 (K.B.).

213. 33 U.S. (8 Pet.) 591, 675 (1834).

that described the protected work in highly abstract and broad terms. Unlike the literary property debate, in which the distinction first appeared, the new contexts in which the distinction was used involved almost no concern about the adequacy of the intangible object of property within a conventional theory of property as ownership of things. Instead, the dominant issue became the anxiety of private control over the public circulation of knowledge. Thus, the main role of the new idea/expression dichotomy was to soothe this anxiety. It promised that, notwithstanding the ongoing expansion of copyright protection, all ideas and knowledge remained free.

Thus, like originality doctrine, the new version of the idea/expression dichotomy acquired a deeply paradoxical character. It appeared exactly at the time when the scope of copyright protection expanded to encompass an ever-growing sphere. It acquired a dominant status at the same time that learned accounts of copyright protection developed the notion of the work as an abstract and fluid entity that covered a multitude of concrete forms. The inverse correlation is striking. At the dawn of the twentieth century, a line of cases appeared that imputed an unprecedented significance to the idea/expression dichotomy and elevated it to the status of a fundamental tenet of the field.[214] The more abstract and broad copyright protection became, the stronger was the insistence that it was limited to concrete expressions. The more copyright came to resemble general control of an abstract and elusive object that could cover a manifold of forms, the more fundamental became the assertion that all ideas were left absolutely free for public use.

B. The Rise of the Work in Context

Similar to the process that produced the originality doctrine, the process that gave rise to "the work" involved an interaction between the concepts of authorship and a myriad of other interlocking influences. In the abstract image of authorship, authors were presented as owning the intellectual works they created—that is to say, they were seen as having absolute control over a postulated intellectual "object." The direct doctrinal reflection of this vision—the claim that copyright was a perpetual property right under the common

214. *See, e.g.*, Kalem Co. v. Harper Bros., 222 U.S. 55 (1911); Nutt v. Nat'l Inst. Inc. for the Improvement of Memory, 31 F.2d 236 (2d Cir. 1929); Dymow v. Bolton, 11 F.2d 690 (2d Cir. 1926); London v. Biograph Co., 231 F. 696 (2d Cir. 1916); Stodart v. Mut. Film Corp., 249 F. 507 (S.D.N.Y. 1917); Eichel v. Marcin, 241 F. 404 (S.D.N.Y. 1913). These cases would lead to the now-classic opinion of Judge Learned Hand in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).

law—ultimately failed both in England[215] and in the United States.[216] Despite this defeat, the conceptualization of copyright as ownership of an intellectual work did not disappear. Arguments based on this idea constantly surfaced within copyright doctrine. Typically such arguments were used to attack copyright's old framework as a limited reprint entitlement and replace it with a much broader scope of protection.

The material aspect of this process was rooted in the technological and economic developments already discussed. The new conceptualization of the work was closely related to the rise of a new, nationwide commercialized publishing industry and to its increased standardization and rationalization toward the end of the century. The growing publishing industry was increasingly geared toward identifying and creating market demand. The new strategies for achieving these goals included advertising, distribution, and marketing techniques, the creation of a broad variety of new products, and growing fine differentiation of similar products.

In 1854 George Putnam offered the same publication—Irving's works in fifteen volumes—in the following variety of covers: cloth cover ($19); sheep ($20); half calf ($30); half morocco, gilt tops ($33); calf, extra ($37.50); calf, antique ($40); and morocco, super extra ($48).[217] Cover varieties had little to do with the content of the work and hardly involved copyright. The example demonstrates, however, the growing consciousness of techniques for manipulating and creating market demand. Many other techniques for capturing and creating demand involved what today would be called derivative products and markets, such as abridgments, translations, and collected works editions or serializations. Eventually this trend led publishers to see as "derivative" markets that went beyond the realm of book publishing. The early example of dramatization[218] spread by the beginning of the twentieth century to other sectors of the emerging entertainment industry.[219] In this context, expanding copyright protection beyond the traditional right-to-print-a-copy paradigm became relevant to ever more powerful economic interests.

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215. Donaldson v. Beckett, (1774) 1 Eng. Rep. 837 (H.L.).

216. *Wheaton*, 33 U.S. (8 Pet.) 591.

217. ZBORAY, A FICTIVE PEOPLE, *supra* note 84, at 11.

218. The exclusive entitlement to dramatization was added to the Copyright Act in 1870. Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212. Some doubts as to the exact scope of the entitlement persisted, *see* DRONE, *supra* note 71, at 461-67, though these doubts were resolved by another statutory amendment in 1891, *see* Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106.

219. *See Kalem*, 222 U.S. 55 (motion pictures); White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908) (music embodied in perforated scrolls).

A related new phenomenon was the "hit" or bestseller. Books that managed to achieve massive popularity and unprecedented sales were a novelty. These new bestsellers promised a broad potential for exploitation in derivative markets. *Uncle Tom's Cabin*, published in 1852, was the first novel to become a bestseller in the modern sense. It sold three hundred thousand copies in the first year of its publication and many more before the Civil War.[220] It was, thus, no mere accident that *Stowe v. Thomas* was the first major (unsuccessful) attempt to expand copyright protection to cover the derivative market for translations.[221] As the phenomenon of the bestseller became more common,[222] the economic potential of utilizing and controlling derivative markets became increasingly lucrative and the stakes of copyright's scope dramatically increased.

These trends intensified in the last decades of the century. The publication industry underwent a process of "rationalization and control."[223] There were efforts to reign in the wild competition that characterized the industry in the antebellum years and to increase the stability and predictability of sales as well as prices.[224] Conscious attempts to shape products to target markets and capture demand as well as concentration on achieving big "hits" became the norm.[225]

Under such conditions, the expansion of the reach of copyright as a means of making investment more secure and of controlling derivative markets became a significant goal of the dominant publishers. The rise of the image of the work as an intellectual essence encompassing a manifold of forms and of copyright as general control of all formats and markets supplied a powerful justification in terms of authorship and ownership for these interests. However, for similar reasons to those discussed above, the materialist account,

220. RICHARD OHMANN, SELLING CULTURE: MAGAZINES, MARKETS, AND CLASS AT THE TURN OF THE CENTURY 21 (1996). Widespread claims that the novel sold millions of copies before the Civil War were recently challenged. *See* Michael Winship, *The Greatest Book of Its Kind: A Publishing History of "Uncle Tom's Cabin,"* 109 PROC. AM. ANTIQUARIAN SOC'Y 309 (1999). There is no doubt, however, that the book was sold in unprecedented numbers in the American market.

221. *See* Homestead, *supra* note 154, at 203-04.

222. "[H]ardback sales of 100,000 copies and more became common in the 1890s." OHMANN, *supra* note 220, at 23-24.

223. *Id.* at 23.

224. LEHMANN-HAUPT, *supra* note 84, at 259-63.

225. OHMANN, *supra* note 220, at 23-24. Ohmann overstates the case somewhat by claiming that none of these developments appeared before the 1890s. This is unsurprising, given that the main argument of his book is that "mass culture"—a radically new phenomenon—appeared only in the 1890s.

while essential, seems insufficient. Why were those interested in the extension of copyright as a means of control of an ever-growing sphere of derivative markets consistently victorious? Why were the arguments developed by such interested actors overwhelmingly convincing to judges and commentators? And what accounts for the tension-riddled structure of legal concepts in the area?

One important intellectual influence in this field was again the modern market concept of value and the view of the market as the sole institution for allocating social reward.[226] The abstract, metaphysical debates about the nature of intellectual works were woven with concepts of and assumptions about market value. The two sets of arguments—those dealing with the nature of the intangible object of property and those focusing on market value—were almost always locked together. The one informed and constituted the other. Shifting the focus to market profit was the conceptual trigger that destabilized the traditional notions of protection and defined the new ones. It was in the context of the claim that "to the author belongs the exclusive right to take all the profits of publication which the book can, in any form, produce"[227] that Curtis, Drone, and others developed the image of the work as an intellectual essence that could take a manifold of forms. The metaphysical question of the borders of an intangible work was both precipitated and answered by the claim that the author had to collect all the market profits of his work. It was exactly this idea that elicited Justice Story's observation that copyright came closer than any other field to dealing with "the metaphysics of the law"[228] and prompted him to introduce the fair use doctrine.[229]

The 1847 case *Story v. Holcombe*[230] marked the transition in copyright thought and the role played by the market concept of value. In *Story*, a case which involved an abridgment of Justice Story's *Commentaries on Equity Jurisprudence*, Justice McLean found himself between the hammer of the new conceptual scheme, which he had already internalized, and the anvil of the old doctrinal framework, which, for him, still held authority, if not coherence. A master appointed by the court concluded that the work at issue was a fair abridgment, and, accordingly, the defendant relied on the established rule that a bona fide abridgment is not an infringement.

226. *See supra* text accompanying notes 130-136.

227. CURTIS, *supra* note 55, at 237-38.

228. Folsom v. Marsh, 9 F. Cas. 342, 344 (Story, Circuit Justice, C.C.D. Mass. 1841) (No. 4901).

229. *See supra* text accompanying notes 176-182.

230. 23 F. Cas. 171 (McLean, Circuit Justice, C.C.D. Ohio 1847) (No. 13,497).

"This controversy has caused me great anxiety and embarrassment," Justice McLean confessed.[231] The cause of his emotions was what Justice McLean saw as a firmly established line of English precedents under which a bona fide abridgment was not treated as an infringement. He found that he was bound by those precedents, but he accepted the rule grudgingly. He declared that had it been an open question, he would have felt little difficulty in finding the other way. "I yield to it in this instance," Justice McLean said, "more as a principle of law, than a rule of reason or justice."[232]

The abridgment was a particularly troubling case for anyone who came to think of copyright in terms of protecting market value because, by definition, it was a market substitute for the original. As Justice McLean explained,

> An abridgment should contain an epitome of the work abridged—the principles, in a condensed form of the original book. Now it would be difficult to maintain that such a work did not affect the sale of the book abridged . . . are there not many who are able to buy the original work, that will be satisfied with the abridgment? What law library does not contain abridgments and digests, from Viners and Comyns down to the latest publications. The multiplication of law reports and elementary treatises, creates a demand for abridgments and digests; and these being obtained, if they do not generally, they do frequently prevent the purchase of the works at large.[233]

Thus, the quality that was a virtue from the perspective of eighteenth-century judges—the abridgement's usefulness to the reading audience—was, from Justice McLean's point of view, its chief evil. The abridgment was a market substitute for the protected work, and, as such, it encroached upon its value. "Now an abridgment, if fairly made," Justice McLean explained, "contains the principle of the original work, and this constitutes its value."[234] When the effect on the market value of the original work became the focus of copyright protection, the traditional rules allowing derivative uses lost all coherence.

For Curtis, writing in the same year as the *Story* decision, this connection between protecting market value and the scope of protection was already taken for granted. An abridgment, he wrote, does not only injure the sales of "copies

231. *Id.* at 172.

232. *Id.* at 173.

233. *Id.* at 172-73.

234. *Id.* at 173.

which the true proprietor has already published, but it also interferes with his use of his copyright, and with his power of disposing of it."[235] "His copyright," he explained,

> must be held to have secured to him the right to avail himself of the profits to be reaped from all classes of readers, both those who would purchase his production in a cheap and condensed form, and those who would purchase it in its more extended and costly shape.[236]

By the end of the century, this form of argument would be endemic in copyright law.

Another powerful ideological force at work behind this part of copyright law was the republican ideal of the free dissemination of knowledge in society. This ideal had a long lineage both within and outside copyright thought. In the context of copyright, it went all the way back to the early eighteenth century, when English stationers, discovering that their traditional justification of copyright on the basis of censorship had run out of steam, turned to the new notion of the "encouragement of learning."[237]

In the late eighteenth-century context of American republicanism,[238] the ideal of the promotion of knowledge changed in significant ways. To begin with, there was now a stronger emphasis on the broad dissemination of knowledge and the enlightenment of all members of the citizenry (of course, the notion of "citizenry" itself would evolve and become more inclusive over time).[239] Second, the ideal became a predominantly moral and political ideal. The dissemination of knowledge and the free flow of information came to be seen as an essential condition for effective political participation of citizens in

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235. CURTIS, *supra* note 55, at 278.

236. *Id.*

237. *See* Bracha, *supra* note 27, at 178-83. This shift left its mark in the Statute of Anne, the full title of which was "[a]n act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." The preamble of the Act made a long reference to the goal of the "encouragement of learned men to compose and write useful books." 8 Ann., c. 19, pmbl. (1710).

238. On republicanism, see generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); and GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969).

239. MICHAEL WARNER, THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA 63-67 (1990).

the life of the polity. Moreover, these ideals were also seen as the basis of citizens' civic virtue, without which a republic was doomed to fall into corruption and ruin.[240] Thus, the free flow of information acquired the status of the ultimate guarantor of liberty and of a virtuous republic. A 1765 essay by John Adams that provided a short account of the history of the West was a striking example of these views. Adams traced the decay of Europe to the success of tyrants in reducing "the people" to "a state of sordid ignorance and staring timidity" and in "infusing into them a *religious* horror of letters and knowledge."[241] England, and particularly America, Adams described as the antithesis of this picture of tyranny and decay:

> [K]nowledge gradually spread in Europe, but especially in *England*; and in proportion as *that* increased and spread among the people, *ecclesiastical* and *civil* tyranny, which I use as synonymous expressions, for the *cannon* and *feudal* laws, seem to have lost their strength and weight. The people grew more and more sensible of the wrong that was done them, by these systems; more and more impatient under it; and determined at all hazards to rid themselves of it . . . . It was this great struggle, that peopled America.[242]

A new confidence in the dissemination of knowledge as the road of society to both material and intellectual progress accompanied these convictions.[243] Finally, some of the more radical strands of thought emphasized the broad dissemination of knowledge as an egalitarian force that would guarantee an equal opportunity to all members of society.[244]

The ideal of the free flow of knowledge persisted in various incarnations and variations as a major ideological force throughout the nineteenth century. Around the American Revolution, the image of a vital sphere of broad and unimpeded flow of information was strongly associated with the field of printing that was about to be transformed into the publishing industry.[245] The

240. *Id.*

241. John Adams, A Dissertation on the Canon and the Feudal Law, *in* 1 PAPERS OF JOHN ADAMS 112 (Robert J. Taylor ed., 1977).

242. *Id.* at 113.

243. Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 BUFF. INTELL. PROP. L.J. 3, 17-21 (2001).

244. CARL F. KAESTLE, PILLARS OF THE REPUBLIC: COMMON SCHOOLS AND AMERICAN SOCIETY 1780-1860, at 91-92 (1983).

245. *See* WARNER, *supra* note 239, at 4.

ideal was embedded in a series of fundamental legal documents of the era, ranging from the federal and state constitutions to state and federal copyright enactments.[246] Toward the middle of the nineteenth century, it animated many of the efforts of the movement for common schools and general education in the United States.[247] It also inspired the mid-century proliferation of societies for the diffusion of knowledge[248] and various initiatives such as the short-lived American Library of Useful Knowledge.[249]

Importantly, one of the chief areas where the ideal was cultivated was the growing publishing industry. The popular self-image in the industry was a narrative composed of a mixture of technological advancement and democratic progress.[250] In 1855 one writer argued that the establishment of the first "penny daily" was an "event, which stands out so prominently beyond and above all others, the consequences of which, to this country and all other countries, must be so immense, and, finally, so beneficial, that no other can be seriously placed in competition with it."[251] He went on to declare,

> The Cheap Press—its importance cannot be estimated! It puts every mind in direct communication with the greatest minds . . . . It is the great leveler, elevator and democratizer. It makes this huge Commonwealth, else so heterogonous and disunited, think with one mind, feel with one heart, and talk with one tongue.[252]

In the same year, in a meeting of the Association of New York Publishers, Reverend E.H. Chapin described the press as a "troublesome democrat," "a revolutionist," "a prophet of free and beautiful thought," and "a working preacher" that "tears the chained word of God from the pillars of the monasteries and scatter[s] it all over the world, and kindle[s] a light to read it by."[253] "The rumble of the power of the press is better than the rattle of artillery," he declared, and cried to the cheers of his audience: "Advance battalions!"[254]

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246. Birnhack, *supra* note 243, at 27-40.

247. KAESTLE, *supra* note 244, at 4-8, 78-81.

248. 1 TEBBEL, *supra* note 27, at 241.

249. *Id.* at 241-42.

250. ZBORAY, A FICTIVE PEOPLE, *supra* note 84, at 4-5.

251. J. PARTON, THE LIFE OF HORACE GREELEY, EDITOR OF THE NEW YORK TRIBUNE 137 (1855).

252. *Id.* at 138-39.

253. ZBORAY, A FICTIVE PEOPLE, *supra* note 84, at 5.

254. *Id.*

Thus, the ideals of broad and free dissemination of knowledge and of information as the basis of progress and as the condition of democracy were powerful in America dating back to the early days of the Republic. They assumed various guises during the nineteenth century, both outside and within copyright discourse. Yet the changing reality of actual copyright doctrine stood in ever-growing tension with this ideal. The tension is, of course, inherently built into a modern copyright system that creates private exclusion power over information in the name of maximizing the free dissemination of information. This inherent tension, however, intensified and was brought to the surface during the nineteenth century. As copyright protection steadily expanded beyond its formerly narrow sphere, the constraints it laid on the free flow of information became increasingly palpable. These constraints were no longer limited to the verbatim copier or the publisher engaged in reprinting. They extended to a steadily expanding sphere of exchanges of information and ideas that were now seen as derivative markets.

The United States became a society strongly committed to the ideal of the uninhibited flow of information that developed massive mechanisms for regulating that flow. The picture of the press as the "leveler, elevator and democratizer" threatened to crash against the new structure of copyright as tight and expansive regulation of the flow of information.[255] One early twentieth-century court clearly articulated this anxiety:

> If an author, by originating a new arrangement and form of expression of certain ideas or conceptions, could withdraw these ideas or conceptions from the stock of materials to be used by other authors, each copyright would narrow the field of thought open for development and exploitation, and science, poetry, narrative, and dramatic fiction and other branches of literature would be hindered by copyright, instead of being promoted.[256]

255. Of course, there was always the reconciling argument, which is still viable today, that by creating initial incentive copyright is, in fact, an "engine of free expression." *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985). Nevertheless, the new doctrinal and practical reality constituted a serious threat to the coherence between copyright and commitment to the ideal of the free and broad dissemination of information. The social cost of copyright that became more tangible and apparent had a double effect in this respect. First, there was the very realization that there is a cost to copyright protection. Second, given this realization, copyright threatened to become an amalgam of imperfect compromises that had a fragile and uncertain relation to its core ideal of progress, rather than a certain promise that, by definition, promoted that ideal.

256. Eichel v. Marcin, 241 F. 404, 409 (S.D.N.Y. 1913).

As in the context of originality, there appeared a growing tension between the changing framework of copyright and a fundamental ideological commitment that held a dominant position both within and outside copyright thought. The development of the late eighteenth-century idea/expression dichotomy and related rules provided a mechanism for dealing with this troubling tension. The gist of these new doctrines was the assertion that copyright protection left the flow of ideas and knowledge completely unimpeded. It was a way to have the cake and eat it too. The new idea/expression dichotomy enabled courts to simultaneously claim that copyright created full protection of market value for all forms of the work and that the free flow of ideas and knowledge remained completely uninhibited.[257] The dichotomy mediated and repressed the inherent conflict between the two propositions.

As in the case of originality doctrine, the tension-reducing role played by the idea/expression dichotomy explains the inverse proportion between the rise of this doctrine and the general reality of copyright law. The more copyright extended to create tighter control over the flow of ideas and the more supportive it became of a hierarchical social structure for creating and disseminating information, the more severe grew the tension with the republican ideal of the free flow of knowledge. The soothing mechanism grew in significance and strength in exact proportion to that process. The idea/expression dichotomy became a central and defining tenet of copyright law. As demonstrated by Curtis's insistence that an author did not retain to himself the "appropriation and enjoyment of the ideas"[258] or a later court's observation that copyright always leaves others free to "exploit the facts, experiences, field of thought, and general ideas,"[259] it was used time and again to reiterate the image in which the author received the entire profits of his work while all ideas remained free as the air.

257. Later in the twentieth century, this sharp binary distinction between ideas and expression would be transformed into a blurry continuum. The seminal decision in this regard is Judge Learned Hand's opinion in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930). The continuum approach continued to carry out the same ideological function as the binary distinction, albeit as characteristic of realist and post-realist American jurisprudence, with somewhat less assurance of precise lines discernable through technical procedures. While the old binary distinction mitigated the dissonance with the ideal of the free flow of ideas by implying that no ideas were monopolized, the new continuum approach did the same by suggesting a right balance point along the continuum—an objective and prudent way that allowed judges to split the difference between the contradictory principles of copyright.

258. CURTIS, *supra* note 55, at 13.

259. *Eichel*, 241 F. at 409.

By the end of the nineteenth century, the conflict between new commercial interests and market ideology on the one hand and a deep commitment to the republican ideal of the free flow of information on the other left this area of copyright law brimming with internal tensions. The protected intellectual work came to be seen as an abstract intellectual essence that encompasses a multiplicity of forms, yet it was vigorously insisted that protection extended only to concrete expressions and not to abstract ideas. The notion that copyright created control over all derivative markets of the work became dominant, yet the flow of information was seen as free and uninhibited. A meager originality standard, supported by a cumulative conception of creation, was applied as a threshold for copyright protection, yet a sharp qualitative distinction between the original and the derivative came to dominate doctrines that dealt with infringement.

V. OWNERS OF PROPERTY: THE WORK-FOR-HIRE DOCTRINE

The area of copyright where the broadest rift between doctrinal reality and authorship rhetoric was formed was the rules that govern initial ownership. The development here most resembled a gradual erosion of a strong authorship model. Since the 1780s, authors—or at least the actual creators of works—were recognized as the persons entitled to receive copyright's initial legal protection.[260] Throughout the first half of the nineteenth century, whenever disputes arose the actual creator was consistently preferred over other potential claimants as the original owner of copyright.[261] Around the middle of the century, however, cracks began to appear in this firm attitude. Gradually the default rules that allocated ownership shifted to disfavor the actual creator.[262] This gradual change in the case law culminated in the 1909 legislation of the modern work-for-hire doctrine that explicitly vested ownership in employers rather than the actual creator of a work.[263] Thus, by that time, in the employment context, which became ever more central to creation, copyright law reverted back to publishers' rather than authors' rights.

260. *See infra* text accompanying note 266.

261. *See infra* text accompanying notes 271-278.

262. *See generally* Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1 (2003) (describing the development of the modern work-for-hire doctrine and the change of copyright ownership rules which resulted in an increased recognition of employers' ownership of employees' works).

263. *See infra* text accompanying notes 284-292.

There is probably no more striking example of how far modern copyright law traveled from its supposed grounding in romantic authorship.

The description of the change of rules governing ownership as erosion of a strong romantic authorship model must be qualified. It is somewhat exaggerated to describe the early strict adherence to initial ownership by authors as a strong manifestation of the ideology of romantic authorship. To be sure, ownership of the right by authors is a basic and essential quality of a copyright regime that purports to be founded on authorship. It is so basic, however, that in itself it is hardly enough. Initial allocation to authors, in other words, is a necessary but hardly sufficient condition for characterizing a copyright regime as embodying a strong worldview of romantic authorship. Thus, it is somewhat hyperbolic to say that early American copyright adhered closely to romantic authorship simply by virtue of its formal insistence on initial ownership by authors. In contrast, the later decline of this insistence and the rise of recognition of non-authorial ownership was a clear sign of the extent to which late nineteenth-century copyright doctrine moved from any straightforward implementation of original authorship as a guiding principle. By that time, even the most fundamental decree of that vision—that authors would be the owners of the rights—was only too often ignored. How did this happen and what can we learn from the process?

A. Ownership and the Appearance of the Work-for-Hire Doctrine

Authors had not always held the rights recognized by copyright law. In England prior to 1710, it was stationers and only stationers that could register copyright.[264] In the few known cases of copyright-like grants in the American colonies, it was publishers or printers who received governmental privileges.[265] It was only in the state grants and general statutes of the 1780s that authors were first recognized. The 1790 regime, however, was already unequivocal on this point. Authors became the principal owners of rights recognized by the

264. Whether authors had any rights vis-à-vis stationers under this framework is a complex question. The common scholarly assertion that authors were completely ignored in the stationers' copyright regime is inaccurate. During the century and a half of pre-1710 copyright, there emerged social norms—backed by sporadic formal enforcement of the stationers' company—that created a measure of recognition of authors' entitlement for compensation and, possibly, for some control over first publication. For a detailed discussion, see Bracha, *supra* note 27, at 158-69.

265. *Id.* at 252-57.

federal statute, while the entitlements of all other claimants such as "executors, administrators or assigns" were clearly derivative of those of the author.[266]

The law reports from the first decades of the copyright system are not filled with disputes about original ownership between authors and competing claimants. This fact is, in itself, somewhat indicative. Moreover, when a trickle of disputes in which non-authors claimed initial ownership finally arose, courts uniformly denied such claims. Repeatedly, courts saw it as self-evident that the person entitled to original ownership was the actual creator of the work—the author.[267] One of the earliest cases in this vein,[268] which arose in the somewhat unique context of engravings,[269] involved a classic collaborative creation. A plaintiff who commissioned various craftsmen to execute the design, drawing, and engraving of an ornamented version of the Declaration of Independence for the hefty sum of four thousand dollars obtained copyright registration and attempted to sue an alleged infringer. The court, however, found that "neither the design, nor general arrangement of that print, nor the parts which composed it, were the invention of the plaintiff,"[270] but rather of the various craftsmen employed. Thus, it did not hesitate to deny copyright protection.

Similarly, other cases from this era did not involve direct confrontations between authors and other claimants. These cases, rather, came in two configurations. The first involved lawsuits by authors who created the work as employees or from whom works were commissioned against alleged infringers. In these cases, courts simply assumed that such authors, as long as they made no express assignment, were the owners of the rights.[271] In the second group of

266. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802).

267. Fisk, *supra* note 262, at 16-25.

268. Binns v. Woodruff, 3 F. Cas. 421 (Washington, Circuit Justice, C.C.D. Pa. 1821) (No. 1424).

269. The context of engraving was unique because such works were protected under separate language added to the copyright statute in 1802. The court's reasoning was grounded in that specific language, which referred to any person "who shall invent and design, engrave, etch or work, or from his own works and inventions, shall cause to be designed and engraved, etched or worked, any historical or other print or prints." Act of Apr. 29, 1802, ch. 36, § 2, 2 Stat. 171, 171 (repealed 1831).

270. *Binns*, 3 F. Cas. at 424.

271. Most of the early cases involved two fields in which employment or commission were common: law reporting and theatrical adaptations. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 667-68 (1834), in which the court assumed that a reporter of the Supreme Court was the author and owner of his reports, unless he assigned his rights to a proprietor; *Heine v. Appleton*, 11 F. Cas. 1031 (C.C.S.D.N.Y. 1857) (No. 6324), in which an artist who accompanied an expedition to Japan and the China sea was denied copyright in his drawings due to express assignment of his rights; and *Little v. Gould*, 15 F. Cas. 612 (Nelson, Circuit Justice, C.C.N.D.N.Y. 1852) (No. 8395), which found that an express assignment by both

cases, employers or persons who commissioned works tried to sue infringers. Courts denied that such persons were the owners of the copyright unless express assignment could be shown.[272]

Direct challenges to the ownership of creators by employers or persons who commissioned their work hardly arrived to the courts. One rare case of this brand was the 1846 case *Pierpont v. Fowle*.[273] In this case, the court strongly rejected an employer's claim that the assignment of the copyright in books written by his employee entitled him to be the owner of the renewed copyright for the additional term of fourteen years.[274] The reasons for this clear favoring of the actual creator were taken right out of the vocabulary of original authorship. "It was the genius which conceived and the toil which compiled the book that is to be rewarded," Judge Woodbury wrote, "and no one ever dreamed that an assignee could alone take the second or extended term, unless he has paid for it, [and] clearly contracted for it."[275] An opposite conclusion would be a law that "aids those kinds of patrons, who fatten on the labors of genius."[276] Copyright, the basic justification for which was rooted in the vision of romantic authorship, seemed to allow no other conclusion.

It is somewhat speculative to infer from formal law to actual social practice. Nevertheless, the limited current knowledge of early publishing practices seems to suggest that, other than in exceptional areas such as cartography,[277]

state legislation and specific contract vested initial copyright ownership not in the reporter but in the state of New York.

272. De Witt v. Brooks, 7 F. Cas. 575 (C.C.S.D.N.Y. 1861) (No. 3851); Atwill v. Ferrett, 2 F. Cas. 195 (C.C.S.D.N.Y. 1846) (No. 640) (recognizing a theater manager who commissioned an opera adaptation as the copyright owner only due to his deep involvement in the creation process).

273. 19 F. Cas. 652 (Woodbury, Circuit Justice, C.C.D. Mass. 1846) (No. 11,152).

274. Copyright duration at the time consisted of fourteen years and an additional term of fourteen years subject to renewal by the author. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802).

275. *Pierpont*, 19 F. Cas. at 659-60.

276. *Id.* at 660.

277. While it was customary for a map publisher to claim the copyright, the actual contribution of publishers to the creative process varied. It ranged between active involvement in the surveying and drafting to a mere supervisory role. The answer to the crucial question of whether there existed express assignment from all the contributors to the creation of the map is somewhat obscure. There are, however, reasons to believe that often initial ownership by the publisher was simply assumed. *See* Fisk, *supra* note 262, at 26-31. At least one case formally recognized that initial ownership of a map resided in the publisher, even in the absence of express assignment. Commonwealth v. Desilver, 3 Phila. 31 (D. Pa. 1858).

authors were usually the initial owners of copyright as a matter of both doctrine and social practice.[278]

In the second part of the century, first cracks began to form in the uniform front of initial allocation of rights to authors. More cases of direct disputes between authors and other claimants over initial ownership began to appear. In some of these cases, courts adhered to the traditional view that, absent express assignment, the author was the owner.[279] The early challenges to this guiding principle were indirect and subtle. Thus, the 1861 case *Keene v. Wheatley*, which recognized the rights of a theater owner in an adapted play produced by one of her actors, was based not on copyright doctrine but on equitable principles.[280] Wrapped in the formalistic distinction between copyright and equitable rights, however, was a radically new proposition. Since the employee created the adaptations "in the course of his willing performance of this duty," the court

278. A quick look at the record of registered copyrights during the regime's early years shows that many of the persons who obtained initial copyright registrations were not the authors of the relevant works, but rather "proprietors." Throughout the decade, proprietors registered 46.6% of copyrights. B. ZORINA KHAN, THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920, at 236 (2005). This, however, does not necessarily mean that in the majority of these cases authors were simply ignored and others were the owners of the original rights. It is plausible that many of these cases involved pre-registration assignment by the author. In such cases, despite the formal initial registration to the proprietor, the author was the owner and beneficiary of the original right both in the formal-legal and the practical sense. Direct evidence on this issue is somewhat lacking. The main indication of a common practice of pre-registration assignment is that in most, although not all, of the cases in which copyright was registered for a proprietor, there was also an explicit reference in the record to the name of the author. Of course, there is a gap between mentioning the name of the author and insisting on authorial assignment before registration. The former, however, provides some indication. This issue will remain ambiguous until early copyright registration practice is reconstructed. *See generally* FEDERAL COPYRIGHT RECORDS, *supra* note 82 (transcribing federal copyright registrations from the first decade of the federal regime); Felcone, *supra* note 82 (transcribing New Jersey copyright registrations from 1791 to 1845).

279. Boucicault v. Fox, 3 F. Cas. 977 (C.C.S.D.N.Y. 1862) (No. 1691). A federal court in Massachusetts, deciding a case that involved the same dispute, was somewhat more ambiguous. While holding that the mere fact of employment as an actor and stage manager did not constitute assignment, it left open the hypothetical question of whether initial ownership would shift through a contract to write a play. Roberts v. Myers, 20 F. Cas. 898, 899 (C.C.D. Mass. 1860) (No. 11,906).

280. 14 F. Cas. 180, 186-87 (C.C.E.D. Pa. 1861) (No. 7644). The court found that the additions to the existing play were not copyrightable. *Id.* at 186-87. Nevertheless, it decided that the plaintiff had equitable rights against third parties who procured the additions from her employee-actor who was the person who created them. *Id.*

reasoned, the employer "became the proprietor of them as products of his intellectual exertion in a particular service in her employment."[281]

The most important doctrinal development in this area was a shift toward analyzing initial ownership disputes in terms of implied intent. The early cases stated clear per se rules that vested ownership in authors. By contrast, courts in the second part of the century decided such cases using the vocabulary of the intent of the relevant parties as implied in the relationship between them. This was the case in the *Keene* decision that relied on a series of new contract and trade secret cases to deduce the "duties of theatrical performers to their employers."[282] The court analyzed the allocation of rights and duties as somehow embedded in the employment relationship between the parties. By the same token, implied intent became the main axis of formal copyright doctrine in this area. Whether a specific court ended up allocating ownership to the author or moved toward ownership by the employer the issue was decided on the basis of implied intent. Thus the highly influential dictum of the 1869 case *Lawrence v. Dana*, which vested initial ownership in the person who commissioned a work, relied on the proposition that "the title to the same vested in the proprietor . . . as necessarily implied by the terms of the arrangement."[283] The court explained that "an equitable title may vest in one person to the labors of another, where the relations of the parties are such that the former is entitled to an assignment of the production."[284] Other cases of the era that adhered to the traditional rule of author's ownership cast their analysis in similar terms.[285]

281. *Id.* at 187.

282. *Id.* at 186.

283. 15 F. Cas. 26, 51 (Clifford, Circuit Justice, C.C.D. Mass. 1869) (No. 8136).

284. *Id.* The allocation of ownership away from the author was dictum in this case because there existed an express contract in which the commissioning party agreed not to make further use of the work with no express authorization from the author. *See* Donaldson v. Wright, 7 App. D.C. 45, 58 (D.C. Cir. 1895) (denying a claim by a census compiler that he had an equitable right to prevent the publication by his governmental employer of a "mutilated" version of his work). The court based its rejection of the employee's claim on "the nature of the work, and the well-understood power of supervision and control under which it was performed" and found that "[t]he power of revision, alteration and omission by the superior, was necessarily implied in the nature of the work performed by the subordinate." *Id.*

285. *See* Callaghan v. Myers, 128 U.S. 617, 647 (1888) (basing a reporter's copyright ownership in his reports on "a tacit assent by the government to his exercising such privilege"); Root v. Borst, 36 N.E. 814, 814 (N.Y. 1894) (inferring the author's ownership from the terms of employment).

The final demise of employee ownership arrived at the dawn of the twentieth century. It occurred almost simultaneously on the case law and the legislative fronts. A new line of cases appeared toward the end of the nineteenth century in which defense claims by alleged infringers that the plaintiff who was not the author of works created by employees was not the proper initial owner of copyright were flatly rejected.[286] Gone was the traditional rule according to which, in the absence of assignment, the author was the owner of the copyright. Similarly, the practice of framing the question in terms of the implied intent of the parties either was marginalized or disappeared altogether. Instead, courts stated a new default rule of employer ownership. This new rule was grounded in the degree of involvement of the employer's representatives in the creative process, in the supervision exercised or in the expenditure undertaken by it.

From this point, the way was short to the next stage, which involved cases of direct confrontations between authors and the entities in whose employment or commission they had created the work. Early twentieth-century courts took the last step and declared a firm default rule that allocated ownership in such contexts away from the author.[287] One court phrased the rule in terms of the burden of establishing ownership. It held that "when an artist is commissioned to execute a work of art . . . the burden of proving that he retains a copyright in the work of art executed, sold, and delivered under the commission rests heavily upon the artist himself."[288] Whether in terms of burden of proof or as a straightforward ownership default rule, courts moved to openly side with the employer or the commissioning person.

A parallel move occurred almost simultaneously on the legislative front. In the conferences of interest groups that led to the Copyright Act of 1909, the representatives of several publishing industries pressed their need for an easy mechanism of obtaining both initial ownership and the right of renewal.[289] Assignment, they argued, was too burdensome and sometimes infeasible,

286. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903); Edward Thompson Co. v. Am. Law Book Co., 119 F. 217, 219-20 (C.C.S.D.N.Y. 1902); Mut. Adver. Co. v. Refo, 76 F. 961, 963 (C.C.D.S.C. 1896); Schumacher v. Schwencke, 25 F. 466, 468 (C.C.S.D.N.Y. 1885).

287. Nat'l Cloak & Suit Co. v. Kaufman, 189 F. 215 (C.C.M.D. Pa. 1911); Dielman v. White, 102 F. 892 (C.C.D. Mass. 1900); Colliery Eng'r Co. v. United Correspondence Sch., 94 F. 152, 153 (C.C.S.D.N.Y. 1899).

288. *Dielman*, 102 F. at 894.

289. Fisk, *supra* note 262, at 63.

especially when works prepared by numerous contributors were involved.[290] These demands resulted in an innocent-looking short provision with potentially far-reaching consequences.[291] "The word 'author,'" section 62 of the 1909 Copyright Act provided, "shall include an employer in the case of works made for hire."[292] The significance of this prose was that an employer was recognized as the owner of employee works and enjoyed all copyright entitlements.

By 1909, the rule of initial ownership in the employment context was completely flipped. It was now employees, and often independent contractors, who created works who had to point to an express contract that assigned them copyright ownership. In the absence of such a contract, initial ownership was vested in someone else. At the dawn of the twentieth century, even the most fundamental feature that one would expect to find in an authorship-based copyright regime—that authors would be the legally recognized owners—disappeared in the context in which an ever-increasing number of the most valuable works was created. Only too often, authors were no longer owners.

B. Ownership in Context

Pressures to locate the legal entitlements to economically exploit works in hands different from the ones that created them were, of course, as old as copyright. In the pre-authorship era in both England and America, the outlet for these pressures was quite straightforward. The economic privileges to exploit a work were granted directly to the person who was seen as being in the best position to utilize them. In the overwhelming majority of cases, this

290. 1 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT 56 (E. Fulton Brylawski & Abe Goldman eds., 1976) [hereinafter LEGISLATIVE HISTORY].

291. The discussion here brackets the question of the actual distributive effects of the work-for-hire doctrine. As John Witt explains, one cannot infer any specific actual distributive effects simply from a formal legal allocation of entitlements, especially when the relevant rule is a default rule around which parties can theoretically contract. *See* John Fabian Witt, *Rethinking the Nineteenth Century Employment Contract, Again*, 18 LAW & HIST. REV. 627, 635 (2000). For the purposes of this Article, suffice it to say that shifting initial allocation to employers was a significant ideological change, whatever its actual distributive effects. That said, there seem to be compelling preliminary reasons to assume that initial ownership rules in this area were "sticky defaults"—rules that parties were less likely to consider and contract around ex ante. Thus, these rules were likely to be entitlements with substantial distributive effect. *See* Fisk, *supra* note 262, at 50-51.

292. Act of Mar. 4, 1909, ch. 320, § 62, 35 Stat. 1075, 1088.

person was a publisher or a printer rather than the author.[293] Copyright was openly and in the most direct sense a publisher's right.

When authorship ascended in the eighteenth century, this arrangement lost its legitimacy. If the ideology of authorship demanded anything, it was that authors would be the actual owners of their works. The pressure for locating control in the hands of those who could best economically exploit the work did not dissipate, however. The mechanism that was used to mediate these two conflicting demands may look too obvious to mention. Assignabilty allowed initial ownership by authors, on the one hand, and reliance on market transactions to transfer the work to those who were best situated to exploit them, on the other. There was, of course, nothing inevitable about assignabilty. Indeed, some continental countries ended up significantly limiting the alienability of at least some of the rights they awarded to authors.[294] In England and the United States, however, assignability was the unquestioned norm. It seems this happened through the force of inertia. There were no great debates about the assignability of copyright. When the Statute of Anne created authors' copyright in England, there was already more than a century of tradition in which publishers' copyright had been treated as any other commodity. Stationers sold, bought, and mortgaged their copyrights and assigned shares in them.[295] When the familiar publishers' right was extended to authors in 1710, no one thought to question or even to consciously contemplate this feature. When the United States created its authors' copyright regime in 1790, it imported wholesale the British institutional framework, again with little conscious consideration of this feature. Assignability was simply there as what copyright had been for more than a century. In the new

293. In England, pre-1710 copyright was based on the guild apparatus and as a rule was limited to stationers—the publishers of the day. *See* Bracha, *supra* note 27, at 129-46. A parallel protection mechanism was an ad hoc royal privilege of exclusivity, known as the printing patent. Although a few printing patents were granted to authors, the majority of them were issued to publishers or printers. *See id.* at 121-29. In colonial America, the few known privilege grants were all issued to printers or publishers. *See id.* at 252-56.

294. *See* DAVID SAUNDERS, AUTHORSHIP AND COPYRIGHT 75-121 (1992). In the German case, it seems that the strong consolidation of some authorial inalienable rights occurred in the second half of the twentieth century. Early twentieth-century German law placed fewer restrictions on alienability and even included a weaker and more limited version of the American work-for-hire doctrine. *See* JACQUELINE SEIGNETTE, CHALLENGES TO THE CREATOR DOCTRINE: AUTHORSHIP, COPYRIGHT OWNERSHIP AND THE EXPLOITATION OF CREATIVE WORKS IN THE NETHERLANDS, GERMANY AND THE UNITED STATES 30-31 (1994).

295. 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 364, 378 (1924); John Feather, *From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries*, *in* THE CONSTRUCTION OF AUTHORSHIP, *supra* note 1, at 191, 197-99; Bracha, *supra* note 28, at 171-72.

authorship-based system, however, it ended up being the major mechanism for mediating the often conflicting demands of authors' ownership and economic exploitation. The early American case law that firmly located ownership in the hands of authors, in the absence of express assignment, was grounded in this framework.

In the second half of the nineteenth century, the pressures to locate ownership away from authors grew, and the strain on assignability as a mediating mechanism intensified. This mounting pressure was a result of changing economic practices and of the growing relevance of copyright to various branches of industry. Economic and creative projects that were based on a collaborative effort of a large number of individuals gradually became more common and more economically significant. Such works that involved a collaborative multi-contributor effort included, for example, catalogs, dictionaries, encyclopedias, and magazines. If creating a dictionary was at the beginning of the century a one-person project, by its end it was much more likely to be a multi-participant initiative, directly coordinated and supervised by a publisher. Moreover, as economic activity moved from individuals to firms, a rising share of this collaborative creation came to take place in the employment context. Other changes in copyright law made these rising forms of collaborative creation increasingly relevant to copyright discourse. The steady expansion of copyrightable subject matter[296] and the continuous decline of the originality bar[297] brought within the auspices of copyright many of the economic activities that were likely to have such patterns of creation. Both older industries like cartography and lithography and new ones such as advertisement and magazine publishing were likely to involve collaborative creation or a hierarchical setting and to produce a demand to locate ownership away from the actual creators.

Interestingly, most of the cases in the mid-period of ownership rules did not involve such industries or settings. It is possible that what influenced judges who began to soften the hard authorial ownership rules was not so much direct demands from these new interests as the erosion of the image of the author produced by them.[298] Against the backdrop of the economic changes, people who created works, at least in the context of employment or commission, appeared less like genius creators and more like hired craftsmen or simply wage laborers. Ironically, the craftsman who collaborates with other

296. *See* Bracha, *supra* note 27, at 373-78.

297. *See supra* text accompanying notes 48-55.

298. Another possibility, as suggested by Catherine Fisk, is that it was mainly the peculiar facts of those few cases that most influenced their outcomes. *See* Fisk, *supra* note 262, at 7-8.

craftsmen in the making of a "book" was exactly the image that the ideology of romantic authorship replaced when it first arose.[299]

Whatever the exact motivation of judges, the mid-period cases subtly moved away from the clear framework of initial ownership by authors subject to express assignment. As explained, the main doctrinal vehicle for this move was the notion of implied intent as embedded in the relationship of the parties. Implied intent was a mediating mechanism. It allowed judges to move away from authorial ownership without clearly saying or recognizing that they were doing so. Implied intent obscured the conflict between the ideological demand to allocate ownership to authors and the felt necessity to locate it in the hands of other economic actors. It blurred the difference between a governmental reallocation of initial ownership and the long-recognized ability of authors to privately exercise their choice and assign their rights.[300]

Implied intent, however, could mediate the conflict only to an extent. Toward the end of the century, as the pressures to move away from authorial ownership continued to intensify, implied intent came under increasing strain until it finally collapsed. The moment of the impending collapse of the implied intent construct is epitomized by Drone's treatment of employer ownership. Drone was the great synthesizer of copyright law. His treatise, while full of rhetorical hyperbole, was nonetheless a model of coherence and clarity. Against this backdrop, the employer ownership section conspicuously sticks out. There is no way to describe it other than incoherent and confused. Within the space of five pages Drone managed to declare the following: that the state of New York became the owner of its law reports "by virtue of having employed and paid the reporter";[301] that "[t]he mere fact of employment does not make the employer the absolute owner of the literary property created by the person employed";[302] that "the property is in the author, unless he has consented to

299. Woodmansee, *supra* note 4, at 426-27.

300. This function of implied intent in the copyright context had a very similar structure to what Duncan Kennedy saw as the central role of implied intent in "pre-classical" American private law. According to Kennedy, the implied intent construct was frequently used in antebellum private law in a way that blurred the distinction between public government-imposed decisions and private individual choices. KENNEDY, *supra* note 144, at 157. Interestingly, like other legal concepts, implied intent flourished in the copyright context at a time when it was already in sharp decline in other doctrinal areas.

301. DRONE, *supra* note 71, at 255.

302. *Id.* at 257.

part with it";[303] that an agreement to assign "may be implied from the terms and conditions of the employment";[304] and that when an author is

> expressly employed to write . . . articles, and, especially if he be regularly employed and paid a salary, these circumstances, in the absence of an express agreement, will go far toward supporting, and in some cases will be enough to establish, an implied agreement that the publisher is to be the absolute owner of the copyright.[305]

The linchpin that was supposed to hold all of these possibly contradictory statements together was implied intent. But the contradictions and the fictive nature of implied intent were becoming only too apparent.

The final demise of implied intent through its replacement by per se rules of employer ownership was underscored by the continuous rise of the same economic trends that served as the background of the earlier undermining of authorial ownership. The turn-of-the-century cases, unlike those of the previous decades, did typically involve employers from industries such as lithography and advertisement where the pressure against authorial ownership was the strongest. There is yet another typical feature to those cases. In the majority of them, the relevant employer was a corporation. Thus, the rise of the work-for-hire doctrine was woven with the "incorporation of America,"[306] with the rise of the modern business corporation as a dominant social-economic phenomenon. Corporations were both the context where romantic notions of authorship came to be seen as particularly inadequate and the least likely contenders for initial ownership under the traditional scheme. The creator in the corporate context was usually a far cry from the romantic image of the author. Rather than an individual independent spirit producing new ideas, he was much more likely to be a wage laborer carrying out a routine task assigned to him and controlled by his supervisors. It was very hard to see the industrial lithographer, for example, as a genius author entitled to ownership.[307]

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303. *Id.*

304. *Id.* at 258.

305. *Id.* at 259-60.

306. *See generally* ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE (1982) (describing the social and cultural implications of the rise of the modern business corporation in America).

307. Thus, in the discussions leading to the 1909 statutory work-for-hire doctrine, the initial objection to the proposed rule by Robert Underwood Johnson on behalf of the American Authors' Copyright League was based solely on the use of the term "author" in relation to

At the same time, the alternative owner was possibly even less fitting. The legal fiction of a business corporation was hardly the ideal owner within an authorship-based copyright regime. The argument in one of the early cases involving corporations included an objection of this kind. The owner corporation, it was argued, "is a mere legal fiction, and not an author entitled to copyright within the meaning of the laws of the United States, in that it is incapable of intellectual labor, incapable of begetting children."[308] The court rejected the argument and explained that "[i]t sufficiently appears that complainant's publication is the result of the intellectual labor of the editors and compilers employed."[309] Thus, the intellectual labor of the employees, which could not justify granting them ownership, supported the ownership of the corporation that employed them.

This important aspect of the work-for-hire doctrine was part of a more general move in the period's legal thinking—a move to adjust traditional legal doctrines and categories to the new environment of corporate liberalism. As one contemporary legal scholar put it, the new underlying assumption of almost every legal field came to be that "corporate bodies are really like individuals the bearers of legal rights and duties."[310] The practical significance of this proposition was a general trend at the turn of the century to relocate powers and rights from the individuals composing the corporation to the corporation itself.[311] The work-for-hire doctrine, whose typical context was that of the corporation, was yet another instance of this trend.

Was there anything left of the ideology of authorship in this branch of copyright law after its most fundamental tenet—that authors would be owners—was clearly abandoned? One approach by contemporary jurists was, indeed, to openly reject romantic authorship as an anachronism and ground legal protection in different justifications. Thus, in *National Telephone News Co. v. Western Union Telegraph Co.*,[312] which involved a somewhat different doctrinal context, the court explained that at the time when the copyright regime was established, "[t]he business world, that in this day permits nothing to escape as a means for its exploitation had not yet pressed into her service art

employers. Johnson thought that an employer "ought to be considered the proprietors and not the author." *See* 1 LEGISLATIVE HISTORY, *supra* note 290, at 56-57. Depriving employees of ownership in works they created was never an issue. It was only too easy to classify such employees out of the privileged group of authors worthy of protection.

308. Edward Thompson Co. v. Am. Law Book Co., 119 F. 217, 218-19 (C.C.S.D.N.Y. 1902).

309. *Id.* at 219.

310. W.M. Geldart, *Legal Personality*, 27 LAW Q. REV. 90, 97 (1911) (emphasis omitted).

311. HORWITZ, *supra* note 130, at 94-100.

312. 119 F. 294 (7th Cir. 1902).

and books . . . . In the public mind the publication of a book meant that literature, as Literature, had received an accession."[313] Times, however, were changing, and the court thought that the law should change with them. Should news agencies be denied protection "against the inroads of the parasite," it asked, "for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public, cannot be made to fit the relations of the public and this dissimilar class of servants?"[314] Its answer was unequivocal: "We choose, rather, to make precedent—one from which is eliminated, as immaterial, the law grown up around authorship . . . ."[315] To some extent, such willingness to toss authorship aside[316] and find new grounds for protection characterized other courts of the era. It is common to find judges and lawyers emphasizing financial expenditure and appealing not to original authorship but rather to the need to protect investment and created "value" as the basis of copyright and related legal protections.

Yet even in the specific area of the work-for-hire doctrine, authorship refused to disappear altogether. Rather, it kept popping up in various twisted forms. One perverse use of the trope of authorship in the employer ownership age was identified by Peter Jaszi as the projection of the romantic author image on the employer rather than the actual creator.[317] This strategy appeared in some, although not all, of the work-for-hire cases. In *Schumacher v. Schwencke*,[318] the court justified corporate ownership of the work on the basis of the corporation president's involvement in the design process. The artist who actually created the work, the court explained, "executed Schumacher's design," and this fact "cannot defeat the copyright. The sculptor seldom touches the marble from which his statues are carved. The fact that the brush which embodied Schumacher's idea was held by another artist rather than by himself cannot be important in considering a question of this character."[319] All the virtues of the romantic author were now projected from the actual creator

313. *Id.* at 297.

314. *Id.* at 300-01.

315. *Id.* at 301.

316. It is important to notice that the *National Telephone News Co.* court, despite its criticism of authorship as an anachronism, was not willing to purge it out of copyright law. Rather, it tried to create a new body of law, external to copyright law, which would not be bound by such requirements.

317. Jaszi, *supra* note 4, at 488-89.

318. 25 F. 466 (C.C.S.D.N.Y. 1885).

319. *Id.* at 468. Similarly, the copyright owner in *Bleistein*, in which Justice Holmes rhetorically used the figures of the great masters, was a corporation. Bleistein v. Donaldson Lithiographing Co., 188 U.S. 239 (1903); *see supra* text accompanying notes 151-152.

onto the employer-corporation. The mechanism that powered this strategy was the metaphor of "agency."[320] The corporation, through its managerial staff, was clothed in the garments of the "originating, inventive, and master mind."[321] The employee who actually created the work was imagined as a mechanical extension of this creative subjectivity—merely carrying out instructions and performing only the physical non-creative tasks.[322]

Even more important than such occasional use of the authorship trope was the survival of authorship within the very statutory arrangement of the work-for-hire doctrine. The 1909 Copyright Act, remember, did not simply recognize employers as the owners of their employees' works. Rather, it designated them as "authors."[323] The temptation to read too much into this phrasing should be resisted. Lawyers and drafters, then as today, understood "author" in this context as a technical term of art, whose use was mainly a drafting technique.[324]

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320. *See* Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1297-98 (1984) (using the analogy of the machine or the mechanical extension to describe theories of agency).

321. *Schumacher*, 25 F. at 468.

322. My claim that the use of authorship rhetoric in *Schumacher* is perverse is not based on the assumption that the creative process never involves a "division of labor" that allocates the crucial creative role to the designer rather than to the person who produces a physical object embodying the design. It is based on two other arguments. First, even assuming that in the circumstances of the case the corporation's president played the crucial creative role and the employee's role was limited to mechanical execution, the decision did not vest the ownership in the president but in the corporation. One way or another, the court used authorship rhetoric in order to vest ownership in an entity different from the actual creator or creators, a fact that is unaltered by the legal fiction of identifying managerial actions with those of the corporation. Second, and admittedly more speculatively, reading the *Schumacher* opinion leaves one with a strong impression that, at least in part, the metaphor shaped the court's view of the roles of the contributors to the creative process. In other words, it seems plausible that the court's predisposition to see the employee as the mechanical extension of the corporation helped to shape its assessment of the relative importance of the creative contributions by the president and the employee.

323. Act of Mar. 4, 1909, ch. 320, § 62, 35 Stat. 1075, 1087-88.

324. Richard Bowker, for example, explained in this context that

> [w]e notice the practical value particularly in this way, if you always have the word "author" in the law and then provide that that author, no matter of what class, should become the copyright proprietor when he has satisfied the conditions that we make. In other words, everybody is an author, and the author or his legal representative or his assign acting in the name of the author becomes the copyright proprietor, and so on for all other provisions of the act . . . . [I]nstead of the many provisions providing for what I will call subsidiary authorship, the word "author" should be defined in a single section, which should be absolutely comprehensive.

Yet there was more. Several times when the work-for-hire provision, designed to vest initial ownership in employers, was discussed in the preparatory conference, participants expressed concern over the constitutional limitations on copyright protection. As Samuel James Elder, speaking as an expert copyright lawyer, explained to the participants: "When you come down to the question of who can take out copyright you are confined by the language of the Constitution to authors and by the broadening of the idea that the courts have given it to the assignees of author[s]."[325] Concerns about whether employers as original owners, rather than assignees, could be covered by the constitutional mandate continued to bother the drafters.[326] When doubts were expressed about the early language that termed the employer an author,[327] it was explained that Richard Bowker's (of the American Authors' Copyright League) "impulse [in using this language] originated in the authority under which Congress provides copyright laws, and that is the Constitution, and the only term used there is 'author' and then he had to define what 'author' might include in this act."[328]

The point should not be exaggerated. The drafters of the 1909 Act were not conspiring to create a deception by the use of the term "author." And yet, within the flux of drafting debates and legal technicalities, the absurdity of this aspect of the process was overlooked. Somehow it made perfect sense to the drafters to assume that the Constitution, by using the term "authors," prescribed some real restrictions on the identity of the initial owner—possibly to the degree of frustrating the attempt to vest ownership in employers—and for the drafters then to avoid this problem by simply creating a statutory definition of an author that included whomever they wanted. Authorship, as a constitutional requirement, was simultaneously accorded due respect and defined out of existence.

At the dawn of the twentieth century, the interaction between the underlying ideology of authorship and the demands of interests produced by a dramatically changed economic-social context left the doctrinal area of initial ownership as one of the most contradictory spheres of copyright law. The most fundamental principle of the authorship justification of copyright—authorial

2 LEGISLATIVE HISTORY, *supra* note 290, at 143.

325. 1 LEGISLATIVE HISTORY, *supra* note 290, at 54.

326. *Id.* at 56.

327. The doubts were raised by Charles Scribner, representing the American Publishers' Copyright League. At that stage of the drafting process, the term "author" was not yet extended to every employer, but rather to specific categories such as periodical publishers. 2 LEGISLATIVE HISTORY, *supra* note 290, at 146.

328. *Id.*

ownership—was now partially deserted. Authorship was almost abandoned in this area of copyright discourse. Yet it kept springing back into existence, often in rather perverse forms.

CONCLUSION: THE IDEOLOGY OF AUTHORSHIP REVISITED

What does it all mean? There are a few lessons to be learned from the foregoing account—lessons about American copyright law and more generally about the relationship between law and ideology. An understanding of the intricate relationship that was formed in the nineteenth century between the concept of authorship and copyright places us in a position to decipher the ongoing significance of this relationship today. A decade ago, Mark Lemley questioned the relevance of "romantic authorship" to analyzing contemporary copyright. He observed that current trends in copyright law, which is "heavily skewed to protect the interests of corporations, not individual authors"[329] and which is at odds with the notion of the original author in numerous other respects,[330] cannot be understood as "the product of some eighteenth-century vision of authorship with unfortunate consequences."[331] Lemley is right to the extent that one tries to explain modern copyright by projecting onto it an abstract eighteenth-century aesthetic theory of authorship.[332]

The historical account elaborated here, however, suggests a very different way of understanding the copyright-authorship nexus. It shows that the conceptual structure of American copyright law underwent a radical transformation during the nineteenth century. This change was not by any means the mere implementation of a preexisting aesthetic theory of authorship. In fact, the abstract theory of original authorship never had a golden age in American copyright. At the end of the eighteenth century, copyright still had most of the institutional features of the traditional printing privilege, though it came to be supported by a new theoretical construct of original authors as proprietors of their intellectual creations. During the nineteenth century, as features of this theoretical construct were gradually embedded in actual legal doctrines and concepts, they were mediated through the influence of the

329. Lemley, *supra* note 26, at 882.

330. *See id.* at 882-86.

331. *Id.* at 902.

332. For an argument that the abstract aesthetic theory of original authorship was not fully adopted even by eighteenth-century English copyright law, see Simon Stern, *Copyright, Originality, and the Public Domain in Eighteenth-Century England*, *in* ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT (Reginald McGinnis ed., forthcoming 2008).

publishing industry, among others, as well as through various ideological filters. These filters include a commitment to the free flow of knowledge, a market concept of value, and a particular understanding of the legitimate role of the state and of the judiciary. The modern structure of authorship-ownership in copyright, as it emerged at the dawn of the twentieth century,[333] was nothing like a re-creation of copyright in the image of eighteenth-century theory of authorship. Thus, trying to extrapolate directly from late-eighteenth-century aesthetic theory to issues of twenty-first-century copyright law seems a futile exercise. Rather, the place to look is the very different construct of authorship that became part of the doctrinal and conceptual structure of modern copyright.

When one examines authorship ideology as embedded in copyright law, it becomes apparent that Lemley is both right and wrong. Copyright law has many features that are diametrically opposed to the fundamental tenets of original authorship, but at the same time it is saturated with concepts that are directly traceable to these tenets. Modern copyright's rules of ownership often favor corporations and other commercial entities at the expense of actual creators of works,[334] but at the same time copyright is justified on the basis of authors' rights, and many of copyright's rules—sometimes the very rules that deprive authors of ownership—are constructed in terms taken from the vocabulary of authorship.[335]

Copyright's minimalist threshold originality requirement is but a mockery of the romantic vision of the author as an individual spirit who creates ex nihilo meritorious intellectual works.[336] Yet American copyright discourse adamantly resists a "sweat of the brow" regime and clings to originality as a constitutive feature of the field.[337] Moreover, other areas of copyright law, such as the rules that define the scope of protection, are dominated by latent assumptions suspiciously similar to those of original authorship, namely, a sharp distinction between a superior original and a mere derivative with substantial normative

333. I do not mean to claim that the story of authorship in copyright was over by 1900—a mistake that I have accused some of the existing accounts of copyright history of making. I only mean to say that by that time, many of the features of the contemporary notion of authorship in copyright law had appeared. This is not meant to foreclose the possibility of further changes during the ensuing century.

334. *See* 17 U.S.C. § 201(b) (2000) (establishing the work-for-hire doctrine); *id.* § 101 (defining a "work made for hire").

335. *See supra* text accompanying notes 289-299.

336. *See supra* text accompanying notes 49-55.

337. *See* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 352-60 (1991).

consequences attached to it.[338] Copyright is at once about Justice Story's observation that "[n]o man creates a new language for himself"[339] and Eaton Drone's conclusion that a translator or a "dramatist invents nothing, creates nothing,"[340] a conclusion for which the doctrinal foundations were laid by Justice Story.[341]

Balancing competing interests of rights-holders and users is a dominant concern of modern copyright and of doctrines that profess to ensure the uninhibited circulation of ideas, knowledge, and information which lie at its heart.[342] But modern copyright is also pervaded by a strong expansionist drive motivated by a conviction that the owner is entitled to control an ever-growing sphere of derivative markets. This drive necessarily results in restrictions upon the access of others to information and their ability to use it freely.

The key point is that modern copyright is the whole complex amalgam of conceptual structures described above. The framework we inherited from the nineteenth century and that was perfected in the previous century encompasses radically different arguments, deeply conflicting commitments, and ingredients that stand in sharp tension and even outright contradiction with one another. It also includes the ways in which these different parts are organized and managed together, despite the tensions between them and the mechanisms that enable us to go back and forth between them. This structure and the historical account of its emergence is also the key for understanding the ongoing role of authorship in copyright law as an *ideology*.

Authorship as embedded in copyright law is an ideology, first and foremost, in the basic sense of this term.[343] It is a conceptual scheme through which we construct reality, a set of assumptions about the world and of categories for understanding it. Authorship, however, also functions as an ideology in the stronger sense often used in the critical tradition—namely, it is a motivated mystification.[344] It is a mystification because the representation of authorship in some parts of copyright law is removed from the realities of authorship. The reality of authorship—the real practice of the creative process—has never overlapped with the premises of original authorship that

338. *See* 17 U.S.C. §§ 103(a), 106(3).

339. Emerson v. Davies, 8 F. Cas. 615, 619 (Story, Circuit Justice, C.C.D. Mass. 1845) (No. 4436).

340. DRONE, *supra* note 71, at 464.

341. *See supra* text accompanying notes 172-182.

342. *See, e.g.*, 17 U.S.C. §§ 102(b), 107.

343. On ideology as a social construct, see TERRY EAGLETON, IDEOLOGY: AN INTRODUCTION 28 (1991).

344. For a critical description of the notion of ideology as false consciousness, see *id.* at 10-24.

dominate some areas of copyright discourse. The practices of creating texts today or in the past have never come close to being anything like solitary individuals creating original works ex nihilo. The creative process, to varying degrees in different contexts, has always been collaborative and cumulative, involving reworking of existing materials and meanings rather than originating completely new ones. It never entailed a sharp distinction among imitating, borrowing or adapting, and creating new, original ideas.[345]

Moreover, original authorship is a mystification because its representation of reality is removed from the actual doctrinal arrangements of copyright law itself. For example, copyright law is justified in terms of authorial ownership, while its ownership rules often assign ownership away from the creator. Copyright is presented as grounded in protecting originality and creativity, while its actual originality requirement is technical and anemic.

But why speak of mystification when I have conceded that there is no complete overlap between original authorship and modern copyright? Who exactly is deceived when copyright consists of a variety of ideas and assumptions—some in harmony with and others diametrically opposed to the premises of original authorship? Is not authorship in modern copyright discourse merely a harmless declaratory layer of rhetoric, a relic of bygone times that has little influence on "real" copyright law? After all, even a cursory look at copyright doctrine seems to confirm that romantic authorship is just that.[346] We may sometimes still be talking about originality as the essence of authorship and about authorial ownership. But all accept that in "real" copyright law, originality is a minimal requirement that has little to do with the romantic vision and that "author" is a technical legal term that may mean some legal entity who is not the actual creator.

The point, however, is not that anyone is being deceived. Rather, the curious and important quality of this conceptual field is the way in which it enables us to maintain deeply conflicting images, commitments, and modes of argument. No modern copyright lawyer is deceived into believing that copyright law is anything like a pure model of original authorship. Yet, the lawyer can move smoothly with very little sense of dissonance between arguments that assume and embody very different assumptions about authorship and about copyright protection. She can argue doctrinal questions of originality in terms that assume a cumulative process of creation and switch without blinking to arguing questions of infringement in terms that assume a

345. Jaszi & Woodmansee, *supra* note 21, at 3-4.

346. *See* BOYLE, *supra* note 4, at 157-58 (criticizing the claim that authorship is a mere insignificant rhetoric which is not believed by anyone).

sharp distinction between an original and a derivative. The mystification lies in the coexistence of those conflicting fundamental assumptions and in the mechanisms that allow us to maintain them.

This mystification is "motivated" because its patterns are not random or arbitrary. As the historical account elaborated here shows, the specific patterns of copyright's structures pertaining to authorship were formed during the nineteenth century in the context of emerging economic changes and particular social relations of power. The process was shaped by the demands of an increasingly commodified publishing industry, the interests of business corporations and other employers, and the rise of the media or content industries and other copyright-related industries such as advertising. The resultant framework of copyright bears the marks of those forces and interests. Far from being distributed randomly, the conflicting assumptions about authorship in copyright law are often arrayed strategically in a way that serves these interests. On the most general level, current copyright law appeals to the legitimizing aura of authorial property, while avoiding many of the consequences of actual implementation of that vision.[347]

Mystification, power, and legitimacy, however, are not the whole story. In order to be effective, the elements of original authorship and the mechanisms that help reconcile them with conflicting concepts and commitments must have some practical bite. As E.P. Thompson put it in another context,

> The rhetoric and rules of a society are something a great deal more than sham. In the same moment they may modify, in profound ways, the behaviour of the powerful, and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions.[348]

347. In the extreme case of the work-for-hire doctrine, copyright law avoids even the most basic principle that follows from an authorship-based justification, namely ownership by authors.

348. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 265 (1975). Thompson made those observations in regard to the notion of the rule of law as it developed in eighteenth-century English criminal law, but it seems just as applicable to our context. For a critical treatment of Thompson's view, see Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561 (1977) (book review). Horwitz's criticism applies not so much to Thompson's observation on the dual nature of the ideology of the rule of law as to his further inference that the rule of law is "an unqualified human good." THOMPSON, *supra*, at 266.

The same is true of copyright law.[349] Take originality, for example. For the most part, originality has been a mechanism of mystification in American copyright. Treating originality and creativity as fundamental constitutive elements of copyright while reducing their actual doctrinal effects to a minimum supported the expansion of copyright scope in ways that had little to do with original authorship while still maintaining the force of that legitimating ideal. When pushed to the limit, however, the pale originality requirement showed that it still had some vitality left in it. When in 1991 the Supreme Court declared that originality was still "[t]he *sine qua non* of copyright"[350] and denied protection to certain works, it placed some limit on the ability of powerful commercial interest to use copyright to their advantage. At least in some contexts, such as factual databases, this limit had real practical and economic significance.[351] In order to be effective in disguising the realities of power, the ideology of authorship sometimes may curb that power and check its incursions.

One last possible objection to the claim of persisting importance of the ideology of authorship in modern copyright is presenting it as merely a language or a discourse capable of expressing a diverse set of views and arguments. If authorship is the entire amalgam of conflicting concepts and assumptions, what difference does it make if we talk this way in copyright law? If one can use parts of it to construct diametrically opposed positions, if it contains radically contradictory visions, such as romantic originality and creativity as a cumulative process, does it not follow that it makes no difference? Is it not just a depository of rhetorical resources, which could be used in different ways and which in itself determines nothing?[352]

Authorship is more than a neutral language. The fact that the modern version of ideology of authorship includes conflicting structures and commitments means neither that it is radically indeterminate nor that it lacks significance. While the modern ideology of authorship, as embedded in copyright doctrines, contains these conflicting elements, the choice between

349. *See* Jaszi, *supra* note 4, at 501 ("Romantic 'authorship' and its connotations are deeply embedded in legal consciousness and . . . this belief sometimes expresses itself in ways that are inconvenient, to say the least, for the commerce of intellectual property.").

350. Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

351. *See generally* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After* Feist v. Rural Telephone, 92 COLUM. L. REV. 338 (1992) (discussing the effect of the Supreme Court's interpretation of the originality requirement on copyright protection for informational works such as factual databases or directories).

352. *See* John Dewey, *The Historical Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

them is not completely random. Likewise, the speaker is not in a position of a completely autonomous agent who can choose and apply, in each case, whichever part or whichever underlying substantive commitment she prefers. The conventional forms of the ideology of authorship, rather, have an intricate structure of managing and allocating its different elements among various fields of discourse and within each field.

It is entirely proper, for example, to employ a strong romantic account of original authorship in a legislative debate about a certain amendment to the Copyright Act. The same account would probably seem out of place when arguing certain doctrinal issues in court. This semantic segregation exists even within the same general field of discourse. Thus, for example, when engaged in a doctrinal legal argument about originality as a threshold requirement for protection, it would be most natural, indeed, necessary, to treat originality as a narrow and technical concept. When arguing questions of derivative works, however, a strong hierarchical distinction between originals and derivatives is built into the very terms of the argument. In some doctrinal contexts, it is entirely plausible to depict copyright protection as limited to a very low level of abstraction and as leaving all ideas as free for the use of all; in others, arguing that copyright protection is limited to a narrow set of concrete forms would be brushing existing concepts against the grain. A court may see it as entirely plausible to deny ownership to a contributor who had not reached the level of an author and at the same time recognize a business corporation as the original author-owner.

There is nothing necessary or natural about such divisions, but they nonetheless exist as strong conventions. They are part of the construct of authorship that was shaped by powerful forces in the past. Thus, despite its internal tensions and conflicting ingredients, authorship does often matter.

Is the foregoing analysis of any use in trying to change copyright law? It would be naïve, of course, to assume that simply understanding the ideological structure of copyright and authorship will magically ensure its transformation. The exercise nonetheless may be of some use. To begin, uncovering the genealogy of the ideology of authorship in copyright should make us more alert to the social power relations underlying it. No doubt, the array of interests shaping copyright law has changed and grown more complex in the intervening century, but many of the forces that exerted their influence in the formative era of the nineteenth century are still with us.

Second, understanding critically the structure of this ideology may help foster an attitude which is facilitative of its transformation. Coming to terms with the tensions, inconsistencies, and conflicts inherent in the current system

places one in a position which is somewhat removed from and skeptical of its conventions.[353]

Third, the existing ideology can supply the building blocks or at least the starting points for its piecemeal transformation from within. Scholars who find the recent expansion of copyright and the shrinking of the public domain worrisome often present the ideology of authorship as part of the problem. Lawmakers and jurists who cling to that ideology, it is argued, tend to exaggerate the extent to which creation is an individualist and solitary activity, and underestimate the essential role for flourishing creativity of the ability to freely access and rework existing materials.[354] This may be true. It is difficult, however, to imagine what it would mean to discard or do away with the ideology of authorship in copyright law.[355]

Yet it is quite possible to understand what it would mean to transform or rework it. To do so would entail a process similar to the one that occurred in the nineteenth century. A process of transformation would begin by using the existing ideological forms, while rearranging or reworking them and gradually imbuing them with new meaning. The complexity of the modern ideology of authorship and the fact that it is already filled with conflicting concepts and assumptions assures us that the initial resources for accomplishing this task are already there.

This, of course, will not be a mere literary task of deconstruction and reconstruction. If the history surveyed here teaches us anything, it is that the ideological forms embedded in copyright law are the products of social structures of power, including economic forces, powerful commercial interests, and political influence, among other things. Such forces and interests are not gone today.[356] Nevertheless, given a political will, the ideological resources for change are already there. All it takes is human agency.

353. *See* ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 18 (1975) ("[T]hrough its workings on our self-consciousness, the practice of total criticism itself may work toward the revision of the moral sentiments and the reorientation of politics.").

354. *See, e.g.*, BOYLE, *supra* note 4, at 169; James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, LAW & CONTEMP. PROBS., Winter/Spring 2003, at 33, 51-52; Fisher, *supra* note 43, at 277-84; Lange, *supra* note 4, at 143.

355. Regrettably, authorship scholarship tends to ignore the question or to lapse into vague metaphors. *See, e.g.*, Lange, *supra* note 4, at 151 ("[A]uthorship in the form of creative play will flourish . . . not in the anonymity of a murmur, but as if in moments between lovers exchanging gifts.").

356. I thank Mark Rose for helping me see this important point.