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THE DIGITAL COMMONS AND COPYRIGHT: THE CONFLICT BETWEEN PROPERTY RIGHTS AND FREE SPEECH

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Introduction

The lifeline of a knowledge-based economy is information. Intellectual property laws and policies are implemented in order to transform this intangible asset into economic, social, and cultural wealth. The control of these various forms of property depends on how the laws, policies, and institutions are constructed. How to balance the various interests involved is a question that has been around for centuries, yet seems more important than ever before.[1] Intellectual property, as a field of law and regulation, continues to grow as the scope and limits of the law are adapted to new situations. Thus, there is always something new to learn and understand in regards to the practices surrounding intellectual property.[2] As a field intellectual property is comprised of three subfields, copyright, patents, and trademark. Though there are many fascinating questions involving patents and trademarks, this paper will focus primarily on the history of copyright and how it has developed into an arena where free speech rights and property rights are both contested and under pressure because of the development of new technology.

The attempt to find a balance between protecting the rights of authors in order to promote production of literary works, and providing public access to works in order to maintain an educated and democratic society, is the heart of American copyright law. Essentially, copyright law attempts to balance the rights of authors with the rights of the public to access authors' works. However, creating a balance among competing rights can be very difficult because the needs of authors vary from that of the rest of the public. On the one side, the protection of private property has always been a main concern. On the other side of balance, the fundamental right of

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[1] Peter Yu, "Preface," *Intellectual Property and Information Wealth*, ed. Peter Yu (Westport, Connecticut: Praeger Publishers, 2007), vii.

[2] Ibid, viii.

individuals to better themselves through access and use of information remains important.[3] Technological advances such as the creation of the printing press allowed works to be copied quickly and cheaply and to be distributed more widely than ever before. This drastic change led to the need to protect the right of authors.[4] Because technological change itself is not new in this conflict between individual rights of private property and the ability to use the knowledge and information copyrighted materials contain, understanding how technological change worked to shape the contest between these areas can be instructive to today's problems.

In this paper, I will argue that issues surrounding copyright in the digital commons effects our freedom of speech. In the first section I will discuss the origins of copyright law in Britain. In the second section I will then follow the development of copyright laws as they began emerging in the colonies and eventually the United States of America. In my third section I will illustrate the transformation that copyright undergoes in the 20th and 21st century and how these changes affected the freedom of speech. Finally, in the conclusion I will discuss the present conflict between free speech and copyright in the digital commons and how some of these issues may be resolved.

Britain

As with most of American law, copyright law is derived from the British legal system. In the British legal system, an author's right to prevent the illegal publication of their work appears to have been founded in principles of natural justice. In this concept the author becomes a proprietor because their work is the product of intellectual labor and is considered property just as much as the physical substance on which it was written (Party 2000). Literary scholar Mark Rose asserts that the concept of an author being a proprietor is the legal elaboration of the

[3] Gretchen Hoffmann, *Copyright in Cyberspace 2*, (New York, New York: Neal-Schuman Publishers Inc. , 2005), 3.
[4] Ibid, 4.

Lockean notion that an author, like other workman, has a natural right to the product of his labor that enables both the text and authorship itself to become assimilated into the world of ordinary commodities.[5] However, Meredith McGill claims that this only applies to British Authorship and that it does not translate smoothly into American copyright. American copyright law has its origin in British copyright law, but has been reformulated so as not to recognize the author as the owner of its commodity and the Lockean argument that underlies it. The landmark American copyright case *Wheaton v. Peters (1834)*, established that going-into-print as the moment when individual rights give way to the demands of the social and defines the private ownership of a printed text as the temporary alienation of public property. According to McGill nineteenth century American copyright law is primarily concerned with the circumscription of individual rights and not with their extension.[6]

The invention of the printing press changed British society substantially. Prior to the invention of the printing press a majority of the British population was illiterate and uneducated. People who produced literary works did so only for the consumption of the very limited aristocratic class.[7] In 1476, the printing press was invented and became an invaluable tool during the Tudor period. The Tudor period also brought with it a large emphasis on education that enabled the emergence of the middle class. The printing press enabled mass production of literary works. The accessibility of literary materials played a large role in these social changes. However, although book publishers and vendors became wealthy as a result of these technological advances, authors were seldom compensated. Not only did they barely receive any monetary compensation from their works, but publishing thrived on piracy. This was the first

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[5] Noah Webster, *A Collection of Papers on Political, Literary, and Moral Subjects*, (New York: Webster and Clark, 1843).

[6] Meredith McGill, *American Literature and the Culture of Reprinting 1834-1853*, (Philadelphia: University of Pennsylvania Press, 2003).

[7] Gretchen Hoffmann, *Copyright in Cyberspace 2*, (New York: Neal-Schuman Publishers Inc. , 2005), 5.

technological advance that began bringing free speech issues to light for authors. Yet assuming that copyright laws were a response to the concern of authors' rights would be a mistake. Instead, the monarchy was terrified that mass publication of political materials would lead to political and religious rebellion. The widespread dissemination of such writing, then, led directly to the creation of copyright laws as a reaction by the government to the power of the printing press.

In 1534, the government responded by creating the regulations which required both a license and approval from official censors before anyone could publish a work.[8] Almost forty years later, the Stationer's Company, an association for book publishers and vendors was constructed to fulfill the role of a censor. This also allowed them to monopolize publishing. In 1577 that this mutual benefit was formalized: The Stationer's Company censored works for the monarchy and in return, the members received a monopoly.[9] One difficulty with the creation of this monopoly was that only members of the Stationer's Company could publish, and members could only publish works to which they had bought the publication right. Thus, copyright was intended to only control the making and selling of books and initially had nothing to do with the authors' rights to creation.[10] However, in the early eighteenth century, the Association's 150-year-old license to own the publishing monopoly had expired and was not renewed.[11]

This was a huge relief for authors and publishers alike. Despite the gains members received from being a part of the association they too were negatively affected by piracy. The Stationer's Company's license was not renewed because the House of Commons had grown tired of the power instilled in the monopoly. Upset with the outcome members petitioned parliament

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[8] Marshall Leaffer, "Understanding Copyright Law," *Cornell Law Review* (1995): 857-904,

[9] Ray Patterson, and Stanley Lindberg, *The Nature of Copyright: A Law of Users' Rights*, (Athens: The University of Gerogia Press, 1991).

[10] Ibid, 21-22

[11] Marshall Leaffer, "Understanding Copyright Law," *Cornell Law Review* (1995): 857-904,

for help, claiming that their objective was the advancement of wholesome knowledge.[12] However, instead of reversing the decision Parliament began drafting a regulatory statute. Later on in 1707, a similar petition was made by booksellers, asserting that the pirates' actions discouraged all writers from partaking in any useful part of learning.[13] The underlying factor encouraging writers to partake in producing works that would useful to the public interests was claims of authorship. Literary scholar Mark Rose has illustrated that this strategy was probably based on the relationship established between authors and property rights in the censorship debate and the renewal of the Licensing Act. In 1707 and 1709 petitions referred to the useful knowledge produced by books, and explicitly included the writers of such books as having a legal claim similar to the books' printers and vendors.[14]

At the end of the 16th century, it became apparent that the book trade did not expand to small-scale enterprises. Thus, small trades began to support introducing legislation. By 1709, support for some type of regulatory legislation for the printing industry was widespread. Even the wealthy London booksellers were advocating for legislation and claimed that the public would substantially benefit from it as well. Eventually in 1710, the first copyright statute was enacted and, was inevitably the result of a compromise.[15]

The Statute of Anne passed in 1710 was the first copyright law in Great Britain. This act was officially titled "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copied, during the times therein mentioned." The Statute of Anne began to shape copyright into what we know of it today. It not only recognized

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[12] Alexander Isabella, *Copyright Law and the Public Interest in the Nineteenth Century*, (Portland: Hart Publishing, 2010), 22-30.
[13] Ibid
[14] Ibid
[15] Ibid

the rights of authors, but it also recognized the concept of a public domain.[16] The term "public domain" refers to creative materials that are no longer protected by intellectual property laws such as copyright. The public owns these works, not an individual author. Anyone is allowed to use public domains works without obtaining permission, but no one can ever own it. Although each work belongs to the public, collections of public domain works may be protected by copyright. For instance, if someone has collected public domain images in a book, than that collection as a whole may be protected even though the individual images are not.[17] The concept of a public domain is crucial to the development of society because it allows individuals more access to information. A public domain is also important because it promotes the freedom of speech. As more restrictions are placed on authors' works then the public domain will begin to shrink in turn hindering our freedom of speech.

The purpose of the statute was to promote education, science and arts, and protect the rights of authors for a set amount of time.[18] Under this law, a twenty-one year term was given to works that were already published, and new published works were protected for fourteen years. An author could choose to renew the copyright after the fourteen year term for another fourteen years if they were still alive. At first the Statute of Anne was implemented by requiring authors to register works with the Stationer's Company in order for them to be protected. In later years, an additional requirement to post a copyright notice on all works that had been registered with the Stationer's Company was created. This way innocent infringement became impossible, such as copying a work subconsciously and forgetting to cite it.[19]

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[16] Marshall Leaffer, "Understanding Copyright Law," *Cornell Law Review* (1995): 857-904,
[17] http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter8/8-a.html
[18] *Millar v Taylor* (1769) 4 Burr. 2303, 98 ER 201
[19] Laura Gasaway, and Sarah Wiant, *Libraries and Copyright: A Guide to Copyright Law in the 1990s*, (Washington D.C.: Special Libraries Association, 1995).

Despite the fact that the Statute of Anne was able to revolutionize the nature of rights, it was still quite limited. Jane Ginsburg has written that, in terms of delineating what would be treated as property from what was in the public domain, 'the realm of copyright was a shoreline of uncertain contours. The Statute of Anne may have separated the waters from the lands, but it did not clearly tell us which was which.[20] One example of its lack of scope can be seen in that it only applied to written works, while it did not apply to other creative productions, such as artwork. Thus, the statute allowed piracy to remain a serious concern for artists. However, with time and enormous pressure, Parliament ended up passing the Engraver's Act of 1735, which gave artists the same rights authors had under the Statute of Anne. After the passage of the Engraver's Act of 1735 the fundamentals of copyright law began to emerge even though some aspects would not become important until the twentieth century.

In sum, the tension surrounding potential political and religious rebellion was the reason that copyright laws were first enacted and have continued to be a contributing factor along with economics. Since the Statute of Anne and the Engraver's Act of 1735 there have been many modifications and new statutes that have been influenced by the politics and economics of the day. From the development of copyright law came the emergence of authors as property owners and a market of literary works.[21] These two developments have played and will continue to play crucial roles in the adaptation of copyright law. The modern notion that an author is a proprietor finds its origin in the domain of law during the eighteenth century British struggle of the Statute

[20] Alexander Isabella, *Copyright Law and the Public Interest in the Nineteenth Century*, (Portland: Hart Publishing, 2010), 22-30

[21] Meredith McGill, *American Literature and the Culture of Reprinting 1834-1853*, (Philadelphia: University of Pennsylvania Press, 2003).

of Anne. Once this statute was passed it helped facilitate the development of authorship as a market phenomenon.[22]

Colonies

Though the Statute of Anne and copyright legislation in general played a significant role in shaping the British Printing Industry they did not have them same effects in the colonies. The norms of different colonies gave shape to what was or was not allowed in them. In 1671, Sir William Berkeley, governor of Virginia, remarked: "I thank God there are no free schools nor printing, and I hope we shall not have these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both."[23] Sir William was clearly not a proponent of the Printing Industry. It was not until 1730 that Virginia permitted printing. During the time of Sir William's declaration, there was only one printing establishment in the colonies and that was in Cambridge, Massachusetts.[24]

Virginia was not the only restrictive colony at the time. In 1685, King James II had instructed Thomas Dongan, the royal governor of New York, that printing was prohibited without his personal permission. In that same year Pennsylvania authorities shut down an effort to establish a printing press by forcing printer William Bradford to move to New York where he needed Dongan's permission to institute his business. Given the political climate during this time it is hardly surprising that the printing industry in the colonies did not get off to a fast start. Though it was difficult to establish a printing press it was not impossible. Authors that wanted to publish their works in the colonies went to states that did not have very strict regulations in

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[22] Ibid

[23] William Hening, *The Statutes at Large, Being a Collection of All the Laws of Virginia*, (Richmond: Franklin Press, 1819).

[24] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

place. For example, in 1675, the Massachusetts General court went to private printer John Usher in order to publish. However, in order to protect himself against piracy, Usher petitioned the court to create a monopoly for his work. The General Court decided to grant Usher's petition and gave him the following printing patent:

> Enacted, That no Printer shall print any more copies than are agreed and paid for by the owner of the copy or copies, nor shall he nor any other reprint or make Sale of any of the same without the said Owner's consent upon the forfeiture and penalty of treble the whole charges of Printing and paper of the quantity paid for by the owner of the copy, to the said owner or his assigns.[25]

Although Usher's petition was granted and some form of protection was given, he was still not satisfied, and petitioned the General Court for more specific legislation. On November 7, 1770, Williams Billings, a Boston Musician, petitioned the Massachusetts House of Representatives to grant him exclusive privilege of selling his composed work for a certain amount of years. Billings was told to prepare a bill, but due to certain inconsistencies surrounding his authorship his bill was not discussed until the next session.[26] Two years later, Billings petitioned the royal governor of the house and was granted the exclusive right to print and sell his works for 7 years. Though he was successful in his petition, the royal governor, Thomas Hutchinson, returned an unsigned bill to the House.[27]

Constitutional Era

It was not until the revolutionary era that the printing industry really began to take off. In 1781, The Connecticut General Assembly granted musician Andrew Law the ability to publish

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[25] Thorvald Solberg, *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright*, (Library of Congress, 1963).

[26] Some of the inconsistencies surrounding Billings works were the fact that he was such a poorly known composer that the courts questioned whether or not he was truly the creator of the works he was seeking protection. Prior to seeking protection for his works Billings had been known in Boston for running a tanning shop and as of 1770 his musical qualifications were unimpressive; his training apparently went no further than what he had learned as a local choir master.

[27] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

his music books. The Assembly also gave him an exclusive patent for 5 years as long as he produced enough copies for the public and at an affordable price.[28] The following year Noah Webster sought to protect his dictionary in progress. Having been a dissatisfied schoolteacher and member of the bar Webster created an American Textbook for the purpose of being used in American schools.45 Rather than the current textbook which was created by a British author. Though Webster was unsuccessful in his attempt to lobby the legislatures in New York, Pennsylvania, New Jersey, and Connecticut for copyright statutes a year later the first general colonial copyright statute was enacted.[29]

With Connecticut leading the way in copyright statutes, efforts to get the other colonies to enact similar law were under way. Some influential authors that helped increase these efforts were Joel Barlow, Jeremy Belknap, and Thomas Paine. Each provided justifications for the need for copyright protection. Barlow even wrote to Elias Boudinot, president of the Continental Congress in order to ensure that the matter was a priority. On January 8, 1783, the Continental Congress received a copy of the Connecticut Copyright Act and the letter Barlow had sent. Three months later Hugh Williamson of North Carolina motioned to have a committee appointed to consider creating a copyright statute.[30] The motion was passed and a committee comprised of Williamson, Ralph Izard (South Carolina), and James Madison (Virginia) was appointed. On May 2, 1783 the committee issued its report using a strong natural rights approach to protection:

> The committee… to whom were referred sundry papers and memorials from different persons on the subject of literary property, [are] persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius...[31]

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[28] Ibid
[29] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[30] Ibid, 18
[31] Ibid, 21

Based on the committee's favorable recommendation, the Continental Congress passed an act that same day. This act encouraged all states to secure to the authors or publishers of any new books not printed thus far, being citizens of the United States, and to their executors, administrators, and assigns, the copyright of such books for a certain time not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators, and assigns, the copyright of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing, and vending the same, to be secured to the original authors, or publishers, their executors, administrators and assigns, by such laws under such restrictions as to the several States may seem proper.[32]

In forming this copyright act, much of the detailed provisions were based off of the Statute of Anne. Although many of the provisions were designed by Parliament to deal with the Stationer's monopoly, it is still considered to be the first federal copyright statue enacted by the new nation. Massachusetts and Maryland had anticipated the Continental Congress's action and began enacting their own laws. When drafting their version Massachusetts legislators relied heavily on Connecticut's previous law, but included a number of public interest provisions such as a deposit requirement, and a de facto prohibition on the use of anonymous and pseudonymous designations.[33] Delaware was the only state that did not pass a copyright law.

The copyright statutes that were enacted during the colonial era only protected citizens of the United States and only written works that had not been previously published. The most common length of protection was 14 years which was derived from the Statute of Anne. This term of protection was adopted by Connecticut, Georgia, Maryland, New Jersey, New York,

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[32] Thorvald Solberg, *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright*, (Library of Congress, 1963).

[33] Ibid

North Carolina, Pennsylvania, and South Carolina.[34] States such as Massachusetts, Rhode Island, and Virginia granted a 21-year period, while New Hampshire granted a 20-year period. Connecticut, Georgia, Maryland, New Jersey, New York, Pennsylvania, and South Carolina also granted an additional renewal term of 14 years which again was derived from the Statute of Anne. Though all these states had enacted some version of copyright law the type of literary property that was protected varied. South Carolina only protected book; New Jersey, New York, Pennsylvania, and Virginia protected both books and pamphlets; Maryland protected books and writings; Massachusetts, New Hampshire, and Rhode Island protected not only books, but any type of literary works; Connecticut and Georgia provided a wider range of protection by covering book, pamphlets, maps, and charts.

Another variation seen with the copyright laws that were enacted in the colonies was where the protection had to be filed in order to be valid. Connecticut, Georgia, New Jersey, New York, North Carolina, and South Carolina required the author to file the title of the book with the Secretary of State in order to receive copyright protection. Virginia required the author to file with the clerk of council, and Pennsylvania required authors to file in the prothonotary's office in Philadelphia. States such as Maryland and South Carolina did not require the title to be registered prior to protection being granted, but as a means to prevent innocent infringement from occurring. Massachusetts, New Hampshire, and Rhode Island did not even contain provisions on registering titles or anything of that nature.

Similar to the Statute of Anne, Connecticut, Georgia, New Jersey, New York, North Carolina, Pennsylvania, and Virginia included a provision providing a penalty on all infringing copies and a fine of double their value. Connecticut, Georgia, New York, North Carolina, and South Carolina statutes also contained provisions requiring the author to provide a sufficient

[34] Ibid

number of copies at an affordable price. After examining not only the federal copyright statute, but the state statutes as well it is apparent that there is a strong emphasis on the natural rights of authors. Seven state statutes contained preambles that expressly refer to such rights.[35] The New Hampshire preamble is a wonderful example of this. Their preamble stated that the progression of civilization, the advancement of knowledge, and of human happiness, greatly depend on resourceful persons in the various arts and sciences. In order to encourage these persons to continue to make great strides and benefit society as a whole then they must be legally assured that the fruits of their labor will be protected.[36]

Despite the fact that the states finally enacted copyright statutes very few authors took advantage of them. However, Noah Webster was an exception. Webster's untiring efforts on behalf of his A Grammatical Institute of the English Language during 1785 and 1786 began to illustrate the practical problems facing an author or publisher under the colonial laws. Up until 1786 copyright laws were the only from of legal protection for written works. It was not until the Constitutional Convention on May 28, 1787 that more protection was proposed. At the Constitutional Convention South Carolina representative Charles Pickney, proposed that the Constitution include a clause enabling the federal government to protect the rights of authors.[37] Despite this proposal no action was taken to include this clause into the Constitution because the were more pressing concerns at the time. Another possible reason the copyright clause was omitted was that the delegates opposed the statutory establishment of monopolies. After the convention Madison and Jefferson had sent correspondence to one another indicating that their reasoning was indeed the fact that they opposed monopolies.

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[35] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[36] Thorvald Solberg, *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright*, (Library of Congress, 1963).
[37] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

Though the first proposal to include a copyright clause into the Constitution was unsuccessful, a few months later, three more proposals were made to include intellectual property rights within the enumerated national powers. The first was another proposal by Pickney, to secure the rights of authors for a limited amount of time. James Madison then made the other two proposals: (1) protecting the rights of literary authors for a limited amount of time; or (2) to encourage the advancement of useful knowledge and discoveries.[38] At the end of August the Committee considered them, but the discussion surrounding the final decision is unknown due to the secret nature of the discussions. Although one can infer what the committee's reasoning may have been due to Madison's comment in the *Federalist Papers*:

> The practicality of this power will rarely be questioned. The copyright of authors has been guaranteed, in Great Britain, to be a right of common law. The right inventors have with their creation whether physical or intellectual belongs to the inventor. The public good fully coincides in both cases with the claims of individuals.[39]

Four key principles can be learned from this brief statement. First, copyright is a right recognized by common law. Second, the incentive to create knowledge that will advance and benefit society is key to granting this right to authors. Third, copyright must become federal law in order to be as effective as possible. Fourth, the public interest fully coincides with the rights authors have over their works. It is clear that the intentions of the Founding Fathers was that private property, including intellectual property, was the best method to ensure that democracy will flourish over the tyranny of the aristocracy.

On September 5, 1787, the Committee proposed the copyright and patent sections of the Constitution to Congress. The proposed clause read "Congress shall have the power: To Promote the progress of science and useful arts, by securing, for limited times, to authors and inventors,

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[38] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[39] Ibid, 24

the exclusive right to their respective writings and discoveries."[40] This clause was unanimously agreed on and incorporated in the Constitution as adopted by the Convention on September 17, 1787. Eleven days later Congress approved the Constitution and referred it to the states for ratification. The Constitution was then ratified and became effective on June 21, 1788.

19th Century

While the Constitution empowered Congress to enact copyright protection, it did not address the matter of administrative procedures for registration or enforcement. This resulted in some authors believing that they were required to apply to Congress for private copyright bills.[41] Immediately after the first session of Congress, a number of writers, including David Ramsay and John Churchman, petitioned Congress for private bills to protect their works. Ramsay, originally from Pennsylvania, had become a prominent physician and politician in South Carolina. While serving as a delegate to Congress in 1782-1783, he had used records of the revolution to publish his *The History of the Revolution of South Carolina*. He also wrote a generalized version entitled, *History of the American Revolution*, for which he also sought protection.[42]

Churchman, also a native of Pennsylvania, had created several different methods to explain the principles of magnetic variation. He petitioned for a law granting him the right of vending spheres, hemispheres, maps, charts and tables on his principles of magnetism. Both petitions were submitted to the House on April 15, 1789, by Thomas Tudor Tucker of South Carolina, and were referred to a special committee comprised of Tucker, Alexander White of Virginia, and Benjamin Huntington of Connecticut. The following day the petitions were submitted to the Senate. A few days later the House committee favorably reported on not only

[40] Ibid, 25
[41] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[42] Ibid

Ramsay and Churchman's petitions, but also a general bill that would secure the right of an author and inventor to their writings and inventions.[43] Upon review the House favorably agreed with Ramsay and Churchman's proposals, and ordered that private bills be introduced securing the desired rights, as well as public bills providing for general copyright and patent protection.[44]

Two months after their proposals Representative Huntington introduced H.R. 10, the first federal copyright bill. H.R. 10 was a general bill and was thought to have been based on an earlier draft by Noah Webster.[45] The bill was read on a few occasions, but consideration was postponed until August 17, when it was held over until the next session. At the start of the second session of the First Congress, President Washington reviewed the accomplishments of the first session and during his State of the Union Address stated that intellectual property should be among the second session's main priorities. President Washington stated that nothing can better deserve ones patronage than the promotion of science and literature.[46] In response to the President's address the Senate replied that literature and science are indeed essential to the preservation of democracy and that government measures should be taken to help promote and strengthen them. The House then replied by concurring with the President's statement and claiming that they will not lose sight of the objects that are so worthy of regard.[47]

Following the State of the Union Address, during the second session in a floor statement, Representative Hartley of Pennsylvania spoke to the general copyright and patent bills, observing that their introduction had been solicited by very intellectual men and should be highly considered. The House referred the matter to a select committee. A few days later the private and public bills were discussed again. Representative Burke of South Carolina urged both types of

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[43] Ibid, 26
[44] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[45] Ibid
[46] Ibid, 27
[47] Ibid, 28

bills be introduced, but in light of the immediate threats to particular works, he urged that the private bills be moved more quickly. Representative Alexander White of Virginia wanted patent protection to be included in the bills, but Burke replied that he was going to find another resolution for that at a later date since it would take more time and discussion to figure out. On January 28, 1790 Representative Burke presented H.R. 39, a general bill designed for "securing the copy right of books to authors and proprietors."[48] The next day, the bill was read a second time and ordered considered by the full House. H.R. 39 was taken up by the House on February 1, when it was ordered to be engrossed with amendments. The third time the bill was read it was ordered back to a committee consisting of Elias Boudinot of New Jersey, Roger Sherman of Connecticut, and Peter Silvester of New York, for further consideration.

On February, 25, 1790, Elias Boudinot presented the committee with an amended bill, H.R. 43, which encouraged learning by protecting the copies of maps, charts, books and other writings, to authors and proprietors for a set amount of time. After a second reading the bill was sent to the House where action was postponed until April 29, at which time the amended bill was ordered engrossed and read the next day. On April 30, H.R. 43 passed the House.

On May 4, 1790, H.R. 43 was referred by the Senate to a committee comprised of Senators Read Delaware, Paterson New Jersey, and Johnson Connecticut. On May 13, the bill was considered by the committee and was agreed to along with amendments. The following day the Senate passed the bill with its own amendments. The bill was sent back to the House for consideration and agreed to the Senate amendments on May 17. 87 H.R. 43 was then signed into law on May 31, 1790 by President Washington.88H.R. 43 only granted copyright protection to national authors and not international. Congress instituted the system of formalities and restrictions created by the Statute of Anne. Though majority of the U.S. Copyright Act was based

[48] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

off the Statute of Anne one non-British aspect was that prices would be determined solely on the marketplace and not government officials.

The U.S. Copyright act also extended protection from published works to unpublished manuscripts. Protection for both published and unpublished works was limited, however, to American citizens.[49] This restriction severely harmed international since the law allowed American printers to flood the market with cheap editions of leading British authors. The availability of these pirated foreign editions made the publishing of less well-known American authors economically unattractive to American publishers. However, it is not until 1891 that these injustices were addressed.

Gradually, as new subject matter developed the scope and term of copyright protection increased. In 1802, the U.S. Copyright Act was amended to include historical documents and other prints, and required, for the first time, copyright owners to include a notice on every copy of the work distributed to the public.[50] However, the consequences for failure to adhere to the required notice were not specified in the act. They were determined later on in *Ewer v. Cox*, where the court held that failure to comply with the requirement and the prerequisites set forth in the 1790 Act resulted in a lack of protection.[51] The newly amended Act was more expansive, or at least more specific in terms of scope of protection, than the original Act. Later on in 1819, original but not exclusive jurisdiction over copyright and patent cases was granted to federal courts.[52] This resolved the issue of state courts hearing cases dealing with federal statutory copyright cases. These cases had been previously kept out of federal courts unless diversity of citizenship existed. This amendment also provided that actions for copyright infringement could

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[49] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[50] Ibid
[51] Thorvald Solberg, *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright*, (Library of Congress, 1963).
[52] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

be brought in the equality court, and empowered the circuit courts to grant injunctions to prevent infringement.

Following the amendment in 1802 the first of four general revisions to the original copyright act occurred in 1831. The main principles being changed by this revision was protection musical compositions without the right of performance and for all types of cuts and engraving; extending the copyright term to 28 years; restriction of ownership of the renewal term of 14 years to the author or his or her widow(er) and/or children and granting them the right to renew the copyright if the author died during the first term of protection; extending the statute of limitations for actions for damages to two years; and eliminating the requirement that the original term a notice of claim of copyright be published in a newspaper.[53] These changes occurred due to changes in technology. During this time period printing became more affordable and products such as the printing press developed which allowed cheap and quick dissemination of information. This in turn caused more types of works to be protected because there was a greater likely hood that they would be seen or heard.

In 1834, the 1790 U.S. Copyright Act was amended to permit, for the first time, recording of copyright assignments. Although failure to record did not result in loss of protection, an assignment not recorded within 60 days of the execution was to be "judged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration without notice."[54] Twelve years later the Act was amended to require one copy of each published work to be deposited to the Smithsonian Institution and an additional copy with the Library of Congress. These copies were in addition to the copies that were already required to be sent to the Secretary of State. Requiring these additional copies to be deposited represented a change in philosophy.

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[53] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[54] Ibid

Prior to this amendment, deposits were retained by the Secretary of State for preservation purposes only. Requiring the additional copies to be deposited in the Library of Congress and the Smithsonian Institute, was motivated by an apparent desire to further knowledge by having more copies available for use. These copyright deposits eventually became an important source for the development of the collections of the Library of Congress; however, this was not really enforced due to the lack of enforcements provisions in the 1848 Act.[55]

In 1855, in order to ease the method of depositing copies Congress passed legislation permitting postage-free mailing of the required deposit. The following year the first right of public performance was granted, but was limited to dramatic compositions.128 It was also not limited to for-profit performances. Violating this right resulted in a fee of one hundred dollars or more for the first offense and fifty dollars for every additional performance. This provision represented the first time minimum statutory dames were incorporated into the federal Copyright Act.129 The1856 Act's greatest effect was, expanding the scope of copyright protection, as the courts increased infringement findings beyond the literal words of the composition.[56]

As time went on copyright protection began to extend to photographs, but simultaneously loss of the right of publication for all classes of works was provided for in cases where the claimant failed to comply with depositing a copy with the Library of Congress. In order to enforce the consequences of failing to deposit copies with the Library of Congress and the Smithsonian Institute a penalty of $25 was given to works that had not been deposited within one month of publication.[57]

In 1870, the second general revision of the Act occurred. This revision caused a dramatic effect on the future of copyright law. First, over the objections of authors and publishers, all

[55] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[56] Ibid
[57] Ibid, 36

responsibility for administration of copyright matters was transferred to and centralized in the Library of Congress. The Librarian was then able to establish a small copyright department to aid in discharging these responsibilities. Second, the scope of protected subjects matters expanded to included paintings, drawings, statue and statuaries. The deposit requirement was then increased to two copies, and the time for deposit was reduced form one month to ten days after publication. Another change that occurred was the fact no person would be granted copyright protection unless these requirements were met. By centralizing copyright administration in the Library of Congress the number of registrations increased.[58]

The unstable ground on which the copyright act was built upon became very apparent in the late 1870s, when copyright was subjected to the most inquisitive analysis the United Kingdom has done.[59] The Association to Protect the Rights of Authors began responding to injustices international authors faced by exposing the conflicts that the copyright law entailed. Members of this association included Charles Dickens, Edward Jenkins, and Disraeli all of whom had suffered greatly at the hands of pirates, especially in America.[60] Due to the concerns brought to light by these authors Disreali's government responded by appointing a Royal Commission to consider all aspects of copyright law that arose before them. They were responsible for assessing whether the boundaries of the law had been drawn correctly, if changes were necessary, and what changes would be implemented if needed. After thirty years of discussion and testimony the commission had not made great strides. However, in 1886 enough pressure was given by the British government that several bills, adopting differing schemes for

[58] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[59] Alexander Isabella, *Copyright Law and the Public Interest in the Nineteenth Century*, (Portland: Hart Publishing, 2010),
[60] Ibid

protection were presented. After long and considerable deliberation, much amending and re-amending, The Chase Act, as it was known, became law in 1891.[61]

By the end of the nineteenth century, copyright law had been subjected to heavy examination by the Royal Copyright Commission and had also expanded its scope of power. Copyright law not only applied to written works, but included spoken word, in the form of lectures and plays, and performances of musical works.[62] Copyright protection also expanded from protecting only American authors to international authors as well.

20th and 21st Century

The first copyright statute was overhauled by the early twentieth century. The Copyright Act of 1909 made several substantial changes to copyright law such as expanding the scope of subjects protected; doubling the term of protection to 28 years instead of 14; and changing the establishment of protection from registration to the moment of publication.[63] The only two aspects of the original act that were not altered were that unpublished works were not protected[64], and the requirement of registration and deposit with the Library of Congress.[65]

Just as the original Copyright Act of 1790 had been amended several times to adapt to a changing world so did the 1909 act. However, it was not until 1955 that Congress had authorized a revision of the Copyright Act which after 21 years of work, culminated into the Copyright Act of 1976. One might be lead to believe that since Congress spent 20 years drafting a new copyright law that the end product would be concise, logical and well crafted. Instead, the 1976 Copyright Act is a statute that is incredibly difficult to interpret and has generated much debate.

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[61] Ibid, 153

[62] Alexander Isabella, *Copyright Law and the Public Interest in the Nineteenth Century*, (Portland: Hart Publishing, 2010),

[63] Copyright Act of 1909, U.S. Code, vol. 17, sec 4[1909]

[64] Marshall Leaffer, "Understanding Copyright Law," *Cornell Law Review* (1995): 857-904,

[65] Laura Gasaway, and Sarah Wiant, *Libraries and Copyright: A Guide to Copyright Law in the 1990s*, (Washington D.C.: Special Libraries Association, 1995).

Speaking very broadly, these problems are the result foundation on which the original copyright act was created, the speed at which the world and technology are changing, and the number of amendments that have been created in order to remedy both of these issues.

During the drafting of major legislation lobbyists become involved at some point. Lobbyists are individuals who meet with and work members of Congress in order to voice their opinion/interests on a particular piece of legislation. Their goal is to convince members of Congress to draft legislation that reflects their interests. Congressmen often depend on lobbyists to help them become knowledgeable about certain issues and how new legislation may affect constituents. The result of lobbying is that members of Congress work with people advocating special interests when drafting legislation. In the end, it is Congress' decision to address what issues they believe to be important and how to address them. In the drafting of the 1976 Copyright Act the American Library Association lobbied Congress on behalf of libraries and library users.[66]

Though lobbying typically is the main method in which Congress becomes informed and drafts bills the 1976 copyright act was different. Lobbying efforts were made by a considerable number of groups including the American Library Association, but special interest groups with an economic interest in copyright law, such as authors and publishers, negotiated amongst themselves, created compromises acceptable amongst each other, and presented Congress with language for a statute the represented these compromises. Congress was behind this process, forcing the parties to negotiate compromises prior to considering any language for the statute. This method implemented by Congress was unusual for at least two reasons. The awareness congressional members have of the depth and complexity of copyright law and their inability to

[66] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

master it is a perfect example of why Congress should rely on lobbyists. Another reason Congress probably chose this method to draft the 1976 Copyright Act is that they were concerned about the possibility of enacting a law that would not make anyone satisfied.

Despite Congress' efforts to please everyone this process of developing a law was not only unsuccessful, but created even more problems. The result of allowing authors, publishers, and anyone else with a vested economic interest in copyright law is a law that is not only difficult to interpret, but to apply as well. There is an established process for how to interpret statutes when applying them to a given situation. Traditionally, the courts observe the plain language of the law. One question they consider is: Is the law as it was written clear in its meaning? If they determine that it is not, then they go to the legislative history of the statute. At this point they ask themselves can we determine what congress intended the law to mean. If this does not resolve the issue, then they look to prior judicial interpretation to see how the courts have applied the law in similar situations.

Legal scholar Litman claims that serious problems exist at each of these steps in the process of interpreting the 1976 Copyright Act. The law as it is written is extremely complex, with language that is not often precise and various sections that are independent of one another. As for the legislative history, it is nearly impossible to determine Congressional intent since majority of the bargaining happened between private groups and not within Congress. It is for these reasons and others that Litman suggests that the courts continue to rely on either the 1909 Copyright Act or to familiar case law based on that act in an attempt to interpret and apply the 1976 Act. As a result, the statute is complex, and the case law is complicated and frequently contradictory. Though the new copyright act was more favorable to copyright owners than the 1909 act and less favorable to users, the act does in some instances reflect a balance of special

interest that took over 20 years to achieve. However, the difficulty of interpretation has caused the court to undermine this balance with unpredictable randomness.[67]

On top of all of these complexity issues, amendments to the Copyright Act seemed to be made almost every session of Congress. Clearly if everyone had been satisfied with the compromises made then there would have not been nearly as many amendments. Not only was the copyright law confusing enough already Congress continued to add amendments that more complex than the one before. These amendments were created in response to adapt copyright law to an ever more rapidly changing world. Unfortunately, the current state of the Copyright Act suffers from even more complexity due to years of highly political amendments.

The Congresses writing the 1976 Act recognized the need to establish a law that was more flexible and that could adapt to a wider variety of technological advances as quickly as possible. This can be seen in the language of the act when Congress defines copies as "material objects… in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Despite Congress's efforts some technological changes were so unforeseeable in 1976 such as the internet, that the act was only partly successful in meeting this goal.[68]

Technology and increasingly important nature of copyright law are two of the major forces behind copyright law. Even prior to the internet, international law was a major concern for copyright. As I have mentioned earlier in this paper international authors had struggled with copyright infringement throughout much of the 18th and 19th century until the scope of copyright protection expanded to include their works. International law also became a major concern for

[67] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[68] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

copyright when CDs and cassette tapes were being made in Asia, imitation Rolexes and name brand clothing items were being sold in major U.S. cities. The internet of course creates an entirely new set of challenges because everything that goes on the internet becomes international in scope instantaneously.[69]

One issue regarding international copyright law is how the various governments are supposed to deal with these issues, since each country has their own version of copyright laws. The solution to this was copyright treaties. Treaties are agreements between governments that state they will follow certain regulations set forth within the given treaty. These governments are also subject to whatever penalties may be laid out in the given treaty. In some instances penalties may involve not recognizing work from that particular nation. In other situations, penalties may include being sanctioned with trade restrictions.[70]

Amendments were not the only changes to occur to the 1976 Copyright Act. The Convention for the Protection of Literary and Artistic Works and the Agreement on Trade Related Aspects of Intellectual Property Rights treaties also caused major change to the 1976 Copyright Act. The United States joined both treaties to ensure greater international protection for its authors and inventors. The Berne Convention required that formalities such as requiring notice and registration be done away with. As a result, the Copyright Act was amended in 1988 to do away with the requirement of posting notice; however, it is still required for U.S. authors in order to bring infringement suits. Joining the latter treaty did not result in changes to the 1976 Act, but it did lead to the Digital Millennium Copyright Act, which addressed a range of issues and problems created by a digital world.[71]

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[69] Ibid
[70] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).
[71] Gretchen Hoffmann, *Copyright in Cyberspace 2*, (New York, New York: Neal-Schuman Publishers Inc. , 2005), 3.

Recently, there have been two pieces of legislation enacted that affect copyright, both of which have received a great deal of attention, especially in the library community: the Digital Millennium Copyright Act (DMCA) and the Sonny Bono Copyright Term Extension Act, both of which amended the 1976 Copyright Act. A third revision was proposed to the Uniform Commercial Code (UCC), a model code dealing with all various types of commercial transactions, but failed. The proposed addition to the act was going to regulate various aspects of licensing in the electronic environment, which would affect everything in the electronic environment.[72]

When the proposed addition to the UCC was not adopted, its supporters turned it into the Uniform Computer Information Transaction Act (UCITA). This act is now being addressed individually by each of the 50 states. In 2001, only two states had passed some form of UCITA, but many more were studying the issue prior to implementing it. Maryland was the first state to pass the UCITA, where it went into effect October 1, 2000. Virginia also passed the UCITA, but delayed enacting it until 2001, pending the outcome of a study by the Joint Commission on Technology and Science concerning potential problems. In Delaware, Hawaii, Oklahoma, and Washington, D.C., UCITA has been introduced in at least on chamber of legislature. In Illinois and Maine it was introduced, but tabled for the mean time. In some states such as Arizona, New Jersey, and Washington, the UCITA is being studied by government agencies or the state bars. Some states disliked the act so much that they passed legislation to protect their own citizens from the effects of other states passing UCITA. An example of this is Iowa which passed legislation known as the bomb shelter. The passage of these various types of copyright legislation caused much concern for users particularly libraries and library users. Though fairly

[72] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

simple, the library community is not satisfied with the Sonny Bono Act. The DMCA and UCITA are extremely complicated pieces of legislation that even fewer groups are satisfied with.[73]

The duration of copyright has been slowly been lengthening, and ever more rapidly, during the last 100 years. The original Copyright Act of 1789 gave copyright owners a 14 year term, renewable for another 14 years at the end of the first term if the author was still alive. Copyright then increased to two 28 year terms with the 1909 Act. Under the 1976 Act, for the first time the copyright term was expanded beyond the lifetime of the author, creating one term for the life of the author plus 50 years. For corporate, anonymous, or pseudonymous works or works for hire, the term was for 75 years from publication or 100 years from creation, whichever occurred first. Then in 1998, Congress passed the Sonny Bono Copyright Term Extension Act, which added an additional 20 years to the term, for a total of life plus 70 years. For corporate, anonymous, or pseudonymous works or works for hire, the term was 95 years from publication or 120 years from creation, whichever occurred first.[74]

The continual increase in term duration has stirred many questions and issues surrounding the purpose of copyright law. Many copyright scholar and attorneys claim that awarding protection long after the life of the author has ended, and then we as a society have moved away from the original purpose of copyright law, which was supposed to be an incentive to encourage the creation of scientific and artistic works. This argument is more applicable especially when the duration of the term extends beyond the life of the author. After all, an individual will not be any more motivated to create a work knowing that it will be protected

[73] Gretchen Hoffmann, *Copyright in Cyberspace 2*, (New York, New York: Neal-Schuman Publishers Inc. , 2005),
[74] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

decades beyond your death. Copyright laws are supposed to protect the rights of the proprietor and this can only be beneficial when they are living not deceased.[75]

The question then becomes who is advocating for these extensions when it is clearly not the deceased author. Naturally, one would assume the decease's family since they could potentially benefit from it. Though, on average, the vast majority of works do not become popular until 70 years after the death of the author. Most likely, the main advocated are the corporate authors since they would benefit the most from the extension. First of all, a corporation is much more likely to be around for a 100 or more years after publishing a work than any human. Secondly, a corporate work, such as a movie, is more likely to be in demand 70 years after publication than a book typically would be. The Sonny Bono Act was created to support the entertainment and publishing industries, which have a large economic interest in the work. This act was in no way shape or form created to motivate individual authors to produce more works. More specifically, the Sonny Bono Act was passed more quickly due to the impeding expiration of the copyright on Mickey Mouse.[76]

As I have mentioned earlier library lobbyists were not satisfied with the passage of these acts, particularly the Sonny Bono Act. In an attempt to satisfy them, a provision was included in the Act that allows a library, archives, or nonprofit educational institution "to reproduce, distribute, display, or perform in facsimile or digital form a copy… for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that" the work is no longer 'subject to normal commercial exploitation' (which is nowhere defined), cannot be obtained at a "reasonable price," or if the copyright owner provides notice that either of these conditions applies. (Copyright Act of 1976, U.S. Code, vol.

[75] Gretchen Hoffmann, *Copyright in Cyberspace 2*, (New York, New York: Neal-Schuman Publishers Inc. , 2005),
[76] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

17, sec. 109 [1999]) In other words, libraries, not individual users are exempted from some of the repercussions of the Sonny Bono Act. However, the general progression of extending copyright duration further and further has alarmed many librarians and educators. The continual extension of protection threatens the balance of copyright law, and does nothing to promote the progress of science and the useful arts which was the purpose of copyright in the first place.[77]

An example of how the Sonny Bono Act affects individuals can be seen in *Eldred v. Ashcroft*. In an attempt to encourage his teenage daughters to read and become more interested in classic literature, Eric Eldred began providing the text of classic literature that is in the public domain on the internet. Eldred also provided additional material of interest, such as timelines, illustrations, and biographies of various authors. Eventually his effort to encourage classic literature, Eldritch Press, began to include nonfiction works as well. Eldred's project received praise and recognition from the national Endowment for the Humanities, the Nathaniel Hawthorne Society, and the William Dean Howells Society. The Sonny Bono Act was then passed and hindered Eldred from putting specific version of a collection of Robert Frost poems on his site since the coverage had been extended by 20 years.[78]

Enraged Eldred began gaining support for his cause and eventually got the attention of Lawrence Lessig, professor of law then at Harvard University, now at Stanford University. Lessig helped Eldred bring a lawsuit challenging the Sonny Bono Act and included nine other plaintiffs in addition to Eldred. The lawsuit was filed in federal district court in the District of Columbia, and challenged the act on three grounds: (1) that it violated the First Amendment right to free speech; (2) that the extension to cover works retrospectively was unconstitutional because

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[77] Ibid

[78] William Patry, *Copyright Law and Practice*, (The Bureau of National Affairs, Inc., 2000).

it violated both the terms "limited times" and "to the author" in Article 1, section 8 of the U.S. Constitution; and (3) that it violated the public trust doctrine.

The district court granted summary judgment to the government, basing its opinion on the documents filed by the parties. The court held that: (1) the act does not violate the First Amendment, because there is not First Amendment right to use the copyrighted works of others; (2) the retrospective extension of the act is within Congress' constitutional power, because the "limited times' period is subject to the discretion of congress, and an author may agree in advance to transfer any future benefit Congress might confer; and (3) the public trust doctrine applies only to navigable waters.[79] Eldred then appealed to the United States Court of Appeals for the District of Columbia Circuit where the decision of the district court was upheld. He then appealed to the U.S. Supreme Court. In a 7-2 decision the Court ruled the act constitutional relying heavily on the Copyright Acts of 1790, 1831, 1909, and 1976 and precedent for retroactive extensions.

Many people have heard references to the Digital Millennium Copyright Act, and many do not realize that the DMCA is not simply an amendment to one part of the Copyright Act; rather, it includes several provisions on a range of topics within copyright. The DMCA was one response to figure out how to apply copyright to the cyber world. Creating the DMCA was a very long and strenuous job, because many constituencies had very specific concerns, and those concerns often conflicted with one another. Earlier versions of the DMCA were much less pleasant to libraries and information users than the version that passed. Through the hard work of hundreds of librarians, library supporters, and library organizations, many issues of concern for libraries were addressed. Though the library community was not entirely satisfied with the

[79] Eldred v. Reno, 74 F.Supp.2d 1[D.D.C. 1999])

DMCA, it shows that library lobbyists were successful since their interests were reflected in the resulting statute.

Current Issues

The rapid growth of the internet and internet technologies provides a renewed opportunity for citizens to be heard on a wide variety of issues. However, this new sense of freedom is short lived due to the ever expanding scope of copyright laws. Continual expanding the scope of copyright laws is creating many issues in regards to free speech. By expanding copyright we are inevitably shrinking the public domain, effecting the copyright protection of future generations, hindering the rights of users, and infringing upon the freedom of speech and expression granted to us by the First Amendment of the U.S. Constitution.

One example of the consequences of copyright expansion was mentioned earlier in the discussion of *Eldred v. Reno (1999).* This case challenged the repercussions of the Sonny Bono Copyright Term Extension Act, which added an additional 20 years to the term, for a total of life plus 70 years. Since its conception, the term of copyright protection has been increasing and with that the decrease of the public domain. However it was not until the passage of the Sonny Bono Act that the public domain really took a dive for the worse. By expanding the term of copyright protection Congress in turn has limited the rights of users by limiting their access to information.

Although the Sonny Bono Act does not specifically create any conflicts associated with the internet and freedom of speech the Digital Millennium Copyright Act does. The DMCA was created in response to the ever conflicting need to apply copyright to the cyber world. Due to do to the fact that once information becomes available on the internet it becomes international within seconds the ways with which information may be stolen and misused was a main concern. In response to such concerns, the DMCA prohibits circumvention of technology that prevents

access to a work. In laymen terms, if Jane Doe wants uses a certain type of technology to control access to her Web page, in order to prevent others from accessing her page without her permission, under the DMCA, it is not explicitly illegal for anyone to try to get around that preventive technology. There is a limited exception to this rule, but it only applies to libraries and grants them the right to browse items to which they are contemplating purchasing.

Another major concern was that the DMCA would negatively affect fair use, creating what has been called an exclusive right to browse or right to read. In response, the final version of the DMCA included the anti-circumvention provision, but delayed implementing it for two years, pending a study conducted by the Librarian of Congress concerning the likelihood that users will be adversely affected in their ability to make non-infringing uses of copyright works.