Explaining Copyright

The Normative Implications of its Sociotechnical Construction

by

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Abstract:

The construction of copyright law can be causally explained by two possible types of explanation: dialectical explanations and material explanations. I argue that an adequate causal description of the copyright discourses of Western legal systems must incorporate a material explanation in order to account for many of the general and particular characteristics of the evolution of copyright. As a vast variety of contingent and interactive social and technical conditions have caused the evolution of copyright, we should expect a plausible material explanation to be multifaceted and multi-layered.

However, in addition to providing a causal sociohistorical description, a good legal explanation should also seek to include a normative account detailing the moral grounds of the law, or lack thereof. Dialectical explanations can be teleological: they can presuppose that the law is directed towards a perfect legal state and that it is essentially guided by a set of moral ideals. Material explanations, on the other hand, are essentially non-normative and do not explicitly address moral questions. But this does not entail the elimination of moral considerations from material explanations.

As I aim to show, we should not address the moral and sociohistorical elements of copyright legal discourses independently because they are causally connected: moral justifications have been rhetorically used by social actors to influence lawmaking processes, and conversely, changes in technical conditions have given rise to sociotechnical formations that enable and structure the norms of copyright. Given this, I propose that lawmakers should adjudicate and legislate from a broad and flexible standpoint. They should not attempt to merely apply old principles to new problems, but should comprehend new moral norms introduced by new conditions, and balance them against the older, more established principles enshrined in traditional intellectual property theories.
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Chapter I: Introduction

Among scholars, there are (at least) two fundamentally different methodological approaches to legal explanation – ways of explaining how or why a law exists. One method is to explain a law using moral reasoning, or by appealing to moral principles and justifications. This method is exemplified in legal philosophy and often employed in judicial decisions, litigation arguments, legislative policy rhetoric, and law school textbooks. When one gives this kind of explanation, one rarely considers the history or sociology of the law, as these are mostly thought to be irrelevant to its moral justification. Rather, this method aims to provide ahistorical reasons for laws, assuming that such reasons are there to be given. In contrast, another method of legal explanation is one that relies primarily on historical considerations. More precisely, it aims to describe the causes of the development of a legal discourse in terms of a historical narrative shaped by social, political, technological and economic interaction.

One might suppose that these two explanatory methods are theoretically compatible because they deal with different subject matter. The former is a normative method that aims to explain why a law should or should not be endorsed. The latter is a descriptive method that aims to explain how a law has developed in a particular legal context. However, I am not sure the distinction is so clear.

In the process of developing a legal theory, a proponent of the former method might also explicitly or implicitly provide a parallel causal explanation of a legal discourse, and thereby slip into description. For instance, she might think that lawmakers of legitimate legal discourses tend to be guided by natural moral principles or systemic procedural teleologies. But with regards to copyright law, this sort of causal explanation
is inaccurate. Although the copyright discourse has played out in pivotal legal and moral disputes over the appropriate conceptual structure and scope of copyright law, these normative disputes have often been dominated by powerful political actors responding to changes in their technological and socioeconomic environments. Rather than independently guiding the lawmaking process, traditional normative intellectual property theories have been rhetorically and sometimes disingenuously manipulated by social actors aiming to skew the moral debate, and the lawmaking process, for their own ends. In light of such considerations, this dissertation will argue that it is implausible to reduce the history of copyright to a teleological dialectic. Rather, the most appropriate causal explanation seems to be that copyright law has unfolded as it has because of a confluence of social, technical and economic forces.

Still, this does not yet erode the suggested normative-descriptive distinction between the two kinds of explanation. Even if one were to accept a material causal story of the copyright discourse, one might still contend that it bears no relation to our consideration of its a priori moral justifications. Just because the law has been shaped by powerful actors with reactionary agendas, this does not entail that it is unjust.

I admit that it might be perfectly acceptable to ground some general legal norms in abstract, universal moral norms. For instance, one could plausibly justify anti-slavery laws by appealing to principles of autonomy and equality. The human rights activist might claim that regardless of the society or circumstances, slavery practices are in principle prohibited absolutely. Even if the development of a morally obligatory law was causally formed by its material conditions (i.e. if the abolishment of slavery in a given legal system was caused by a sequence of socioeconomic and political factors, instead of
the legal recognition of moral hypocrisy), this is irrelevant to its moral grounds. However, for other laws we may not be able to spell out this kind of universal justification. Some laws are specifically designed to deal with unanticipated social, economic or technological changes, but are still morally grounded. Laws against drunk driving have not and should not have been legislated for all contexts and all times, because there are other possible contexts or times in which drunk driving would not be a social problem requiring legislation. Rather, drunk driving laws have and should have been legislated in response to a combination of contingent developments, such as: increases in the speed, power and proliferation of the automobile, improvements in road conditions that allow for faster driving, and the increasing urbanization of our post-industrial society, all of which contribute to more possibilities for injurious or fatal car accidents. If automobiles had never run faster than 30 km/h and were only ever driven in rural areas, harsh drunk driving penalties would not really make much sense. But, as things stand, these penalties are justified because of the extensive harm now caused by the social problem of drunk driving, which has been made possible by a set of material conditions. Thus, some laws may be rationally justifiable, even morally obligatory, but are nonetheless grounded *a posteriori*. They cannot be justified from the armchair.

As mentioned, material causal explanations reject the idea of legal teleology; they do not seek to depend on the guidance of *a priori* moral principles in order to explain legal changes. But this does not entail that material explanations are disconnected from questions of moral legitimacy. In the case of copyright, I would argue to the contrary that the general moral norms that formally underlie its normative structure are causally attributable to *a posteriori* material conditions. In particular, media technologies (the
printing press and the Internet) have enabled and restructured the general moral norms of
Intellectual property theory (as outlined in Chapter III). And insofar as social actors have
rhetorically adopted them, interpretations of these norms have shaped subsequent legal
and social configurations. Accordingly, it is problematic to attempt to either morally
judge copyright law or explain its material history without first understanding the causal
relationship between material configurations and moral norms. The moral theory is too
entangled with the history of copyright, and too central to its future, to be analyzed
independently.

It is perhaps trivial to claim that legal norms should be adjusted to fit changing
material circumstances. This triviality is not the crux of my argument. The crux is that
new kinds of moral norms have arisen from material conditions, which lawmakers should
aim to include in their deliberations. As such, the law may need to consider new
approaches that can encompass these norms instead of relying on the static principles
enshrined in traditional intellectual property theories. In suggesting that traditional
justifications of copyright are insufficient, I merely echo numerous contemporary authors
who advocate a significant reform of copyright law.

To clarify my theoretical claims, I do not seek to show that moral norms do not
have an effect on the copyright discourse. If this were true, then legal reform in light of
new moral norms would be impossible. Nor do I ally myself with strict deterministic
descriptions of history; even though I retrospectively propose a material causal story of
copyright, this does not entail that there is no room for a notion of freedom, or for
alternatives to the status quo. To the contrary, I seek to show that: (1) the moral norms
relevant to copyright can shape and be shaped by material configurations, and thus should
be integrated with the material explanation of copyright; and, (2) social actors who sometimes employ moral rhetoric for their own purposes can propel the development of copyright law in potentially immoral directions, thus making just legal reforms in light of moral norms all the more difficult, but all the more important.
Chapter II: Material Explanations

What is a material explanation? Why is a material explanation the best causal explanation of the copyright discourse? This chapter aims to answer these questions by clarifying and specifying a theoretical account of the causal relationship between various material phenomena and the construction of copyright law. This mainly involves an investigation of the capacity and the respects in which material phenomena interact with copyright law. But to satisfy certain conceptual concerns, we should first qualify the ways in which I am employing certain loaded notions.

For some philosophers, my (perhaps somewhat casual) use of the terms ‘cause’ and ‘causal’ throughout this thesis might provoke controversy. Some may challenge my failure to distinguish causes from enabling conditions – or conditions that create sets of possibilities. But I contend that a technical distinction between a cause and a condition is unnecessary, at least in the context of this inquiry. Although this may not accord with some philosophical analyses of the semantics of causality, in ordinary causal descriptions of sequences of sociohistorical events, we do not and cannot always discriminate between necessary enabling conditions and causal factors. Indeed, if historical events are typically caused by confluences of interacting and layered social, economic and technological forces, then it might be difficult to identify very many sociohistorical causes that are not functionally equivalent to enabling conditions. For instance, the establishment of defensive pacts among allied nations in the late 19th and early 20th century was a necessary enabling condition of WWI: these pacts were in all likelihood necessary for the instigation of a world (or at least pan-European) war. However, their existence alone would not have instigated the war without the concurrent strains on various political
relationships, and the indeterminate actions of particular social actors (such as the famous instigating action of Gavrilo Princip). But even if these defensive pacts were not a sufficient cause of WWI, it would not be a stretch to suggest that they were in some sense a cause or a causal factor. Thus, this thesis will proceed under the assumption that it is acceptable to use the terms ‘necessary enabling condition’ and ‘causal factor’ synonymously.¹

That said, the next task is to identify essential differences between so-called material and dialectical causal legal explanations. The methodological distinction I am making here (for heuristic purposes) has roots in the disagreement between Hegel and Marx over the locus of sociohistorical change. But we must be careful to avoid confusion; Marx’s material explanation of sociohistorical change is also described as ‘dialectical’. So, terminological clarification is required.

By the term ‘dialectical explanation’, I mean to refer to causal explanations of legal evolution that are at least one of the following: (a) exclusively idealist, (b) teleological and/or (c) internalist. Idealist explanations posit that the evolution of a legal discourse is (exclusively or non-exclusively) caused by the discursive interplay of ideas, concepts, principles and/or rules, rather than changes in non-discursive material arrangements like technological configurations or economic relations. Teleological explanations posit that the law is driven towards a preordained ideal moral state: for

¹ Towards the end of this chapter, I argue that certain technical configurations were necessary enabling conditions preceding the rise of fundamental normative concerns in the legal discourse surrounding copyright. These technical configurations are not sufficient or independent causes. To the contrary, it is the contingent responses of social (including legal) actors to these technical possibilities that have immediately preceded the institution of the norms of copyright in legal principles and precedents. Under different environmental circumstances, or with different actors involved, the norms of copyright might have been differently formulated in law. But for the purposes of sociohistorical explanation, I maintain that it is unproblematic to claim that certain technical configurations are necessary enabling conditions for the development of copyright norms, and thus are partially causally responsible for them.
instance, because of an intrinsic, directing procedural mechanism. Internalist explanations posit that legal practices are causally autonomous from other social practices: that the decisions of lawmakers are influenced only by the particular facts of the case (which are admittedly external to but necessary for the process), legal rules and procedures, and/or past legislative and judicial decisions. For internalist accounts, all other considerations are deemed irrelevant.

These criteria are neither necessarily exclusive of each other nor necessarily co-dependent (though it is hard, perhaps impossible, to conceive of some combinations – an internalist, non-exclusively idealist explanation, for instance), and there is a diversity of legal theories that may explicitly or implicitly satisfy one, two or all three of them. For instance, Hegel’s view of human law as a natural and particular manifestation of a dynamic universal social consciousness is evidently both exclusively idealist and teleological, though perhaps not internalist (Hegel, 1807, Chapter VI; 466-469; 473-474). From the other side of the philosophical spectrum, Ronald Dworkin’s ‘Interpretivist’ theory of law posits that the legal decisions of lawmakers are informed by several considerations: contingent facts of the case, institutional facts (the relevant preconditions intrinsic to institutional procedures) and moral principles (Dworkin, 1986). According to Dworkin, law is constructed by judges who rationally deliberate on these different sorts of considerations and then explicitly articulate interpretations that aim to be the most ‘fitting’ (closest to the ideal) for the case in particular, and for the legal system in general, in accordance with the body of law as a whole, and in some cases, with external moral principles. As such, insofar as Dworkin does not allow for the significant influences of technical configurations or economic relations on legal processes, his account seems to
be implicitly exclusively idealist. It also seems implicitly teleological – for if in fact lawmakers successively interpret the law in accordance with Dworkin’s method, then it seems inevitable that, standing on the shoulders of forbears, their interpretations would progress towards more ideal, contextually fitting interpretations. Along with Dworkin, Natural Law theories (Finnis, 2001) are exclusively idealist and teleological insofar as they suggest that legal actors are solely engaged in a progressive practice of matching legal norms to *a priori* natural moral norms².

It seems, then, that there are a variety of legal theories that fit one or more of the proposed criteria for the dialectical explanation. However, I do not seek to contest any specific theories or positions in the philosophy of law, or claim definitively that any specific theory fulfills certain criteria. I have mentioned these examples merely for the sake of contrast. I only mean to clarify my theoretical position, which is that the legal discourse of copyright is non-dialectical because it is: (a) not exclusively caused by the discursive interplay of ideas, concepts, principles and/or rules; (b) non-teleological; and, (c) influenced by factors external to the legal process (besides the facts of particular cases). These are the criteria for the converse ‘material explanation’ of law, which I hope to show is the correct explanation for the case in question.

Sponsors of the material explanation *qua* general legal explanation putatively include legal realists and critical legal theorists³. However, I do not seek to secure

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²Although H.L.A. Hart’s legal positivism might in fact satisfy the ‘internalist’ criterion, I have refrained from including a categorization of legal positivism in my examples because there is some controversy as to whether or not legal positivism is compatible with legal realism. As such, it is not clear whether or not it should be lumped in with dialectical or material explanations of the law, or neither. For a discussion of this controversy and of legal realism in general, see: Leiter, Brian “Legal Realism and Legal Positivism Reconsidered” *Ethics*, Vol. 111, No. 2. (Jan. 2001) 278-301. Also see Hart’s influential critique of legal realism in *The Concept of Law*, Clarendon Press (1961).

myself within one of these traditions, nor do I seek to make claims about the nature of legal evolution in general (though certain general propositions on the nature of law could potentially be extrapolated from this account). Rather, I will limit the thesis to an analysis of the causal evolution of copyright, which in turn will inform a consideration of the ethics of copyright. With regards to the causal story of copyright, I will demonstrate that copyright law is partially caused by external and non-idealist factors, and that it is non-teleological, for two reasons: (a) copyright’s general normative structure depends on technologies (i.e. the printing press) and their socioeconomic and sociocultural consequences; and, (b) the particularities of copyright have developed haphazardly and indeterminately due to the contingent influences of a variety of social actors.

In the Introduction, I briefly discussed the role of ‘material conditions’ and ‘material configurations’ in relation to copyright. But these terms could potentially refer to any number of objects, states-of-affairs or relations. I will now try to narrow the field and specify the material phenomena that systematically (non-accidentally) have a significant effect on the formation of copyright law. So the question is, can we talk about the material causes of copyright systematically? Surely the influences of material phenomena on this legal discourse are not entirely random.

The Technological Genesis of a Moral Discourse

Simply put, the normative framework of copyright law would not have been conceived of without one of the earliest media technologies: the printing press. Prior to the printing press, of course, documents were painstakingly copied by hand. Hand-written, scribal copies of literary works were considerably different from later printed...
copies. Scribal copies took more time, effort and expense to produce. Furthermore, scribal copies were not replicates of an original work in the strict sense: different scribes were more or less skilled at reproducing a previous work, writing styles could differ, and mistakes could be made. Thus, scribal copies were more likely to be less in number and distribution, more expensive, and more variable in presentation and content than printed copies. (Eisenstein, 1983, 43-56)

However, Elizabeth Eisenstein cautions us not to overstate the role of the printing press as an agent of change. She criticizes some historians for exaggerating or failing to be precise about exactly how they think the printing press has had an impact “on every field of human enterprise – political, economic, philosophical and so forth” (Eisenstein, 5). For instance, Eisenstein argues it is specious or at best inexact to claim that the printing press radically increased the proliferation of new forms of knowledge among the general European populace. The printing press certainly increased the number of literary items being distributed, but away from the academic centres of Europe, these items usually consisted of bibles, catechisms, calendars and a smattering of deceptive esoteric classical writings. As a result, “many medieval world pictures were duplicated more rapidly during the first century of printing than they had been during the so-called Middle Ages” (Eisenstein, 50). Furthermore, even if the printing press was a cause of some social developments, these developments did not occur immediately; Gutenberg’s displaying of his invention to the world was not exactly a pivotal event. Following the incorporation of printing press technology into the mainstream literary production trade, which occurred many years and models after Gutenberg developed the first machine, there was a long period of widespread hybrid scribal-print culture. There were examples
of scribes copying printed documents and vice versa, and print culture initially made use of scribal production methods before it developed its own technically superior methods. Print culture was initially an offshoot rather than a replacement of scribal culture – an offshoot that was met with both hostility and excitement in different quarters (Eisenstein, 20-21).

Nonetheless, despite these details, Eisenstein agrees that the printing press eventually made both scribal methods and scribal culture obsolete. And as it became more sophisticated and widespread, the printing press caused several major social and economic changes with regards to the distribution of information: it made books less expensive, more numerous in distribution and virtually standardized. More significantly for our purposes, these changes introduced several new moral considerations that would soon instigate the normative discourse of copyright. Firstly, established authority figures became worried about the rapid spread of revolutionary and controversial ideas that might be enabled by printing press technology. Although censorship is no longer deemed a legitimate theoretical reason for copyright, Mark Rose reminds us that soon after the introduction and spread of printing press technologies in Britain, concern over censorship justified and motivated the introduction of publishing licenses, which prefigured the first copyright laws (Rose, 1993, 9-16). These licenses allowed the British sovereign to restrict printing licenses to publishers that could be relied upon to print amenable and compliant reading materials.

Secondly, with the ability to produce virtually identical copies of popular literary works, and a significant decrease in production costs, the economic potential for a literary producer increased exponentially. It became possible to produce large quantities of a
work for a relatively minor cost, and new kinds of printing houses were established to
exploit this new potential (Eisenstein 24-25). As with other new industrial markets, left
to its own devices, the printing market naturally became competitive in ways that its
predecessor (the scribal market) could not. A printing house could now undercut its
competition, and still be successful, by increasing its distribution and lowering the margin
of profit on each work. Of course, the printing houses often worried that this would
result in a race-to-the-bottom scenario, and ultimately, less profits for all. Thus, unlike
the scribes, established printers came to see an economic (utilitarian) need for regulating
literary production (Rose, Chapter III).

Thirdly, as per the first chapter of Mark Rose’s *Authors and Owners*, the
standardization of literary works generated by the printing press had an effect on how
both authors and the public came to view the relationship between the author and his
work. In modern English literature textbooks, medieval poems are presented as having
an ‘anonymous’ author, but this is a misnomer. As Eisenstein tells us (78-89), most of
what was written down by medieval scribes prior to the printing press originated in oral
modes of communication (narratives, rhyming patterns, songs), which were the primary
means of sharing information. Oral modes of communication are dynamic: they change
from person to person and generation to generation. Thus, a medieval ballad may have a
score of authors who have contributed to it over the years. Scribal culture reflected the
oral culture in the sense that each copy produced was distinctive – more or less
intentionally or unintentionally modified – and its origin uncertain. Moreover, even if
there were an identifiable individual creator of a particular poetic verse, that creator
would rarely claim ownership over it. More likely, if it was a particularly good verse, he
would profess that he was merely an instrument of a literary muse or God in its creation. Even the bible had a “complex multiplicity of authorship... [and as a result,] veneration for the wisdom of the ages was probably modified as ancient sages were retrospectively cast in the role of individual authors – prone to human error and probably plagiarists as well” (Eisenstein, 86). With the printing press, though, as individuals began to frequently tag the copies of their works with names, individual authors were more explicitly tied to literary works. And as certain works became popular and more widely circulated, living authors became popular cultural icons by association. Of course, specific literary works were written by and attributable to certain individuals since long before the printing press. But the printing press provided the initial technological foundations for the notion of the romantic author, the individual creative genius who creates her own work independently – a notion that became fundamental to the copyright discourse.

Evidently, the printing press played some sort of causal role in the initial development of copyright. As the cause of a fundamental change in cultural production, it introduced new moral considerations related to censorship, economics and authorship, two of which would later become central to theoretical and popular moral discourses on copyright. Furthermore, as indicated in the fourth chapter of this thesis, subsequent media technologies seem to have stimulated the expansion of copyright to new domains. Most Western legal systems have been more or less quick to include subsequent media technologies that achieve major commercial success (photography, motion pictures, recorded music) within the purview of copyright. Copyright regulates tangible, replicable media content; thus, it is dependent on the introduction and proliferation of media technologies that channel information into tangible, replicable forms. But what
does this mean, causally? In what capacity and to what extent does media technology cause copyright? Should we go so far as to say that it determines copyright in some sense, perhaps because it determines the socioeconomic arrangements that encourage the extension of copyright to new media?

**Technological Determinism and its Problems**

In his Preface to *A Contribution to the Critique of Political Economy*, Karl Marx famously depicts his view of the relationship between material conditions and social institutions as a base-superstructure relationship. According to this model, economic relationships, namely, the “totality of… relations of production” (Marx, 1859) are prior to legal systems and essentially determine the form that legal systems take. As the economic base changes, so do the social superstructures. Thus, insofar as it suggests that all changes in legal discourses are reducible to, or at least dependent on, economic changes, Marx’s view is a radical departure from the aforementioned dialectical explanation of the evolution of law. Yet the precise ordering of this sociological model is not altogether apparent.

Some commentators have interpreted Marx as a so-called technological determinist (Heilbroner, 1967). According to this interpretation, the specific technical configurations of society (i.e. the technologies that constitute its industries, monetary system, transportation system, etc.) constitute its ‘basic’ structure, and everything else – including class relations – constitutes its social superstructure(s). Other authors deny this characterization, claiming that Marx “portrays technology more as an enabling factor than as an original cause, autonomous force, or determining agent.” (Bimber, 1994, 95) Nonetheless, given the seemingly ‘basic’ nature of media technologies relative to
copyright norms – as exemplified in the case of the printing press – it might be useful to
explore whether or not technological determinism would supply us with a good method
for explaining how copyright is materially constructed.

Critics have responded to the thesis of technological determinism with various
skeptical queries like: (1) what is the mechanism through which this causal process
occurs? (2) How do we tell whether or when technological change is determining social
change and not vice versa? And, (3) to what extent and in what respects does
technological change determine social change (how strong a ‘determinism’ do we have in
mind)? Several defenders of the thesis have answered these sorts of questions differently
– one of the most important and influential being Robert Heilbroner, a philosopher who
gave his initial account in 1967, which he later ‘revisited’ in 1997.

As a self-styled Marxian, Heilbroner’s initial answer to question (1) is economic
development. According to this story, in medieval society pre-industrial artifacts
functioned collectively to form a certain mode of production – feudalism – and with the
industrial revolution, new technologies functioned collectively to form a more complex
mode of production – capitalism. For Heilbroner, as technologies change, the structures
of economic relations change, and in turn, the structures of social relations change. This
is especially evident in ‘high capitalist’ societies⁴, in which laissez-faire governmental
policies allow for an unfettered market, fueling commodity competition and
consequently, technological innovation. Combined with the innovation possibilities
opened up by scientific knowledge, high capitalism engenders a process of irrepressible

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⁴ On one reading, in his 1997 article, Heilbroner seems to want to replace his original systematic model of
history with something much more modest. As he is unsure whether technology drives social change in
societies of ‘low socialism’, which may no longer subscribe to “capitalist-like motivations” (Heilbroner,
1997, 77), he refocuses his thesis of technological determinism squarely on post-industrial societies of
‘high capitalism’. This generates some theoretical confusion, which he unfortunately does not clarify.
technological development in which consumer technologies naturally coalesce into economic networks (Heilbroner, 1997).

Using this framework as a guide, one might claim that economies produced by new media technologies have systematically formed social networks that demand new kinds of legislation. After all, changes in copyright law seem to consistently track changes in media technology. As detailed in the fourth chapter, the invention and development of motion picture technology provided the technical potential for a new commercial industry. In turn, social actors who wanted to exploit this new potential actively advocated for copyright extensions, and ended up being partially responsible for the 1909 and 1912 amendments to U.S. copyright legislation. Based on the recurrence of stories such as these, we might be tempted to think that the ‘superstructure’ of copyright law is ‘based’ in media technology.

But there are several challenges that must be faced by this putatively Marxian causal story with regards to how it answers questions (2) and (3) above. Firstly, it is not enough to show that technological change ‘tracks’ social change. The aim of technological determinism is to isolate technology as the significant formative cause. Thus, it must be shown that it is suitable to place technology in an uncaused causal role. Heilbroner posits that technology develops autonomously – that each and every artifact exists as a link in some sort of sequential and natural chain of development. He thinks that there are several points that count as evidence for this position: (a) the same technologies have often been developed simultaneously by independent developers, suggesting that new technologies naturally result from their predecessors; (b) there are rarely technological ‘leaps’, and more often small developmental steps; and, (c) future
technologies can be predicted with reasonable accuracy, though admittedly not with precision (Heilbroner, 1967, 399-400).

However, we might question the truth, validity and relevance of this ‘evidence’. The accuracy of futurology is, I think, poorer than Heilbroner would have us believe. And even if it is empirically true that similar artifacts are invented simultaneously and developed in small steps, this does not necessarily entail that technological development is not influenced by social factors. Steady and uniform technological development could be explained by the dominance of a common mode or style of innovation among developers, the broad effects of social mores on market demand, the sharing of ideas among inventors and/or the influence of regulatory measures and incentive schemes. On the other hand, simultaneous development might simply be a retrospective story we tell. In hindsight, if they fill similar niches or are the subject of an IP lawsuit (in which the plaintiff tries to persuade the court and the public that her competitor has stolen her idea) some technologies can look more alike than they in fact are, technically speaking.

In contrast to Heilbroner, other authors convincingly demonstrate the social contingency of technological development. Pinch and Bijker show how a development process can be thoroughly socially constructed. Since a technical problem “is defined as such only when there is a social group for which it constitutes a ‘problem’” (Pinch and Bijker, 1986, 30), technological development, which is essentially aimed at overcoming identified problems, is socially directed accordingly. In their paradigm example of early bicycle development and production, Pinch and Bijker recall how several distinct problems were identified by and for distinct consumer groups. One problem was that the standard high Wheeler models required a certain manner of dress deemed inappropriate
for women (trousers). Other perceived problems had to do with the safety and speed of available bicycles, issues of concern for select social groups. Pinch and Bijker show how technological fixes were developed in response to these perceived problems, and how some of these fixes were accepted while others were not.

Acceptance takes time, and occurs through a process of technical ‘stabilization’ – a more or less gradual settlement among producers on a particular product model. For Pinch and Bijker, acceptance is the only sociologically significant measure of technical success, and stabilization the most accurate description of the developmental process. Thus they contend that “the ‘invention’ of the safety bicycle was not an isolated event (1884), but a nineteen-year process (1879-98)” (Pinch and Bijker, 39). To illustrate this, consider the early development of the air tire. Originally conceived of as a solution for the vibration problem for low-wheeled safety bicycles, the air tire was seen as aesthetically ridiculous, and was not necessary for the sporty high-wheelers of the late 1800s. However, once the air tires of the low-wheeled bicycle were shown to be superior in speed to their high-wheeled counterparts, the low-wheeled safety bicycle finally stabilized as the accepted bicycle model for both groups, and over time, public opinion on the aesthetics of the air tire changed (Pinch and Bijker, 28-46).

Pinch and Bijker suggest that the tendency of historians to focus on successful technologies might make us imagine that technological development occurs in an autonomous, linear fashion. But in fact, the success of a technology is dependent on its stabilization and acceptance. There are many examples of prototypes that could have been successful and influential under different social circumstances, which in reality became failures that remain undeveloped.
Finally, even if we were to reject Pinch and Bijker’s argument and contend rather that technological change is an autonomous cause of social change, this still would not entail that technology determines society in a strict sense. As Bruce Bimber points out, in analytic philosophy, determinism has traditionally been cast in definite nomological terms (Bimber, 83). Peter Van Inwagen, for instance, defines metaphysical causal determinism as the thesis that, given the laws of nature and the current or past state of the physical world in descriptive totality, there is only one possible future world⁵.

Analogously, a strict technological determinism would be the thesis that given the laws of the technology-society relationship and the current state of society, there is only one possible future society. This kind of determinism would leave no room for contingency.

Even Heilbroner does not want to take his theory this far. Though he thinks that technological determinism “must reveal a connection between ‘machinery’ and ‘history’ that displays lawlike properties” (Heilbroner, 1997, 70), he purports to endorse a ‘soft’ determinism, claiming that “the general level of technology may follow an independently determined sequential path, but its areas of application certainly reflect social influences.” (Heilbroner, 1967, 402). He stresses that he does not mean to challenge the freedom of individual choices, which can collectively affect the social use of technology. No abstract causal explanation of social change can give exact explanations or be completely accurate with its predictions (though perhaps this is not because such an explanation is in principle impossible, but rather because epistemic limitations necessitate explanatory imprecision). However, despite the micro-level contingency of individual choice, Heilbroner maintains that macro-level social changes are generally explained by

⁵ For a thorough account of this definition see: Van Inwagen, Peter. An Essay on Free Will. Oxford University Press (1983)
economic changes, and economic changes are generally explained by technological
changes. The question remains, in light of all that has been said, is this view still
coherent? It seems clear that we must disagree with Heilbroner’s contention that
technology follows an ‘independently determined sequential path’ and recognize that it is
heavily influenced by social factors, but does this concession mean that we must give up
technological determinism as a methodological strategy altogether?

Complicating the Technology-Society Relationship

Leading sociological theories on the relationship between society and technology,
such as social constructivism (endorsed by Pinch and Bijker) and actor-network theory,
typically contest sociological explanations that purport to reify the technological grounds
of society. As I have already alluded to, for social constructivists, technology is a
manifestation of social action; a technology cannot be explained apart from its often
obfuscated social source and use. On the other hand, actor-network theorists agree with
the social constructivist criticism of technological determinism, but think that the social
constructivist model oversimplifies the issue by dichotomizing society and technology.
For actor-network theorists like Bruno Latour and Michel Callon, sociological analyses
falter when they divide human and non-human entities into different categories on
account of a subject-object distinction. For them, both humans and non-humans are
actors that build and constitute networks when juxtaposed (as actors always are). Thus,
the subjects of sociological analysis are best understood as heterogeneous sociotechnical
networks, which are composed of sets of human and non-human actors (Sismondo, 2004,
Chapter VI and VII).
In “Pragmatogonies” (1994), Bruno Latour demonstrates how one could genealogically trace the causal story behind a sociotechnical phenomenon back through multiple layers of ‘technology’ and ‘society’. In so doing, he hopes to show that both technologies and social groups/individuals are interacting causal agents situated within layered sociotechnical contexts. For example, consider the historical entanglement of the social and the technical as they apply to modern institutions. A contemporary corporation is a social network that is organized around several technical networks (telecommunications; aeronautical transportation). These networks are in turn organized around previous social networks (the demographics of 20th century urbanization) that preceded their implementation. A few layers prior we get to the industrial revolution – consisting of the introduction of a new mechanistic technical and commercial order – which once again was preceded by a social network – the organized rationalization of scientific and technological research, development and production. Latour goes so far as to trace the escalating layers of sociotechnical complexity back in time to the (pre-human) origins of ‘society’ when humans first became tool-users, thereby materializing and solidifying early social interactions (Latour, 803-805).

The actor-network approach taken up by Latour has broad appeal. It firmly repudiates the idea that technological development is autonomous, and for good reason, yet it recognizes that technologies can be actors that are not just means, but also sources of social manipulation. They are “mediating mediators” (Latour, 794). Still, there remains an ambiguity in his account with regards to the respects in which he thinks we should unify the notions of ‘society’ and ‘technology’. Latour frequently suggests that layers of technologies and social organizations are not only historically and causally
indebted to previous layers, but imply and use both social and technical features in all of their manifestations. In some places, this leads him to condemn the very idea of distinguishing society from technology (Latour, 795; 805-806). Nonetheless, his genealogy relies on him maintaining a fragile conceptual distinction between these two loaded, interconnected concepts. His analysis would not work if we could not distinguish the prominent technical features of layers from their social counterparts.

Commonsensically, we can tell the difference between a non-human technology and a human social entity. Just because they are causally interconnected, this does not mean they are conceptually indistinguishable. Thus, in order to read Latour in the best light, we should view technology and society as being thoroughly and intimately entangled, but conceptually distinct. Sociotechnology may function as a ‘seamless web’, but the features of this web are multifarious and conceptually classifiable, even as they are contextually situated. If, on the other hand, they were indistinguishable, causal relations between particular entities could not be revealed or disentangled by systematic sociological analyses, and the actor-network methodology would be explanatorily unsatisfying.

Applying Latour’s framework to the main inquiry, we can stipulate the following theoretical characteristics: media technology is a prior, necessary cause of copyright, existing as and acting from a series of technical layers. These layers vary in complexity – ranging from an early print layer, to a recorded audiovisual layer, to a digital layer – but they can be grouped together as a functional type, the manifestations of which enable more complex layers of socioeconomic arrangements and norms, which in turn inform the actions of legal actors. Yet, even as they become enablers, media technologies are
adjusted and transformed by the actors of the markets they make possible. A successful media technology becomes a tool for profit that can be manipulated by social actors. Thus, it becomes part of a sociotechnical network, which includes producers, consumers and copyright regimes.

**Limited Methodological Determinism**

In “Technological Determinism is Dead; Long Live Technological Determinism” (2008), Sally Wyatt gives an account of different kinds of technological determinism, particularly contrasting ‘descriptive’ and ‘methodological’ varieties. The descriptive kind attempts to give a complete causal description of social change, leading critics like Bimber to berate it for reducing social change to a systematic technological evolution. As we have seen, technological reductionism is implausible. However, if technological determinism is conceived of not as an ontological description, but rather as merely the most appropriate and pragmatic methodological approach for analyzing a specific problem, it becomes more credible. Moreover, Robert Heilbroner’s point becomes more salient if it is taken methodologically. As Wyatt interprets him, Heilbroner merely “reminds us to start our analyses of societies, and of smaller scale social organizations, by examining the technologies available to them” (Wyatt, 175).

But, if we accept Latour’s actor-network model, why start the analysis with media technology at all? Could we not alternatively construe media technology as a social function, or perhaps dig deeper into sociotechnical genealogies in order to give more detailed explanations? Yes. In the fourth chapter, there is a discussion of a prior social ‘layer’ that informs the development of media technology and its socioeconomic and legal reactions: the capitalist normative assumption that new media should become
commodified. But despite this, the state of media technology remains a dynamic locus of agency. As we have seen with the printing press and as we will see with the Internet, different states of media technology have reconstituted cultural production and created new kinds of moral norms. As such, technological determinism offers a heuristic approach that can show how and why material conditions restructure the moral landscape of copyright. In brief, in Chapter IV and V I will seek to empirically demonstrate that the particularities of copyright law are constructed by a complex variety of layered interacting moral, social, economic and technical forces, but the technical layers of media technology are distinctive because they have enabled: (a) major potential for commercial growth; (b) new sites of cultural production; and, (c) the construction of general moral norms fundamental to the copyright discourse.

We are inevitably left with an incomplete explanation. A localized, theoretical explanation of this kind cannot hope to cover all of the relevant variables. It cannot address the myriad of conflicting material contingencies that could confound or disrupt typical social actions and responses. And it cannot account for individual choice. In the end, we must maintain that (human) actors can more-or-less decide how they want to respond, and may not respond in predictable ways. Furthermore, there are undoubtedly aspects of copyright legal practices that should be attributed to the rules and principles of legal procedures. I do not seek to deny this possibility, but merely to bracket it, as I believe that even if only some facts and norms of copyright are best explained in reference to material causes, the prescriptive import of the analysis still holds.

As a legal explanation, this account is deficient in another respect. Unlike, for instance, teleological explanations that claim that the law is and should be driven by a set
of natural law principles, the material explanation is not tied to a set of moral ideals – yet it allows for the possibility of alternative normative responses to material conditions. In the next chapter, I will argue that the material explanation should be complemented by a broad moral theory that does not merely apply old principles to new problems, but considers alternative theoretical formations of new and old moral norms in order to address new problems.
Chapter III. Intellectual Property Theory

The specific constitutions of copyright systems vary considerably. Nonetheless, the general moral norms inherent in copyright discourses seem to have remarkably similar forms. In “Theories of Intellectual Property” (2001), William Fisher groups these general justifications into four theoretical types: utilitarianism, labour theory, personality theory and social-planning theory. His outline provides a useful framework for investigating the role of intellectual property theory in the construction of copyright law.

Utilitarianism

Utilitarian intellectual property (IP) theories vary at the margins, but are unified under the presupposition that the sole or primary purpose of an intellectual property regulation system is to maximize ‘net social welfare’. Typically, the utilitarian posits that intellectual property rights (IPRs) are needed to provide incentives for innovation, which are necessary for sustaining a productive and consumptive market economy. Without IPRs, so the argument goes, producers (inventors, authors, publishers, etc.) would have less incentive to create and distribute products, and this would be detrimental to both industry and culture.

But utilitarians also recognize the need to limit the rigidity, scope and duration of intellectual property protections like copyright. This is because, as Fisher notes, IPRs have a tendency to “curtail widespread public enjoyment” (Fisher, 169) of protected creations. Indeed, throughout the history of copyright in Western courts, judges invoking a utilitarian rationale have expressed the need for balancing innovation and accessibility. For example, this balancing act comes to the forefront in debates over the degree of abstraction to be covered by copyright: debates over the optimal level of specificity at
which a new work should be considered to be infringing on an original work. On the basis of a utilitarian rationale, lawmakers might try to answer questions like: what is the optimal level of protection for musical creations? That is, should we only prohibit exact duplications of a musical piece, or should we prohibit reproductions of certain melodic motifs or chord structures?

The trend has been to interpret such problems almost entirely in economic terms; lawmakers tend to presuppose that utilitarianism demands the level of regulation most likely to promote the maximization of welfare, as defined in terms of the highest level of economic efficiency (Fisher, 177). But Fisher points out that a comprehensive articulation of the optimal level of regulation cannot be achieved even from within an economic framework. Some economists favour a strong IP system. On top of the standard innovation rationale, they advocate a strong system because it tracks consumer preferences, sends ‘refined signals’ to producers, and thereby more efficiently directs production, or (in the case of patents), because it prevents economic waste from being generated by competitive researchers who do not share information6.

But other theorists point out the problems inherent in these justifications. Firstly, comprehensive empirical evidence demonstrating the economic need for IP incentives is lacking. The studies that do exist suggest that the IP stimulation of innovation more-or-less depends on the kind of products being produced, among other factors (Fisher, 180-181). Without hard evidence to refute or support them, some commentators think that “other monetary or nonmonetary rewards – such as profits attributable to lead time,

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inventors’ opportunities to speculate in markets that will be affected by the revelation of their inventions, the prestige enjoyed by artistic and scientific innovators, academic tenure, and the love of art – would be sufficient to sustain current levels of production” (Fisher, 180) in many cases. Secondly, even if some kind of regulatory protection is deemed necessary, it is not clear that IPRs offer the optimal method of protection. Other kinds of regulatory reward systems might in some cases be better able to stimulate innovation⁷, and would not have to tolerate the market obstructions imposed by IP monopolies. Most economists would agree that an alternative system that improves accessibility without undermining incentives would be preferable. Thirdly, the ability of IPRs to improve production by sending ‘refined signals’ to producers is hardly a good enough reason to endorse a strong IP system. Fisher paraphrases Glynn Lunney’s response to this line of argument:

Scholars and lawmakers who take this road confront an additional problem: what is the set of productive activities the incentives for which we are trying to adjust?.... In virtually no field of economic activity are innovators empowered to collect the full social value of their innovations. The elementary schoolteacher who develops a new technique for teaching mathematics, the civil-rights activist who discovers a way to reduce racial tension, the physicist who finds a way to integrate our understandings of gravity and quantum mechanics – all of these confer on society benefits that vastly exceed the innovators’ incomes. Enlarging the entitlements of intellectual-property owners thus might refine the signals sent to the creators of different sorts of fiction, movies, and software concerning consumers’ preferences, but would lead to even more serious overinvestment in intellectual products as opposed to such things as education, community activism and primary research. (Fisher, 182, emphasis in original)

Lastly, Fisher discusses how many commentators think that the inefficiency of competitive independent research initiatives is not in fact solved or even mitigated by IP

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⁷ I would add, for instance, that recent studies on the effectiveness of patents as incentives for pharmaceutical research and development on neglected diseases of the developing world have indicated that alternative incentive schemes would be preferable to what is currently in place. Among other reasons, the patent regime is demonstrably ineffective and inappropriate for the developing world pharmaceutical market because the incentive function of a patent is dependent on a projected minimum level of consumer capital. Many commentators (i.e. Thomas Pogge) have suggested alternative R&D reward systems that could only improve upon the status quo. (For a recent anthology of scholarship on this topic, see: The Power of Pills: Social, Ethical and Legal Issues in Drug Development, Marketing and Pricing. Eds. Jillian Clare Cohen, Patricia Illingworth, Udo Schuklenk. Pluto Press, 2007)
regulations. In any event, this concern only seems relevant to patent law. In sum, Fisher shows just how divided economists are on this issue. Thus, even if it is confined to an economic framework, the utilitarian rationale cannot practically specify any particular level or form of IP regulation, and more precisely for our purposes, any particular level or form of copyright regulation.

James Boyle argues that especially in the contemporary era, the optimal level of regulation has been grossly overestimated and “the ironic result is that a regime which lauds and proposes to encourage the great creator may in that process actually function to take away the raw materials which future creators need to produce their little piece of innovation” (Boyle, 1997, 98-99). In his account and in the accounts of others, this overestimation is attributable to a shortsighted understanding of economic-utilitarianism, which is shared and promulgated by commercial media actors with vested interests.

In addition to frequently being shortsighted, though, interpretations of economic-utilitarianism are too narrow. A utilitarian justification of copyright could theoretically be construed in many different ways. It could incorporate both economic and non-economic norms: in light of empirical evidence, it could consider the innovation concern and balance it with other concerns having to do with power and culture. But economic-utilitarian copyright theories purport to refrain from speculating on non-economically analyzable conditions of the good life, even though the possibility of such conditions being realized could be affected and in some cases undermined (as per Chapter V) by the application of narrowly construed economic-utilitarian policies. In principle, a fleshed out utilitarian theory could work if it was honest about its range of consequences and if it
comprehended more than just economics. But then it would be essentially similar to Fisher’s last approach: social-planning theory.

**Labour Theory**

Fisher’s second type consists of theories grounded in a Lockean understanding of the relationship between labour and property. Locke, of course, famously asserted that one gains ownership over a resource that is ‘held in common’ once one has ‘mixed his labour’ with it, given the conditions that the acquisition leaves ‘as much and as good’ for others and is not wasteful. But relying on Lockean theory as a justification for any particular IP system is problematic. First, on the basis of historical scholarship it seems clear that Locke did not intend to apply his theory of property to intellectual property (Rose, 32-33; 44-47). His two conditions are clearly aimed at regulating the appropriation of rivalrous material resources, resources that are capable of being depleted and becoming scarce. (Though it is debatable whether or not IPRs can in fact fulfill Locke’s conditions, in spite of his intentions). Thus, when modern IP theorists claim to ‘rely’ on Locke, they are at best adapting or expanding on his theoretical framework for their own purposes.

Second, Fisher shows that if we examine the various reasons Locke gives for why labour generates property relations, we might think that his theory can be used to justify different IP legal prescriptions, depending on how it is construed. If we are to apply Locke’s theory to copyright, we must first identify the significant features of ‘intellectual labour’, and these are less obvious than those of material labour. Fisher contends that various features could count: “(1) time and effort…; (2) activity in which one would rather not engage…; (3) activity that results in social benefits…; and (4) creative
activity…. (Fisher, 185). Our choice here is important because the question of what counts as intellectual labour has bearing on what counts as intellectual property. As Fisher puts it, “The third [option]… suggests that we should insist, before issuing a patent or other intellectual-property right, that the discovery in question satisfy a meaningful ‘utility’ requirement…. The second would counsel against conferring legal rights on artists who love their work…. The fourth would suggest that we add to copyright law a requirement analogous to the patent doctrine of ‘nonobviousness’” (Fisher, 186).

Furthermore, assuming we hold to the well-established idea-expression distinction, which stipulates that ideas are not protectable, but expressions of those ideas in tangible media are, there is an asymmetry with regards to how labour theory treats material property versus intellectual property. According to Locke, with material property, in addition to her indefinite ownership of the fruit of her labour, the owner indefinitely owns the land upon which the fruit was grown (though not entirely – she is still subject to various jurisdictional restrictions; it has now become conventional in legal theory to think of a property right as a ‘bundle’ of rights). But this arrangement does not hold as a metaphorical description of IP law. By modern and historical standards (probably because of an appreciation of the utilitarian value of public need), an owner only acquires temporary ownership over the fruit of her intellectual labour – the expression – and she acquires no ownership over the land upon which it was grown – the ‘idea’ or the source of the expression in the ‘intellectual commons’. But if the intellectual commons cannot be justifiably appropriated and regulated, then its content requires specification, and we must make a somewhat arbitrary decision on exactly what that content is. It could legitimately include the set of all possible ideas, the totality of
the world as represented by facts or by linguistic propositions, and/or the set of cultural
artifacts and ideas that are meaningful for artistic creation (Fisher, 186). Depending on
how we construe the intellectual commons, the set of intellectual things that can be
justifiably appropriated and regulated will differ. Moreover, the length of term on patents
and copyrights appears arbitrary from the perspective of labour theory. Finally, we can
add to these difficulties the problem of proportionality – the problem of specifying what
an owner is due from derivative works, among other things. In light of all of this, it is
hard to non-arbitrarily decide on what sorts of regulations follow from an adherence to
labour theory. On this matter, “Locke gives us little guidance” (Fisher, 189).

**Personality Theory**

Fisher’s third type encompasses theories that ascribe intellectual property rights to
some aspect of the author’s personality. For personality theorists, maintaining a legal
framework of IPR contributes to the protection and nurturance of many personal interests
and attributes insofar as it generates conditions under which people can privately own
property – assuming that the personal control supplied by private ownership is a
precondition of the good life. But personal control is enabled just as well “by providing
people rights to land or shares in private corporations” (Fisher, 190). If IPRs are to be
justified just because they are necessary for personal fulfillment, then it must be the case
that certain personal needs would remain unfulfilled by an exclusively material system of
property law. Fisher admits that an IPR system could possibly be necessary in order to
satisfy individual needs for privacy, the capacity for individual self-realization, the ability
to affirm self-identity, and maybe even the ability to “express ideas of what is beautiful or
to enact beautiful wishes”\(^8\) (Fisher, 190). However, once again, he shows that the amount of disagreement over personality theory, and in particular over the conditions of personal fulfillment, makes it difficult to decide on any systematic legal solutions. For instance, there is great disagreement on whether considerations of personhood justify post-publication rights, whether IPRs are inalienable, what the conditions of fair use should be, and whether or not considerations of personhood are grounds for trade secret law or celebrity persona protections. As he puts it, “either a more fully articulated vision of human nature (that would forthrightly address such grand questions as the importance of creativity to the soul) or a conception of personhood tied more tightly to a particular culture and time seems necessary if we are to provide lawmakers guidance on the kinds of issues that beset them” (Fisher, 192).

At least with regards to copyright law, I contend that attempts to ground IPRs in human nature seem destined to failure, mainly because any attempt to specify the ‘natural’ relationship between an author and his work is subject to historical critique. As discussed elsewhere in this thesis, dominant Western perspectives on the author-work relation have undergone significant, multifarious changes. Thus, unless one wants to hold the precarious and chauvinistic position that one particular construal of the author-work relation is ontologically true for all people, times and places, regardless of the diversity of cultural (and authorial!) perspectives on the topic, it does not seem that the personhood justification of copyright can be naturalized. Regarding Fisher’s offhand suggestion that ‘a conception of personhood tied more tightly to a particular culture’ could possibly provide us with the needed grounds, I would say that the great diversity of

\(^8\) Presumably, these considerations are not intended to justify IPRs held by fictional persons like corporations.
perspectives on the author-work relation, even among contemporary theorists from (more-or-less) the same culture, indicates that even if one existed, a specified common conception of this relation for any given culture would be hard to stabilize and articulate.

With such controversy, it seems clear that, along with the others, personality theory cannot provide comprehensive legal guidance. Moreover, seeing as IPRs are simultaneously social protections and social barriers, we should worry that they can in some circumstances obstruct the flourishing of certain valuable human characteristics in the course of attempting to promote others.

Social-planning Theory

Fisher dubs his fourth type ‘social-planning theory’. Theories of this type posit that intellectual property rights “can and should be shaped so as to help foster the achievement of a just and attractive culture…. This approach is similar to utilitarianism in its teleological orientation, but dissimilar in its willingness to deploy visions of a desirable society richer than the conception of ‘social welfare’ deployed by utilitarians” (Fisher, 172). Thus, the social-planning theorist outlines a list of ideal societal characteristics and then attempts to formulate IP law in order to achieve them.

In this category, Fisher includes the theories of philosophers as diverse as Marx, Jefferson and the adherents of neo-republicanism (Fisher, 172). In doing so, he does not mean to downplay differences in theoretical content. To the contrary, he recognizes that many intelligent, rational thinkers have posited plausible but inconsistent political views on the ideal form of society, and this leads him to point out an obvious weakness in social-planning theory: its unashamed endorsement of a particular conception of the good society makes it vulnerable to liberal criticism and skepticism. How can we know that
the chosen political vision is explicitly or implicitly shared by the rest of society? And if it is not shared, how can privileging this political vision over others be just if it is imposed against the wills of a significant number of citizens? These are difficult, persistent questions for any abstract political prescription. Still, I think that they are only ruinous to one of two possible kinds of social-planning theory.

A *perfectionist* social-planning theory formulates a single, permanent conception of the features of a good society. Epitomized by Marx, this kind of theory typically includes a ‘grand narrative’ of historical change, and thus purports to be transhistorical—unmoved by historical contingency. A *historicist* social-planning theory, on the other hand, accepts that cultural, political, economic and technological transformations and revelations may affect the tenability of any comprehensive vision of the good society. As such, it formulates a vision that is subject to perpetual revision, which can respond to newly identified social problems. It is able to accommodate material changes, affirm its fallibility and recognize the limitations of its cultural and historical applicability. Its institutional configuration is made perpetually subject to reevaluation and reconstitution, thereby avoiding the liberal worry.

With superior flexibility, then, the historicist social-planning model can self-consciously affirm that its principles do not necessitate a particular legal interpretation, and so any legal decision that invokes it is transparently open to critique (as opposed to an economic-utilitarian justification, for instance, which disguises its interpretations beneath a pretense of neutrality); and it can consider and incorporate a variety of possible moral norms, which are excluded in principle by dominant theories. This kind of approach is more aligned with American Pragmatism than Marxism. Moreover, just
because she takes a modest approach, this does not mean that the historicist social-
planning theorist cannot make strong positive normative claims. In another article that
seems to take the form of a historicist social-planning model, (Fisher, 1999) Fisher argues
in detail for his own regulatory model of Internet IP law. While he advises lawmakers to
maintain certain kinds of restrictions, he suggests that the increasing development and
use of security technologies and contracts in the contemporary context makes heavy
regulation unnecessary.

In a way, all of the aforementioned IP theories involve social plans. They all have
an idea of the kind of society that IP law should aim to develop, whether it be a society
that promotes maximal social welfare or one that promotes the natural rights of creators
over their creations (derived from either labour or personality). But historicist social-
planning theory does not attempt to deduce policy from a priori fundamental principles.
Instead, in its more modest form, it self-consciously constructs a comprehensive vision of
the characteristics of a good society, which is admittedly subject to revision, and then
demonstrates possible legal avenues that can fuse together these diverse, sometimes
contradictory, characteristics through regulation. Fisher’s particular version (Fisher,
1999; Fisher, 2001) seems to incorporate normative insights of the more dominant
theories – the importance of the incentive function of IPRs; the intuition that there is an
idiosyncratic connection that authors have to their work – and suggests that these
elements need to be balanced with other considerations: (a) the need to promote a
’semiotic democracy’ (a society in which all persons are both creators and consumers of
cultural meaning); (b) the need to promote distributive justice; (c) the need to promote
vibrant and interactive communities; and, (d) the need to promote a society with a
‘cornucopia of information and ideas’ (a society in which a wealth of information is
widely accessible to both consumers and creators)\(^9\).

In recent literature, the latter group of considerations has come to the forefront.
The development of digital media and the Internet has altered the manner in which
culture is produced, and the prohibitory legal and technological mechanisms that have
been constructed in response are seen to threaten the new circumstances of cultural
expression and reception (as per Chapter V). But traditional theories are too narrow and
exclusive to contemplate values (like the value of a semiotic democracy) associated with
new media culture, or the potentially oppressive character of these new legal and
technological mechanisms. Therefore, with its ability to adapt to new circumstances,
historicist social-planning theory offers an attractive lawmaking method to judges and
legislators. It models the way in which lawmakers should consider pertinent moral norms
when making legal decisions on copyright law. As with the other theories, it is
problematic to think that social-planning theory can be used as a comprehensive
guidebook for copyright lawmakers. The perfectionist version is too presumptuous and
the historicist version too modest for either to legitimately prescribe a specific system of
IP law. Even so, in place of a comprehensive guide, the latter might offer a fresh
approach. By asking lawmakers to consider a variety of moral norms in more depth, this
method encourages them to be more creative, reflective and sensitive to contemporary
concerns, and more aware of the full extent of the practical consequences of their
decisions.

\(^9\) These are just some of the moral considerations that Fisher thinks might be relevant to IP law, which I
think are especially relevant to copyright debates over digital content (Fisher, 2001, 192-193)
Theories and Practices

One of Fisher’s notable accomplishments is to demonstrate how all of the aforementioned IP theories suffer from the same limitation. None of them *necessitate* the adoption of a particular set of laws. Thus, in practice, a legal decision on intellectual property always involves subjective interpretation. A subjective judicial interpretation is not adjudicated in contemplative isolation. It usually relies on a number of factors, including: the facts of the case, the quality of the legal arguments made, relevant precedent(s), theoretical considerations and, of course, the discretion of the judge (which is ostensibly influenced by sociocultural circumstances and personal bias). In every Western legal system, these factors are combined in numerous cases in diverse ways, leading to a vast variety of legal decisions and a patchwork structure of IP law.

But the process is not entirely random. As I hope to show, when it comes to copyright regulations, there invariably seems to be in the background a collection of social actors with invested interests and loud legal voices. These actors have varying degrees of influence, but the more powerful ones try to exploit the law, employing moral rhetoric to advance their causes. And if they are fortunate enough to get favourable legal decisions, precedents are established that incline future lawmakers to interpret legal theories accordingly. Seeing as governmental legislators draw upon both judicial advice and the political will of powerful lobbyists, they are equally if not more susceptible to the influence of these social actors.

The next chapter will show that at least with regards to the copyright discourse, instead of impartially guiding the legal discourse, dominant IP theories (utilitarianism, labour theory and personality theory) have primarily been employed by actors seeking to
inscribe their agendas into the structure of copyright law. Instead of guiding copyright teleologically, IP theories are in fact rhetorical tools that function within the material explanation of copyright. Fisher contends that even if IP theories cannot serve as comprehensive lawmaking guides, this does not mean that they lack worth. He argues rather that they are advantageous insofar as they illuminate nonobvious solutions to legal problems and stimulate legal dialogue. But because of how they are often used for certain politico-economic ends, which may or may not serve the public good, I would contend that the harm the dominant theories facilitate can sometimes outweigh the benefit.
Chapter IV: The Material History of Copyright

This chapter is inductive, and would require tremendous amounts of empirical information in order to be deemed ‘conclusive’. Thus, for the sake of brevity and the limits of epistemological possibility, the goal will be to merely flesh out a plausible historical narrative of the practical construction of copyright. I will not be able to chronicle or even summarize many of the interesting events and developments in the evolving legal discourses of Western nations; chronicles of this kind have already been written and revised by hosts of accomplished historians. Rather, I will attempt to focus on several significant episodes in the history of copyright in Britain and North America, which serve to demonstrate my argument.

The Statute of Anne and its Historical Preface

The history of Anglo-American copyright law is complex and multifarious. Nonetheless, certain historical developments can be highlighted as being especially significant. Of particular note are the historical developments leading up to the enactment of the Statute of Anne of 1710, a British law that many consider to be the founding statute of copyright law, and a standard for subsequent laws in Britain and in North America (Patterson, 1968, 180).

In the late 1600s, the long-standing practice of book licensing (briefly mentioned in Chapter II) was under fire. This practice had given the Stationer’s Company a monopoly on the production of literature, which was thought by many to be a problem both because it allowed a select group of booksellers to control pricing and distribution, thereby obstructing a competitive free market, and because it effectively provided the aristocracy and the sovereign with an instrument of censorship. Censorship was
important for the traditional ruling class because it could help control the distribution of
dangerous ideas. Allegedly, it was also important for the protection of authorial
‘propriety’, which effectively meant the preservation of the author’s reputation and the
conformity of his work to certain social norms (Rose, 18). In the late 1600s, though, the
reasoning behind licensing was being questioned in Britain by people who were also
challenging the authority of the traditional ruling class. John Locke, for one, played an
influential role in the movement to end licensing practices. In his *Memorandum*, a
document addressed to parliament, he suggested that it is absurd to think that monopolies
on the production of ancient writings functioned to preserve the propriety of ancient
authors, and therefore, problematic to continue the practice of licensing (Rose, 31-33).

When the Licensing Act of 1662 expired in 1695, the English booksellers were
desperate for a new law that would protect their established commercial interests. They
first lobbied for a renewal of the Licensing Act, but Parliament was resistant. So, for
several years, England went without restrictions on publishing. In addition to the
booksellers, some authors were also concerned by this. In particular, Daniel Defoe and
Joseph Addison began making public arguments for authorial rights. Mark Rose
highlights Defoe and Addison as significant examples because they were two of the
earliest authors in British history to represent the authorial right in terms of ‘property’
(Rose, 34-48). In order to show how new this metaphor of property was at the time, Rose
underscores the inconstancy of the authorial approach to literature by examining authorial
self-referencing. In the initial period following the development and proliferation of the
printing press industry in Britain, authors still thought of literature as being of divine or
common origin, and the author a mere instrument for its creation. But in the ensuing
centuries, the conception of the literary work was variously represented as an independent entity bearing the mark of the author’s personality, a child of the author’s blood whom he raises and molds, and finally as the author’s own property, which he has exclusive rights to sell, alter or destroy if he so wishes. (Rose, 28-30; 37-48; 57-58) As Rose notes (37), Defoe and Addison were making their appeals because they wanted to make independent incomes as authors without relying on patronage. But their success depended on them being able to control and profit from their work. The metaphor of property was clearly the most useful one for their purposes, as it allowed them to do just that. It is surely no coincidence that the metaphysical characterization of authorial ownership they ended up endorsing was also the one that best promoted their financial interests.

The booksellers observed that the arguments of Defoe and Addison could serve their interests as well. Relying on the rationale of the author’s property right, along with the argument that the absence of a copyright statute would lead to “the discouragement of learning” (Rose, 42), in 1709, the booksellers and their political allies backed the initial bill that would become the Statute of Anne. During this process, their emphasis on the importance of recovering licensing protections indicates that they “had in mind their own properties rather than any independent author’s common-law right” (Rose, 43). The introduction of copyright law would effectively reinstitute the publication protections of the Licensing Act, though it was less desirable for the booksellers because it did so on the grounds of authorial rather than royal permission, and thus it could not guarantee the preservation of their monopolies. In the end, though, the booksellers were relatively successful because in 1710 the Statute of Anne was instituted in Britain.
As with many laws, the Statute was legislated in large part because of the influence of social actors trying to find legal avenues to secure their stakes in the commercial opportunities made possible by the printing press. Seeing as the Statute was the initial standard for British copyright law, an act that would have lasting ramifications for both British and North American law, this is significant. It demonstrates that the legal construction of copyright in the English world was initially designed to look after certain commercial interests, and the conceptual construal of the literary work as a form of property was adopted and refined in law in aid of those interests.

Legal Disputes Following the Statute of Anne

With the Statute of Anne, copyright became a property right; however, the final form of the Statute contained an important caveat that distinguished copyright from other forms of property: a clause of limited term. Unlike material property, the intellectual property of literary expression was not to be owned by authors and publishers indefinitely. It seems that the legislators of the time had recognized a major problem with using the metaphor of property to explain copyright. Because of its inexhaustible supply and reproductive capacity, a salient idea might be distributed throughout the social consciousness indefinitely. It might even become a cultural icon. As a crucial part of cultural expression, it would have been difficult and problematic to regulate and commodify literary expression absolutely, especially because it would have only served to maintain and strengthen the bookselling monopolies, a consequence that many in the British parliament hoped to avoid. Nonetheless, as the limited terms on the copyright protections preserved by the Statute of Anne were reaching their expiration date in the late 1700s, the notion of the limited term itself was being repeatedly tested in court. In a
long series of legal battles – Millar v. Kinkaid, Millar v. Taylor, Tonson v. Collins, Hinton v. Donaldson, and Donaldson v. Becket – the adequacy of the limited term restriction was fiercely debated. Proponents of perpetual copyright argued that copyright was a natural authorial right derived from the common law, and thus that it applied to works unconditionally. Opponents argued that copyright was a privilege granted by the state through statutory legislation, and so its protection did not extend beyond the statutory term (Rose, 67-91).

It bears notice that all of this took place within the context of a long struggle between English and Scottish booksellers. In each of the cited cases, the prosecution consistently represented the interests of English booksellers, who hoped to establish a precedent that would legally prohibit the distribution and sale of cheap Scottish reprints of English publications no longer under statutory protection; and the defence consistently represented the interests of Scottish booksellers, who simply wanted a larger piece of the bookselling pie (Rose, 69-71). Thus, the legal conflict was rooted in a deeper commercial and cultural discord: the English booksellers resented the Scottish ‘piracy’, and the Scottish booksellers resented the English monopolies. Both sides were represented by numerous high-profile lawyers who expressed differences of opinion on the many complex legal issues at play, such as: the legitimacy of the notion of immaterial property; the appropriate balance between the freedom to access public ideas and the freedom to control private ideas; the conceptual difference between copyright and patents; and, whether there is a relevant difference between a pre-publication and post-publication authorial right. But there were no clear answers to any of these conceptual quandaries, and the judicial decisions varied a great deal (though the matter was
effectively put to rest in Donaldson v. Becket when the House of Lords ultimately ruled that copyright protections would continue to be limited in term) (Rose, 103).

Inevitably, in several of the cases, the judicial decisions reflected cultural allegiances. It is surely no coincidence that Hinton v. Donaldson, the only case adjudicated in a Scottish court, was also the only one of the mentioned cases in which the judge decisively ruled in favour of the statutory basis of copyright (Rose, 67-68). There is also evidence to suggest that at least one of the rulings was influenced by personal interactions among prominent legal personalities. The well-known rivalry between Lord Mansfield and Lord Camden quite likely influenced the final ruling of the House of Lords in Donaldson v. Becket. As told by Rose, in his address to the House, Camden made a pointed criticism of Mansfield and his view. To everyone’s surprise, Mansfield, a well-known eloquent and persuasive champion of perpetual copyright, perhaps out of pride or embarrassment, refused to respond to Camden’s personal attack. There is speculation that the final decision on perpetual copyright in Donaldson v. Becket might have gone differently if he had (Rose, 97-103).

Copyright in the American Context

Just a few years after the Donaldson v. Becket decision, copyright legislation was introduced in the United States for the first time when the Congress passed its initial Copyright Act. Several notable authors and publishers had been pushing for this statute (including a man whose name continues to be attached to the study of English spelling and grammar to this day, Noah Webster) and it finally passed in 1790. Formally speaking, it was justified primarily on a utilitarian rationale of incentive rather than on a property or natural law rationale (Vaidhyanathan, 45). In this respect, it differed from
British law. But, as in Britain, in the years following the initial Copyright Act, the legal discourse on copyright in the U.S. evolved in the way that it did because of the political jockeying of powerful players reacting to new economic and cultural developments, not because of the court’s *de facto* recognition of the importance of adhering to principle or legal consistency.

The Copyright Act provided protection for American authors, but until 1891, British copyright was not recognized under American law. As such, there was nothing to protect British works from being reprinted by American publishers. This diminished the profits of British authors and publishers, who would have otherwise received the royalties from books sold in America, and caused American works to be undersold by cheap reprints of British works. Thus, British writers, publishers and politicians were allied with American writers in their condemnation of the absence of a bilateral copyright agreement. However, prior to 1874, the price of these reprinted British books was still kept relatively high because of a collusive honour system that existed among the major American publishers known as the ‘courtesy principle’. In accordance with this principle, a publishing company would announce its intention to publish an edition of a foreign book, and the other American publishers would ‘courteously’ refrain from publishing competing editions. In 1874, though, Donnelly, Gassette and Lloyd (a company that was not “part of the eastern seaboard elite club of publishers” – the consortium adhering to the courtesy principle) published a series of reprinted foreign classics under the title of the Lakeside Library. This strategy was quickly copied by competitors who subsequently launched the Fireside Library series, the Seaside Library series, and eleven other cheap library series (Vaidhyanathan, 50-53).
These new libraries were enabled by technical conditions. Firstly, they made use of an efficient postal system. They were classified as periodicals and so they could be mailed directly to consumers through second-class mail, cutting out the retail costs of middle men (Sullivan and Schurman, 60-63). Secondly, they were enabled by new developments in printing press technologies. In the 1830s, rotary or penny presses were developed that were able to turn out low quality printed materials much faster and cheaper than other types of presses. This new technology was initially applied to news formats, and was a cause of the newspaper revolutions of the mid 1800s (Cullen, 82-84). Given the masses of literate Americans who could not afford to buy expensive books and liked short and simple stories, it is to be expected that new printing press technology would be utilized in the production of literature for American consumers.

The rise of these cheap libraries drove down the prices of both domestic and foreign literature. The result was that, “by the late 1880s, major American publishers and authors united to champion international copyright so that they could bring some stability to the publishing market” (Vaidhyanathan, 53). A notable group of American authors found themselves allied with major American publishing companies in support of the international copyright cause. And as a result of their lobbying, a bill on international copyright was heard by the Senate Committee on Patents in 1886. Due to the opposition of the newer publishing companies and a throng of unions and trade groups committed to economic protectionism, the bill failed. But Siva Vaidhyanathan tells the story of what happened next quite well:

The last part of the political machine that would eventually convince Congress to agree to international copyright was the printers’ unions in the major eastern cities. As book prices spiraled downward, squeezing profits from established firms, the newer “cheap books” publishers had to cut costs as well. Many operated in cities where the printers’ unions were weak, and most quickly abandoned unionized white men who were unwilling to print and bind books for pennies
per day. Instead, many of the cheap publishers employed nonunion women and shared and reused printing plates to set type. The printers’ unions realized that while the lack of international copyright was protecting the jobs of more American printers, the workers who filled those jobs were the wrong kind – women instead of men. By the late 1880s the unions flipped sides and joined the major publishers and authors in support of some measure of international copyright…

[a] bill was finally passed by both houses in March of 1891 and promptly was signed by President Benjamin Harrison (Viadhyanathan, 55)

If Viadhyanathan’s historical account is accurate, it seems that the passing of this very influential bill on international copyright was due to a series of economic and political changes that prompted powerful actors to join forces and put pressure on Congress to implement it.

While the normative logic of copyright was ultimately reliant on the technical conditions of print culture, at the same time, its early evolution was anything but straightforward or predictable. Copyright law was contingently developed via a haphazard series of decisions, which quite possibly could have unfolded differently under different circumstances. Essentially, these examples show that early landmark copyright cases were heavily influenced by the political jockeying of social actors trying to fend for their commercial, cultural and personal interests. But seeing as it was a debate that had no clear theoretical resolution, perhaps this is to be expected.

**Edison’s Example**

In 1894, the Kinetoscope, a personal viewing device containing a simple array of pictures simulating motion, was perfected in Thomas Edison’s lab by one of his assistants. This device was initially commercially successful, but its novelty soon wore off. Nonetheless, it marked the beginning of a major technological shift. In 1896, Edison purchased the marketing rights to a more advanced projector dubbed the Vitascope from the inventor Thomas Armat, one of several inventors who were developing early motion picture technology. The Vitascope became quite lucrative for Edison and his company,
and alongside two other major projection companies – Vitagraph and Biograph – produced the first generation of commercially available motion pictures. According to Vaidhyanathan, films released between 1895 and 1903 were almost exclusively produced on projectors from these three firms (Vaidhyanathan, 87-88). But the competition was getting stronger. When small entrepreneurs began importing European projectors or developing their own knockoffs, Edison decided to take action. He filed a number of patent lawsuits, including one against his rival Biograph in which he asserted that the Biograph projector was a patent infringement on the original Kinetoscope. The court ruled against Edison, citing differences in the mechanical operation of projectors as the deciding factor. Here, patent law proved an ineffective tool for protecting Edison’s income. Thus, he turned to copyright. Since he could not prevent competitors from using similar projectors, he hoped to prevent them from showing the same or similar movies (which at the time had rudimentary plotlines without much variation) (Vaidhyanathan, 88-91).

Initially, Edison was unsuccessful at establishing a precedent for copyrighting the motion pictures he produced. Motion pictures were not yet a medium that the state had deemed subject to copyright protection, so Edison had been registering his motion pictures as photographs. In the initial ruling of Edison v. Lubin, a motion picture was deemed unprotectable as a photographic image, simply because it is a series of pictures rather than a single picture. On appeal, the court reversed the decision, arguing that the ‘expression’ of the photograph “is what viewers interpret from it, not the particular arrangement of the silver crystals on the celluloid substrate” (Vaidhyanathan, 90). The
court thus ruled that the meaning of ‘an expression of art in a tangible medium’ needed to be flexible in order to accord with common sense and the public interest.

A few years later, however, Edison’s endeavour to apply copyright to motion pictures worked against him. In a copyright suit, Edison was forced to defend his cinematographically altered imitation of a Biograph motion picture comedy about a man who puts out an ad in the personals for a wife, finds himself faced with too many interested women, and is eventually forced into wedlock at gunpoint by a particularly aggressive bachelorette. But the court ruled in Edison’s favour once again. Judge Lanning denied Biograph’s request for an injunction against Edison’s production because although its storyline was virtually identical to the Biograph original, since the choreography and camera angles were different, it was deemed to be only a copy of an idea, not an expression (Vaidhyanathan, 91-92). In addition to exemplifying early legal interactions between media corporations, these two cases provide a glimpse of the contingency involved in judicial interpretations of the scope of copyright.

Lawsuits like these were costing Edison and Biograph a lot of money, and there were new threats on the horizon from a host of new independents. Three years later, Edison, Biograph and several other major motion picture producers forged an alliance called the Motion Picture Patents Company (MPPC) to try and undercut the competition.

As Vaidhyanathan describes it:

The trust would license the use of its patents only to each other. Eastman Kodak colluded by allowing only trust members to buy its film. The companies would use only distributors who agreed to their price schedule and excluded independent films. The theaters could show only Patents Company films on Patents Company projectors. But the most powerful weapon the Patents Company deployed was the lawsuit. It hired private investigators to weed out patent violators. (Vaidhyanathan, 92)
In response to this pressure, most of the independents migrated to California, beyond the *de facto* reach of the MPPC. ‘Pirating’ the patented motion picture technology of the MPPC, and led by none other than William Fox (the founder of the Fox Media Corporation), these independents produced a wealth of fresh and innovative creations. While the MPPC attempted to “market a uniform commodity… keeping the audiences’ expectations [and marketing costs] low” (Vaidhyanathan 93), the independents were breaking new creative ground. Despite Edison’s and the MPPC’s best efforts, Fox was able to survive, and he turned out to be a major contributor to the early development of film, following the eventual dissolution of Edison’s motion picture cartel\(^\text{10}\). But all of the legal action surrounding copyright and film, mostly initiated by Edison and his peers, was a stimulus for early 20\(^{\text{th}}\) century revisions to U.S. copyright legislation. Vaidhyanathan summarizes these revisions as follows:

In the wake of the early film copyright cases, advances in technology, and the growing popularity and profitability of narrative film, Congress set about rewriting American copyright laws…. The chief change instigated by the 1909 law was the extension of copyright from fourteen (renewable for another fourteen years) to twenty-eight years (renewable for another twenty-eight years). It also extended copyright to the mechanical reproductions of music and clarified the registration process.

The most significant change in the 1909 revision, however, was largely unexpected. The new law created a new definition of authorship: corporate authorship. By 1912, Congress acknowledged that the courts needed guidance and confidence when ruling that films were a worthy subject of traditional copyright law. So in a brief revision to the law, Congress added ‘motion picture photoplays’ to the list of protected methods of representation in the law. (Vaidhyanathan, 98-99)

In addition to formally adding ‘motion picture photoplays’ and mechanical reproductions of music (which arose from concern over the ‘piracy’ of player pianos and phonographs) to the list of copyrightable materials, these revisions strengthened copyright by making it longer in duration. But the creation of corporate authorship was probably the most notable contribution of the 1909 amendment. With corporate

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\(^{10}\) Somewhat ironically, Fox Media is now one of the loudest and most intimidating corporate advocates of stronger copyright protections.
authorship, personality theory justifications and romantic appeals to natural authorial rights no longer made much sense. With corporate authorship, the state effectively admitted that copyright is at least partially aimed at protecting the interests of corporate commercial media actors rather than authors *per se*.

**The Logic of Extension**

The story of Edison’s intellectual property exploits is just one of many that involve powerful figures pushing for the expansion of useful IP protections like patents and copyright. Along with Edison, numerous political and economic actors have pushed the envelope of litigation, hoping to get IP protections extended in various directions\(^{11}\), and in general, it seems their wishes have been answered. Following its formal inception into British law with the Statute of Anne, and its subsequent adoption by many national (and international) legal systems, copyright has undergone a massive expansion of scope. As is true for most legal discourses, this expansion has developed heterogeneously in various times, legal systems and areas. Thus, at least for the purpose of sociological analysis, the many facets of various copyright regimes should be understood as having many contextually situated, heterogeneous (though interrelated) genealogies, instead of one unified, systematic and homogeneous history (Murray and Trosow, 2007, 20-21).

That being said, several general trends can be traced throughout the evolution of copyright – trends that are palpable in their simplicity, but which, upon closer inspection, highlight potential problems.

\(^{11}\) Vaidhyanathan discusses several other early figures who tactically supported a strong copyright regime. Two examples are: Mark Twain, who campaigned enthusiastically for protections that would benefit him personally and professionally (but who also somewhat hypocritically borrowed/stole a story idea from Thomas Carlyle); and, D.W. Griffith, who cleverly utilized the corporate copyright provisions of 1909 in order to run his business. (Vaidhyanathan, 55-80; 83-87; 100-105)
One obvious trend has already been mentioned: the mere fact that copyright (and IP in general) has undergone a massive expansion. In addition to this, though, we can specify some of the common historical avenues of this expansion. Slowly but surely, on top of its initial role of prohibiting reprints, copyright has typically been extended to prohibit authors from producing works that are similar in ‘expression’ to existing protected works, and to prohibit the non-consensual production of ‘derivative works’. Of course, these expansions are codified differently in different legal systems. But regardless of format, the idea-expression dichotomy and the derivative works clause have found traction in most copyright regimes. And these extensions have inevitably introduced new legal controversies with regards to: the appropriate demarcation and application of the aforementioned idea-expression distinction, as well as the distinction between ideas and facts (which are unprotectable); and, the extent to which derivative works should be protected (a controversy captured by Robert Nozick’s famous question: ‘if I pour my can of tomato juice into the ocean, do I now own the ocean?’) (Murray and Trosow, 11; 39-47).

But for our purposes, perhaps the most significant identifiable trend in the history of copyright is its ever-increasing extension to new forms of media. Today, copyright has been extended to cover the content of almost all commercialized artistic products, including: film and video, sheet and recorded music, photography, other visual arts, certain kinds of news media, certain types of crafts, educational materials and computer code. What was once quite literally a printing right is now theoretically applicable to any original expression that can be represented in a tangible medium. And as many
contemporary commentators have pointed out, the increased diffusion and domination of copyright has had a major impact on our culture.

Returning now to the main line of inquiry, we might ask: what was the cause of this expansion? How did copyright change forms and evolve so drastically? There are two responses we might give. If we endorse a teleological dialectical explanation, we might claim that the indefinite applicative scope of copyright is the natural consequence of its inherent normative logic. While there was initially only one medium to which it was applied, copyright is about securing creative property, not just about promoting the book trade per se. It should be neutral with regards to the types of creative media it protects.

This kind of response seems to be typical of the decisions of copyright lawmakers. Although some judges were initially hesitant to accept the arguments of litigators attempting to expand the scope of copyright, most quickly came around. Following a period of unsystematic judicial responses to a flurry of cross-media copyright cases, Judge Learned Hand’s celebrated 1936 ruling in Sheldon v. Metro-Goldwyn established a theoretical base for copyright in the United States. In this case, Hand ruled that copyright should aim to cover the “very web of the authors’ dramatic expression” (Vaidhyanathan, 109). For Hand, the complex pattern of narrative elements (plot, character, setting, purpose) is what is copyrighted, not the tangible manifestation of the narrative in any particular medium. Therefore, in order to determine whether or not one work is infringing on the copyright of another, one should just determine whether the patterns expressed are substantially different. Implicit in this abstract criterion is the
notion that every sufficiently unique pattern of ideas should be considered subject to copyright protection (Vaidhyanathan, 109; 112).

However, the normative logic of indefinite copyright extension presupposes that all creative expressions that have been materialized in a tangible medium are or should be commodities. As William Fisher has shown, this presupposition is not logically demanded by any of the Intellectual property theories. (1) Labour theory posits that the fruit of one’s ‘intellectual labour’, derived from an idea of the ‘intellectual commons’, should become one’s property. But even if we accept labour theory, we must concede that one cannot non-arbitrarily pin down the meaning of ‘intellectual labour’ and the content of the ‘intellectual commons’. What one considers labour, another might call a cultural contribution; what one considers the plagiarism of an original expression, another might consider the artful use or reinterpretation of a cultural icon. That is, according to some interpretations, expressions that do not require their producers to undertake time, effort and personal expense should not be deemed copyrightable, even if they are creative; and according to some interpretations, creative expressions that have become iconic should be deemed to be part of the intellectual commons. (2) Some versions of personality theory attempt to argue that commodification is necessary for personal fulfillment. But the claim that personal fulfillment requires a comprehensive system of intellectual property is controversial. Alternative personality theorists resolutely reject the idea that the commodification of creative expression is necessary for personal fulfillment. (3) Economic versions of utilitarianism fail to even address the question of commodification. They assume that every artistic expression is a marketable product produced by an identifiable original author and then attempt to ascertain the most
efficient system of regulating intellectual ‘products’. But it is an open question which or
whether or not forms of creative expression should be rendered intellectual products in
order to fulfill a principle of utility (see Chapter III).

In practice, prior to the formal IP theories and the logic of indefinite copyright
extension, there lies a capitalistic assumption regarding the benefits of the broad
commercialization of creative expression. This assumption is not a given. As critiques
of copyright demonstrate, it is a cultural assumption that has become solidified in law.
Indigenous perspectives on creative expression often overtly deny its commodifiability,
and African American music traditions are often based on the assumption that certain
motifs, styles and songs are constitutive of a tradition of musical mimicry, parody and
adaptation (Vaidhyanathan, 12-15). Thus, perhaps the capitalist assumption should be
conceived of as a consequence of our Western liberal-capitalist culture.

This capitalist assumption does not necessitate specific legal formations; the
particularities of copyright regimes are dependent on the contingent choices of the actors
involved in their formation. But seeing as, generally speaking, the capitalistic interests of
powerful commercial media actors have throughout the history of copyright been
increasingly reinforced by copyright regimes, it seems that the capitalist assumption has
had a significant enduring effect on copyright lawmakers. I would suggest that this is
because commercial media actors are largely responsible for litigating copyright lawsuits,
prompting an ongoing series of judicial rulings on copyright extension. As investors
envision the commercial potential of new media, they seek out protections. They seek
out patents for new media technologies and copyright protections for media content. So,
commercial media actors stimulate the judicial consideration of copyright in the areas of cultural production opened up by new forms of media.

I do not mean to imply that commercial media actors control the construction of copyright law – obviously judges and legislators are the ones who directly control its implementation, and they are not always sympathetic to corporate interests. As I have already mentioned, the facts of the case, the quality of the legal arguments made, relevant precedent(s), theoretical considerations, and the discretion of the judge all contribute to the form of a judicial ruling. But simply because they have the money and power to form powerful lobbies and fund expensive lawsuits, corporations have forced the court to expand its consideration of copyright (Lessig, 2004, 3-7). Judges and politicians are continually prompted to reconsider copyright, as it applies to the new legal terrain generated by new technologies, and though their decisions have varied, over a long history of corporate litigation and lobbying, a patchwork extension of copyright law to many kinds of media has developed. Meanwhile, the capitalistic assumption regarding the commercialization of expressions has steadily become more firmly embedded in the minds of lawmakers, perhaps because it could, in combination with the rhetoric of dominant IP theories, conceptually unify and rationalize the trend of extension.
Chapter V: Power and Culture in a New Sociotechnical Reality

We can say that, as a matter of fact, copyright has been doggedly expanded in many directions by a host of interested social actors, in particular commercial media actors. But each time a new media technology becomes successful, a normative question arises: should the fruits of this technology be regulated and privatized? As cultural production is increasingly channeled through technological media, an unvarying affirmative answer to this question could have dire consequences, thus it should never be finally answered for all technical configurations. And with the rise of the Internet, this question has taken on new significance. We must ask ourselves, is it just and beneficial to thoroughly regulate this new online reality?

Powerful Actors

Edison did not have a personal relationship with motion picture technologies, conferring to him a natural right of control. He was merely a market investor who got in early. Based on his actions, he did not seem concerned with the morality of motion picture plagiarism per se. In at least one instance (mentioned above), he clearly plagiarized a competitor’s quite specific ‘idea’ for a motion picture, if not his exact expression of it. Nor did Edison seem to care for the effects of IP protections on ‘the progress of science or useful arts’. Ironically, his legal pursuit of stronger IP protections seems to have been squarely aimed at preventing the development of motion picture technology and art. Clearly, Edison was primarily interested in protecting his financial investments, using any and all available tools, and IP law proved quite useful to him, at least for a limited time.
As Vaidhyanathan puts it, “Edison’s experiences serve as a model for how later barons such as Bill Gates tried to create unnatural monopolies by manipulating copyrights, patents, contracts, and access to technology and works.” (Vaidhyanathan, 87) Although Edison got the ball rolling on the corporate manipulation of IP protections in new media industries, it certainly did not stop with him. The motion picture industry is now notorious for its strategic tactics against ‘pirates’. In the 1970s, for instance, the MPAA collectively but unsuccessfully lobbied the U.S. Congress to restrict VCR sales, fearing revenue loss, and it only really relented when it realized that VCR proliferation was going to go ahead regardless (Lessig, 75-77). As discussed in detail towards the end of this sub-chapter, the movie industry has become bold in its use of political, moral-rhetorical and technological tools in addition to legal ones in order to advance its interests.

The MPAA is not alone. Indeed, for every major media industry, the power and corporate usefulness of copyright has become palpable. Alleged copyright infringements are litigated relentlessly. Consider a few prominent examples from the music industry: the recording company Acuff-Rose sued 2 Live Crew for parodying Roy Orbison’s song “Oh, Pretty Woman”, alleging that it was not a true parody and thus did not fit the ‘fair use’ criteria; the Supreme Court sided with the defendant, overturning the Court of Appeals decision; ASCAP, a composer’s organization, threatened to sue the Girl Scouts for failing to pay for songs the girls sang around campfires, though it backed down after an ensuing public outcry; and most famously, a consortium of record companies and other interested parties sued Napster for enabling p2p music sharing, thus initiating “a war on file-sharing technologies” (Lessig, 74).
Of these three copyright lawsuits, only the Napster suit was ultimately decided in favour of the plaintiff. Nonetheless, these cases indicate a certain attitude of audacity among major media corporations and organizations with regard to the amount of control they should have over their intellectual products. Lawrence Lessig details several other particularly sinister cases, including the conflict between Jesse Jordan and the RIAA, and the conflict between Jon Else and Fox Media, which show just how audacious these media institutions can be.

In the former conflict, Jesse Jordan, a student at Rensselear Polytechnic Institute in Troy, New York, modified an intranet search engine for the RPI network, which became quite popular and functional. The index of the search engine included “pictures, which students could use to put on their own Web sites; copies of notes or research; copies of information pamphlets; movie clips that students might have created; university brochures” (Lessig, 49) as well as music files. But because his search engine index was 25% music files, the RIAA labeled him a pirate and a willful enabler of music sharing. They sued him for $150,000 per infringement, demanding $15,000,000 in total. The lawsuit against Jordan was combined with several other suits against a group of students, and part of a larger legal initiative. As Lessig recounts the story:

If you added up the claims, these four lawsuits were asking courts in the United States to award the plaintiffs close to $100 billion — six times the total profit of the film industry in 2001.

Jesse called his parents. They were supportive but a bit frightened. An uncle was a lawyer. He began negotiations with the RIAA. They demanded to know how much money Jesse had. Jesse had saved $12,000 from summer jobs and other employment. They demanded $12,000 to dismiss the case.

The RIAA wanted Jesse to admit to doing something wrong. He refused. They wanted him to agree to an injunction that would essentially make it impossible for him to work in many fields of technology for the rest of his life. He refused. They made him understand that this process of being sued was not going to be pleasant (As Jesse’s father recounted to me, the chief lawyer on the case, Matt Oppenheimer, told Jesse ‘You don’t want to pay another visit to a dentist like me.’) And throughout, the RIAA insisted it would not settle the case until it took every penny Jesse had saved. (Lessig, 51)
Faced with this kind of pressure, and the knowledge that fighting back would require an enormous amount of money (at least $250,000) Jesse settled, and wired his savings to the RIAA.

In the latter conflict, Jon Else, filmmaker, had intended to use a short clip of The Simpsons in a small independent documentary. The clip was to be displayed on a television in the corner of the room for a scene that centered on some stagehands playing checkers. Worried that he might be infringing on copyright, Else called Matt Groening and Gracie Films, the respective creator and producing company of The Simpsons. Both of them gave him unconditional permission, but suggested he talk to Fox Media, Gracie’s parent company, just to make sure. Fox demanded that Else pay them a $10,000 licensing fee. This was far beyond the budget of the film, and so Else ended up deciding to digitally replace the background Simpsons clip with something else, a replacement that he thinks detracted from the artistic quality of the work. And Else’s is not an uncommon case. There are many similar incidents in which major corporations have prevented independent filmmakers from including corporate or cultural references in documentaries by threatening litigation (Lessig, 95-99).

Cases such as these paint a picture of the current situation: copyright, or the threat of copyright, is used by powerful actors either in order to directly make money, or in order to demonstrate political points that in the end are geared towards making money. At least in the United States, copyright has always been a ‘balancing act’ between private interests and the public good (Vaidhyanathan, 21-24). But based on these kinds of cases, it now seems more like a legal muscle that has grown stronger over time, which is increasingly flexed by commercial media actors. Despite the charged normative rhetoric
they sometimes employ, media corporations are not concerned with justice; they are concerned with maximizing profits using any lawful (or occasionally unlawful) means necessary. And when they are able to get decisions strongly in their favour, the result is usually the creation of cultural barriers and unequal markets. These are not necessarily new or surprising observations. Corporations and clever, opportunistic entrepreneurs (like Edison) have always been concerned with financial gain to the near exclusion of everything else, and perhaps justifiably so – that is, perhaps they owe this to their shareholders. But the circumstances of the modern age have amplified the danger they pose to society as a whole.

Many modern commercial media actors, mainly actors in the modern music, motion picture, television and software industries, perceive the information age to be a threat to their very survival, and have worked hard to make sure that the anarchic dream of an unregulated online culture will not be realized (Gillespie, 33-40). Creative works expressed through visual, audio and textual media and computer code are increasingly getting copyright protected (and/or protected through other legal or technical mechanisms), and the practice of violating these rules (‘piracy’) is thus getting increasingly more common.

Tarleton Gillespie shows how content providers are now able to technically regulate the transmission of information – a function that was previously only carried out by the mechanism of law – using Digital Rights Management technologies (Gillespie, 2007, Chapter VI). The term Digital Rights Management (DRM) refers to encrypted digital programs that only grant access to a particular work to users under certain prearranged contractual conditions. In some economic contexts, DRM technologies have
been hugely successful, but their success depends on cooperation (or collusion) between technology manufacturers and content providers. For the DVD and movie industries and for many purchased software downloads, some form of DRM is now standard (Gillespie, 169-172; 181-182). But in addition to the technical protections provided by DRM, in the United States, the hacking of DRM encryptions is now illegal under the Digital Millennium Copyright Act (DMCA). With the DMCA, the law does not just permit private corporations to technically regulate information distribution; it actually makes it a crime for anyone to circumvent those barriers, even if done for perfectly lawful reasons (Gillespie, 173-180). In Canada, a similar copyright bill with ‘anti-circumvention provisions’ was recently tabled (Bill C-61 in June, 2008), though it subsequently died with the dissolution of parliament and the announcement of a new election in September, 2008. Nonetheless, these kinds of cases, in which the law works in tandem with commercially-backed security technologies in order to protect the interests of powerful commercial media actors, are becoming increasingly common.

Gillespie suggests that digital technology creates new concerns because it introduces a new respect in which information can be controlled. DRM shifts the power of regulation from lawmakers to the commercial media actors themselves, and laws like the DMCA and Bill C-61 sponsor this shift. These kinds of laws are, I think, overly protective of the private interests of content providers and insensitive to the consequences this shift might have for the public good. Thus, the legal sponsorship of privately controlled regulatory measures is again inconsistent with the U.S. history of copyright, which has traditionally kept regulation in the hands of public policy-makers and, as mentioned, tried to maintain a balance between private and public interests.
So why the change? What is it about digital technologies that has provoked such severe legal responses and renewed popular debate over the ethics of copyright? It is my contention that the technical possibilities of digital technologies are largely at the root of this change in legal policy. James Boyle points to one of these new possibilities in the following passage:

It used to be relatively hard to violate an intellectual property right. The technologies of reproduction or the activities necessary to infringe were largely, though not entirely, industrial. The person with the printing press who chooses to reproduce a book is a lot different from the person who lends the book to a friend or takes a chapter into class. The photocopier makes that distinction fuzzy, and the networked computer erases it altogether. (Boyle, 2003, 40)

Digital technologies make copyright infringement easier to accomplish and harder to punish, and some actors have become quite anxious about this. But while these new technological developments certainly present us with new problems, there is more than one way in which to respond. In the next few sections, I will attempt to show exactly how digital technologies have introduced a range of new moral norms, which reveal alternative possibilities that need to be considered in discussions on how to respond to the current circumstances.

**New Technologies and New Values**

The internet is a potentially revolutionary medium -- socially, economically, and politically. Engagement in and with it is likely to alter our values. It is bound to change our senses of how we might implement our existing ideals. And it may well alter the values themselves. We should be open to such possibilities -- and should not foreclose them through premature efforts to impose order on the system. (Fisher, 1999, Part III)

With the rise of the so-called information age, digital technologies have introduced new technical possibilities and brought a new class of actors into the fray. These new actors are seriously challenging the capitalist assumption built into the strong programme of copyright as it applies to digital space. For some academics, the new digitalization and globalization of information is constitutive of an ethereal, postmodern
reality. But we do not need to mystify the impact of the new media to recognize that they have at least two fundamentally new social functions: (1) for the first time, the new digitalization of media allows information users to replicate copies of works nearly instantaneously and at virtually no cost (though more time and effort may be required if one wants to modify a work in the process of replicating it); and, (2) with the advent of the Internet, digital files can be globally distributed to an unlimited amount of users nearly instantaneously and at virtually no cost.

Many of those who were more intimately involved in the information technology revolution were initially optimistic about the new capabilities of information sharing. The self-described ‘Netizens’ conceived of the Internet as a thoroughly public domain that could reinterpret media content in new terms: as information that is essentially transitory rather than tangible, and most importantly, information that “wants to be free” (Gillespie, 34). But the utopian community of the Netizens was to be more than just a marketplace of free ideas. As the slogan goes, ‘free culture’ is not intended to mean ‘free’ as in ‘free beer’, but ‘free’ as in ‘free speech’ (Lessig, xiv). Netizens saw the Internet – and still see it – as a technical remedy for the producer-consumer model of media content distribution; a remedy they hoped would reform information transmission practices for the better. With users taking the role of both producers and consumers in a non-commercial, unregulated ‘gift economy’, problems of censorship and the commercialized distortion of information could be averted (Gillespie, 33-40). To use Fisher’s terms, they envisioned a public space inhabited by a ‘cornucopia of information’, and a non-commercialized ‘semiotic democracy’, where users are simultaneously receivers and expressers of cultural meaning (see Chapter III). They saw it as a site or
many sites of culture where one can express oneself in the absence of regulations and censorship.

The dream of a wholly unregulated Internet has passed, but the Internet continues to grow in size and mass appeal such that it is beyond the control of any one regulatory body. Increasingly, more people are spending more of their lives on the Internet; from entertainment and education to social and commercial communications, the Internet now mediates a vast variety of social functions. With the availability of these kinds of functional capacities, it is no wonder that it now accommodates a plethora of vibrant and dynamic online communities where one can find many examples of free and unchecked personal and communal expressions. We might debate whether or not the chaotic mass culture of the Internet is a boon to society. But we must admit that the alternative of having it wholly regulated promises to be much more problematic. As the Internet becomes more privatized, it turns online expressions into transactions, and transforms culture into commerce (Boyle, 2003). While this can increase economic efficiency and output, it destroys a venue of public expression. If allowed to increase in strength and scope, copyright laws and their technical counterparts (DRM) could significantly stifle and commercialize the public, cultural domain of the Internet. Especially because of the unimpeded growth of the Internet in numbers of users, sites and functional capacities, at the very least, this is cause for consideration, if not action.

12 The Internet is wholly conditioned by certain social and technical forces. For instance, it is conditioned by the actions of computer manufacturers and service providers, as well as the technical limitations of products. But these actors have not (yet) coordinated their actions so as to regulate the Internet in a strong and uniform fashion with specific goals in mind.
Rhetorical Tools and Responses

Commercial media actors have been worried about the threat of the Internet from early on. Initially, they saw it as just another derivative technology like the VCR that, if left unregulated, could significantly undermine profits. But the rise of Napster, the first major peer-to-peer network, showed just how disruptive to the status quo this new medium could be. As Gillespie tells it, “in less than a year Napster grew from a college student’s plaything to a pulsing network of seventy million users at the peak of its popularity; dozens of similar peer-to-peer applications followed in its wake” (Gillespie, 107). In response, commercial media actors set out to coordinate political, moral-rhetorical, legal and technical mechanisms in order to try to stem the alleged ‘waves of creative destruction’. And the first job was to set up the needed political and moral-rhetorical foundations. If increased copyright protections and the imposition of technical barriers were to be sanctioned by governments and the general public, the aforementioned Netizen values would have to be publicly discredited (Gillespie, 105-109).

Gillespie details how public figures – particularly the beguiling personality of MPAA CEO, Jack Valenti – were able to persuasively make the case for increased protections. Valenti painted peer-to-peer users as a threat: evil online pirates as opposed to adolescent computer geeks, or worse, a burgeoning young online community engaging in altruistic information sharing. He alluded to epidemics, terrorism and even child pornography in order to implant in the public consciousness a negative image of information sharing. Beneath the inflammatory and sensational rhetoric, Valenti was relying on classic IP theory justifications for copyright. Intermingled in his account were
familiar protestations that the right of authorship and the survival of the creative
industries both demanded strong levels of protection. Essentially, he tried to reify
intellectual property, going so far as to equate it with material property, and its
appropriation with theft (Gillespie, Ch IV).

Of course, Valenti’s portrayal is not the only way to construe peer-to-peer
networks, or even the most coherent way. Prohibitions against users sharing information
are not prohibitions against theft. Rather, they are licensing restrictions placed on
property: they prohibit a user who has bought media content from manipulating that
content so as to allow others to copy it. It is not illegal for one to borrow a friend’s book
and read it. Nor is it considered stealing to copy by hand (or appropriate) a passage of
that book, or even the whole thing if one has the time, as long as one does not attempt to
sell that copy. As Fisher demonstrates, intellectual and material property are significantly
disanalogous (see the discussion of labour theory in Chapter III). Valenti’s view is more
radical than most of the standard legal opinions on copyright, and would require
significant revision in order to be made consistent with them. Clearly though, Valenti
was not interested in investigating the complexities of the ethics of information sharing in
a digital age. Rather, it is because shared digital files can be copied so easily and
distributed so widely that Valenti rhetorically equated them with stolen goods. For him,
then, media ‘theft’ effectively referred to information sharing practices that were
perceived as threats to the profits of content providers. Even so, there is still a question
of whether Valenti was correct in assuming that these practices constituted a significant
threat to content providers.
There are some users who download music and videos who otherwise would have purchased them. But as Lawrence Lessig notes, this is only one category of users. There are also: users who would not have otherwise bought the CD or DVD, either because they cannot afford it or are only interested in downloading content that is easily accessible (i.e. when they, in a fit of nostalgia, decide to download a few songs of their youth); users who want to preview full songs before they buy the album; and users who may or may not have otherwise bought the album or DVD, but want to use the content in their artistic creations (these users may also require that the content be in certain unregulated digital formats). Depending on the relative sizes of these categories, p2p and other file sharing software will reduce, not change or even increase CD/DVD sales. Moreover, even if the software does in fact reduce CD/DVD sales, this does not necessarily reflect the effect it has on cultural production (Lessig, 68-74).

Still, the rise of file sharing technologies has probably reduced the profits of content providers somewhat. According to the New York Times, in 2003 the RIAA claimed that there had been a 31 percent reduction in gross sales since file sharing first became popular, though “statistics from Forrester Research show that the sales decline since 2000 has been half that, or 15 percent, and that 35 percent of that amount is because of unauthorized downloading.” (Strauss, 2003) In spite of this, file sharing has provoked different reactions among different segments of the public, and even among different segments of artists.

Musician responses have varied. Small-time musicians who benefit from the exposure and distribution it generates usually encourage file sharing. But some established artists like Metallica have vehemently opposed file sharing, joining forces
with their record company and the RIAA as they attempt to curb the spread of these practices. Other established musicians – Moby, System of a Down, Public Enemy and the Grateful Dead – are critical of the legal actions taken by record companies and a few of their peers, and even encourage file sharing. And still others are either ambivalent on the issue, or they do mind file sharing, but are hesitant to sue their fans. In actuality, many established musicians (including the Backstreet Boys) have not made much or any money from CD royalties. They tend to make more from concert tickets and merchandise than from CD sales (Strauss, 2003). Therefore, it is not clear that information sharing discourages artistic innovation, as the utilitarian claims. To the contrary, if it were to create more of a financial dependence on concert sales, perhaps this would encourage artists to put on greater numbers of more interesting concerts.

With the celebrated online release of the album ‘In Rainbows’ in the fall of 2007, Radiohead became one of the first bands to experiment with ‘embracing’ (or acquiescing to) the new technology. On October 10th, 2007, for a period of two months prior to its CD release, Radiohead allowed the album to be downloaded online on their website at a price set by the customer. Users were given the opportunity to download the album for free or for a specified sum that was sent directly to the band. Allegedly, in a survey of 3000 people conducted by Record of the Day, only one third of customers claimed to have downloaded the album without paying, and a few claimed to have donated much more than the retail price of a CD. Users paid on average £4 for the download. Moreover, the online release was followed with the release of a limited edition discbox in early December, 2007, which contained a standard release CD album, two 12" heavyweight vinyl records with artwork and lyric booklets, a second enhanced CD with
eight additional tracks, and digital photos and artwork. Packaged in a hardcover book
and slipcase, the entire set was priced at £40 (approx. $80 CDN), and according to
various comments by band members, they had sold 60,000 to 80,000 copies by the end of
December, 2007. Not including the online downloads and their privately sold discbox
set, the In Rainbows CD was officially released in January 2008, jumping to the number
one spot in both the UK and the USA with 44,000 and 122,000 units sold in the first
week respectively13. Therefore, in the end, the online release may have reduced the gross
sales of their album slightly, but it certainly did not ruin them. It could also have a
lasting positive effect on their fan base and their income in other areas.

Radiohead’s method of release was unusual and may not be an attractive business
model for other bands. But it does show that file sharing does not necessarily sound the
death knell for the incomes of established musicians. It demonstrates that, instead of
supporting or undertaking a barrage of litigation suits against a countless supply of
computer geeks, artists might try to use creative marketing techniques to maintain album
profits. However, these kinds of alternatives remain unacceptable to the record and
motion picture companies. While it is debatable how much damage it has done to various
media corporations, it is clear to them that, at least from a short-term financial
perspective, the costs of file sharing vastly outweigh its benefits. Thus, as we might
expect, established commercial media actors inexorably aim to heavily regulate and
commercialize online file transfers, using ever-stronger technical and legal mechanisms.

13 These statistics were collected from a well-referenced Wikipedia entry:
Chapter VI: Conclusion

Looking back over the history of copyright law, it seems apt to describe it as a complex evolutionary process that is caused in part by collections of social actors somewhat indeterminately responding to the conditions enabled by prior technical and social layers. Instead of by purpose or procedural rationality, this process has been primarily driven by numerous contingent intersecting sociotechnical forces. Moral norms have played a part in the causal story; but they have often been disingenuously and rhetorically skewed in accordance with the agendas of commercial media actors. But just because the process is not in fact teleologically guided or entirely socially impartial, this does not abrogate the responsibility of lawmakers to try to adjudicate or legislate justly to the best of their ability, equally considering all of the relevant moral issues in their deliberations. To the contrary, I hold that the truth of the material explanation would make their lawmaking duties all the more crucial. Copyright lawmakers are informed and influenced by social and technical conditions, but they are also actors who can make free choices in light of moral considerations; they are actors who can make a difference.

By and large, commercial media actors have routinely responded to the success of new media technologies by pressuring lawmakers to extend the jurisdiction and strength of copyright protections. But while the perpetual extension of copyright has often been construed by them as the only morally appropriate legal response to new media, the rise of the Internet has revealed other responses that are possible, perhaps even morally required. The Internet brings with it a unique set of technical characteristics, which has enabled it to become a valued new location of cultural production. It has introduced moral imperatives such as, ‘we ought to protect cultural venues of semiotic democracy’,
and ‘we ought to protect the accessibility and integrity of immense public caches of information’, which would not have been conceivable prior to the information technology revolution and the rise of the Internet. These imperatives are subversive of the ‘logic of extension’; they stipulate that we ought to protect the technologies and the cultures that have made the imperatives possible in the first place – that is, they entail that we should not heavily regulate the contents of the Internet. As Vaidhyanathan puts it, lawmakers must now make an important choice:

Copyright was designed to regulate only copying. It was not supposed to regulate one’s rights to read or share. But now that the distinctions among accessing, using, and copying have collapsed, copyright policy makers have found themselves faced with what seems to be a difficult choice: either relinquish some control over copying or expand copyright to regulate access and use, despite the chilling effect this might have on creativity, community, and democracy. (Vaidhyanathan 152-153)

Social actors, new technologies and new moral imperatives are influential, but they cannot dictate our choices or the choices of lawmakers. We (and they) must reflect on whether it is better to (a) maintain the commercial status quo using any means necessary, which may mean relentlessly hunting down file-sharers and deliberately fueling the privatization of the Internet or ‘the enclosure of the intellectual commons’ as James Boyle might put it (Boyle, 2003); or, (b) attempt to find coping strategies that are relatively less inegalitarian and restrictive.

If we accept the capitalist assumption and adhere to the traditional interpretations of dominant IP theories, we will accept the strong programme of copyright. But if we deny the capitalist assumption and try to balance new moral imperatives with the traditional concerns regarding innovation incentive and the rights of authorship, then we might side with the Netizens. This would not entail that there would be no role for copyright, but it might entail a promotion of alternative creative economies in order to
meet new concerns. Such alternative economies are not without their difficulties. For instance, the creative materials they produce may be inferior in some respects to the materials produced by big-budget projects in heavily regulated copyright regimes. But these are problems that should be worked out within a moral framework that can comprehend and balance the many normative issues at play. And this framework is not supplied by any of the traditional IP theories, as they are ordinarily interpreted.

If we agree that a material explanation is the best explanation of the construction of the norms and facts of copyright, then we should admit that the traditional IP theories are incomplete. Thus, in their normative assessment of copyright, lawmakers should adjudicate and legislate as historicist social-planning theorists (or perhaps broad utilitarian theorists), who can equally consider and weigh both new and old moral concerns.
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