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## DIGITAL ATTRIBUTION: COPYRIGHT AND THE RIGHT TO CREDIT

GREG LASTOWKA\*

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### INTRODUCTION

*If [a publisher] does not sell copies at a profit, he will soon be a bankrupt ex-publisher. The author, however, may be interested in the widest possible dissemination of his writings, and if someone were willing to reprint 10,000 copies of his article for free distribution, that would provide a great additional profit to the author in terms of professional credit.<sup>1</sup>*

The above quote is taken from Ralph Shaw’s May 1951 article in the journal *Science*, entitled *Copyright and the Right to Credit*.<sup>2</sup> In the article, Shaw

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<sup>1</sup> Ralph R. Shaw, *Copyright and the Right to Credit*, 113 *SCIENCE* 571, 572 (1951).

<sup>2</sup> The article was an excerpt from Shaw’s book, published by the small press he had founded. See generally RALPH R. SHAW, *LITERARY PROPERTY IN THE UNITED STATES* (1950).

argued that copyright law paid insufficient attention to the attribution interests of authors. Observing that the straightforward pecuniary interests of publishers diverged from the more complex reputation-based interests of authors, Shaw explained how authors and publishers might have differing views regarding the benefits of providing thousands of copies of a work for “free distribution.”<sup>3</sup> Of course, since he had just pointed out that no sensible publisher would be interested in giving away free copies, the example he used to demonstrate these divergent interests was only theoretical.

Ralph Shaw was a librarian, not a lawyer.<sup>4</sup> He was interested in information science, of course, but he also pursued various other projects. One of those projects was advancing the technologies of information storage and retrieval. Notably, Shaw was instrumental in funding one prototype version of Vannevar Bush’s “Memex” machine,<sup>5</sup> often referenced today as the conceptual predecessor of the World Wide Web.<sup>6</sup> The “Rapid Selector” that Shaw and Bush developed together was a mix of circuitry and microfilm that was about the size of a car.<sup>7</sup> It reportedly scanned ten thousand frames of text each minute in search of bits of information.<sup>8</sup> The unveiling of this “electronic marvel” was reportedly attended with substantial publicity.<sup>9</sup>

But both of Shaw’s projects described here – his attempt to get copyright to incorporate a right to credit and his attempt to revolutionize information dissemination and retrieval practices with new technology – did not pan out very well. The logic of copyright law continued to be guided by the interests of publishers, not authors. And the Rapid Selector project was largely a failure

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<sup>3</sup> Shaw, *supra* note 1, at 572.

<sup>4</sup> Shaw had a prominent career as a librarian. He served as the Dean of the Library and Information Sciences Department at Rutgers University and as the chief librarian at the U.S. Department of Agriculture. See generally 3 EUGENE GARFIELD, *To Remember Ralph Shaw*, in ESSAYS OF AN INFORMATION SCIENTIST 504 (1980), available at <http://www.garfield.library.upenn.edu/essays/v3p504y1977-78.pdf>.

<sup>5</sup> See generally Vannevar Bush, *As We May Think*, ATLANTIC MONTHLY, July 1945, at 101, available at <http://www.theatlantic.com/unbound/flashbks/computer/bushf.htm>.

<sup>6</sup> See JAMES GILLIES & ROBERT CAILLIAU, HOW THE WEB WAS BORN: THE HISTORY OF THE WORLD WIDE WEB 91-93 (2000). But see Richard H. Veith, *Memex at 60: Internet or iPod?*, 57 J. AM. SOC’Y FOR INFO. SCI. & TECH. 1233, 1238 (2006) (suggesting that people often misinterpret Bush’s seminal paper to foreshadow, among other things, the Internet).

<sup>7</sup> See Colin Burke, *The Other Memex: The Tangled Career of Vannevar Bush’s Information Machine, the Rapid Selector*, 43 J. AM. SOC’Y FOR INFO. SCI. 648, 652 (1992).

<sup>8</sup> 3 GARFIELD, *supra* note 4, at 506. Some of those who have studied the history of the Memex are critical of the credit given to Bush for both its conception and implementation. See generally Michael K. Buckland, *Emanuel Goldberg, Electronic Document Retrieval, and Vannevar Bush’s Memex*, 43 J. AM. SOC’Y FOR INFO. SCI. 284 (1992) (suggesting that Bush’s contemporaries were more inventive and had more imaginative understandings of the potentials of information technology); Burke, *supra* note 7 (suggesting that Bush’s work on practical versions of the Memex was a history of avoidable design failures).

<sup>9</sup> 3 GARFIELD, *supra* note 4, at 506.

due to technical problems.<sup>10</sup> As it turned out, the future of access to information lay not with microfilm, but with a candidate that must have seemed highly unlikely in 1951: the behemoth calculator ENIAC, a \$500,000 monstrosity that had the primary task of working on firing tables for U.S. artillery shells.<sup>11</sup> ENIAC was obviously not part of a network, and its information storage capacity was miniscule by today's standards.<sup>12</sup>

However, the Memex that Shaw and Bush sought to create turned out to be ENIAC's descendant: the World Wide Web delivers a hyperlinked, high-speed information environment that Shaw and Bush could not have imagined. With the advent of the World Wide Web, just as Shaw predicted, authors are now giving away thousands – even millions – of free “reprints” and realizing “a great additional profit . . . in terms of professional credit.”<sup>13</sup>

Copyright law has largely ignored this fact. Shaw's “right to credit” is still as much a fantasy today as the World Wide Web was half a century ago. This Article takes up Ralph Shaw's call for a right to credit in a new era of networked information systems. Copyright law should be adjusted to take into account the growing importance of open access forms of copyright creation – a term I'll shorten here to “open copyright”<sup>14</sup> – and reputation economies. Prioritizing the legal importance of attribution in copyright is a long overdue change. The contemporary digital environment provides an opportunity and an important additional reason to revisit Shaw's distinction between the motivations of authors and publishers.

This Article proceeds in three sections. In Part I, I describe the ways in which copyright has responded to the “digital dilemma.” I point out that, in

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<sup>10</sup> Burke, *supra* note 7, at 655.

<sup>11</sup> See H. Conrad Cunningham & Pallavi Tadepalli, What Is Computer Science All About?, at 1, <http://www.cs.olemiss.edu/about/whatiscs.pdf> (last visited Feb. 1, 2007).

<sup>12</sup> See *id.* at 2 (“Today, a computer with the capacity of the ENIAC would be smaller than a coin from our pockets, would consume little power, and cost just a few dollars on the mass market.”). Those excited about digital computers did see their potential as information retrieval devices. Like all visionaries, though, they were slightly off:

You will be able to dial into the catalogue machine “making biscuits.” There will be a flutter of movie film in the machine. Soon it will stop, and, in front of you on the screen, will be projected the part of the catalogue which shows the names of three or four books containing recipes for biscuits.

EDMUND CALLIS BERKELEY, GIANT BRAINS, OR MACHINES THAT THINK 181 (1949), *quoted in* Buckland, *supra* note 8, at 286. Edmund Berkeley was a founder of the Association of Computing Machinery. See Peter J. Denning, *Edmund C. Berkeley: ACM Founder*, 31 COMM. ACM 781, 781-82 (1988).

<sup>13</sup> Shaw, *supra* note 1, at 572.

<sup>14</sup> For a description of what “open access” means, see Peter Suber, Open Access Overview: Focusing on Open Access to Peer-Reviewed Research Articles and Their Preprints (June 21, 2004), <http://www.earlham.edu/~peters/fos/overview.htm>. I use the term “open copyright” to emphasize that the material at issue here is formally subject to copyright control and not in the public domain.

Washington, the dilemma is described in potentially misleading terms. Despite the fact that open copyright has played a key part in the social utility of the World Wide Web, the law has largely ignored its impact, focusing instead on the perspective of publishers. I explain why the phenomenon of open copyright is not primarily an ideological agenda, but a market transformation. Attribution and social reputation markets are essential to many open copyright authors.

In Part II, I look at how intellectual property law addresses authorial attribution interests. I begin with an extended discussion of advertising and law, drawing parallels between open copyright and advertising. I then move on to copyright and trademark law, noting that protections for authorial attribution are as sorely lacking today as they were in Shaw's day. I conclude by noting that, despite the formal deficit in statutory intellectual property law, there are hopeful signs that a new interest in authorial attribution is emerging.

Finally, in Part III, I suggest one concrete proposal for adapting copyright to better fit online reputation economies. I propose formally including attribution as a fifth factor in the statutory fair use analysis under 17 U.S.C. § 107. Although there have already been a handful of cases that considered attribution in the course of a fair use analysis, I argue that attribution deserves specific mention in the statutory language.

## I. COPYRIGHT AND DIGITAL NETWORKS

### A. *The Digital Dilemma and Legal Responses*

During the last decade, the costs of information capture, replication, manipulation, and distribution have been reduced dramatically by widespread digital tools and networks. Yet in copyright policy circles, this change has (perhaps strangely) been framed not as a social boon, but as a "digital dilemma."<sup>15</sup> The perceived problem is that with more powerful and less expensive technologies, the public will infringe copyrights by reproducing and disseminating works.<sup>16</sup> Even highly dense and complex audiovisual information objects such as Hollywood films are now subject to unauthorized transmission and replication through digital networks. Many of those in the copyright industries express dismay at the extent to which their enforcement efforts are failing to prevent rampant digital piracy.<sup>17</sup> Reports of copyright piracy can be found practically every day in the news media.

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<sup>15</sup> See generally COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000).

<sup>16</sup> See *id.* at 3-4.

<sup>17</sup> See, e.g., Frank Ahrens, *Hollywood Says Piracy Has Ripple Effect: Illegal Film Distribution Decreases Sales, Jobs and Tax Revenue, Study Says*, WASH. POST, Sept. 29, 2006, at D5.

Copyright holders have attempted to respond to the “digital dilemma” in several ways. First, they have lobbied for and obtained stronger copyright laws. These laws are intended to send stronger deterrent signals to potential infringers by increasing the criminal penalties associated with copyright infringement. The No Electronic Theft Act<sup>18</sup> is one prominent example.<sup>19</sup> A second response has been the employment of extra-legal technologies and contractually based practices to achieve copyright-related outcomes that cannot be achieved through the law of copyright.<sup>20</sup> The popular use of “digital rights management” (DRM) constitutes an attempt to achieve practical results through technology that effectively mirror or extend the proprietary rights envisioned by copyright law.<sup>21</sup>

Additionally, new laws have been created to respond directly to the digital environment.<sup>22</sup> The Digital Millennium Copyright Act (DMCA)<sup>23</sup> is the most well-known example of a law that creates a new breed of para-copyright entitlements.<sup>24</sup> The anti-circumvention provisions of the DMCA combine with the DRM controls described above to create a “technological” system of copyright.<sup>25</sup> Rather than protecting the copyright-protected works, the DMCA’s anti-circumvention provisions protect the integrity of the digital protections that enclose and encode those works.<sup>26</sup> During the last two

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<sup>18</sup> Pub. L. No. 105-147, 111 Stat. 2678 (1997).

<sup>19</sup> See generally Eric Goldman, *A Road to No Ware: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 OR. L. REV. 369 (2003).

<sup>20</sup> As Jessica Litman has explained, attempts to achieve functional as well as legal control over reproduction are nothing new. See Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 35-36 (1996).

<sup>21</sup> See Dan L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, 74 FORDHAM L. REV. 537, 538, 548, 557 (2005).

<sup>22</sup> Discussion surrounding such laws has been going on for over a decade. See, e.g., Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed To Protect Them*, 12 BERKELEY TECH. L.J. 161 (1997).

<sup>23</sup> Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

<sup>24</sup> See *Med. Broad. Co. v. Flaiz*, No. 02-8554, 2003 U.S. Dist. LEXIS 22185, at \*8 (E.D. Pa. Nov. 25, 2003) (“[C]laims under the DMCA, however, are simply not copyright infringement claims and are separate and distinct from the latter.”); 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT § 12A.18[B]* (2006) [hereinafter *NIMMER ON COPYRIGHT*].

<sup>25</sup> See James Gibson, *Re-Reifying Data*, 80 NOTRE DAME L. REV. 163, 167 (2004) (coining the term “technological” to describe an approach that “involves the legislative regulation of technological behavior”).

<sup>26</sup> *Id.* at 168-70. These provisions of the DMCA have been widely criticized. See, e.g., Lawrence Lessig, *Law Regulating Code Regulating Law*, 35 LOY. U. CHI. L.J. 1, 7-8 (2003); Timothy B. Lee, *Circumventing Competition: The Perverse Consequences of the Digital Millennium Copyright Act 2* (Cato Inst., Policy Analysis No. 564, 2006), available at [http://www.cato.org/pub\\_display.php?pub\\_id=6025](http://www.cato.org/pub_display.php?pub_id=6025). See generally Pamela Samuelson,

decades, the impact of digital copyright reforms has been debatable. The new “technological” wave of copyright has generally been popular and resilient in legislatures and courtrooms.<sup>27</sup> Yet there seems to be no abatement in digital piracy – things are said to be getting constantly worse for the copyright industries. Academic commentary, moreover, has grown increasingly critical of expansions in the strength of copyright law, pointing out that lawmakers may be ignoring, or acting contrary to, the public interest.<sup>28</sup>

B. *The Growth of Open Copyright*

The “digital dilemma” story – a story of piracy and legal response – takes the forefront in media reports about copyright today. Stories that criticize the overextension of intellectual property laws appear as well, though less frequently. Yet the most important story to be told about digital networks and copyright goes untold, perhaps because it is a commonplace: the last decade has brought society an incredible wealth of access to copyright-protected content that is made freely available online, with the permission of copyright holders.<sup>29</sup>

The creators of much of the popular content on the World Wide Web do not seek payment in return for access to their work. Much of the essential content on the World Wide Web is “posted” so that it is freely accessible to anyone with an Internet connection. Creating such a universally accessible sea of interlinked information had long been a dream of technologists,<sup>30</sup> and the drive to share useful information resources with others in distant locales through

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*Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999).

<sup>27</sup> See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 444-60 (2d Cir. 2001) (rejecting constitutional challenges to the DMCA).

<sup>28</sup> See, e.g., LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 159-60 (2004) [hereinafter LESSIG, *FREE CULTURE*]; LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 187-90 (2001) [hereinafter LESSIG, *FUTURE OF IDEAS*]; JESSICA LITMAN, *DIGITAL COPYRIGHT* 151-65 (2001); Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 339-40 (2002).

<sup>29</sup> I have discussed this phenomenon in previous scholarship. See generally F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 RUTGERS COMPUTER & TECH. L.J. 293 (2001) (arguing for revision of the copyright laws to account for the role played by free access content on the Internet). For additional commentary, see generally Jessica Litman, *Electronic Commerce and Free Speech*, 1 ETHICS & INFO. TECH. 213 (1999), available at <http://www-personal.umich.edu/~7Ejdlitman/papers/freespeech.pdf> (concluding that Congress’ initial reaction to the rise of the Internet in the 1990s was to enact copyright reform favoring commercial speech at the expense of non-commercial speech), and David G. Post, *His Napster’s Voice*, 20 TEMP. ENVTL. L. & TECH. J. 35 (2001) (reflecting upon the unprecedented and unpredicted vitality and diversity of Internet-based content).

<sup>30</sup> See Bush, *supra* note 5, at 101-08.

electronic networks was one of the primary reasons for the original creation of the Internet.<sup>31</sup>

The realm of “open access”<sup>32</sup> materials made publicly available on the Web is essentially a realm of “open copyright.” I use the term “open copyright” rather than “open access” here to emphasize that the universally accessible information we rely upon today is generally protected by copyright law. The creators of Web-posted, copyright-qualifying information goods are generally copyright proprietors, having rights no different than any other copyright proprietors. The creator of an original story posted on a web page has the same standing under copyright law as the author of a best-selling novel.

One of the most interesting features of open copyright is that it is dominated by amateurs.<sup>33</sup> The term “amateur” does not imply that the work is of low quality, but that it is shared outside traditional profit-oriented chains of copyright production.<sup>34</sup> There are numerous examples of major genres of amateur-dominated open copyright today: blogs on Blogger.com,<sup>35</sup> encyclopedia entries on Wikipedia,<sup>36</sup> brief films on YouTube,<sup>37</sup> digital photos on Flickr,<sup>38</sup> personal profiles, images, and audio on MySpace,<sup>39</sup> and group discussions, fan fiction,<sup>40</sup> and fan art on Yahoo Groups<sup>41</sup> or AOL.<sup>42</sup> It is worth noting that, in all of the above cases, online businesses have been built around the free hosting and free distribution of open copyright content.

The size of open copyright is staggering. Recent estimates suggest that the “surface Web” now contains roughly twelve billion web pages.<sup>43</sup> In 2003,

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<sup>31</sup> KATIE HAFNER & MATTHEW LYON, *WHERE WIZARDS STAY UP LATE: THE ORIGINS OF THE INTERNET* 38 (1996) (describing psychologist J.C.R. Licklider’s “Intergalactic Computer Network”).

<sup>32</sup> See Suber, *supra* note 14.

<sup>33</sup> See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 53-55 (2006); Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 956 (2004).

<sup>34</sup> Hunter & Lastowka, *supra* note 33, at 956 (defining amateurs as those who “lack financial and proprietary motives”).

<sup>35</sup> <http://www.blogger.com> (last visited Feb. 1, 2007).

<sup>36</sup> <http://www.wikipedia.org> (last visited Feb. 1, 2007).

<sup>37</sup> <http://www.youtube.com> (last visited Feb. 1, 2007).

<sup>38</sup> <http://www.flickr.com> (last visited Feb. 1, 2007).

<sup>39</sup> <http://www.myspace.com> (last visited Feb. 1, 2007).

<sup>40</sup> See Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 652 (1997).

<sup>41</sup> <http://groups.yahoo.com> (last visited Feb. 1, 2007).

<sup>42</sup> <http://www.aol.com> (last visited Feb 1, 2007).

<sup>43</sup> See John Markoff, *In Silicon Valley, a Debate Over the Size of the Web*, N.Y. TIMES, Aug. 15, 2005, at C6 (estimating the size of the Web at between 8.1 and 19.2 billion pages); Antonio Gulli & Alessio Signorini, *The Indexable Web Is More Than 11.5 Billion Pages* (May 10-14, 2005), <http://www.cs.uiowa.edu/~asignori/web-size>. I use the term “surface Web” to distinguish fixed web pages from the “deep Web” of dynamically accessible

information researchers at the University of California at Berkeley calculated that the Web (including images and other data) consisted of roughly 170 terabytes of data, while the books of the Library of Congress (if digitized with full formatting) contained roughly 136 terabytes.<sup>44</sup> If the Library of Congress were digitized as unformatted text, it would be many times smaller than the surface Web by this estimate.

The Web continues to accelerate its growth, outpacing the printed word in new information content by orders of magnitude. The same Berkeley researchers estimated that in 2002, the surface Web grew by roughly fifty terabytes, whereas a maximum of five terabytes of new books were printed.<sup>45</sup> (The Berkeley report also estimated that roughly 600,000 terabytes of new email messages were written in 2002!)<sup>46</sup>

Based on these figures, it appears that the amount of textual information available on the Web for free has now surpassed the amount available in the Library of Congress, and that the open copyright sphere of the printed word will continue to outpace the universe of offline content in its rate of growth. Indeed, the goal of the Google Book Search project and other book digitization efforts is to bring all the offline texts in the Library of Congress (and elsewhere) into an accessible form online.<sup>47</sup>

Apart from the staggering growth rate of online open copyright material, it is also true that open copyright information is now at least as influential in modern society as information flowing through the traditional copyright channels.<sup>48</sup> As we all know, the Internet has become a primary source of information and entertainment. For most individuals, open copyright information holds a huge advantage over offline information in terms of ease of access. The open copyright information on the Web may suffer in terms of a quality comparison,<sup>49</sup> but it is alluring because it can be summoned freely in an instant to the average computer screen.

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database content. *See generally* How Much Information? 2003: Executive Summary, <http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm> (last visited Feb. 1, 2007) [hereinafter How Much Information?] (estimating that the deep Web is roughly five hundred times larger than the surface Web).

<sup>44</sup> *See* How Much Information?, *supra* note 43.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See generally* Jeffrey Toobin, *Google's Moon Shot: The Quest for the Universal Library*, *NEW YORKER*, Feb. 5, 2007, at 30.

<sup>48</sup> *Accord* Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 *LAW & CONTEMP. PROBS.* (forthcoming 2007) (arguing that fan fiction tends to be undervalued as a form of creative cultural output).

<sup>49</sup> The recent quality comparisons between the open copyright Wikipedia and the Encyclopedia Britannica are one example of the debates that are taking place. BENKLER, *supra* note 33, at 70-74.



Open copyright practices (including free software) are now a meaningful part of the contemporary information economy.<sup>50</sup> Most of us are now reliant upon online open copyright content for discovering useful information, participating in communities, entertaining ourselves, and expressing ideas.<sup>51</sup> From the standpoint of consumer/creators, it seems that access to open copyright information and the ability to contribute to the open copyright sphere are providing ever-increasing social benefits. We might expect our copyright law to pay at least some attention to the causes, effects, and broader implications of open copyright. But so far it has not.

C. *Explaining the Lack of Legal Responses to Open Copyright*

The growth of open copyright has so far exerted very little influence on the law of intellectual property. There are many possible reasons for this. One obvious reason is that open copyright exists somewhat apart from the commercial marketplace, making it invisible to law designed to order that marketplace. As Robert Ellickson has noted: “Lawyers and legal scholars understandably tend to focus on domains of life where law is central.”<sup>52</sup>

Open copyright amateurs have, understandably, done little to remedy the situation. Though, in the aggregate, amateurs make very important contributions to the public wealth of information, they generally lack the funds, the skills, and the interest to participate in legislative reform efforts.<sup>53</sup> Unlike the entertainment industry, they do not employ lobbyists or make targeted contributions to political campaigns. They are also less likely to press their concerns before courts: when one’s method of operation is to provide one’s work for free to the public, it is not always sensible to front the costs of hiring an attorney.

The creators of open copyright are also numerous and diffuse, whereas the firms who profit from copyright are well-organized and capable of pooling resources for focused action. Commercially motivated industries can, and do,

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<sup>50</sup> Recent developments in the music industry reflect this trend. See Hal R. Varian, *Internet Changes the Economics of Information Industries*, N.Y. TIMES, July 27, 2000, <http://partners.nytimes.com/library/financial/columns/072700econ-scene.html> (“Today, tens of thousands of musicians, amateur and professional, freely distribute their music over the Internet. Fee-to-listen music will have to compete with this free-to-listen music . . .”).

<sup>51</sup> Various studies concerning the average U.S. citizen’s use of the Web are available online. See Pew Internet & American Life Project, <http://www.pewinternet.org> (last visited Feb. 1, 2007). According to the Pew surveys, more than fifty million Americans rely on the Internet for daily news, more than forty million surf the Internet for pleasure, and more than fifty-three million have created content online.

<sup>52</sup> Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 229 (2006).

<sup>53</sup> See Hunter & Lastowka, *supra* note 33, at 956; cf. Tushnet, *supra* note 48 (arguing that law undervalues fan fiction because it is non-commercial).

pay to have their positions brought to the attention of Washington legislators.<sup>54</sup> Public choice theory explains that in such a situation, regulation will tend toward industry capture and away from the optimal protection of the public interest.<sup>55</sup>

The entertainment and publishing industries also have strategic reasons to persuade lawmakers to ignore open copyright practices. Stronger property protections stand to increase their profits. Such reforms are better supported by claims that society is suffering from a lack of incentives for the production of new works.<sup>56</sup> Keeping Congress and the public focused on a story of rampant digital piracy and economic loss accomplishes industry objectives by justifying calls for stronger digital copyright laws.<sup>57</sup> Drawing attention to the contemporary spread of open copyright practices, on the other hand, would produce cognitive dissonance. When open copyright is mentioned to copyright's incumbents, the preferred rhetorical strategy is often dismissal: open copyright is framed as either poor in quality, economically inconsequential,<sup>58</sup> or anti-capitalist in sentiment.<sup>59</sup>

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<sup>54</sup> See Robert C. Piasentin, *Unlawful? Innovative? Unstoppable?: A Comparative Analysis of the Potential Legal Liability Facing P2P End-Users in the United States, United Kingdom and Canada*, 14 INT'L J.L. & INFO. TECH. 195, 197 (2006) ("The American approach is politically influenced with strong entertainment industry lobbying efforts significantly impacting the form and substance of relevant legislation.").

<sup>55</sup> See Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 568 (2006) ("As a result of special-interest capture, the Copyright Act confers overly broad rights to copyright owners at the expense of the public interest in having access to creative works."); Niva Elkin-Koren, *What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons*, 74 FORDHAM L. REV. 375, 375-76 (2005) (describing Creative Commons, a nonprofit developed as a response to the problems caused by industry capture of copyright); Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 531-32 (2000) (arguing that the problems predicted by public choice theory are particularly acute in the context of intellectual property law).

<sup>56</sup> See Elkin-Koren, *supra* note 55, at 384.

<sup>57</sup> See Goldman, *supra* note 19, at 374-75 (discussing the legislative history of the No Electronic Theft Act).

<sup>58</sup> Just to take one example, Patrick Ross of the Progress & Freedom Foundation recently criticized a presentation by Yochai Benkler, stating that "Wikipedia [doesn't] contribute in any meaningful way to the US economy." Posting of Patrick Ross to IPcentral Weblog, [http://weblog.ipcentral.info/archives/2006/05/benkler\\_and\\_the.html](http://weblog.ipcentral.info/archives/2006/05/benkler_and_the.html) (May 31, 2006, 3:15 PM). If one requires the exchange of dollars for information, this is a correct appraisal of Wikipedia's contribution to the economy – but the economics of information are considerably more complex than that.

<sup>59</sup> See, e.g., Andrew Keen, *Web 2.0: The Second Generation of the Internet Has Arrived. It's Worse Than You Think*, DAILY STANDARD, Feb. 13, 2006, <http://weeklystandard.com/Content/Public/Articles/000/000/006/714fjczq.asp>. As explained below, I believe some of this is half-true.

Oddly enough, many legal academic observers have also been somewhat indifferent to the open copyright upside of the digital information revolution. Some may be convinced, like the entertainment industry, that open copyright is not “quality” copyright. Others may be silent because open copyright produces little in the way of case law, for reasons noted above. Even if legal scholars value open copyright, those sympathetic to the “copyleft” may feel a need to stay on the frontlines of a culture war.<sup>60</sup> Because open copyright actually embodies the ideal of public access, the sphere of open copyright is generally left unattended and energy is devoted to solving perceived problems created by the efforts of copyright industries. When open copyright practices are invoked, they are often drafted, rhetorically, to serve in copyleft agendas. For instance, Lawrence Lessig and others often frame amateur creativity on the Web as something of a grassroots political process.<sup>61</sup>

#### D. *The Motivations of Open Copyright*

Within some circles of open copyright production, a quasi-political reading of creative practices seems appropriate: some creative individuals do espouse counter-copyright ideologies. With regard to free and open-source software, for instance, the community of hackers is both articulate about copyright and culturally productive.<sup>62</sup> Organized resistance among that community to

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<sup>60</sup> See generally Dan Hunter, *Culture War*, 83 TEX. L. REV. 1105 (2005).

<sup>61</sup> For example, in a discussion of digital remix culture, Lessig has written that it has extraordinary democratic potential – changing the freedom to speak by changing the power to speak, making it different. Not just broadcast democracy, but increasingly a bottom-up democracy. Not just the *New York Times* democracy, but blog democracy. Not just the few speaking to the many, but increasingly peer-to-peer. This is what this architecture begs for – this form of expression, then this expression set free on a free digital network that anyone in the world can access as they demand. This is the invitation that digital technologies give to our cultures.

Lawrence Lessig, *Creative Economies*, 2006 MICH. ST. L. REV. 33, 37-38; see also Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1334 (2004) (describing the public domain as the “cause célèbre among progressive intellectual property and cyberlaw scholars”); Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 106 (2006) (recognizing a “strong strain of anticommercialism” among intellectual property theorists); Hunter, *supra* note 60, at 1117 (“Agents-provocateurs like Larry Lessig, Yochai Benkler, and Eben Moglen pen books and articles equating freedom and autonomy of individuals with a reform of the intellectual property system.”).

<sup>62</sup> DOUGLAS THOMAS, HACKER CULTURE 10-11 (2002) (describing the evolution of the 1970s hacker into the modern-day hacker). See generally E. Gabriella Coleman, *The Social Construction of Freedom in Free and Open Source Software: Hackers, Ethics, and the Liberal Tradition* (Aug. 2005) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

copyright in computer software is well-known.<sup>63</sup> Many of those who contribute to open-source software projects understand and debate the moral and ethical dimensions of intellectual property.<sup>64</sup>

Copyright in software has always been somewhat differently situated, however, than other forms of open copyright creativity. For decades, copyright law struggled with computer programs. In 1974, Congress established the National Commission on New Technological Uses of Copyrighted Works (CONTU) largely because it was uncertain that software was a proper subject for copyright protection.<sup>65</sup> CONTU's 1978 Final Report concluded that copyright was a suitable framework for software.<sup>66</sup> Yet there have always been those, including many computer programmers, who disagreed. For instance, a 1994 manifesto by Professor Pamela Samuelson and others argued in favor of a *sui generis* regime of software protection.<sup>67</sup>

Perhaps the most well-known opponent of software copyright is Richard Stallman, who founded the Free Software Foundation in 1984.<sup>68</sup> Stallman is often described as a "pioneer" and "visionary" at the lead of a popular movement.<sup>69</sup> The General Counsel of the Free Software Foundation is Columbia law professor Eben Moglen.<sup>70</sup> Moglen has also spoken out against

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<sup>63</sup> For an excellent discussion of the legal issues raised by "open source" and "copyleft" software, see generally Greg R. Vetter, "*Infectious*" *Open Source Software: Spreading Incentives or Promoting Resistance?*, 36 RUTGERS L.J. 53 (2004) [hereinafter Vetter, "*Infectious*" *Open Source Software*], and Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563 [hereinafter Vetter, *The Collaborative Integrity*].

<sup>64</sup> See, e.g., Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1528-29 (2004) (discussing the relevance of ethical "sharing" from the kindergarten sandbox to copyright).

<sup>65</sup> See Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 114-15 (2004).

<sup>66</sup> *Id.* at 115-16; Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection for Computer Programs in Machine-Readable Form*, 1984 DUKE L.J. 663, 665. Some legal commentators, like Arthur Miller, wrote important articles agreeing with this conclusion. See generally Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977 (1993).

<sup>67</sup> Pamela Samuelson et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2312 n.6 (1994) (citing to "voluminous" literature on the question). The joint manifesto noted that it was written in reaction to a more dominant trend. *Id.* at 2312-13 ("[T]he idea of *sui generis* protection for software has generally fallen out of favor since the United States, Japan, and the European Union, among others, decided to use copyright to protect programs.").

<sup>68</sup> It is worth clarifying that the Free Software Foundation is not opposed to those who charge for the delivery of software on media – the enemy in their view is not the business of creating software, but the legal regime that makes code proprietary.

<sup>69</sup> Vetter, "*Infectious*" *Open Source Software*, *supra* note 63, at 83.

<sup>70</sup> FSF Leadership, <http://www.fsf.org/about/leadership.html> (last visited Feb. 1, 2007).

the “proPERTIZATION” of software. In 1999, he wrote an article attacking copyright and patent protections for software, arguing that intellectual property laws would soon be rendered insignificant by the triumph of free software and anarchic modes of information production.<sup>71</sup>

On the other side of the “software proPERTIZATION” fence is Microsoft, probably the greatest financial beneficiary of the CONTU-endorsed regime of proprietary software. Microsoft has understandably never been enthusiastic about free software. According to Bill Gates, progress is dependent upon proprietary rights. In 1976, when Microsoft was an unknown company, Gates asked computer hobbyists: “Who can afford to do professional work for nothing?”<sup>72</sup> The Free Software Foundation, for its part, is less than enthusiastic about the practices of Microsoft. It features a web page that asks and answers the question, “Is Microsoft the Great Satan?”<sup>73</sup> The page emphasizes that Microsoft is only one of many companies who improperly attempt to turn software into legal property.<sup>74</sup>

These debates among software creators are worth understanding as part of the greater story of open copyright. But it may be equally important to get past them. The passionate debates over free software are generally not characteristic of other communities of open copyright practices. Most individuals who create blogs, post photos online, or contribute to Wikipedia seem only vaguely aware of current debates over intellectual property rights. If the average proprietor of an open copyright work knows what copyright is, she probably lacks any strong stance on copyright reform. In fact, it is not uncommon for those who provide open copyright content to make highly aggressive claims of their authorial ownership. In short, while ideologically driven creators may exist in some domains of open copyright, they are not categorically present. With regard to open copyright generally, the economic puzzle that Gates posed – “Who can afford to do professional work for

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<sup>71</sup> See generally Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, FIRST MONDAY, Aug. 1999, [http://www.firstmonday.dk/issues/issue4\\_8/moglen](http://www.firstmonday.dk/issues/issue4_8/moglen). See also Hunter, *supra* note 60, at 1129 (discussing Moglen’s “dotCommunist” theories).

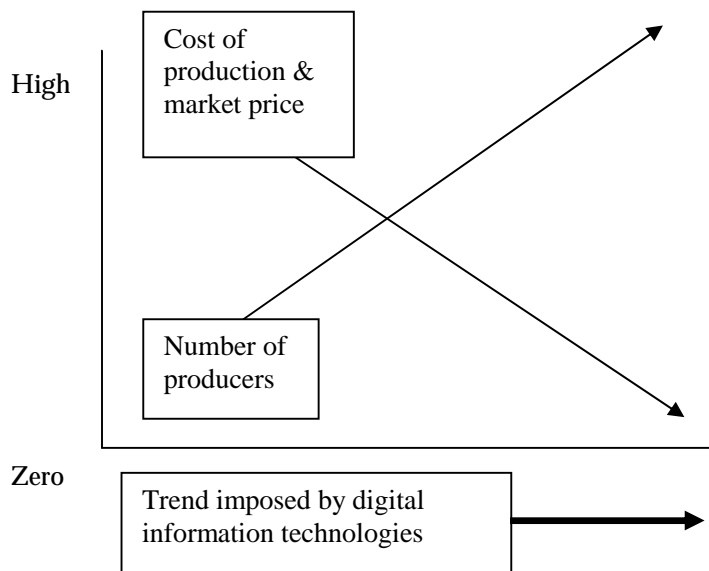
<sup>72</sup> Bill Gates, Gen. Partner, Micro-Soft, An Open Letter to Hobbyists (Feb. 3, 1976), available at [http://www.digibarn.com/collections/newsletters/homebrew/V2\\_01/homebrew\\_V2\\_01\\_p2.jpg](http://www.digibarn.com/collections/newsletters/homebrew/V2_01/homebrew_V2_01_p2.jpg) [hereinafter Gates Letter] (claiming that piracy and lack of payment for software prevented good software from being written); see also Amy Harmon, *The Rebel Code*, N.Y. TIMES, Feb. 21, 1999, § 6 (Magazine), at 34. Gates further noted that he would be able to create jobs if a more proprietary approach to software was accepted: “Nothing would please me more than being able to hire ten programmers and deluge the hobby market with good software.” Gates Letter, *supra*; cf. Eric Schlachter, *The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet*, 12 BERKELEY TECH. L.J. 15, 16 (1997) (“[M]any predict that intellectual property creators will be reluctant to create works for the Internet environment since creators will be unable to protect their copyright interests.”).

<sup>73</sup> <http://www.gnu.org/philosophy/microsoft.html> (last visited Feb. 1, 2007).

<sup>74</sup> *Id.*

nothing?” – is probably not best answered by pointing to a free software ideology.

Rather, changes in technology may provide a better explanation for the current shift in copyright practices. Because the costs of copyright-relevant technology have dropped in recent years, the costs of entry into the copyright game have also dropped. In this situation, it is predictable that competition among information producers should drive down prices for copyright-protected works. This is a very simple concept, displayed graphically below.



With practically any form of technological progress, decreased production costs lead to reduced prices and greater consumer wealth. There are only two things about this situation that are peculiar. First, the number of copyright producers is increasing.<sup>75</sup> Second, the trend in open copyright is toward a price

<sup>75</sup> In many cases, reduced production costs might lead to a smaller number of producers as easily as a larger number. The growth of copyright producers today is largely due to the fact that copyright creation is intimately intertwined with technologies of fixation. For many people, traditional practices of “communication” are now being labeled “production” due to their fixation. The conversational blog is a copyright-protected work – the morning conversation at the bus stop is not. See Hunter & Lastowka, *supra* note 33, at 959 (“Technologically fixed copies have been removed from their privileged status and have become part of the processes of conversation.”).

point of zero. The second trend may seem puzzling.<sup>76</sup>

Even open copyright “amateurs” make significant investments to produce and distribute their work. Blogs, digital photos, fan fiction, and other forms of popularly generated Web-based open copyright content are not costless. They all require, at a minimum, investments of time. The costs of relevant technologies of production and distribution may have dropped in recent years, but they are still above zero. Yet many open copyright producers do not have clear business strategies and do not seem to profit from open copyright in any monetary sense. Hence the Gates puzzle: who does “professional” work for free?

To see the answer to this puzzle, one must be able to frame creative economies as about more than the exchange of money for products. Creativity may or may not be “professional work.” As many scholars have noted, there can be very good reasons, apart from profit motives, to create the sorts of original works of authorship that qualify for copyright protection.<sup>77</sup> Likewise, work that is freely distributed, as Ralph Shaw noted, can provide authors with “a great additional profit” that is not pecuniary.

Unraveling what Yochai Benkler has termed “nonmarket” production is a complex matter, but it is worth attempting to do.<sup>78</sup> Dan Hunter and I have suggested that open copyright on the Web is characterized by an amateur-to-amateur mode of peer production.<sup>79</sup> Since then, some commentators have suggested that our use of the term “amateur” approaches a slight to open copyright, given that “amateurs” are those who do not do things properly, seriously, and professionally.

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<sup>76</sup> See BENKLER, *supra* note 33, at 5 (suggesting that “free” information production “run[s] against the grain of some of our most basic Economics 101 intuitions”).

<sup>77</sup> See, e.g., Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in *THE FUTURE OF THE PUBLIC DOMAIN* 137 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006) (stating that creativity is broader than and antecedent to market exchanges); Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1947 (2006) (discussing “spiritual or inspirational motivations that are inherent in the creative task itself” and not related to the prospect of economic reward); Laura A. Heymann, *The Trademark/Copyright Divide*, 60 SMU L. REV. (forthcoming 2007) (manuscript at 40, on file with author) (arguing that a creator is often motivated not by profit but by “the public knowledge that she is the creator”); cf. Lisa P. Ramsey, *Intellectual Property Rights in Advertising*, 12 MICH. TELECOMM. & TECH. L. REV. 189, 216 (2006) (stating that numerous “non-copyright” incentives exist to “stimulate the creation of new works”).

<sup>78</sup> See BENKLER, *supra* note 33, at 43 (providing a chart contrasting “market” and “nonmarket” information production strategies); Richard A. Lanham, *Barbie and the Teacher of Righteousness: Two Lessons in the Economics of Attention*, 38 HOUS. L. REV. 499, 532 (2001) (claiming that in an “economy of attention,” copyright utility is derived from the extreme polarities of “fame” and “play”).

<sup>79</sup> See Hunter & Lastowka, *supra* note 33, at 956 & n.11.

This is true as far as it goes. The term “amateur” is generally opposed to the term “professional,” with the latter generally connoting a more prestigious rank (especially among those who consider themselves professionals!). On the other hand, as Marjorie Garber has explained, the rank of “amateur” has long been a badge of pride for those who perform “for love” and not for profit.<sup>80</sup> In some social circumstances, and perhaps particularly with regard to art, the pursuit of financial gain may be viewed as a corruption of purer motives.<sup>81</sup> Amateurs are uncorrupted by the influence of money and have not “sold out.”<sup>82</sup>

Indeed, one can trace, as Garber does, an interesting history of the amateur/professional divide as a rhetorical struggle between those who claim “insider” and “outsider” status and stand in different relations to a dominant group or market. Garber suggests that the terms are often deployed as guises by those who strategically seek to cast themselves as outsiders or as insiders: there are “professional amateurs” (those who take on the role of full-time outsiders to a field) as well as “amateur professionals” (those who use their professional status in one field to be a dilettante at another).<sup>83</sup> By the end of Garber’s essay on the topic, one is left with the sense that the terms carry very little intrinsic meaning.

The primary root of the amateur/professional divide for most people, however, is economic. Amateurs don’t participate in economic markets while professionals do. Hence the question of amateurism can be aligned with debates over the dangers of “market commodification” and the vices and virtues of market exchange. As Viviana Zelizer and Margaret Radin have noted, the presence or absence of economic exchanges can have complex social and legal framings: registers of social currency operate in different ways and the forms of value they hold are not commensurable.<sup>84</sup> Locating

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<sup>80</sup> MARJORIE GARBER, *ACADEMIC INSTINCTS* 5 (2001). Thanks to Rebecca Tushnet for alerting me to Garber’s thoughtful writing on this subject.

<sup>81</sup> See 17 *PARL. HIST. ENG.* (1774) 1000 (“Glory is the reward of science, and those who deserve it, scorn all meaner views . . .”); Kwall, *supra* note 77, at 1946-47 (recognizing the tension between spiritual motivations and extrinsic market rewards); Marc Perlman, *Art, Commerce, and Ambivalence in the Moral Psychology of File-Sharing* (Nov. 17-20, 2005) (unpublished manuscript, on file with author) (investigating the interplay of commercial motivations and the ethics of artistic production).

<sup>82</sup> Garber notes that one slang dictionary defines “pro” as prostitute. GARBER, *supra* note 80, at 19.

<sup>83</sup> *Id.* at 19-20.

<sup>84</sup> See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996); VIVIANA A. ZELIZER, *THE SOCIAL MEANING OF MONEY* (1994); Viviana A. Zelizer, *The Purchase of Intimacy*, 25 *LAW & SOC. INQUIRY* 817 (2000). For additional material on the subject, see generally *RETHINKING COMMODIFICATION* (Martha M. Ertman & Joan C. Williams eds., 2005); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 *HARV. L. REV.* 491 (2005).



exchanges of value “outside the marketplace” does not place such exchanges “outside the realm of social intercourse.”<sup>85</sup>

Consider the classic examples of wine and flowers. Obviously, one cannot obtain these at most wineries or florists with “payments” of gratitude. But neither can money be substituted for those products in other circumstances. A gift of wine to a friend providing dinner or a gift of flowers following a romantic rendezvous might be considered an appropriate expression of gratitude, whereas a direct monetary payment would be offensive.<sup>86</sup>

Comparable social norms can, and do, exist against the appropriation and monetization of creative production in some contexts.<sup>87</sup> Indeed, the arguments of Yochai Benkler and Lawrence Lessig often seem to draw upon the normative force of amateur and non-market virtues.<sup>88</sup> Zero-price information practices are translated into expressions of communitarian populism resisting intellectual property laws as the instrumental expressions of hierarchy and corporate greed.<sup>89</sup>

Such arguments have a special purchase in the digital arena. Within histories of software development, one can locate entrenched mythologies of wily and wooly “hackers” challenging and toppling greedy and profit-focused giants. The epic saga of counter-cultural ascendancy runs deep among the digerati – the obligatory sneakers and jeans of Silicon Valley are part of this ethos. And this counter-cultural mythos has been easily ported to debates over the evils of digital copyright.<sup>90</sup> It is fair to say that for some of those who identify with and participate in Lessig’s “free culture” movement, the trend toward mass amateurization in digital copyright is understood as tantamount to a progressive political revolution.<sup>91</sup>

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<sup>85</sup> RADIN, *supra* note 84, at 18.

<sup>86</sup> Neil Duxbury and Yochai Benkler, among others, have used this example of the incommensurability of exchanges within social gift realms and social cash realms. See BENKLER, *supra* note 33, at 92-99; Neil Duxbury, *Law, Markets and Valuation*, 61 BROOK. L. REV. 657, 675-76 (1995).

<sup>87</sup> See R. Polk Wagner, *The Perfect Storm: Intellectual Property and Public Values*, 74 FORDHAM L. REV. 423, 432 (2005). See generally CODE: COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY 1-108 (Rishab Aiyer Ghosh ed., 2005) (offering anthropological and sociological perspectives on various cultural property economies).

<sup>88</sup> See generally BENKLER, *supra* note 33; LESSIG, FREE CULTURE, *supra* note 28.

<sup>89</sup> See Lessig, *supra* note 61, at 43.

<sup>90</sup> See STEVEN LEVY, HACKERS: HEROES OF THE COMPUTER REVOLUTION 23-35 (1984); see also Jane C. Ginsburg, *Have Moral Rights Come of (Digital) Age in the United States?*, 19 CARDOZO ARTS & ENT. L.J. 9, 16 (2001) (“The prevailing rhetoric in academe and in the press tends to portray those who seek to protect their works against unauthorized copying (never mind alteration) as Goliath copyright owners who strain to preserve their mastodontic business models against the happy hacking Davids who only want free speech on the Net.”).

<sup>91</sup> See generally LESSIG, FREE CULTURE, *supra* note 28; Hunter, *supra* note 60.

There is something to this. There is a logical connection between our mythologies of rebellion, innovation, and creativity. And certainly, the absence of pecuniary markets for open copyright productions has some laudable characteristics and consequences. As Ellen Goodman has explained, drawing on the work of Jürgen Habermas and others, there can be compelling reasons to keep economic markets at a distance from some realms of human communicative activity.<sup>92</sup> Indeed, a recent study published in the journal *Science* suggests that, all things being equal, just thinking about money makes people more likely to avoid helping others and to concentrate on selfish goals.<sup>93</sup>

However, it would be misleading to imply that all open copyright creators are altruistic communitarians. Even a “gift economy” that operates in a social register apart from market exchange creates spaces of competition and allows those within it to further their self-interest. Indeed, the furtherance of self-interest is rarely satisfied by the mere acquisition of money. Likewise, even though an amateur creator may not realize a pecuniary gain from open copyright practices, she can easily realize a profit. This was Ralph Shaw’s point half a century ago: self-interested authors often create not merely in pursuit of money, but also in pursuit of attention and recognition.<sup>94</sup> Promoting personal reputation within a particular community is certainly not the sole motivator for open copyright production, but I would wager that it is among the top two.<sup>95</sup>

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<sup>92</sup> See Goodman, *supra* note 61, at 122-25 (arguing that “stealth marketing” payments for editorial favor may corrupt public discourse by inducing broadcasters to abandon their duties as “public fiduciaries”); *id.* at 115-16 (explaining that Habermasian theory seeks to privilege communicative action over strategic, mercantile action).

<sup>93</sup> See generally Kathleen D. Vohs et al., *The Psychological Consequences of Money*, 314 *SCIENCE* 1154 (2006).

<sup>94</sup> Shaw, *supra* note 1, at 572. The claim that artistic creativity can be motivated largely by the pursuit of “fame” is not uncommon. See, e.g., John T. Cross, *Giving Credit Where Credit Is Due: Revisiting the Doctrine of Reverse Passing Off in Trademark Law*, 72 *WASH. L. REV.* 709, 765 (1997); Roberta Rosenthal Kwall, *Fame*, 73 *IND. L.J.* 1, 1 (1997); Lanham, *supra* note 78, at 523.

<sup>95</sup> Indeed, Yochai Benkler suggests that the pursuit of reputation benefits is perhaps the primary motivational engine of his two categories of “non-exclusionary” (open) copyright creation. BENKLER, *supra* note 33, at 43 (stating that “*Nonexclusion-Market*” production is driven by a desire “to get clients” and to “advertise,” while “*Nonexclusion-Nonmarket*” production is done “in return for status” and “benefits to reputation”).

With regard to the other contender, my personal intuition is that the intrinsic enjoyment of creative production has always produced and will always produce the majority of the material that copyright protects. The human impulse to “play” is generally undervalued and understudied. Lanham, *supra* note 78, at 532. For more on the importance of play, see generally JULIAN DIBBELL, *PLAY MONEY: OR, HOW I QUIT MY DAY JOB AND MADE MILLIONS TRADING VIRTUAL LOOT* (2006); JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* (Beacon Press 1955) (1938); Greg Lastowka, *Law and*

Reputation market goals can be found in various forms of open copyright production. As open-source pundit Eric Raymond suggested in *The Cathedral and the Bazaar*, “The ‘utility function’ Linux hackers are maximizing is not classically economic, but is the intangible reward of their own ego satisfaction and reputation among other hackers.”<sup>96</sup> Raymond has repeatedly claimed that prestige, not money, drives open-source production.<sup>97</sup> Indeed, standard Free and Open-Source Software (F/OSS) licenses are characterized by a trade of standard copyright protections for authorial attribution.<sup>98</sup> For example, one open-source software project, the Apache server software, imposes only a single requirement: the provision of attribution to its creators.<sup>99</sup> And a well-known conflict between Richard Stallman and Linus Torvalds revolves around whether “Linux” software distributions should be described as “Linux” (Torvalds’ preferred name) or “GNU/Linux” (Stallman’s preferred name) – a debate over credit.<sup>100</sup>

A recent study by Professor Randall Davis,<sup>101</sup> of the Computer Science and Artificial Intelligence Laboratory at MIT, also provides evidence of the importance of attribution and reputation in open copyright practices.<sup>102</sup> Professor Davis used an informal survey to assess the attitudes of colleagues in his computer science laboratory toward intellectual property. According to Davis, the majority of his survey participants behaved according to Ralph Shaw’s prediction. In other words, they opted for the price that would best maximize their reputation gains: zero. Davis concluded that the researchers and hackers he surveyed “work for reputation, the recognition of their expertise, accomplishments, and contributions.”<sup>103</sup>

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*Games Studies*, 1 GAMES & CULTURE 25 (2005). See also Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 371 (2005) (commenting on “the centrality of play to human creative activity”).

<sup>96</sup> ERIC S. RAYMOND, *THE CATHEDRAL AND THE BAZAAR* 64 (1999).

<sup>97</sup> See, e.g., Harmon, *supra* note 72 (quoting Raymond as stating that “[t]his all goes back to evolutionary biology where we’re all competing for prestige because we think it will get us babes”).

<sup>98</sup> Vetter, “*Infectious*” *Open Source Software*, *supra* note 63, at 74; Vetter, *The Collaborative Integrity*, *supra* note 63, at 672-75.

<sup>99</sup> Vetter, “*Infectious*” *Open Source Software*, *supra* note 63, at 74 n.43.

<sup>100</sup> See Vetter, *The Collaborative Integrity*, *supra* note 63, at 569 n.12. In *Revolution OS*, a documentary film, Richard Stallman stated that “giving the Linus Torvalds Award to the Free Software Foundation is sort of like giving the Han Solo Award to the rebel fleet.” *REVOLUTION OS* (Wonderview Productions 2001).

<sup>101</sup> Professor Davis was the principal author of *The Digital Dilemma*. See *supra* note 15.

<sup>102</sup> See generally Randall Davis, *Dilemmas Faced by Creative People in IT*, Position Paper for the Microsoft Intellectual Property Conference at Princeton University (May 12-14, 2005), available at <http://people.csail.mit.edu/davis/Dilemma.pdf>.

<sup>103</sup> *Id.* at 2.

The same information practices are common among law professors with regard to their primary intellectual product: the law review article.<sup>104</sup> Many law professors distribute their principal work products on web pages and elsewhere for free, with some even competing in “tournaments” to count who has given the most copies away.<sup>105</sup> We spend our research budgets distributing paper reprints *gratis*.<sup>106</sup> Some law professors even devote significant amounts of time to writing blogs, another laborious activity dominated by open copyright practices.<sup>107</sup> While I believe altruism does motivate some of this, I think we can presume that most law professors are, at least as much as the average person, rational economic actors.<sup>108</sup> Like the hackers described by Davis, law professors seek – at least in part – profits associated with reputation.

The pursuit of reputation also leads to information-sharing practices in realms outside of copyright. A survey by Emmanuelle Fauchart and Eric von Hippel suggests that within the community of French chefs, recipes are generally guarded as trade secrets.<sup>109</sup> Techniques of culinary production, while not typically policed by intellectual property laws, constitute a valuable form of knowledge. However, according to Fauchart and von Hippel, some chefs

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<sup>104</sup> See Mark A. Lemley, *Rights of Attribution and Integrity in Online Communications*, 1995 J. ONLINE L. art. 2, ¶ 11, [http://www.wm.edu/law/publications/jol/95\\_96/lemley.html](http://www.wm.edu/law/publications/jol/95_96/lemley.html) (observing that for academic authors, “attribution may be more important than the right to commercial control”).

<sup>105</sup> The most well-known of these is SSRN’s “Top Law Schools” rank of downloads. I should add that I believe such “tournaments” are terribly silly and, if taken too seriously by the legal academy, could have a pernicious influence on the direction of legal scholarship. Yet they are just one example of the new and underappreciated challenges posed by digital reputation economies.

<sup>106</sup> See Dan Hunter, *Open Access to Infinite Content (or “In Praise Of Law Reviews”)*, 10 LEWIS & CLARK L. REV. 761, 775 (2006) (observing that, at least at first blush, investments made on law review publishing are economically irrational); Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779, 787-91 (2006) (recognizing that law professors are paid by law schools to produce and essentially give away their most valuable work product).

<sup>107</sup> Professor Daniel Solove posts a regular (informal) census of law professors who blog. He tallied 202 professors in a recent count. See Posting of Daniel J. Solove to Concurring Opinions, [http://www.concurringopinions.com/archives/2005/11/law\\_professor\\_b\\_3.html](http://www.concurringopinions.com/archives/2005/11/law_professor_b_3.html) (Nov. 14, 2005, 12:02 AM).

<sup>108</sup> Lest there be any doubt about the economic rationality of blogging, it should be observed that several members of the faculty at the University of Chicago Law School blog, as does Judge Richard Posner. See The University of Chicago Law School Faculty Blog, <http://uchicagolaw.typepad.com> (last visited Feb. 1, 2007); The Becker-Posner Blog, <http://www.becker-posner-blog.com> (last visited Feb. 1, 2007).

<sup>109</sup> Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs* 15-16 (MIT Sloan Sch. of Mgmt., Working Paper No. 4576-06, 2006), available at <http://ssrn.com/abstract=881781>.

will select “their more important and interesting recipes to reveal [to the public], reasoning that their reputation will be more effectively enhanced by revealing major rather than minor innovations.”<sup>110</sup> The most important norm that Fauchart and von Hippel identified with regard to this sharing was the expectation of proper attribution.<sup>111</sup>

Yet this is not to say that reputation markets are entirely distinct from conventional markets. Reputation economies can be and often are closely tied to pecuniary matters.<sup>112</sup> Among the hackers described by Raymond, demonstrated proficiency in coding can lead to employment prospects. Within the communities of computer scientists studied by Davis, reputation is no doubt closely tied to advancement in the academy.<sup>113</sup> Fauchart and von Hippel note the same connection with regard to French chefs bolstering popular reputations in order to attract patrons, their primary source of income.<sup>114</sup>

The pursuit of reputation, of course, can also be an “intrinsic” motivator. Attention and social standing are sometimes pursued for their own sake, divorced from or even opposed to financial goals. My claim here is not that basic monetary goals lurk behind all attempts to enhance reputation; the matter is more complex than that.<sup>115</sup> The point is that reputation and finances are not discrete spheres. Exchanges in value between the register of reputation and the register of the economic market are common.<sup>116</sup>

Indeed, the line we draw between spheres of wealth and reputation is probably too crisp.<sup>117</sup> David Hume stated centuries ago that “[e]very thing in

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<sup>110</sup> *Id.* at 19.

<sup>111</sup> *Id.* at 17.

<sup>112</sup> Accordingly, one Federal Court of Appeals recognized that the use of the mark “CoolMail” in conjunction with a freely distributed open-source program was sufficient to establish “use in commerce” for the acquisition of trademark rights. *See Planetary Motion, Inc. v. Techplosion, Inc.*, 261 F.3d 1188, 1200 (11th Cir. 2001) (“Competitive activity need not be fueled solely by a desire for direct monetary gain.”).

<sup>113</sup> Catherine Fisk’s work is particularly perceptive and noteworthy in this regard: it links the right of attribution, often framed as a matter of intellectual property law, to the law of employment. *See* Catherine L. Fisk, *Credit Where It’s Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49, 87-91 (2006).

<sup>114</sup> Fauchart & von Hippel, *supra* note 109, at 24-25.

<sup>115</sup> As Carol Rose has noted, there can be gift elements in market exchanges and vice versa. Carol M. Rose, *Property and Language, or, the Ghost of the Fifth Panel*, 18 YALE J.L. & HUMAN. (SPECIAL ISSUE) 1, 26-27 (2006). And, to be clear, gift economies are not always normatively better than cash economies – the absence of participation in a gift economy is arguably “liberating” in some circumstances. *See id.* at 27 (“Who wants to have to have an intimate relationship with the gas station guy just to be able to drive around?”).

<sup>116</sup> For example, as Laura Heymann notes in a forthcoming article, some copyright holders have enforced their property rights in order to protect their reputation interests. *See* Heymann, *supra* note 77 (manuscript at 3).

<sup>117</sup> *Cf.* Martha M. Ertman & Joan C. Williams, *Preface* to RETHINKING COMMODIFICATION, *supra* note 84, at 1, 4 (“The new materials in this book, taken as a

this world is judg'd of by comparison,"<sup>118</sup> and a "rich man feels the felicity of his condition better by opposing it to that of a beggar."<sup>119</sup> And Thorstein Veblen observed (cynically) that those who pursue material wealth often trade it for the status gained by publicly divesting themselves of it.<sup>120</sup> More recent cultural theorists have argued that market demand itself emerges from social expectations and cultural pressures.<sup>121</sup> Taking this view, it would be a mistake to conceive of reputation economies as essentially tertiary and negligible because they are "extra-market." Rather, market exchanges should be viewed as surrounded by, enabled by, and expressive of a more complex and politically contested field of social meanings.<sup>122</sup>

Just as reputational incentives and gift economies are deeply intertwined with market economies, they are also deeply intertwined with copyright entitlements. It is not surprising that laypeople generally (and mistakenly) understand copyright violations as related to plagiarism.<sup>123</sup> As Rebecca Tushnet describes in a forthcoming article, fan authors who create Internet-based derivative works regularly "pay" copyright proprietors with attribution in an attempt to protect themselves from claims of infringement.<sup>124</sup> What is surprising is that such "payments in credit" have barely any legal relevance.

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whole, argue against the vision of a world bifurcated into separate hostile spheres whose boundary is policed by commodification anxiety.").

<sup>118</sup> DAVID HUME, A TREATISE OF HUMAN NATURE 323 (L.A. Selby-Bigge ed., Oxford Univ. Press, 2d ed. 1978) (1739-1740).

<sup>119</sup> *Id.* at 316.

<sup>120</sup> THORSTEIN VEBLÉN, THE THEORY OF THE LEISURE CLASS 75 (Penguin Books 1979) (1899) ("Conspicuous consumption of valuable goods is a means of reputability to the gentleman of leisure."); see also Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 325 (2004) ("[T]he attainment of wealth is not purely functional and extrinsic but, as Veblen explained long ago, plays a role in providing social recognition . . .").

<sup>121</sup> See generally NICHOLAS XENOS, SCARCITY AND MODERNITY (1989) (arguing that economic wealth and economic scarcity are socially constructed concepts). See also Arjun Appadurai, *Commodities and the Politics of Value*, in RETHINKING COMMODIFICATION, *supra* note 84, at 34, 40 (stating that economic demand is not abstract and intrinsic but located within a skein of culture).

<sup>122</sup> Those opposed to commercialism and the expansion of advertising often make this claim, stating that advertising does not merely provide information in response to consumer demand, but also *creates* desires that might be better avoided. See Goodman, *supra* note 61, at 104-08.

<sup>123</sup> Tushnet, *supra* note 48 (manuscript at 15-16). For further thoughts on this point, see Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. REV. 1171, 1184-85 (2005).

<sup>124</sup> Tushnet, *supra* note 48 (manuscript at 17) (observing that copyright practices fail to take into account the fact that "fan" authors of derivative works sometimes use attribution "payment" in lieu of monetary payment).

Before proceeding, I should respond to the possible objection that fan authors, hackers, computer scientists, French chefs, and law professors are all idiosyncratic and marginal data points in the greater information economy. As explained above, the most significant problem with this view is that it assumes popular and amateur copyright practices are not socially valuable, despite overwhelming evidence that digital technologies are radically changing that assumption. However, if there is a need to move past “amateurs,” there are certainly many “professionals” now participating in open copyright practices on the Web. For profit-driven firms, zero-price copyright production is not beyond the pale when it can be justified by some other important benefit. Advertising, which I mention in the next section, is proof of this. Other forms of zero-price output may be cross-subsidized by advertising (this has long been the case with over-the-air broadcasts of radio and television), sales of associated goods and services, or alternative business strategies.<sup>125</sup> There are many examples of open copyright business models today – for instance, the online versions of *The New York Times* and *The Washington Post* have largely abandoned price-based sales models for their information and follow an online variant of the broadcast television model, where advertising provides the primary source of revenue.<sup>126</sup>

The primary lesson here is that while open copyright practices do have some involvement with particular ideologies about the propriety of monetary exchange for creative work, their current prominence is likely not due to some collective ideological decision about copyright. Rather, the cost-benefit analysis that Ralph Shaw recognized many years ago is playing out on today’s stage. Those who set a price of zero for their creative output have always been capable of realizing important non-monetary returns if they could find a means of distribution. Network technologies now provide those means, allowing creators to respond to very old incentives. Many forms of copyright production are drifting toward a zero-price strategy and the maximization of reputational currency.

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<sup>125</sup> Eric Schlachter noted this almost a decade ago:

[T]he profit-maximizing price on the Internet may be where marginal revenue equals marginal cost [i.e. zero cost and price] because intellectual property will be cross-subsidized by other products in a manner sufficient to cover the fixed costs associated with intellectual property creation and distribution. If this is true, a market price of zero for intellectual property can still create long-term economic profits attributable to intellectual property creation.

Schlachter, *supra* note 72, at 23.

<sup>126</sup> Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & Com. 509, 517 (1996) (stating that most broadcasts are oriented around an attention economy where viewers obtain entertainment in exchange for their attention to advertisements).

The key question is: how should copyright law respond? The next section answers that question with Shaw's prescription. Attribution must become more central to copyright law.<sup>127</sup>

## II. LAWS OF CREDIT AND ATTRIBUTION

### A. *The "Law of Advertising"*

The relevance of advertising to open copyright is obvious: as mentioned above, advertising is one of the key cross-subsidizing techniques used to sustain "professional" open copyright business models.<sup>128</sup> Understanding the role and policy of advertising may therefore be important to understanding how the law should respond to open copyright. Yet apart from that, advertisements themselves fall within the definition of open copyright, and vice versa. As Ralph Shaw put it: "Publication of contributions to knowledge is the only form of advertising considered ethical among the professions."<sup>129</sup>

It may seem harsh or heretical to suggest that advertising is a species of open copyright. The positive normative charge of providing "free content" is reversed with respect to advertising.<sup>130</sup> But the fact that both advertising and open copyright are freely distributed and oriented – at least in part – toward mechanics of reputation suggests that the history of advertising might provide some guidance for investigations of the future of open copyright.

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<sup>127</sup> For an earlier discussion along similar lines, see Lemley, *supra* note 104, ¶¶ 13, 21 (considering whether the rise of the Internet as a forum for communication might warrant the creation of new attribution rights).

<sup>128</sup> Advertising is, of course, the primary source of revenue for Google, which provides as its primary service a tool used to find open copyright materials online. Advertising also supports many of the "free" hosting services for blogs and online communities. The major newspaper companies that provide open copyright content over the Web are also primarily reliant on advertising to finance their businesses.

<sup>129</sup> Shaw, *supra* note 1, at 572.

<sup>130</sup> The "non-commercial" charge of open copyright amateurism is replaced, in the case of advertising, with a "hyper-commercial" presumption of strategic, intrusive, and manipulative speech. See Goodman, *supra* note 61, at 115-25. Standard open copyright practices probably will not provoke acts of principled resistance by Adbusters or the Billboard Liberation Front. See ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* 73-76 (1998) (discussing "activist appropriations" of advertising artwork); NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES*, at xxi-xxii (2000) (describing instances of anti-branding activism); Rosemary Coombe & Andrew Herman, *Trademarks, Property, and Propriety: The Moral Economy of Consumer Politics and Corporate Accountability on the World Wide Web*, 50 DEPAUL L. REV. 597, 599-600 (2000) (pointing to the activities of the Billboard Liberation Front as an example of "critical commentary upon corporate texts"); Sonia Katyal, *Semiotic Disobedience*, 84 WASH. L. REV. (forthcoming 2006).



Advertisements are creative forms of information. Like paintings, novels, and software, advertisements take creativity and labor to produce and are legally protected by copyright.<sup>131</sup> Successful advertising is perhaps just as creatively challenging as any genre; the author must manage to engage viewers (sometimes against their will) while conveying a particular message that encourages a particular activity (generally the purchase of goods and services).

In contrast to open copyright, where a zero price initially seemed puzzling from an economic standpoint, with advertising there is no puzzle. Despite the fact that the advertiser (the business financing the advertisement) fails to recoup the costs of production through sale of the creative product, advertising is clearly a sensible activity for most firms. When the reputation benefits that come from creating and distributing information to the public outweigh the cost of doing so, there can be a positive return on a zero investment.

Just like the computer scientists in Davis' survey, advertising firms attempt to build up their reputation capital. And just as some open-source software creators seek to extend the social penetration of their practices through "viral licensing,"<sup>132</sup> so too are many advertisers exploring the use of so-called "viral" mechanisms designed to "infect" the creative work of others, harnessing the energy of the public to promote their brand messages beyond their direct creative control or financing.<sup>133</sup>

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<sup>131</sup> The seminal case is *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903), in which Justice Holmes stated that "the special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright." *Id.* at 251. That has been the law ever since. See 1 NIMMER ON COPYRIGHT, *supra* note 24, § 2.08[G][4]; Ramsey, *supra* note 77, at 201; Note, *Rethinking Copyright for Advertisements*, 119 HARV. L. REV. 2486, 2488 (2006).

<sup>132</sup> See Vetter, "Infectious" Open Source Software, *supra* note 63, at 81-82.

<sup>133</sup> Ramsey, *supra* note 77, at 243; see also Chris Gaither, *A Web Contagion: 'Viral' Ads Gives Companies an Unconventional Method of Spreading a Message Online. The Spots Must Be Entertaining or Compelling to Viewers*, L.A. TIMES, Aug. 28, 2005, at C1 ("Viral ads – also called pass-along ads – spread by word of mouse: The goal is to make the ads so funny, charming, sexy, or controversial that viewers e-mail them to friends or post them on websites."); Pia Sarkar, *A Different Way of Selling Clothes: Gap's Animated Online Stripper Latest Viral Ad To Get Attention as Firms Seek New Ways To Reach Buyers*, S.F. CHRON., Aug. 27, 2005, at C1 ("Companies have increasingly turned to viral ads – ads that spread like viruses through word of mouth or e-mail forwards – as television and radio continue to lose their audiences to TiVo and iPods.").

This footnote will now become a vehicle for viral marketing by way of a personal anecdote about viral marketing – one that is relevant, I hope, to the substance of the footnote. I recently received a new "beta" model multimedia cell phone as part of the "Sprint Ambassador Program." See Sprint Power Vision Ambassador: FAQ, <http://ambassador.sprint.com/faq.aspx> (last visited Feb. 1, 2007). Pursuant to my agreement with Sprint, I had no obligation to do anything and I received a fancy new cell phone with service for six months. Apparently this offer was extended to me because Sprint believed I just *might* tell other people about the phone – which I have now done.

For corporations, while advertising is primarily about driving the sales of products and services, it can also serve some of the intrinsic functions that were discussed with regard to open copyright. Ad campaigns help to build positive reputations around a business name, help to improve employee morale, and perhaps even provide some rough corporate analogue to the “egoboo” coveted by open-source programmers.<sup>134</sup>

Like open copyright, advertising is generally ignored in discussions of copyright law. Indeed, the wisdom of according it copyright protection has been questioned.<sup>135</sup> Reciprocally, one can find treatises on the “law of advertising” that ignore copyright.<sup>136</sup> The “law of advertising” seems to be understood as primarily the law of trademark and unfair competition.<sup>137</sup>

This is curious. What it might suggest is that our legal attitude toward information goods distributed at zero price to promote reputations is substantially different than our attitude toward information goods distributed for sale. When law confronts advertising, its role shifts from the copyright model of creating property-based creation incentives to the communication model of protecting reputation and preventing deception.

Yet, when we consider it, “advertising” seems not so much a substantive definition of some objective quality of information content, but a shorthand for “zero-price information.” Increasingly, copyright markets that are *not* characterized by zero prices are serving the purposes that are associated with advertising.<sup>138</sup> Promoting reputations and brands, sending persuasive rhetorical messages, and attempting to influence popular opinion are all things we can find in information that is sold today under the traditional copyright model.

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<sup>134</sup> See DAVID OGILVY, OGILVY ON ADVERTISING 117 (1983) (“Corporate advertising can improve the morale of your employees . . . . It can also make it easier to recruit better people, at all levels.”).

<sup>135</sup> See Ramsey, *supra* note 77, at 193-94 (proposing changes to copyright law that would accord advertisements a lesser degree of copyright protection); Note, *supra* note 131, at 2487 (same). While I share the view that property incentives may not be necessary to ensure an optimal level of advertising, as is discussed below, I am dubious that firm lines can or should be drawn between advertising and art. See Goodman, *supra* note 61, at 117 (“[C]ourts have long recognized the impossibility of separating art from politics from commerce.”); Ramsey, *supra* note 77, at 199, 238, 242 (acknowledging that it is often hard to distinguish between advertising and entertainment). *But see id.* at 245 (arguing that despite such line-drawing challenges, reform is warranted).

<sup>136</sup> See, e.g., GEORGE ERIC ROSDEN & PETER ERIC ROSDEN, THE LAW OF ADVERTISING (2006).

<sup>137</sup> *Id.*

<sup>138</sup> For a thorough treatment of the permeation of advertising messages into copyright markets, see generally Goodman, *supra* note 61.

Consider contemporary children's entertainment offerings.<sup>139</sup> Popular children's cartoons like Pokemon,<sup>®</sup> Clifford,<sup>®</sup> Rescue Heroes,<sup>®</sup> Winnie the Pooh,<sup>®</sup> and Bratz<sup>®</sup> are all undeniably copyright-protected works, sold on VHS and DVD as well as in traditional book form. They are also (effectively) advertisements for extensive lines of affiliated toys, games, bedsheets, backpacks, and other products. Children watching these programs on television are, in a sense, watching well-made advertisements that are additionally cross-subsidized by more traditional commercials.

The Harry Potter<sup>®</sup> franchise epitomizes the impossibility of drawing bright lines between content and advertising. Harry Potter is, unquestionably, the protagonist in an award-winning series of literary stories. Harry does double duty, however, as a brand-licensing juggernaut for all manner of commercial flotsam and jetsam that bear his extremely valuable trademark. One simply cannot escape Harry Potter's fame. He is even a font of legal wisdom.<sup>140</sup> As Jessica Litman has observed, popular content blurs into advertising and advertising blurs into cultural vocabulary.<sup>141</sup> In those areas of academia that operate outside the discourse of law (especially cultural studies), it is generally recognized that the texts of advertising and the texts of Hollywood (whose purveyors have driven major copyright reforms in the past decades) are not all that different.<sup>142</sup>

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<sup>139</sup> Recent films like *Fahrenheit 9/11* and *The Passion of the Christ* might also be used as examples of ideological and persuasive entertainment offerings, but the apparent indifference of most adults to children's programming has made it an ideal playground for advertainers.

<sup>140</sup> Seriously. See, e.g., Susan Hall, *Harry Potter and the Rule of Law: The Central Weakness of Legal Concepts in the Wizard World*, in *READING HARRY POTTER: CRITICAL ESSAYS* 147 (Giselle Liza Anatol ed., 2003); Paul R. Joseph & Lynn E. Wolf, *The Law in Harry Potter: A System Not Even a Muggle Could Love*, 34 *U. TOL. L. REV.* 193 (2003); William P. MacNeil, "Kidlit" as "Law-and-Lit": *Harry Potter and the Scales of Justice*, 14 *LAW & LITERATURE* 545 (2002); Jeffrey E. Thomas et al., *Harry Potter, Law, and Culture*, 12 *TEX. WESLEYAN L. REV.* 427 (2005). (In fact, I should probably face up to the fact that Harry Potter will likely have a greater influence on legal scholarship than I will have, based on the number of law review articles in which his name appears in the title.)

<sup>141</sup> Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 *YALE L.J.* 1717, 1732-34 (1999). The film *Time To Dream*, by M. Night Shyamalan, is an interesting example of this confusion. The short film, which doubles as a commercial for American Express, can easily be found online by searching for "Shyamalan" and "Time To Dream." See Barbara Lippert, *Awakening the Senses*, *ADWEEK*, Mar. 13, 2006, [http://www.adweek.com/aw/search/article\\_display.jsp?vnu\\_content\\_id=1002157246](http://www.adweek.com/aw/search/article_display.jsp?vnu_content_id=1002157246) (predicting that the advertisement "will have a big viral presence on the Web"). It might be worth noting that Shyamalan gave the money he made from doing the spot to school scholarships and did not permit the advertisement to be aired in theaters. See *id.*

<sup>142</sup> See, e.g., ROLAND BARTHES, *MYTHOLOGIES* 36-38 (Annette Lavers trans., Hill & Wang 1972) (1957); COOMBE, *supra* note 130, at 172-73; JACKSON LEARS, *FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA* 1 (1994); GRANT

Seeing the connection between open copyright practices and advertising may help advance the scholarly discourse over digital copyright in constructive ways. If open copyright is indeed a cousin to advertising, its legal rules might be structured in similar ways. Most importantly, laws of open copyright might focus on matters of attribution, a concern at the heart of advertising.<sup>143</sup>

Where a provider of information can obtain essentially no market benefit other than popular attention, proper attribution of the information to the source of production is essential.<sup>144</sup> The law is capable of providing this type of attribution protection for authors of creative works, ensuring that those who invest in creating new information products will reap the consumer goodwill that flows from those investments.<sup>145</sup>

In the digital environment, protections for reliable authorial attribution should be, to borrow Julie Cohen's phrase, "one cornerstone of a well-balanced copyright edifice."<sup>146</sup> As will be explained in the next section, however, attribution protections in the realm of intellectual property law are in a sorry state, little improved from (if not even worse than) the state that Ralph Shaw criticized in 1951.

#### B. *Copyright: VARA and the CMI Provisions of the DMCA*

European copyright systems provide protections for authorial attribution under the rubric of so-called "moral rights."<sup>147</sup> In European countries, moral rights are understood as unique to the author and cannot be alienated.<sup>148</sup> Among an author's moral rights is the right of paternity, which carries the

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MCCRACKEN, *CULTURE AND CONSUMPTION* 77-79 (1988); Marsha Bryant, *Plath, Domesticity, and the Art of Advertising*, C. LITERATURE, Summer 2002, at 17, 19; Carol J. Singley, *From Women's Movement to Momentum: Where Are We Going, Where Have We Been, and Do We Need Nikes To Get There?*, 25 J. AM. & COMP. CULTURES 455, 455 (2002); Michael E. Zega, *Advertising the Southwest*, 43 J. SOUTHWEST 281, 281 (2001).

<sup>143</sup> See Schlachter, *supra* note 72, at 30 ("[F]or cross-subsidization to work, buyers impressed with product X (freely given away) must be led to product Y (for sale). In most cases, this will mean that product X must give proper attribution to the seller of product Y so that buyers can make the connection.").

<sup>144</sup> See Shaw, *supra* note 1, at 572 ("If [a scientific author's] name need not be included, the incentive for publishing scientific literature would be greatly reduced.").

<sup>145</sup> See William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 268-73 (1987).

<sup>146</sup> Cohen, *supra* note 95, at 348.

<sup>147</sup> The phrase "moral rights" is an unfortunate accident of translation, especially given the disdain shown by legal pragmatists for "moral" discourse. See, e.g., Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1639 (1998) ("[E]ven if moral theory can provide a solid basis for some moral judgments, it should not be used as a basis for legal judgments."). A better translation would probably be "personality rights."

<sup>148</sup> They may be waived, however, depending on the jurisdiction. Kwall, *supra* note 77, at 2010 & n.349.

connotation of a genetic connection between the author and the work. In practice, the right of paternity functions as a right to credit – the author has the right to be publicly acknowledged as the work’s creator.<sup>149</sup>

In the United States, however, the moral right of paternity (and moral rights generally) are not recognized, and there are few protections for authorial attribution.<sup>150</sup> A significant right of authorial attribution exists at only one place in the copyright law: the Visual Artist Rights Act of 1990 (VARA).<sup>151</sup> VARA was enacted in order for the United States to meet its new international obligations pursuant to the most important international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works (“Berne”).<sup>152</sup> Pursuant to amendments to Berne, signatories were required to recognize and implement, “independently of the author’s economic rights,” a legal order that would protect an author’s “right to claim authorship of [her] work.”<sup>153</sup> VARA, however, was limited to the protection of a very tiny subset of copyright-protected works, namely, the works of visual artists who produce single works or editions of works numbering fewer than two hundred.<sup>154</sup> VARA essentially protects only “fine artists.” Because of this, it has negligible impact on the economic engines of the copyright industries, which are the core concern of U.S. copyright law.

Outside the limited context of VARA works, it is difficult to spot references to attribution in the copyright statute.<sup>155</sup> The only other attribution-related provisions in copyright law can be found in the 1998 Digital Millennium Copyright Act. The DMCA protects attribution interests (in a fashion) by

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<sup>149</sup> See *id.* at 1992.

<sup>150</sup> See Karen L. Gulick, *Creative Control, Attribution, and the Need for Disclosure: A Study of Incentives in the Motion Picture Industry*, 27 CONN. L. REV. 53, 91-92 (1994); Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2 (1994); Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1203, 1203-15 (2002).

<sup>151</sup> Pub. L. No. 101-650, §§ 601-610, 104 Stat. 5089, 5128-33 (codified at scattered sections of 17 U.S.C. (2000)).

<sup>152</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. TREATY DOC. NO. 99-27 (1986) [hereinafter Berne Convention]. It took the United States over a century to sign the treaty. See Susan P. Liemer, *How We Lost Our Moral Rights and the Door Closed on Non-Economic Values in Copyright*, 5 J. MARSHALL REV. INTELL. PROP. L. 1, 6-8 (2005) (discussing the history of the Berne Convention).

<sup>153</sup> Berne Convention, *supra* note 152, at art. 6bis(1).

<sup>154</sup> 17 U.S.C. § 101 (2000) (defining “work of visual art”); *id.* § 106A (providing special protections for such works); see also Kwall, *supra* note 77, at 1993-95 (discussing the limitations of VARA). It is interesting to note that VARA explicitly excludes advertising from its scope of coverage. See Ramsey, *supra* note 77, at 193.

<sup>155</sup> See Kwall, *supra* note 77, at 1995 (stating that “no clear remedy exists” for attribution-related harms if the conduct is not covered by VARA).

outlawing the alteration and removal of “copyright management information” (CMI) conveyed in connection with a work.<sup>156</sup> However, the potential attribution rights found in the CMI provisions of the DMCA have been underused, difficult to employ, and have presented interpretive challenges.

The CMI provisions in the DMCA were enacted pursuant to obligations under two 1998 World Intellectual Property Organization (WIPO) treaties. However, versions of the CMI provisions (and other key provisions of the DMCA) were actually first drafted in the United States in 1995 under the direction of President Clinton.<sup>157</sup> The purpose of these provisions was to prospectively retool copyright for the anticipated online economy. According to the U.S. Copyright Office, both the anti-circumvention provisions under 17 U.S.C. § 1201 and the CMI provisions in 17 U.S.C. § 1202 “serve as technological adjuncts to the exclusive rights granted by copyright law.”<sup>158</sup> While the anti-circumvention provisions have received considerable (and largely negative) attention, there had been, until recently, a relative “dearth of caselaw” on the CMI provisions.<sup>159</sup> In the past few years, however, there have been a number of cases interpreting the CMI provisions.<sup>160</sup> The early returns suggest that the provisions have not been particularly efficacious or well-drafted.<sup>161</sup>

According to the Senate Report on the CMI provisions, they are intended to assist in the “licensing of rights and indicating attribution, creation and ownership.”<sup>162</sup> Quickly summarizing the precise language of the CMI provisions is impossible, but they generally prohibit the knowing distribution

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<sup>156</sup> 17 U.S.C. § 1202; *see also* Ginsburg, *supra* note 90, at 11-12.

<sup>157</sup> *See* IQ Group, Ltd. v. Wiesner Publ’g, LLC, 409 F. Supp. 2d 587, 593-94 (D.N.J. 2006).

<sup>158</sup> U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 3 (1998), available at <http://www.copyright.gov/legislation/dmca.pdf>.

<sup>159</sup> *Schiffer Publ’g, Ltd. v. Chronicle Books, LLC*, No. 03-4962, 2004 U.S. Dist. LEXIS 23052, at \*43 (E.D. Pa. Nov. 12, 2004); *see also* *Gordon v. Nextel Commc’ns*, 345 F.3d 922, 926 (6th Cir. 2003) (referring to “the very few reported cases”).

<sup>160</sup> *See, e.g., Gordon*, 345 F.3d at 925-27; *IQ Group*, 409 F. Supp. 2d at 593-94; *Schiffer Publ’g*, 2004 U.S. Dist. LEXIS 23052, at \*42-46; *Med. Broad. Co. v. Flaiz*, No. 02-8554, 2003 U.S. Dist. LEXIS 22185, at \*9 (E.D. Pa. Nov. 25, 2003); *Thron v. HarperCollins Publishers, Inc.*, No. 01 Civ. 5437, 2002 U.S. Dist. LEXIS 13670, at \*4-5 (S.D.N.Y. July 26, 2002); *Ward v. Nat’l Geographic Soc’y*, 208 F. Supp. 2d 429, 449-50 (S.D.N.Y. 2002); *Learn2.com, Inc. v. Bell*, No. 3:00-CV-812-R, 2000 U.S. Dist. LEXIS 14283, at \*44-47 (N.D. Tex. July 20, 2000); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999), *aff’d in part, rev’d in part*, 336 F.3d 811 (9th Cir. 2003).

<sup>161</sup> Only a handful of plaintiffs have successfully invoked the CMI provisions. *See, e.g., Med. Broad. Co.*, 2003 U.S. Dist. LEXIS 22185, at \*9 (finding a violation of the CMI provisions based on the defendant’s unauthorized appropriation of computer files from his former employer); *Learn2.com*, 2000 U.S. Dist. LEXIS 14283, at \*47 (same).

<sup>162</sup> S. REP. NO. 105-190, at 16 (1998).

of false CMI that enables copyright infringement, as well as the intentional removal or alteration of CMI with knowledge that this will facilitate copyright infringement.<sup>163</sup>

There are still many open questions about the CMI provisions. For instance, courts have expressed differing opinions as to whether they are specifically targeted at digital information, or whether they also apply to non-digital works. Looking at the legislative history simply clouds the issue.<sup>164</sup> The language used in the WIPO treaties took a narrow approach, requiring member states to implement the protection of “electronic rights management information.”<sup>165</sup> However, the CMI provisions enacted in the United States do not use any “digital” or “electronic” modifier, but simply protect “copyright management information.”<sup>166</sup> And the U.S. version of CMI, by statutory definition, includes several types of information that could be presented in digital or analog form, including the title of the work, the name of the work’s author, copyright owner, performer, writer, and/or director, the terms and conditions regarding use, and “numbers,” “symbols,” or “links” referring to terms of use.<sup>167</sup> Most courts

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<sup>163</sup> The exact language of the critical operative section (currently) is as follows:

(a) FALSE COPYRIGHT MANAGEMENT INFORMATION. – No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement –

(1) provide copyright management information that is false, or

(2) distribute or import for distribution copyright management information that is false.

(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION. – No person shall, without the authority of the copyright owner or the law –

(1) intentionally remove or alter any copyright management information,

(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

17 U.S.C. § 1202(a)-(b) (2000).

<sup>164</sup> David Nimmer has written extensively about the DMCA and its CMI provisions. See, e.g., David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA’s Commentary*, 23 CARDOZO L. REV. 909, 923 (2002); David Nimmer, *Aus Der Neuen Welt*, 93 NW. U. L. REV. 195, 196-200 (1998); David Nimmer, *Puzzles of the Digital Millennium Copyright Act*, 46 J. COPYRIGHT SOC’Y 401, 418-21 (1999).

<sup>165</sup> See Séverine Dusollier, *Some Reflections on Copyright Management Information and Moral Rights*, 25 COLUM. J.L. & ARTS 377, 382-83 (2003).

<sup>166</sup> See *id.* at 388.

<sup>167</sup> 17 U.S.C. § 1202(c).

have, at least in dicta, interpreted the definition of CMI broadly,<sup>168</sup> incorporating analog forms of copyright within its scope. But at least one district court has opined that CMI should be “limited to components of . . . technological measures.”<sup>169</sup>

Also unresolved is the question of whether information conveyed with the work, but not proximate to the work, qualifies for CMI protection. The case of *Kelly v. Arriba Soft Corp.*<sup>170</sup> is often cited with regard to this issue. The case involved a claim brought by a photographer whose work was redisplayed by an image search engine outside the context of the plaintiff’s website. The district court noted that the CMI was not present in the image files displayed, but was part of the surrounding website. The court stated that the CMI provisions applied “only to the removal of copyright management information on a plaintiff’s product or original work.”<sup>171</sup>

The district court in *Kelly* clearly regarded the information surrounding the images on the original website as a form of CMI.<sup>172</sup> However, subsequent district courts have used the above-quoted language from *Kelly* to support the proposition that CMI must be found somewhere spatially proximate to the work. For instance, in *Schiffer Publishing, Ltd. v. Chronicle Books, LLC*,<sup>173</sup> the district court cited *Kelly* for the proposition that to run afoul of § 1202(b), “a defendant must remove copyright management information from the ‘body’ of, or area around, plaintiff’s work itself.”<sup>174</sup> In *Schiffer*, the copyright-protected photographs were present in a book that did not display any CMI on the same page as the pictures. Hence, the court concluded the copyright

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<sup>168</sup> The statutory language cited in the prior footnote, as well as the legislative history, makes this interpretation very defensible. See S. REP. NO. 105-190, at 16 (1998) (“CMI need not be in digital form . . .”).

<sup>169</sup> *IQ Group, Ltd. v. Wiesner Publ’g, LLC*, 409 F. Supp. 2d 587, 593 (D.N.J. 2006) (referring to the scholarship of Julie E. Cohen); see also *id.* at 597 (“[The CMI provisions in § 1202] should not be construed to cover copyright management performed by people, which is covered by the Copyright Act, as it preceded the DMCA; it should be construed to protect copyright management performed by the technological measures of automated systems.”).

<sup>170</sup> 77 F. Supp. 2d 1116 (C.D. Cal. 1999), *aff’d in part, rev’d in part*, 336 F.3d 811 (9th Cir. 2003).

<sup>171</sup> *Id.* at 1122.

<sup>172</sup> *Id.* (“There is no dispute the [Defendant] removed Plaintiff’s images from the context of Plaintiff’s Web sites where their copyright management information was located, and converted them to thumbnails in Defendant’s index. There is also no dispute the [Defendant’s] search engine allowed full-size images to be viewed without their copyright management information.”).

<sup>173</sup> No. 03-4962, 2004 U.S. Dist. LEXIS 23052 (E.D. Pa. Nov. 12, 2004).

<sup>174</sup> *Id.* at \*46.



information in other areas of the book was not CMI with regard to the infringing pictures.<sup>175</sup>

With regard to the removal of CMI, plaintiffs often fail because their claims do not involve an assertion of their economic rights.<sup>176</sup> In order to prove liability under the CMI provisions in § 1202(b), a plaintiff must essentially prove that a defendant was expressly contemplating copyright infringement when removing or distributing the information without the required CMI.<sup>177</sup> This tightly binds the CMI removal provisions to traditional economic rights and divorces them from any independent concern about authorial interests in attribution.

For instance, in a hypothetical situation where an author's publisher wished to remove the author's attribution without permission, the author would have no cause of action against the publisher, unless the publisher's copying of the work would constitute infringement.<sup>178</sup> In most cases it would not, because the author would have transferred copyright or licensed the publisher to reproduce the work without requiring attribution. Additionally, even where infringement could be found to exist, the burden of showing a culpable mental state on the part of the defendant is a heavy burden for any plaintiff. Rights-owning plaintiffs in several cases have failed to prevail on their CMI claims because they lacked admissible evidence of the requisite mental state of the infringing defendant.<sup>179</sup>

Of course, authors contracting with publishers might exchange their proprietary rights for express attribution protections. But such contractual forms are not efficient. An unregulated market in sales of property that relies on private parties to protect attribution rights leads to a particular type of market failure.<sup>180</sup> Trademark law is based upon that proposition.

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<sup>175</sup> *Id.*

<sup>176</sup> See Dusollier, *supra* note 165, at 397 (stating that the CMI provisions are focused on the economic interests of the producer rather than the personality rights of the author); Ginsburg, *supra* note 90, at 13 (stating that the DMCA does not recognize the importance of "authorship credit").

<sup>177</sup> See 17 U.S.C. § 1202(b) (2000).

<sup>178</sup> See Ginsburg, *supra* note 90, at 13 ("[S]ince it is not copyright infringement even willfully to miscredit the author, there would be no violation of section 1202 unless it could be shown that miscrediting authorship induces infringement.").

<sup>179</sup> See, e.g., *Gordon v. Nextel Commc'ns*, 345 F.3d 922, 923, 927 (6th Cir. 2003); *Schiffer Publ'g.*, 2004 U.S. Dist. LEXIS 23052, at \*45; *Thron v. HarperCollins Publishers, Inc.*, No. 01 Civ. 5437, 2002 U.S. Dist. LEXIS 13670, at \*5 (S.D.N.Y. July 26, 2002); *Ward v. Nat'l Geographic Soc'y*, 208 F. Supp. 2d 429, 450 (S.D.N.Y. 2002); *Kelly v. Arriba Soft Corp.*, 77 F. Supp. 2d 1116, 1122 (C.D. Cal. 1999).

<sup>180</sup> Lastowka, *supra* note 123, at 1221-28.

C. *Trademark: Attribution Rights After Dastar*

If we had full faith in property and contract, we might just let producers of tangible products in the marketplace “fix” the absence of legal trademark rights. Producers might demand the recognition of attribution rights from all those who purchase and sell goods, using contractual mechanisms to secure the integrity of their business reputations. However, the transaction costs of such a regime would be overwhelming. Instead, the law provides businesses with a much more efficient solution: trademark protection. Trademark law allows the providers of goods and services the right to secure and foster the goodwill flowing from accurate attribution, and to prevent misattribution of inferior products that they did not produce. It also serves the public by creating private causes of action to prevent deceptive and misleading speech.

There is a fairly clean fit, at least from a theoretical perspective, between authorial attribution rights and the law of trademark.<sup>181</sup> Many cases, prior to 2003, recognized that authors had the right to bring suits where their attributions of authorship were removed or their works were misattributed.<sup>182</sup> However, the Supreme Court overturned this long history of lower court doctrine in 2003, in *Dastar Corp. v. Twentieth Century Fox Film Corp.*,<sup>183</sup> holding that trademark law did not extend to the protection of authorial attribution.<sup>184</sup>

At issue in *Dastar* was a Fox television series based on Dwight Eisenhower’s 1948 book *Crusade in Europe*.<sup>185</sup> Forty-six years after the Fox series originally aired, a small company, Dastar, obtained copies of the series, stripped out all of the original indications of authorship and references to Eisenhower’s book, and then re-released the series with a new credit sequence,

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<sup>181</sup> *Id.* at 1194-1200.

<sup>182</sup> *See, e.g.*, *Smith v. Montoro*, 648 F.2d 602, 608 (9th Cir. 1981) (finding that the Lanham Act provided a cause of action where an actor’s name was omitted and his role attributed to another in film credits); *Gilliam v. ABC*, 538 F.2d 14, 17 (2d Cir. 1976) (finding that the Lanham Act provided a cause of action where a television show was heavily edited and aired without its authors’ approval); *Follett v. New Am. Library, Inc.*, 497 F. Supp. 304, 313 (S.D.N.Y. 1980) (“The Lanham Act . . . is designed not only to vindicate ‘the author’s personal right to prevent the presentation of his work to the public in a distorted form,’ but also to protect the public and the artist from misrepresentations of the artist’s contribution to a finished work.” (quoting *Gilliam*, 538 F.2d at 24) (citations omitted)); *see also* Lauren M. Wise, Note, *King v. Innovation Books: An Analysis of Credit Attribution with Respect to the Lanham Act*, 1 VILL. SPORTS & ENT. L.J. 147, 147 (1994) (“Authors may sue under . . . the Lanham Act when an erroneous credit is used.”). *But see* *Comedy III Prods., Inc. v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000) (“If material covered by copyright law has passed into the public domain, it cannot then be protected by the Lanham Act without rendering the Copyright Act a nullity.”).

<sup>183</sup> 539 U.S. 23 (2003).

<sup>184</sup> *Id.* at 30.

<sup>185</sup> *Id.* at 25-26.

which was limited to the names of the Dastar editors.<sup>186</sup> Fox sued Dastar for “reverse passing off” – misrepresenting a Fox product as its own in violation of trademark law.<sup>187</sup> Although Fox prevailed on its misattribution claim at the district court level and on Dastar’s initial appeal to the Ninth Circuit,<sup>188</sup> it lost before the Supreme Court.

The Court’s opinion, authored by Justice Scalia, essentially eviscerated trademark-based protections for authorial attribution. Scalia drew a bright, broad line between the laws of copyright and trademark. According to the *Dastar* opinion, trademark law was never intended to reach authorial attribution, because authors could not be understood as “origins” of goods:

[A]s used in the Lanham Act, the phrase “origin of goods” is in our view incapable of connoting the person or entity that originated the ideas or communications that “goods” embody or contain. Such an extension would not only stretch the text, but it would be out of accord with the history and purpose of the Lanham Act and inconsistent with precedent.<sup>189</sup>

While *Dastar* has received substantial praise from some commentators, it has received serious criticism as well.<sup>190</sup> Those who praise *Dastar* argue that it was correct because it prevented Fox from exerting intellectual property rights relative to a work that had fallen into the public domain.<sup>191</sup> (However, the

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<sup>186</sup> *Id.* at 26-27.

<sup>187</sup> *Id.* at 27 & n.1.

<sup>188</sup> *Id.* at 27-28.

<sup>189</sup> *Id.* at 32.

<sup>190</sup> See, e.g., Jane C. Ginsburg, *The Author’s Name as a Trademark: A Perverse Perspective on the Moral Right of “Paternity”?*, 23 CARDOZO ARTS & ENT. L.J. 379, 380 (2005); Jane C. Ginsburg, *The Right To Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 267-70 (2004); Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377, 1382-83 (2005); Michael Landau, *Dastar v. Twentieth Century Fox: The Need for Stronger Protection of Attribution Rights in the United States*, 61 N.Y.U. ANN. SURV. AM. L. 273, 275 (2005); Liemer, *supra* note 152, at 4 n.26.

<sup>191</sup> See, e.g., Lynn McLain, *Thoughts on Dastar from a Copyright Perspective: A Welcome Step Toward Respite for the Public Domain*, 11 U. BALT. INTELL. PROP. L.J. 71, 91 (2003) (“It is to be hoped that the Court will continue the work that it has begun. The public domain’s borders . . . must not be permitted to be truncated by other bodies of law . . .”); Jessica Bohrer, Note, *Strengthening the Distinction Between Copyright and Trademark: The Supreme Court Takes a Stand*, 2003 DUKE L. & TECH. REV. 0023, ¶ 11, <http://www.law.duke.edu/journals/dltr/articles/PDF/2003DLTR0023.pdf> (“The Court . . . was rightfully concerned that allowing the line to blur in a case such as this would create a state of ‘perpetual copyright protection’ that could nullify the intent and effect of copyright and trademark law.”); Richard Ronald, Note, *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 19 BERKELEY TECH. L.J. 243, 255 (2004) (“[T]he *Dastar* Court frees manufactures [sic] to use public domain works without fear of a burdensome attribution requirement.”).

scope of *Dastar* has not been limited by subsequent courts to public domain works.)<sup>192</sup> Those who criticize the *Dastar* case argue, among other things, that by removing trademark law as a vehicle for addressing authorial attribution, the Supreme Court has licensed plagiarism.<sup>193</sup>

Following *Dastar*, some courts have attempted to place even more distance between copyright and trademark laws, keeping the regimes of intellectual property neatly separated as Justice Scalia purported to do.<sup>194</sup> If copyright and trademark come near each other, the story seems to go, they will create a dangerous alchemy producing some monstrous “mutant,” as David Nimmer and Justice Scalia have described it.<sup>195</sup> This urge to establish some kind of legal “buffer zone” between the regimes of trademark and copyright is extremely odd and dangerous. Obviously, courts should not confuse copyright and trademark laws, and their respective animating theories, with each other.<sup>196</sup> When the expansions of both doctrines lead courts to blur them into a single property right, this can create significant harm. Rights of publicity and what Justin Hughes has recently termed “micro-works” are examples, I think, of the dangerous mutants that can spring from the interstices of copyright and trademark.<sup>197</sup> But if we have learned anything from Hollywood’s *X-Men* trilogy, it is that not all our new mutants are evil. Some degree of mutation is essential to legal evolution.<sup>198</sup> *Dastar*’s attempt to keep copyright and

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<sup>192</sup> Lastowka, *supra* note 123, at 1204 & n.168.

<sup>193</sup> See, e.g., Landau, *supra* note 190, at 298 (“Copying a work without giving attribution is plagiarism, and the Court . . . is giving its blessings to the practice.”).

<sup>194</sup> See *Chosun Int’l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324, 328 n.2 (2d Cir. 2005) (citing *Dastar* for the principle that allowing intellectual property owners to “recategorize one form of intellectual property as another” would result in protection for authors beyond the duration Congress contemplated); *IQ Group, Ltd. v. Wiesner Publ’g, LLC*, 409 F. Supp. 2d 587, 592 (D.N.J. 2006) (stating that the extension of copyright protections to trademark would create a blurring of the two that Congress never intended).

<sup>195</sup> See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 34 (2003) (speaking of a “mutant copyright law”); David Nimmer, *The Moral Imperative Against Academic Plagiarism (Without a Moral Right Against Reverse Passing Off)*, 54 DEPAUL L. REV. 1, 59-60 & n.340 (2004) (pointing out that the phrase “mutant copyright law” appeared in a brief that Nimmer co-authored in support of *Dastar*, but that “[h]appily for Justice Scalia . . . his own opinion in *Dastar* eliminates any right to maintain that those words in the Court’s opinion represent reverse passing off”).

<sup>196</sup> See generally Graeme B. Dinwoodie, *Trademark and Copyright: Complements or Competitors?*, in *ADJUNCTS AND ALTERNATIVES TO COPYRIGHT* 498 (Jane C. Ginsburg & June M. Besek eds., 2002).

<sup>197</sup> See Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1164 (2006) (arguing against the application of copyright law to protect the right of publicity); Justin Hughes, *Size Matters (or Should) in Copyright Law*, 74 FORDHAM L. REV. 575, 585-86 (2005) (discussing the copyrightability of “small, highly original phrases”).

<sup>198</sup> See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

trademark separate is misguided: the formal purity of separateness that the Court seeks to maintain results in a decision that denies the animating logic of both copyright and trademark.<sup>199</sup>

A separatist logic has even found its way into cases involving the CMI provisions of the DMCA. In *IQ Group, Ltd. v. Wiesner Publishing, LLC*,<sup>200</sup> one advertising firm took another advertising firm's work, stripped out its logo and hyperlink, and continued to distribute the advertisements without the marks of authorship.<sup>201</sup> The court failed to find a violation of the DMCA's CMI provisions, in part because the logo was too clearly "a trademark":

[A] logo in an email, to the extent that it operates as a trademark or service mark, could communicate information that indicates the source of the email. . . . The problem is that this construction allows a trademark to invoke DMCA protection of copyrights, eliminating the differentiation of trademark from copyright that is fundamental to the statutory schemes. If every removal or alteration of a logo attached to a copy of a work gives rise a cause of action under the DMCA, the DMCA becomes an extension of, and overlaps with, trademark law.<sup>202</sup>

Thus, after reviewing the status of trademark and copyright, we are left with a dilemma. Copyright law generally fails to provide any significant protections for authorial attribution. At the same time, trademark law after *Dastar* cannot provide a remedy for authorial misattribution.<sup>203</sup> (At least this is the case for *unregistered* authorial marks – curiously, the Patent and Trademark Office still allows authors to register their names as trademarks in certain circumstances.)<sup>204</sup> This forces copyright proprietors to leverage

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<sup>199</sup> See Heymann, *supra* note 77 (manuscript at 10) (contrasting copyright's purpose of promoting creativity with trademark's purpose of protecting consumers).

<sup>200</sup> 409 F. Supp. 2d 587 (D.N.J. 2006).

<sup>201</sup> *Id.* at 589.

<sup>202</sup> *Id.* at 592.

<sup>203</sup> See Lastowka, *supra* note 123, at 1209 & n.188 (collecting cases). Despite the overwhelming body of case law denying authorial attribution claims post-*Dastar*, it is still possible that some lower courts will decide to interpret *Dastar*'s holding narrowly. *Id.* at 1208-09 & n.187; see also *Clauson v. Eslinger*, 455 F. Supp. 2d 256, 261 (S.D.N.Y. 2006) (allowing the plaintiff to bring an authorial attribution claim under section 43(a) of the Lanham Act, because the "*Dastar* Court explicitly left open the possibility that some false authorship claims could be vindicated under the auspices of this section's prohibition on false advertising"); cf. *Bach v. Forever Living Prods. U.S., Inc.*, No. C05-970MJP, 2007 U.S. Dist. LEXIS 8424, at \*16 (W.D. Wash. Feb. 6, 2007) (allowing an author's section 43(a) claim based on the famous cover of a book to proceed, albeit pursuant to the rationale that "[t]his is not a case like *Dastar* or *Shaw* where the plaintiffs were attempting to use trademark law to prosecute plagiarism of their creative work").

<sup>204</sup> See, e.g., *First Draft, Inc.*, 76 U.S.P.Q. 2d (BNA) 1183, 1190-92 (Trademark Trial & Appeal Bd. Sept. 20, 2005) (refusing trademark registration to best-selling author Mary Ruth Kuczki for her authorial pseudonym "Fern Michaels," but stating that authorial

entitlements to control reproduction (and other exclusive rights) if they want to secure attribution.<sup>205</sup> Yet we know, by virtue of the very existence of trademark law, that leaving source attribution to private ordering is a suboptimal strategy. Additionally, *Dastar* seems to foster among lower courts an antagonism toward arguments that authorial attribution and reputation protection have any general place in either trademark or copyright law.

Despite this rather dismal state of affairs, Ralph Shaw's arguments for a right to credit are, if anything, more compelling today than they were half a century ago. Giving legal valence to authorial attribution would acknowledge the fundamentally different dynamics of open copyright practices and promote the smooth functioning of reputation economies. In the next section, I discuss two indications that, despite the current status of intellectual property law, an increased role for attribution in copyright may be on the way.

#### D. *Two Signs of an Attribution Shift*

##### 1. The Experience of Creative Commons

Creative Commons<sup>206</sup> was founded in 2001 and is currently led by venture capitalist and entrepreneur Joi Ito (Chair) and Professor Lawrence Lessig of Stanford Law School (CEO). As Niva Elkin-Koren suggests, it is probably best understood as a social movement.<sup>207</sup> Its Board of Directors includes several prominent law professors who write in the area of intellectual property

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indicators may generally be registered as marks where they serve a source-identifying function); U.S. PATENT & TRADEMARK OFFICE, EXAMINATION GUIDE 04-06, REGISTRABILITY OF MARKS USED ON CREATIVE WORKS (2006), available at <http://www.uspto.gov/web/offices/tac/notices/examguide4-06.htm> (neglecting to mention *Dastar* and stating that "the name of the author or performer may be registered if: (1) it is used on a series of written or recorded works; AND (2) the application contains sufficient evidence that the name identifies the source of the series and not merely the writer of the written work or the name of the performing artist"); cf. Sauer, 27 U.S.P.Q. 2d (BNA) 1073, 1073-74 (Trademark Trial & Appeal Bd. Apr. 23, 1993) (refusing the trademark registration of "Bo Ball" by someone other than athlete Bo Jackson, pursuant to section 2(a) of the Lanham Act, which bars the registration of marks that falsely suggest a connection with a person).

Of course, even if the U.S. Patent and Trademark Office is correct in holding that authorial marks can be registered post-*Dastar*, it must be acknowledged that such registration is generally not feasible for the overwhelming majority of open copyright authors and artists. Authorial attribution rights are better protected by common law rights – open copyright creators generally lack the wherewithal to pursue, maintain, and enforce trademark registrations in their names. See *supra* note 33 and accompanying text (explaining that open copyright creators are generally "amateurs").

<sup>205</sup> See Lastowka, *supra* note 123, at 1217-18; Rick Mortensen, *D.I.Y. After Dastar: Protecting Creators' Moral Rights Through Creative Lawyering, Individual Contracts and Collectively Bargained Agreements*, 8 VAND. J. ENT. & TECH. L. 335, 353-62 (2006).

<sup>206</sup> Creative Commons, <http://creativecommons.org> (last visited Feb. 1, 2007).

<sup>207</sup> Elkin-Koren, *supra* note 55, at 387-88.

and copyright.<sup>208</sup> A key mission of Creative Commons has been the promotion of a set of licenses designed to enable creators to selectively reserve certain rights.<sup>209</sup>

In its online mission statement, Creative Commons makes clear that it sees its work as analogous to the work of the Free Software and open-source movements. It states that “our ends are cooperative and community-minded,” and that it helps people “dedicate their creative works to the public domain – or retain their copyright while licensing them as free for certain uses, on certain conditions.”<sup>210</sup> Like the Free Software movement that it invokes in its mission statement, Creative Commons is typically associated with the “copyleft” principles of resistance to intellectual property law. Yet, also like the Free Software movement, Creative Commons does not simply add new matter to the public domain – it uses the licensing of copyright entitlements as a tool to advance its goal of changing the default setting of copyright.

When Creative Commons released its first group of licenses in 2002, it offered a menu of eleven license choices that mixed and matched four different requirements made of those wishing to use the licensed works: a requirement that authorial attribution be provided (“by”); a requirement that use of the work be non-commercial (“nc”); a requirement that no derivative works be created utilizing the original work (“nd”); and a “viral” requirement that any derivative works created be licensed under terms identical to the original license (“sa”). Given this “menu” approach, Creative Commons can aptly be described as incorporating a certain degree of “ideological fuzziness”<sup>211</sup> into its core mission from the outset.

In June of 2006, Chief Technology Officer Mike Linksvayer estimated that over 140 million web pages had included Creative Commons licenses.<sup>212</sup> If this is accurate,<sup>213</sup> it is a tremendous figure – though it pales beside the size of the open copyright realm generally. Given the estimate that there are roughly twelve billion web pages in existence,<sup>214</sup> this means that approximately 1.2% of web pages link to a Creative Commons license of some form. Creative

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<sup>208</sup> In addition to Professor Lessig, Professors James Boyle, Michael Carroll, and Molly Shaffer Van Houweling also currently serve on the Board.

<sup>209</sup> As I indicated in an article prior to the establishment of the Creative Commons, I support the development of such simple licensing options for content creators, though I believe that metadata solutions might be more effective in a digital environment. See Lastowka, *supra* note 29, at 323 & n.108.

<sup>210</sup> Creative Commons: About Us, <http://creativecommons.org/about/history> (last visited Feb. 1, 2007); see also Elkin-Koren, *supra* note 55, at 377.

<sup>211</sup> Elkin-Koren, *supra* note 55, at 377.

<sup>212</sup> Posting of Mike Linksvayer to CC News, <http://creativecommons.org/weblog/entry/5936> (June 13, 2006).

<sup>213</sup> See Elkin-Koren, *supra* note 55, at 401 n.85 (noting that the data is somewhat unclear and suggesting that it might be an overestimate).

<sup>214</sup> See *supra* note 43 and accompanying text.

Commons licenses are also used in relation to content that is not hosted on individual web pages. For instance, over fourteen million digital photographs on the Web-based photo-sharing site Flickr are reportedly licensed under Creative Commons licenses.<sup>215</sup>

A cynic might argue that pasting a Creative Commons logo on a publicly available blog, web page, or Flickr photo is redundant – perhaps even an assertion of ownership rights rather than a type of sharing.<sup>216</sup> By definition, the average web page or publicly posted digital photo on Flickr *is* being shared with the public. The Creative Commons licenses therefore operate, in part, to express ownership and make demands. They assert that the owner prohibits derivative works (“nd”), or prohibits commercial exploitation of the content (“nc”). There is nothing legally wrong with this, of course – these are both rights that are inherent in the copyright entitlement. But as Niva Elkin-Koren suggests, there is a possibility that by making ownership explicit, Creative Commons may be reifying copyright norms that did not characterize the early Web.<sup>217</sup>

However, the Creative Commons licenses do help accomplish the mission of increasing content sharing insofar as they enable those who access the content to legally repurpose it. All Creative Commons licenses make some “non-commercial” uses of licensed works legal, which particularly encourages investment in non-commercial distribution of the author’s creative content. Thus, in some ways, the effect of Creative Commons is not so much to encourage public *access* to works as it is to encourage investment in the non-commercial repurposing of works. From the standpoint of attribution and law, Creative Commons is remarkable, if perhaps accidentally so. Though it did not encourage the adoption of any particular type of license from its menu, Creative Commons reported in 2004 that over 97% of websites to use Creative Commons licenses chose some variety of license requiring attribution.<sup>218</sup> In response to this, Creative Commons removed the attribution “option” from its new licenses and made attribution a default part of its licenses menu.<sup>219</sup> There are now six possible CC “Version 3.0” licenses, all of which require authorial attribution.<sup>220</sup>

The formal announcement that accompanied this change indicated that it was not motivated by any particular ideological commitment to attribution, but was simply a pragmatic decision motivated by popular demand:

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<sup>215</sup> Posting of Mike Linksvayer to CC News, <http://creativecommons.org/weblog/entry/5937> (June 13, 2006).

<sup>216</sup> See Elkin-Koren, *supra* note 55, at 390.

<sup>217</sup> See *id.* at 400.

<sup>218</sup> Posting of Glenn Otis Brown to CC News, <http://creativecommons.org/weblog/entry/4216> (May 25, 2004).

<sup>219</sup> *Id.*

<sup>220</sup> Creative Commons Licenses, <http://creativecommons.org/licenses> (last visited Feb. 1, 2007).



Our web stats indicate that 97-98% of you choose Attribution, so we decided to drop Attribution as a choice from our license menu – it’s now standard. This reduces the number of licenses from eleven possible to six and makes the license selection user interface that much simpler.<sup>221</sup>

For those who believe that *Dastar* was a boon for the public domain, making attribution a default requirement may seem inconsistent with the mission of an organization devoted to the commons. A handful of commenters on the Creative Commons mailing list made this exact charge, arguing that Creative Commons was no longer enabling “free” content.<sup>222</sup> A summary of the licenses by advisers at the Debian project (an open-source operating system) was highly critical of an early version of the new Creative Commons licenses, suggesting that they were incompatible with the principles of free software.<sup>223</sup>

Even Creative Commons did not seem committed to the modification: “If we see a huge uprising against the attribution-as-stock-feature, we’ll certainly consider bringing it back as an option.”<sup>224</sup> In all likelihood, when it came up with its original “menu,” Creative Commons did not intend to act as a vehicle for popularizing attribution rights. Yet its experience has shown the importance of attribution to open copyright creators. At least in one corner of the online content universe, off-the-shelf licensing provisions have permitted copyright’s “information as commodity” protections to be discarded in favor of trademark’s reputation protections.

## 2. The Copyright Office’s Orphan Works Proposal

A second example of a shift toward attribution protections in copyright law can be found in proposed legislation on “orphan works.” When a work is still protected by copyright, but the copyright holder is difficult or impossible to find, it is an “orphan work.”<sup>225</sup> The concern with regard to orphan works is that, in the absence of any means to obtain a license from the copyright proprietor, the work will be neglected and underused.<sup>226</sup> In other words, the

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<sup>221</sup> Posting of Glenn Otis Brown to CC News, *supra* note 218.

<sup>222</sup> See, e.g., Posting of Rob Myer to <http://lists.ibiblio.org/pipermail/cc-licenses/2004-August/001059.html> (Aug. 16, 2004, 04:22:55 EDT) (“The work isn’t ‘Free’, you’re paying for it with attribution.”); Posting of Toddd to <http://lists.ibiblio.org/pipermail/cc-licenses/2004-August/001065.html> (Aug. 16, 2004, 13:55:44 EDT) (“Currently, there is not a single free . . . license. They are ALL non-free. The current CC is a smack in the face of the free software movement.”).

<sup>223</sup> See Evan Prodromou, Debian-Legal Summary of Creative Commons 2.0 Licenses (Apr. 3, 2005), <http://people.debian.org/~evan/ccsummary.html>.

<sup>224</sup> Posting of Glenn Otis Brown to CC News, *supra* note 218.

<sup>225</sup> U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf> [hereinafter REPORT ON ORPHAN WORKS].

<sup>226</sup> *Id.*

fear of liability for copyright infringement will become an insurmountable transaction cost preventing the work from being repurposed.

Following the Supreme Court's landmark pro-copyright decision in *Eldred v. Ashcroft*,<sup>227</sup> and reportedly "at the urging of prominent legal scholars, academic-library organizations, technology companies such as Google and Microsoft, and many other interested parties,"<sup>228</sup> Congress began to consider the problem of orphan works. In January of 2005, Senators Orrin Hatch and Patrick Leahy wrote to the Copyright Office, urging it on behalf of Congress to study the issue and make recommendations for policy and legislation.<sup>229</sup> House Intellectual Property Subcommittee Chairman Lamar Smith and Ranking Member Howard Berman also wrote to express their support for the effort.<sup>230</sup>

On January 26, 2005, the Copyright Office issued a Federal Register Notice summarizing the issues raised by orphan works and soliciting written comments from all interested parties.<sup>231</sup> The Copyright Office received over 850 written comments, from brief email messages to extensive legal briefs.<sup>232</sup> The Copyright Office also hosted public roundtable discussions on orphan works in Washington, D.C. and Berkeley, California.<sup>233</sup> At the end of this process, on January 31, 2006, the Copyright Office submitted its report to Congress. The report contained a proposal for a law that would limit the remedies available to copyright holders of orphan works against infringers.<sup>234</sup>

For the purposes of this Article, the most interesting thing about the Copyright Office's proposed new law is that it explicitly incorporates a requirement of attribution in order to take advantage of the limited remedy provisions:

- (a) Notwithstanding sections 502 through 505, where the infringer:

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<sup>227</sup> 537 U.S. 186 (2003).

<sup>228</sup> Scott Carlson, *Whose Work Is It, Anyway?*, CHRON. HIGHER EDUC., July 29, 2005, at A33.

<sup>229</sup> Letter from Senator Orrin G. Hatch & Senator Patrick Leahy to Marybeth Peters, Register of Copyrights, U.S. Copyright Office (Jan. 5, 2005), *reprinted in* REPORT ON ORPHAN WORKS, *supra* note 225.

<sup>230</sup> Letter from Representative Lamar Smith to Marybeth Peters, Register of Copyrights, U.S. Copyright Office (Jan. 7, 2005), *reprinted in* REPORT ON ORPHAN WORKS, *supra* note 225; Letter from Representative Howard L. Berman to Marybeth Peters, Register of Copyrights, U.S. Copyright Office (Jan. 10, 2005), *reprinted in* REPORT ON ORPHAN WORKS, *supra* note 225.

<sup>231</sup> Notice of Inquiry, 70 Fed. Reg. 3739 (Jan. 26, 2005).

<sup>232</sup> REPORT ON ORPHAN WORKS, *supra* note 225, at 1.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 127 (proposing the addition of a new section, § 514, to 17 U.S.C.).

(1) prior to the commencement of the infringement, performed a good faith, reasonably diligent search to locate the owner of the infringed copyright and the infringer did not locate that owner, and

(2) throughout the course of the infringement, provided attribution to the author and copyright owner of the work, if possible and as appropriate under the circumstances,

the remedies for the infringement shall be limited as set forth in subsection (b).<sup>235</sup>

This attribution requirement, with slight revisions, was adopted in the version of the bill introduced by Congressman Lamar Smith before the House of Representatives. The introduced legislation provided for limited remedies in the event that “the infringing use of the work provided attribution, in a manner reasonable under the circumstances, to the author and owner of the copyright, if known with a reasonable degree of certainty based on information obtained in performing the reasonably diligent search.”<sup>236</sup>

Since neither copyright law nor trademark law mention attribution, its prominent place in the proposed legislation may seem strange. According to the Copyright Office, the attribution requirement was not the result of any strong outside campaign – “only a handful of commenters proposed a requirement along these lines.”<sup>237</sup> Nonetheless, echoing Ralph Shaw, the Copyright Office “found several good reasons to support this requirement . . . including the notion that attribution is critically important to authors, even those who consent to free use of their works.”<sup>238</sup>

The link to the experience of Creative Commons was made explicit in the discussion of the attribution requirement:

[A]ttribution is a critically important aspect of copyright for authors and owners, particularly individual authors. From our discussions with various stakeholders, in the situation where an author is found after a search prior to use, many times the author consents to a royalty-free use, provided that the user provides proper attribution. Indeed, the Creative Commons has published information that for those authors who adopt one of the many forms of Creative Commons licenses, about 94% of them opt for a license that requires attribution. Thus, even among a group of creators that are willing to permit wide dissemination and re-use of their works, attribution is an essential and important part of preserving the author’s interests in the work.<sup>239</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> Orphan Works Act of 2006, H.R. 5439, 109th Cong. § 2(a) (2006).

<sup>237</sup> REPORT ON ORPHAN WORKS, *supra* note 225, at 10, 110.

<sup>238</sup> *Id.* at 10.

<sup>239</sup> *Id.* at 111 (footnote omitted). In addition, the report stated that (1) attribution would facilitate market transactions between copyright owners and users, (2) attribution would

The comments of the Copyright Office draw the right lesson from the experience of Creative Commons. They point out the way in which open copyright economies, in the so-called Digital Millennium, are increasingly relying upon the dynamics of reputation and attribution as incentives for creation.<sup>240</sup> These are incentives that intellectual property law is at the present moment ill-tuned to protect. Hopefully, the Orphan Works draft legislation and the comments on attribution by the Copyright Office offer a sign that this might change in the future.

### III. A MODEST PROPOSAL FOR MODIFYING FAIR USE

I have argued up to this point that attribution should play a larger role in copyright law, given the importance of reputation to open copyright incentives and markets. In this section, I would like to briefly suggest one initial method to recognize the importance of attribution in copyright law.<sup>241</sup> Namely, I propose that the “fair use” provisions in 17 U.S.C. § 107 be amended to include a fifth factor: the provision of attribution. This proposal is one small step toward adapting copyright law to the digital attribution economy. Reform efforts should not end with such a small adjustment; this is simply intended as a starting point.

“Fair use” is the defensive mechanism in copyright law by which an alleged infringer can escape liability for copyright infringement. It originated in the United States as a judicial doctrine but became fixed by statute in the Copyright Act of 1976.<sup>242</sup> Currently, the four well-known statutory factors that must be included in any determination of fair use are:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>243</sup>

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avoid improper claiming of credit by the putative infringer, and (3) attribution would be a non-burdensome requirement. *Id.* at 111-12.

<sup>240</sup> See Tushnet, *supra* note 48 (manuscript at 15-16) (describing the Copyright Office’s Orphan Works Proposal as relying on evidence of a powerful attribution norm).

<sup>241</sup> For additional proposals along similar lines, see Kwall, *supra* note 77, at 2004 (arguing for the expansion of VARA to create a moral rights regime including broad rights of authorial attribution) and Heymann, *supra* note 77 (manuscript at 6-7) (arguing for the recognition of trademark-based interests in communicative goods).

<sup>242</sup> Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C.).

<sup>243</sup> 17 U.S.C. § 107 (2000).

My proposal is to add an additional fifth fair use factor, modeled on the language used in the proposed Orphan Works legislation:

(5) the provision of attribution, in a manner reasonable under the circumstances, to the author of the work.

This amendment is advisable because the existing fair use factors fail to take into account the importance of credit and attribution. To the contrary, the first and fourth factors clearly take an approach toward copyright that prioritizes the centrality of commercial markets and the marginality of the “non-commercial” sector.<sup>244</sup> According to the first and fourth factors, if a use participates in or interferes with existing pecuniary markets, it is presumed unfair. If a use occurs outside existing pecuniary markets, it is presumed fair.<sup>245</sup>

Open copyright practices, however, operate outside pecuniary markets and place high value on practices of attribution. When fair use law is applied to open copyright practices, it would be decidedly unfair not to take into account the manner in which attribution has been provided to an author. Reputation is, after all, the primary market value that the open copyright author is seeking to maximize. Adding a requirement that courts consider attribution would focus their attention on this important matter,<sup>246</sup> but at the same time would not bind them: fair use is a “notoriously fuzzy” test,<sup>247</sup> which in the eyes of some is impossible to damage further.<sup>248</sup>

Before the creation of the four factors in the 1976 Act, cases can be found that explicitly took into account the interplay of attribution and fair use. For instance, in the 1941 case of *Karll v. Curtis Publishing Co.*,<sup>249</sup> a district court found that the reprinting of partial song lyrics by the *Saturday Evening Post* – with authorial attribution – served to add to the reputation capital of the copyright owner:

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<sup>244</sup> Wagner, *supra* note 87, at 425.

<sup>245</sup> I do not have much to say about the second and third fair use factors. The second factor, by prioritizing the creative works that are seen as at the core of copyright’s concern, essentially gives a more nuanced voice to the idea/expression dichotomy. The third fair use factor is also essentially a statement about copyright law’s logic: it points to the fact that slight “borrowing” is more permissible than wholesale appropriation. While these factors can be criticized, they seem largely neutral with respect to open copyright.

<sup>246</sup> See Patrick G. Zabatta, Note, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 SYRACUSE L. REV. 1095, 1134-35 (1992) (“Though the criteria suggested by the Copyright Act are not intended to be exclusive, the absence of moral rights as an enumerated consideration could lead courts to overlook these important interests. By specifically mentioning attribution and integrity, Congress will focus the courts’ attention to this matter without materially altering the fair use doctrine.” (footnote omitted)).

<sup>247</sup> Liu, *supra* note 65, at 133 (“Although the fair use defense has played a significant role in setting the copyright balance, it is notoriously fuzzy in application.”).

<sup>248</sup> See *id.*; Wagner, *supra* note 87, at 426-27.

<sup>249</sup> 39 F. Supp. 836 (E.D. Wis. 1941).

It will be noted that the author of the article in question acknowledged the authorship of the song, and in fact paid a tribute to him. No question of the originality of the song is here involved. . . . Undoubtedly many thousands who read the article became aware for the first time of the existence of a musical composer by the name of Eric Karll.<sup>250</sup>

In light of all the circumstances, the court found that the reprinting of Karll's song lyrics was fair.

Though today's four factors do not include attribution, this does not mean that attribution is never mentioned in modern fair use cases. While some secondary sources downplay the importance of attribution,<sup>251</sup> a substantial number of cases support the relevance of attribution to fair use. These cases usually manage to fit the question of attribution into the first factor. The Nimmer treatise briefly notes that the "propriety" of a defendant's conduct is relevant to the "purpose and character of the use," and that under the rubric of equitable considerations, the provision of attribution can contribute to a finding of fair use.<sup>252</sup>

One of the first post-1976 Act cases to consider attribution in the context of fair use was *Marcus v. Rowley*,<sup>253</sup> decided in the Ninth Circuit. The plaintiff was a home economics teacher who brought suit against another home economics teacher for the unauthorized copying and sale of portions of a book on cake decorating.<sup>254</sup> The district court dismissed the case on the merits, finding that the defendant's copying of the material was protected under fair

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<sup>250</sup> *Id.* at 837.

<sup>251</sup> See, e.g., Kenneth D. Crews, *Harmonization and the Goals of Copyright: Property Rights or Cultural Progress?*, 6 IND. J. GLOBAL LEGAL STUD. 117, 131 n.87 (1998) ("[P]ublishers generally have insisted that educators and librarians include formal notices on any 'fair use' copies, even though nothing in the 'fair use' law requires attribution."); Otto W. Konrad, *A Federal Recognition of Performance Art Author Moral Rights*, 48 WASH. & LEE L. REV. 1579, 1627-28 (1991) (stating that fair use allows for the use of a work without attribution).

The pre-1976 Act case of *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938), is sometimes cited for the indifference of fair use doctrine to attribution practices. See *id.* at 304 ("The fact that the defendant acknowledged the source from which this matter was taken does not excuse the infringement. While the acknowledgment indicates that it did not intend unfair competition it does not relieve the defendant from legal liability for the infringement.").

<sup>252</sup> 4 NIMMER ON COPYRIGHT, *supra* note 24, § 13.05 [A][1][d]. Professor Rebecca Tushnet has suggested that in the case of fan fiction, attribution "bears an indirect relation to the fourth fair use factor," because it minimizes confusion as to source and thus "preserves the market for the official product." Tushnet, *supra* note 40, at 680.

<sup>253</sup> 695 F.2d 1171 (9th Cir. 1983).

<sup>254</sup> *Id.* at 1173.

use.<sup>255</sup> The Ninth Circuit re-examined the issue, taking each fair use factor in turn. In considering the first factor, the court noted that “there was no attempt by defendant to secure plaintiff’s permission to copy the contents of her booklet or to credit plaintiff for the use of her material . . . . Rowley’s conduct in this respect weighs against a finding of fair use.”<sup>256</sup>

Three years later, the Second Circuit took up the relation of attribution and fair use in the case of *Maxtone-Graham v. Burtchaell*.<sup>257</sup> The defendant had printed quotations (consisting of over seven thousand words, or about 4.3% of the book) and provided attribution to Maxtone-Graham.<sup>258</sup> Though the opinion of the court did not focus specifically on attribution in the fair use analysis, it did note that the defendant had credited the plaintiff as the source of the quotes and had not sought to displace the market for the original work.<sup>259</sup> The court ultimately concluded that the use in question was fair.<sup>260</sup>

In the case of *Weissmann v. Freeman*,<sup>261</sup> the Second Circuit addressed the issue of attribution and fair use more squarely. At issue was, as the court described it, “the paradigm of the problems that arise when a long relationship between accomplished professor and brilliant assistant comes to an end” – that is, a professor took credit for his assistant’s work.<sup>262</sup> Judge Cardamone, focusing on the equities of the case before proceeding to the statutory fair use factors, noted that the professor “not only neglected to credit [the assistant] for her authorship of [the work], but actually attempted to pass off the work as his own, substituting his name as author in place of hers.”<sup>263</sup> According to Judge Cardamone, “Dr. Freeman’s conduct severely undermines his right to claim the equitable defense of fair use. No case was cited – and we found none – that sustained such defense under circumstances where copying involved total deletion of the original author’s name and substitution of the copier’s.”<sup>264</sup>

Judge Cardamone once again discussed attribution in the well-known case of *Rogers v. Koons*,<sup>265</sup> in which the defendant asserted a fair use defense to the

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<sup>255</sup> *Id.* at 1174.

<sup>256</sup> *Id.* at 1176.

<sup>257</sup> 803 F.2d 1253 (2d Cir. 1986). The plaintiff was Katrina Maxtone-Graham, who had published a book titled *Pregnant by Mistake*, which contained interviews with a number of women who had experienced unwanted pregnancies. The defendant was James Burtchaell, a Catholic priest and a theology professor at Notre Dame. Burtchaell had sought permission to use portions of Maxtone-Graham’s interviews in his book, *Rachel Weeping*, but she had denied permission.

<sup>258</sup> *Id.* at 1257.

<sup>259</sup> *Id.* at 1260.

<sup>260</sup> *Id.* at 1265.

<sup>261</sup> 868 F.2d 1313 (2d Cir. 1989).

<sup>262</sup> *Id.* at 1315.

<sup>263</sup> *Id.* at 1324.

<sup>264</sup> *Id.*

<sup>265</sup> 960 F.2d 301 (2d Cir. 1992).

charge that he had copied the plaintiff's "Puppies" photograph to create his "String of Puppies" sculptures. In its analysis of the first of the four statutory use factors, the court addressed the defendant's contention that the purpose of his sculpture was to parody the original work. In rejecting the argument, Judge Cardamone focused on the fact that Koons had not made the public aware of the original work:

By requiring that the copied work be an object of the parody, we merely insist that the audience be aware that underlying the parody there is an original and separate expression, attributable to a different artist. This awareness may come from the fact that the copied work is publicly known or because its existence is in some manner acknowledged by the parodist in connection with the parody.<sup>266</sup>

As in the *Weissmann* case, Judge Cardamone's understandings about the importance of proper credit clearly played a significant role in the ruling against the defendant.

Two recent district court cases in the Second Circuit have also incorporated the issue of attribution into discussions of fair use. In *Williamson v. Pearson Education, Inc.*,<sup>267</sup> involving a charge that the defendant had copied the plaintiff's book on General George Patton, the court favored a finding of fair use under the first factor in part because the defendant had included the plaintiff's book in a list of "Recommended Reading" and given credit to the plaintiff as a source of the borrowed material.<sup>268</sup> In *Richard Feiner & Co. v. H.R. Industries*,<sup>269</sup> the owner of the *Hollywood Reporter* published a Laurel and Hardy photograph without obtaining permission from the copyright holder or providing attribution.<sup>270</sup> The court found that the failure to attribute was relevant to the fourth fair use factor: it created the impression that the photograph was in the public domain, and thus prevented the copyright holder from making money on its copyright.<sup>271</sup>

What these cases demonstrate is not that attribution is regularly considered by courts as a factor in the fair use analysis. This is most certainly not the case. The cases merely illustrate that in certain cases, plaintiffs and defendants have been successful in persuading courts to incorporate evidence about attribution into a fair use analysis. Despite the absence of any explicit mention of attribution in the fair use factors, some judges have seen fit to incorporate attribution in their opinions, finding it to be an equitable consideration guiding fair use analysis.

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<sup>266</sup> *Id.* at 310.

<sup>267</sup> No. 00 Civ. 8240(AGS), 2001 WL 1262964 (S.D.N.Y. Oct. 19, 2001).

<sup>268</sup> *Id.* at \*5.

<sup>269</sup> 10 F. Supp. 2d 310 (S.D.N.Y. 1998), *vacated on other grounds*, No. 98-9390, 1999 WL 385763 (2d Cir. June 4, 1999).

<sup>270</sup> *Id.* at 311-12.

<sup>271</sup> *Id.* at 314.



The task of reforming copyright law to take open copyright practices into account will be a long and complicated struggle. My proposal here is just one possible way to start the process. In light of the shift described in this paper toward open copyright and reputation-based production markets, adding a fifth “attribution” factor to the fair use factors would be a very small step in the right direction.