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# Remembering the Public Domain

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## INTRODUCTION

Rapid advances in communication technology over the past decade have resulted in the previously unimaginable ability to seamlessly exchange ideas and data on a global basis. Yet, despite this undeniable progress, access to information is becoming increasingly difficult. The carefully balanced provisions of copyright law are gradually becoming displaced by contractual,[1] technological,[2] and legislative[3] constraints that permit tight control of access to and use of knowledge resources.[4] As a result, material that belongs in the public domain[5] is being transformed into private property. Such a state of affairs has potentially serious consequences, as the ability to access and make use of ideas and information is critically important to creativity, competition, innovation, and a democratic culture.[6]

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1. *See* discussion *infra* Part II (reviewing the various types of contractual methods often utilized, including contracts in the form of shrinkwrap, clickwrap, or browsewrap licenses).

2. *See* discussion *infra* Part II (noting the increasing use of digital rights management systems (DRMs) by copyright proprietors).

3. *See* discussion *infra* Part II (discussing the Digital Millennium Copyright Act (DMCA)).

4. *See* Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1298 (1996).

5. Attempts to define the term "public domain" have been the topic of considerable academic debate, as well as the subject of numerous scholarly articles. *See, e.g.*, Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 361-62 (1999) ("The public domain is the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged."); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 38-63 (2003); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990) (defining the public domain as "a commons that includes those aspects of copyrighted works which copyright does not protect . . . "); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215, 256 (2002); Pamela Samuelson, *Mapping the Digital Public Domain: Threats and Opportunities*, 66 LAW & CONTEMP. PROBS. 147, 148-154 (2003). The term "public domain" as used in this article consists of all non-copyrightable information, as well as the unprotected components of copyrighted works. Such a definition would necessarily comprise specific limitations articulated in the Copyright Act, in addition to uses that would qualify as fair use.

6. Samuelson, *supra* note 5, at 170; *see also*, White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J., dissenting) ("Creativity is impossible without a rich public domain . . . . Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 250 (2001) ("[C]reation is always the building upon something else."); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Immi-*

## I. COPYRIGHT LAW AS A BASELINE

Until recently, copyright law served as the baseline from which issues relating to the use and ownership of creative works were decided. The Copyright Act provides protection only to "original works of authorship."[7] Originality is not a statutory requirement, but a constitutional prerequisite for the benefits of the Act to attach to a given work.[8] To be original, a work must be "independently created," in other words, not copied from another work, and possess "at least some minimal degree of creativity."[9] Such conditions do not generally pose a significant hurdle, particularly since a relatively low level of creativity will usually suffice.[10]

Nonetheless, facts do not meet this modest threshold.[11] One of the "most fundamental axiom[s] of copyright law" is that "[n]o author may copyright . . . the facts he [or she] narrates."[12] This is because one who reports a particular fact has not created it, but merely discovered its existence.[13] Since factual data is not "original" in the constitutional sense, it is not entitled to protection but may instead be copied at will.[14] As the Supreme Court has explained "[t]his result is neither unfair nor unfortunate," but "is the means by which copyright advances the progress of science and art."[15]

Similarly, ideas also are not subject to copyright protection.[16] A basic principle of copyright law, the "idea/expression" dichotomy, allows copyright protection to attach to the expression of an idea, but not the idea itself.[17] Consequently, one may utilize the ideas contained within another's copyrighted work without seeking the creator's permission.[18] This provides "authors the right to their original expression, but encour-

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*nent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 381 (1999) ("With unfettered access to facts, the public may gain valuable information necessary for an enlightened citizenry, while later authors are free to create subsequent works utilizing those facts."); Margaret Jane Radin, *Property Evolving in Cyberspace*, 15 J.L. & COM. 509, 510 (1996) ("[W]e cannot be creators without a robust public domain, a rich tradition and culture to draw upon freely.").

7. 17 U.S.C.A. § 102(a) (West 2006).

8. U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to secure "for limited Times to Authors . . . the exclusive Right to their respective Writings . . . "); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (declaring that "[o]riginality is a constitutional requirement").

9. *Feist*, 499 U.S. at 345 (citing 1 M. NIMMER & D. NIMMER, COPYRIGHT §§ 2.01[A], [B] (1990)).

10. *Id.*

11. *See id.* at 344-45.

12. *Id.* (citing Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985)).

13. *Id.* at 347-48 ("'No one may claim originality as to facts' . . . because facts do not owe their origin to an act of authorship") (quoting 1 M. NIMMER & D. NIMMER, COPYRIGHT § 2.11[A] (1990)).

14. *Id.* at 350.

15. *Id.*

16. *Id.* (citing *Harper & Row*, 471 U.S. at 547-48).

17. *Id.*

18. *Id.* at 349-50.

ages others to build freely upon the ideas . . . conveyed by a work."[19] This balance of rights between authors and the public is rooted in the belief that society is best served by the unrestricted flow of information and ideas.[20]

Furthermore, depending on the circumstances, all or part of the protected portions of a copyrighted work may be used without the consent of the copyright holder.[21] The Copyright Act contains a number of provisions that expressly restrict the exclusive rights granted by statute to the owner of the copyright.[22] Many of these pertain only to particular types of uses by certain categories of individuals in specific situations,[23] however, not all of the exceptions are so specialized. For example, the doctrine of fair use is much more far-reaching, often allowing for the use of excerpts from a work for purposes such as teaching, news reporting, and criticism without compensation to or the permission of the copyright holder.[24]

These carefully considered constitutional and statutory limitations are designed to balance the rights of creators with the interests of the public. By providing adequate protection for authors so they have an incentive to create, but precluding a copyright owner's ability to control all uses of such works, the public domain is intended to be a rich resource for future creators, innovators, and participants in democratic culture. The ability to access and use such materials is essential since creativity and social progress clearly do not take place in a vacuum, but are cumulative in nature. In fact, "[n]othing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before."[25] Unfortunately, this traditional development process is being threatened as a result of drastic responses to technological innovation.

## II. THE NEW PROPRIETARY LANDSCAPE

Recent advances have made it possible to quickly, inexpensively, and effortlessly produce perfect copies of many different types of creative works. As a result, copyright holders have sought to prevent uncontrolled duplication from occurring.

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19. *Id.*
20. *See id.*
21. *Id.* at 350-51.
22. 17 U.S.C.A. §§ 107-122 (West 2006).
23. *See, e.g.*, 17 U.S.C.A. § 110 ("Notwithstanding the provisions of section 106, the following are not infringements of copyright: . . . (6) performance of a nondramatic musical work by a governmental body or a nonprofit agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition conducted by such body or organization . . . .").
24. *See* 17 U.S.C.A. § 107.
25. *White*, 989 F.2d at 1513 (Kozinski, J., dissenting).

While some fine-tuning of established doctrines may be necessary to account for these changes, the amount of control copyright holders have attempted to exert can arguably be characterized as extreme. Although in limited circumstances generally unrestricted power to limit access and use may seem reasonable, in most situations, this is not the case.[26]

Increasingly, copyright proprietors have turned to technological measures, such as digital rights management systems (DRMs), to strictly regulate access to their works.[27] These efforts have been bolstered by the passage of the Digital Millennium Copyright Act,[28] which proscribes technologies that could be used to defeat DRMs and imposes liability for acts of circumvention.[29] This legislation is somewhat radical since traditionally "Congress has achieved the objectives of the Constitution's Copyright Clause 'by regulating the use of information—not the devices or means by which the information is [obtained].'"[30] Such developments are particularly troublesome in light of the fact that "preventing access is now often tantamount to preventing use."[31]

To the extent all hurdles to access are overcome, further restrictions on use are frequently present, as copyright holders attempt to prevent all uncompensated and unauthorized uses of their works.[32] In an effort to attain this goal, standard form contracts, often in the form of shrinkwrap,[33] clickwrap,[34] or browsewrap[35] licenses are frequently utilized.

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26. Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 AM. J. COMP. L. 323, 360-61 (2004).

27. Stephen M. Kramarsky, *Copyright Enforcement in the Internet Age: The Law and Technology of Digital Rights Management*, 11 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1, 10 (2001); *Symposium: The Law & Technology of Digital Rights Management*, 18 BERKELEY TECH. L.J. 697, 736-37 (2003); Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161, 161-62, 183 (1997); Bechtold, *supra* note 26, at 323-24.

28. Pub. L. No. 105-304, 112 Stat. 2860 (1998).

29. 17 U.S.C.A. §§ 1203-1204 (West 2006). For further discussion of the Digital Millennium Copyright Act, see generally Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909 (2002); Orin S. Kerr, *A Lukewarm Defense of the Digital Millennium Copyright Act*, *in* COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 163 (Adam Thierer & Wayne Crews eds., 2002); Craig Allen Nard, *The DMCA's Anti-Device Provisions: Impeding the Progress of the Useful Arts?*, 8 WASH. U. J.L. & POL'Y 19 (2002); Matt Jackson, *Using Technology to Circumvent the Law: The DMCA's Push to Privatize Copyright*, 23 HASTINGS COMM. & ENT. L.J. 607 (2001).

30. David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 683 (2000) (citing H.R. REP. NO. 105-551, pt. 2, at 24 (1998)).

31. Jacqueline Lipton, *A Framework for Information Law and Policy*, 82 OR. L. REV. 695, 762 (2003).

32. Maureen Ryan, *Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World*, 79 OR. L. REV. 647, 661 (2000).

33. *See, e.g.*, Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 428 (2d Cir. 2004) ("A shrinkwrap license typically involves (1) notice of a license agreement on product packaging (*i.e.*, the shrinkwrap), (2) presentation of the full license on documents inside the package, and (3) prohibited access to the product without an express indication of acceptance. Generally, in the shrinkwrap

These "agreements"[36] often contain harsh provisions that seek to prohibit actions that are clearly allowed under the Copyright Act, such as conduct that would undoubtedly qualify as fair use. Additionally, the use of facts and ideas contained in copyrighted works is often heavily regulated, as they are increasingly viewed as mere commodities in the marketplace—even though they constitute the building blocks of knowledge and are supposed to remain within the public domain.[37]

Lawmakers and judges have been quick to support these technological and contractual restraints implemented by copyright proprietors despite the fact that they undeniably alter the delicate balance struck by the Copyright Act to the detriment of the public. Increasingly, all unremunerated uses of information are perceived as unacceptable assaults on the rights of copyright holders.[38] This is due in large part to the fact that legislators promulgating statutes and adjudicators resolving disputes concerning data have failed to adequately take into account the multidimensional problems involved in disputes concerning access to information. The focus is often inappropriately centered on the tangible property within which information is contained, for example in a software program or a computer server. Additionally, once an owner of such property is ascertained, all of the conventional attributes of ownership are

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context, the consumer does not manifest assent to the shrinkwrap terms at the time of purchase; instead, the consumer manifests assent to the terms by later actions." (citations omitted)).

34. *See Register.com, Inc.*, 356 F.3d at 429 (defining a "clickwrap license" as one which presents "the potential licensee (*i.e.*, the end-user) 'with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon.'") (citing Specht v. Netscape Commc'ns Corp., 150 F. Supp. 2d 585, 593-94 (S.D.N.Y. 2001)).

35. *See, e.g.*, Recursion Software, Inc. v. Interactive Intelligence, Inc., 425 F. Supp. 2d 756, 782 (N.D. Tex. 2006) (defining a "browsewrap license" as a license that is "typically part of a web site—its terms may be posted on the site's home page or may otherwise be accessible via a hyperlink" and explaining that "[i]n contrast to clickwrap licenses, a user may download software under a browsewrap license prior to manifesting assent to its terms." (citations omitted)).

36. The validity of these agreements has been the subject of extensive scholarly discussion. *See generally* Benkler, *supra* note 5, at 429-40 (discussing copyright law and the scope of the public domain); J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 906 (1999) (examining the practice of contracting around federal intellectual property law); Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH L.J. 827, 877-78 (1998) (exploring the relationship between contract and copyright law); Maureen A. O'Rourke, *Copyright Preemption After the* ProCD *Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 57, 71 (1997) (discussing the competing interests involved in freedom of contract and preservation of the public domain); Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 BERKELEY TECH. L.J. 93, 106 (1997) (discussing whether parties should be allowed to contract around copyright).

37. Jessica Litman, *Copyright and Information Policy*, 55 LAW & CONTEMP. PROBS. 185, 187 (1992); Ryan, *supra* note 32, at 661, 669-70. Patry, *supra* note 6, at 368-69. ("Copying such material promotes the progress of science by keeping the basic building blocks of knowledge free for all to use . . . ."); *see also* Lipton, *supra* note 31, at 738; Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1294-95 (2000).

38. Litman, *supra* note 37, at 206 ("Courts increasingly see uncompensated uses of copyrighted works as invasions of the rights in the copyright bundle."); *see also* Ryan, *supra* note 32, at 661.

normally granted, including the right to exclude.[39] As a result, almost insurmountable obstacles are faced by any other party whose interests might be affected by a lack of access or an inability to utilize the resource, as the burden almost always falls on these other parties to explain why the previously identified owner's rights should be limited.[40]

Such a myopic view of property rights allows for the tight control of access to and use of information contained within the tangible property. This problem is often most pronounced in the Internet context where lawmakers and judges have not only treated cyberspace as though it were virtually equivalent to a place in the physical world, but seem to believe that all of its constituent parts must be privately owned by someone or something that has absolute power over the property.[41] Ubiquitous in legislation affecting and judicial opinions concerning cyberspace is the granting of rights to private parties, thereby providing them with the ability to exclude whomever or whatever they choose.[42]

Illustrative of this presumption toward privatization is the case of *eBay v. Bidder's Edge*.[43] Plaintiff eBay brought suit against Bidder's Edge for using a software robot to access and gather factual data contained on eBay's publicly accessible Internet site, despite the fact that its computer system had not been harmed by Bidder's Edge's robotic activity.[44] In granting the preliminary injunction against Bidder's Edge, the court held that eBay had a "fundamental property right to exclude others from its computer system."[45] Determinations such as these allow website owners to restrict who and what may enter, and consequently make use of, the information contained on even a publicly accessible website. Furthermore, these decisions generally fail to recognize the benefits that inure from a diverse, open network. The end results of such judgments are considerable impediments to public access to ideas and information.

## CONCLUSION

It is imperative that judges and policy makers give more comprehensive attention to all of the interests implicated in controversies involv-

39. *See* Ryan, *supra* note 32, at 692.

40. *See* JOSEPH WILILAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 10 (2000).

41. Mark A. Lemley, *Place and Cyberspace*, 91 CAL. L. REV. 521, 532-33 (2003).

> Courts have assumed not only that cyberspace is a place akin to the physical world, but further that any such place must be privately owned by someone who has total control over the property. This is a common assumption these days; it sometimes seems as though our legal system is obsessed with the idea that anything with value must be owned by someone.

*Id.*

42. Ryan, *supra* note 32, at 692; *see also* Morton J. Horwitz, *Technology, Values, and the Justice System: Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 116 (2004).

43. 100 F. Supp. 2d 1058 (N.D. Cal. 2000).

44. *See eBay*, 100 F. Supp. 2d at 1060-63.

45. *Id.* at 1067.

ing materials which arguably belong in the public domain. This must include acknowledgment of the fact that the ability to access and make use of a robust, ever-expanding public domain is essential to the progress of society.[46] Such resources allow the public to gain valuable information necessary for an "enlightened citizenry."[47] A prodigious public domain advances learning, knowledge, and creativity by permitting later authors and innovators to build on prior works and discoveries. Ultimately, we must recognize the way the structure of intellectual property rights reflects the values we find important and the type of society we wish to create.[48]

46. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3-4 (2004).

47. Patry, *supra* note 6, at 381.

48. Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1046 (1996) ("Questions about the kind of society that we are, and the kind of society that we wish to become, must be inherent parts of the interpretation of [property rights]."); SINGER, *supra* note 40, at 155; Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 173-74 (2004) ("Property ownership, like information property ownership, has powerful social consequences."); JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP 90-91 (2000); *see also* STEVEN R. MUNZER, A THEORY OF PROPERTY 149 (1990) ("Property discloses much about societies and persons . . . . First for all societies, if one describes the institution of property as it exists in a society, the description reveals something important about that society."); Ryan, *supra* note 32, at 647 ("[I]t is important to identify the values we are promoting when resolving current issues regarding information as property."); JEDEDIAH PURDY, FOR COMMON THINGS: IRONY, TRUST, AND COMMITMENT IN AMERICA TODAY 131 (1999) ("Every law and each political choice is in part a judgment about the sort of country we will inhabit and the sort of lives we will lead.").