

COPYRIGHT AS OPPOSED TO SUBVERSIVE OF COMMON GOOD

In today's world there is somewhat an era of piracy. people copy unauthorized material from tangible things. To curb this danger COPYRIGHT is provided by law. copyright may be define as

In Justice O'Connor's majority opinion for the Supreme Court in Harper & Row Publishers, Inc. v. Nation Enterprises, for example, speaks of copyright law as the "engine of freedom of expression" To hold The Nation liable for copyright infringement for publishing excerpts from Gerald Ford's memoirs of his presidency was not, in the Court's view, to condone an act of private censorship. It was consistent with first amendment principles because one could count on copyright incentives to ensure that these memoirs would reach the public

Copyright and free expression principles are, in the mainstream view, in harmony because copyright protection is only available to the "expression" of authors, and not to the "ideas" or information the authors works may contain . Other authors are always free to express the same idea or reuse the information in a protected work in a different way than the first author. In this way, private censorship is avoided. Also contributing to the compatibility of copyright and freedom of expression principles has been the fair use doctrine. Howard Hughes may have acquired copyright in a magazine article about him in order to try to stop publication of an unauthorized biography. An appellate court rebuffed this attempted exercise of copyright to accomplish an act of private censorship, however, by finding that the biographer had made fair use of the article . Similarly, the owner of the "Pretty Woman"

Crew's sale of a rap parody of that song in part because it didn't like the meaning of this parody. However, the Supreme Court found persuasive the argument that this rap parody was a critical commentary on the original work that the fair use doctrine was intended to protect . In these and other cases, courts have invoked fair use to prevent the use of copyrights to censor content of which the author disapproves.

However, sometimes fair use and the idea/expression distinction has failed to maintain harmony between copyright and free expression principles. In the aftermath of the Harper & Row decision, for example, biographers and historians were at risk of private censorship from copyright if they quoted from unpublished letters or manuscripts of public figures, such as the reclusive J.D. Salinger or the controversial founder of the Scientology movement . In response to concerns of historians and biographers, Congress amended the fair use provision to clarify that the unpublished nature of copyrighted works does not preclude fair use . A seeming deviation from the harmony of copyright and freedom of expression principles was thus mended, and historians and biographers, among others, breathed a sigh of relief. On other occasions, concerns about copyright's trespass on freedom of expression principles have been cured by subsequent court decisions. Some years ago, Fred Yen expressed concern that the "total concept and feel" theory of software copyright lawsuits was so vague as to threaten freedom in computer programming expression . However, later cases repudiated the broad "look and feel" claims , arguably rendering Yen's concerns moot.

These doctrines and developments have bred complacency in most copyright scholars about the compatibility of copyright and freedom of expression principles . It would be interesting to know whether first amendment scholars would find as much harmony between these principles were

likely that such scholars would import some first amendment doctrines into their analysis of copyright issues which might inject a breath of fresh air into copyright discourse. While copyright scholars have sometimes visited the first amendment literature to find support for their arguments on specific copyright issues, virtually all of the considerable law review literature on the copyright/freedom of expression relationship has been unit-directional. Copyright scholars may be blinded by familiar doctrines from perceiving certain threats to free expression values that a first amendment scholar would easily perceive .

This may, however, change. The work of a number of young copyright scholars -- Yochai Benkler, Julie Cohen, Neil Netanel, and Mark Lemley, among them -- recognizes that the potential for disharmony between copyright and freedom of expression principles is greater than earlier generations of scholars may have perceived . These young scholars have looked to first amendment and other constitutional principles to shore up limiting doctrines of copyright law or to make policy recommendations about how copyright law should evolve. As admirable as this new literature is, it largely ignores the fact that copyright has at least as long a history of being a handmaiden of censorship as it has a history of being the so-called "engine of free expression" . Understanding this history may be valuable in assessing whether this past may be a prologue to a future in which copyright and censorship will once again be conjoined.

So let us briefly visit this history: The Anglo-American copyright regime grew out of practices and policies of the English Stationers' Guild in the late 15th and early 16th centuries . To ensure harmony within the ranks, the guild established a registry system for staking claims in books. Members entered into the guild register the names of the books in which they claimed printing rights , whereupon other guild members were expected to

enforcement system enabled guild members to resolve disputes amongst themselves over rights in particular books. While some stationers in this era were surely noble fellows who sought to enlighten the public, the private copyright system of the pre-modern era mainly functioned to regulate the book trade to ensure that members of the guild enjoyed monopolies in the books they printed.

This system was, however, conducive to taking on a second function. Conveniently for English authorities, the guild's practices provided an infrastructure for controlling (i.e., suppressing) publication of heretical and seditious materials. The English kings and queens were quite willing to grant to the Stationers Guild control over the publication of books in the realm in exchange for the guilds promise to refrain from printing such dangerous materials . Until its abolition, the Star Chamber was available to back up judgments emanating from the stationers private enforcement and censorship system.

If the pre-modern copyright system promoted freedom of expression by making books more widely available, this was an incidental byproduct of the market that arose for books, not an intended purpose of the then-prevailing copyright system. Far more harmonious was the relationship between copyright and censorship in that era. Men burned at the stake for writing texts that were critical of the Crown or of established religion. The stationers copyright regime was part of the apparatus aimed at ensuring that these texts would not be printed or otherwise be widely accessible to the public.

The development that ushered in the modern era of copyright was the English Parliaments passage of the Statute of Anne in 1710 . On its face, this statute was not only a repudiation of several principal tenets of the stationers copyright system; it was also a redirection of copyright's purpose away from censorship and toward freedom of expression

among printers and booksellersthat is, to break the stranglehold that major players in the Stationers' Company had over the book trade. Insofar as that monopoly continued in revised form, the statute provided recourse for those injured by excessive prices of books.

The key aspects of the Statute of Anne for achieving these goals were these: First, the act granted rights to authors, not to publishers. Second, it did so for the utilitarian purpose of inducing learned men to write and publish books. Third, the act established a larger societal purpose for copyright, namely, to promote learning. Fourth, it granted rights only in newly authored books. Thereafter, ancient books were in the public domain and could be printed by anyone. Fifth, it limited the duration of copyright to fourteen year terms (renewable for another fourteen years if the author was living at the end of that term), thus abolishing perpetual copyrights . Sixth, the statute conferred rights of a limited character (not to control all uses, but to control the printing and reprinting of protected works). Seventh, it imposed a responsibility on publishers to deposit copies of their works with designated libraries. Eighth, it provided a system for redressing grievances about overpriced books.

While it took about fifty additional years for pre-modern system to die out , the modern law of copyright emerged from the Statute of Anne's precepts. Censorship held no place of honor in this new copyright system which, in the main, embraced Enlightenment values that also influenced the framers of the U.S. Constitution. The clause of this constitution that empowers Congress to promote the progress of science and the useful arts by securing to authors and inventors an exclusive right in their respective writings and discoveries for limited times should be viewed in historical context as an American endorsement of England's repudiation of the speech-suppressing, anti-competitive and otherwise repressive pre-modern copyright system

Statute of Anne. Core elements of the Statute of Anne are reflected in Article I, sec. 8, cl. 8's purpose ("to promote Science"), in the persons to whom rights were to be granted ("authors"), and in the duration of rights ("for limited times").

Marci Hamilton has sometimes asserted that the original Constitution did not include a provision on freedom of speech because the framers had done everything necessary to ensure a healthy system of free expression by authorizing enactment of a copyright law . Though I would not go that far, I would agree that the constitutional copyright clause, properly construed, embodies first amendment and anti-monopoly principles. Because of this, I agree with Professor Hamilton that there is a "dormant copyright clause" waiting to be reawakened in the case law -- and hopefully in Congress -- after a long sleep in which the clause has become a meaningless cliché .

To understand why rejuvenation of this clause may be desirable, it may be worth considering some parallels between copyright in the pre-modern era and copyright as it has evolved in the past decade or so (the trend toward which I will call "copyright in a post-modern era").

CONSOLIDATION IN THE COPYRIGHT INDUSTRIES: The rise of publishing and media giants, such as Reed Elsevier, Time Warner, and Disney, harkens back to the dominance of certain London booksellers in the Stationers Company and their influence on copyright law and policy. As the work of James Boyle, among others, has shown, established copyright industries have lately been very successful in promoting their agenda in the policy arena as though their interests were the only interests about which policymakers should be concerned .

THE DECLINE OF THE AUTHOR/THE RISE OF THE WORK: As in the pre-modern era, the post-

noted, on "the work" and "the copyright," rather than on "authors" . This post-modern copyright system promotes the interests of rightsholders in their works more than it promotes the interests of individual authors.

THE DECLINE OF UTILITARIAN AND LEARNING PURPOSES OF COPYRIGHT/ THE RISE OF PROFIT MAXIMIZATION:

From the standpoint of dominant players in the copyright industries, the purpose of this law is to maximize revenues for the benefit of rights holders, not to provide just enough protection to incant creative activity, let alone to promote learning or innovation . Hollywood may have recouped its investments in films many times over, but if there is any residual value in those films, Hollywood wishes to exploit that value. Especially clear proof that the utilitarian rationale for granting authors limited rights in their works have given way to pure rent- seeking behavior is the Congressional decision in 1998 to extend the copyright term for another twenty years .

THE DECLINE OF FAIR USE AND OTHER COPYRIGHT LIMITATIONS:

The pre-modern copyright system had no "fair use" or other public interest exceptions to the scope of publisher rights, nor did it seek to promote science, innovation, or freedom of expression, values which in the modern era, have given rise to such exceptions in the modern era . Fair use and other limitations on the scope of copyright have been long regarded in U.S. copyright law as part of the social bargain of the copyright system . However, U.S. policymakers in the 1990s have sometimes spoken of fair use and other limitations as an "unfair tax" on publishers . They have also predicted that fair use will recede in importance because of the rise of licensing schemes through copyright owners can be compensated for uses of their works . The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) arguably limits national authority to create exceptions and limitations that

exploitations of their works . Some representatives of the copyright industries have already expressed a desire to use this agreement to challenge fair use and other exceptions in national copyright laws .

PERPETUAL COPYRIGHTS: In the pre-modern era, copyrights were perpetual. In the modern era, copyrights have been limited in duration, long enough to enable authors and their immediate families to enjoy the benefits of value the authors created, but enriching the public domain thereafter. The decision of the U.S. Congress to extend the term of copyright for an additional twenty years suggests that copyright in the post-modern era may be on its way to becoming perpetual again (on the installment plan, as Peter Jaszi so wittily observed) .

THE DECLINE OF ORIGINALITY AS A MEANINGFUL CONSTRAINT ON PUBLISHER RIGHTS: If major information industry players, such as Reed Elsevier, have their way, Congress will soon adopt a new form of intellectual property protection for collections of information that will, in essence, obviate the need for any "originality" in an informational work in order for copyright or copyright-like protection to be available for it . In addition, some firms, Microsoft prominent among them, claim copyright protection in digitized versions of public domain works . If these works cannot be fully controlled by copyright because of lingering questions about the sufficiency of their originality, one can expect these firms to use mass-market licenses to get protection for such digital works via the model licensing law known today as Article 2B of the Uniform Commercial Code .

EXCESSIVE PRICING: In the post-modern era, as in the pre-modern era, complaints about excessive pricing or otherwise burdensome terms and conditions in licenses for copyrighted works has once again become common . Universities have been especially vocal about excessive pricing of

discourse about this issue in the U.S. is any serious consideration of the possibility of imposing compulsory licenses, legal licenses, or obligations to license on fair and reasonable terms as a way to counteract this problem.

UNCLARITY ABOUT ORIGINS OF RIGHTS: In the post-modern, as in the pre-modern era, there is noticeable unclarity about the source of authority firms have for claiming rights in certain informational works. Do rights to license works on any terms or to technically protect copyrighted works derive from ownership or possession of a particular artifact, from intellectual property rights that might pertain to such an artifact, or from some other legally recognized or asserted right? In the pre-modern era, printers considered their "copie" rights to derive from possession of manuscripts and investments in printing the contents of manuscripts

. In the post-modern era, claims of seemingly absolute rights to license works on all but unconscionable terms or to control access to protected works by encrypting them have an unclear provenance. Jessica Litman has pointed out that proposed Article 2B posits the existence of property rights in information other than those arising from intellectual property law without specifying exactly what those rights are or how far they extend .

PRIVATE ORDERING/PRIVATE ENFORCEMENT:

Also evident in the post-modern copyright era is a renewed romance with private ordering. Julie Cohen has explored similarities between prevalent rhetoric of commercial exploiters of informational works and rhetoric from a now discredited Supreme Court decision that challenged public policy limitations on freedom of contract . Though Cohen's analysis is powerful, an even more striking example of private ordering affecting informational works is the stationers copyright system. Studying the history of this system reveals why leaving the exploitation of informational works solely to private ordering can have serious deleterious consequences for society, in

dissemination of learning . As in the pre-modern era, industry groups in the post-modern era have played significant roles in policing compliance with copyright norms. Well known is the "hotline" the Software Publishers' Association provides through which disgruntled employees and the like can inform on their employers for unlicensed software .

THE RHETORIC OF "PIRACY" AND "BURGLARY": Characterizing unauthorized copying as "piracy" has both pre- and post-modern roots. In the pre-modern era, the so-called "pirates" were printers not belonging to the Stationers Company . Today "pirates" seem to come in many shapes and sizes. Increasingly common is use of the term "piracy" to refer to single acts of infringement by individuals. Major firms in the post-modern copyright industries are using, or planning to use, technical protection systems to protect their works from such "piracy" . They do not intend to rely solely on this form of private ordering to protect their interests. They have persuaded Congress to outlaw the act of bypassing of technical protection systems used by copyright owners to control access to their works, as well as technologies that can be used for access-control or use-control purposes . They liken such bypassing to "burglary" and the technologies for bypassing to "burglary tools" . The anti-circumvention provisions of the Digital Millennium Copyright Act, while ambiguous in some key respects, provides legal reinforcement for this private ordering, with criminal penalties for willful violators of these norms .

INCREASED CRIMINAL SANCTIONS: The rhetoric of piracy lends itself to increased use of criminal penalties to enforce anti-copying norms. Post-modern copyright, like pre-modern copyright, increasingly looks to criminal law to punish bad actors in the copyright space. In the modern era, criminal penalties were reserved for large-scale commercial infringers. In the post-modern era, copyright crimes are proliferating. Some of these do

liability; others, notably the anti-circumvention provisions of the DMCA, require no underlying act of infringement.

The social, political, and economic context within which these post-modern developments are occurring, as well as a continuing belief in modern copyright precepts by members of the judiciary, obviously distinguish the post-modern from the pre-modern copyright era. It would be unduly alarmist to suggest that post-modernism has totally captured copyright law or that copyright law will get divorced from freedom of expression principles in order to remarry censorship. What may save copyright's second marriage from doom may well be this larger context. Yet, it would be naive not to notice the drift toward a renewed flirtation with censorship principles and do nothing to stop it.

Working against the enactment of Article 2B is probably the most significant step that could be taken to arrest this flirtation. Article 2B works off the base of copyright, finding in it "informational rights" that then can be licensed under the Article 2B aegis. As other copyright scholars have noted, this model law treats copyright limitations as presumptively precatory and capable of being overridden by license terms . Strong criticism of Article 2B from intellectual property law experts has led to a lessening of this presumption of the model law . Article 2B now expressly empowers courts to withhold enforcement of contract clauses that violate "fundamental public policy" . However, this limitation on licensor authority may be sufficiently vague as to provide little comfort to persons arguably subject to a free expression/copyright limitation override provision. Individual computer scientists, for example, may be deterred from posting on the Internet the results of performance tests on database programs whose license terms prohibit public dissemination of such results. These scientists may be personally convinced that public policies favoring the free

enough to make such clauses unenforceable, but they may not be keen to invite litigation to challenge these restrictions. Also troublesome in mass-market licenses are clauses aimed at maintaining trade secrecy-like limitations on use of licensed information . Such terms might include prohibitions on reverse-engineering, pledges not to disclose information, or statements of agreement with the unpublished nature of information. Such terms may generally be unobjectionable in the context of individually negotiated licenses between sophisticated parties with relatively even bargaining power. However, they become disturbing if the licensed work has been the subject of a mass-market transaction. Even though reverse-engineering computer program object code may be lawful as a matter of copyright law , license restrictions may inhibit exercise of this copyright-based privilege. It remains to be seen whether anti-criticism/anti-reverse engineering clauses will proliferate and how courts will deal with them . The potential certainly exists for Article 2B to be used to accomplish acts of private censorship that copyright and freedom of expression principles, left to their own devices, would disfavor.

A more direct way in which copyright may enable private censorship arises from the new anti-circumvention provisions of the DMCA. One provision of this law makes it illegal to circumvent a technical protection system used by a copyright owner to control access to its work ; another outlaws the manufacture or distribution of technologies primarily produced or designed to circumvent access controls . To illustrate how this rule might impact first amendment values, consider this example: Suppose that an employee of a major chemical company gave a reporter a disk containing a digital copy of a report pertaining to a major chemical spill that the company was trying to cover up. If information on the disk is technically protected and the company has not authorized the employee to give the document to the reporter, the

system to get access to the report would, on a strict interpretation of the anti-circumvention law, be illegal . Also illegal, on a strict interpretation, would be the writing of a short program to enable the reporter to read the document in plaintext . Consideration of free press and free speech interests might suggest that an act of circumvention for this purpose and the development of a tool to read the report were justifiable. One subsection of the DMCA's anti-circumvention provision states that "[n]othing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products" . But how much comfort would this offer to the reporter or his newspaper? Congress realize the potential for the anti-circumvention provision to conflict with free speech interests . However, it provided very little guidance on how to mediate or resolve the tension between the interests of free speech and those underlying the anti-circumvention rule .

For copyright law to remain true to the modern aspiration to live in harmony with freedom of expression principles (and to remain divorced from censorship principles), those who deeply believe in its second marriage will need to be steadfast in monitoring the evolution of this policy. Post-modernism has made considerable headway. However, the struggle is far from over. Much of the work that needs to be done to avert dire consequences is, oddly enough; work suitable to scholars of constitutional and copyright law. Peter Jaszi has identified the important task of developing a new and more powerful rhetoric that will allow us to maintain constitutionally grounded values in copyright law and policy . Copyrights past will unquestionably be a prologue to its future. The principal question is: to which of its pasts shall we chart its course? Which choice we make will have profound consequences for the kind of information society in which we will be living in the twenty-first century .

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The attempt to "scoop" first publication of the only part of this memoir that the public would be likely to want to read and the allegedly "purloined" nature of the manuscript from which the Nation's editors drew the excerpts heavily colored the Courts decision.

Neil W. Netanel, Copyright and a Democratic Civil Society, 106 Yale L.J. 283 (1996).

See, e.g., Robert C. DeNicola, Copyright and Free Speech: Constitutional Limitations on the Protection of Expression, 67 Cal. L. Rev. 283 (1979); Paul Goldstein, Copyright and the First Amendment, 70 Colum. L. Rev. 983 (1970); Melville B. Nimmer, Does Copyright Abridge the First Amendment Guarantee of Free Speech and Free Press?, 17 UCLA L. Rev. 1180 (1970).

Rosemont Enterp. V. Random House, Inc., 366 F.2d 303 (2d Cir. 1966).

Campbell v. Acuff-Rose Music, Inc., 114 S.Ct. 1164 (1994).

See, e.g., Pierre Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105 (1990) (discussing these cases).

See 17 U.S.C. sec. 107, as amended.

See Alfred C. Yen, A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Works "Total Concept and Feel," 38 Emory L.J. 393 (1989).

See, e.g., *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006 (N.D. Cal. 1992), *affd*, 35 F.3d 1435 (9th Cir. 1994) (rejecting "look and feel" claim for user interface).

James Boyle is one of the insightful and provocative scholars to commented on ways in which copyright analysis impacts societal values, such as those concerning free expression. See generally JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996).

A notable exception is Mark A. Lemley and Eugene Volokh, [article on copyright injunctions as prior restraints on speech], *Duke L.J.* (forthcoming 1999).

See, e.g., Yochai Benkler, *Free As the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain*, *N.Y.U. L. Rev.* (forthcoming 1999); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 *Conn. L. Rev.* 981 (1996); Netanel, *supra* note 3; Lemley, *supra* note 12.

See *supra* note 1 and accompanying text. For a history of copyrights past, see, e.g., L. RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968).

This history is recounted in Patterson, *supra* note 13; MARK ROSE, *AUTHORS AND OWNERS: THE* In order to appreciate intellect and skills which go in creating fonts I hold a strong opinion that copyright must subsist in the fonts. "Creativity being the food for mind" needs to be acknowledged. Legally speaking, fonts satisfy both the criteria of being original and creative then fonts or the software of such fonts being deprived the privilege of copyrights is beyond comprehension.

INVENTION OF COPYRIGHT (1993); JOHN

PUBLISHING (1988). The guild included not only the printers of books, but others involved in the book trade, such as book-binders and booksellers. English kings and queens also granted letters patent to certain printers conferring on them exclusive rights to print certain types of works was an auxiliary system of regulating the printing trade that in time was folded into copyright. Over time, the Stationers Company became the predominant copyright system. See Patterson, *supra* note 14.

Rights to print these books were regarded by guild members as perpetual in duration; they could, however, be assigned or licensed to other guild members.

The Licensing Acts that are so important to the emergence of first amendment principles were integrally interrelated with the Stationers copyright system. This is demonstrated by the emphasis the Stationers Company (which evolved into a kind of trade association as the medieval guild system waned) placed on its valuable role in suppressing dangerous speech when arguing that Parliament should reinstate the Licensing Acts after they expired in the late 17th century. See Rose, *supra* note 15 (recounting this history).

See, e.g., Rose (discussing the Statute of Anne).

A "grandfather" provision allowed holders of existing copyrights some additional time to exploit the rights, but the duration was limited. *Id.*

See, e.g., *id.* (recounting the litigation about the impact of the Statute of Anne on common law rights).

Address to the Section on Defamation and Privacy, Association of American Law Schools, San Francisco CA, January 1998.

Clause (manuscript 1998).

See, e.g., James Boyle, *The Politics of Intellectual Property: Environmentalism for the Net?*, 47 *Duke L.J.* 87 (1997).

See Peter Jaszi, *Toward a Copyright Theory: The Metamorphoses of Authorship*, 1991 *Duke L. J.* 455 (1991).

See, e.g., Netanel, *supra* note 3.

See, e.g., Pub. L. No. 105-xxx.

See, e.g., 17 U.S.C. secs. 107-121 (exceptions to various exclusive rights).

See, e.g., Peter Jaszi, *Goodbye to All That: A Reluctant (and Perhaps Premature) Adieu to a Constitutionally Grounded Discourse of Public Interest in Copyright Law*, 29 *Vand. J. Transl. L.* (1996).

See, e.g., Bruce Lehman, *Report of the Working Group on Intellectual Property, Intellectual Property and the National Information Infrastructure* (Sept. 1995).

Id.

See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, reprinted in *THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS -- THE LEGAL TEXTS* 2-3 (Gatt Secretariat ed. 1994); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, Annex 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights, reprinted in *RESULTS OF URUGUAY ROUND*, *supra* at 6-19, 365-403. See TRIPS, art. 13.

Protection Under the TRIPS Agreement, 29 Vand. J. Tran's L. 559 (1996). But see Pamela Samuelson, The U.S. Digital Agenda at WIPO, 37 Va. J. Intl L. 369 (1997) (arguing that existing copyright exceptions and limitations are largely if not wholly compatible with TRIPS).

Id.

H.R. 354, 106th Cong., 1st Sess. (1999).

See, e.g., Pamela Samuelson, The Originality Standard For Literary Works Under U.S. Copyright Law, 42 Am. J. Compar. Law 393 (1994) (discussing such claims).

See generally Symposium, Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce, 13 Berkeley Tech. L.J. 809 (1998); Symposium, Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce, 87 Calif. L. Rev. 1 (1999).

See, e.g., Stanley Chodorow & Peter Lyman, The Future of Scholarly Communication, in THE MIRAGE OF CONTINUITY (Brian Hawkins & Patricia Battin, eds. 1998).

See, e.g., Rose, *supra* note 15.

See Jessica Litman, The Tales That Article 2B Tells, 13 Berkeley Tech. L.J. 931 (1998).

See, e.g., Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 Mich. L. Rev. 462 (1998).

See, e.g., Patterson, *supra* note 14; Rose, *supra* note 15.

Restaurant owners have also complained in recent years about private enforcement tactics of ASCAPs enforcement personnel.

See, e.g., Feather, *supra* note 15.

See, e.g., Mark Stefik, *Shifting the Possible: How Trusted Systems and Digital Property Rights Challenge Us To Rethink Digital Publishing*, 12 *BERKELEY TECH. L.J.* 137 (1997) (discussing the concept of trusted system technology).

See Digital Millenium Copyright Act, Pub. L. No. 105-304.

See, e.g., Testimony of Allan Adler, Hearing Before the Subcommittee on Courts and Intellectual Property of the House Judiciary Committee on H.R. 2281, 105th Cong., 1st Sess., Sept. 17, 1997.

See 17 U.S.C. sec. 1201, 1204. For an analysis of the ambiguities of this statute, see, e.g., Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need To Be Revised*, 14 *Berkeley Tech. L.J.* (forthcoming 1999).

See, e.g., Charles McManis, *The Privatization (of "Shrinkwrapping") of American Copyright Law*, 87 *Calif. L. Rev.* 173 (1999).

See, e.g., David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 *Calif. L. Rev.* 17 (1999).

See Article 2B, Sec. 2B-105 (as revised in November 1998).

See, e.g., Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 *S. Cal. L. Rev.* 1239 (1995) (critical of such licenses).

977 F.2d 1510 (1992).

The present version of the Article 2B Reporters commentary suggests that anti-criticism and anti-reverse engineering clauses are among those that might be struck down, but of course, this commentary will not be part of the black-letter law. See Reporters Notes to Sec. 2B-105.

Id., sec. 1201(a)(1)(A).

Id., sec. 1201(a)(2). See also *id.*, sec. 1201(b)(1) (outlawing other circumvention technologies).

If the reporter bypasses the technical protection system to get access to the document in the first two years after enactment of DMCA, he will not be in violation of the law because of the two year moratorium on its enforcement. See 17 U.S.C. sec. 1201(a)(1). Other examples of legitimate reasons for bypassing a technical protection system to get access to documents that are protected by copyright law (even if not typically thought of as copyrighted material) can be found in Samuelson, *supra* note 47.

Id. Because the anti-device rule is not subject to the same two year moratorium as the act of circumvention rule, the reporter would seem to be liable for this violation upon making the software tool.

17 U.S.C. sec. 1201(c)(1). The reporter may be especially nervous because of the potential for criminal liability if he builds a tool to circumvents the technical protection system willfully to promote the commercial interests of the newspaper for which he works. See *id.*, sec. 1204.

See, e.g., Benkler, *supra* note 13 (discussing first amendment implications of the anti-circumvention regulations).

See, e.g., Samuelson, *supra* note 47 (discussing

might be construed to avert troublesome results).

See, e.g., Jaszi, *supra* note 28.

See Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 *Emory L.J.* 869 (1996) (recommending ways to translate constitutional values into the new information environment). See also Boyle, *supra* note 11.