

Note: This is a very preliminary draft. Please do not circulate.

From Copyright to Trademark

Greg Lastowka^{*}

INTRODUCTION

A copyright is an unusual property interest. The holder of a copyright has the legal right to prohibit others from replicating information patterns. The law's recognition of this right, in theory, provides desirable outcomes. It creates incentives for the production of new information patterns by forcing the public to obtain licenses from the copyright holder if they wish to make new physical iterations or spatial performances of the information patterns first created by the copyright holder.

With the advent of digital technologies, copyright law is being transformed into something different. As many observers have realized in the past decade, the notion of information as property is seriously challenged today because the costs of information capture, replication, manipulation, and distribution are dramatically reduced by the advent of digital technologies. In such an environment, we increasingly move away from concerns about the dangers of information scarcity and move toward concerns about the dangers of information superabundance. It becomes increasingly difficult, once information patterns are digitally encoded, to restrain the public from reproducing and further disseminating those patterns. This is true for even highly dense and complex information objects such as film and music. Part of the reaction to the digital moment by copyright stakeholders has been seen in attempts to strengthen copyright law's property-like controls in response to this new "digital dilemma."¹ At the same time, copyright industries have attempted to bypass the law entirely by investing in efforts to control

^{*} Assistant Professor of Law, Rutgers School of Law—Camden.

¹ See COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, COMPUTER SCIENCE & TELECOMMUNICATIONS BOARD, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (National Academy of Sciences Press 2000).

reproduction and dissemination through technology and contract.² New laws (like the Digital Millennium Copyright Act) supplement this effort by creating new stripes of property rights in means of technological protection for copyright-protected information.³

Yet the legal responses of copyright so far have largely been rear-guard efforts to put the genie of digital information back into the bottle of a property model that made societal sense at a different technological moment. There are many information creators, both professional and amateur, that are not interested in retrofitting their current information practices to the property models envisioned by copyright. A more progressive vision of copyright law would need to take this segment of information producers into account and ask what copyright law can do to meet their needs. Too often, contemporary copyright scholars see their role in non-proprietary information environments as “hands-off.” The absence of property is envisioned as a romanticized commons.⁴ Their arguments are largely reactive to what is decried as a (corporate-driven) expansion in intellectual property rights and an enclosure of the commons. Normative appeals are reduced to either staying the course of traditional law (rejecting copyright expansion) or attempting to tinker with the existing system to reinstate “balance” under a proprietary model.

I would propose that the key benefits that the law of copyright can and will provide in future digital environments will have little to do with information as property and much more to do with the regulation of information delivery. Copyright law should, and probably will, play a part in

² To some extent, this has always been the business strategy of well-organized copyright industries. Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 34 (1996) (“Copyright holders have long sought to back up their legal control over reproduction with functional control.”)

³ Lawrence Lessig, *Law Regulating Code Regulating Law*, 35 LOY. U. CHI. L.J. 1, 7 (2003). Whether the anti-circumvention provision of the DMCA are akin to copyright protections or constitute theoretically distinct para-copyright entitlements is unclear. Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 174-78 (1998); Pamela Samuelson, *Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); *Universal City Studios v. Corley*, 273 F.3d 429 (2d Cir. 2001).

⁴ See Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331, 1334 (2004) (“cyberlaw scholars have embraced, perhaps inadvertently, a kind of libertarianism for the Information Age”).

this process. Copyright, for instance, can seek to ensure that digital information is properly attributed to its authors in order to provide those authors with reputation benefits and to ensure that markets for works are not distorted by fraud and undesirable inefficiencies. The reader may be understandably skeptical of this claim because intellectual property laws are often thought to be inevitably *about* property restrictions on reproduction and dissemination of creative work.⁵ Without property as a guiding concept, what is intellectual property?

This reaction may be sensible enough with regard to copyright law, but it is largely inapplicable to trademark law. Trademark has historically regulated information *relationships* rather than information *property*. Trademark law therefore faces fewer fundamental challenges in the digital environment than does copyright law. If copyright is to maintain its centrality as a law used to beneficially regulate the circulation of expressive and creative information, it must learn to work in ways more like trademark. The property frameworks of the past must be supplemented or surpassed by non-property frameworks that are focused on ensuring truthful disclosure, protecting consumer interests, and prohibiting fraud and unfair forms of information competition.

A. HISTORY AS PREQUEL: COPYRIGHT’S BIRTH IN TRADEMARK

[Please note: This section is fairly sketchy and needs to be integrated better—but you’ll see where I am trying to go with it.]

Despite many popular claims, it would seem unwise to closely tie the birth of copyright with the notion of Romantic authorship. The trigger of English copyright was, in fact, not ideological, but technological and commercial. Before any legal notion of authors’ rights had emerged, something called a copyright had been established within the industry of book printing.⁶ In its first English incarnation copyright (meaning stationer’s copyright) was entirely oblivious to the notion of Romantic authorship. It was instead a private

⁵ For thoughts on the differences between intellectual property and property, *see* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 29-30 (2004)[hereinafter Carrier, *Cabining IP*]; Mark A. Lemley, *What’s Different About Intellectual Property*, 83 TEX. L. REV. 1097 (2005).

⁶ [Cite Patterson.]

arrangement between printers in furtherance of their mutual interests. The original “copyright” claim of an exclusive right to print a book in the Stationers Company (the guild of publishers) was not derivative of any notion of authorial genius or proprietary rights in a creator—it was supported simply by being the first to press.⁷ All manner of ancient classical texts became literary properties “owned” by their first printers and registered with the Stationers’ Company. Trade regulation, not Romantic genius, gave birth to copyright.

From a contemporary standpoint, the “first possession” system of the stationers’ copyright seems out of keeping with our understanding of copyright as an incentive to authors. From the internal standpoint of a mercantile guild, however, it was a reasonable strategy. Proto-copyright within the Stationer’s Company effectively allocated interests in a classic Demsetzian fashion—dividing up resources to optimally reward printer investments in book production and prevent the externalities associated with aggressive price competition. Stationers’ copyright also decreased guild member conflicts, promoted organizational obedience and cohesion, and allowed the Stationers’ Company to exercise administrative control over the entire market for printed works.⁸ This control was not absolute, of course. As in all cartel arrangements, there were attempts by members to play outside of the organizational rules for individual gain.⁹ But the Stationers’ Company could often retaliate effectively. The internal cartel rules were therefore largely respected and copyright thrived.

The transition from this mercantile system into a system designed around the promotion of authorial interests took several centuries and was a

⁷ [Cite]

⁸ While cartels are generally understood as undesirable today, the “first possession” system might have, to some extent, benefited consumers in ways roughly similar to the contemporary copyright incentive. Requiring printers to acquire property interests by printing first must have created some incentive to discover and publish previously unpublished texts, that adding to the diversity of texts in circulation. Perhaps the theory here is more appealing than the reality, however. *See* JOSEPH LOWENSTEIN, *THE AUTHOR’S DUE* 70-71 (2002) (noting how many earlier Italian printers in the 15th century “went out of business pursuing a fairly inelastic market for traditional manuscripts rather than diversifying production”).

⁹ [PETER DRAHOS & JOHN BRAITHWAITE, *INFORMATION FEUDALISM* __ (2003)]

complicated political, legal, and intellectual affair.¹⁰ But as Professor Joseph Lowenstein notes in his book, *The Author's Due*, it would be a mistake to see the emergence of the author in copyright law as simply a rejection of the pre-existing mercantile regime in favor of a legal mythology of Romantic authorial genius. The origins of authorial copyright instead flowed in an evolutionary and inevitable fashion from the guild practices of the printing trade. Practices of using authors to promote works effectively created and popularized the Romantic author with the book-purchasing public. The members of the Stationers' Company created the Romantic author for their own purposes and sowed the seeds of contemporary copyright.

Printers used authors as advertisers. It was not uncommon to find, in the prefaces of printed books, complaints by authors made against “unauthorized” printers, many of whom were foreign and thus outside the control of the Stationers' Company. A common claim was that the work produced without the author's consent was a shoddy production, full of errors and omissions that were ruinous to the reputation of the author.¹¹ “Authorized” editions were advertised as superior products, being the accurate renditions of the author's original words—a true and superior reflection of the author's genius. As the markets for contemporary works matured, so did the understanding of the author's role in the promotion of sale. The author's name and endorsement were increasingly understood by printers as a type of brand that could fuel the purchase of new works and editions.¹²

Lowenstein describes how, over the course of the late 16th century, the title pages of printed versions of theatrical performances gradually moved away from displaying information about the details of acting companies and

¹⁰ For treatments of the early history of English copyright law see JOSEPH LOWENSTEIN, *THE AUTHOR'S DUE* (2002); LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993).

¹¹ See JOSEPH LOWENSTEIN, *THE AUTHOR'S DUE* 47, 102 (2002) [add more examples].

¹² MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 1 (1993); JOSEPH LOWENSTEIN, *THE AUTHOR'S DUE* 82-87 (2002) [add more examples]. On the issue of author names as trademarks, see Laura A. Heymann, *The Birth of the Authornym: Authorship, Pseudonymity, and Trademark Law*, 80 NOTRE DAME L. REV. 1377 (2005); Greg Lastowka, *The Trademark Function of Authorship*, 85 BOSTON U. L. REV. 1171 (2005).

venues. Instead, the names of famous playwrights began to appear on title pages because this was recognized as being a more reliable way to market the product.¹³ As Lowenstein notes, Shakespeare’s fame originated at this time and in this way. The social prominence of *the* English authorial genius was thus, at least in part, due to the printing industry’s efforts to market authorial genius as part of a strategy for selling copies of plays. Lowenstein states: “the name of the dramatic author was taken up as an inducement to book sales.”¹⁴

It must be emphasized that this shift toward the use of author names as brands in England took place a full century before any recognition of authorial copyright. The printers themselves discovered the marketing value of the figure of the author in much the same way as Hollywood would later discover the marketing value of the “star”. The early printers brought the author into their promotional model and used the voice of the author increasingly in their political appeals to the Crown and in their internal regulatory arrangements.¹⁵ But just as the Hollywood studios created and ultimately lost control of the “star” system, the early printers would see the authors they employed for their own ends ultimately move beyond their control.

In some ways, the creation of the Romantic author ultimately saved the publishers. The recognition of proprietary rights in authors ultimately rescued the legal existence of the proprietary rights sought to be retained by the publishers. The Crown’s ultimate endorsement of authorial copyright in the Statute of Anne was thus a victory for publishers, not merely authors.¹⁶ A proprietary right in printed texts was permitted to endure, though it was now a time-limited right that publishers would be forced to acquire (by assignment or license) from authors. The printers were hardly surprised by this—they were complicit in the formation of this new arrangement. When they realized that their guild control over printing was politically untenable, they used the newly acquired social status of authors to rescue proprietary rights that they

¹³ JOSEPH LOWENSTEIN, *THE AUTHOR’S DUE* 86 (2002).

¹⁴ *Id.*

¹⁵ *Id.* 44 (“Authors’ rights will thus appear as a back-formation within the development of industrial copyright.”).

¹⁶ Statute of Anne, 8 Ann., c. 19 (1710) (Eng.).

could subsequently re-acquire. In other words, the history of pre-copyright does not tell the story of the invention of the printing press coinciding with a regime that was designed to create incentives for authors. Instead, it tells the story of a regime where authors were used as trademarks by publishers giving way to a regime where authors were ultimately accorded property rights that could be repurchased by publishers.

In the current moment of technological crisis, we are seeing the inverse situation: authorial property is losing its valence as the technology of printing becomes increasingly cheap and the processes of distribution decentralized. As the property right in copyright slips in prominence, the voices and concerns of socially prominent creative authors, sans property rights, are re-emerging in ways that were seen before authorial copyright. The concerns sound much like the old concerns. Authors are demanding the protection of reputations, demanding that authorial messages are transmitted faithfully, and demanding that the public—the audience—not be deceived. These are demands that resonate today not with the law of copyright, but with the law of trademark.

B. FROM COPYRIGHT PROPERTY TO TRADEMARK ADVERTISING

Since its inception in the time of the Stationers' Company, copyright law has spoken the language of property.¹⁷ Copyright envisions registered and recorded discrete works that are, like houses and paintings, owned and alienated as species of legal property. Copyright owners inevitably view the entitlement they possess as a “thing” with particular metes and bounds.¹⁸ With regard to assignments and licenses of copyright, the language of property maps perfectly to the contractual treatment of the interest. From the perspective of copyright lawyers, property rhetoric is sensible. For some lawyers, copyright is as sacrosanct a form of property as the family home.¹⁹

¹⁷ See Carrier, *Cabining IP*, *supra* note 5 at 4 (2004) (discussing the increasing “proportization” of intellectual property); Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 92 (2004) (noting how copyright originated as a property rights regime).

¹⁸ [cite Madison, Things & Law]

¹⁹ See, e.g., JAMES V. DELONG, PROPERTY MATTERS 309-28 (Free Press 1997).

But copyright’s object has always been a strange form of property. The familiar observation distinguishing intellectual property from other forms of property notes that intellectual property is an economic “public good.”²⁰ In addition to that economic insight, it might be noted that intellectual property has the peculiar structure of operating to legally mandate the absence of the information thing that it is understood to protect.²¹ In other words, copyright law “protects” Platonic works by prohibiting the greater public from calling them into being.²² Independently of the public good nature of copyright’s subject matter, this “negative protection” makes copyright a strange thing to call property. One might say instead that copyright is a law that allows private parties to restrain the public from acting and speaking in certain ways—essentially preventing society from attempting to reproduce, among themselves, certain structures of information they are understood to be capable of producing.²³

This difference between property and intellectual property should not be overstated, because one might say a fairly similar thing about “tangible” property laws. Property laws can be understood not as laws of tangible objects and physical spaces but as laws prohibiting the public from certain actions (*e.g.* acts of trespassing into certain spaces or destroying certain things).²⁴ Still, the significant difference is that intellectual property laws are not “pinned” to spatial or tangible invasions—and this is a salient difference at law.²⁵ The justification for this unusual sort of property is that those

²⁰ [Cite someone for this.]

²¹ Structurally, copyright (and patent) are much like privacy rights. For some thoughts on the similarity, *see* Pamela Samuelson, *Privacy As Intellectual Property?*, 52 STAN. L. REV. 1125, 1130-36 (2000) (discussing the possibility that privacy rights might be transformed into intellectual property rights); *id.* at 1146-59 (discussing how this has occurred, arguably, in the case of trade secrets and rights of publicity).

²² This is true in the main, though there are some exceptions. *See, e.g.*, the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A (2000), which creates authorial entitlements to prohibit particular acts with regard to tangible copies of works.

²³ *See* 17 U.S.C. § 106 (setting forth exclusive rights).

²⁴ Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927).

²⁵ *See, e.g., Ralph v. Pipkin*, 183 S.W.3d 362 (Tenn. Ct. App. 2005):

burdened by the legal prohibitions of copyright benefit via the creation of socially important and desirable information-objects. These information objects would, without the system of copyright, never exist.²⁶

We are now in a new technological moment. Many citizens seem more skeptical (or perhaps more aware) of copyright's bargain. Prior to the dissemination of the popular ability to reproduce dense information structures cheaply, copyright at times largely amounted to a form of "insider" regulation within certain industries—a public form of the private regulations within the Stationers' Company.²⁷ Now that those outside these commercial firms have become significant players in the game of copyright, the laws of copyright are subject to new challenges.²⁸ To today's digital generation, forbidding the social replication of Platonic objects seems counter-intuitive—they are accustomed to snapshots from cell phones and attachments by email. They live in the cut-and-paste culture of collaborative digital technology and always-on social connectivity. The next generation will grow up, socially, communicating with each other richly and densely in information regimes that currently permit (and will continue to permit) free creation, transmission and reproduction of rich information structures. Even if contemporary copyright holders do not endorse or participate vigorously within these emergent information orderings, rich and non-proprietary information exchange practices will not cease. They will simply continue alongside (not within) the structure of copyright.

The non-proprietary information realm the new generation will inhabit will likely be a more compelling and useful version of today's Internet. The digital revolution has provided cheap and ubiquitous recording tools and

As this Court has noted, intellectual property is part of 'a species of intangible personal property . . . as opposed to tangible personal property that can be seen, felt, weighed and measured.' The law recognizes important differences between the two.

²⁶ The same thinking applies to patents. See Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 VAND. L. REV. 1727, 1728 (2000) (providing the standard economic explanation of intellectual property rights).

²⁷ See, e.g., JESSICA LITMAN, DIGITAL COPYRIGHT 35-69 (recounting the history of copyright legislation in the twentieth century and explaining its bias toward the interests of private industry).

²⁸ Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 24-25 (1996).

access to rich information storage networks. These tools inevitably resulted in an online information environment that now rivals, in sheer size, the information offerings produced by commercial copyright marketplaces in the past.²⁹ Consider today's World Wide Web where the majority of information transmitted flows between remote computers on demand and without payment to the proprietors of the information. The size of the World Wide Web is debated, but recent estimates put it at about 10 billion pages.³⁰ Assuming the average web page constitutes a 25 kilobyte textual file (which is likely a substantial underestimate), that means the World Wide Web holds roughly 25 terabytes of information. One expert's calculation puts the size of the textual information in the Library of Congress at about that same size: 26 terabytes.³¹ These estimates may be off (it is not clear in which direction) but if the sheer weight of information on the World Wide Web today has not yet exceeded the size of the equivalent information in the Library of Congress (and McLuhan's "Gutenberg Galaxy" generally³²) it will do so within the next few years. The odd thing here, of course, is that the wealth of information stored on the Web flows from millions of nodes to millions of other nodes on demand and without the property negotiations envisioned by copyright law. Generally speaking, everyone can access the information posted to the computers that constitute the World Wide Web and everyone does.

Copyright law simply does not have the option of killing the Web to reinstitute the normative legitimacy of copyright's property model. Nor does it have option of killing off the other new online Web-based digital micro-

²⁹ See Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 956 (2005); Yochai Benkler, *Coase's Penguin, or Linux and the Nature of the Firm*, 102 YALE L.J. 369 (2002); David G. Post, *His Napster's Voice*, 20 TEMP. ENVTL. L. & TECH. J. 35, 43 (2001).

³⁰ See John Markoff, *In Silicon Valley, a Debate Over the Size of the Web*, N.Y. TIMES, Aug. 15, 2005, <http://www.nytimes.com/2005/08/15/technology/15search.html> (estimating the size of the Web at between 8 billion and 19 billion pages); Antonio Gulli & Alessio Signorini, *The Indexable Web is more than 11.5 billion pages*, <http://www.cs.uiowa.edu/~asignori/web-size/> (May 2005).

³¹ The rough calculation was made by Brewster Kahle, and notably was based on textual coding, not images. See Brewster Kahle, *Universal Access to All Human Knowledge* (Nov. 20, 2002), <http://www.loc.gov/rr/program/lectures/kahle.html>.

³² MARSHALL MCLUHAN, *THE GUTENBERG GALAXY* (Univ. Toronto Press 1962) (describing the world of printed literature with this term).

forums that are non-proprietary: *e.g.* Flickr,³³ Wikipedia, weblogs, etc. What we can see here is the technology of the digital network pushing information rights as property rights to the background in the online environment. For those who are accustomed to these environments, property claims create transaction costs that slow things down in ways that are not acceptable and not necessary. In a broad sense, the Internet treats a property rights as damage and routes around them.³⁴

Those who require property incentives and protection are not being forced to participate in this information realm. Many have opted out of non-proprietary distribution practices. But the point to see is that this information model proposed by copyright becomes, with each passing day, increasingly archaic and marginal. Copyright is hardly insignificant today, from a legal or a financial perspective, but from the perspective of information producers, copyright's property protection seems a bargain that now offers a host of liabilities that must be weighed against the theorized economic benefits. Treating information as copyright envisions it subject to legal strictures allowing the taxing and disabling of social reproduction. Even the latent prospect of this right his decreases the potential social value of that information to the public, limits the author's potential audience for that information, and decreases the value of the information to each recipient who is not free to distribute the information further. What this suggests is that, increasingly, information property regimes will need to compete, and will fail to compete well with, non-proprietary information regimes.³⁵

At this point, one too-common rhetorical maneuver is to criticize past information orderings as the offspring of profit-oriented and publicly irresponsible corporations—perhaps again drawing parallels to the practices of the Stationers' Company. The emergent model is praised as morally,

³³ <http://www.flickr.com/>.

³⁴ *Cf.* James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 179 (1997) (noting John Gilmore's parallel claims about Internet censorship).

³⁵ For an explanation of the dynamics that are deconstructing traditional copyright markets, *see* Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 956 (2005); F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 RUTGERS COMPUTER & TECH. L.J. 293, 293 (2001).

politically, and/or economically superior.³⁶ I do not wish to explore that comparison. Although I am as inclined as the next person to decry the the Sonny Bono Copyright Term Extension Act of 1998 (“CTEA”)³⁷ as both morally and theoretically indefensible, my sense is that whether we sense an ethical dimension in this trend or no, the shift away from the property-centric view of information and toward a more fluid information environment will not depend upon the strength of my advocacy. In addition, I think that it is possible to overstate the harm created by copyright to society today. In short, while I regret the inability of the public to be able to reproduce images of Mickey Mouse, perhaps there is some good in this.

If the ascendant information order on the World Wide Web is moving past “copyright as property,” as I claim it is, this suggests that perhaps traditional copyright is not so much an impediment to our future information practices as it is a horse and buggy practice holding out against the acceptance of the automobile. Yes, it is good to be upset about the harms created by copyright, and these harms may be real, but the copyleft need not be so vigorously opposed to the existing regime if that regime seems intent on writing itself out of the social picture. The future that copyright law seeks to hold at bay, on the other hand, is already upon us. While it is fine for some copyright scholars to be policing the dying days of the horse and buggy (copyright as property), there is also a pressing need for the law to respond to the birth of the automobile.

Clearly there are many individuals who are interested in revisiting the social role of copyright in the networked world. For instance, Professor Randal Davis of the Computer Science and Engineering at the Massachusetts Institute of Technology has stated that, given the contemporary digital dilemma:

New approaches to IP issues will need to be founded on more than law and technology, embracing as well an understanding of the economics of information, sociology, and psychology. And IP itself may need to be

³⁶ See, e.g., SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUALPROPERTY AND HOW IT THREATENS CREATIVITY 35-37 (2001); PETER DRAHOS & JOHN BRAITWAITE, INFORMATION FEUDALISM (2002)

³⁷ Pub. L. No. 105-298, 112 Stat. 2827 (1998); *see also* Eldred v. Ashcroft, 537 U.S. 186 (2003) (upholding the constitutionality of the CTEA).

conceptualized to some degree, in recognition of the changes we now face.³⁸

In a recent paper, Davis described the results of a survey he had conducted to assess the attitudes of his computer science department toward intellectual property. The study was quite informal, but one might expect that the demographics of the computer science department at MIT would present a fairly vanguard and distinct subculture. Based on the results of his study, Davis concluded that he did see a misfit between the conceptions of intellectual property law and the information practices and beliefs of his colleagues. His summary of the mismatch was that intellectual property law sought to reward creators with profits, whereas “researchers and hackers... work for reputation, the recognition of their expertise, accomplishments, and contributions.”³⁹ Davis stated that those intellectual property producers he surveyed sought not to profit financially from the sale of their information, but to have its flow to as large an audience as possible, reaping the reputation benefits that would accrue from a wide audience and the recognition of their work.

The results of Davis’s survey clearly indicate that his subjects were not acting in ways predicted by copyright law. But, in fact, the motivations of his subjects would seem to sing the praises of the third member of the standard intellectual property triad: trademark. Trademark law, at least in dominant contemporary conceptions, is a law designed to improve information flows and create incentives for better products by ensuring that proper attribution is given to creators. Trademark law also attempts to establish fair rules for information marketplaces by preventing deceptive, disparaging and fraudulent information from being distributed. If the insights of Davis with regard to his colleagues describe the needs and desires of other creators in the new digital environment, it seems he has not demonstrated a failure of intellectual property generally. Instead, he has suggested that—for his hackers and

³⁸ Professor Davis was the principal author of *THE DIGITAL DILEMMA*, *supra* note 1.

³⁹ See Randall Davis, *Dilemmas Faced by Creative People in IT*, Position paper for Princeton University - Microsoft Intellectual Property Conference, May 12, 2005 at 1, available online at: <http://people.csail.mit.edu/davis/Dilemma.pdf>.

researchers—a theory of information based on trademark law has supplanted a theory based on copyright.

Yet while the laws of copyright and trademark at times operate in close proximity, they are discrete statutory and common law regimes.⁴⁰ When the law recognizes the proximity of copyright and trademark, its response is often a formalistic animus to keep the regimes of intellectual property conceptually separated. For instance, Judge Guido Calabresi recently stated in an opinion that “intellectual property owners should not be permitted to recategorize one form of intellectual property as another.”⁴¹ This was as blunt a demand for formal separation of theory and application of intellectual property laws as one can imagine. Calabresi cited for this statement to a recent Supreme Court case, *Dastar Corp. v. Twentieth Century Fox Film Corp.*,⁴² which applied that logic to neatly divide the realms of trademark and copyright.⁴³

Reality, alas, is not so neat. One area of creative enterprise where copyright and trademark have established an odd sort of mutual legal dominion is advertising. Advertisements, like paintings or novels, are a creative form of information production that requires time and labor to create. Advertisements must also attract and engage the attention of the viewer if they are to be successful. To achieve this end, advertisements employ many of the same techniques found in associated forms of entertainment. For instance, contemporary television commercials often feature narrative, special effects, orchestrated scores, and all the other bells and whistles of creative film-making that can be crammed into a thirty-second spot. Because of these formal characteristics, television advertising clearly and properly falls within the scope of copyright’s protections as a form of creative film-making.⁴⁴ But

⁴⁰ The overlap has occurred primarily in instances involving claims of improper authorial attribution and associated “moral rights.” See, e.g., *Gilliam v. Am. Broad. Cos.*, 538 F.2d 14, 15 (2d Cir. 1976); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

⁴¹ See *Chosun International, Inc. v. Chrisha Creations*, 413 F.3d 324, 327 (2d Cir. 2005) (Calabresi, J.) (noting the principle that and citing *Dastar*). [Bonito Boats?]

⁴² 539 U.S. 23 (2003).

⁴³ *Id.*; see generally Greg Lastowka, *The Trademark Function of Authorship*, 85 BOSTON U. L. REV. 1171, 1200-1213 (2005) (exploring the questionable logic of *Dastar*).

⁴⁴ See, e.g., *Leibovitz v. Paramount Pictures Corporation*, 137 F.3d 109 (2d Cir. 1998) (copyright infringement action based on a photograph originally featured as a magazine cover); *Bleinstein v. Donaldson Lithographic Co.*, 188 US 239, 251 (1903) (Holmes, J.) (“[T]he special adaptation

unlike most books, songs, or films, we all know that television advertising is not like those things. Who has ever bought a book of advertisements or paid to see a commercial? Advertising is understood as a complex information product, yes, but one that the viewer is forced to endure. One submits to advertisements in exchange for access to desirable affiliated content. Advertising is creatively and laboriously produced information content that we would pay to *avoid*. This sits uneasily with our normative vision of copyright.⁴⁵

Our attitude toward advertising is notably different than our stance toward the mythologized objects of copyright.⁴⁶ Whereas we legally valorize complex and creative information products by the provision of statutory copyright incentives, advertising is regarded as information kudzu. It is worthy of derision.⁴⁷ Perhaps it is additionally worthy of special legal rules constraining its creation, presentation, and dissemination.⁴⁸ Perhaps it is even deserving of civil disobedience in the form of vandalism.⁴⁹

Unsurprisingly, we don't generally think of copyright as part of the law of advertising and neither do writers of treatises on that law.⁵⁰ Instead, given the superabundance of advertising content that is provided to us, we turn to the law of trademark and unfair competition (primarily) to guide us through the legal dimensions of advertising and to structure permissible and impermissible forms of advertising. Trademark law approaches advertising information content not as an object of valuable property rights, but as a non-proprietary social process which must be regulated. The role of trademark law in this

of these pictures to the advertisement of the Wallace shows does not prevent a copyright.”).

⁴⁵ Advertising is hardly the only type of copyright-protected information that we would pay to avoid. I would gladly pay, for instance, to avoid the paintings of Thomas Kinkade, one of the most commercially successful fine artists of the contemporary era.

⁴⁶ Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991).

⁴⁷ There is a broad spectrum of complaints about advertising. On the conventional end, there are familiar complaints about ugly billboards, annoying infomercials, and vacuous commercial hype. On the more bohemian edge are anti-corporate crusades against brands. NAOMI KLEIN, *NO LOGO* xxi-xxii (2000) (describing instances of anti-branding activism). In short, people seem to agree that they dislike advertising, but it is hard to put complaints under a single umbrella. [Ellen Goodman, *Stealth Marketing*]

⁴⁸ [Ellen Goodman, *Stealth Marketing*]

⁴⁹ [Sonia Katyal, *Semiotic Disobedience*]

⁵⁰ See generally GEORGE E. ROSDEN & PETER E. ROSDEN, *THE LAW OF ADVERTISING* (Matthew Bender 2004) (generally ignoring the topic of copyright).

arena is not to create incentives for new advertising production, but to limit the structure of advertising “messages” (note how this rhetoric differs from “works”) and to ensure that they are not false. The paramount concern of trademark is that consumer goodwill generated by a particular business entity will not be unfairly diverted from that entity.

Advertising is a helpful object to study when thinking about the new environment of non-proprietary digital information exchange. When the costs of dense information production and dissemination fall, we seem to see copyright owners gripped by fears of “property” loss (due to, *e.g.*, peer-to-peer file-sharing). The advertiser, on the other hand, is not generally threatened by “unauthorized” distribution of advertisements. Indeed, the advertiser has an interest in promoting peer-to-peer distribution. Increasingly, advertisers are focusing on the generation of “viral” social mechanisms to promote the discussion and disseminations of their advertisements.⁵¹

At this point, we might erase a line I have been pretending to respect. My discussion up to this point has assumed that we can draw a distinction between advertisements and the traditional objects of copyright. But in the new information environment (that operates in a decentralized fashion and with the absence of any pecuniary exchange) how does one know the difference between advertising and “content” if there is no payment to serve as a guide? Formally, we might admit that there is no clear method for determining when something should be understood as an advertisement. The ancient sculptures we recognize as “high art” served, in a way, as advertisements for their owners and the spaces in which they were displayed.

⁵¹ Chris Gaither, *A Web Contagion: 'Viral' ads gives companies an unconventional method of spreading a message online*, 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*, SAN FRANCISCO CHRONICLE, 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.”). I can also anecdotally testify (and perhaps participate in!) the trend toward virtual market. I recently received a new “beta” model multi-media cell phone as part of the “Sprint Ambassador Program.” See <http://ambassador.sprint.com/Faq.aspx>. I have no obligations and I get free phone service for six months. Apparently this offer was extended to me because Sprint believed I *might* write about the phone on a weblog.

Blurring the line is much easier with low art, such as childrens' cartoons. Contemporary television offerings such as Pokemon,[®] Rescue Heroes,[®] or Bratz[®] are reasonably understood not as information content, but as advertisements for affiliated products. I am not being so cynical as to say there is nothing valuable to be found in this information beyond promotional effects. It would probably be offensive to some if one did not find something valuable in Harry Potter[®] books.⁵² Certainly, those books can be severed from the role they play in driving the sales of associated games, actions figures, and other Harry Potter[®] branded flotsam and jetsam, including affiliated information products. But if we can extract the “content” of Harry Potter[®] from the media empire that has wrapped itself in his brand, we can equally extract instances of content value from the wrappings of conventional advertising. We might agree, for instance, that the recent “Time to Dream” American Express advertisement, featuring M. Night Shyamalan, offered viewers something a little more than a mere “advertisement” for a credit card.⁵³ The line between what we can call content and advertisement, it is clear, is becoming increasingly a matter of degree.⁵⁴

In the next decade, it is easy to anticipate that we will see more information content offered in ways that blur the line between content and advertising. Legal prohibitions on dissemination of information objects may

⁵² Indeed, if I were to call all Harry Potter[®] literature simply advertising rather than content, I would risk undermining the insights of some very interesting legal scholarship. *See, e.g.,* Jeff Thomas, Danaya Wright, James Charles Smith, Aaron Schwabach, Joel Fishman, Daniel Austin Green, Timothy S. Hall, and Andrew P. Morriss, *Harry Potter and the Law*, ___ TEXAS WESLEYAN L. REV. ___ (forthcoming 2006); 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* at 147-62 (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 L. & LIT. 545 (2002).

⁵³ The advertisement can easily be found online by searching online for the director’s name and “Time to Dream.” *See* Barbara Lippert, *Awakening The Senses: M. Night Shyamalan stays true to his life, vision in AmEx ad*, ADWEEK.COM, March 13, 2006 (predicting that the ad “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 scholarship and did not permit the advertisement to be aired in theaters by American Express. *Id.*

⁵⁴ [Ellen Goodman, *Stealth Marketing*]

even, over a longer time, wane vestigial.⁵⁵ As both a practical and normative matter, the object of copyright will blur into the advertisement, subsumed into the law of trademark.

C. THE GOALS OF THE NEW PRINTERS

The early Stationers' Company was a mercantile guild of capital-rich technologists who propertized and profited from words in which they lacked any formal legal rights. The printers made their money through meeting the public demand for information and entertainment, harnessing new and privately owned industrial technologies to meet that demand. Today's analogous printers are the search engines, internet portals, and other intermediaries that specialize in technologies and platforms for content distribution that meet the public demand for information. Like the Stationers Company before them, they hold few true legal rights in the information they deliver, but exercise considerable power over that information in the marketplace. The new intermediaries differ most significantly in that rather than distributing physical texts, they "distribute" information through proprietary indices and technologies of search. In contemporary information regimes characterized by anarchic superabundance, effective search is a requisite function. It is hardly helpful to have the legal freedom to view 10 billion pages of information if one does not know where to find the relevant pages one is seeking.

End Note:

That's all I have for now and this is at a very early stage. As you might sense from this, my practice in writing articles and essays is generally to figure out what I need to say during the process of writing. Then I discover what I have said, and continually attempt to revise and reorder. I also have a great deal of reading to do—hopefully some of it will involve advertising case law that I can make relevant to my claims here.

I do not know where this is ultimately heading in terms of length or final thesis, but I do have several things that I want to talk about before I reach the conclusion.

⁵⁵ [Cite Julie Cohen, Terry Fisher, etc.]

1) I want to discuss social norms relating to plagiarism. My sense here is that the public has never had much of a sense of the ethics of copyright (which I think are counterintuitive), but has always had a sense the ethics of trademark, which are reflected in norms against plagiarism. I want to draw out how this applies to digital environments.

2) I want to talk about the Creative Commons project and the requirement of attribution that was recently extended to all creative commons licenses. This seems to me to reflect, again, the way that copyright is shifting toward trademark in a fairly dramatic fashion. Authors who adopt creative commons licenses will often give away their most valuable copyright entitlements in exchange for what seems like a new trademark requirement. This is further evidence of the digital shift I am observing.

3) I'd like to discuss the Copyright Office's draft legislation on orphan works, which includes attribution requirements. Again, this seems to me to point to a sense that, in environments where the transaction costs imposed by dealing with property rights are outweighed by the interests in allowing the flow of information, attribution (and trademark) step in to take the place of copyright. And here we have this in new copyright legislation, which is fascinating. It is also interesting to note that the attribution language in the legislation seemed to be something that the Copyright Office arrived at independently of outside comment.

4) I will need to acknowledge that many of the problems of copyright in the digital environment are not solved by the use of trademark law. For instance, the problem of derivative works remains a serious issue—what does attribution look like in cases of add-on collaboration. E.g. in the case of blogs, one sees complaints about the copying of concepts and insights without attribution. This is hardly a simple issue to resolve.

5) Finally, while I am content to keep this at a fairly high level of generality (especially if it remains an essay and not an article), I might want to make one or two particularized proposals for the reform of copyright. I am not sure at this point exactly what those proposals will be, however.