THE ART AND INNOVATION OF EXCLUSIVE RIGHTS

by Maria A. Pallante*

Thank you to the Copyright Society for the honor of delivering this lecture, which has been given by so many people I admire.[1] It is wonderful to see everyone, and to be in New York — a city that is so important to authors, artists, publishing, and of course copyright law.

In my remarks, I would like to share some thoughts about the art and innovation of the exclusive rights codified in section 106,[2] by which I mean a few things:

First, the clever function of exclusive rights within the architecture of the Copyright Act, affirmed time and time again as its intentional keystone.

Second, the extraordinary impact of exclusive rights as a catalyst for creative expression and scientific progress, including through copyright markets; and

Third, the fact that the value of any particular exclusive right, while unknowable at first, will reveal itself over time, in ways that are often unpredictable if not immeasurable, to both the author and society — much like art.

We should not, however, take this brilliant blueprint for granted. Rather, exclusive rights require time, respect, and protection to accomplish their statutory mission — elements that are at risk of being misunderstood, or worse, disregarded, in the hurried environment in which they operate today, for the sake of inconvenience or expedience.

In my view, to rush exclusive rights or underestimate their long-term value is to limit their potential, and in doing so, to shortchange the author's contributions to society — both the art and the innovation.

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[1] I thank my peers at the Copyright Society and Hansen IP Institute, previous distinguished Brace lecturers, and my brilliant colleagues, past and present, for inspiring me.

[2] 17 U.S.C. § 106. Subject to §§ 107-122, the owner of copyright may exclusively undertake or authorize the right of reproduction, public distribution, public performance, and public display, as well as the right to prepare derivative works. Separately, visual artists enjoy certain rights of attribution and integrity.

REFLECTIONS ON MR. BRACE

Before I go any further, I would like to say a few words about this evening's hero, Donald Brace, who was a leader in his time in the industry that I am proud to represent today.

Born in 1881, Brace came of age at the turn of the twentieth century, as New York and much of the world were embracing great change, industrially and intellectually. He met his future business partner Alfred Harcourt at Columbia University, and they learned the ropes at Henry Holt and Company for several years before launching their own publishing house in 1919.

As a publisher, Donald Brace was known for being loyal to his authors' interests and for his business expertise and policy appreciation, reflected by his support of freedom of speech and copyright protections. He served on the foreign trade committee of the American Book Publishers Council, a predecessor to the Association of American Publishers.

Context is everything, so as we in this room reflect on the past three years of Covid-19, let us also consider that, a little over 100 years ago, as these two friends were launching their book business, New York and the rest of the world were still grappling with multiple waves of another deadly pandemic, the Spanish flu.

1919 was also remarkable for another reason, perhaps less relatable: the Eighteenth Amendment.[3] It was the year that Congress enacted sweeping prohibitions on the manufacture, sale, or transport of intoxicating liquors (except for medicinal purposes).

We do not know if prohibition brought sobriety to the publishing industry, but we do know that it generated thousands of illicit speakeasies that became popular with writers and musicians, especially here in New York. But if drinking had become complicated in the United States, it was much easier in Europe, especially in the City of Lights, where it was among the freedoms that attracted artists, musicians, and poets to the expat community of the 1920s, including Ezra Pound, F. Scott Fitzgerald, Gertrude Stein, and Earnest Hemingway. Indeed, the American talent pool in Paris was so impressive at the time that editor Sam Putnam declared it to be "the literary capital of the United States."[4]

Back in New York, the new firm of Harcourt Brace was focusing its energy on both American and British writers, and almost immediately began publishing an exceptional roster that included Sinclair Lewis, Carl Sandberg, Lewis Mumford, Jean Stafford, James Thurber, Virginia Wolf,

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[3] U.S. CONST. AMEND. XVIII. PROHIBITION OF INTOXICATING LIQUORS. *See also* U.S. CONST. AMEND. XXI (repealing the Eighteenth Amendment fourteen years later)

[4] *See* SAMUEL PUTNAM, PARIS WAS OUR MISTRESS 5 (1947).

and George Orwell— authors who devoted decades to their crafts and had both the vision and publisher support to produce groundbreaking works.

When Donald Brace died in 1955, T.S. Eliot penned an obituary for him in the London Times, writing that "no American publisher was better known or better liked in the literary world of my generation."[5]

EXCLUSIVE RIGHTS AS KEYSTONE

If authors were breaking new ground in the early twentieth century, so too was something that will sound very familiar to the copyright experts in this room: new technologies. While such developments had the potential to make exclusive rights more valuable, they also introduced uncertainties into a copyright statute that was becoming increasingly strained. This too may sound familiar.

Nevertheless, while technologies may come and go, exclusive rights are foundational: they do not happen to an author accidentally. To the contrary, they are intentional under the law, from the moment they vest to the moment they expire, and with respect to every interaction in-between. They are the heart and soul of copyright commerce, and the means by which authors are induced to create and disseminate their works to the public.

This equation is constitutionally empowered: Art I Section 8 Cl 8 empowers Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[6] The Supreme Court upheld the foundation in *Eldred v. Ashcroft* in 2003, holding that "copyright law serves public ends by providing individuals with an incentive to pursue private ones."[7] Years earlier, in *Mazer v. Stein* in 1954, it explained, "[t]he economic philosophy behind the [Copyright] [C]lause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."[8]

This ability to pursue private gain is what fosters copyright markets: it drives authors to pursue their crafts with some confidence and publishers and producers to invest in them. Copyright "celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . The profit motive is the engine that ensures the

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[5] *See Donald C. Brace Papers, 1939–1991, bulk 1901–1955*, COLUMBIA UNIVERSITY LIBRARIES ARCHIVAL COLLECTIONS, RARE BOOK & MANUSCRIPT LIBRARY, https://findingaids.library.columbia.edu/ead/nnc-rb/ldpd_12414983 (last visited Apr. 24, 2023).

[6] U.S. CONST. art. 1, § 8, cl. 8.

[7] *See* Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003).

[8] *See* Mazer v. Stein, 347 U.S. 201, 219 (1954).

progress of science."[9] Or in the words of legal scholar Paul Goldstein, "It can cost a lot to conceive, execute, produce, and market a creative work. . .[and] if the work has commercial value, copyright's aim is to put that value in the copyright owner's pocket."[10]

Copyright markets are rarely static because they follow the arc of technology. In the first part of the 20th century, as the world was introduced to silent films, motion pictures, television, and more, it became clear that the exclusive rights of authors were tethered inflexibly to the aging 1909 Copyright Act, which had never been forward thinking or even cohesive in the first place.

What had been a relatively simple exclusive right to publish, print, and reprint was transforming into a bundle of exclusive rights, including the right of translation, dramatization rights, and rights of public performance in dramatic and musical compositions. As later noted in legislative testimony, this suite or bundle "might conveniently be referred to as "copyright" but was in reality, many copyrights."[11]

Courts struggled with questions of whether authors had to assign or reserve their rights to derivative markets, even as they struggled to neutralize the draconian impact on authors of statutory formalities that injected works prematurely into the public domain. Meanwhile, book authors, songwriters, dramatists, publishers, and producers began to push for statutory revisions. The Authors League, comprising the Authors Guild and Dramatists Guild, was founded in 1912 primarily to ensure the vitality of the author's exclusive rights in emerging markets, and two years later ASCAP was founded by songwriters, composers and music publishers to provide efficient voluntary payment of public performance royalties.

The good news is that nearly everyone agreed revisions were needed. The bad news is that it would take until 1976 to accomplish a comprehensive overhaul. This is not to say that the Congress and the Courts had never grappled with new technologies or new rights. In 1865, the Congress had amended the Copyright Act to protect the burgeoning innovation known as photography. The case involved, in the Supreme Court's words,

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9 *See* Am. Geophysical Union v. Texaco, Inc., 802 F. Supp 1, 27 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913 (2d Cir. 1994).

10 *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 4 (2003).

11 *See* U.S. COPYRIGHT OFF., STUDY NO. 11: DIVISIBILITY OF COPYRIGHTS, Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d. Sess., 3 (1957); In its own report, the Committee on Foreign Relations noted the criticality of divisibility "to the welfare of authors" and clarified that, "The principle of divisibility extends not merely to varieties of use. It includes time considerations and place considerations." *Id*. at 36 (quoting COMM. ON FOREIGN RELATIONS, EXEC. REP. NO. 4, 74th Cong., 1st Sess., 16 (1935)).

a "harmonious" and "graceful" image of Oscar Wilde taken by Napoleon Sarony.[12]

Burrow-Giles, a lithography company, challenged Sarony's protection on constitutional grounds after it sold 85,000 unauthorized copies of his photograph. It argued first that Copyright Clause limits protection to "writings," and second, even if the Congress had the power to interpret the word "writings" more broadly, photographers could not be "authors" under the Clause as their creativity is aided by mechanical processes, however innovative.[13]

In a unanimous decision, the Court confirmed that the Congress is free to extend "writings" to other forms of creative expression and, at least in this case, the photograph was a work of art and therefore a work of authorship. The Court went on to offer a definition of author that left room for future modern technology: "anyone who "represents, creates, or gives effect to the idea, fancy, or imagination."[14]

The *Sarony* decision (1884) is sometimes regarded as a limited decision, but I believe it gave the gift of longevity to the Framer's eighteenth-century vision of copyright, by recognizing that if technology could evolve over time, so too could creative expression, and if it could evolve over time, so too could copyright law. Recently, scholars have noted the application of *Sarony* to contemporary questions of copyright and artificial intelligence.[15]

But while the Congress had recognized photography as early as the Civil War, it would take a century to remove the constraints of indivisibility that hindered the licensing of new uses. As noted in Register Kaminstein's 1957 study on the matter, the problem arose because copyright no longer consisted solely of the right to multiply copies:

> "The present difficulty arises from . . . the great proliferation of rights and uses which have developed since the turn of the century. The concept of indivisibility tends to force all sales or transfers of copyrights or rights in copyrights into one of two molds, *(a)* assignment, a complete transfer of all rights, or *(b)* license, a transfer of any portion of those rights. An assignment carries all rights; a license is really a contract not to sue the licensee, and the licensee cannot fully enforce his rights against third parties."[16]

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12 *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 54 (1884).

13 *See id*. at 56.

14 *See id*. at 61.

15 *See generally* Jane C. Ginsburg & Luke A. Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L.J. 343 (2019).

16 *See* U.S. COPYRIGHT OFF., STUDY NO. 11: DIVISIBILITY OF COPYRIGHTS, Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary, 86th Cong., 2d. Sess., 1 (1957).

In other words, notwithstanding the growing reality of divisible transactions, a licensee was not a copyright owner under the law.

The Authors League and the motion picture industry were the main proponents of codifying divisibility, as they needed the confidence of good title for the exciting movie artform, which was frequently based on the underlying stories of book authors and other writers, as remains true today. The authors were reeling from the unjust decision in *Dam v. Kirk La Shell* in 1910, a convoluted case that regrettably injected a published story into the public domain because neither author nor magazine publisher owned the entire copyright.[17]

I do have a personal aside on the issue of formalities.

Because the 1976 Act was already in force by the time I was a law student, I remember reading the 1909 case law more like it was an interesting novel than something I might need to actually learn and apply for a client. But within a year and a half of graduating from law school, I wrote my first copyright brief, a petition for the Authors League (where I was the staff attorney) to the U.S. Copyright Office (which I would have the privilege of leading 20 years later) on an issue involving section 24 of the 1909 Act (the renewal provisions).[18]

Our client was an elderly widow, whose husband Charles Tazewell had written a bestselling, award-winning children's book, a Christmas story, called *The Littlest Angel*.[19] It was my job to inform the Copyright Office General Counsel that renewal requirements had been met, albeit imperfectly, when the executor mistakenly filed the renewal registration in his own name, rather than the widow's.

Perhaps because I was young and passionate, I told the Copyright Office that to inject the work into the public domain would constitute no less than a "tyranny of words."[20] The Office must have been impressed. . .because it permitted us to reform the application, ultimately persuaded by the case law on constructive trust.[21]

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[17] *See* Dam v. Kirk La Shell, 166 F. 589 (CCNY 1908), *aff'd*, 175 F. 902 (2d Cir. 1910).

[18] *See* Copyright Act of 1909, § 24, Pub. L. 60–349, 35 Stat. 1075 (repealed 1978).

[19] *See* CHARLES TAZEWELL, THE LITTLEST ANGEL (1946).

[20] MARIA A. PALLANTE, THE AUTHORS LEAGUE OF AMERICA, PETITION TO THE U.S. COPYRIGHT OFFICE IN SUPPORT OF THE REQUEST BY LOUISE TAZEWELL FOR A RULING ON THE COPYRIGHT ACT OF 1909 (1991). "[T]he registration filed in the executor's name has served to alert others that there is indeed a copyright owner and that the work will not be donated to the public. Forfeiting The Littlest Angel into the public domain on these facts would give undue weight to the default clause in Section 24 and would constitute a tyranny of words."

[21] Letter from Dorothy Schrader to Paul J. Sherman, Pryor, Cashman, Sherman, & Flynn (recognizing the Author's League's reasoning that Bartok v. Boosey & Hawkes, Inc., "effectively eliminates any doubt that might have previously existed

The Littlest Angel is a great illustration of divisible rights and derivative markets. The book was deemed a national treasure, translated into many languages, made into a musical by Lester Osterman, and on the verge of a television special forty-five years after it was first published in 1946, which is how the renewal error came to light.

In truth, Congress took such a long time to address the problem of indivisibility, that when it finally did so in 1976, there were arguments that they no longer needed to, especially since it had begun to eliminate the harsh formalities that had exacerbated the confusion and terrible impact. But I think the clarity was helpful, especially because Congress kept the doctrine flexible. Importantly, it did not attempt to enumerate the ways in which exclusive rights might divide, avoiding trying to enumerate the technologies, formats, business models, and other commercial innovations that were just around the corner.[22] Rather, §201(d)(2) states that the author's exclusive rights "may be subdivided infinitely," and that "each subdivision of an exclusive right may be owned and enforced separately."[23]

Divisibility is not only a central feature of copyright law today, but also pure statutory magic. That exclusive rights are divisible under the law amplifies their constitutional purpose, compounds their potential, and solidifies the underlying architecture of the Copyright Act. Divisible exclusive rights are like nesting dolls marching in their own creative directions, or like adding an elevator to a pre-war building that runs from the lobby to the penthouse, or better yet, as in *Charlie and the Chocolate Factory*,[24] an elevator that can go up and down, sideways, or through the rooftop — empowering new and unpredictable forms of authorship.

In moving the United States closer to international norms, the 1976 Act was an important equity adjustment for authors and heirs who were too often at risk of losing their copyrights and income. In 1989, the United States was finally able to join the signature copyright treaty, the *Berne Convention for the Protection of Literary and Artistic Works*,[25] which Eu-

concerning the validity of a renewal claim which is filed in good faith but in the name of the wrong claimant" and concluding that "a valid renewal exists of the copyright in The Littlest Angel, which is owned by Louise Tazewell."

[22] *See* U.S. COPYRIGHT OFF., STUDY NO. 11: DIVISIBILITY OF COPYRIGHTS; See, *e.g.*, the submissions responding to the Register on question of whether to list or limit the rights in which separate ownership will be recognized, including concern that definitive enumeration would limit "*future development of new uses for copyrighted material," id. at 80.*

[23] *See* H.R. REP. NO 94-1476, at 61 (1976)*;* S. REP. NO 94-473, at 57 (1975)*; see also* 17 U.S.C. § 201(d(2).

[24] *See* ROALD DAHL, CHARLIE AND THE CHOCOLATE FACTORY (1964).

[25] *See* Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, S. TREATY DOC. NO. 99-27 (1986).

ropean countries had adopted in 1886 thanks to the vision and considerable work of the incomparable Victor Hugo. Before doing so, the Congress still had to eliminate the draconian condition that copyright owners must affix a perfectly placed copyright notice as a condition of protection — the provision that dated back to the 1790 Copyright Act but had caused so much trouble in practice.[26] Interestingly, this decidedly American construct persists today as a voluntary practice that is useful to most copyright businesses. One would be hard pressed to pick up a novel, watch a motion picture, or play a video game without being put on notice that one or more copyrights are claimed.

As exhaustive as it was when completed, the 1976 Copyright Act did not fully predict or address the Internet economy that would soon frame debates, especially the potential impact of one-to-one communications on the author's exclusive rights, the central question that in 1996 prompted countries to gather in Geneva to adopt a new pair of copyright treaties.[27] The WIPO Internet Treaties confirmed — unambiguously — that authors control and may authorize the communication of their works to the public "in such a way that members of the public may access these works from a place and at a time individually chosen by them."[28]

Last June, the Copyright Society focused on the history and "Silver Anniversary" of the Treaties, particularly "the making available right," at its annual meeting, noting that many Treaty partners (but not the United States) implemented the making available right expressly through provisions governing "communication to the public." As Register Marybeth Peters explained in testimony, U.S. officials believed that "the relevant acts were encompassed within the existing scope of exclusive rights," and were intended to include the "mere offering of copies to the public."[29] In other words, the copyright owner will have a cause of action even in the absence of a completed download or other transfer of the copy.[30]

Lest we lose the point of this international tale, here it is: In order to adapt the law to the sweeping new technologies of the Internet economy,

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[26] The Berne Convention Implementation Act of 1988.

[27] *See* WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121.; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 2186 U.N.T.S. 203. The United States implemented the Treaties into national law in the Digital Millennium Copyright Act. Pub. L. No. 106-160, 113 Stat. 1774.

[28] *See* WIPO Copyright Treaty, art. 8.

[29] *See Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet & Intellectual Prop. of the H. Comm. on the Judiciary*, 107th Cong. 114 (2002) (letter from Marybeth Peters, Register of Copyrights).

[30] *See generally* U.S. Copyright Off., The Making Available Right In The United States: A Report of the Register of Copyrights (Feb. 2016) at 73-74.

policymakers at the start of the twentyfirst century took steps to reaffirm the author's exclusive rights as the essential statutory keystone, in forward-thinking fashion.[31] They did not react by changing the architecture of the statute, but instead enacted technology neutral protections that would ensure the long-term potential of authorship, just as their colleagues of the eighteenth, nineteenth, and twentieth centuries had done before them. And in a modern twist, they encouraged the existing exclusive rights to work together to get the job done — like actors, singers, or dancers in an ensemble performance.

AN EXTRAORDINARY EQUATION

Copyright is broadly accepted as inducing creative expression, but it also induces dissemination through economic transactions, which in turn fuel the democratic exchange of ideas and scientific progress. Indeed, as the Supreme Court opined in *Golan v. Holder*, public dissemination was very much on the minds of the Framers when they empowered Congress to grant exclusive, *marketable* rights to authors for limited times.[32] But commercial success is never automatic. This past summer, a leading publisher told a federal court that publishing houses "invest every year in thousands of ideas and dreams, and only a few make it to the top."[33]

Nor is success a straight line. Rather, the collateral beauty of authorship is that it can enrich the public by educating and inspiring other authors. The effect is like the movie *It's a Wonderful Life*,[34] in which one thing depends upon another. Harry Bailey wasn't there to save the troops on the transport ship if George Bailey wasn't there to save him from drowning. It's the same for creative inspiration.

For example, Margaret Atwood's 1985 novel *The Handmaid's Tale* found new audiences following both the Hulu adaptation and the Supreme Court's decision in *Dobbs v. Jackson*[35] this year. She credits three famous works as inspiration, including Orwell's *1984* (1949), Huxley's *Brave New World* (1932), and Bradbury's *Fahrenheit 451* (1953).[36] Bradbury was in-

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[31] Among the critical forward-thinking elements are that the making available right is technology neutral and specifies access rather than receipt. U.S. COPYRIGHT OFF., THE MAKING AVAILABLE RIGHT IN THE UNITED STATES AT 1. Of course, exclusive rights also drive exceptions and limitations forward, as there is nothing to except if there are no rights in the first place.

[32] Golan v. Holder, 565 U.S. 302 (2012).

[33] *See* United States v. Bertelsmann SE & Co. KGaA, No. CV 21-2886-FYP, 2022 WL 16748157, at *3 (D.D.C. Nov. 7, 2022).

[34] *See* IT'S A WONDERFUL LIFE (Liberty Films 1946).

[35] Dobbs v. Jackson Women's Health Org., 597 U.S. (2022)

[36] *See* Joshua Barajas, *Margaret Atwood on the Dystopian Novels that Inspired Her to Write 'The Handmaid's Tale'*, PBS NEWSHOUR (Mar. 23, 2021), https://

fluenced by Edgar Rice Burroughs, especially the character *John Carter of Mars* (1912).[37]

With respect to the Box office smash movie *Avatar,* the director James Cameron has said that his inspiration was "every single science fiction book I read as a kid."[38]

For Hamilton composer and actor Lin-Manuel Miranda, it was Ron Chernow's incredible biography of Alexander Hamilton. He said he just wanted a big book to read on vacation.[39]

Sometimes science mimics art. The concept of a *smartwatch, so prevalent today, appeared in the "Dick Tracy" comic strips* in the 1940's. Unbelievably, the detective had a device that he could speak to from his wrist.[40]

In Stanley Kubrick's masterpiece "*2001: A Space Odyssey,*" the astronauts carried handheld computers that look remarkably like iPADS.[41]

The 1865 novel *From the Earth to the Moon* by Jules Verne, inspired the first science fiction film, *A Trip to the Moon,* in 1902. In the book, three men launch to the moon in a space cannon called the Columbiad — a module weighing about 20,000lbs.[42] A century later, three men landed on the moon's surface in a module called Columbia, named after Verne's creation. And it weighed just about 20,000lbs.[43]

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www.pbs.org/newshour/arts/margaret-atwood-on-the-dystopian-novels-that-inspired-her-to-write-the-handmaids-tale.

[37] *See* Matt Novak, *Ray Bradbury: The Day I Read to a Legend*, BBC (June 7, 2012), https://www.bbc.com/future/article/20120608-meeting-the-master-ray-bradbury.

[38] *See* Jeff Jensen, *James Cameron Talks "Avatar"*, ENTERTAINMENT WEEKLY (Jan. 15, 2007), https://ew.com/article/2007/01/15/james-cameron-talks-avatar.

[39] *See* Alexandra Gibbs & Tania Breyer, *Award-Winning 'Hamilton' Musical Was 'No Overnight Success', Says Creator Lin-Manuel Miranda*, CNBC (Dec. 28, 2017), https://www.cnbc.com/2017/12/28/hamilton-creator-lin-manuel-miranda-on-the-making-of-the-musical.html.

[40] *See* Gil Press, *The iPhone 10th Anniversary and Dick Tracy's 2-Way Wrist Radio*, FORBES (Jan. 8, 2017), https://www.forbes.com/sites/gilpress/2017/01/08/the-iphone-10th-anniversary-and-dick-tracys-2-way-wrist-radio/?sh=7a416ef6175a. The original "Dick Tracy" strip premiered during the Great Depression, Oct. 4, 1931.

[41] *See* Fandom, *Personal Access Display Device*, FANDOM (last visited Feb. 12, 2023) https://memory-alpha.fandom.com/wiki/Personal_Access_Display_Device; see also Star Trek, *PADD*, STAR TREK (last visited Feb. 12, 2023), https://www.startrek.com/database_article/padd.

[42] *See* JULES VERNE, FROM THE EARTH TO THE MOON (1865).

[43] *See* Neil Armstrong, Apollo 11 Technical Air-to-Ground Voice Transmission (July 23, 1969), https://history.nasa.gov/alsj/a11/a11transcript_tec.html: "Good evening. This is the Commander of Apollo 11. A hundred years ago, Jules Verne wrote a book about a voyage to the Moon. His spaceship, Columbia, took off from Florida and landed in the Pacific Ocean after completing a trip to the Moon. It seems appropriate to us to share with you some of the reflections of the crew as the modern day Columbia completes its rendezvous with the planet Earth and the same Pacific Ocean tomorrow."

But art takes time. Before moving to Washington and policy, I had the pleasure of serving as intellectual property counsel with the global Guggenheim Museums for eight years. The iconic flagship building at 5th and 88th, was completed in 1959, sixteen years after Solomon Guggenheim commissioned Frank Lloyd Wright. Construction took a reasonable three years once it began, but the first thirteen years involved some 700 sketches and relentless, painstaking revisions to blueprints.[44] The patience paid off, as the museum is not merely a building that houses art but a work of art itself and an inspiration to many later architects, including Zaha Hadid and Renzo Piano.

And the timeline is never clear. The late singer-songwriter Christine McVie was a very talented and prolific artist for Fleetwood Mac. Remarkably, she wrote her signature ballad *Songbird* in just 30 minutes in the middle of the night, having kept a small piano next to her bed for moments of inspiration.[45]

Frequently, the process is more daunting. Ernest Hemingway described the inner turmoil of writing in his Paris memoir, *A Moveable Feast,* published a few years after his death but written decades before he was a decorated novelist:

> Sometimes when I was starting a new story and I could not get it going, I would sit in front of the fire and squeeze the peel of the little oranges into the edge of the flame and watch the sputter of blue that they made. I would stand and look out over the roofs of Paris and think. . .All you have to do is write one true sentence. Write the truest sentence that you know.[46]

J.K. Rowling took years to build the universe and characters of her Harry Potter stories in exacting detail.[47] She was famously rejected by twelve houses before Bloomsbury took a chance with a small advance and print run, igniting a global, grass roots phenomenon in children's literature.[48]

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[44] *See generally* Francesco Dal Co, The Guggenheim: Frank Lloyd Wright's Iconoclastic Masterpiece (2017).

[45] *See* Julia Dzurillay, *The Fleetwood Mac Song Christine McVie Finished in 30 Minutes*, MSN (Oct. 22, 2022), https://www.msn.com/en-us/music/news/the-fleetwood-mac-song-christine-mcvie-finished-in-30-minutes/ar-AA13gozK.

[46] *See* Ernest Hemingway, A Moveable Feast 12 (1964).

[47] *See* Allen Gannett, The Creative Curve: How to Develop the Right Idea, at the Right Time 219 (2018).

[48] *See* ABC Radio, Conversations with Richard Fuller, *Publisher Nigel Newton on harnessing the Harry Potter effect* (April 6, 2016), https://www.abc.net.au/local/stories/2016/04/06/4437991.htm.

And Lin-Manuel Miranda needed seven years to write Hamilton. "There is no overnight success," he said later. "It took me a year to write the second song."[49]

EXPEDIENCE IS A THREAT

This reality — namely that art and innovation evolve according to their own timelines — reminds us to be cautious, if not vigilant, about protecting the copyright architecture in which the author's gain is the key to the public's gain.

As I said at the outset of this lecture, the author's exclusive rights require time, respect, and protection to accomplish their statutory mission, much like the art and innovation they incentivize. But are these principles at risk of being misunderstood, or worse, disregarded, in the hurried environment in which they operate today, simply because they require time?

Increasingly today, we see attempts to limit, if not ignore, the author's control and monetary return during the author's lifetime and sometimes immediately upon publication, simply because technology permits it or because a third party's business model might benefit. Among these efforts, a digital distribution service is copying and offering for transmission millions of protected literary works in their entirety worldwide —without permission or payment — under an unprecedented fair use theory.[50]

But disseminating an author's work as quickly and limitlessly as possible is not a particular objective of copyright law if, during the term of legal protection, that is not what the author or lawful rightsholder wants. As *Stewart v. Abend* maintains, the author's exclusive rights encompass the right "to refuse to license" and "to decide to whom."[51]

Certainly, technology has empowered authors in many exciting ways, including by generating new business models, new tools, and the promise of rapid transactions. We should not, however, destroy progress for the sake of progress. I like the advice of Coach John Wooden, the basketball genius at UCLA who became a best-selling author. "Activity is not achievement," he wrote.[52]

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[49] *See* Alexandra Gibbs and Tania Breyer, *Award-Winning 'Hamilton' Musical Was 'No Overnight Success', Says Creator Lin-Manuel Miranda*, CNBC (Dec. 28, 2017), https://www.cnbc.com/2017/12/28/hamilton-creator-lin-manuel-miranda-on-the-making-of-the-musical.html.

[50] *See* Hachette Book Group Inc., et al. v. Internet Archive, et al., 542 F. Supp. 1156 (2023).

[51] *See* Stewart v. Abend, 495 U.S. 207, 229 (1990).

[52] *See* JOHN WOODEN & STEVE JAMISON, COACH WOODEN'S LEADERSHIP GAME PLAN FOR SUCCESS: 12 LESSONS FOR EXTRAORDINARY PERFORMANCE AND PERSONAL EXCELLENCE (2009).

Last year the state of Maryland intruded into the patient pace of copyright by enacting a state compulsory license that would have forced publishers and authors to license eBook and audiobook formats of their literary works to the state's public libraries on terms deemed reasonable by the state.

The legislation ignored key differences across library and consumer markets[53] and threatened publishers with liability and penalties that were impossible to reconcile with the exclusive right of distribution, prompting a constitutional challenge.[54]

Unsurprisingly, the Maryland district court deemed the state copyright law preempted and unconstitutional because it frustrated "the objectives and purposes of the Copyright Act."[55] Maryland contended that by compelling distribution and lower prices it was serving the public interest. But taking a long view the court said in effect, "no, not really." "It is only through the protection of copyright that books and other creative works may be generated at all," the judge wrote.[56]

Today I worry a lot about the plights of individual creators. While serving as Register, I was proud to assist the Congress with its first comprehensive review of the Copyright Act in decades, working with many colleagues and stakeholders. We published major public studies[57] that were the basis of the music and small claims solutions enacted a few years later.[58]

But small claims won't matter much if piracy is not addressed with more commitment and less distortion.[59] We may have become used to it

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[53] *See* OVERDRIVE, MORE PUBLIC LIBRARIES THAN EVER EXCEED 1 MILLION DIGITAL BOOK CHECKOUTS IN 2022 (Jan. 11, 2023), https://company.overdrive.com/2023/01/11/more-public-libraries-than-ever-exceed-1-million-digital-book-checkouts-in-2022/; See GoodEReader, EBOOK REVENUES WERE DOWN 6.6& IN 2022 (Feb. 10, 2023), https://goodereader.com/blog/e-book-news/ebook-revenues-were-down-6-6-in-2022.

[54] *See* Ass'n of Am. Publishers, Inc. v. Frosh, 586 F. Supp. 3d 379 (D. Md. 2022).

[55] *See id.*at 393

[56] *See Frosh* at 398.

[57] U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS, (2015); U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS, A REPORT OF THE REGISTER OF COPYRIGHTS (2013); U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTION FOR PRE-1972 SOUND RECORDINGS: A REPORT OF THE REGISTER OF COPYRIGHTS (2011).

[58] *See* Orrin G. Hatch-Bob Goodlatte, Music Modernization Act, Pub. L. 115–264, 132 Stat. 3676 (2018); Copyright Alternative in Small Claims Enforcement (Case) Act of 2020, Pub. L. 116-260, § 212, 134 Stat. 1182, 2176.

[59] In November 2022, the FBI and U.S. Department of Justice shut down the notorious eBook pirate Z-Library, under charges of criminal copyright infringement, wire fraud, and money laundering. *See* Ledra Manos, *Pirated E-Book Site Z-Library Shut Down by the Feds*, LA WEEKLY (Nov. 11, 2022), https://www.laweekly.com/pirated-e-book-site-z-library-shut-down-by-the-feds. Contrast-

by now, but the hyperbole deployed a decade ago to attack piracy legislation aimed at offshore websites was unprecedented at the time,[60] prompting the Ranking Member of the House Judiciary Committee to respond with palpable dismay:

"To suggest that by establishing a means to combat theft of intellectual property online we will somehow devolve into a repressive regime belittles the circumstances under which true victims of tyrannical governments actually live."[61]

But piracy is not the only problem. Perhaps ironically, as legal scholar Jiariu Liu points out, the concept of restrictive regulation, including compulsory licenses, is prevalent in North America and the European Union, the homes of constitutional democracies. By dramatic contrast, China, which is often "viewed as a pirate kingdom in the eyes of international observers," is working to strength exclusive rights and remove roadblocks to the formation of efficient copyright markets.[62]

Former Register of Copyrights Barbara Ringer delivered the Brace lecture months before Congress finally enacted the 1976 Copyright Act, which she had worked on in exacting detail for more than a decade. Notwithstanding the accomplishment, she was concerned about the possible rise of regulatory proposals in the face of mass communications and what they would mean for independent authorship. She said, "Some ideas put forward as solutions to practical problems of copyright clearance and ac-

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ing the relief expressed by authors were accusations that compared the seizure to the burning of the mythical Alexandria library. *See* Mahim Javaid, *The FBI Closed the Book on Z-Library and Readers and Authors Clashed*. WASHINGTON POST (Nov 17, 2022), https://www.washingtonpost.com/nation/2022/11/17/fbi-takeover-zlibrary-booktok-impacted .

[60] *See* Nigel Cory, *A Decade After SOPA/PIPA, It's Time to Revisit Website Blocking,* ITIF, https://itif.org/publications/2022/01/26/decade-after-sopa-pipa-time-to-revisit-website-blocking/. ("Courts in Australia, the European Union, and elsewhere have demonstrated that website blocking is a fair, effective, and proportionate tool to target major piracy sites and that it does not undermine human rights, free speech, or net neutrality.").

[61] *See Stop Online Piracy Act: Hearing Before the H. Comm. on the Judiciary*, 112th Cong., 1st Sess., 40 (2011) (statement from Mel Watt, Ranking Member of the House Judiciary Committee), https://www.govinfo.gov/content/pkg/CHRG-112hhrg71240/pdf/CHRG-112hhrg71240.pdf; *See also* Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. REP. NO. 112-39 (2011), https://www.congress.gov/congressional-report/112th-congress/senate-report/39. Today dozens of countries permit their governments to block pirate websites.

[62] *See* Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, 31 BERKELEY TECH L.J. 1461, 2016 (2017).

cess to information may turn out to be more destructive to our society than the problems they are supposed to solve."[63]

In my own view, attempts to force, control, or devalue creative works are shortsighted, not in a small way, but in the irreversible manner of replacing a farm with a subdivision, or destroying art, or burning books. In the long run, but maybe not such a long run, the quality, respect, and potential of authorship will suffer. Balance is of course important. But in an ideal world, the balance will be constitutional not political.

CONCLUSION

In closing, I would maintain that to overtake exclusive rights through overbroad exceptions or regulations that interfere with the author's control and financial return is to limit the potential of exclusive rights twice, to both author and society.

Rather than regulate, limit, manipulate, or indeed, commoditize the value of creative works during the term of protection, we should leave them safely tethered to the author's exclusive rights, where they can percolate and surprise us like the art and innovation that is their mission, until statutory protection expires, subject only to reasonably calibrated exceptions and limitations that do not conflict with or unreasonably prejudice the author's legitimate copyright interests.[64]

Consider the fantasy movie *Midnight in Paris*[65], in which Owen Wilson's character, struggling writer Gil Pender time travels to 1920s Paris where he hangs out with the ex-pat community—Hemingway, Gertrude Stein, both Fitzgeralds, Cole and Linda Lee Porter, and Josephine Baker are there, as well as Rodin, Picasso, Dali, Man Ray, and Modigliani. They then travel back further to 1890 to meet Degas, Gauguin, and Toulouse-Lautrec. And the group debates the greatest period for art.

My question involves time travel to the future. Who will be the greatest authors of our day and 100 years from today?

And so, despite the hurried pace of modern life, let's have a longer view of copyright, one that respects the author's exclusive rights, and in doing so, celebrates the promise of the authors, composers, poets, painters, photographers, publishers, filmmakers, and other creators as a critical, invaluable, source of progress in the world.

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63 *See* Barbara Ringer, Copyright in the 1980s: The Sixth Donald c. Brace Memorial Lecture, 18 (Mar. 25, 1976), https://files.eric.ed.gov/fulltext/ED126906.pdf.

64 As adopted, the three-step test appears in longer form in a number of copyright treaties that address exceptions and limitations, including the Berne Convention, *supra* note 25, Art. 9(2); Trade related Aspects of International Trade, Art 13; the WIPO Copyright Treaty, *supra* note 27, Art 10; the Beijing Treaty on Audiovisual Performances, Art 13(2) and the Marrakesh Treaty, Art 11.

65 See MIDNIGHT IN PARIS (Sony Pictures 2011).