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Copyright's Paradox

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CHAPTER ONE

Introduction

A "Largely Ignored Paradox"

THE U.S. SUPREME COURT has famously labeled copyright "the engine of free expression."[1] Copyright law, the Court tells us, provides a vital economic incentive for the creation and distribution of much of the literature, commentary, music, art, and film that makes up our public discourse.

Yet copyright also burdens speech. We often copy or build upon another's words, images, or music to convey our own ideas effectively. We cannot do that if a copyright holder withholds permission or insists upon a license fee that is beyond our means. And copyright does not extend merely to literal copying. It can also prevent parodying, remolding, critically dissecting, or incorporating portions of existing expression into a new, independently created work.

Consider *The Wind Done Gone,* a recent, best-selling novel by African American writer Alice Randall. Randall's novel revisits the setting and characters of Margaret Mitchell's classic Civil War saga, *Gone with the Wind,* from the viewpoint of a slave. In marked contrast to Mitchell's romantic portrait of antebellum plantation life, Randall's story is laced with miscegenation and slaves' calculated manipulation of their masters. As Randall explained, she wrote her novel to "explode" the racist stereotypes that she believes are perpetuated by Mitchell's mythic tale.[2] Perhaps Randall could have vented her rage in an op-ed piece, street corner protest, or scholarly article instead. But what more poignant way to drive her point home than to write a sequel that turns Mitchell's iconic story on its head?

Mitchell's heirs did not suffer Randall's adulterations gladly. They brought a copyright infringement action against Randall's publisher, and a Georgia district court preliminarily enjoined the novel's publication, castigating Randall's upending of Mitchell's classic as "unabated piracy."[3] Yet the Eleventh Circuit Court of Appeals soon vacated the preliminary injunction. It held that by barring public access to Randall's "viewpoint in the form of expression that she chose," the trial court's order acted "as a prior restraint on speech," standing sharply "at odds with the shared principles of the First Amendment and copyright law."

Copyright is thus a potential impediment to free expression no less than an "engine of free expression." Copyright does provide an economic incentive for speech. But it may also prevent speakers from effectively conveying their message and challenging prevailing views. Indeed, while Randall eventually emerged victorious, not all courts have proven as solicitous of First Amendment values as the Eleventh Circuit panel that lifted the ban on her novel.

In a seminal article from 1970, Melville Nimmer, the leading copyright and First Amendment scholar of his day, aptly termed the copyright–free speech conflict a "largely ignored paradox."[4] At that time, those who valued creative expression happily favored both strong copyright protection and rigorous judicial enforcement of First Amendment rights without perceiving any potential tension between the two.

That sanguine view, first questioned by Professor Nimmer, has now been shattered by a spate of widely debated lawsuits. The battle over *The Wind Done Gone* led op-ed pieces across the nation to ponder whether copyright unduly chills minority voices. When the Supreme Court rejected Web publisher Eric Eldred's constitutional challenge to the Sonny Bono Copyright Term Extension Act—which gave copyright holders another twenty years of protection for existing books, movies, songs, and other works—the *New York Times* headlines proclaimed a "corporate victory, but one that raises public consciousness."[5] The American Civil Liberties Union stepped in to defend artist Tom Forsythe against Mattel's copyright and trademark infringement action over Forsythe's photographs of naked Barbie dolls attacked by household appliances—photographs, the artist stated, that were designed to lay bare the "objectification of women" and "perfection-obsessed consumer culture" that the Barbie character embodies. Princeton University computer science professor Edward Felten petitioned a court to affirm his First Amendment right to present his research at an academic conference after a recording industry trade association threatened that the presentation would subject him to liability under the Digital

Millennium Copyright Act (DMCA). Martin Luther King's heirs provoked concerted media protest when they sued CBS for copyright infringement over the network's documentary on the civil rights movement that included some of its original 1963 footage of King delivering his seminal "I Have a Dream" speech. Diebold Election Systems, a leading producer of electronic voting machines, sent copyright infringement cease-and-desist letters to three college students and their Internet service providers in a vain attempt to quash the Internet posting of internal company e-mails revealing technical problems with the machines' performance and integrity. Publishers and authors sued to prevent Google and several major research libraries from making vast repositories of books and other printed material available to Internet users for online search. Millions of users of peer-to-peer file-trading networks, like Grokster, Kazaa, and the original Napster, have been given cause to consider whether assembling and exchanging a personalized mix of one's favorite music recordings (or a creative "remix" of segments of various recordings) is an exercise of expressive autonomy or the deplorable theft of another's intellectual property. The *New York Times Magazine* ran a cover story on this emerging "copyright war," encapsulating the tumultuous crosscurrents both in the article's perplexed, interrogatory title, "The Tyranny of Copyright?" and in its unmistakably declarative notice, "Copyright 2004 The New York Times Company."[6]

Why has the conflict between copyright and free speech come so virulently to the fore? What values and practices does it put at stake? How should the conflict be resolved? These are the principal questions this book seeks to answer.

At its core, copyright has indeed served as an engine of free expression. In line with First Amendment goals, the Constitution empowers Congress to enact a copyright law in order to "Promote the Progress of Science," meaning to "advance learning." Copyright law accomplishes this objective most obviously by providing an economic incentive for the creation and dissemination of numerous works of authorship. Yet copyright promotes free speech in other ways as well. As it spurs creative production, copyright underwrites a community of authors and publishers who are not beholden to government officials for financial support. Copyright's support for authorship may also underscore the value of fresh ideas and individual contributions to our public discourse.

But copyright has strayed from its traditional, speech-enhancing core, so much so that in its present configuration and under present conditions, copyright imposes an unacceptable burden on the values that underlie First

Amendment guarantees of free speech. As the Supreme Court has emphasized, the First Amendment aspires to the "widest possible dissemination of information from diverse and antagonistic sources."[7] Yet copyright too often stifles criticism, encumbers individual self-expression, and ossifies highly skewed distributions of expressive power. Copyright's speech burdens cut a wide swath, chilling core political speech such as news reporting and political commentary, as well as church dissent, historical scholarship, cultural critique, artistic expression, and quotidian entertainment. And copyright imposes those speech burdens to a far greater extent than can be justified by applauding its "engine of free expression" role.

The primary, immediate cause for copyright's untoward chilling of speech is that copyright has come increasingly to resemble and be thought of as a full-fledged property right rather than a limited federal grant designed to further a particular public purpose. As traditionally conceived, copyright law strikes a careful balance. To encourage authors to create and disseminate original expression, it accords them a bundle of exclusive rights in their works. But to promote public education and creative exchange, it both sharply circumscribes the scope of those exclusive rights and invites audiences and subsequent authors freely to use existing works in every conceivable manner that falls outside the copyright owner's domain. Accordingly, through most of the some 300 years since the first modern copyright statute was enacted, copyright has been narrowly tailored to advance learning and the wide circulation of information and ideas, ends that are very much in line with those of the First Amendment. Copyright holders' rights have been quite limited in scope and duration and have been perforated by significant exceptions designed to support robust debate and a vibrant public domain. Indeed, as courts have repeatedly suggested, it is copyright's traditional free speech safety valves—principally the fair use privilege, copyrights' limited duration, and the rule that copyright protection extends only to literal form, not idea or fact—that have enabled copyright law to pass First Amendment muster.

In recent decades, however, the copyright bundle has grown exponentially. It now comprises more rights, according control over more uses of an author's work, and lasting for a longer time, than ever before. If copyright law remained as it was in 1936, the year Margaret Mitchell wrote *Gone with the Wind,* Mitchell's copyright would have already expired, and Randall could have written her sequel without having to defend a copyright infringement lawsuit.[8] Under copyright law as it stood when Martin Luther King delivered "I Have a Dream," King would have likely been held to dedicate his speech to the public domain, leaving CBS and anyone else free to incorporate King's words in historical accounts of the civil rights era.[9] Prior

to the Digital Millennium Copyright Act of 1998, Professor Felten's paper on digital music encryption would have fallen entirely outside the reach of copyright law. Had he presented his findings before the DMCA took effect, he would have had no need to invoke the First Amendment to protect his right to speak.

There are a number of interrelated causes for copyright's ungainly distension, including relentless copyright industry lobbying, judges' inconstant application of copyright's traditional free speech safeguards, and the prevalence of a "clearance culture" in which distributors regularly require that authors obtain copyright licenses even for uses of others' expression that are likely noninfringing.[10] Whatever the cause, as copyright expands, its fundamental character changes. As "engine of free expression," copyright law's traditional aim has been to provide sufficient remuneration so that authors and publishers will create and distribute original expression. Copyright holders have enjoyed exclusive rights in their works, but those rights have been narrowly tailored in line with the understanding that they serve primarily to provide a public benefit. In concert with copyright's expansion, however, copyright is increasingly treated more akin to conventional property than a finely honed instrument of expressive diversity.

The preeminent eighteenth-century English jurist, Sir William Blackstone, depicted property as an individual's "sole and despotic dominion . . . over the external things in the world, in total exclusion of the right of any other individual in the universe."[11] In actual fact, property rights come in varied shapes and sizes and are subject to policy-laden limitations. Nonetheless, Blackstone's hyperbolic, individual-as-sovereign formulation reverberates within the libertarian ethos of American culture to heavily influence the way we think about "property." As such, it sets the default assumption for demarcating property rights.

So it is with copyright. Property rhetoric, whether invoked reflexively or strategically, has tended to support a vision of copyright as a foundational entitlement, a broad "sole and despotic dominion" over each and every possible use of a work rather than a limited government grant narrowly tailored to serve a public purpose. Examples begin with Blackstone himself, who argued that copyrights are common-law "property" and should thus last in perpetuity. In similar fashion, today's motion picture industry lobbyists insist that Congress must mandate technological controls that would override fair use in order to "protect private property from being pillaged." And courts brand as "theft" any unauthorized use of a copyright holder's work, including even uses like Alice Randall's that contain considerable independent creative expression and critique.

The more copyright embraces the features and rhetoric of conventional property, the more it serves not just to spur Margaret Mitchell's creation of *Gone with the Wind* but to bolster her heirs' efforts to control how that work is presented and perceived well over half a century later. The result is a sharpening conflict between copyright and free speech.

The copyright–free speech conflict cuts across traditional and emerging electronic media alike. Yet digital technology adds a vast new dimension. Armed with personal computers, digital recording devices, and the Internet, millions of people the world over can cut, paste, and recombine segments of existing sound recordings, movies, photographs, and video games to create new works and distribute them to a global audience. Such creative appropriation has given birth to entire new art forms: remixes, mashups, fan videos, machinima, and more. It has also spawned an acrimonious debate about copyright's place in the digital age, pitting entertainment media bent on stamping out massive "digital piracy" against individuals who increasingly perceive copyright as an undue and unworthy impingement on their liberty and expressive autonomy.

Copyright law was designed to create order in the publishing trade, to prevent ruinous competition when unscrupulous firms engage in wholesale commercial piracy. So how does copyright law apply in an age in which millions of individuals are both authors and publishers? How is copyright to respond when anyone can easily make perfect copies of existing works, as well as cut, paste, edit, remix, and post them on YouTube, MySpace, FanFiction .net, Machinima.com, and a multitude of other Web sites online? The incumbent copyright industries understandably view these ubiquitous acts as a mortal threat, worse even than the commercial piracy of old. They argue that more extensive copyright protection and enforcement mechanisms are required to combat the nefarious "culture of contempt for intellectual property" that courses through the Internet.[12]

The industries have met a receptive ear in Congress and the courts. And evoking Blackstone, the industries insist that if they are to serve the digital marketplace, they must enjoy the effective and enforceable right to assert hermetic control—even greater control than was previously imaginable—over their movies, music recordings, and books. They must have the legal entitlement, if they wish to exercise it, to seal their content in tamper-proof containers and charge every time an Internet user reads, views, or hears a work online. To that end, the motion picture, recording, and publishing industries have begun to use digital encryption to control and meter access and uses of their content, and have successfully lobbied Congress to prohibit

the circumvention of those technological controls even to engage in fair use.[13]

The industries have looked to traditional copyright to tame the Internet beast as well. They have sued thousands of individual file traders, as well as companies that facilitate peer-to-peer file trading. And motion picture studios and record labels are now taking on the remix culture of YouTube and MySpace. As I write these words, those sites are targets of lawsuits brought, respectively, by Viacom and Universal Music, characterizing them as iniquitous dens of "user-stolen" intellectual property.

At the other end of this Kulturkampf are scholars, bloggers, archivists, and activists who view the Internet as a precious opportunity to remake our public discourse. These commentators celebrate digital technology's capacity to unleash the power of individuals' speech and drastically reduce our dependence on the mass media for information, opinion, and entertainment. And—much to copyright industries' consternation—they tolerate file trading and herald individuals' creative appropriation and remixing as "the art through which free culture is built."[14] Some activists suggest, indeed, that the Internet will realize its full free speech potential only if copyright is banished from its realm. In this view, at its very best, copyright is irrelevant to the profuse and richly diverse array of expression that individuals regularly post on the Internet without any intention of preventing others from copying and borrowing as they wish. At worst, copyright and technology controls threaten to reshape the Internet into something like an expanded multichannel cable television or celestial jukebox, a platform for the one-way transmission of content from mass media conglomerates to passive consumers.

Real-world developments are rapidly overtaking some of the extreme positions that have been staked out. First and foremost, the sheer magnitude and global reach of peer-to-peer file trading, the explosive growth of Web sites featuring user-created content, and the freely copying and remixing mind-set of a generation of Internet users have thus far surpassed the copyright industries' ability to curtail, much less control. As a result, we are starting to see some cracks in the industries' opposition to freewheeling Internet culture. Warner Music, for instance, broke ranks with other major labels to license YouTube to show both Warner Music videos and user-created clips that incorporate Warner music. And after threatening to sue YouTube for "tens of millions of dollars," Universal Music followed in Warner's footsteps (but shortly thereafter sued MySpace). The YouTube deals reflect a growing blurring of Internet culture and traditional media: Rupert Murdoch bought MySpace, Simon & Schuster has signed book deals with fan fiction writers, newspaper Web sites feature numerous blogs and online

reader discussion groups, and NewsCorp and NBC Universal announced plans to make TV and movie clips available for user sharing and remixing on their online video site.[15]

It is too soon to tell whether these moves will culminate in the copyright industries' acquiescent embrace of remix culture or an industry campaign to clip its wings. Much may depend on the outcome of the pending YouTube and MySpace litigation. Certainly, though, the battles that have raged in the space between digital anarchy and digital lockup will continue in new contexts, new media, and new uses of copyrighted expression.

This book takes First Amendment values as its lodestar for navigating that contested space. Copyright, I argue, should be delimited primarily by how it can truly serve as an "engine of free expression." Copyright's scope, duration, and character should be shaped to best further the First Amendment goals of robust debate and expressive diversity. Copyright law and policy can rightly accommodate other goals as well, including maximizing economic efficiency, securing authors' interest in creative control, and providing incentives for technological innovation. But overall, it is First Amendment values that should dominate and inform copyright.

My claim for employing free speech as the dominant metric to assess copyright law rests on two principal pillars. First, as a matter of normative principle, free speech concerns *should* play a central role in shaping copyright doctrine. Copyright law has the capacity to both promote and burden speech and thus implicates values that lie at the heart of our liberal democratic society. It behooves us to give those values considerable, if not overriding, weight in copyright law and policy.

Second, viewing copyright through a free speech lens makes clear, where other approaches do not, that determining copyright's character and reach *necessarily* rests on questions of speech and media policy. How broad and enduring should copyright holders' exclusive rights be? When should copyrights give way to fair use? In what circumstances should copyright holders' proprietary veto over unlicensed uses be replaced by a right of reasonable compensation? Our answers to such questions heavily impact the types of speech and speakers who will have a voice in our public discourse. They tip the scales between market and nonmarket expression and, often, between mainstream and dissident speakers. The free speech lens lays bare those trade-offs.

The First Amendment lodestar can helpfully guide us not only in assessing current copyright doctrine, but also in adapting copyright law to the rapidly changing conditions wrought by digital technology. Copyright can

continue to serve as an engine of free expression in the digital arena. But to do so, copyright must be narrowly tailored to further its speech-enhancing objectives, no less than in traditional, off-line media. Contrary to what some entertainment industry lobbyists would have us believe, copyright is not ultimately about securing strong property rights. Rather, copyright's fundamental ends, like those of the First Amendment, are to "Promote the Progress of Science" by spurring the creation and widespread dissemination of diverse expression. To the extent exclusive rights in original expression best serve those ends, copyright doctrine should provide for proprietary rights. But to the extent property rights in expression unnecessarily stand as an obstacle to free speech, they should be limited in scope and duration or even jettisoned in favor of less constraining and less censorial mechanisms for securing authorship credit and remunerating producers and purveyors of original expression.[16]

My argument and analysis unfold in three parts. The first grounds my claim that our current bloated copyright imposes unacceptable burdens on speech. I begin in chapter 2 by providing concrete illustrations of why we should care, of how copyright often prevents speakers from effectively conveying their message. In chapter 3, I turn, more analytically, to our basic understandings of "free speech" and "First Amendment values." Given those understandings, copyright is properly said to burden "free speech" in some ways but does not truly implicate free speech concerns in some others. Finally, in chapter 4, I document the most troublesome areas of copyright expansion that fuel the copyright–free speech conflict.

The second part juxtaposes copyright's conflicting roles as engine of free expression and impediment to free expression. In chapter 5, I elucidate copyright's traditional "engine of free expression" role and consider whether copyright still serves that function given the profusion of nonmarket expression on the Internet. In chapter 6, I identify several distinct, if interrelated, ways in which copyright burdens speech. Those speech burdens include copyright holders' deliberate silencing of certain expressive uses of their works, speaker and distributor self-censorship in the face of copyright holder overreaching, prohibitively costly copyright license fees and transaction costs, and copyright law's buttressing of media concentration. Along the way, I show that even the influential school of economic analysis of copyright—which purports to consider only economic efficiency—must, by its very terms, ultimately devolve to making value judgments of speech policy. Chapter 7 then counters arguments that a proprietary, Blackstonian copyright would actually foster expressive diversity.

The third part presents a blueprint for addressing the copyright–free speech conflict. I argue in chapter 8 that a correct and consistent reading of the First Amendment would impose certain external constraints on copyright holder prerogatives, at the very least to ensure that copyright law's internal free speech safety valves live up to their task. Finally, in chapter 9, I present some proposals for modifying copyright law to better protect and promote First Amendment values beyond what is required as a matter of First Amendment doctrine. Copyright and free speech will always stand in some tension. But there are ways in which the copyright–free speech conflict can be ameliorated, in which copyright can continue to serve as an engine of free expression while maintaining ample room for speakers to build on copyrighted works to convey their message, express their personal commitments, and fashion new art.

CHAPTER TWO | From *Mein Kampf* to Google

FOR SOME, COPYRIGHT'S SPEECH burdens are painfully obvious. But many others do not perceive that copyright poses any serious conflict with freedom of speech. They view copyright infringers as merely making "other people's speeches."[1] Or they say that, after all, the underlying ideas and information presented in authors' works are free for anyone to use, that copyright merely prevents others from copying the unique way in which a particular author presents ideas. Or they view copyright as basically just about trivial entertainment products, nothing with any real import for expressive autonomy and diversity.

This chapter presents some illustrative examples that ought to at least give doubters some pause; we leave for later discussion whether, when, and how copyright's speech burdens should be ameliorated. The examples range from speech that is overtly political to purely artistic, from fantasy to documentary, from discrete cases to entire expressive genres, from religious tracts to counterculture comics, from analog to digital, from out-and-out copying to highly creative recasting, and from copyright holders' calculated suppression of unwanted expression to speakers' inability to pay the copyright license fee that was offered. Like the battle over Alice Randall's *The Wind Done Gone,* they demonstrate that copyright may indeed prevent us from effectively conveying a message, pursuing deeply held beliefs, expressing artistic inspiration, participating in a cultural tradition, or, for that matter, promoting "the progress of science."

Alan Cranston's Unauthorized Mein Kampf

Alan Cranston served in the U.S. Senate for more than two decades, beginning in January 1969. As a young man, in the late 1930s, Cranston worked as a journalist for the International News Service, covering England, Germany, and Italy. While stationed in Europe, Cranston, a fluent speaker of German, read Adolf Hitler's *Mein Kampf* and reacted with horror. But when Cranston later came across the Nazi blueprint's official English translation in Macy's bookstore in New York, he was doubly disturbed. The official translation was a heavily edited, bowdlerized version designed to make Hitler more palatable for British and American readers. Cranston was so incensed that he set out to produce his own, unauthorized translation. Published just months before Germany's blitzkrieg invasion of Poland, Cranston's translation also heavily abridged Hitler's two-volume original but highlighted the ominous passages that Hitler's licensed translator had strategically expurgated. To further sound the alarm, Cranston added critical commentary unmasking Hitler's propaganda and distortions and featured a lurid, red cover depicting Hitler carving up the world. Cranston's edition pledged, "Not 1 cent of royalty to Hitler," and promised that any profits would go to help refugees from the Nazi Reich. Cranston's thirty-two-page newsprint pamphlet, priced at only ten cents a copy, sold half a million copies in ten days.

Hitler's U.S. publisher was Houghton Mifflin. Years later that firm championed freedom of speech in its defense against the Margaret Mitchell estate lawsuit over *The Wind Done Gone.* But, in 1939, Houghton Mifflin was the aggrieved copyright owner. It sued Cranston for copyright infringement, and upon Houghton Mifflin's motion, the court enjoined further publication of Cranston's avowedly anti-Hitler translation.[2] With that, Cranston ceased further distribution and, at this critical time in history, the American public was left without his pointed corrective to the whitewashed translation.[3]

Worldwide Church of God Dissidents

Herbert Armstrong was the founder and pastor general of the Worldwide Church of God. Shortly before his death in 1986, Armstrong completed a book, *Mystery of the Ages,* in which Armstrong pontificated on a variety of issues, including divorce, remarriage, divine healing, and race relations. The Worldwide Church of God distributed more than 9 million free copies of *Mystery of the Ages.* But some two years after Armstrong's death, the church's

Advisory Council of Elders disclaimed a number of Armstrong's positions. The church then ceased distribution of the book and destroyed all remaining inventory copies, expressing particular concern that Armstrong had "conveyed outdated views that were racist in nature" and would perpetuate "ecclesiastical error."[4]

Unable to abide the church's new dogma, two former church ministers founded the Philadelphia Church of God, a breakaway sect that preached strict adherence to the teachings of Herbert Armstrong. It viewed *Mystery of the Ages* as central to its religious practice and made the book required reading for all new members. When the Philadelphia Church began making and distributing copies of the book, the Worldwide Church did not rest at renunciation to suppress this heresy. It sued the offshoot church for copyright infringement.

The district court found in favor of the defendants, but the Ninth Circuit reversed. It found that, as a matter of law, the Philadelphia Church was not entitled to claim fair use. "Even an author who ha[s] disavowed any intention to publish his work during his lifetime [is] entitled to protection of his copyright," the court opined.[5] "The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts."[6] (If someone held a copyright in the Bible and sued to prevent its distribution, would the court be so sanguine that the law's refusal to recognize copyright in facts is sufficient to protect free speech?) So holding, the Ninth Circuit remanded for entry of a preliminary injunction against the Philadelphia Church, pending a trial on damages.

The Ninth Circuit's ruling is typical of a number of cases involving the publication of religious tracts, sometimes for use by adherents and sometimes in order to criticize the mainstream church. In case after case, courts have applied copyright, denied fair use, and enjoined publication.

Jon Else's Stagehands' Ring Cycle

Jon Else is a widely acclaimed documentary filmmaker and a journalism professor at the University of California at Berkeley. In 1990, Else filmed a documentary entitled *Sing Faster: The Stagehands' Ring Cycle.* The film portrays a San Francisco Opera production of Richard Wagner's *Ring Cycle* from the perspective of the union stagehands working behind the scenes.[7] As seen in the interwoven shots of foreground and background action, both onstage and off, Else adroitly juxtaposed two sharply contrasting realms, each an integral component of the production: the stylized, fantastical heights of

German Romantic opera and the sometimes frenetic, sometimes tedious workaday world of the stagehands.

At one point, Else focused on stagehands playing checkers in a backstage room while the opera was being performed onstage. In a corner of the room was a television set, and at the instant Else filmed the stagehands, a scene from an episode of *The Simpsons* featuring Homer Simpson happened to be playing. The checkers scene in Else's film contained a 4.5-second serendipitous shot of Homer Simpson, out of focus and with no sound, on the television in the background.

It took Else nine years to obtain funding to complete the editing and production of his one-hour-long film. When the Public Broadcasting Service agreed to air *The Stagehands' Ring Cycle* in 2000, Else was required to complete a visual cue sheet and obtain copyright releases for any copyrighted material appearing in any scene, as is typical for broadcasters' errors and omissions insurance. Else assumed that obtaining release for *The Simpsons* background shot would be a trivial matter, and so it seemed at first. The assistant to *The Simpsons* creator Matt Groening told Else that including the shot in Else's film was no problem at all, but that Else would have to check with Groening's production company's corporate parent. The parent told Else the same: "As far as we're concerned, you're most welcome to use the shot, but you need to check with our parent company." That led Else to Twentieth Century Fox Film Corporation, holder of the copyright in *The Simpsons.* Fox insisted on a licensing fee of $10,000, a fee—for a 4.5-second out-of-focus, no-sound background shot—several orders of magnitude higher than the licensing fees that Else paid to clear other copyrights for his film.

Else pleaded that his film was a PBS documentary, not a commercial venture, and that *The Simpsons* shot had been entirely unplanned. Fox explained that the $10,000 fee was the company's minimum rate for noncommercial documentary films. Else told Fox that he would have to cut the scene from his film rather than pay anything more than a fraction of Fox's demanded fee. To no avail.[8]

Else consulted with copyright counsel. He was advised, absolutely correctly: "Your shot is most probably a fair use, but, given the unpredictability and inconsistencies of fair use case law, you can't be certain. And they will drive you into the ground in litigation." Even if Else had been willing to defend his fair use in court, he would have been lucky to find a broadcaster and distributor willing to take that risk.

Else kept the checkers scene in his film, but he digitally removed *The Simpsons* from the television screen and replaced it with an excerpt from another of his films. As a result, Else's audience has been deprived of a shot

poignantly showing Homer Simpson, perhaps the quintessential popular culture foil to Wagnerian high art, as part of the stagehands' background to an opera about Teutonic gods. And, no less to Else's dismay, a film that is supposed to be a documentary contains a bit of calculated untruth.

A recent study, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers,* makes abundantly clear that Else's experience is anything but atypical.[9] Documentary filmmakers regularly edit out background footage and music to avoid the increasing costs, delays, difficulties, and barriers of obtaining copyright clearances. Moreover, filmmakers typically face broadcasters, distributors, and errors and omission insurance carriers who insist on such clearances even for uses of public domain material and for incorporation of copyrighted images and music that should fit comfortably within the realm of fair use. As a result, the documentary films we see have often been stripped of clips, background shots, music, and archival footage that would have greatly enhanced poignancy, artistic quality, and historical elucidation.

Journalist Declan McCullagh

Declan McCullagh is a reporter for CNET News. While researching a story on airport security measures, McCullagh came upon four documents on the Transportation Security Administration Web site that, according to a brief description on the site, covered "airport security procedures, the relationship between federal and local police, and a 'liability information sheet.' "[10] The documents were encrypted; the Web site permitted McCullagh to download the files but required a password to open and read them. A confidential source gave McCullagh what the reporter believed to be the correct secret password to the documents.

Like any journalist worth his salt, McCullagh's first impulse must have been to enter the password, read the documents, and report on any newsworthy contents. That has been the soul of investigative newsgathering since long before the *New York Times* published the Pentagon Papers. But McCullagh, who often reports on technology and intellectual property issues, feared that, by using a purloined password to de-encrypt the document, he could face civil and criminal liability under the Digital Millennium Copyright Act. The DMCA forbids circumventing a technological protection measure—for example, encryption—that effectively controls access to copyrighted material, and courts have held that there is no fair use exception to that prohibition. McCullagh chose the better part of valor. He declined to

use the password to view the documents but reported on his own dilemma with the hope that, perhaps, some reporter in a country not shackled by the DMCA would uncover the contents of the mysterious documents.

Ironically, a couple courts have since held that circumventing means only hacking a technology protection measure not using a password that the content provider issued to an authorized user.[11] But, even if that interpretation continues to prevail, the DMCA still threatens journalists, muckrakers, and whistleblowers who, without a password, can view encrypted documents only by using computer technology or know-how to circumvent the encryption.

Free Republic Web Site

Free Republic is a Web site described by its operators as an "online gathering place for independent, grassroots conservatism."[12] Part of the Web site is devoted to criticizing the way the mainstream media cover current events and politics. In doing so, Free Republic Web site visitors regularly posted verbatim copies of various *Los Angeles Times* and *Washington Post* news articles and then added remarks and commentary critical of the articles. Visitors also discussed the underlying news events covered in the articles.

The *Times* and *Post* sued to stop the copying and posting of their articles. In response, Free Republic's operators asserted a fair use and First Amendment defense. They contended that copying was necessary to enable Free Republic Web site visitors effectively to express their views concerning media coverage of current events. They emphasized that the omissions and biases in newspaper articles would be difficult to convey unless Free Republic visitors could post the full text of each article.

The court rejected Free Republic's claims.[13] The Free Republic defendants, the court held, failed to show that copying news articles verbatim was essential to communicating Web site visitors' opinions and criticisms. Even where media coverage was the subject of the critique, the court held, the gist of the comments usually could be communicated without full-text copying of the article. Finally, the court found that rather than copying news articles, defendants could post links to plaintiffs' Web sites, even if Internet users following links to noncurrent articles have to pay a fee to access *L.A. Times* and *Washington Post* Web site archives.

Faced with a $1 million damages award, the Free Republic operators settled the case rather than bring an appeal. For months thereafter, the site contained no discussion of *L.A. Times* or *Washington Post* articles. Now, apparently having revamped its Web site technology, Free Republic includes

just the first paragraph of the article being discussed, followed by a link that sends discussants to newspapers' own Web sites to read the entire article. That change, while not costless, seems like a relatively minor burden on the discussants' speech. But the current procedure relies on the newspapers' provision of free access to their sites, thus precluding stories, op-eds, and entire Web sites that are open only to paid subscribers. In addition, as we will shortly see, a copyright infringement action against Google's news story aggregation service, Google News, has questioned the legality even of Free Republic's quotation of just the first paragraph of the mainstream media news articles that its discussants regularly lambaste.

The Air Pirates

The Air Pirates were a group of underground cartoonists who worked in San Francisco at the height of Haight-Ashbury hippie counterculture. In the early 1970s, the group created a counterculture comic book that depicted Mickey Mouse and other Disney cartoon characters engaged in various sexual acts and illicit drug taking. Through that flagrantly outrageous parody, they sought to contest Disney's all-American "world of scrubbed faces, bright smiles and happy endings."[14] Not surprisingly, Disney strenuously objected to the perverse variant of Mickey Mouse's "innocent pleasure." Disney obtained a court order enjoining publication, bringing an end to the Air Pirates' effort at social critique. In an often-criticized ruling, the court emphatically denied that the Air Pirates' parody was fair use. (Ironically, the first commercially successful Mickey Mouse cartoon, the 1928 animated short *Steamboat Willie,* was itself a loose parody of Buster Keaton's silent film classic *Steamboat Bill Jr.* One wonders how Walt Disney would have fared in today's copyright environment if forced to defend his "piracy" of Keaton's story.)

As the Air Pirates case underscores, copyright's regulation even of low-culture entertainment might implicate concerns about free speech. There are, of course, many ways to challenge romanticized imaginings of American life. But the humorous denigration of a cultural icon can be a particularly potent way to do so.

Hip-Hop Music

Our next example concerns an entire genre of music. Hip-hop music is composed of speech voiced in cadence over urban funk, rock, and disco beats.

Hip-hop emerged from a rich African and African diaspora tradition of rhythmic verbal jousting, ranging from West African griot storytelling to Jamaican dub music.[15] It owes its immediate origins to South Bronx DJ and Jamaican immigrant Kool Herc, who, in the 1970s, regaled neighborhood parties by using two turntables to meld percussive and melodic fragments from an array of sound recordings while joking and boasting over a microphone. Herc's turntable "cuttings" were often recorded on cassette tapes. Copies rapidly spread through New York City, inspiring other DJs to engage in similar performances. As the practice caught on, hip-hop music, the interplay of rhythmic speech over prerecorded beats, vocal segments, and melody lines, grew to become a significant—and highly commercially successful—expression of African American urban culture and experience.

Most important for our purposes, the mixing and sampling of sounds from existing sound recordings were central to hip-hop's origins and emergence as a popular art form. By the mid-1980s, hip-hop artists regularly used digital synthesizers to copy, incorporate, alter, and rearrange myriad short segments from existing recordings. For these artists, the combination of digital technology and vintage, primarily vinyl record albums became their musical instruments. Significantly, hip-hop samplers called themselves "producers" rather than "composers" or "musicians" and viewed themselves as bearers of the DJ turntable tradition. Their aesthetic acumen lay in their vast collections and knowledge of vintage record albums, their ability to mine those recordings for break beats and for textures resonant in the distinct production values of earlier record labels and producers, and their melding and modification of numerous and varied samples.[16] Their intricate, digitally manipulated montages, weaving disparate prerecorded riffs, beats, and production qualities, created a unique sound, far more complex, sharp, and hard-hitting than any attempted re-creation of similar sounds by studio musicians.[17]

Beyond that aural aesthetic, sampling was also a vehicle to recover, reclaim, and pay homage to earlier DJs, recording engineers, and African American performers. As hip-hop chronicler Greg Tate described it, "Hip-hop is ancestor worship."[18] In other instances, artists directed their sampling to parody, social criticism, reinterpretation, or simply the ironic juxtaposition of sounds from sources as incongruous as Israeli folk music, bebop jazz, and television news broadcasts. Those myriad creative and expressive uses of sampling pervaded and defined the new musical genre. As one commentator notes, "[S]ampling . . . [is] an inherent part of what makes hip-hop music identifiably hip-hop."[19]

Copyright changed all that. In the late 1980s, record producers, music publishers, and songwriters brought a handful of copyright infringement

actions against hip-hop artists whose recordings sampled prior works. The early cases were inconclusive. Nevertheless, the credible threat of successful copyright infringement litigation induced risk-averse record labels to refuse to produce and distribute hip-hop recordings without clearing rights for each sample. Then in a 1991 decision that began with the biblical admonition "Thou shall not steal," a New York district court enjoined the distribution of a Biz Markie album containing a song that sampled three words and looped a background music fragment from a recording of Gilbert O'Sullivan's composition "Alone Again (Naturally)." That sampling also led the court to refer Markie to the district attorney for criminal prosecution. Courts and industry practice have steadily and severely constrained unlicensed sampling since that decision. Most recently, in perhaps the ultimate culmination of that trend, the Sixth Circuit Court of Appeals ruled that any sampling whatsoever from a sound recording, presumably even a single note, infringes the copyright in the sampled recording.[20]

The Sixth Circuit blithely assumed that its bright line rule of "[g]et a license or do not sample" would not "stifl[e] creativity in any significant way."[21] Like other courts and commentators, the Sixth Circuit expressed an unbridled faith in the efficacy of the copyright licensing market (in addition to failing utterly to grasp that for hip-hop producers live instrumentation cannot replace earlier sound recordings): "[T]he market will control the license price and keep it within bounds. The sound recording copyright holder cannot exact a license fee greater than what it would cost the person seeking the license to just duplicate the sample in the course of making the new recording."[22]

But as Jon Else and numerous documentary filmmakers have discovered, the copyright market does not operate like many courts and commentators naively assume. With few exceptions, clearing rights to multiple samples on a single recording has become prohibitively time-consuming and expensive. Recorded music consists of at least two separate copyrighted works, the recorded musical composition and the sound recording of the composition as performed in the studio or onstage. Thus, each sample of recorded music requires clearances from the owners of copyrights in both the sampled music composition, typically a music publisher, and the sound recording, typically a record label.

The publishers and labels do not generally issue sampling licenses without first hearing the entire track in which the sample appears, and clearance invariably requires the consent of a substantial number of people, including lawyers, artists, and various other copyright-holder representatives. That means that the hip-hop artist must take the risk that, after investing the time

and expense of recording the track, some publisher or label representative will refuse to license or will hold up the artist's release unless paid an exorbitant license fee or given a large share of ownership in the album. Even aside from such holdouts, each publisher and label typically sets its sampling license fee or demand for ownership share without discounting for what others might be demanding. Consequently, the sum total of the demanded license fees and ownership shares in the hip-hop artist's recording often renders the recording commercially infeasible, sometimes even exceeding what the artist can hope to receive.[23]

The result of this market failure, as hip-hop artist Chuck D laments, is that the "whole collage element is out the window."[24] Today's hip-hop recordings typically feature only one primary sample, rely on vanilla-wrap samples from sample libraries rather than judiciously selected vintage recordings, or incorporate prerecorded mini-segments that are buried so deeply in the mix as to be wholly unrecognizable (and the Sixth Circuit's any-sampling-is-infringement ruling threatens even that practice).[25] Those artists who do include recognizable samples must carefully select and limit their source material in accordance with lawyers' advice, or simply throw caution to the wind and hope that they do not get sued. Although hip-hop albums still garner considerable commercial success and critical acclaim, the copious remixing and brazen sampling that once defined the genre and gave hip-hop music its distinctive artistic edge are no more: this, the principal consequence of neither artistic choice nor cultural evolution, but the chilling effect of the law.

While classic hip-hop's flagrant celebration of copying and focus on sound recordings as raw material for artistic inspiration might have been unique, its practice of incorporating strands of preexisting music was not. Copying is endemic to music. As Olufunmilayo Arewa has recently limned in rich detail, classical composers from Beethoven to Mozart to Bartok to Charles Ives have regularly recycled themes, motifs, and segments of prior works.[26] Handel borrowed so extensively that he was even accused of plagiarism. Contemporary popular musicians also commonly mine existing music for riffs, melodies, and rhythms. For that matter, our classical literary tradition is no different. Shakespeare borrowed heavily from Plutarch; Milton from the Bible; Coleridge from Kent, Schelling, and Schlegel; Yeats from Shelly; Kafka from Kleist and Dickens; Joyce from Homer; and T. S. Eliot from Shakespeare, Whitman, and Baudelaire, all in ways that would infringe today's bloated copyright. In literature and music, as in other forms of expression, such "patterns of influence—cribbing, tweaking, transforming—[are] at the very heart of the creative process."[27] And, for all, the line between

permissible and infringing expression twists elusively with the vagaries of copyright law and enforcement.

Google

Google, a multibillion-dollar Internet search engine company, will no doubt strike some readers as an unlikely hero for illustrating the conflict between copyright and free speech. But First Amendment protagonists are not limited to individuals and media entities that produce new speech. Our First Amendment–inspired commitment to the "widest possible dissemination of information from diverse and antagonistic sources" also embraces institutions that make the existing store of knowledge and culture, ranging from ancient Greek plays to vintage sound recordings, widely available in useful form. Such speech disseminators have traditionally included libraries, schools, universities, and even the postal service, through its preferential rates for printed material. Together, these institutions collect vast inventories of recorded expression, organize the store of knowledge so that patrons can actually make use of it, and make information widely available to the public. That collection, organization, and diffusion of knowledge plays a vital role in our system of free expression.

Yet important as these traditional institutions have been, their capacity as repositories, catalogers, and disseminators of information has been limited by storage space, transport capability, geography, and, indeed, the relative imperviousness of the physical media of print. As a result, they are now increasingly supplanted by the Internet, which puts information from diverse sources at our fingertips to an extent exceeding the wildest dreams of previous generations. Digital communication and storage hold the promise of making virtually the entire store of the world's recorded knowledge and expression available online. Digitized collections can also be organized in ways that dramatically improve our ability to find and use the information we need. Indeed, the technologies of search engines, hyperlinking, and bookmarks can transform library collections—which traditionally have been composed of vast numbers of distinct books—into an integral part of the World Wide Web. It can enable us seamlessly to discover information within books and follow connections among books and other materials. As *Wired* magazine cofounder Kevin Kelly graphically puts it, "Once text is digital, books seep out of their bindings and weave themselves together."[28]

Enter Google. Google's search engine provides Internet users access to billions of Web pages, responding to users' keyword search requests with a

high degree of precision and recall in a fraction of a second.[29] The company earns several billion dollars per year selling twelve-word "sponsored links," unobtrusive yet highly effective advertising snippets targeted to users' search queries. That vehicle has made it financially feasible—indeed presumably highly profitable—for the company to advance the Internet's speech-enhancing promise, first, by scanning into searchable, digital format vast amounts of information and expression that have thus far not been available on the Internet and, second, by applying its search engine algorithm to text, pictures, music, and video.

Google has incurred copyright holders' wrath on a number of fronts. I focus here on two particularly noteworthy Google initiatives, the Google Book Search Project and Google News.

The Google Book Search Project aspires to make all of the world's printed books available for digital search, without charge, for anyone with access to the Internet.[30] To that end, Google has thus far contracted to scan, at its cost, significant portions of the print collections of the libraries of several elite universities (as of this writing: Harvard, Stanford, Oxford, Michigan, Wisconsin, all campuses of the University of California, and the Universidad Complutense Madrid), as well as the New York Public Library. Those libraries contain some 15 million unique titles, which represent about one-half of all titles contained in the collections of the world's libraries.[31] Google's costs for scanning the books have been estimated at between $10 and $25 per book.[32] Its investment in this initial stage of its project would thus amount to between $150 million and $375 million (and possibly more if Google finds it necessary to scan some titles from more than one source).

Because of copyright, the Google Book Search Project will be something far less than a universal, fully accessible and searchable digital library of the world's printed books. Google will maintain a digital copy of each book on its searchable database and will give a copy to the library from whose collection the book was scanned. And by entering a search query in the Google search engine, users will be able to browse the full text of public domain materials. But for books that were first published after 1922 and thus might still be under U.S. copyright, users will be able to see only a three-sentence "snippet," comprising the sentence that contains the search term and the sentence before and after that sentence, together with the book's bibliographic information.[33] When a search term appears more than three times in a book, only the first three snippets will appear. Hence, Google will display no more than nine sentences of a potentially in-copyright book in response to a book search query. (Under Google's Partner Program, a publisher or author controlling the applicable copyrights can license Google to scan books and

display a couple pages or more of a book's text in response to a user search query. But I focus here only on unlicensed scanning and displays, which, as we will see, would necessarily make up the lion's share of Google's project.)

Even with those significant constraints for displaying unlicensed post-1922 books, Google's Book Search is a highly useful research tool. Its users will be able to identify which books are likely most germane to a specific inquiry, to locate the pages on which the search term appears, and to get a limited sense of what the book might say with regard to the subject of the user's search. Google will also list local libraries where the book might be found and post links to third-party sites, like Amazon.com, where users may purchase the book or view or download portions of it for a price. For the Internet user, then, Google's Book Search Project is roughly akin to having ready access to a virtual card catalog for a significant portion of the world's books, with the huge added value of being able to apply search engine queries to the entire text of every book, view the full text of public domain materials, and receive information about where to locate or buy copyright-protected materials.

Google's Book Search Project comes on the heels of a number of nascent nonprofit efforts to digitize portions of university and public library archives. Yet the Google project dwarfs these nonprofit efforts in commitment of resources and scope. The nonprofit campaigns generally scan books published prior to 1923 only, but Google plans to scan and display millions of post-1922 books (at least those in collections in the United States), including those that are still in copyright. That will make a significant difference in the scope and comprehensiveness of Google's database. More than 80 percent of the research libraries' collections that Google has already agreed to scan are potentially in copyright.

Google plans to include millions of potentially in-copyright books in its database for two reasons. First, it believes that there is significant consumer demand for being able to search post-1922 books despite the constraint of viewing only a few lines of text for a given search query. Consequently, advertisers will pay good money for sponsored links targeted at such queries. Second, Google believes that because it displays only a few lines of text, the project avoids copyright infringement.

A number of publishers and authors vehemently disagree with Google's reading of copyright law. In response to those objections, Google announced that it would honor all copyright holders' requests to exclude books from the project. Upon receipt of a copyright holder's request, Google will refrain from scanning the identified book or, if it has already scanned the book, will delete it from the Book Search database. Yet a number of copyright holders

insist that Google's project infringes their rights nonetheless. In their view, Google's proffered opt-out procedure turns "every principle of copyright on its ear" by shifting "responsibility for preventing infringement to the copyright owner rather than the user."[34] The Authors Guild and the five major members of the Association of American Publishers have accordingly brought copyright infringement lawsuits against Google seeking a court order forbidding Google from scanning their books without the copyright holder's express prior authorization.

Make no mistake. If the authors and publishers succeed in their lawsuits, the dream of creating and making available on the Internet a value-added virtual "card catalog" for the complete collections of the world's greatest research libraries, let alone all of the world's printed books, will lie dormant for the foreseeable future. To seek and obtain explicit copyright holder permission for each of millions of titles would render the project excessively expensive and unwieldy, even for Google.[35] For millions of titles, indeed, it would simply be impossible to clear rights.

Tellingly, Google's primary cost might not even be the license fees it would have to pay to copyright owners; those fees could well pale in comparison to the overwhelming burden of administering and negotiating permissions, including locating the parties who controls the copyrights needed to grant the permission. Only some 25 percent of all post-1922 books, and less than 2 percent of all in-copyright books published in the United States prior to 1950, remain in print.[36] The original publishers of many such books no longer exist. And given that neither copyright assignments nor testamentary dispositions need be recorded with the Copyright Office, the current copyright holders, whether they be successors to the publisher or the author's heirs, can often be located only with great difficulty if at all.

In many cases, moreover, finding the publisher or author's heirs will not be enough because no one knows who holds the electronic rights that Google needs to license to include the book in its Book Search Project. Book publishing contracts more than a few years old generally leave unclear whether the author or publisher would have the right to license scanning a digital copy of the book into an electronic database and publicly displaying portions of the contents over the Internet. As a result, even when the publisher or the author's heirs can be found, clearing rights to include a book in Google's project would require a legal opinion regarding which party has the authority to grant those rights under the original book publishing contract (or, barring that, obtaining a new agreement among all relevant parties).

Nonprofit digital archives estimate that the copyright clearance process consumes approximately a dozen man-hours per work even when the copy-

right owner is easy to find. The cost of locating the copyright owner of the print book and determining whether that party has the authority to license the book to Google's Book Search Project, let alone negotiating and paying royalties, would be prohibitively expensive for millions of books. The result would be a database of far less comprehensiveness and utility for researchers.

Google's primary legal defense of its Book Search Project is that its scanning of complete copyrighted texts and display of three-sentence snippets surrounding a user's search term are both fair use. Most observers assume that, under prevailing fair use doctrine, Google's most difficult legal hurdle will be to defend its scanning of entire books. Google's display of three-sentence snippets responding to a user's search inquiry would seem to fall more comfortably within traditional fair use. Displaying short excerpts of others' texts also comports with search engines' typically accepted practice, at least when the material that the search calls up has already been made available on the Internet by the copyright owner. But a recently settled lawsuit against Google News threatens to make even that practice subject to the copyright owner's exclusive, proprietary control.

The Google News Web site uses Google's search engine algorithms to gather news stories from some 4,500 English-language sources and arrange them in order of importance. For each leading news story, Google News displays the headline, less than two sentences of the story lead, and a miniature thumbnail version of a photograph from a press Web site (smaller even than the thumbnails displayed on any Google image search). Each headline and photograph is hyperlinked to lead the reader to the newspaper's or news agency's own Web site. Google News also displays numerous links—often thousands—to related stories from other sources immediately below each story lead. Readers may conduct word searches within the Google News material and may customize the Google News page to highlight stories on topics of personal interest or from certain regions of the world. As such, Google News is an invaluable tool for anyone wanting to assess and compare how a wide variety of press outlets from around the world cover a given story or to find news coverage of topics of general or personal import without having to go to the multiple Web sites of individual newspapers.

In March 2005, Agence France Presse (AFP), which claims to be the world's oldest news agency, sued Google for including headlines, story leads, and thumbnail versions of photographs from the agency's stories on Google News. The agency claimed that its headlines and story leads are each "original copyrightable text and qualitatively one of the most important aspects of AFP's news stories" and that Google's reproduction and display of that short text, as well as thumbnails of AFP news photos, constituted a

willful infringement of AFP's copyrights, even if readers who sought to read the AFP story or see a full-size photograph had to click on a link leading to either the AFP Web page or the page of the news outlet that posted the material under license with AFP. Google settled the AFP lawsuit in part by agreeing to link AFP material only to the AFP Web site, thus bypassing the news outlets that are AFP customers. But AFP's legal arguments remain for others to assert, and the World Association of Newspapers has announced on behalf of its 18,000 member newspapers that it, too, intends to challenge the "exploitation of content" by Google and other search engines.[37]

The Google initiatives and the lawsuits against them raise a difficult question: Should Google be required to share with copyright holders a portion of the revenue that it earns from compiling and organizing (and thus adding substantial value to) copyright-protected material? We will revisit that question later. More important here, the Google cases illustrate the potential conflict between our free speech aspirations and proprietary copyright. In line with traditional rules applicable to tangible property, advocates of a proprietary copyright contend that, at the very least, Google's projects are subject to a copyright holder's entitlement to withhold permission and, more broadly, to Google's obligation to seek out and obtain copyright holder consent. Even honoring copyright holders' requests to opt-out, the procedure that Google assiduously follows, creates holes in Google's information repositories, rendering them less valuable for users. To require, beyond that, that Google cannot include any texts unless it has received prior express consent from the appropriate copyright holder, would sound the death knell for Google's projects (and, if applied to search engines generally, for Google itself).

At its core, copyright shares our First Amendment commitment both to increasing the store of knowledge and to making it widely available for learning, inspiration, enjoyment, and further expression. Yet, as the Google cases make clear, today's proprietary copyright threatens to stand as an obstacle to the Internet's realization of our First Amendment ideals.

As with Alice Randall, copyright does not completely suppress the speakers I have just described. With the exception of Google, all these speakers could present their ideas without copying or incorporating copyrighted expression. Yet in each instance, that speech would be significantly diminished. Alan Cranston, for example, might have merely drafted a critical review of the original *Mein Kampf* or the official English translation. More broadly, he could have simply spoken out against the Nazi regime and warned of the dangers of appeasement. But Cranston's translation reached a much wider audience and

conveyed Cranston's message in a far more pointed and accessible manner. As was no doubt Cranston's aim, his translation also likely reached a portion of the public that would have otherwise been duped by reading the official, expurgated version.

Likewise, to one degree or another, with the Philadelphia Church of God, Jon Else, Free Republic, the Air Pirates, and countless other speakers. Some credibility, some understanding, some communicative force is lost when a speaker is deprived of the use of particular words, images, or sounds. Whatever might be its benefits, copyright stifles, muffles, or, at the very least, imposes costs on speech. And today's bloated copyright does so to a far greater extent than ever before.

There are, of course, counternarratives of writers, artists, and musicians devoted to creative endeavor and dependent on copyright for sustenance. I do not mean to be dismissive of that viewpoint; as I will discuss, copyright has traditionally played an important role in underwriting creative work and supporting professional authorship. But stories about "[s]acrificial days devoted to . . . creative activities" have dominated copyright discourse for some three centuries—and have often been used by copyright industries to gain support for new entitlements that only indirectly benefit actual creators, if at all.[38] Lost in that discourse is any recognition that speakers who use existing copyrighted works in conveying their message are often no less deserving and, indeed, no less creative than the author of the prior work. Nor does the reward-for-authors rhetoric capture the complexities and tremendous potential for disseminating knowledge embodied in new technological media, of which the Google projects are but two of many examples.