

7-1-2001

## The Idea of Progress in Copyright Law

Michael D. Birnhack  
*University of Haifa*

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### Recommended Citation

Michael D. Birnhack, *The Idea of Progress in Copyright Law*, 1 Buff. Intell. Prop. L.J. 3 (2001).  
Available at: <https://digitalcommons.law.buffalo.edu/buffaloipjournal/vol1/iss1/2>

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# ARTICLES

## THE IDEA OF PROGRESS IN COPYRIGHT LAW

MICHAEL D. BIRNHACK†

### INTRODUCTION

Copyright law is the main legal space that addresses one of the most distinct features of humankind: knowledge.<sup>1</sup> It attempts to regulate some aspects of what is usually referred to as the *creative process*, but it does not limit its view to the initial point of the process. It aims at the more lofty goal of human knowledge. This paper is an endeavor in intellectual history. I will explore an idea, strangely understudied, that guides much of our thought about copyright. Exposing this idea is especially important today, when copyright law is at a crucial crossroads and has already been declared dead by some observers.<sup>2</sup>

Strictly anecdotal surveys reveal that even many copyright lawyers don't remember all of the Constitution's copyright clause. Here it is:

The Congress shall have Power . . . 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.<sup>3</sup>

The phrase they usually forget is “the Progress of.” This paper sheds light on *the idea of progress* and its central place in copyright law. The idea of progress is the belief that humankind is on an inevitable course of betterment, and that knowledge is a product of an ongoing cumulative effort which is secular in nature.

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† Assistant Professor, Faculty of Law, University of Haifa, Israel. I wish to thank Yochai Benkler, Diane Leenheer Zimmerman, and the participants of the JSD Colloquium at NYU School of Law for helpful comments on earlier drafts, and Fania Oz-Salzberger for sharing her enlightening comments.

<sup>1</sup> Neil Postman defined knowledge as “organized information — information that is embedded in some context; information that has a purpose, that leads one to seek further information in order to understand something about the world.” See generally NEIL POSTMAN, *BUILDING A BRIDGE TO THE EIGHTEENTH CENTURY* 93 (1999).

<sup>2</sup> See generally Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millennium*, 47 J. COPR. SOC'Y 193 (2000).

<sup>3</sup> U.S. CONST. art. I, § 8, cl. 8.

Today the idea is so obvious that it is hardly noticed, and its relation to copyright law has been almost entirely overlooked.<sup>4</sup> The argument I will make here is simple: The *knowledge process*, which is at the core of copyright law, is best understood through the idea of progress. This is a normative argument, and thus has important implications for contemporary analysis and application of copyright law.

Explaining the central place of the idea of progress in copyright law is an attempt to unearth the hidden assumptions that the law holds as to the knowledge process. Once we accept that copyright law addresses the knowledge process (and this does not require that we abandon other subject matters of copyright law, not even Paul Goldstein's claim that "[m]ostly, though, copyright is about money"<sup>5</sup>), it immediately follows that the law must reflect (and at the same time construct) an understanding of *knowledge*. I will try to detect this view. A successful attempt should pass a double test: it should be able to explain the way in which copyright law operates (a descriptive test), and it should be normatively appealing (a prescriptive test). We can rephrase these demands in Dworkinian terms as "fit" and "justifica-

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<sup>4</sup> There are a few exceptions: one is the historical project of ROBERT NISBET, *THE HISTORY OF THE IDEA OF PROGRESS* 203 (1994, 1998). Nisbet, however, only mentions the copyright clause as an example of the close relationship of knowledge and progress. Another exception is a short reference to the copyright clause made by Robert Goldwin, who explains it on the background of the framers' economic philosophy, and aptly proposes that the clause be called "the progress clause." See ROBERT A. GOLDWIN, *WHY BLACKS, WOMEN, AND JEWS ARE NOT MENTIONED IN THE CONSTITUTION AND OTHER UNORTHODOX VIEWS* 41 (1990). A third exception is an important article by Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power* 43 *DEPAUL L. REV.* 97 (1993). As the title of her article indicates, Chon juxtaposes a traditional ("modern") notion of progress with a postmodern one. Here, I concentrate on what Chon names "modern" progress: the original meaning of the idea as it is fixed in the Constitution. Chon's critique of the modernist "progress" is aimed at its linearity and at its incapacity to recognize the "global village" phenomenon. She is interested in distribution of fairness and decentralization of control over knowledge (*id.* at 101-102, 133), and articulates a right to access. However, postmodernism does not have a monopoly over the latter concerns. In fact, these concerns have brought others, not necessarily writing within a postmodernist paradigm, to the same conclusion (see for example Patterson and Lindberg, *infra* note 15). Furthermore, Chon herself links the postmodernist view of progress to the Enlightenment, and bases her case for the right to access on Madison and Jefferson, *id.* at 134-144 (concluding that "[a] modern 'Progress' read in light of both Madison's and Jefferson's views on intellectual property requires not just that incentives be provided to authors and inventors to increase knowledge, but that each human being have the right to use that knowledge"). Chon tries to distance herself from the modernist view by claiming that "[p]ostmodern 'Progress' is also premised on knowledge but seeks a different relationship to it," *id.* at 144. By a "different relationship" she means indeterminacy or contingency. In this paper I engage in a modernist analysis. However, the concerns here are similar to Chon's, though I think they are traditional concerns just as much as they are postmodernist.

<sup>5</sup> PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 7 (1994).

tion," which are two cumulative requirements of interpretation.<sup>6</sup> The idea of progress, I shall argue, passes both these tests.

There have been other attempts to explain copyright's conception of the knowledge process, even though they were not articulated as such. An important project discussed the place of the *author* in copyright law: this is the notion of the singular, romantic author, who works in a deteriorated physical environment but enjoys spiritual inspiration. The romantic author bears a unique relationship to his or her work, which is often described in terms of embodiment of personality and in metaphors of parenthood.<sup>7</sup> That project showed that the notion of the author is a social construction,<sup>8</sup> explained how it came into being,<sup>9</sup> and showed its place in copyright law.<sup>10</sup> It is said to be quite a central place, and indeed it explains a few copyright doctrines and the attitude of some courts. It also provides a convenient point of comparison between copyright in this land and across the ocean.<sup>11</sup> Subsequent participants in the authorship project showed its negative effects.<sup>12</sup> The more the notion of the romantic author occupies our mind, the less it is capable of capturing other forms of creation: collaborative authorship (the movie industry, scientific research, tribal folklore), authorship which is the product of hard work (creating data bases), works created in well-funded plants (the pharmaceutical industry), and commercial works that lack inspiration (like most phonebooks). The notion of the romantic author also tips our view of copyright law towards a proprietary conception thereof—namely, that copyright is a natural right that is best explained either on the back-

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<sup>6</sup> RONALD DWORKIN, *LAW'S EMPIRE* 228, 230-231 (1985).

<sup>7</sup> See, e.g., Zechariah Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503 (1945) ("The man who brings out of nothingness, some child of his thought, has rights therein which cannot belong to any other sort of property."). For discussion, see MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993) at 38-39 (paternity metaphor) and at 114 (personality).

<sup>8</sup> Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the Author*, 17 EIGHTEENTH CENTURY STUDIES 425 (1984); Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, 30 REPRESENTATIONS 109 (1990).

<sup>9</sup> See THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE 191 (Martha Woodmansee & Peter Jaszi eds., 1993); Rose, *supra* note 7.

<sup>10</sup> Peter Jaszi, *Toward a Theory of Copyright: The Metamorphosis of "Authorship,"* 1991 DUKE L. J. 455.

<sup>11</sup> See Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TULANE L. REV. 991 (1990), reprinted in *OF AUTHORS AND ORIGINS* (Brad Sherman & Alain Strowel eds., 1994).

<sup>12</sup> See generally JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* (1996).

ground of Lockean labor theory<sup>13</sup> or on the background of personhood theories.<sup>14</sup> The concept of authorship does explain a large portion of copyright law as it is applied, but it does not explain all doctrines (joint authorship, work for hire, and fair use, for example), and its drawbacks—the exclusion of other forms of creation—are too numerous to allow this notion to be a prescription.

There has been another attempt to explain the concept copyright law holds of the knowledge process: that its core element is not the author, but the user. This was mainly the project of Professors L. Ray Patterson and Stanley Lindberg.<sup>15</sup> In their view, copyright law is important for what it omits. While the law addresses the rights of authors and other owners, its residuary is the most important site: the users.<sup>16</sup> Patterson and Lindberg find an implied right of access,<sup>17</sup> deduce a personal use principle, and articulate a fair use principle.<sup>18</sup> This attempt, while normatively appealing, often fails the descriptive role of a successful theory. Patterson and Lindberg show again and again how users' rights were narrowed as the authors' rights expanded. They complain about a transformation from a regulatory view of copyright law to a proprietary one,<sup>19</sup> about the role false fictions play in developing the law,<sup>20</sup> and about the failure of various doctrines, such as fair use.<sup>21</sup>

The idea of progress has the capacity to be both descriptive and prescriptive. It can explain much of copyright law's doctrines (the idea/expression dichotomy and fair use are examples I will discuss later on), it fits the "economic philosophy" of the Supreme Court and other official functions as to copyright law,<sup>22</sup> and it is compatible with the economic analysis of this field.<sup>23</sup> It can explain historical changes and especially the politicization of copyright law—that is, how copyright came to embody a political principle. It can also serve as a pre-

<sup>13</sup> See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT – THE SECOND TREATISE* 1690 (Peter Laslett ed., 1988), and discussion in JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988).

<sup>14</sup> See Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

<sup>15</sup> L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* (1991).

<sup>16</sup> See *id.* at 5.

<sup>17</sup> See *id.* at 52.

<sup>18</sup> See *id.* at 69 (private use); at 66 (fair use).

<sup>19</sup> See *id.* at 77, 88.

<sup>20</sup> See *id.* at 134.

<sup>21</sup> See *id.* at 103.

<sup>22</sup> For the "economic philosophy," see *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The legislature has repeatedly explained copyright law on a utilitarian basis. See for example HR Rep. No. 2222, 60<sup>th</sup> Cong. 3d Sess.

<sup>23</sup> See William M. Landes & Richard Posner, *An Economic Analysis of Copyright Law*, 18 *J. LEGAL STUD.* 325, 327 (1989).

scription: it is more flexible and dynamic than the authorship project, it does not exclude non-romantic forms of creation and, finally, it captures the regulatory conception of copyright law rather than the proprietary conception. In its normative affiliation, the idea of progress captures the prescriptive claims of Patterson and Lindberg's rights-of-users project, but bases them on more solid grounds.

This paper, in section I below, begins with an introduction of the idea of progress in itself: its main features and subject matters, its relationship to other intellectual movements in history, and the place it occupied in the eighteenth century. Section II then turns to show how the idea was injected into American copyright law at the end of the eighteenth century. This is a historical argument. I will outline the history of copyright law up to that point and show that its English source is best explained as a form of trade regulation. We will then cross the ocean, to study the introduction of copyright law into the American legal system. This is a snapshot of the idea of progress at the time of the formation of the Constitution. We will see that this introduction shifted the nature of copyright law into a political idea. Section III takes another snapshot, this time of contemporary copyright law. It is meant to establish that the idea of progress is pervasive in our thought about copyright law, though it is not recognized as such.

The task of this paper is quite ambitious. There is much more work that can be done in this project. My goal here is to offer an alternative way of thinking in copyright law, or more accurately, to expose an explanation that, I argue, is already quite pervasive in our thought.

## I.

### THE IDEA OF PROGRESS

Progress was a buzzword in the eighteenth century,<sup>24</sup> and its strong relationship to the Enlightenment explains this timing. It is hardly a buzzword today, and the quiet disappearance of the idea has caused not only students of copyright law to ignore its original meaning and role, but also students of the Constitution.<sup>25</sup> Professor Robert Nisbet traces the first use of the word *progress* to a time as early as the Roman poet Titus Lucretius (99-55 BC) in the expression *pedetemtim progredientes*, meaning step by step.<sup>26</sup> The view that the origin of pro-

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<sup>24</sup> For a similar observation, see CARL BECKER, *PROGRESS AND POWER* 3-4 (New York, 1949).

<sup>25</sup> One important exception is ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (New York, 1978). Bickel analyzed the activism of the Warren Court through the lens of progress.

<sup>26</sup> Nisbet, *supra* note 4, at xii, 42.

gress is to be found in the classics is controversial.<sup>27</sup> The majority of scholars hold that it is a modern idea of the seventeenth and eighteenth centuries.<sup>28</sup> For our task here, I need not outline the history of the idea, but rather present it as it was understood in the eighteenth century. What follows is thus not a chronological discussion.

So what is the idea of progress? Consider Professor Nisbet's definition, following St. Augustine:

[t]he vision of an unfolding cumulative advancement of the human race in time—a unified, single human race, be it emphasized—a single time frame for all the peoples and epochs of the past and present, the conception of time as a linear, single flow, the use of evolving stages and epochs in the history of humanity, belief in the *necessary*, as well as sacred character of mankind's history as set forth in the Old Testament, and finally, the envisagement of a future, distinctly utopian end of history when the saved would go to eternal heaven.<sup>29</sup>

Or consider a secular definition, that of David Spadafora: “[t]he belief in the movement over time of some aspect or aspects of human existence, within a social setting, towards a better condition.”<sup>30</sup>

These definitions contain almost all the central features of the idea. The idea has a few dimensions: one is its *structure*, a term that addresses the idea's view of time, direction, and goal. Another dimension is that of the *players*. The idea of progress celebrates human beings rather than an external entity. Nisbet's definition is based on St. Augustine, and is inherently religious. Interestingly, the players are not conceived as individuals, but as parts of a collective, which is the entire humankind. Yet another dimension of the idea is the *content* of the idea. Nisbet's definition, quoted above, addresses the progress of history, but there are other subject matters of the idea, like morality, science, technology, and knowledge.

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<sup>27</sup> The strongest argument for this view is Nisbet, *id. passim*. See also LUDWIG EDELSTEIN, *THE IDEA OF PROGRESS IN CLASSICAL ANTIQUITY* (Baltimore, 1967). For a moderate view, see MARGARITA MATHIOPOULOS, *HISTORY AND PROGRESS – IN SEARCH OF THE EUROPEAN AND AMERICAN MIND* 7-11 (New York, 1989).

<sup>28</sup> The most notable example is the classical work of JOHN BAGNELL BURY, *THE IDEA OF PROGRESS: AN INQUIRY INTO ITS ORIGIN AND GROWTH* 7 (New York, 1932). Daniel Boorstin identifies the first “progressive” statement in modern times to be that of the French philosopher Marquis de-Condorcet in his *Sketch of a Historical Picture of the Progress of Human Mind*, published in 1795. DANIEL J. BOORSTIN, *THE SEEKERS: THE STORY OF MAN'S CONTINUING QUEST TO UNDERSTAND HIS WORLD* 184 (New York, 1998). Later on I shall argue that earlier modern statements can be found in the American context.

<sup>29</sup> Nisbet, *supra* note 4, at xiii.

<sup>30</sup> DAVID SPADAFORA, *THE IDEA OF PROGRESS IN EIGHTEENTH CENTURY BRITAIN* 6 (New Haven, 1990). Margarita Mathiopoulos deliberately refrains from a definition. See *supra* note 27, at 2.

I shall now examine the various elements of progress.

### A. *The Structure of the Idea of Progress*

#### 1. *Time*

One of the most obvious elements of the idea of progress is that it is a theory of change over time. The temporal dimension is crucial for the understanding of the idea. Saying that changes occur over time seems self-evident to us today, but it has not always been obvious. The idea of progress emphasizes the temporal dimension by recognizing a gradual development. Thus, Professor Bury noted: "The idea of human Progress then is a theory which involves a synthesis of the past and a prophecy of the future."<sup>31</sup> Two notes are to be made in regard to this element.<sup>32</sup>

One is that it rejects other views of time. It rejects an idea that civilization is static and is not moving anywhere in particular. The temporal dimension is also tied to the notion of irreversible time.<sup>33</sup> Most importantly, this feature distinguishes progress from *primitivism* and from a *cyclical* view. The former is the aspiration to restore things to their oldest known mode, following the belief that the past was better in some sense. Such a view is usually connected to ethics and morality. The doctrine of original sin is an example of the aspiration to restore an old order that is considered to be superior to the present.

Cyclical theories deny the linear advancement of civilization. Rather, they describe it as moving in cycles, in the form of "rise and fall." Thus, good times will be followed by bad times.<sup>34</sup> The cyclical theory has yet another implication that distinguishes it from the idea of progress: it is descriptive in nature, rather than prescriptive. It is a pessimistic view.

A second note to be made is that progress is not just a historical account of the past, but it is also, again in Bury's words, a "philosophy of action."<sup>35</sup> In other words, it is not only a descriptive account, but a

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<sup>31</sup> Bury, *supra* note 28, at 5.

<sup>32</sup> The temporal element can be understood in a religious context, as St. Augustine understood it. See Nisbet, *supra* note 4, at 62. I do not discuss the religious reading of the temporal dimension, since, as will be discussed shortly, progress drifted away from the religious emphasis, though it did not entirely depart from it.

<sup>33</sup> Nisbet, *id.* at 63

<sup>34</sup> See also Nisbet, *id.* at 63, 103-104; Spadafora, *supra* note 30, at 14, and Edelstein, *supra* note 27, at 46 (tracing the origins of the cyclical theory to Pythagoreans of the fifth century BC); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 85 (Cambridge, Mass., 1967) (reporting that the cyclical theory was held by many in the colonies).

<sup>35</sup> Bury, *supra* note 28, at xl. See also ARTHUR ALPHONSE EKIRCH, *THE IDEA OF PROGRESS IN AMERICA, 1815-1860* 11 (New York, 1944).

prescription for behavior in the future. The philosophy of action derives its content from the past. This is not to say that the past serves as the sole instructor to the present and a philosophy for the future. This would be the antithesis of progress, because it would eliminate the next dimension we discuss, that of change. The past serves as guidance, a first crossroads in a philosophical inquiry, remote from its final destination.

The temporal dimension removes progress from the exclusive realm of historians. It becomes relevant to civilization at large and acquires practical meanings. We can think of many fields that are candidates for the subject matter of the idea. In fact, any field of human activity that we can plausibly think of as having a history, even if it is a week-old field, can be the subject matter of progress. Lawyers are familiar with one such field: law itself. This should be no surprise. As a matter of fact, this temporal dimension of progress is particularly familiar to jurists who practice within a common law system. The temporal dimension, with its implicit elements (that things change, that there is a development, and that the future is determined, in part, on the basis of the past), is how courts make law. The idea of progress fits the legal common law practice perfectly. It both describes the practice, and commands a prescription for the future: it is a prescription in which the past is given significant weight in the process of determining the future. The prescriptive element is demonstrated in Professor Ronald Dworkin's theory of interpretation and adjudication. The metaphor of law as a chain novel embodies both elements of the temporal dimension of progress: "[E]ach novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on."<sup>36</sup>

## 2. *Direction*

The prescriptive feature of progress, understood as a reliance on civilization's change over time, is not indifferent to the direction of the change. The idea of progress holds a strong belief that the direction is towards betterment. This is how we use progress in daily language. Bury writes that "[t]he idea means that civilization has moved, is moving and will move in a desirable direction."<sup>37</sup> Or in the words of another scholar: "The word progress has positive, optimistic connotations. It conveys the notion of advancement to higher accomplishments, towards an attainable utopia, a world of infinite diversity

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<sup>36</sup> DWORKIN, *LAW'S EMPIRE*, *supra* note 6, at 228-232.

<sup>37</sup> Bury, *supra* note 28, at 2.

and yet stable despite its complexity, a world developing a path of deterministic development.”<sup>38</sup>

A statement that things will improve in the future can be understood in one of two ways.<sup>39</sup> One is that it merely reflects a belief based on an optimistic view of human nature, or even just a hope. This kind of belief, in its extreme, does not allocate any role for mankind. We are to observe passively the changing world. Another way to understand the statement that things will improve is that it is a prescription. In this sense, the clear direction of progress is not merely a belief. It dictates an active role for humankind. It is guidance for action. Here, too, the idea of progress should be familiar to common law lawyers. Law aims at solving conflicts. We keep amending the law, so as to improve it. Oliver Wendell Holmes aimed, in his *Common Law*, at an ideal state to which law progresses.<sup>40</sup> The Constitution aims “to form a more perfect union.”

Does this forward-looking direction mean that there is an end to the change, an ultimate end to be achieved? The idea of progress, at least in its Anglo-American understanding, defies such a view. Progress is endless. It has a purpose, and in this sense is teleological, but the purpose is not a fixed one. It keeps changing—and the change is one of advancement. The idea of progress claims that there is *always* a place for improvement.<sup>41</sup>

### B. The Human Role

So far we have seen that the idea of progress is that civilization advances toward a better situation in the course of time. Another feature of the idea finds its origin in Christianity: civilization is on a route

<sup>38</sup> Antonio Gracia-Bellido, *Progress in Biological Evolution* in *THE IDEA OF PROGRESS* 175 (Arnold Burgen ed.). See also George Henrick von Wright, *Progress: Fact and Fiction*, in *THE IDEA OF PROGRESS*, *id.* at 1 (“Progress is a change for the better.”).

<sup>39</sup> John Baillie aptly pointed to a similar distinction, between “observed progress,” which he connected to technical progress, and “belief in progress,” which he classified as spiritual. See JOHN BAILLIE, *THE BELIEF IN PROGRESS* 156 (London, 1950).

<sup>40</sup> GRANT GILMORE, *THE AGES OF AMERICAN LAW* 53-54 (New Haven, 1977).

<sup>41</sup> Some political thinkers and historians held otherwise. Karl Marx argued that humankind progresses over time, that change is for the better, and that there is an ultimate goal to be achieved. More recently, Francis Fukuyama could announce no less than the end of history, in his *THE END OF HISTORY AND THE LAST MAN* (1992). He did not mean, despite the provocative title, that from then on nothing would happen anymore. It was not an apocalyptic view; on the contrary, Fukuyama argues that history has an end. Finding authority for the latter view in both G.W.F. Hegel and Marx, despite their different views of what that end is, Fukuyama argued that there is today a remarkable consensus about the legitimacy of liberal democracy, and that this is “the final form of human government” (at 64-65). This is an exceptionally provocative view, and I think the nervousness many people felt in reaction was due to the claim that the goal of humankind is fixed, that there is an end to betterment.

of progress as part of God's design.<sup>42</sup> This was the contribution of the Christian philosophers to the idea of progress.<sup>43</sup> Divine will dictates a necessary progress. Accordingly, as St. Augustine argued in the fifth century, the ultimate goal towards which humankind constantly progresses is to achieve the "City of God,"<sup>44</sup> to fulfill the millennial hope. The City of God was in another life, and the Earthly City could never be as spiritual.

The immediate implication of holding a religious view of progress is that it leaves a relatively minor role for human beings. If everything that happened and will happen is part of God's unfolding plan, man has a rather passive role.<sup>45</sup> We could follow religious commandments, such as the Calvinist ethic of work, and improve our stakes in the world, but the general instruction as to progress is that this is beyond man's reach. If so, progress cannot be *promoted*, to use the constitutional language.

But as the seventeenth and eighteenth centuries unfolded, the idea of progress abandoned the extreme religious view.<sup>46</sup> This process should be understood against the background of the Enlightenment both in its European origin and its American form.<sup>47</sup> The roots are found earlier, in the Renaissance, with its placement of Man in the center. Reason replaced God.<sup>48</sup> The teleological character of progress, its continuous evolution toward the better, and its goal to reach perfection were not given up in the process of secularization. The City of God was transformed and reformulated as the achievement of a better civilization for men. Some scholars explain this process as "the offspring of a union of the millennial hope with the moralism of the

<sup>42</sup> Rutherford E. Delmage, *The American Idea of Progress, 1750-1800*, 91 PROCEEDINGS OF AMERICAN PHILOSOPHICAL SOCIETY 307 (1947).

<sup>43</sup> Nisbet, *supra* note 4, chapter 2.

<sup>44</sup> This is the name of Augustine's book, as well as Carl Becker's study. See generally CARL L. BECKER, *THE HEAVENLY CITY OF THE EIGHTEENTH-CENTURY PHILOSOPHERS* (1932). See also WALLACE K. FERGUSON, *THE RENAISSANCE IN HISTORICAL THOUGHT—FIVE CENTURIES OF INTERPRETATION* 84 (1948).

<sup>45</sup> See Postman, *supra* note 1, at 26-27.

<sup>46</sup> Nisbet, *supra* note 4, at 69; Ferguson, *supra* note 44, at 83-84; Delmage, *supra* note 42, at 308-309; Becker, *supra* note 24, at 48, 129. This process was enabled by another transformation: that of Puritanism into a more optimistic view. See *infra* note 79.

<sup>47</sup> For a comprehensive discussion of the American form of Enlightenment, see HENRY FARNHAM MAY, *THE ENLIGHTENMENT IN AMERICA* (1965); BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 34, at 26-27.

<sup>48</sup> Reason – and progress – were not accepted without criticism; the most famous was that of Jean-Jacques Rousseau. For an argument about the complex relationship between progress and rationality see LARRY LAUDAN, *PROGRESS AND ITS PROBLEMS: TOWARD A THEORY OF SCIENTIFIC GROWTH* 6 (1977).

cyclical view of history.”<sup>49</sup> God, however, remained only in a secondary role.

The main effect of the process of secularization was a redefinition of man’s role in the world. If there is progress, as the abandonment of the cyclical theory implies, and it is not understood anymore as dictated by God’s plan, then it must be someone else, or something else, that motivates the change. There must be an engine that supplies power to civilization and enables its progress.<sup>50</sup>

One suggestion was to identify the engine of progress as an “invisible hand.” This, of course, is Adam Smith’s explanation of economic growth. The transformation of one view, that of static, fixed civilization, into the idea of progress is evident by the comparison of Smith’s *Wealth of Nations*, published in 1776, with the lesser-known book by Bernard Mandeville, *Fable of the Bees—Private Vices, Public Benefits*, first published in 1705. Both proposed that in order to achieve a common goal, we should aim at the self-interest of individuals. But Mandeville did not think of an *increase* of wealth, whereas Smith believed that wealth could indeed be increased.<sup>51</sup> Mandeville’s view is not one of progress, whereas Smith’s is.

Another explanation, and one that fits within the invisible hand theory, points to us, human beings, as the engines of progress. In the process of secularization, man gained a greater role in achieving progress.<sup>52</sup> Forrest McDonald finds the origins of this view in John Locke’s epistemological proposition: If man is born *tabula rasa*, and achieves whatever is achieved through means of experiences over time, then humanity too can improve by education and social experience.<sup>53</sup> This new emphasis on human beings’ own control over their lives was a result of, first, the Renaissance, and then of the Enlightenment, and their celebration of the individual and reason. Once humans regained control over their fate, the prescriptive element of progress was born as well: “The aim of the historian *en philosophe*, however, was not merely to depict the march of human progress, but to aid further advance by instructing and enlightening men.”<sup>54</sup>

The individual was reborn, in the sense of detachment from God. But the individual is still conceived as part of humankind. The idea of

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<sup>49</sup> Stow Persons, *The Cyclical Theory of History in 18<sup>th</sup> Century America*, 6 AMERICAN Q. 147, 158 (1954).

<sup>50</sup> See BECKER, *THE HEAVENLY CITY*, *supra* note 44, at 129.

<sup>51</sup> This point was made by FORREST McDONALD, *NOVUS ORDO SECLORUM—THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 126 (1985).

<sup>52</sup> Persons, *supra* note 49, at 163.

<sup>53</sup> McDonald, *supra* note 51, at 53.

<sup>54</sup> Ferguson, *supra* note 44.

progress is *cumulative* in nature. The gradual, constant change is achieved through the common promotion of progress, by human beings, along the course of time. We have seen this element in Nisbet's definition, cited above: it was "a unified, single human race" that is the subject of progress.<sup>55</sup> The inter-temporal dimension itself suggests the accumulation of knowledge over time.<sup>56</sup>

This view has raised some objections. Consider, for example Thomas Kuhn's theory of the development of science. Roughly speaking, the structure of scientific changes, according to Kuhn, is a structure of serial paradigms. Most scientists engage, most of the time, in "normal science."<sup>57</sup> Their work is paradigm-dependent.<sup>58</sup> They try to further articulate and explain the paradigm: eliminating ambiguities, discovering new applications and rendering the paradigm more precise.<sup>59</sup> This stage is very different from that of introducing a new paradigm: a new paradigm undermines the old one and changes the whole way of thinking in the field. If a new paradigm manages to gain recognition, it is a scientific revolution.<sup>60</sup> Kuhn applies "progress" language, which should be familiar by now, and accuses textbooks of misrepresenting scientific revolutions:

[Textbooks create the impression that] science has reached its present stage by a series of individual discoveries and inventions that, when gathered together, constitute the modern body of technical knowledge. . . . One by one, in a process often compared to the addition of bricks to a building, scientists have added another fact, concept, law, or theory to the body of information supplied in contemporary science texts. But that is not the way science develops.<sup>61</sup>

Without going into an evaluation of Kuhn's work, we should note that even his theory leaves room for cumulative advancement *within* the paradigms.<sup>62</sup>

Considering this gradual process of secularization, it is easy to see how it is possible for human beings "to promote the Progress."<sup>63</sup> This brings us to another feature of progress. The religious belief in God-directed progress meant that the process is inevitable. I think this fea-

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<sup>55</sup> See Nisbet, *supra* note 4, at xiii.

<sup>56</sup> Arnold Pacey explains how some authors tried to measure progress, to prove its cumulative nature. See ARNOLD PACEY, *THE CULTURE OF TECHNOLOGY* 13 (1996).

<sup>57</sup> THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 5-6, 23 (3rd ed., 1996).

<sup>58</sup> *Id.* at 30.

<sup>59</sup> *Id.* at 34.

<sup>60</sup> *Id.* at 6, 90, 92.

<sup>61</sup> *Id.* at 140.

<sup>62</sup> For another non-cumulative account of progress, see Laudan, *supra* note 48, at 147.

<sup>63</sup> U.S. CONST., art. 1, § 8, cl. 8.

ture is best understood as a supplement to the absence of human influence over progress. Once humans cannot control the stream of events, it is a natural conclusion that it is conceived as inevitable. Inevitability in this sense means inability to affect improvement. But if human beings are the ones in control, it is not so clear that the progress is inevitable. The modern idea of progress, the one reformulated in the Enlightenment, had, however, some difficulties accepting this notion. Some dominant figures searched for a law of progress, something that drives it.<sup>64</sup> Darwin's evolutionary theory can be described as an attempt to find the law of progress in biology; Marx's theory of the social struggle can be described as an attempt to find the law of progress in history. Today, we may doubt this feature of inevitability,<sup>65</sup> especially when we talk about progress in history measured by human welfare.

### C. *The Subject Matter of Progress*

By now, it should be evident that, in a sense, progress is a general idea.<sup>66</sup> It directs us towards a better condition, but does not define what is better. Thus, we are given leeway for different conceptions of the good,<sup>67</sup> and are also free to choose the right way to achieve it.

This feature of the idea of progress is revealed in its subject matter. The feature of change over time implies its relevance to history, but its prescriptive element indicates a wider range of subject matters. Nisbet mentions a variety of contents that the idea embraces: "The idea of progress does indeed point to material, moral, and spiritual advancement. . . ."<sup>68</sup> He identifies one subject matter of progress to be knowledge, and a second major proposition to be "man's moral or spiritual condition on earth, his happiness, his freedom from torments of nature and society, and above all his serenity or tranquility."<sup>69</sup> I shall leave aside the spiritual content of progress. Whether or not we are persuaded by it, and as far as it does not overlap knowledge, it is clear that the means to promote spiritual progress is not primarily le-

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<sup>64</sup> See Nisbet, *supra* note 4, at xv.

<sup>65</sup> See Gilmore, *supra* note 40, at 104 ("The one thing that is clear is that no one, except speakers on ceremonial occasions, any longer believes the comforting eighteenth-century myth about the inevitability of progress.").

<sup>66</sup> Ekirch defines this feature as rendering progress a vague idea. See Ekirch, *supra* note 35, at 7, 37. Spadafora addresses this feature from a more sympathetic view, and points out that "there is a multitude of possible expressions of the idea," *supra* note 30, at 7.

<sup>67</sup> See Becker, *supra* note 24, at 5; W. WARREN WAGAR, *THE IDEA OF PROGRESS SINCE THE RENAISSANCE* 19 (1969).

<sup>68</sup> Nisbet, *supra* note 4, at xiii.

<sup>69</sup> Nisbet, *id.* at 5, 127.

gal. Other possible subject matters of progress were noted as well. Among these are “progress in knowledge of the environment of man,”<sup>70</sup> in arts, social and political organization,<sup>71</sup> or, as Francis Bacon named his book, *The Advancement of Learning*,<sup>72</sup> in “the natural sciences,” and finally in technology.<sup>73</sup> Progress in this naked form is indifferent to the good. In this sense, the idea of progress is not an independent theory; it does not embrace a grand theory that has a comprehensive view over its subject matter. Moreover, the adaptability of other theories to the idea of progress, and its own inability to be a singular theory, might explain why it has been underestimated by many scholars in the past 212 years. It is conceived at best as an ancillary idea. It is not surprising that progress received almost no discussion by lawyers and the attention of only a relatively small group of historians.

These subject matters can roughly be divided into two main groups. One relates to changes in politics, in a broad sense, which I shall refer to as *political-intellectual* progress. This contains the subject matter of knowledge, and social and political organization. The other relates to material changes, e.g., progress in technology and natural sciences. It is not an intellectual area, but rather an earthy, measurable one. I shall call this group *material* progress. We can identify a subgroup, progress in *welfare*, which is simply the maximization of welfare, quite a familiar theme to economic analysts of law. This subgroup fits either of the two kinds of progress. The two groups are the ones most mentioned by those who held the idea, and by students of progress.<sup>74</sup> The debate over progress is, to a large extent, the tension between the various kinds of progress. Does material progress imply or entail political-intellectual progress?

In the next section I argue that the Constitution incorporates both kinds of progress, but that copyright law is best understood in terms of *intellectual* progress, while patent law is best understood in

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<sup>70</sup> SIDNEY POLLARD, *THE IDEA OF PROGRESS: HISTORY AND SOCIETY* vii (1968); Don Price identifies two main groups of progress: of society, which is political freedom, and of science, which is material benefits. See DON K. PRICE, *THE SCIENTIFIC ESTATE* 1 (1965).

<sup>71</sup> Nisbet identifies these in Plato's *THE LAWS*. See Nisbet, *supra* note 4, at 29.

<sup>72</sup> Bacon's book is dated to 1605. It is telling to note the similarity of this title to the 1709 Statute of Anne, often considered the first modern copyright law. See *infra* note 128. For a discussion of Bacon's articulation of the idea of progress see Nisbet, *id.* at 112-115, and Spadafora, *supra* note 30, at 8, 21-22. It seems that Bacon was more interested in what Baillie named “earthy advancement,” but this was so because of his belief in science's larger implications, which are less earthy matters. See Baillie, *supra* note 39, at 100-103.

<sup>73</sup> See Baillie, *id.* at 156; Price, *supra* note 70.

<sup>74</sup> Ekirch points to this difference as well, though according to his report, the American version of progress is closer to the material, and the European version is closer to the political. See Ekirch, *supra* note 35, at 37.

terms of *material* progress. But we first note the influence of the idea in America.

#### D. *The Idea of Progress in Eighteenth-Century America*

In the 1770s, America knew a powerful intellectual turmoil that culminated in the Revolution and the formation of the Constitution. Why did the colonies revolt against Britain? Why did they, a decade later, decide to crown their successful independence with a written Constitution? Why did they come up with the Constitution as we know it? The answers to these questions are by no means simple. There are political, economic, cultural, psychological, religious, and probably many other explanations.<sup>75</sup> All these constituted a political context that enabled (or perhaps motivated) the Revolution and later the formation of the Constitution. Obviously, any attempt to discuss or even map all the intellectual themes and their relation to each other is far beyond the scope and needs of this paper. Louis Hartz aptly described the intellectual background of the late eighteenth century in America as an “ideological confusion.”<sup>76</sup> I focus on the idea of progress. This should not be understood as underestimating the substance, importance, or impact that other ideologies and intellectual sources might have had. Among these are legal sources, like the common law<sup>77</sup> and natural law;<sup>78</sup> religious sources, like New England Puritanism<sup>79</sup> and Hebraism;<sup>80</sup> and political sources, like the political theories of John Locke and David Hume,<sup>81</sup> radical English opposi-

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<sup>75</sup> Bailyn maps four major lines to the interpretation of the Revolution. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 3-9 (1967).

<sup>76</sup> As well as “ideological smoke,” LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 79, 86 (1955).

<sup>77</sup> Blackstone’s *Commentaries* was especially influential. See Hartz, at 47. A variation of this theme is “a constitutional perspective” of the ideological origins. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (Madison, Wis., 1995).

<sup>78</sup> The Declaration of Independence is the main evidence of this theme, though it has been criticized as irrelevant. See John Phillip Reid, *The Irrelevance of the Declaration in LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW* 46 (Hendrik Hartog ed., 1981).

<sup>79</sup> See WOODBRIDGE RILEY, *AMERICAN THOUGHT FROM PURITANISM TO PRAGMATISM AND BEYOND* (1915). Riley characterizes Puritanism as constituted of three elements: passivity, determination, and pessimism. The notion of Puritanism flourished in the seventeenth century, and was replaced in the following century by a deist belief, which was the complete opposite of Puritanism, and was constituted of activity, freedom, and optimism.

<sup>80</sup> Hebraism in the sense of a belief in the idea of being a “chosen people” that carries out a mission, especially in terms of the “New World” vs. the “Old World.” See Hartz, *supra* note 76, at 37. Interestingly, Hartz describes the Supreme Court as being the “Hebraic expositor of the American general will.” *Id.* at 208-209.

<sup>81</sup> For a discussion of political theories’ influence on the founders, see generally Thomas L. Pangle, *The Philosophic Understandings of Human Nature Informing the Constitution* in *CONFRONTING THE CONSTITUTION* 9 (Allan Bloom ed., 1990). For discussion of

tionist theories,<sup>82</sup> liberalism,<sup>83</sup> republicanism,<sup>84</sup> and various political economies.<sup>85</sup> And there was the Enlightenment, properly called the "deep background" of all the dramatic political changes.<sup>86</sup>

The idea of progress enjoyed a central role among these varying intellectual sources, but that does not mean it had the leading or dominant role. But it is progress's characteristic, that of being a general idea, that enabled it to fit all of these other ideas and enabled the founders to ask questions about the future. It enabled them to posit themselves on a continuous time line, aware of the past, but aware of the future as well, and enabled them to ask how they could improve life. As Professor Delmage notes, "It was natural for the political leaders of the time to apply the idea of progress to politics during this time."<sup>87</sup> The idea of progress enjoyed a wide support by the people too, not only by the political elite.<sup>88</sup> It was more popular in the New World than in the Old World, as a consequence of the major political changes that took place over a relatively short time, and as a result of the vast, rich land that was available.<sup>89</sup> The geographic factor indicates the close relation of the idea of progress in its American formulation

the influence of Locke, see generally MORTON WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* 11 (1978).

<sup>82</sup> Bailyn emphasizes the role of radical thought. See BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 34, *passim*, as well as Common Law (at 31), Puritanism (at 32), and social thought of English Civil War time (at 34). See also BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION*, *supra* note 75, at 38-39, 54, 57-58.

<sup>83</sup> Hartz presents the most forceful argument that celebrates the Lockean right-based theory as the single most important theme in the revolutionary era. For a criticism of this approach, see generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* (1969).

<sup>84</sup> Wood defines republicanism as "the ideology of the Enlightenment." See *id.* at viii. As he explains, "republicanism" is not a particular form of government, but "the elimination of a king and the institution of an elective system." *Id.* at 47.

<sup>85</sup> Charles Beard offered an economic interpretation of the Constitution, and argued that it was the product of self-interest-motivated politicians. His work was controversial, influential, and lastly repudiated, but nevertheless path breaking. See CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913). (For an evaluation of Beard's work, see the introduction to the 1986 edition, by Forrest McDonald).

<sup>86</sup> See Bernard Bailyn, *The Central Themes of the American Revolution: An Interpretation* in *ESSAYS ON THE AMERICAN REVOLUTION* 7 (Stephen G. Kurtz, James H. Hutson eds., 1973).

<sup>87</sup> Delmage, *supra* note 42, at 309. See also at 310 (the idea was widespread). See also Nisbet's discussion of progress in eighteenth-century America, *supra* note 4, at 193-203; Ekirch, *supra* note 35, at 25-26.

<sup>88</sup> Boorstin, *supra* note 28, at 77.

<sup>89</sup> The land was "available" in the eyes of the immigrants. For the differences of the idea of progress in its European origin and its American adaptation, see Ekirch, *supra* note 35, at 13, 37.

to the idea of the frontier: setting new challenges to be conquered by human beings.<sup>90</sup>

Thus, progress served as a fertile background and a catalyst for the dramatic political changes of the 1770s and 1780s. The pervasiveness of the idea is apparent in the Constitution. As much as it reflects Enlightenment thought,<sup>91</sup> so it reflects the idea of progress. This is the case in both the specific wording of the Constitution and in its general spirit, and actually in the idea of the Constitution itself.<sup>92</sup> The preamble of the Constitution declares as its first purpose "to form a more perfect Union." This carries in few words the essence of progress: human beings undertaking the task of perfecting their own lives.<sup>93</sup> Charles Beard points to the amending mechanism, established by the Constitution, as a reflection of its acceptance of progress.<sup>94</sup> Bernard Bailyn taught us that constitutions were understood by the colonists (in the process of becoming independent) "to be ideal designs of government. . . ."<sup>95</sup> This sense, that the social artifact we call law can, and in fact is, "a vital agency for human betterment,"<sup>96</sup> survives up to our time.<sup>97</sup>

What was the form of American progress? When the idea of progress was imported into the New World, it was still in the process of transformation into its more secular form. Thus, other than the belief in constant, gradual development towards a better human condition, progress was still partially religious and it was losing the feature of its inevitability. But as the idea was adapted to the newly discovered land, its content turned more and more towards the political-intellectual branch.

The settlers of the New World were, of course, religious, and the Calvinist ethos has quite probably influenced the shaping of the politi-

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<sup>90</sup> The classical work remains FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* (1920). See also Ekirch, *supra* note 35, at 25 (tying the ideas of progress and the frontier); see generally Mathiopoulous, *supra* note 27, chapter 9 (similar).

<sup>91</sup> "The Constitution is perhaps the greatest monument of the Moderate Enlightenment . . ." May, *supra* note 47, at 99, 100. See also Wood, *supra* note 83, at 606 ("The Constitution represented both the climax and the finale of the American Enlightenment . . .").

<sup>92</sup> See Delmage, *supra* note 42, at 312-314.

<sup>93</sup> For a different understanding of this goal, see MORTIMER J. ADLER, *WE HOLD THESE TRUTHS: UNDERSTANDING THE IDEAS AND IDEALS OF THE CONSTITUTION* 14 (1987) ("[ 'more perfect union' means] the indispensable condition of peace on this continent."). See also *id.*, at 16.

<sup>94</sup> In his introduction to Bury, *supra* note 28, at xxxvi, xxxviii. See also Delmage, *supra* note 42, at 312 (similar).

<sup>95</sup> Bailyn, *supra* note 34, at 230.

<sup>96</sup> Felix Frankfurter (1915), quoted in Bickel, *supra* note 25, at 20.

<sup>97</sup> Alexander Bickel described Legal Realism as a belief in "man-made progress," and the Warren Court as the child of "these Progressive realists." Bickel, *supra* note 25, at 19.

cal institutions.<sup>98</sup> But during the eighteenth century the pessimistic form of New England Puritanism was replaced by an optimistic Deist belief.<sup>99</sup> The latter allows more freedom than the deterministic Puritanism, and enabled human beings to think about the future as something they could shape, not just be subordinated to. The change in religious beliefs had taken place against the background of powerful intellectual competition: the Enlightenment.

Whether from religious belief or from the celebration of reason, man had been designated a new role in shaping the course of events. Thus, the framers could declare that the Constitution is meant to achieve a “more perfect Union”; thus they could accord Congress the power “to promote . . . Progress.” In the old, religious form of progress, it was obvious that man had no role in progress but that of a passive subject. Now men and women gained the power to control their lives. Man himself is the engine of progress. The language of the copyright clause shows the transitional stage of progress at the time; it suggests the inevitable feature of progress.<sup>100</sup> Progress happens by itself, but man is not a passive bystander. Progress can be aided.

The writings of the prominent founders also reveal their belief, quite strong at times, in progress. Consider the author of the Declaration of Independence, Thomas Jefferson.<sup>101</sup> He was a strong believer in the idea of progress.<sup>102</sup> It was a belief in both forms of progress: the political-intellectual and the material. The two were connected in Jefferson’s views and actions. He was an inventor himself and later a member of the first Patent Board.<sup>103</sup> This was the material progress. The political-intellectual progress was part of his mix of optimism, belief in the rationality of human beings, and a deep commitment to knowledge as a guarantor of happiness.<sup>104</sup> Jefferson understood knowledge to be the engine of democracy, and in fact, “[I]n the realm

<sup>98</sup> See MARCI A. HAMILTON, *THE REFORMED CONSTITUTION – REPRESENTATION, CALVINISM, AND CONGRESSIONAL RESPONSIBILITY* (forthcoming, 2001).

<sup>99</sup> See generally, Riley, *supra* note 79.

<sup>100</sup> For example, Blackstone held this view, though in his writing it still had a religious gloss. See Boorstin, *supra* note 28, at 78, 82.

<sup>101</sup> I will consider Jefferson as an example. There is a lot to be written about the place of the idea of progress in the political thoughts and actions of many of the other founders.

<sup>102</sup> See generally, EDWIN THOMAS MARTIN, *THOMAS JEFFERSON AND THE IDEA OF PROGRESS* (1941) (unpublished Ph.D. dissertation, University of Wisconsin). See also Ekirch, *supra* note 35, at 31-32.

<sup>103</sup> The Supreme Court has attributed to Jefferson great influence on the 1793 Patent Act, but Edward C. Walterscheid shows that the Court has created a “Jeffersonian mythology,” and overrated Jefferson’s influence. See Edward C. Walterscheid, *The Use and Abuse of History: The Supreme Court’s Interpretation of Thomas Jefferson’s Influence on the Patent Law*, 39 *IDEA: J. L. & TECH.* 195 (1999).

<sup>104</sup> Martin, *supra* note 102, at 140, 142-43, 316.

of government, Jefferson naturally identified the whole democratic principle with progress.”<sup>105</sup> Accordingly, he afforded great importance to education.<sup>106</sup> This was seen by him to promote the progress of knowledge. Thus he wrote: “I think by far the most important bill in our whole code, is that for the diffusion of knowledge among people”; “Reason and free inquiry are the only effectual agents against error . . .”; “[E]rror of opinion may be tolerated where reason is left free to combat it”; “No one, more sincerely wishes the spread of information among mankind than I do, and none has greater confidence in its effect towards supporting free and good government.”<sup>107</sup>

James Madison, in a famous passage, tied democracy and self-government to knowledge: “[A] popular government without popular information or means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power knowledge gives.”<sup>108</sup>

It is this close relationship of the Constitution and the idea of progress that emphasizes the meaning progress had at the time: it was *political* progress. The framers and other statespersons at the close of the eighteenth century understood progress as relating mainly to the social and political perfection and development of the union, to the continuous growth of knowledge. We will see this close relationship between progress and politics in the discussion of copyright law, in the next section.

The political content the framers read into progress does not mean that they were not impressed by technological advancements. In fact, they were fascinated by them. Jefferson was an inventor himself. But material progress and political progress were intertwined. In as far as the founders referred to the material aspect of progress, it was understood by them to be a precondition to the political structure: Jefferson and Franklin understood science to have “a liberating effect on the politics of all nations.”<sup>109</sup> This rich concept of progress is reflected in copyright law and constructs it.

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<sup>105</sup> *Id.* at 144.

<sup>106</sup> *Id.* at 321.

<sup>107</sup> Quotation from a letter in 1786, before the Bill of Rights was enacted. All the quotations in this paragraph are borrowed from Martin’s work. See Martin, *supra* note 102, at 208-209.

<sup>108</sup> THE WRITING OF JAMES MADISON 103 (1910).

<sup>109</sup> Price, *supra* note 70, at vii. See also Mathiopoulos, *supra* note 27, at 110-11, 226.

## II.

## THE INJECTION OF PROGRESS INTO COPYRIGHT LAW

By now, the early history of American copyright law has been relatively explored: the origins in the English Common Law, the (modest) colonial experience, and the constitutionalization of intellectual property. This section outlines the history of copyright law, from its English origins to its American adaptation in the Constitution. The argument here is that English copyright law was, at least until the end of the eighteenth century, more of a trade regulation than a political concept, but in its American incarnation the emphasis was switched: it was first a political idea and only second a trade regulation.<sup>110</sup> The politicization was achieved through the injection of the idea of progress into copyright law as its guiding concept.

*A. The English Origins of Copyright Law: Trade Regulation*

The conventional time line of American copyright law begins across the Atlantic Ocean, in sixteenth-century England. An earlier date and location can be attributed to the invention of movable type by Johannes Gutenberg in 1455,<sup>111</sup> and to the evolving printing industry of Venice in the second half of the sixteenth century.<sup>112</sup>

The main features of this history are along two lines. One is that copyright law started as ancillary to censorship, but slowly became an independent legal artifact. The second line is that the rights the law created were, at first, those of the publishers, and only later became authors' rights. These two transformations were completed before the adoption and application of copyright law in the colonies, and thus require only a short summary.

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<sup>110</sup> Professor Patterson identified four stages in American copyright law, and four main ideas. Each period emphasized a different idea, without excluding the other ideas. The four periods are marked by major events in the field: the states' laws, the Constitution, the Federal Act of 1790, and finally the case of *Wheaton v. Peters*, 8 Pet. 591, 33 U.S. 591 (1834). The four ideas are the protection of authorship, the promotion of learning, the regulation of the book trade, and the prevention of harmful monopoly. I am especially interested in the second period, the Constitutional period, and the dominant idea that Patterson found therein, namely the promotion of learning (at 180-81, 193). In the other phases, Patterson rates this idea to occupy second place (in the states' phase and the Federal Act) and third place (in *Wheaton*).

<sup>111</sup> Encyclopaedia Britannica, <http://www.britannica.com/bcom/eb/article/1/0,5716,39381+3,00.html> (last visited March 12, 2001).

<sup>112</sup> BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 43-48 (Public Affairs Press, 1967). See also Rose, *supra* note 7, at 9-11.

## 1. 1538-1694.

Copyright was an unintended outcome of monarchical control over the evolving printing industry.<sup>113</sup> Its early buds were in the 1538 establishment of a royal licensing system by King Henry VIII. The purpose was to prevent the publication of “naughty printed books.”<sup>114</sup> Two decades later, in 1557, Queen Mary issued a charter to the Stationers’ (printers’) Company.<sup>115</sup> She had one interest in mind, her own. The charter established a monopoly over the new book industry, and only a member of the company was allowed to print books. The licensing system and the monopoly were tools in the hands of the monarchs: their purpose was not so much a concern for the new industry, but for the stability of their regime. The monopoly created a convenient bottleneck where the content of the books and other printed articles could be examined. In other words, it enabled an effective censorship. The Stationers’ monopoly enabled the prevention of publication and dissemination of anything that might threaten the monarchy.<sup>116</sup> The company, however faithfully it followed the orders, channeled its power to its own benefit. The monopoly gave it a strong bargaining power vis-à-vis authors, who could not publish their works anywhere else; vis-à-vis the consumers, regarding prices; and vis-à-vis other printers who were not part of the company and booksellers who were not printers.<sup>117</sup> The last factor is especially important. The high cost of producing a book and the low cost of reproducing it resulted in copying and damage to the financial incentives of publishers.<sup>118</sup>

This censorship-motivated legal monopoly continued from 1557 to 1694, including the period of the English Civil War.<sup>119</sup> The sources

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<sup>113</sup> The common cradle of copyright and censorship was also the case in Venice. See Rose, *supra* note 7, at 11. The same was true in France. See Hesse, *supra* note 8, at 111-12. This was also the case in Jewish communities in fifteenth-century Italy. See NAHUM RAKOVER, *COPYRIGHT IN JEWISH SOURCES* 133, 136 (1991).

<sup>114</sup> See Encyclopaedia Britannica, <http://www.britannica.com/bcom/eb/article/8/0,5716,117358+23,00.html> (last visited March 12, 2001).

<sup>115</sup> The Stationers’ Company was established in 1403. For a thorough history of the Stationers, see CYPRIAN BLAGDEN, *THE STATIONERS’ COMPANY: A HISTORY 1403-1959* (Stanford, 1960). See also LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (Nashville, 1968), Ch. 3 at 28.

<sup>116</sup> See BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 3 (1967). See also Blagden; Patterson, at 36-41; Rose, *supra* note 7, at 12-13; PUTNAM, *THE QUESTION OF COPYRIGHT* 27, 114 (New York, 2d ed., 1896).

<sup>117</sup> Blagden, at 31-33, 63-64; Patterson, at 43; Putnam, at 9; Bugbee, *supra* note 112, at 51.

<sup>118</sup> See A.J.K. Robinson, *The Evolution of Copyright, 1476-1776*, 22 *CAMBRIAN L. REV.* 55 (1991).

<sup>119</sup> For discussion of the various legislation, see Blagden, at 40-46 (ordinances of 1559, 1562); 70-74 (decrees of 1566, 1586); 117-121 (decree of 1637); 145-147 (Parliament’s ordinances of 1643, 1649, 1652); 148 (Licensing Act of 1662); AUGUSTINE BIRRELL, *THE LAW*

of the institutionalized monopoly varied during this period. The royal charter was replaced first with decrees of the notorious Court of the Star Chamber (first issued in 1586), and then with the statute of monopolies (1624) and further decrees of the Star Chamber (1637). But the latter was abolished in 1641, when the Civil War began. For a short while, the book trade remained unregulated, but despite the violent political turmoil of those days, Parliament reinstated the licensing system (1643) and then produced a few orders against unlicensed printing.<sup>120</sup> It was at that time that John Milton published his famous *Areopagitica*, which is commonly taken to be a manifesto for free speech.<sup>121</sup> But it was narrower in its immediate purpose: to fight against the renewal of the Licensing Act.<sup>122</sup> Milton himself was “tolerant” only towards those with whom he agreed—for instance, Catholics did not enjoy his tolerance.<sup>123</sup> Later on, Milton himself became a licenser-censor.<sup>124</sup>

Under the Commonwealth, Parliament enacted the Licensing Act (1649) and the Printing Act (1653), which somewhat curtailed the Stationers’ power. When the monarchy was restored, the various legal sources were once again reenacted, this time in the Licensing Act (1662), which was renewed several times (in 1664, 1665, 1685, and 1693), until it finally lapsed, in 1694. The House of Commons refused to renew the Act. That refusal marked the beginning of a fifteen-year political debate, in which the Stationers’ lobbied for an act that would preserve their monopolistic power. They succeeded, or at least so they thought, when the Statute of Anne was enacted.<sup>125</sup>

## 2. *The Statute of Anne, 1709*

Since the 1640s there was a gradual demise in the Stationers’ power<sup>126</sup> and a growing divergence of censorship from the book trade.

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AND HISTORY OF COPYRIGHT IN BOOKS, 59-68 (South Hackensack, N.J., 1899); Patterson, Chapter 6 at 114. For a survey of the different acts see also GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT 26-38 (1847), and HARRY RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING, 1710 (1956).

<sup>120</sup> See Ransom, at 66-75.

<sup>121</sup> AREOPAGITICA (1644; Bandanna Books edition, Santa Barbara, Cal., 1992).

<sup>122</sup> *Id.* at 43-44.

<sup>123</sup> LEONARD L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 95-96 (Torchbook edition, 1963).

<sup>124</sup> PHILIP GAUNT, CHOOSING THE NEWS: THE PROFIT FACTOR IN NEWS SELECTION 24 (New York, 1990).

<sup>125</sup> For an account of the political struggle in 1694-1709, see Patterson, *supra* note 115, at 139-142; Ransom, *supra* note 119, at 90-92.

<sup>126</sup> Blagden, *supra* note 115, at 175-177; Rose, *supra* note 7, at 33; R. F. WHALE, COPYRIGHT: EVOLUTION, THEORY, AND PRACTICE 4-7 (Totowa, N.J., 1972).

To be sure, the censorial interests did not suddenly disappear: the state pursued them under a new legal avenue, that of libel. The publishers as well did not lose all the power gained since 1538, but the foundation of the regulation now was no longer the combined interests of the monarchy and the publishers. The publishers were on their own.

In 1709, the Statute of Anne was enacted.<sup>127</sup> Its long title read: "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times herein mentioned."<sup>128</sup> Its main instructions were the limitation of the Stationers' existing copyright to a period of 21 years, the awarding of new copyrights for a period of 14 years (with an option for renewal), and a registration requirement. Professor L. Ray Patterson analyzed the statute closely, and explained that it was aimed at regulating three monopolies created by the printing and licensing acts of the seventeenth century. These were the Stationers' monopoly, the monopoly of the booksellers within the Stationers, and the printing patent.<sup>129</sup> He concluded, accordingly, that it is better seen as a trade regulation than as a copyright act, at least as we understand the latter term today.<sup>130</sup>

This description is backed up both by the legislative history of the statute and by its subsequent interpretation. The titles of the bills that were considered after the lapse of the Licensing Act in 1694 indicate their regulatory content: "A Bill for regulating of printing and printing-presses" (1697), "An act for the better regulating of printers, and printing-presses" (1698), "A bill to prevent licentiousness of the press" (1703).<sup>131</sup> The repetitive failures of the printers to achieve their goal brought them to change their strategy. In 1709, the London Booksellers were allowed to present Parliament a bill to secure property,<sup>132</sup> which became the Statute of Anne. In this sense, it was a property law, rather than a trade regulation.

But, despite the statute's language providing for rights of *authors*, there is a consensus among scholars that this was a strategy taken by the printers to ensure their ongoing control of the industry, taking into consideration the common practice of the day that authors transferred

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<sup>127</sup> 8 Ann. c. 19 (1709). Some scholars mention the year of the statute as 1710. The confusion is caused by changes in the calendar. See Patterson, *supra* note 115, at 3.

<sup>128</sup> The full text of the statute can be found in Ransom, *supra* note 119, at 109. For a detailed history of the political and legal changes that concluded in the statute, see Patterson, *id.* at 143-150.

<sup>129</sup> See Patterson at 144.

<sup>130</sup> *Id.* at 14, 143, 150.

<sup>131</sup> *Id.* at 140-41.

<sup>132</sup> See Rose, *supra* note 7, at 42.

all their rights to the publishers.<sup>133</sup> This last fact indicates that there was not a real competition among the publishers.<sup>134</sup>

A series of legal disputes culminated in the definitive interpretation of the statute only 65 years later, when the House of Lords ruled, in the famous case of *Donaldson v. Becket*, that copyright is a statutory right, and thus is not perpetual.<sup>135</sup> But at its institution and until the 1774 *Donaldson* case, the Statute of Anne was understood merely as a trade regulation, rather than as a property law.<sup>136</sup> It was driven by trade concerns, and addressed them. *Donaldson* marks the failure of the Stationers' strategy. Their intentions—to use the author as a convenient hook for their interests—were not realized. A new legal status was established, that of an author.<sup>137</sup>

Another recent study challenges the common view that the Statute of Anne is the first copyright law. Brad Sherman and Lionel Bently argue that modern copyright emerged only as late as the mid-

<sup>133</sup> Patterson, *supra* note 115, at 147; Kaplan, *supra* note 116, at 8; Jaszi & Woodmansee, *Introduction*, in *THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 9, at 7; Jaszi, *supra* note 10, at 468-469.

<sup>134</sup> One scholar mentioned other factors that enabled the publishers to control competition, such as town planning laws, social security legislation, and industrial training regulations. See Peter Prescott, *The Origins of Copyright: A Debunking View*, 6 EIPR 453 (1989). He further suggests that the real motivation behind the publishers' interest was to prevent parallel imports from Scotland, where there were no copyright laws. Whether this suggestion is more accurate or not, it is clear that authors were just a pawn in the publishers' game. See *id.* at 454-455.

<sup>135</sup> *Donaldson v. Becket*, 4 Burr. 2408, 98 ER 257 (1774). These legal disputes are the main scene where the notion of the author was constructed, and they have deserved the close attention of the authorship project (see especially Rose, *supra* note 7, and his *The Author in Court: Pope v. Curl* (1741), in *THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 9, at 211). My purpose here is different. It is to lay the background for the injection of the idea of progress into American copyright law, toward the end of the eighteenth century.

<sup>136</sup> Mark Rose describes the Statute of Anne as the "reestablishment of copyright under the rubric of property rather than of regulation." (Rose, *AUTHORS AND OWNERS*, at 48). But this assertion should be read against the background of the authorship project, and more specifically, the notion of the romantic author; hence it is hindsight. Rose himself notes that the bill that later became the Statute "revealed its lineal relationship to the old Licensing Act of 1662" (*id.* at 42). The Statute established copyright as property only after the "author" was constructed.

<sup>137</sup> *THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 9, *passim*; WOODMANSEE, *THE GENIUS AND COPYRIGHT*, *supra* note 8; Rose, *supra* note 7. The construction of the notion of "authorship" was not unique to England, though in other European countries this socio-legal construction took different courses. The French Monarchy created a regulatory scheme, two years before the revolution, which acknowledged authors' rights. This regulation was deliberately meant to bypass publishers, to ensure better control over the writings. See Hesse, *supra* note 8, at 114. John Feather suggests that "it would be perverse to claim that authors' rights were widely recognized in pre-revolutionary England, it would be more accurate, although still perhaps a slight exaggeration, to suggest that they were dimly perceived." John Feather, *From Rights in Copies to Copyright: The Recognition of Author's Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries*, in *THE CONSTRUCTION OF AUTHORSHIP*, *supra* note 9, 191, at 208.

dle of the nineteenth century.<sup>138</sup> It was only then, they argue, that the Statute of Anne came to be understood as the origin of copyright law.<sup>139</sup>

In sum, English copyright law was born as ancillary to censorship and slowly diverged from it until it became an independent legal regime. But during the eighteenth century it was merely a regulation of the printing and publishing trades. Despite its title, “An Act for the encouragement of learning,” the Statute of Anne did not reflect a philosophical concept at the time of its enactment or until its definitive interpretation in 1774. A possible objection might point to the purpose of the statute, as declared in its title: it signals that the Act was no longer part of censorship. The answer to this objection is that the statute lacked a forward-looking vision. Its purpose was to look backwards, to regulate an already existing market, and to avoid the deficiencies caused by monopolies. But the title did carry the seed of the political conception of copyright, which emerged only once it was replanted in American soil.

### *B. The American Adaptation of Copyright Law: A Political Concept*

American copyright law was to be construed out of the English ingredients. Censorship was no longer one of these ingredients, and the construction of authorship was not yet completed. My argument here is that in the process of introduction of copyright law into the newly created American political system, it was also adapted, and its essence shifted. It was no longer just a trade regulation, but became a political concept. This concept is what the Supreme Court would call, a century and a half later, an “economic philosophy,” but it is a philosophy that operates within the wide framework of the idea of progress; there is more to it than that. It is not merely the general version of progress (a general idea) but rather what I called political-intellectual progress. This process of politicization of copyright law, through the injection of the idea of progress, took place during the 1780s, when the American constitutional system was invented. This section begins by outlining the timeline of American copyright law in the eighteenth century. I then go into details of events that injected the idea of progress into copyright law.

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<sup>138</sup> BRAD SHERMAN & LIONEL BENTLY, *THE MAKING OF MODERN INTELLECTUAL PROPERTY LAW: THE BRITISH EXPERIENCE, 1760-1911* (Cambridge, U.K., 1999).

<sup>139</sup> *Id.* at 207-08.

## 1. *The Colonial Period*

During the colonial period there had been little literary activity, and practically no legal protection for literary works, with one exception: a 1672 Massachusetts law, 38 years before the Statue of Anne.<sup>140</sup> The Articles of Confederation contained no copyright (or patent) clause. Copyright was to be dealt with by the states. Some state constitutions of the early 1780s addressed issues of encouragement of learning but did not create a copyright system. Connecticut was the first state to enact a copyright law, soon followed by Massachusetts and Maryland.<sup>141</sup> The state legislative activity was boosted by a 1783 congressional resolution, which resulted in a series of copyright laws in nine more states.<sup>142</sup> By the time the Constitutional Convention met in 1787, in Philadelphia, the framers had had this experience, as well as the English experience, and the delegates were lobbied by a group of prominent authors. The Convention composed the constitutional clause in its current form, and it was approved without debate. Shortly thereafter, in 1790, Congress passed the first federal Copyright Act.

This is the course of events that resulted in a federal system of copyright, with a constitutional anchor. Our view is focused on one decade, from 1780 to 1790. What follows is not an attempt to provide a comprehensive historical account, but rather a search for the understanding of copyright law, and I will show that it was a political concept, inspired by the idea of progress.

## 2. *State Copyright Laws*

Following a couple of private ordinances issued by the Connecticut state legislature, that state was the first to enact a general copyright law, which was to become a model for several other states.<sup>143</sup>

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<sup>140</sup> Bugbee, *supra* note 112, at 65-66; Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright* 29 WAYNE L. REV. 1119, 1171-1172 (1983). The Massachusetts 1672 Act did not, however, award the rights to the authors, but to publishers. Bugbee explains the 1672 law to be a general one, but its language ("in ansr to the petition of John Vsher, the Court [Mass. legislature is known today as the General Court] judgeth it meete to order, & be it by this Court ordered & enacted . . .") suggests that it was a "private" law, specifically granting protection to Usher.

<sup>141</sup> The text of these statutes can be found in the Library of Congress' COPYRIGHT LAWS OF THE UNITED STATES OF AMERICA 1783-1952 (Washington, D.C., 1952).

<sup>142</sup> The exception was Delaware. See Patterson, *supra* note 115, at 183-92; Bugbee, *supra* note 112, at 112-13. For a comparative discussion of these statutes, see Francine Crawford, *Pre-Constitutional Copyright Statutes* 23 BULLETIN OF THE COPYRIGHT SOCIETY OF THE USA 11 (1975).

<sup>143</sup> There seems to be some disagreement as to which states were influenced by the Connecticut statute. Bugbee found it influenced New Jersey, Pennsylvania, South Carolina, and North Carolina, as well as indirectly influenced Virginia, Georgia, and New York. Pat-

Another model was that offered by Massachusetts (and copied by New Hampshire and Rhode Island). These various statutes were all influenced, at least to some degree, by the Statute of Anne, and eight of these had explanatory preambles. The preamble of the Connecticut statute read:

Whereas it is perfectly agreeable to principles of natural equity and justice, that every author should be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings; which may do honor to their country, and service to mankind.<sup>144</sup>

And the preamble of the 1783 Massachusetts copyright statute read:

Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: As the principal encouragement such persons can have to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind . . .<sup>145</sup>

Both preambles carry two conceptual elements, but their order is different. The Connecticut statute explains and justifies copyright on the basis of “natural equity and justice.” This is a theory of natural rights. Only then does the preamble speculate (“may”) that this might benefit the public: copyright might encourage publication, which in turn might honor the country and “service humankind.” But it is quite clear that the public benefits are a consequence of the copyright, not its reason. Furthermore, the authors of the preamble sound somewhat skeptical about the causal linkage between the copyright and the public benefit.

The Massachusetts preamble, by contrast, starts with the public benefit. This is not Connecticut's skeptical view, but a confident declaration. The public benefit is spelled out: It is not just publication, and the national goal of “honor to the country” is absent. Rather, it is a lofty and general benefit that elaborates what Connecticut summarized in the vague term “service to mankind.” The public benefit according to the Massachusetts statute is worth repeating. It is “the improvement of knowledge, the progress of civilization, the public

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erson identifies the influence on Georgia and New York. This disagreement does not bear on the discussion here.

<sup>144</sup> Reprinted in Patterson, *supra* note 115, at 186-87.

<sup>145</sup> Reprinted in Patterson, *id.* at 187.

weal of the community, and the advancement of human happiness.”<sup>146</sup> The public benefit is spelled out as a justification for the copyright system established by the statute. This is also the first explicit mention of progress in connection with copyright in an official document. This public basis for copyright is coupled with an explicit natural-rights justification, but it is quite clear that this is an accompanying justification, and not a primary one.

The public emphasis in the Massachusetts statute should be read against the background of that state’s Constitution. The second section of the fifth chapter of the Massachusetts Constitution, written by John Adams, is entitled “The Encouragement of Literature, Etc.” and still reads as follows:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.<sup>147</sup>

This wide grant of power relates not only to intellectual property laws but also to direct state patronage. The goals, however, are the same in both cases. The most interesting point here is that literature and knowledge are regarded as a necessary means to achieve democratic ideals of protecting “rights and liberties.” This is a first place where we can note that knowledge is assigned a direct political purpose. It states that literature and the sciences are not cherished as ends in themselves, but as means to achieve democratic values. The specific and concrete means, of supporting the enumerated institutions, are ways to achieve the promotion of literature, science, and

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<sup>146</sup> *See id.*

<sup>147</sup> John Adams was surprised at the time by the unanimous approval of the Massachusetts legislature. These words, he later wrote, “I would not now exchange for a sceptre, and wish may be engraved on my tomb stone.” Letter to Benjamin Waterhouse, August 7, 1805. Reprinted in *STATESMAN AND FRIEND – CORRESPONDENCE OF JOHN ADAMS WITH BENJAMIN WATERHOUSE 1784-1822*, 22- 27 (W.C. Ford ed., Boston, 1927).

knowledge (which all have the same meaning), which is also an important stage in the creation, realization, and maintenance of the ultimate value: democracy.

Copyright law made its first steps in the independent states. But during the 1780s there were more signs that copyright was a national matter, a recognition that led to its inclusion in the Constitution. The first signal of this recognition was the Congressional resolution of 1783, mentioned above. The resolution itself recommends that the states enact copyright laws, and goes into some detail, such as the duration of the protection (14 years, with an option to renew), and was quite obviously influenced by the Statute of Anne.<sup>148</sup> It did have an interesting recommendation, that the copyright be limited to citizens of the United States. We have seen the national interest in the Connecticut preamble, and shall return to it shortly. The resolution does not offer a justification for the recommended laws. But we can find some hints in the preceding Congressional resolution, to appoint the committee that authored this recommendation. The committee was to consider “the most proper means of cherishing genius and useful arts through the United States by securing to the authors or publishers of new books their property in such works.”<sup>149</sup>

The resemblance of this resolution to the structure of the Constitutional clause is striking. Indeed, the main innovation of this resolution is that it is void of natural-rights language, and offers instead an economic basis for copyright law: the property rights accorded to individuals are the means to achieve the public interest. The public goal, though, is quite narrow: to cherish genius and useful arts. This resolution resulted in nine more states enacting copyright law within the next three years.

### 3. *Lobbying and Nationality*

This fertile legislative activity, as well as the constitutionalization of copyright which we are yet to observe, is attributed, *inter alia*, to a successful campaign of a few authors.<sup>150</sup> Chief among them was Noah Webster (1758-1843), first on the state level, and later at the federal

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<sup>148</sup> The resolution read: “Resolved, that it be recommended to the several states, to secure to the authors or publishers of new books the copyright of such books. . . .” Reprinted in COPYRIGHT LAWS OF THE UNITED STATES OF AMERICA 1783-1952, *supra* note 141, at 1. For the resemblance to the statute of Anne, see Patterson, *supra* note 115, at 183.

<sup>149</sup> Reprinted in Bugbee, *supra* note 112, at 112.

<sup>150</sup> For a skeptical view on the effect of this campaign, see Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of The Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1, 40-41 (1994).

one.<sup>151</sup> The lobbyists were petitioning not only for protection for their own rights. They supplemented their self-interest with a national interest.<sup>152</sup> The latter is interesting, for it carries a conception of copyright. The national argument is in fact composed of three separate arguments. One is the practical need for uniformity among the states, another regards the international arena, and the third is political, and thus the most interesting for our purpose.

The need for uniformity was simple and clear. It was a combination of efficiency and politics. Intellectual works crossed the borders of the states easily, and the states' statutes varied in their details, such as formalities and the duration of protection. There was a need for uniformity and for a central registration that would enable efficient protection (at the time, registration was compulsory in most states). The frequent travels of Webster and other authors to various states to petition for individual protection illustrated this need. This need was later acknowledged by Madison, in Federalist 43, where he wrote that "the states cannot separately make effectual provision for either of the cases [copyright and patent]."<sup>153</sup> This practical consideration enjoyed the obvious support of the federalists, for it helped their more general cause.<sup>154</sup>

The second prong of the national argument was politics on the international level. The new nation felt the need to show its independence, and that included cultural independence. We saw this line of argument in the preamble to the Connecticut copyright statute, which spoke of "honor to [the] country" as one of the reasons for establishing a system of copyright,<sup>155</sup> and in the Congressional resolution of 1783, which limited the protection to American citizens only. This was a strong theme in the authors' campaign. "America," Webster petitioned the Connecticut and New York legislators, "must be as

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<sup>151</sup> Bugbee, *supra* note 112, at 106; Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 371 (1992); RICHARD J. MOSS, NOAH WEBSTER (Boston, 1984); HARLOW GILES UNGER, NOAH WEBSTER: THE LIFE AND TIMES OF AN AMERICAN PATRIOT 55-57 (New York, 1998). Webster's biographers seem to share an admiration for their subject, and yield to his unofficial title as "father of American copyright legislation." See Moss at 7; see Unger at 108. The lobbying continued after the constitutionalization of copyright law, with the successful aim of a federal law. For some of the lobbyists' petitions, see the Library of Congress' COPYRIGHT IN CONGRESS 1789-1904, 112-115, 123, 125 (Thorvald Solberg ed., Washington D.C., 1905).

<sup>152</sup> Moss at 9, and note Unger's title of the biography.

<sup>153</sup> See James Madison, THE FEDERALIST NO. 43 (Everyman, William R. Brock ed., London, 1996) at 220.

<sup>154</sup> For discussion of this aspect see Donner, *supra* note 151, at 374; Walterscheid, *supra* note 150, at 24.

<sup>155</sup> See *supra* note 144.

independent in *literature* as it is in *Politics*, as famous of *arts* as for *arms*.”<sup>156</sup> In the decade following the Independence, this argument did not require elaboration. The new nation had to prove to the Old World, and presumably to itself, that it could stand on its own feet in the intellectual field.

There is yet another feature of the national argument, a political one, which, once again, is apparent in the powerful words of Webster: “An attention to literature must be the principal bulwark against the encroachments of civil and ecclesiastical tyrants, and American Liberty can die only with her Maecenases.”<sup>157</sup>

This is a clear articulation of the new spirit that was injected into American copyright law, one that is deeply tied to its political essence. Literature was understood to be an instrument to ensure liberty. It was understood to be an essential weapon against tyranny, whether by a government or a religious institution. Webster directly tied copyright to strengthening liberty. We thus see that the justification for copyright law was articulated as a legal tool to achieve a public goal. It was not only the general statements found in the preambles of the states’ statutes, for it touched directly upon the essence of the American spirit of independence and of the Constitution to come.

The lobbyists, then, argued simultaneously for the national good and for their own interests. This convergence of interests conveyed another message, which was not otherwise explicit in their arguments, and perhaps they did not even notice it. It was the basic structure of copyright law as we know it today: that to achieve the public good, the law should aim at private interest.

The political motivation with its democratic content is one of the pillars of the original understanding of American copyright law. This pillar constitutes the essence of the constitutional language that emphasizes the public. I now turn to the Constitution itself.

#### 4. *Constitutionalization*

Historians of American copyright law do not know much about the making of the constitutional clause, and most of what we have is historical interpretation, or at times, speculation.<sup>158</sup> The direct evi-

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<sup>156</sup> Bugbee, *supra* note 112, at 108. See also Webster’s petition to the general assembly of Connecticut, printed in Moss, *supra* note 151, at 6.

<sup>157</sup> Quoted in Bugbee at 108. Gaius Cilinius Maecenas was a Roman patron of the arts in the days of Augustus, during the first century B.C.

<sup>158</sup> The speculations point to the large number of lawyers among the delegates to the Convention, and their state-legislative experience. From this they deduce a familiarity with the state copyright laws. See Walterscheid *supra* note 150, at 29 (describing his own method as a speculation).

dence as to actual adoption of the clause is not quite informative. What we do know is that the delegates of the Constitutional Convention were presented with two quite similar proposals, one by James Madison and the other by Charles Pinckney, a delegate from South Carolina.<sup>159</sup> The proposals were for a grant of power to the Congress, and distinguished patents from copyrights.<sup>160</sup> The proposals were referred unanimously to the Committee of Detail,<sup>161</sup> and New York's delegate David Brearley presented the clause on September 5, 1787, in the form we are familiar with today. It was unanimously approved. The convention held its discussion behind closed doors, so we have no information about it. The only direct evidence is Madison's notes, but these do not include reports of the discussion held by the Committee of Detail, only its final proposal:<sup>162</sup>

The Congress shall have Power . . . 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.<sup>163</sup>

We do not know what the immediate reasoning for this particular formation and wording of the clause was.<sup>164</sup> Its second part, that which elaborates the means to achieve the goal ("by securing . . ."), resembles the Continental Congress's charge to a committee to draft a resolution in 1783.<sup>165</sup> But the final proposal had at least three novel elements in comparison to previous copyright law. One is the decision to combine the power to enact patent legislation with the power to protect copyrights.<sup>166</sup> A second new element was the elimination of publishers from the picture. The last innovation, but most relevant for our purposes, was the explicit invoking of the idea of progress. This might seem a minor and irrelevant point to contemporary constitutional interpreters, but progress was a buzzword at the time. Though

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<sup>159</sup> Bugbee, *supra* note 112, at 126. There seems to be a posthumous credit debate between Madison and Pinckney, with no definite victory of either. See Bugbee at 127; Walterscheid, *supra* note 150, at 25, 44-51.

<sup>160</sup> See 1787: DRAFTING THE UNITED STATES CONSTITUTION 904-905 (Wilbourn E. Benton ed., Vol. 1, 1986). Madison's proposal read: "To secure to literary authors their copy rights for a limited time." Pinckney's proposal read: "to secure to authors exclusive rights for a certain time."

<sup>161</sup> Bugbee, *supra* note 112, at 126.

<sup>162</sup> See DRAFTING THE UNITED STATES CONSTITUTION, *supra* note 160, at 928.

<sup>163</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>164</sup> See Walterscheid, *supra* note 150, at 34. Walterscheid argues, for example, that the means of creating (or securing) copyright rights was chosen simply because it was the cheapest way to achieve the goal.

<sup>165</sup> See Bugbee, *supra* note 149.

<sup>166</sup> This coupling has caused much confusion and, subsequently, attempts to dissect the clause. There are numerous confusions, and almost any possible combination of "science and useful arts" is attributed to copyright and to patents.

its insertion was surely no accident, we do not know precisely why the word entered the constitutional clause. "Progress" did not appear in either Madison's or Pinckney's proposals, nor did it appear in the Continental Congress's resolution of 1783. The English origin of American copyright law was also not its source. The only explicit mention of progress prior to the constitutionalization of copyright law is found in the 1783 Massachusetts Copyright Act.<sup>167</sup>

In the remainder of this section, I argue that the Constitution reflects both material progress and political-intellectual progress, but that copyright reflects the latter alone.

### 5. *Useful Arts and Science*

Scholars, dissecting the the constitutional clause, attribute "useful Arts" to patents only, and reserve "Science" for copyright.<sup>168</sup> There is evidence for this distinction beyond the text of the Constitution. The patent statutes referred to useful arts,<sup>169</sup> Congress indicated a similar understanding,<sup>170</sup> and so did the courts.<sup>171</sup> We can reach the same conclusion based on the essence of patents, and their difference from copyright. One of the earliest requirements for according an invention the status of a patent is its utility,<sup>172</sup> dating back to the first patent acts of the 1790s.<sup>173</sup> This might not be the most important requirement, and it "plays only a minor role as a requisite to patentability,"<sup>174</sup> but copyright law never had this requirement or a similar one. In fact, copyright law rejected useful articles as its subject matter. In the areas of "pictorial, graphic, or sculptural works," courts struggle to separate the utilitarian function of works from their expressive features, and protect only the latter.<sup>175</sup> The 1976 Act explicitly excludes "procedure, process, system, method of operation" from copyright protection, as

<sup>167</sup> See Patterson, *supra* note 149; see also LOUIS ADAMS FROTHINGHAM, A BRIEF HISTORY OF THE CONSTITUTION AND GOVERNMENT OF MASSACHUSETTS 25-26 (Boston, 1916).

<sup>168</sup> MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A], at 1-66.7, n. 1; Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 32 J. PAT. OFF. SOC'Y 83, 84 (1950).

<sup>169</sup> See, e.g., the first Patent Act of 1790, titled Acts to Promote the Progress of Useful Arts (codified as amended at 35 U.S.C. § 101).

<sup>170</sup> See, e.g., H.R. Rep. No. 82-1923 (1952) (House Report accompanying the 1952 Patent Act).

<sup>171</sup> See, e.g., *Application of Bergy*, 596 F.2d 952 (C.C.P.A. 1979).

<sup>172</sup> See 35 U.S.C. § 101. See also Patent & Trademark Office Utility Examination Guidelines, 60 Fed. Reg. 36263-02 (1995).

<sup>173</sup> See *Lowel v. Lewis*, 15 F. Cas. 1018, 1019 (Cir. C., D. Mass. 1817) (Story, J.).

<sup>174</sup> MARTIN J. ADELMEIN ET AL., CASES AND MATERIALS ON PATENT LAW 183 (St. Paul, Minn., 1998).

<sup>175</sup> See, e.g., *Mazer*, *supra* note 22 (works of art that are incorporated as designs of useful articles are copyrightable); *Kieselstein-Cord v. Accessories By Pearl, Inc.*, 632 F.2d

well as works that “portray[ ]” a “useful article[ ] as such.”<sup>176</sup> Courts have distinguished the utilitarian from the expressive.<sup>177</sup>

The constitutional clause applies progress to “useful Arts” (as well as to “Science”). I suggest we view it as relating to what I called *material progress*. The patent system is meant to achieve the prosperity of humankind. Inventions that make life more comfortable, save labor, time, and money, are all useful arts—and of course so are inventions that can save lives. They promote the “weal of the public.” This reflects the belief that better technology improves the human condition.

But the more relevant term for us is “Science.” It is obvious that it exceeds the relatively narrow range of the natural sciences such as medicine, chemistry, and physics. At the end of the eighteenth century, “‘science’ was synonymous with ‘knowledge’ and ‘learning.’”<sup>178</sup> The titles of many of the Copyright Acts during the past 200 years make this point. The first act (1790), for instance, was titled “An Act for the encouragement of Learning.”<sup>179</sup> Learning, recall, was the subject matter of copyright ever since it diverged from censorship. The title of the Statute of Anne states that it was for “the encouragement of learning,”<sup>180</sup> even though the statute itself, as we saw, was merely a trade regulation, and did not reflect deeper concepts, despite this title.

So the subject matter of progress, to be achieved through the system of copyright law, was knowledge. In the Massachusetts preamble’s list of public goals, “improvement of knowledge” is the first, followed by “the progress of civilization.” Recall Webster’s advocacy. He brought up liberty, and copyright as an instrument to secure it. This understanding of copyright law as related to knowledge was crystallized in the Constitution, with its enumerated goal, “to promote the Progress of Science.” A clear endorsement of this understanding is found in the events that preceded the first Copyright Act, enacted in

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989 (2d Cir. 1980) (introducing the test of “conceptual separability” to distinguish ornamental aspects of belt buckles from their utilitarian function).

<sup>176</sup> See 17 U.S.C. § 102(b); § 113(b), and definition of “useful article” in § 101.

<sup>177</sup> See, e.g., *Clayton v. Stone*, 5 F. Cas. 999, 1003 (Cir. Ct., S.D.N.Y., 1829). The Court of Appeals found that a publication in a newspaper cannot be worthy of copyright protection, because of its “mere temporary use” (compare this statement to the contemporary treatment of momentary storage in a computer RAM as “copying”). But for our purposes, it is a distinction the court made that is of interest: “The title of the act of congress is for the encouragement of learning (2 Bior. & D. Laws, 104 [1 Stat. 124]), and was not intended for the encouragement of mere industry, unconnected with learning and the sciences.”

<sup>178</sup> Walterscheid, *supra* note 150, at 51; Lutz, *supra* note 168, at 84.

<sup>179</sup> The statute can be found in *Copyright Laws supra* note 141. (1 Stat. 124); See also *Patterson, supra* note 115, at 197; Bugbee, *supra* note 112, at 141; Wilma S. Davis, “Foreword: Bulletin Nos. 13, 14, and 15 of the Copyright Office,” xi (Washington D.C., 1980).

<sup>180</sup> See *Ransom, supra* note 128.

1790, one year after the Constitution was ratified. This Act was the result of President George Washington's address to Congress. His address is worth reporting at length. I insert numbers to facilitate the discussion that will follow:

[T]here is nothing which can better deserve your patronage than the promotion of science and literature.

[1] Knowledge is, in every country, the surest basis of public happiness.

[2] In [a country] in which the measures of government receive their impression so immediately from the sense of the community as in ours, it is proportionably essential.

To the security of a free constitution it contributes in various ways:

[3] By convincing those who are intrusted with the public administration that every valuable end of government is best answered by the enlightened confidence of the public;

[4] and by teaching the people themselves to know and to value their own rights; [5] to discern and provide against invasions of them;

[6] to distinguish between oppression and the necessary exercise of lawful authority . . . [7] to discriminate the spirit of liberty from that of licentiousness, cherishing the first, avoiding the last, and uniting a speedy but temperate vigilance against encroachments, with an inviolable respect to the laws.<sup>181</sup>

The House echoed: "[T]he promotion of science and literature will contribute to the security of a free Government,"<sup>182</sup> and two weeks later enacted the first federal Copyright Act. We can find in Washington's address the belief in the importance of knowledge to the community [1]. Knowledge is not only good, but is essential. The second point Washington made for the importance of knowledge touches upon the structure of the political system. He acknowledged the importance of knowledge in facilitating the flow of information between the governed and the government. This proposition clarifies what it was that Washington addressed. It was not knowledge in an abstract form, but rather in a concrete substance, i.e., information, and the role he assigned information was to facilitate the self-government of the people.<sup>183</sup>

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<sup>181</sup> President Washington, Address to both Houses of Congress (Jan. 8, 1790), *reprinted in* THORVALD SOLBERG, *COPYRIGHT IN CONGRESS, 1789-1904* at 115-116 (1905) (layout of the text edited). Washington mentioned a few measures to promote learning: "aids to seminaries . . . institution of a national university or by any other expedients."

<sup>182</sup> *Id.* at 117-118.

<sup>183</sup> See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government*, *reprinted in* POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965). It is striking to compare these ideas to more recent political thought that explains why and how information is a vital element of self-government.

Washington then listed a few points to make the case for the importance of knowledge to a “free constitution,” i.e., to the political system. The first [3] is that knowledge serves as a check on the public administration. The remaining points [4-7] are that knowledge is an instrument to protect liberty. This echoes Webster’s argument in favor of literature as a safeguard for liberty. Webster mentioned literature as the subject matter of the copyright system he was advocating.<sup>184</sup> Washington replaced literature with knowledge as the subject matter of copyright. This is an instrumental view: that knowledge plays a role in protecting human liberties.

Learning and knowledge are thus to be understood as essential to the ultimate goal of creating and sustaining an informed citizenry that constantly engages in a project of deliberation. The more citizens engage in the public discourse, the better the quality of the collective deliberation. The notion of learning is deeply tied to basic ideas that constitute our contemporary understanding of democracy: self-government of the people and participation in the common project of democracy on equal terms.<sup>185</sup>

Here we are interested in more than the words. We are interested in what they stand for; it is the conception of copyright law that we are searching for. We saw the possible conceptual candidates that the framers had. They could treat copyright law as a trade regulation, like the Statute of Anne. They could treat it as a natural right, as did, to some extent, some of the pre-constitutional state statutes. They had two models for doing so: as a primary justification (Connecticut), or as a supplement to another conception (Massachusetts). They also had a different basis to anchor and justify copyright: as a tool to achieve a public goal. This justification relied on the seeming paradox that the pursuit of private interest results in public good. This is how the system of copyright had worked in England until that day; this is what the lobbyists’ efforts taught the framers, and they had the support of the recent economic theory of Adam Smith, published in 1776. The framers also had a wide array of public interests they could think of: a practical need for uniformity, a federalist agenda, an interest in showing England that the new nation was culturally independent. And there was another range of public goals, candidates for the justification of copyright, best expressed in the Massachusetts statute: “the

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<sup>184</sup> See *supra* note 156.

<sup>185</sup> For current articulations of these ideas of democracy, see Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 63 (Joshua E. Rosenkrantz ed., 1999); OWEN M. FISS, *THE IRONY OF FREE SPEECH* 3 (Cambridge, Mass., 1996) (collective deliberation).

improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness.”<sup>186</sup> I think all four purposes should be read as synonymous or at least as mutually supporting; each implies and reinforces the others. Improved knowledge is a progress of civilization, which promotes the public weal and results in advancement of human happiness (recall also the Declaration of Independence’s “pursuit of happiness”). We also saw some more concrete content to these rather abstract goals: that copyright promotes knowledge, and knowledge is a guarantor of liberty.

We should also place this specific set of possible conceptions against the historical background: it was a time of establishing a new social instrument, the most important one. We should also recall the intellectual background, which we have surveyed earlier, and recall its tremendous influence upon the framers. Ideas of enlightenment, rationalism, Republicanism, Calvinism, political ideas derived from Locke and Adam Smith, as well as the influence of the common law, natural law, and a wide range of other political theories—all were in the air. The idea of progress was one of those floating around.

The framers chose the basic structure of “private vice—public good,” and so eliminated the natural law tones. The act of constitutionalization itself indicates the importance of the public goal, and that the purpose of trade regulation was reduced to at most a secondary consideration. It is quite implausible that a mere trade regulation would have found its way into such a prominent document, especially when trade was already covered by the Commerce Clause.<sup>187</sup> As for the content of the “public good”: the federalization of copyright itself indicates acceptance of the need for uniformity. There is no mention of the narrower political goals, of honor to the country and political independence, but, in a sense, these goods are a by-product of the entire constitutional project.

Out of all the possible options, the framers encapsulated the public goal in one term: “to promote the Progress of Science and useful Arts.” With one phrase they shaped American copyright law for centuries to come, and the shape was that of progress. We have seen the main features of the idea of progress as it was understood at the time. The copyright clause reflected all these features. The copyright system, once rid of natural law tones, is not a mechanism to preserve the past. It does not look backwards. Rather, it fixes its vision straight ahead. The copyright is not an award based on a past event (creation

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<sup>186</sup> See *supra* note 145.

<sup>187</sup> “The Congress shall have Power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” U.S. CONST. art. I, § 8, cl. 3.

by author) but a tool to achieve a goal yet to come. Thus, the copyright system is sensitive to the temporal dimension and implicitly (but clearly) rejects a cyclical view of human progress. The direction of the progress is clear: it is for the better. The goals of improving knowledge, the weal of the public, the advancement of human happiness, and of course “Progress” all indicate that there is a better future lying ahead.

The newly created system is devoid of any religious tones. Once man can promote progress—and does so by creating a system designed to achieve it—God or any other external force is cast out of the picture. Man alone is responsible for the progress, and thus progress can be promoted. This secularization goes hand in hand with eliminating remnants of a natural rights theory. The Lockean theory of natural rights, which could easily explain copyright at the time, was religious in its content.<sup>188</sup> Locke’s theory begins with the proposition that “’tis very clear, that God, as King David says, . . . *has given the Earth to the Children of Men*, given it to Mankind in Common.”<sup>189</sup> The Constitution as a whole does not refer to religious beliefs as a relevant source. Compare it to the religious tone of the Declaration of Independence, thirteen years earlier (“that all men are *created* equal, that they are endowed by their *Creator* with certain inalienable Rights . . .”).<sup>190</sup> Copyright law is part of the less religious Constitution.<sup>191</sup>

We have seen that the idea of progress as such is a general idea, capable of many particular kinds of content. Which is the one that the Constitution reflects? Textually, it is “Science and useful Arts.” Copyright has “knowledge” as its subject matter, and we have seen that it is a term loaded with political meaning, not a mere equivalent to “learning.”

But progress, as a general idea, is also rather vague, and as such does not guide us much in the daily application of copyright law. However, it can host other ideas which can provide the fine-tuning. In the next section, I show how progress is a lively concept in contemporary copyright law, that it can guide us directly, at least in some areas, and that it comfortably hosts other theories.

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<sup>188</sup> I say “at the time,” for today it is implausible to think of unoccupied public domain that can be ripped of its status, based on the Lockean theory.

<sup>189</sup> Locke, *supra* note 13, at 288, § 25 (emphasis in original).

<sup>190</sup> THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) (emphasis added).

<sup>191</sup> I say “less,” for obviously the religious beliefs of the framers were among the factors that shaped their views, and thus are necessarily inserted into the Constitution, albeit indirectly. For an argument about Calvinist influence, see Hamilton, *supra* note 98.

## III.

## PROGRESS IN CONTEMPORARY COPYRIGHT LAW

The idea of progress has gone almost unnoticed by copyright lawyers. Its importance in the eighteenth century makes a contemporary neglect of the idea somewhat surprising. One might argue that progress is a dead idea.<sup>192</sup> But I think the opposite is true. Progress is overlooked not because it is dead, but because it has become an integral part of our thought. There might be lively debates as to whether humankind has actually progressed. We still suffer from uncured illnesses, there are “natural” disasters that we do not know how to cope with, human-made wars are not a past phenomenon, and there are many other wrongs to be corrected. But there seems to be a wide agreement that technology has progressed. Copyright law, which regulates aspects of progress, has absorbed the idea probably more than any other social institution.

In this section my goal is, first, to show that the idea of progress controls much of our thought about copyright law. The gist of the idea of progress in contemporary copyright law resides in two metaphors: that of dwarfs standing on the shoulders of giants, and that of building. Second, I want to show that progress is a useful concept in the operation of copyright law. It has a restraining role that protects us against the self-interest of some parties, and it has a positive role in constructing copyright doctrines. I will briefly discuss the fair use defense and the idea/expression dichotomy in this connection.

*A. Dwarfs, Giants, Building, and Progress*

Two metaphors enjoy wide admiration in copyright law (and patent law), especially by commentators. The two are related, in that they seem to convey the same idea. The first is the “dwarfs on giants’ shoulders” metaphor, or as it has become known, *On The Shoulders Of Giants*, or simply OTSOG.<sup>193</sup> The other is the notion of “building.”<sup>194</sup> A close examination reveals that these metaphors are invoked quite randomly, in support of different arguments, to serve as authorities for applying different doctrines in different ways. In this sense, the metaphors are a tool in the hands of the author (whether a judge, a litigant, or a scholar) to produce meanings while creating an impres-

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<sup>192</sup> See JAMES J. BERNARD, *THE DEATH OF PROGRESS* (1973).

<sup>193</sup> ROBERT K. MERTON, *ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT* (Chicago 1993).

<sup>194</sup> A simple search in Westlaw produced 96 law review articles with one formulation of the dwarfs metaphor. No doubt, there are many articles that are not posted in Westlaw, and there are numerous other formulations of the metaphor.

sion that the meanings are well established.<sup>195</sup> Whatever else the metaphors might contain, they embody the idea of progress. This is progress in its general, rather abstract form. *Lotus Dev. Corp. v. Paperback Software Int'l*<sup>196</sup> serves as an example for this kind of use of the metaphor. The district court faced the metaphors, and noted that the premise they reflect “has long been a virtually unchallenged premise” and “is also firmly established in our case law.”<sup>197</sup>

Let us look into the metaphors and the way in which they convey the idea of progress.

### 1. OTSOG

There is a subtle but fierce academic battle going on in copyright law scholarship, and it all takes place in footnotes of law review articles.<sup>198</sup> It is a search for the earliest source of the OTSOG metaphor, and there could not be a better illustration for the metaphor than this search itself. Let us then look at the unfolding of the sources of the metaphor. We owe this tracing of the origins of the metaphor to Robert Merton’s wonderful inquiry. He is the winner—for the time being—of the competition (and he is not a lawyer).<sup>199</sup>

The best known formulation of OTSOG is attributed to Isaac Newton, who wrote in 1675: “If I have seen further[,] it is by standing on [th]e sho[u]lders of giants.”<sup>200</sup> The physical constellation that the metaphor compels us to imagine is at once majestic and mystifying. Giants belong to an immortal and enchanting land of imagination. But where are the dwarfs? George Herbert had them in the picture thirty years before Newton: “A dwarf standing on a gyant’s shoulder sees further than the two.”<sup>201</sup> So now we have the dwarfs as well. They make the picture less scary. They add color and a figure we can identify with more easily. But where did Newton’s first-person pronoun come from? Seeking for the answer takes us 500 years before Herbert

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<sup>195</sup> The metaphor I just used contains the romantic view of the author: the author who struggles over her work, sweats in its production (and “sweat” is another buzzword in copyright law), and finally manages to produce, on her own, a work. There is much doubt as to the extent this notion accurately reflects copyright law.

<sup>196</sup> 740 F. Supp. 37 (D. Mass. 1990) (holding that menu command structures of computer programs and their presentation on the screen are copyrightable).

<sup>197</sup> *Id.* at 77.

<sup>198</sup> The unofficial declaration of the competition can be found in Chafee’s use of the metaphor, in the text of his article, without attribution to a source. See Chafee, *supra* note 7, at 511.

<sup>199</sup> See Merton, *supra* note 193. See also MATEI CALINESCU, *FACES OF MODERNITY* 15-16 (1977); Foster E. Guyer, *The Dwarf on the Giant’s Shoulder*, 45 MODERN LANGUAGE NOTES 398 (1930).

<sup>200</sup> In a letter to Robert Hooke, February 5, 1675; Merton, *supra* note 193, at 8-9.

<sup>201</sup> Merton, *id.* at 13.

and Newton. John of Salisbury reported that his mentor, Bernard of Chartres, wrote (or said) sometime before 1126 (the original book was lost): "In comparison to the ancients, we stand like dwarfs on the shoulders of giants."<sup>202</sup>

We now have it all: here we are, today, only dwarfs, who on our own behalf are only short-sighted, standing on the shoulders of creatures of the past, who were far more far-sighted than we are. But by standing on their shoulders, which is relying on the knowledge they acquired, we can see even further ahead. Portraying ourselves, contemporaries, as dwarfs vis-à-vis the giants of the past might be understood at first blush as modesty: They were great, we are not.<sup>203</sup> Pointing to our reliance on the giants of the past is a way of apologizing for anything we do differently, for anything we dare to change. Changing is not rebelling against the predecessors' authority. On the contrary, relying on them is precisely what enables and allows us to change. This explains why actors operating within strict systems of authority invoke the metaphor. One such system is the legal one.<sup>204</sup>

Of course, we should not fall for this show of modesty. It is but a nice way to disguise the novelty and rebellious nature of the deviations from the authority. This is no surprise to common law lawyers. We are trained to read judicial opinions with skeptical eyes, searching for the deviations from binding precedents that are not defined explicitly. Distinguishing a case, limiting it to its facts, and other common techniques are subtle manipulations. When faced with the direct accusation of not following binding precedents, courts invoke, *inter alia*, the OTSOG metaphor. They admit the deviation but at the same time

<sup>202</sup> Merton, *id.* at 40, 177.

<sup>203</sup> Guyer argues that this was the main use of the metaphor prior to the "battle of the moderns and the ancients." He consents, however, that the element of priority was not absent either. See *supra* note 199, at 399.

<sup>204</sup> This is not exclusive to the common law system. We thus find a prominent Jewish Italian thinker in the early thirteenth century writing, regarding the power of precedent in Jewish Law:

"I heard from the philosophers[: they] asked the greatest among them [the following: ']we admit that the former [scholars] were smarter and more educated than we are[,] and we admit that we talk about them and contradict their sayings in many places and the truth is among us[.] [H]ow is this possible[?]', and he told them[: ']who sees further[:] the dwarf or the giant[,] i.e., the giant whose eyes are fixed higher than the dwarf, and if you seat the dwarf on the shoulders of the giant, who sees further[?], i.e., the dwarf, whose eyes are now higher than those of the giant's, so are we dwarfs, hanging onto the giant's shoulders[,] and because we saw their wisdom, and add to it from their wisdom we [derived our own] wisdom to say all that we do, and it is not that we are greater than them. . . .[?]"

YISHA'YA DE'TRANI, TSHUVOT HARY"<sup>D</sup>, 75 (Abrham Y. M. Vertheimer ed., Jerusalem 1975) (my translation).

refuse to dismiss the authorities, and turn to “new facts,” or some other change.<sup>205</sup>

In common law as in copyright law, OTSOG serves as a reminder of the idea of progress. Legal systems are binding and authoritative. Systems of knowledge do not have (in most cases) such formal power. But both systems reflect the idea of progress. It is the feature of cumulative, gradual change over time, aiming at what the actors hope is the better. Those who first invoked the idea of progress in post-Renaissance Europe, or at least revived it,<sup>206</sup> faced a problem similar to the one that faces jurists in a common law system. This is the famous “Battle of the Ancients against the Moderns,” which took place in France and England in the seventeenth century.<sup>207</sup> It was a debate on authority: Who has the final say? The ancients had one obvious advantage: they were first in thinking, writing, inventing, and creating. They also enjoy the glamour of antiquity. Being first seems to be a knockout. But the moderns can rely on their predecessors’ work, and devote time and effort to *further* thought. If so, the moderns can reach greater achievements than the ancients did (and indeed, the moderns thought so). They were able to correct the ancients’ mistakes and claim moral superiority (and any other kind of superiority).<sup>208</sup> That too looks like a knockout.<sup>209</sup> So who wins the battle? The idea of progress resolves the problem, using the OTSOG metaphor. It ties the moderns’ success in overcoming the ancients to the ancients them-

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<sup>205</sup> See for example Justice O’Connor’s struggle to explain the deviation from *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and her conclusion that “[t]o overrule prior law for no other reason than that [current views, while no change in facts or the understanding of facts] would run counter to the view repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.” Notice, once again, that the rule of overruling is itself the product of precedents.

<sup>206</sup> See the debate as to the origins of the idea, Mathiopoulos, *supra* note 27.

<sup>207</sup> See Bury, *supra* note 28; Spadafora, *supra* note 30, at 22; Nisbet, *supra* note 4, at 151-156. Jonathan Swift, who gained fame with *Gulliver’s Travels* (now that’s a story about giants and dwarfs!) published in 1704 the “Full and true account of the battle fought last Friday between the ancient and the modern books in Saint James’s library,” which can be found in *A TALE OF A TUB* (Oxford, 2d ed., 1973). In discussing copyright, it is impossible not to mention that Swift was himself accused of copying the book from French sources. See the introduction by A. C. Guthkech and D. Nichol Smith, *id.* at xlix-l. But, later on, Swift was directly involved in lobbying for authors’ rights (vis-à-vis publishers) when a copyright bill was discussed in 1737, in Parliament. See Donald Cornu, *Swift, Motte, and the Copyright Struggle: Two Unnoticed Documents*, 54 *MODERN LANGUAGE NOTES*, 114 (1939).

<sup>208</sup> Calinescu, *supra* note 199, at 26-35.

<sup>209</sup> Dwarfs, I am informed by the Oxford dictionary, are “small beings with magic powers.” I did not find any place where the OTSOG metaphor mentioned the magical power, but it might be implicit in our thought. This power, after all, is how dwarfs manage to overcome the might of the giants.

selves, so both sides win. Knowledge is a joint venture of past, present, and future generations of creators. The battle and its peaceful resolution are embodied in the metaphor, and, thus, the idea of progress is carried by it. The frequent application of the metaphor in copyright law reflects the pervasiveness of the idea in copyright law and reinforces it. We should note, too, that there is no divinity in the giants-and-dwarfs picture.

## 2. *Building*

The building metaphor is not as vivid as the OTSOG one, but it is powerful nevertheless.<sup>210</sup> It is the notion that a second author builds upon the work of the first author (or inventor, for that matter).

Intellectual (and artistic) progress is possible only if each author builds on the works of others. No one invents even a tiny fraction of the ideas that make up our cultural heritage. . . . Every work uses scraps of thought from thousands of predecessors. . . .<sup>211</sup>

And “[c]opyright law has always recognized and tried to accommodate the fact that all intellectual pioneers build on the work of their predecessors.”<sup>212</sup> The same idea is also conveyed without the direct appeal to building. An 1845 decision explained:

In truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before.<sup>213</sup>

There are numerous references to this notion.<sup>214</sup> The building metaphor, like its companion OTSOG, reflects the idea of progress. It

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<sup>210</sup> Architecture offered itself as a metaphor in legal thought a long time ago. Oliver W. Holmes wrote over a century ago that “Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house,” *The Path of Law*, 10 HARV. L. REV. 457, 477 (1897). Spatial metaphors are quite common in discussions of computers (“desktop,” “windows,” “drag,” “open,” “close,” etc). See STEVEN JOHNSON, *INTERFACE CULTURE* (New York, 1997). Not surprisingly, designing the law of the Internet is often described through the metaphor of architecture. See, e.g., LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (New York, 1999).

<sup>211</sup> *Nash v. CBS, Inc.*, 899 F.2d 1537, 1540 (7th Cir. 1990) (Easterbrook, J.).

<sup>212</sup> *Whelan Assocs. v. Jaslow Dental Laboratory*, 797 F.2d 1222, 1238 (3d Cir. 1986), cert. denied, 479 U.S. 1031 (1987).

<sup>213</sup> *Emerson v. Davies*, 8 F. Cas. 615, 619 (C.C. D. Mass. 1845).

<sup>214</sup> For a few examples in modern cases, see *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 352 (1991); *Hoehling v. Universal City Studios, Inc.*, 618 F. 2d 972, 980 (2d Cir. 1980); *American Geophysical Union v. Texaco*, 60 F.3d 913, 940 (2d Cir. 1994) (Jacobs, J., dissenting); *White v. Samsung*, 989 F.2d 1512, 1517 (9th Cir. 1993) (denial of rehearing) (Kozinski, J., dissenting). The metaphor is pervasive among commentators as well. See, e.g., Wendy J. Gordon, *On Commodifying Intangibles*, 10 YALE J. L. & HUMAN. 135 (1998).

portrays intellectual work as a process of gradual, cumulative change over time. The building metaphor is more neutral in its characterization than OTSOG. All authors, former and contemporary, are portrayed in an equal setting, except for the different times in which they operate. There are no giants and dwarfs. So second authors cannot pretend to be modest, and former ones do not enjoy an *ex ante* respect. The building notion gets rid of another feature of the OTSOG metaphor. The latter sees the world in two modes only: now and then. There are only contemporary dwarfs and past giants. The building metaphor, in this sense, is richer. Every author just lays a brick (or perhaps a few bricks). Seeing the human enterprise through the building metaphor reminds us that time is not static. The builder of yesterday did not begin from zero either. She too laid her bricks on already existing ones. The current author too lays his bricks, but these will serve as a basis for future builders. The OTSOG metaphor fails to convey the understanding that she who is the dwarf today might become the giant tomorrow.

Earlier I asked, What progress do we want so much to promote? We can now paraphrase: What exactly is it that we are building? The repetitive use of the building metaphor fails to ask this question. But if we do not pay attention to what it is that we are doing, we might end up, not with a Taj Mahal, but with a Tower of Babel or a Berlin Wall. Towers, we now know, might collapse, and walls restrain freedom.

In sum, the pervasiveness of these two metaphors in copyright law and our thought about it makes them the most obvious ambassadors of the idea of progress in the land of contemporary copyright law. They convey all the major characteristics of the idea: the advancement, over time, toward a better condition, where the advancement is slow, gradual, and cumulative, directed by man and not God.

### B. *Progress in Operation*

On its own, the idea of progress is a general idea. A skeptical reaction might be that the idea is simply empty, that it does not say much, and does not inform us how to operate.<sup>215</sup> Think of the two metaphors we just examined. They are more likely to be invoked by defendants in copyright cases than by plaintiffs. The modesty that the OTSOG metaphor communicates, when uttered by a dwarf who is a later author, classifies the use of the metaphor as a defense argument.

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<sup>215</sup> Umberto Eco is perhaps more generous in his attitude to the OTSOG aphorism, when he suggests that the debate should concentrate not on the meaning of the aphorism itself (thus, implying that there is such a meaning), but rather on the meaning in various contexts. See his introduction to Merton, *supra* note 193, at xv.

One commentator, writing for the Practising Law Institute, mentioned OTSOG as the first strategy for defendants in fair use cases.<sup>216</sup> Put in OTSOGean,<sup>217</sup> we would say that we would like to ensure free access to the giants' shoulders to as many dwarfs as possible, to enable all of us to see further ahead. This would imply minimal protection for previous authors. Or in the terms of the building metaphor, when we look at it from the point of view of the second author, we would conclude that bricks should be as accessible and available as possible, to enable further building.

But plaintiffs can put their spin on these stories quite easily. The metaphors are flexible and elusive enough to allow this. Think of it from the point of view of the first author, the plaintiff. We would like to assure that she will engage in the project of building in the first place, or, in OTSOGean, we would like to make sure she will bother to climb on the high shoulders of some giants, not an easy task. To do so, we should guarantee her enough protection.

Judge Easterbrook addressed both these possible views:

Once a work has been written and published, any rule requiring people to compensate the authors slows progress in literature and art, making useful expressions "too expensive," forcing authors to re-invent the wheel, and so on.<sup>218</sup>

This is the second author's claim. The first author's claim is that

to deny authors all reward for the value their labors contribute to the works of others also will lead to inefficiently little writing, just as surely as excessively broad rights will do. The prospect of reward is an important stimulus for thinking and writing. . . . Before the first work is published, broad protection of intellectual property seems best; after it is published, narrow protection seems best. At each instant some new works are in progress, and every author is simultaneously a creator in part and a borrower in part. In these roles the person has different objectives. Yet only one rule can be in force.<sup>219</sup>

In this sub-section I would like to counter the skeptical view that the idea of progress is empty, and show that the idea is helpful in at least two ways. One is that it serves as a warning against the infiltration of improper conceptions into copyright law—namely, against a

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<sup>216</sup> Richard Lehv, *Fair Use Strategies*, in PATENTS, COPYRIGHTS, TRADEMARKS, AND LITERARY PROPERTY COURSE HANDBOOK SERIES (Practising Law Institute, Nov. & Dec., 1997) 497 PLI/P at 403.

<sup>217</sup> Merton offers a whole dictionary based on OTSOG. See *supra* note 193, at 275.

<sup>218</sup> Nash, *supra* note 211.

<sup>219</sup> *Id.*

proprietary conception.<sup>220</sup> Another way is that progress has an active role in designing copyright doctrines.

### 1. *Progress as a Constraint*

The idea of progress can serve as a powerful reminder of the constitutional principle of copyright law.<sup>221</sup> It is a forward-looking ideal. The past has no importance per se and is relevant only in as much as it is part of the tools copyright law applies. The forward-looking position of the idea of progress thus serves as an additional reason for rejecting the proprietary conception of copyright law. The latter conception is the argument that copyright law is just a case of property, when understood against the background of a natural rights theory or a strong libertarian view. A proprietary view looks to the past, and to the past only. It decides the entitlement based on some event or events that took place in the past. This could be an act of investing labor, or an act of embodiment of one's personality in a physical object.<sup>222</sup> Under a proprietary conception, any goal of the law is simply irrelevant. The temporal feature of the idea of progress reminds us that there is a continuum.

The idea of progress also conveys a message about the way knowledge is created. The proprietary view and the economic analysis of copyright law (which operates within the regulatory conception of copyright law but emphasizes the legal instrument rather than the goal) focus on the first stage, creation.<sup>223</sup> They insulate that stage from those that follow. They do not ask how knowledge is disseminated and used. The idea of progress reminds us that knowledge is created by many participants along the march of time. It is a cumulative process, and the advancement is gradual. Thus, understanding copyright law through the lenses of progress should remind us of this process. Instead of focusing on the creation of the "original" work by the first author, we should remember that the plaintiff is not necessarily the first author. She almost certainly has built on the work of her predecessors, as they did before her. The plaintiff is not the first link in the chain, but rather she is somewhere along it.

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<sup>220</sup> For the distinction between a "regulatory" conception of copyright law and a "proprietary" conception thereof, see Patterson and Lindberg, *supra* note 15.

<sup>221</sup> For a similar use of the idea of progress as a constraint, though with different emphasis, see Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights in Information*, 15 BERKELEY TECH. L. J. 535 (2000).

<sup>222</sup> According to the theories of Locke and Hegel, respectively.

<sup>223</sup> See Landes & Posner, *supra* note 23.

This view reminds us of the importance of maintaining a public domain.<sup>224</sup> If we put thorns on the shoulders of the giants, no dwarf will be able to stand there and see further. If we do not allow new builders to place new bricks on the already existing ones, the whole project of the building will be slowed. Of course, the idea of progress encompasses the need to reward authors for their creations. The giants will be provided with protection, so they have an incentive to look far ahead. The builders will be provided with sufficient incentive so they lay their bricks in the first place. But progress reminds us that the bricks are there for a reason. They are part of our common building.

Margaret Chon complains that courts feel that progress is relevant only when they recognize an enforceable right. She writes that when courts find a particular slice of knowledge is not covered by a copyright or patent, their opinions seem unable to name the "Progress" project. The denial of property rights in knowledge is often accompanied by a rhetorical omission, as if it is almost counterintuitive to suggest that "Progress" of knowledge is furthered by a finding of no copyright or patent right.<sup>225</sup>

She adds that "all of us who think and write about intellectual property are coping with an omission: the missing project of 'Progress.'"<sup>226</sup> Progress can help us in coping with intellectual property, and in a manner that reinforces our commitment to the regulatory conception of copyright law and, within it, to the view that does not forget the *use* of the protected works.

## 2. *Progress as a Guiding Principle: Fair Use*

The idea of progress can play a more active role in designing copyright law. This role is especially apparent in the important doctrine of the fair use defense. The defense allows non-owners to use the expression of a copyrighted work in their work, but only as long as the user satisfies the four factors enumerated in § 107 of the Copyright Act.<sup>227</sup> In what follows, I briefly show how progress can inform us in articulating the fair use defense.

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<sup>224</sup> The traditional definition of the public domain includes all the elements which are not copyrightable, like ideas, facts, works whose copyright protection has lapsed, etc. See Jessica Litman, *The Public Domain*, 39 EMORY L. J. 965 (1990). Yochai Benkler includes also elements that are copyrightable, but whose use is allowed due to an exception or defense, like fair use. See also *Free As the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999).

<sup>225</sup> Chon, *supra* note 4, at 104. See also at 110.

<sup>226</sup> *Id.* at 113.

<sup>227</sup> See 17 U.S.C. § 107.

Most of the scholarly writing about the fair use defense tries to determine its scope and to instruct us as to its best application. But, surprisingly, there is little written about its justifications.<sup>228</sup> The various Senate and House Reports that accompanied the revision bills that culminated in the 1976 Act simply stated that the codification of the defense “is intended to restate the present judicial doctrine,” repeated over and over again that the doctrine should remain flexible,<sup>229</sup> and endorsed “the purpose and general scope of the judicial doctrine.” The defense’s purpose is hardly discussed. It remains assumed.<sup>230</sup> Judicial engagement with the defense was only somewhat more generous in its discussion, and addressed the underlying justifications of the defense only in passing.<sup>231</sup> The lack of discussion is surprising, for one would expect that a 150-year-long (if not longer) debate, sometimes a heated one,<sup>232</sup> would seek guidance in the underlying principles of the debated subject. This, however, is rarely done. Without a clear vision of why exactly we have the doctrine, there should be little wonder that its content is so much debated. In the sporadic discussion that does address this issue we can identify two main justifications. One explains the doctrine in light of general goals of copyright law, against the background of an economic analysis. A second justification is based on a legal fiction borrowed from the law of contracts: the doctrine of implied consent.

The fair use doctrine is often justified as serving the same goals as those of copyright law in general.<sup>233</sup> This is a general justification, for it tells us that the defense serves the general goals of copyright law.

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<sup>228</sup> There are some notable exceptions. See, for example, William W. Fisher, *Reconstructing the Fair Use Defense*, 101 HARV. L. REV. 1659 (1988); Wendy J. Gordon, *Fair Use as a Market Failure: A Structural and Economical Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982).

<sup>229</sup> See, e.g., H.R. Rep. 2237, 89th Congress, 2d Sess. 58 (1966).

<sup>230</sup> An exception is Alan Latman, *Fair Use of Copyrighted Material—Study No. 14* (1958), 86th Cong. 2d Sess. (1960).

<sup>231</sup> It has been said that Justice Story, in his important decision in *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1839), “failed to articulate the purpose of his inquiry.” See Harvey S. Perlman & Laurens H. Rhinelander, *Williams & Willkins Co. v. United States: Photocopying, Copyright, and the Judicial Process*, 1975 SUP. CT. REV. 355, 381.

<sup>232</sup> See the debate about the scope of fair use in the digital environment that took place in a special forum, initiated by the Working Group on Intellectual Property Rights, which was one of the branches of the Information Infrastructure Taskforce (IITF) formed by President Clinton in 1993. See BRUCE A. LEHMAN, THE CONFERENCE ON FAIR USE—FINAL REPORT (Washington, D.C., 1998) (CONFU Report).

<sup>233</sup> See, e.g., *Basic Books, Inc. v. Kinko’s Graphics Corporation*, 758 F. Supp. 1522, 1529-1530 (S.D.N.Y. 1991) (“The copyright law, through the fair use doctrine, has promoted the goal of encouraging creative expression and integrity by ensuring that those who produce intellectual works may benefit from them.”) See also Perlman and Rhinelander, *supra* note 231, at 380 (describing fair use as balancing “the proprietary rights of author against the public interested in access to information”).

This can be described negatively as a check within the copyright machine (or engine): “[The defense] permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster.”<sup>234</sup>

Not stifling creativity is one feature of the general justification. This rationale assumes (correctly) that copyright law’s purpose is to foster creativity. In some articulations of this rationale, the “not stifling creativity” element is omitted, and thus the defense is portrayed as a *positive* mechanism. In this version, the justification simply repeats the purpose of copyright law: “The fundamental justification for the privilege lies in the constitutional purpose in granting copyright protection in the first instance, to wit, ‘To promote the Progress of Science and useful Arts.’”<sup>235</sup> The same reasoning has been adopted at the district level.<sup>236</sup> These negative and positive articulations are two sides of the same coin. Thus, fair use is an integral part of promoting creativity and assuring that it is not stifled. But in fact this rationale does not say much more than that.<sup>237</sup> It needs an injection of substance to become meaningful.

One such injection comes from the economic analysis of copyright law. Under this view, the market for copyrighted works might suffer some failures. The economic analysis detects these situations and attempts to correct them.<sup>238</sup> Fair use, under this rationale, is such an attempt. In a seminal work, Professor Wendy Gordon argued that “fair use should be interpreted as a mode of judicial response to market failure.”<sup>239</sup> She points out instances of such failures. High transaction costs are one of these situations. When, because of various costs, a transaction does not take place, the defense should allow the transaction to be executed, the price for the use being zero. We can include under this heading all costs of facilitating a transaction: initiating con-

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<sup>234</sup> Iowa State University Research Foundation, Inc. v. American Broadcasting Company, Inc., 621 F. 2d 57, 60 (2d Cir. 1980), adopted by the Supreme Court in *Stewart v. Abend*, 495 U.S. 207, 236 (1989); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 596, 577 (1994).

<sup>235</sup> *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1996).

<sup>236</sup> *Love v. Kwitny*, 706 F. Supp. 1123 (S.D.N.Y. 1989). See also U.S. Congress, Office of Technology Assessment, *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION* 54 (Washington, D.C., 1986) (noting that fair use “has the express purpose of fostering the values of the cultural and political realms”).

<sup>237</sup> See Henry S. Hoberman, *Copyright and the First Amendment: Freedom or Monopoly of Expression?*, 14 PEPP. L. REV. 571, 580-581 (1987) (The justification of fair use as promoting the progress of science provides little guidance.).

<sup>238</sup> The compulsory license scheme is an example of an attempt to correct a perceived market failure. See 17 U.S.C. § 111(d) (secondary transmission by cable television); § 115 (making and distributing phonorecords).

<sup>239</sup> Gordon, *supra* note 228, at 1605.

tact with the user, negotiating the transaction and, if necessary, enforcing it.<sup>240</sup> A single author does not have the resources—information, time, and money—to take any of these steps. This is so of most intellectual works: literary works, music, works of fine art, computer software—especially when the use is widely dispersed. Once a musician records her work and distributes it (assuming she keeps the rights), she cannot possibly know of any unauthorized copying or use in any college dormitory, in a New Orleans club, in an East Village bar, on a local radio station in Nebraska, let alone in similar places in Lisbon, Sidney, Beijing, Tel Aviv, or Buenos Aires, so she is unable to initiate negotiations. And even if she knew, our musician lacks the resources to do much about it. And even if she were a person of means, it would not be practical to do much: the cost of the transaction would dramatically exceed the expected revenue. From the owner's point of view, then, transaction costs affect the enforceability of the right.

But today we have legal as well as technological solutions to market failure of this kind. Technology, especially in digital works, makes it possible to block access to “unauthorized” use. The law now provides an additional layer of protection to the copyrighted works (and to uncopyrighted ones as well) in the form of a prohibition of circumvention of these technological devices.<sup>241</sup> In addition, contracts can be used as a legal mechanism to stop the leaking of unauthorized use.<sup>242</sup> The problem with these new legal and technological tools is that they enable owners of copyrighted works to block access and use of works that are in the public domain, as well as some unprotected elements of their works, like the ideas and facts that they embody. If we put all the justificational eggs of the fair use defense in the market basket, we are likely to pay an unintended and high price in terms of free speech concerns and in terms of progress as well.

The second justification that is mentioned to explain the existence of the fair use defense is founded on the legal fiction of implied consent.<sup>243</sup> This version of the justification searches for the consent in a particular case. This reasoning may permit fair use in certain circumstances, but these circumstances turn out to be quite narrow. The con-

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<sup>240</sup> For Gordon's articulation of this problem see *id.* at 1628. See also Landes & Posner, *supra* note 23, at 357-358 (1989).

<sup>241</sup> See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

<sup>242</sup> See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). For a critical analysis, see Niva Elkin-Koren, *Copyright Policy and the Limits of Freedom of Contract*, 12 *BERKELEY TECH. L. J.* 93 (1997).

<sup>243</sup> Latman notes that this rationale is “frequently fictitious.” See Latman, *supra* note 230, at 31. See also 4 *NIMMER ON COPYRIGHT* § 13.05.

tractual configuration is a legal fiction that is limited by its own definition: when the consent cannot be inferred, it will not be available.<sup>244</sup> A more sophisticated version of this justification is that the consent is part of a “bargain” between the public and the author: the author agrees, at the time that she requests legal protection, to allow “fair” use.<sup>245</sup> We could describe this in yet another way. Authors, behind a veil of ignorance, would agree to some use of copyrighted works, for they know that their own creative work necessarily builds on the already existing work of others. Not knowing their future position, they would agree to allow limited use.<sup>246</sup> This version in fact echoes the progress justification, which I shall discuss shortly. Economic analysis might also explain this willingness to allow limited use. Landes and Posner, for example, explain why publishers are better off if they allow book reviews. The case for good reviews is obvious, but Landes and Posner explain that publishers, as a group, are better off, *ex ante*, allowing all reviews, good or bad, since without fair use, publishers would have control over reviews, and the reviews would lose their credibility.<sup>247</sup> Such explanations might provide reasonable answers in some situations, like book reviews, but they cannot explain why copyright owners would agree, *ex ante*, to uses, like parodies and satires, that are far less likely to leave them better off.

These justifications might explain certain aspects of the fair use defense, but each on its own is rather limited in its instruction. The idea of progress offers a stronger justification for the defense. It overarches the ones just discussed, and eliminates their internal limitations. The progress justification ties the fair use defense to the abstract goals of copyright law and adds the spin of the idea of progress. When the creative process is understood as a cumulative, ongoing building project, it is obvious that copyright law should facilitate and enable this process and remove any obstacles in its way. Access to existing work is a necessity. Access is required to enrich the future builders, so that they will not have to reinvent the wheel. It is also required as the raw material for the new knowledge. A brick in the wall stands on other bricks, and cannot be placed in thin air. Complete ownership over knowledge will prevent new builders from joining the project.

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<sup>244</sup> Latman notes that this rationale fails as an overall basis of the defense. See Latman, *supra* note 230, at 7, 31. For an example of such a failure, see *Henry Holt & Co. v. Liggett Myers Tobacco Co.*, 23 F. Supp. 302, 304 (E.D. Pa. 1938). (A tobacco advertisement quoted a physician’s book about the human voice. The court refused to find the use fair, explaining that “it cannot be implied that Dr. Felderman consented to the use of his work for such a purpose.”)

<sup>245</sup> For this version see Latman, *supra* note 230, at 7.

<sup>246</sup> The “veil of ignorance” is of course borrowed from John Rawls.

<sup>247</sup> See Landes & Posner, *supra* note 23, at 359.

Not being able to lay their bricks on the existing bricks, they will not be able to contribute to the project of knowledge. This would obstruct the building, and thus stifle the process of creation. The fair use defense reflects the understanding that, in some circumstances, access to and use of expression, not only of ideas, is required for the continuous building. The following comment of the Sixth Circuit is typical: “[F]air use . . . [is] based upon the principle that subsequent workers in the same field are not deprived of all use thereof, as, otherwise, the progress of science and the useful arts would be unduly obstructed.”<sup>248</sup> This explanation of the defense is apparent also in the *Latman Study*, which was adopted as the official legislative history of the defense.<sup>249</sup> Professor Latman pointed to the need for a “certain degree of latitude” in the use of copyrighted material for the sake of “progress of science and useful arts,” based on the necessary “step-by-step” progress.<sup>250</sup>

A direct consequence of the progress justification is the requirement that the purported fair use should be “productive,” or as Judge Pierre Leval reformulated it, “transformative.”<sup>251</sup> If the second use does not add some value to the first, and is only duplicative, no new brick has been added to the building. The building project is not interested in more bricks of the same kind, but rather in *new* bricks. The building is vertical, not horizontal. This preference is the difference between quantity and quality. The idea of progress is interested in the latter, and is indifferent to the former, at least as long as it does not disturb the qualitative dimension.

The law, in the role of supervising the building project, should also make sure that the builders are motivated to lay any blocks in the first place. This is the familiar incentive aspect of copyright law. Had I known that someone would reproduce “my” block without adding any value to it, and without my permission, I would have thought twice about placing it to begin with.<sup>252</sup> The law assures me that this will not happen. So, according to this line of thought, subsequent use will enjoy the fair use defense only if it adds new value to the already existing work. The added value is the progress.

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<sup>248</sup> *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943).

<sup>249</sup> *Latman*, *supra* note 230.

<sup>250</sup> *Id.* at 7 (introducing the rationale); 30-31 (emphasizing the “practical necessity” of a step-by-step progress). See also Leon R. Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 214 (1954) (weaving all justification into one); Lloyd L. Weinreb, *Fair Use and How it Got That Way*, 45 J. COPYR. SOC’Y. 634, 638-39 (1998) (discussing the justification through the nineteenth-century treatise of Eaton Drone).

<sup>251</sup> See Pierre N. Leval, *Towards a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

<sup>252</sup> In other words, a non-transformative use causes authors greater harm than a transformative use. See Landes & Posner, *supra* note 23.

### 3. *Progress as a Guiding Principle: The Idea/Expression Dichotomy*

Copyright law protects only expressions and prohibits protecting ideas. The dichotomy is now codified in the Copyright Act.<sup>253</sup> The statutory definition, which excludes ideas from the scope of coverage of copyright law, is based on the strong intuition that ideas should be free. Perhaps because of this intuition and its self-evidentiary power, there is little writing about the rationale for the dichotomy.

The dichotomy is one of the cornerstones of copyright law. It was established over a hundred years ago, in the case of *Baker v. Selden*.<sup>254</sup> The Court explained:

The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. But this object would be frustrated if the knowledge could not be used without incurring the guilt of piracy of the book.<sup>255</sup>

The Court identified the communication of knowledge as the purpose of copyright law, and from this goal it deduced the limitation of copyright's subject matter. It should cover only the expression of ideas and leave the ideas themselves free, with no tags of ownership attached. *Baker* thus emphasized the communication of knowledge, its transmission from its creator to its user. This explanation appeals to our intuition that ideas are the essence of knowledge, and hence, if knowledge is valued, ideas should remain beyond the reach of copyright law.

The dichotomy has a second justification, which is best expressed in Justice Brandeis' words: that knowledge and ideas are "free as the air to common use."<sup>256</sup> This can be read either as a description of the impossibility and impracticality of controlling ideas, or as a normative judgment, or as both. The description relates to the (meta)physical feature of ideas as a public good. Ideas are non-excludable and non-rivalrous. It is impossible to exclude unauthorized uses of ideas, and each use does not diminish the value of the idea. The normative judgment derives from the communication rationale of the dichotomy, and from the progress rationale. We want ideas to remain free, for we value their importance in the creation of knowledge.<sup>257</sup> If we pause to query why we value knowledge so much, we are likely to come up

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<sup>253</sup> 17 U.S.C. § 102(b).

<sup>254</sup> *Baker v. Selden*, 101 U.S. 99 (1879).

<sup>255</sup> *Id.* at 103.

<sup>256</sup> *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). See also *Holmes v. Hurst*, 174 U.S. 82, 86 (1899) ("The right thus secured by the copyright act is not a right to the use of certain words, because they are the common property of the human race, and are as little susceptible of private appropriation as air or sunlight. . . .").

<sup>257</sup> For a normative reading of this rationale, see Benkler, *supra* note 224.

with democratic values. Knowledge is also valued per se, but it is the engine of an informed polity, which governs itself through a collective deliberation. In this sense, knowledge is the nerve system of our democracy. It connects the various organs into one whole, and is crucial for their best functioning.

Another rationale, close to the *Baker* one, accepts the basic intuition, but wishes to anchor itself in a broader theoretical framework of knowledge. This is the project of the idea of progress. It is a project of cumulative building of knowledge over time. The relevance to the idea/expression dichotomy is obvious: each contributor to progress necessarily relies on knowledge achieved by predecessors. Had ideas been protected, everyone would have had to start from zero.<sup>258</sup> This would be counterproductive and costly.<sup>259</sup>

An articulate statement of this view is Judge Jon Newman's:

It is a fundamental objective of the copyright law to foster creativity. However, that law has the capacity both to augment and diminish the prospects for creativity. By assuring the author of an original work the exclusive benefits of whatever commercial success his or her work enjoys, the law obviously promotes creativity. At the same time, it can deter the creation of new works if authors are fearful that their creations will too readily be found to be substantially similar to preexisting works. The idea-expression dichotomy . . . is an effort to enable courts to adjust the tension between these competing effects of copyright protection.<sup>260</sup>

The dichotomy, then, finds a solid theoretical base in our understanding of the knowledge process. This, in turn, is best understood in the framework of the idea of progress.

### CONCLUSION

This paper has been a thought experiment, and has offered an old, yet new, way to think of copyright law. I suggest that we look at copyright law as a legal space that addresses the knowledge process: the creation, dissemination, and use of knowledge. From this assumption, we can infer that copyright law holds a view of the process it regulates. It must have a conception of how knowledge is created, otherwise it is meaningless. There has been one major attempt to explain

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<sup>258</sup> For a different expression of this idea, see 4 NIMMER ON COPYRIGHT § 13.03[B][2][a].

<sup>259</sup> See Landes & Posner, *supra* note 23, at 347-48 (arguing that legal protection for ideas would increase the cost of creation and reduce the number of works created). Landes and Posner also argue that while copyright protection for ideas will accelerate the development of new ideas, it will reduce their dissemination. *Id.* at 349.

<sup>260</sup> Warner Bros. v. American Broadcasting Companies, 720 F.2d 231, 240 (2d Cir. 1983).

this conception, the authorship project. According to that project, copyright law is obsessed with a vision of a romantic author. The authorship project can claim only partial success as a description, for there are forms of collaborative authorship that the law acknowledges, which the project cannot explain. Nor can the authorship project explain the minor place of moral rights in the United States.

I offered the progress project instead—that we understand copyright law as a reflection of the idea of progress. This is the view that knowledge is created in a gradual, step-by-step process over time, by many participants. The knowledge is not just accumulated, but it moves humankind toward a better future, in which the sky is the limit. I then made a double claim—that the idea has shaped American copyright law, and that it still enjoys a dominant position in contemporary copyright law. The first claim is historical in nature. I took a snapshot of the idea of progress at the end of the eighteenth century. I then traced the adoption and adaptation of copyright law into the American system. We saw that the idea of progress was injected into copyright law at that point. The English conception of copyright law at the time was one of trade regulation. The American conception injected a political dimension, which found its inspiration and substance in the idea of progress. Furthermore, we saw that the idea of progress had a political content. It was closely affiliated with political ideals about knowledge and government.<sup>261</sup>

We then switched to the present and took another snapshot. The idea of progress is still alive in copyright law, although it is not presented as such. The idea is carried by two ubiquitous metaphors: that of dwarfs standing on the shoulders of giants, and that of building. We studied these metaphors to see how the idea of progress is carried.

The progress project is not just a historical or purely intellectual endeavor. It can be a helpful guide. We noted that the idea reinforces the regulatory conception of copyright law and rejects a proprietary view. It thus serves as a conceptual check. We further noted that the idea explains the importance of the public domain and its maintenance. It can also assist in shaping particular doctrines of copyright law.

The progress project describes copyright law better than the authorship project, and it is a more attractive picture. Unlike the latter, the progress project has room to host non-singular creators. Collaborative authorship fits within it easily, as well as tribal folklore and other creative processes. Unlike the authorship project, which is fixed

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<sup>261</sup> This political dimension is what distinguishes “progress” from “innovation.”

on the moment in which a work was created, the progress project views the creation as a first step in a dynamic process. It also has the benefit of being a prescription that fits comfortably within the constitutional framework. Other theories can also fit within it. A balanced economic analysis can fit within the progress project, in which case progress serves as a check on the economic analysis.

Progress is a modernist concept. It is deeply connected to the Enlightenment. It might indeed be the case that today we live in a post-modernist condition. We are in the midst of a battle between the Moderns and the Post-moderns, and we—the public—are caught in between. It is a fierce battle, and those who enjoy a prominent position under the current copyright regime strive to maintain it in its modernist spirit.<sup>262</sup> The idea of progress, because of its commitment to knowledge, can serve as a powerful force in assuring that whoever wins this battle, the public is not hurt.

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<sup>262</sup> See ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION* (New York, 1999).