

### Part III, Chapter 3: The Indelicate Imbalancing of Copyright Policy<sup>1</sup>

Courts and commentators often claim that copyright policy strikes a delicate balance between public and private interests.<sup>2</sup> I see copyright policy in a different pose, however. I see it struggling to juggle a few particular private interests with other, more general, public and private ones. I see copyright policy wobbling precariously, tipping over, and falling into statutory failure. What has put copyright on such unsure footing? The brutish prodding of special interests. Rather than "delicately balanced," then, I describe copyright policy as "indelicately imbalanced."<sup>3</sup>

Perfect policy equipoise will always elude us. We don't have the numbers necessary to put copyright's many various factors into exact balance. How can we quantify the importance of Picasso's *Guernica*, for instance, or of Dr. Suess's, YERTLE THE TURTLE? In most cases, the numbers simply do not exist. What numbers we can pin down, moreover, appear to us only in a haze of uncertainty.

We can, however, keep an eye open for evident policy disasters, taking care to steer clear of obvious hazards. We should moreover guard against letting copyright maximalists seize the tiller, lest they overemphasize their particular interests to the detriment of other public and private ones. We should instead take the Constitution as

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<sup>1</sup> Most of this chapter results from edited portions of *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 780-87 (2001). Portions also came from *Copyright as Intellectual Property Privilege*, 58 SYRACUSE L. REV. \_\_\_ (2007) (invited) (forthcoming), and *Indelicate Imbalancing in Copyright and Patent Law*, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE at 1 (Adam Thierer & Wayne Crews, eds 2002).

<sup>2</sup> See, e.g., *Sony Corporation Of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (claiming that Copyright Act reflects "a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand"); *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 1994 U.S. App. LEXIS 40786, 2 (2d Cir. 1994) (referring to "delicate balances established by the Copyright Act"); *Recording Indus. Assn. of America v. Copyright Royalty Tribunal*, 662 F.2d 1, 17 (D.C. Cir. 1981) ("delicate balance' that Congress decreed in the Copyright Act"); David Nimmer, et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17, 19 (1999) ("delicate balance' between the rights of copyright owners and copyright users").

<sup>3</sup> I also like to point out that copyright policy aims at offsetting not just private interests against public ones, but rather the select private interests of copyright holders against both: 1) the many private parties who suffer violation of their common law rights under copyright and 2) the public's interest in the positive externalities generated by free access to expressive works.

our lodestar, following its call to "promote the general Welfare"<sup>4</sup> and "the Progress of Science and useful Arts"<sup>5</sup> by checking copyright's policy's excesses.

### A. Copyright Imbalance

Federal lawmakers have steadily increased copyright's duration, scope, power, and complexity. The Copyright Act's few, narrow, and judicially-created limitations do very little to counteract the trend: copyright holders' private interests prevail over others' private, and everyone's public, interests. This section documents that imbalance. The subsequent one explains it.

**1. Duration of Copyright.** The term of copyright has steadily expanded under U.S. law. The first federal copyright legislation, the 1790 Copyright Act, set the maximum term at fourteen years plus a renewal term (subject to certain conditions) of fourteen years.<sup>6</sup> The 1831 Copyright Act doubled the initial term and retained the conditional renewal term, allowing a total of up to forty-two years of protection.<sup>7</sup> Lawmakers doubled the renewal term in 1909, letting copyrights run for up to fifty-six years.<sup>8</sup> The 1976 Copyright Act changed the measure of the default copyright term to life of the author plus fifty years.<sup>9</sup> Recent amendments to the Copyright Act expanded the term yet again, letting it run for the life of the author plus seventy years.<sup>10</sup> Table \_\_,

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<sup>4</sup> U.S. CONST., preamble.

<sup>5</sup> *Id.* at art. I, cl. 8, § 8.

<sup>6</sup> Copyright Act of 1790, 1 Stat. 124 (1790), § 1, *reprinted in* COPYRIGHT OFFICE, LIBRARY OF CONGRESS, BULLETIN NO. 3 (REVISED), COPYRIGHT ENACTMENTS: LAWS PASSED IN THE UNITED STATES SINCE 1783 RELATING TO COPYRIGHT 22, 22. For a discussion of the subtleties in the terms provided under this and subsequent copyright acts, see William Patry, *The Failure of the American Copyright System: Protecting the Idle Rich*, 72 NOTRE DAME L. REV. 907, 915-23 (1997).

<sup>7</sup> An Act to amend the several acts respecting copyrights, 4 Stat. 436 (February 3, 1831), §§ 1-2, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 27, 27. The Act retroactively extended by 14 years copyrights still in their first term as of its effective date. *Id.* § 16.

<sup>8</sup> Copyright Act of 1909, 17 U.S.C. § 23 (1909) (repealed 1978). The Act retroactively extended by 14 years copyrights extant at its effective date. *Id.* § 24.

<sup>9</sup> 17 U.S.C. § 302(a) (1994). The act gave works authored anonymously, pseudonymously, or for hire a term the lesser of publication plus 75 years or creation plus 100 years. *Id.* at § 302(c). It retroactively extended to 75 years copyrights extant at its effective date. *Id.* at §§ 304(a), (b).

<sup>10</sup> Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998), *codified at* 17 U.S.C. §§ 302(a)-(b). Works made anonymously, pseudonymously, or for hire get the lesser of publication plus 95 years or creation plus 120 years. *Id.* at § 302(c). The amendment applies retroactively to copyrights that originated under the 1976 Act. *Id.* at §§ 302(a)-(c). It retroactively extends to 95 years

below, illustrates the growth of the general U.S. copyright term over time, including the retroactive effects of various statutory extensions.<sup>11</sup>

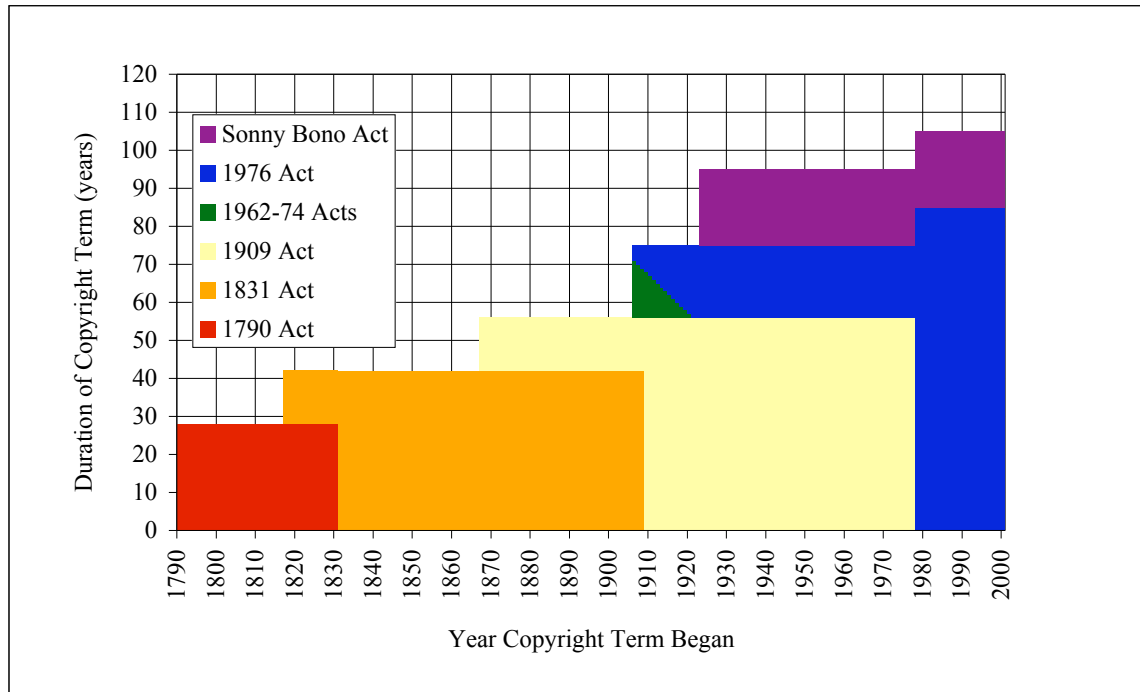


Figure \_: Copyright Term v. Copyright Inception<sup>12</sup>

Note the overhanging ledges in Figure \_\_. The 1962-74 Acts, the 1976 Act, and the Sonny Bono Act reached backwards in time, extending the copyright term even for works that had already been created. The Supreme Court has held that legislative trick constitutional,<sup>13</sup> notwithstanding copyright's policy implied aim of stimulating new authorship—not simply rewarding extant authors.<sup>14</sup>

**2. Scope of Copyright.** The subject matter covered by copyright has steadily expanded, too. The plain language of the Constitution authorizes legislation protecting only "writings."<sup>15</sup> Lawmakers began almost immediately to read that grant broadly, protecting

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copyrights extant at its effective date that had originated under the 1909 Act. *Id.* at §§ 304(a)-(b).

<sup>11</sup> Figures for the table come from the statutes cited *supra*, notes 188-92. In calculating copyright terms based on the life of the author, the table conservatively assumes that authors create their works at age 35 and live for 70 years.

<sup>12</sup> Prof. John Rothchild, showing close attention and diligent scholarship, helped me to correct a draft version of this chart.

<sup>13</sup> See [[cite to *Eldred v. Reno*]].

<sup>14</sup> See [[quote and analyze relevant text of U.S. CONST., art. I, § 8, cl. 8.]].

<sup>15</sup> U.S. CONST. ART. I § 8.

in the 1790 Copyright Act not only books but also maps and charts.<sup>16</sup> Subsequent legislation stretched copyright protection, bit by bit, to include: prints;<sup>17</sup> musical compositions;<sup>18</sup> performance rights in dramatic compositions;<sup>19</sup> photographs and negatives thereof;<sup>20</sup> paintings, drawings, chromos, statuettes, and models or designs intended to be perfected as works of the fine arts;<sup>21</sup> motion pictures;<sup>22</sup> for-profit public performances of nondramatic literary works;<sup>23</sup> sound recordings;<sup>24</sup> computer programs;<sup>25</sup>

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<sup>16</sup> Copyright Act of 1790, 1 Stat. 124 (1790), § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 22, 22.

<sup>17</sup> Act of April 29, 1802, ch. 15, 2 Stat. 171 (1802), § 2, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 24, 25.

<sup>18</sup> An Act to amend the several acts respecting copyrights, 4 Stat. 436 (February 3, 1831), § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 27, 27.

<sup>19</sup> An Act supplemental to an act entitled "An act to amend the several acts respecting copyright," approved February third, eighteen hundred and thirty-one, 11 Stat. 138 (August 18, 1856), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 33, 33.

<sup>20</sup> An Act supplemental to an act entitled "An Act to amend the several acts respecting copyright," approved February third, eighteen hundred and thirty-one, and to the acts in addition thereto and amendment thereof, 13 Stat. 540, § 1 (March 3, 1865), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 34, 34.

<sup>21</sup> An Act to revise, consolidate, and amend the statutes relating to patents and copyrights, 16 Stat. 212, § 86 (July 8, 1870), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 36, 36-7.

A subsequent act temporarily moved from the Copyright Office to the Patent Office registration of engravings, cuts, or prints not connected with the fine arts. An Act to amend the law relating to patents, trademarks, and copyrights, 18 Stat. 78 (June 18, 1874), § 3, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 47, 48. This purely administrative move apparently had no effect on the copyrightability of such works, however. *See id.* (charging the Commissioner of Patents with registration of such works "in conformity with the regulations provided by law as to copyright of prints . . . ."). *See also* An Act to transfer jurisdiction over commercial prints and labels, for the purpose of copyright registration, to the Register of Copyrights, 54 Stat. 51 (July 31, 1939), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 99, 99 (repealing Act of June 18, 1874 and referring throughout to copyrights registered in the Patent Office).

<sup>22</sup> Act of Aug. 24, 1912, ch. 356, 37 Stat. 488 (1912), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 87, 87.

<sup>23</sup> Act of July 17, 1952, Pub. L. No. 82-575, 66 Stat. 752 (1952), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 127, 127.

<sup>24</sup> The Sound Recording Act, Pub. L. No. 92-140, 85 Stat. 391 (1971), § (a), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 135-M, 135-M (amending 17 U.S.C. § 102).

<sup>25</sup> Pub. L. No. 96-517, 94 Stat. 3015, 3028 (1980) (amending 17 U.S.C. 101).

and architectural works.<sup>26</sup> A search of extant laws relating to copyright uncovers only one instance in which a statute arguably reduced the subject matter covered by copyright: with regard to publications of the federal government.<sup>27</sup> The Copyright Act has expanded even beyond the bounds of copyright, protecting artists' moral rights,<sup>28</sup> new designs of vessel hulls,<sup>29</sup> and technological systems that themselves protect copyrights.<sup>30</sup>

**Power of Copyright.** The exclusive rights granted by copyright law have expanded, as well. The 1790 Copyright act covered merely the reproduction and distribution of protected works.<sup>31</sup> The present statute gives copyright owners exclusive rights to the reproduction, distribution, preparation of derivative works, public performance, and public display of protected works.<sup>32</sup> Remedies for infringement have grown from the mere destruction of infringing works and payment of statutory damages<sup>33</sup> to vest copyright owners with a broad panoply of powers. Current remedies include:

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<sup>26</sup> The Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 701-706, 104 Stat. 5089, 5133 (1990) (amending 17 U.S.C. 102(8)).

<sup>27</sup> See An Act providing for the public printing and binding and the distribution of public documents, 28 Stat. 608, § 52 (January 12, 1895), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 55, 55. A subsequent act modified but did not clearly expand the scope of this exception. See An Act to permit the printing of black-and-white illustrations of United States and foreign postage stamps for philatelic purposes, 52 Stat. 6 (January 27, 1938) (providing in § 1 that United States might secure copyrights in black-and-white illustrations of its postage stamps and exempting in § 2 criminal sanctions for reproduction for philatelic purposes of such illustrations of U.S. and foreign stamps).

<sup>28</sup> 17 U.S.C. § 106A (1994) (protecting attribution and integrity rights of authors of works of visual arts).

<sup>29</sup> 17 U.S.C. §§ 1301-32.

<sup>30</sup> 17 U.S.C. §§ 1201-05 (providing civil and criminal penalties for a variety of acts that might interfere with the effectiveness of copyright management systems).

<sup>31</sup> Copyright Act of 1790, 1 Stat. 124 (1790), § 1, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 22, 22 (granting to copyright owners "the sole right and liberty of printing, reprinting, publishing and vending" protected works). *But see id.* § 2, at 23 (providing remedy against unauthorized printing, reprinting, publishing, or *importation* of copyrighted works).

<sup>32</sup> 17 U.S.C. § 106.

<sup>33</sup> Copyright Act of 1790, 1 Stat. 124 (1790), § 2, *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 22, 23 (providing for forfeiture of infringing copies to the copyright owner, "who shall forthwith destroy the same," and for payment "of fifty cents for every [infringing] sheet which shall be found in his or their possession," payable in equal halves to the copyright owner and the United States).

impounding of infringing articles and devices used in infringement;<sup>34</sup> statutory damages or actual damages and profits;<sup>35</sup> costs and attorneys fees;<sup>36</sup> bars on the importation of infringing articles;<sup>37</sup> the power to subpoena digital service providers to disclose the identity of an alleged infringer;<sup>38</sup> and criminal sanctions including fines and imprisonment.<sup>39</sup>

**Complexity of Copyright.** The Copyright Act itself has exploded in size and complexity over the years. The Copyright Act of 1790 had just seven sections, organized in zero chapters and having no subsections.<sup>40</sup> It ran some 1224 words.<sup>41</sup> The current version of the Copyright Act includes eleven chapters, 122 sections, and a superabundance of subsections, sub-subsections, etc.<sup>42</sup> It lumbers along at about 70400 words.<sup>43</sup>

**Limits on Copyright.** The Copyright Act has come to include a number of limitations on the exclusive rights that it establishes. Most of these limitations, such as those that excuse secondary transmission of superstations and network stations for private home viewing,<sup>44</sup> reproduction and distribution of works adapted for disabled persons,<sup>45</sup> and automated or innocent infringement by internet service providers,<sup>46</sup> undoubtedly mean far more to special interests than to the rest of us.<sup>47</sup> The Act does include some

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<sup>34</sup> 17 U.S.C. § 503 (providing civil remedies of impounding and disposition of infringing articles and devices used in infringing works). *See also id.* §§ 506(b), 509 (providing for similar remedies in criminal cases).

<sup>35</sup> *Id.* at § 504.

<sup>36</sup> *Id.* at § 505.

<sup>37</sup> *Id.* at §§ 601-03.

<sup>38</sup> *Id.* at § 512(h).

<sup>39</sup> *Id.* § 506 (calling for criminal punishments in certain cases as provided under 18 U.S.C. § 2319, 18 U.S.C. § 2319 (setting forth applicable fines and prison terms). *See also* 17 U.S.C. §§ 506(b), 509 (providing in criminal cases for the seizure and forfeiture to the United States of infringing items and devices used to infringe).

<sup>40</sup> Copyright Act of 1790, 1 Stat. 124 (1790), *reprinted in* COPYRIGHT ENACTMENTS, *supra* note [[cite]], at 22, 22-24.

<sup>41</sup> *Id.*, by the author's estimate.

<sup>42</sup> 17 U.S.C. §§ 101-803; 1001-1332 (word count by author's estimate).

<sup>43</sup> *Id.*, by the author's estimate.

<sup>44</sup> *Id.* at § 119.

<sup>45</sup> *Id.* at § 121. *See also id.* § 110(8)-(9) (allowing under certain conditions performance of literary works for disabled persons).

<sup>46</sup> *Id.* at § 512. Note that, strictly speaking, § 512 does not limit rights under the Act but rather the remedies for infringement.

<sup>47</sup> *See also id.* 111(a)-(b), (e) (allowing under certain conditions secondary transmissions embodying performances or displays of a work); § 112 (allowing under certain conditions transmitting organizations to make ephemeral recordings); § 113(c) (allowing advertisements, commentaries, and news reports distributing or displaying useful articles

copyright limitations that apply more generally. Most of these apply only in circumstances so narrowly defined as to aggrieve few copyright owners, however.<sup>48</sup> The fair use<sup>49</sup> and first sale<sup>50</sup> doctrines carry some punch, granted. Note, though, that they came from the courts—not from Congress.<sup>51</sup>

## B. Copyright Indelicacy

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embodying copyrighted works); § 114(a)-(c) (limiting rights in sound recordings so as to safeguard copyrights in underlying works thus recorded); § 114(d) (defining rights in sound recordings so as to allow under certain conditions performance via digital audio transmission); § 120(b) (allowing alterations of buildings embodying copyrighted works).

<sup>48</sup> *See id.* at § 108 (allowing under certain conditions reproduction by libraries and archives); § 110(1)-(4), (6), (10) (allowing under certain conditions nonprofit entities to perform or display works); § 110(7) (allowing performance of nondramatic music works to promote sales); § 117 (excusing functionally necessary or archival copying of computer programs); § 120(a) (allowing representations of architectural works constructed in public places and alterations of buildings embodying copyrighted works). *See also id.* § 513 (providing for determination of reasonable license fees charged by performing rights societies). Note that, strictly speaking, § 513 does not limit rights under the Act but rather the remedies for infringement.

<sup>49</sup> *See id.* § 107 (codifying the fair use doctrine).

<sup>50</sup> *See id.* § 109 (codifying the first sale doctrine).

<sup>51</sup> With regard to codification of the fair use doctrine, *see Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 549 (1985) (stating that § 107 was "intended to restate the [pre-existing] judicial doctrine of fair use, not to change, narrow, or enlarge it in any way,"), *quoting* H. R. Rep. No. 94-1476, p. 66 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5680. *See also* S. Rep. No. 473, 94th Cong., 1st Sess. 62 (1976) (making same statement as House Report).

With regard to the codification of the first sale doctrine, *see* 2 PAUL GOLDSTEIN, COPYRIGHT § 5.6.1 at 5:106-108 (2nd ed. 2000), which credits *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), the leading case in a long line of decisions, as the holding that Congress codified in the Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075, 1084 (1909). The Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, replaced § 41 with 17 U.S.C. § 109, the current codification of the first sale doctrine, without substantially altering it.

With regard to the first sale doctrine, moreover, federal lawmakers have repeatedly trimmed back the judicial exception that they earlier codified. *See* The Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (October 4, 1984), codified as amended at 17 U.S.C. § 109(b) (excluding sound recordings from scope of first sale doctrine), The Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650, Tit. VIII § 804, 104 Stat. 5136 (Dec. 1, 1990), codified at 17 U.S.C. § 109(b) (excluding computer programs from scope of first sale doctrine).

Copyright policy combines all the elements of a public choice tragedy: concentrated benefits, diffuse costs, and State power. Caught in a whirlpool of statutory failure, copyright does not strike a delicate balance between all the interests it touches. It will not. It cannot.

Public choice theory convincingly explains copyright's steady growth.<sup>52</sup> Those who create and (especially) market expressive works know who they are, what they want, and how greatly they want it. Unsurprisingly, the pro-copyright lobby approaches Congress as a well-defined, highly motivated, and apparently effective lobby.<sup>53</sup> In contrast, those who might benefit from a less expansive Copyright Act typically have disparate, inchoate, slight, or non-monetized wishes. Advocates for common law rights and the public domain thus have relatively little impact on the legislative process.

The problem runs deeper than the Act's all-too obvious public choice affliction. Even lengthy, open, and sincere civil discourse would of necessity fail to set copyright law into delicate balance.<sup>54</sup> Political authorities cannot measure even the economic factors that would have to go into such a calculation, much less the myriad fluctuating and intangible ones.<sup>55</sup> Even if they could *measure* all the relevant economic, legal, technological, and cultural factors, politicians could not *balance* them.

Copyright law reaches so deeply into our lives that it has become not simply a matter of industrial policy, or even of information policy, but of *social* policy. Copyright law limits what we sing in church, what we post on our blogs, and what we read to our children. Federal lawmakers cannot possibly gauge the value of such things. At the least, we cannot trust them to weigh our fundamental and personal freedoms as heavily as we do.

Does that make the prospect of delicately balancing copyright policy sound unlikely? It gets worse. Public choice theory teaches us that even if lawmakers could get and compare all the data necessary for delicately balancing the public and private interests affected by copyright and patent law, it wouldn't matter.<sup>56</sup> Lawmakers would

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<sup>52</sup> Seminal works on public choice theory include JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

<sup>53</sup> See Jessica Litman, *Copyright and Information Policy*, 55 *LAW & CONTEMP. PROBS.* 185, 187-195 (1992) (describing the interest group dynamics affecting copyright legislation); Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 *CORNELL L. REV.* 857, 865-79 (1987) (describing legislative processes through which commercial interests shaped the 1976 Copyright Act).

<sup>54</sup> See Ejan Mackaay, *Economic Incentives in Markets for Information and Innovation*, 13 *HARV. J.L. & PUB. POL'Y* 867, 906 (1990) (describing questions about the optimality of copyright's quid pro quo as "vacuous").

<sup>55</sup> See generally FRIEDRICH A. HAYEK, *INDIVIDUALISM AND THE ECONOMIC ORDER* 77-78 (1948) (the knowledge essential for central planning does not exist in concentrated form).

<sup>56</sup> See generally BUCHANAN & TULLOCK, *supra* note [[cite]]; MANCUR OLSON, JR., *supra* note [[cite]].

not use the data—or, more precisely, it would have much impact on what laws they make. Instead, lobbying by special interests would invariably ensure that copyright policy favors select private parties against all else. That is not to say that politicians are always corrupt or that democracy must fail; it means simply that politicians respond to the same incentives as the rest of us and that, consequently, democracies tend toward predictably biased outcomes.

Does "delicate balancing" rhetoric merit any place in copyright jurisprudence? The Copyright Act does reflect compromises struck between the various parties that lobby congress and the administration for changes to federal law. A truce among special interests does not and cannot delicately balance all the interests affected by copyright law, however. Not even poetry can license the "balance" metaphor, which aggravates copyright's public choice affliction by endowing the legislative process with more legitimacy than its due. To claim that copyright policy strikes a delicate balance commits not only legal fiction; it aids and abets a statutory tragedy.

### C. How to Assess Copyright Policy

To delicately balance the many interests affected by copyright policy exceeds politicians' capabilities, to say nothing of their motives. Still, though, we might aspire to *roughly* balance the public choice pressures that affect copyright. I suggest some fixes, below.<sup>57</sup> Casting copyrights as intellectual privileges, as I suggested earlier,<sup>58</sup> would help, too.

Does that still sound too optimistic? Granted, even roughly balancing copyright policy might prove beyond us. In that event, we could at least avoid palpable disasters. We cannot tell whether copyright law at present offers would-be composers the optimal set of incentives for maximizing social wealth, for instance, but we can tell whether the public suffers an utter dearth of new musical works. (I for one often find myself bombarded with too much of the wrong sort of music. Hence, I assume, much of the iPod's allure.)

Even though no one can tell whether copyright and patent have achieved that mythical "delicate balance" of public and private interests, we *can* tell when lawmakers have plainly put matters out of whack. Sentencing copyright infringers to death would, for instance, clearly go beyond the pale. Perhaps some current laws do, too. The point here is not to settle such questions but rather simply to observe that imprecise knowledge should not preclude rough justice.

That copyright policy can never delicately balance all the private and public interests it touches means that it always, to a lesser or greater extent, fails. We must therefore keep close watch over copyright, constantly guarding against a policy disaster. Even at its best, copyright remains a necessary evil. If copyright's costs obviously outweigh its benefits, we should not hesitate to reform it.

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<sup>57</sup> See *infra*, chapters [[cite]].

<sup>58</sup> See *supra*, chapter 2.

At the very least, we should challenge the absurd argument that copyrights have become so important to the national economy that they must reach farther still.<sup>59</sup> To the contrary, the evident efficacy of copyright demonstrates that market failure no longer looms and, thus, that copyright has reached the limits of its justification. Far from trumpeting the prodigious revenues, jobs, and exports that their clients generate, in other words, lobbyists for increasing copyright protection should have to prove beyond a doubt that the public suffers terribly from a gross deficiency of expressive works.

Still further, we should regard copyright itself skeptically. Perhaps authors would do just as well without it. We appear to suffer no shortage of creative perfumes,<sup>60</sup> recipes,<sup>61</sup> clothes designs,<sup>62</sup> furniture,<sup>63</sup> car bodies,<sup>64</sup> or uninhabited architectural

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<sup>59</sup> See, for example, STEVEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2000 REPORT (2000) (reporting on behalf of the International Intellectual Property Association that for the ninth straight year U.S. copyright industries ranked among the fastest-growing segments of the U.S. economy), available at <[http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html)> [[find updated report]].

<sup>60</sup> See Pierre Breese, *Olfactory measurement methods linked to sensory analysis, designation and comparison tools for use by the legal expert* <<http://www.breese.fr/guide/htm/parfum/cannes.htm>> (asserting that currently there is no intellectual property protection for olfactory creations apart from trademark law) (visited 11/12/01).

<sup>61</sup> See U.S. COPYRIGHT OFFICE, FORM LETTER 122: COPYRIGHT REGISTRATION IN RECIPES 1 (June 1999) (“Mere listings of ingredients as in recipes, formulas, compounds or prescriptions are not subject to copyright protection.”), available at <<http://www.loc.gov/copyright/fls/fl122.pdf>> (visited 11/12/01). Interestingly, recipes apparently represent the oldest known subject matter of intellectual property protection. See Steven L. Nichols, *Comment: Hippocrates, the Patent-Holder: The Unenforceability of Medical Procedure Patents*, 5 GEO. MASON L. REV. 227, 233-34 (1997) (reporting that c. 500 BC the Greek colony of Sybaris, in Southern Italy, afforded patent-like protection to recipes).

<sup>62</sup> See Jennifer Mencken, *A Design for the Copyright of Fashion*, 1997 B.C. INTELL. PROP. & TECH. F. 121201, ¶¶ 3-5 (December 12, 1997) <[http://www.bc.edu/bc\\_org/avp/law/st\\_org/iptf/articles/content/1997121201.html](http://www.bc.edu/bc_org/avp/law/st_org/iptf/articles/content/1997121201.html)>, visited Nov. 12, 2001 (detailing scope and reasons for noncopyrightability of fashion designs). Incredibly, the author argues for creating copyright protection in clothes designs even though she admits, “It is clear that the lack of copyright protection in the U.S., as well as the existence of protection in Europe, has not changed the ability of designers to create new garments each season. Nor has there been any adverse effect on the power of the public to purchase garments made by quality designers at reasonable prices.” *Id.* at para. 43 (footnote omitted).

<sup>63</sup> See COPYRIGHT LAW 200 (Craig Joyce, et al., eds., 5th ed. 2001) (describing furniture as “largely untouched by the scheme of the copyright law, thanks to the ‘useful articles’ doctrine.”).

<sup>64</sup> See Michael E. Peters, *Note, When Patent and Trademark Law Hit the Fan: Potential Effects of Vornado Air Circulation Systems, Inc., v. Duracraft Corp. on Legal Protection for Industrial Design*, 15 TEMP. ENVTL. L. & TECH. J. 123, 126 (1996) (“[T]he relatively

structures,<sup>65</sup> even though U.S. law affords no effective protection to them *qua* original expressions (nor *qua* novel inventions covered by patent law).<sup>66</sup> Perhaps the same would hold true of subject matter now covered by copyrights, were their protections removed.

We cannot count on lawmakers to resolve such questions--or even to have much resolve in asking them. The problem of encouraging the creation and distribution of original expressions and novel inventions mirrors other difficult problems of social coordination; in no such case can we expect a central political authority to have the information and incentives necessary to identify and implement an efficient public policy. Here, as generally, we should insofar as possible rely on the decentralized enforcement of common law rights and remedies.<sup>67</sup> Although the common law cannot replicate copyrights and patents, those unnatural and purely statutory creations, it might nonetheless supplant them.

Given copyright's inevitable and indelicate imbalance, we should generally favor reducing its towering influence over information policy. Then, at least, copyright's statutory failure would harm fewer innocents. We might eventually find ourselves better served by living entirely without copyright. In the meantime, at the least, we should make sure that copyright offers an easy exit to common law.

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low level of outright invention in a new car design generally fails to meet the rigorous 'uniqueness' requirement of the design patent. Even when a design meets the technical requirements . . . [t]he process frequently takes longer than the typical market life of most products, rendering the patent useless. ") (footnotes omitted).

<sup>65</sup> U.S. copyright protection of architectural works apparently extends only to habitable structures, "such as houses and office buildings. It also covers structures that are used, but not inhabited, by human beings, such as churches, pergolas, gazebos, and garden pavilions." H.R. Rep. No. 735, 101st Cong., 2d Sess. 20 (1990). It apparently does not cover structures not intended for human occupancy, such as bridges, highway cloverleaves, and dams. Although in theory such structures could win patent protection, in practice that appears to have no influence on the creativity evinced in their design.

<sup>66</sup> Although some of the works listed here could in theory win design patent protection under U.S. law, "the patent process has proved too rigid, slow, and costly for the fast-moving, short-lived products of mass consumption, and too strict in excluding the bulk of all commercial designs on grounds of obviousness." J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2460 (1994).

<sup>67</sup> See generally RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).