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## Back to the Future: How Federal Courts Create a Federal Common-law Copyright Through Permanent Injunctions Protecting Future Works

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# BACK TO THE FUTURE: HOW FEDERAL COURTS CREATE A FEDERAL COMMON-LAW COPYRIGHT THROUGH PERMANENT INJUNCTIONS PROTECTING FUTURE WORKS

## I. INTRODUCTION

The Court determines that HBO is entitled to a permanent injunction against Orth-O-Vision's infringement of all of HBO's . . . future copyrighted works.<sup>1</sup>

In this seemingly innocuous manner, a federal common-law copyright was born. Despite a constitutional mandate,<sup>2</sup> federal copyright legislation,<sup>3</sup> and case law mandating strict statutory adherence,<sup>4</sup> the *Orth-O-Vision* court sought refuge in concepts of equity to protect future copyright works. Over the past fourteen years, numerous courts have contributed to the creation of a new federal common-law copyright through the issuance of permanent injunctions to protect future works.<sup>5</sup> This trend demands attention, as federal courts continue to issue such injunctions with increasing frequency. These courts rely on pronouncements of equity and judicial economy for support,<sup>6</sup> ignoring statutory limits

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<sup>1</sup> *Orth-O-Vision, Inc. v. Home Box Office*, 474 F. Supp. 672, 687, 205 U.S.P.Q. (BNA) 644 (S.D.N.Y. 1979).

<sup>2</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>3</sup> 17 U.S.C. §§ 101-810 (1988).

<sup>4</sup> *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 454 (1854); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 665 (1834). For further discussion of *Stevens* and *Wheaton*, see *infra* notes 101-110 and accompanying text.

<sup>5</sup> Generally, a copyright owner brings an action for infringement seeking a permanent injunction to enjoin infringement of any works it presently owns or may own in the future. See *infra* Part II (discussing relevant cases).

<sup>6</sup> See, e.g., *Orth-O-Vision, Inc. v. HBO*, 474 F. Supp. 672, 686 (S.D.N.Y. 1979) ("it would be inequitable to grant the copyright owner partial summary judgment on the issue of liability without enjoining the infringement of future registered works."); see also *NFL v. McBee & Bruno's*, 621 F. Supp. 880, 887, 228 U.S.P.Q. (BNA) 11 (E.D. Mo. 1985) (noting action for statutory damages, instead of permanent injunction, "would be inadequate as it would produce a multiplicity of suits"), *aff'd in part and rev'd in part*, 792 F.2d 726, 230

and merely citing to a previous decision for support.<sup>7</sup>

The issuance of permanent injunctions to protect future works, under the guise of section 502(a) of the Copyright Act of 1976,<sup>8</sup> is instead the creation of a federal common-law copyright. Federal courts ignore the dictates of what is copyrightable<sup>9</sup> as delineated in the Copyright Act as well as the requirements of registration prior to commencing an infringement action<sup>10</sup> and the limitation of injunctions to protecting a copyright.<sup>11</sup>

Furthermore, such a federal common-law copyright is unconstitutional. In protecting future works, which Congress has chosen not to protect, the courts are usurping congressional power as delineated in the Copyright Clause.<sup>12</sup> Also, in extending protection to works that do not exist, federal courts are circumventing the originality requirement and protecting that which is, by definition, not a writing.

To examine the concerns these injunctions present, it is important to understand not only the context in which courts issue future works injunctions, but also the injunctions themselves. Part II contains a brief discussion of the relevant case law. Part III addresses the source of a federal court's authority to issue copyright

U.S.P.Q. (BNA) 30 (8th Cir. 1986).

<sup>7</sup> In all likelihood, the failure of courts to address the arguments against such injunctions probably is attributable to counsel's failure to present such arguments.

<sup>8</sup> 17 U.S.C. § 502(a) (1988) provides, in pertinent part, that "[a]ny court having jurisdiction under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."

<sup>9</sup> 17 U.S.C. § 102(a) (1988) provides, in pertinent part, that "copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . ."

<sup>10</sup> 17 U.S.C. § 411(a) (1988) provides, in pertinent part, that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title."

<sup>11</sup> *Id.* § 502(a).

<sup>12</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." U.S. CONST. art. I, § 8, cl. 8. Professor Patterson observes that:

one must read the passage distributively, recognizing that, as there used, the word *science* retains its eighteenth-century meaning of 'knowledge or learning'. So read, the copyright portion of the clause grants Congress the power to promote learning by securing for limited times to authors the exclusive right to their writings.

L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS' RIGHTS* 48-49 (1991).

injunctions. Although courts have relied almost exclusively on their inherent power to issue such sweeping injunctions, an examination of copyright law in conjunction with the nature and purpose of copyright demonstrates that such authority is purely statutory. Accordingly, where a court's authority to issue an injunction is statutory, the copyright injunction should conform to the rights granted by the statute. The protection of future works, however, exceeds the scope of federal copyright law because such works are not fixed when the injunction is granted.<sup>13</sup>

The next step, taken in Part IV, is to determine whether, permanent injunctions to protect future works are constitutional in light of the Copyright Clause. The grant of power to Congress to enact copyright statutes as well as the requirements set forth in the Copyright Clause<sup>14</sup>—originality,<sup>15</sup> limited times, public domain, and Congressional monopoly of federal copyright law—reveal that injunctions to protect future works are unconstitutional. By using their inherent power to grant these injunctions in the name of judicial economy, federal courts are inadvertently disregarding the mandates of both the Constitution and Congress.

Because future works injunctions cannot conform to constitutional requirements, federal courts should refuse to issue such injunctions in future litigation and, indeed, should modify existing injunctions. This proposal will not, however, leave a copyright owner without remedies. Indeed, the arsenal of remedies available to an owner is a potent one.<sup>16</sup> The threat of statutory damages,<sup>17</sup> attorney's fees,<sup>18</sup> impoundment,<sup>19</sup> and criminal penalties<sup>20</sup> should serve to deter future infringement and to provide protection

<sup>13</sup> 17 U.S.C. § 102(a) (1988).

<sup>14</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>15</sup> *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362, 18 U.S.P.Q.2d (BNA) 1275 (1991).

<sup>16</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433, 220 U.S.P.Q. (BNA) 665 (1984). For a thorough discussion of copyright remedies, see Ralph S. Brown, *Civil Remedies for Intellectual Property Invasions*, LAW & CONTEMP. PROBS., Spring 1992, at 45.

<sup>17</sup> 17 U.S.C. § 504(c) (1988).

<sup>18</sup> *Id.* § 505. But see generally Peter Jaszi, 505 and All That—*The Defendant's Dilemma*, LAW & CONTEMP. PROBS., Spring 1992, at 107, 112 (arguing section 505, as disincentive for litigation by defendants, prevents demarcation of copyright's limits).

<sup>19</sup> 17 U.S.C. § 503 (1988).

<sup>20</sup> *Id.* § 506.

for the constitutional mandate contained in the Copyright Clause and congressional mandates embodied in the present Copyright Act. Finally, Part IV concludes with a proposed amendment to the Copyright Act that would prevent federal courts from issuing injunctions to protect future works.

## II. THE ISSUANCE OF FUTURE WORKS INJUNCTIONS

If a work must be fixed and original in order to be copyrightable,<sup>21</sup> how can a court protect the copyright of a work which is not fixed? How can a work that does not exist and is not fixed, therefore not copyrightable, be eligible for protection? And, if the work is not fixed and not copyrightable, how does a "copyright" owner<sup>22</sup> register<sup>23</sup> that work before maintaining an action for infringement? Furthermore, how can a court issue an injunction to restrain infringement of a work that is not copyrightable, and thus, not possible to infringe? This section will examine the recent ability of federal courts to accomplish these seemingly impossible objectives by issuing permanent copyright injunctions to protect future works.<sup>24</sup>

In 1979, a federal court issued the first copyright injunction designed to protect future works.<sup>25</sup> Since then, courts have issued similar injunctions in eleven other cases. Although the resulting creation of federal common-law copyright is, in all likelihood, unintentional, the increased usage of such injunctions emphasizes the need for federal courts to acknowledge their role in creating this federal common-law copyright. This section, discussing five of

<sup>21</sup> 17 U.S.C. § 102(a) (1988). For further discussion of copyrightability, see *infra* notes 122-126 and accompanying text.

<sup>22</sup> 17 U.S.C. § 501(a) (1988) provides, in pertinent part, that "[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright. . . ." (emphasis added).

<sup>23</sup> *Id.* § 411(a). For further discussion of this provision, see *infra* notes 131-134 and accompanying text.

<sup>24</sup> Note that, as early as 1907, one federal court refused to issue even a preliminary injunction to protect future works. See *Sweet v. G.W. Bromley & Co.*, 154 F. 754, 755-56 (C.C.E.D. Pa. 1907) (refusing to grant preliminary injunction to protect future acts of infringement on grounds that court cannot "interfere" until work is published and that such injunction would be "argumentative and inspecific").

<sup>25</sup> *Orth-O-Vision, Inc. v. HBO*, 474 F. Supp. 672, 687 (S.D.N.Y. 1979).

the eleven cases in which permanent copyright injunctions to protect future works have been issued, provides the necessary context for evaluating the limited statutory authority<sup>26</sup> for federal copyright injunctions and the ensuing violations of the Constitution and the Copyright Act when courts exceed this authority.

The first case in which a court issued an injunction against future works, *Orth-O-Vision, Inc. v. Home Box Office*,<sup>27</sup> involved the failure of an affiliate to compensate a cable network for reception of its transmissions. Although the plaintiff argued that the court could not enjoin the infringement of works that had not been registered,<sup>28</sup> the court concluded that such an injunction could issue. Noting that other courts enjoined "as a matter of equitable discretion, the infringement of works yet unpublished,"<sup>29</sup> the court reasoned that equity dictated "enjoining the infringement of future registered works,"<sup>30</sup> especially where infringement continued and threats of future infringement existed. Further, although the opinion is conspicuously silent on the requirement of fixation for copyrightability<sup>31</sup> and the requirement that an injunction issue to protect a copyright,<sup>32</sup> the court did acknowledge the power of Congress, and Congress alone, to grant copyrights.<sup>33</sup>

In the next case to confront this issue, *Encyclopaedia Britannica Educational Corp. v. Crooks*,<sup>34</sup> the copyright owners sought an

<sup>26</sup> See, e.g., *Dowling v. United States*, 473 U.S. 207, 216, 214 U.S.P.Q. (BNA) 697 (1985).

<sup>27</sup> 474 F. Supp. 672, 687 (S.D.N.Y. 1979).

<sup>28</sup> *Id.* at 685. Defendant HBO counterclaimed, among other bases, for violations of the Copyright Act of 1976. *Id.* at 680, 685.

<sup>29</sup> *Id.* at 686 (emphasis added). This case was decided under the Copyright Act of 1976 so it is especially odd that the court would rely on the pre-Act dividing line of publication for copyrightability. Yet, the *Orth-O-Vision* court cited to cases decided under the 1909 Act. *Id.* The 1909 Act, predecessor to the 1976 Act, relied on publication rather than fixation and did not contain the express preemption embodied in section 301 of the 1976 Act. For further discussion of these provisions, see *infra* notes 123-130 and accompanying text.

<sup>30</sup> *Id.* at 686. Some courts phrase the injunction in terms of "future works" while others utilize "future registered works." Regardless of word choice, the effect is the same—protection, under the auspices of federal copyright law, of works that do not exist at the time the injunction is entered.

<sup>31</sup> 17 U.S.C. § 102(a) (1988).

<sup>32</sup> *Id.* § 502(a).

<sup>33</sup> *Orth-O-Vision, Inc. v. HBO*, 474 F. Supp. 672 (S.D.N.Y. 1979). For a more detailed discussion of Congressional power in the federal copyright domain, see *infra* notes 142-145 and accompanying text.

<sup>34</sup> 542 F. Supp. 1156, 1187, 214 U.S.P.Q. (BNA) 697 (W.D.N.Y. 1982).

injunction "to prevent [copying of] any future copyrighted works that may be copyrighted . . . or for which the plaintiff may acquire the exclusive right of distribution."<sup>35</sup> Observing that a plaintiff may obtain a permanent injunction "in a copyright action when liability has been established and there is a threat of continuing violations,"<sup>36</sup> the court reasoned that equity mandated the issuance of the future works injunction.<sup>37</sup>

Throughout its opinion, the *Crooks* court failed to address a number of issues. Silent on the requirements of fixation and originality for copyrightability in terms of the "future registered works," the court side-stepped the registration requirement by taking refuge in equity. Moreover, the *Crooks* court circumvented the requirement that an injunction issue to protect a copyright. Most importantly, however, it ignored the congressional monopoly of the federal copyright domain.

The Eleventh Circuit contributed to the creation of federal common-law copyright in *Pacific & Southern Co. v. Duncan*.<sup>38</sup> When defendant Duncan videotaped and sold a broadcast transmitted by plaintiff, a NBC affiliate, the ensuing litigation lasted three years and generated five opinions. Despite acknowledging infringement of the plaintiff's copyright, the district court declined to enter the injunction sought by the plaintiff—"to stop future

<sup>35</sup> *Id.* at 1187. The infringing party was the Board of Educational Services for Erie County, New York (BOCES). *Id.* at 1159. The plaintiff created educational programs which were broadcast from a local educational television station. *Id.* at 1158. BOCES maintained a videotape library and a duplication system to provide teachers in the school system with materials taped off-the-air. *Id.* at 1159.

<sup>36</sup> *Id.* at 1187 (quoting *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 976 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984)).

<sup>37</sup> *Id.* at 1187 (relying on *Association of Am. Medical Colleges v. Carey*, 482 F. Supp. 1358, 1364 & n.15 (N.D.N.Y. 1980)). Oddly, in determining whether the defendant could be enjoined from infringing the 126 other works it held, in the absence of evidence that these works were plaintiff's copyrighted works, the court reasoned that since it could enjoin future registered works, judicial economy permitted it to enjoin the 126 other works. *Id.* at 1187-88.

<sup>38</sup> 572 F. Supp. 1186 (N.D. Ga. 1983), *aff'd in part, rev'd in part and remanded*, 744 F.2d 1490, 244 U.S.P.Q. (BNA) 131 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) [WXIA-I]; *Pacific & S. Co. v. Duncan*, 618 F. Supp. 469, 228 U.S.P.Q. (BNA) 141 (N.D. Ga. 1985), *aff'd*, 792 F.2d 1013, 230 U.S.P.Q. (BNA) 330 (11th Cir. 1986) [WXIA-II]. As part of its "news-clipping" service, defendant videotaped and sold a broadcast transmitted by plaintiff, an NBC affiliate. 572 F. Supp. at 1189.

unauthorized copying or sales of copies"<sup>39</sup>—on the grounds that such an injunction would frustrate "the public interest."<sup>40</sup> The court denied plaintiff's request for injunctive relief on First Amendment grounds.<sup>41</sup>

On appeal, the Eleventh Circuit<sup>42</sup> affirmed the finding of infringement but reversed and remanded on the grounds that the district court abused its discretion in refusing to grant injunctive relief.<sup>43</sup> In a footnote,<sup>44</sup> the court responded to the argument that an injunction could not issue to protect works that had not been created. Although the court of appeals recognized that "[a]n injunction against the use of unregistered works would bypass [the section 411(a)] requirement,"<sup>45</sup> it reasoned that "the statute [§ 502] provides for injunctions to prevent infringement of 'a copyright', not necessarily the registered copyright that gave rise to the infringement action."<sup>46</sup> Therefore, the district court had the power to issue a future works injunction. Furthermore, where the

<sup>39</sup> *Id.* at 1189-90.

<sup>40</sup> *Id.* at 1196.

<sup>41</sup> *Id.* at 1196 (reasoning that plaintiff's destruction of its broadcast videotapes demonstrated its lack of interest in reproducing and distributing videotapes, its intent to abandon the copyright, and defendant's ability to render First Amendment-based social benefit through sale of these broadcasts because of plaintiff's destruction). Although the court did discuss the requirements of fixation for copyrightability and registration for maintenance of an infringement action, *id.* at 1191, it did not do so in the context of future broadcasts.

<sup>42</sup> *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 224 U.S.P.Q. (BNA) 131 (11th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) [WXIA-I]; *Pacific & S. Co. v. Duncan*, 618 F. Supp. 469, 228 U.S.P.Q. (BNA) 141 (N.D. Ga. 1985), *aff'd*, 792 F.2d 1013, 230 U.S.P.Q. (BNA) 330 (11th Cir. 1986) [WXIA-II].

<sup>43</sup> *Id.* at 1500.

<sup>44</sup> *Id.* at 1499 n.17. This infamous footnote served as the basis for other future works injunctions. *See, e.g., Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349, 30 U.S.P.Q.2d (BNA) 1798 (8th Cir. 1994); *NFL v. McBee & Bruno's*, 792 F.2d 726, 732 n.7 (8th Cir. 1986); *Georgia Television Co. v. TV News Clips*, 718 F. Supp. 939, 945, 9 U.S.P.Q. (BNA) 2049 (N.D. Ga. 1989).

<sup>45</sup> *Pacific & S. Co.*, 744 F.2d at 1499.

<sup>46</sup> *Id.* (emphasis in original); *but cf. New York Times Co. v. Star Co.*, 195 F. 110, 112-13 (C.C.S.D.N.Y. 1912) (refusing to issue copyright injunction on grounds that prohibition in section 12 of 1909 Act [predecessor to section 411(a)] encompasses all suits in equity; *see also Goldwyn Pictures Corp. v. Howells Sales Co.*, 282 F. 9, 10-11 (2d Cir. 1922) (relying on *Star Co.* principle that provisions regarding availability of injunctive remedy and court's authority to issue injunction "must be read together"). Thus, as early as 1912, the "a copyright/the copyright" distinction had been examined and rejected as being inconsistent with the empowering statutory language.



registered work "and the future works are so closely related, part of a series of original works created with predictable regularity and similar format. . . ,"<sup>47</sup> refusing injunctive relief would frustrate the provision that registration is "not a condition of copyright protection."<sup>48</sup> Moreover, the court failed to recognize that the right to a copyright and the right to a remedy for copyright infringement are two entirely different matters.

Despite its implicit acknowledgement of the originality requirement, the Eleventh Circuit did not adhere to this requirement. Rather than adopting the statutorily mandated approach of refusing to issue this injunction to protect unregistered unfixed works, the court instead chose to honor the clarifying language in section 408.<sup>49</sup> Although it attempted to circumvent the requirement of section 502(a),<sup>50</sup> the court of appeals failed to recognize that if a work is not fixed—and a work that does not exist cannot be fixed—then it is not copyrightable. Thus, regardless of its "a copyright/the copyright" distinction, this injunction rests upon a right not available under the federal statute; namely, a federal common-law copyright.

On remand, the district court<sup>51</sup> issued an injunction that "permanently restrained and enjoined [the defendant] from copying or selling copies of WXIA-TV's broadcast news programs, in whole or in part."<sup>52</sup> The court of appeals, in affirming the injunction,<sup>53</sup> refused to reconsider the defendant's argument that future news broadcasts could not be protected without a copyright registration.<sup>54</sup> It did observe, however, that the injunction did not apply to uncopyrightable material included in the broadcast.<sup>55</sup>

<sup>47</sup> *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1489 n.17 (11th Cir. 1984).

<sup>48</sup> *Id.* (quoting 17 U.S.C. § 408(a) (1977)).

<sup>49</sup> 17 U.S.C. § 408 (1988).

<sup>50</sup> 17 U.S.C. § 502(a) (1988).

<sup>51</sup> *Pacific & S. Co. v. Duncan*, 618 F. Supp. 469, 471 (N.D. Ga. 1985), *aff'd*, 792 F.2d 1013 (11th Cir. 1986).

<sup>52</sup> *Id.*

<sup>53</sup> *Pacific & S. Co. v. Duncan*, 792 F.2d 1013, 1015 (11th Cir. 1986).

<sup>54</sup> *Id.* at 1014.

<sup>55</sup> *Id.* In contrast to the court's willingness to protect on the basis of copyright law that which is uncopyrightable because it is not fixed, the inconsistency of its unwillingness to include uncopyrightable material within the scope of the injunction is puzzling. Yet, having made this distinction, the court of appeals could have followed it to its logical conclusion: The protection of future works cannot be achieved under the auspices of the Copyright Act.

The Eleventh Circuit's attempt in *CNN v. Video Monitoring Services of America, Inc.*,<sup>56</sup> to correct the *Pacific & Southern Co.* court's error was rendered moot when the decision was vacated on procedural grounds. Recognizing the jurisdictional prerequisite of section 502(a),<sup>57</sup> the court held that to have jurisdiction, a plaintiff must fulfill the prior registration requirement of section 411(a).<sup>58</sup> Furthermore, the court noted that "the scope of the remedy for copyright infringement is constrained and dictated by the scope of the copyright claim actually registered."<sup>59</sup>

Turning to the issue of copyrightability, the *CNN* court concluded that because a future work has not been created, it cannot be fixed.<sup>60</sup> Consequently, it is ineligible for copyright protection.<sup>61</sup>

But, it did not. In failing to do so, the *Pacific & Southern Co.* court contributed to the creation of federal common-law copyright.

As early as 1965, the NFL advocated the expansion of injunctions issued pursuant to § 502(a) to encompass future works. See, e.g., *Copyright Law Revision: Hearings on H.R. 4347, H.R. 5680, H.R. 6831 & H.R. 6835 Before the Subcomm. No. 3 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. 1826 (1965)*, reprinted in 7 GEORGE S. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 1826 (1976) (supplemental statement of Pete Rozelle, Commissioner, National Football League) (suggesting amendment to proposed section 502(a) that would encompass infringement of "future programs"). Thus, it comes as no surprise that the next contribution to federal common-law copyright occurred in *National Football League v. McBee & Bruno's*, 792 F.2d 726, 732 n.7 (8th Cir. 1986) (endorsing *Pacific & Southern Co.* approach of granting future works injunction where works related as part of series).

<sup>56</sup> 940 F.2d 1471, 20 U.S.P.Q.2d (BNA) 108, *vacated for reh' en banc*, 949 F.2d 378 (11th Cir. 1991). The defendant had copied and sold transmissions of certain of CNN's programs. The court prefaced its opinion by commenting "[o]ur consideration of [Feist Publications, Inc. v. Rural Tel. Serv. Co. (citation omitted)] together with other authority in the law of copyright requires us to reverse the grant of preliminary injunction. . . ." 940 F.2d at 1472. The order granting the preliminary injunction is not available. See *CNN v. Video Monitoring Servs. of Am., Inc.*, 723 F. Supp. 765, 769-770 (N.D. Ga. 1989) (granting stay of plaintiff's motion for preliminary injunction pending resolution of defendant's motion to dismiss).

<sup>57</sup> 17 U.S.C. § 502(a) (1988).

<sup>58</sup> *CNN*, 940 F.2d at 1480.

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

<sup>60</sup> *Id.* Although commentators disagree whether the Eleventh Circuit correctly refused to issue an injunction, agreement as to the lack of federal statutory copyright protection of future works prevails. See, e.g., Michael W. Baird, Note, *Copyrighting Newscasts: An Argument for an Open Market*, 3 FORDHAM ENT. MEDIA & INTELL. PROP. L.J. 481, 498-500 (1993) (discussing, with approval, court's reasoning in rejecting protection for future works); Carlo G. D'Agostino, Comment, *Cable News Network v. Video Monitoring Systems: Justice or Injunctive Relief Against Copyright Protection?*, 5 DEPAUL BUS. L.J. 335, 352 (1993) ("the Appellate Court was correct in that future works are not entitled to copyright protection"); Amy A. Davis, Case Comment, *Caught in the Crossfire: Cable News Network v. Video*

Additionally, because the copyright does not exist, it cannot have an owner. Thus, if the copyright has no owner, no one can initiate an infringement action as such actions are limited to copyright owners.<sup>62</sup>

The *CNN* court also noted that the originality requirement articulated in *Feist Publications, Inc. v. Rural Telephone Service, Inc.*<sup>63</sup> prohibits the reliance upon equity<sup>64</sup> in the issuance of copyright injunctions.<sup>65</sup> Finally, the issuance of permanent injunctions to protect future works not only sanctioned the evasion of the registration requirement intrinsic to the copyright as monopoly scheme mandated by the Copyright Clause, but also permitted the extension of copyright protection to works in the public domain—"an impermissible and significant departure from existing law."<sup>66</sup>

Monitoring Services and the Nature of Copyright, 53 OHIO ST. L.J. 1155, 1176 n.110 (1992) ("apparent that the Constitution does not permit, and the Copyright Act does not provide for, generic protection for future works").

<sup>61</sup> *CNN v. Video Monitoring Servs. of Am., Inc.*, 940 F.2d 1471, 1480, *vacated for reh'g en banc*, 940 F.2d 378 (11th Cir. 1991).

<sup>62</sup> *Id.* at 1481 (citing 17 U.S.C. §§ 501(a)-(b) (1988)).

<sup>63</sup> 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991). For discussion of this decision and its relevance to the issuance of injunctions protecting future works, see *infra* notes 154-157 and accompanying text.

<sup>64</sup> See *supra* notes 29-37 and accompanying text (discussing reliance of *Orth-O-Vision* and *Crooks* courts upon equity in issuing injunctions to protect future works).

<sup>65</sup> *CNN*, 940 F.2d at 1481.

<sup>66</sup> *Id.* Relying on this opinion, the district court vacated the injunction issued in *Pacific & Southern Co., Inc. v. Duncan*, No. C81-1106-ODE, 1991 WL 323412 (N.D. Ga. Oct. 31, 1991). After the *CNN* decision was vacated on procedural grounds, the *Pacific & Southern Co.* court reinstated the injunction. No. C81-1106-ODE, 1991 WL 279410 (N.D. Ga. Dec. 5, 1991).

In four other cases, federal courts unwittingly contributed to the creation of federal common-law copyright. See, e.g., *Princeton Univ. Press, Inc. v. Michigan Document Servs., Inc.*, 855 F. Supp. 905, 913, 32 U.S.P.Q.2d (BNA) 1405 (E.D. Mich. 1994) (granting permanent injunction encompassing publisher's "existing or future copyrighted works"), *appeal docketed*, No. 94-1778 (6th Cir. July 14, 1994); *Princeton Univ. Press, Inc. v. Michigan Document Servs., Inc.*, No. 92-CV-71029-DT, 1992 WL 436235, 22 U.S.P.Q.2d (BNA) 1863 (E.D. Mich. Apr. 10, 1992) (preliminary injunction); *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1526, 18 U.S.P.Q.2d (BNA) 1437 (S.D.N.Y. 1991) (rejecting fair use claim by provider of course packets and issuing permanent injunction to protect publishing company's future works); *Paramount Pictures Corp. v. Labus*, No. 89-C-797-C, 1990 WL 120642, 16 U.S.P.Q.2d (BNA) 1142 (W.D. Wis. Mar. 23, 1990) (issuing permanent injunction to prevent copyright of plaintiff's future motion pictures on basis of defendant's prior infringement and accessibility of multiple videocassette recorders); *Georgia Television Co. v. TV News Clips*, 718 F. Supp. 939, 945, 9 U.S.P.Q.2d (BNA) 2049 (N.D. Ga. 1989) (granting

Yet, some courts, however, are beginning to recognize that the federal common-law copyright created by the issuance of injunctions to protect future works may be beyond a court's power. In modifying a permanent injunction issued in a software infringement action,<sup>67</sup> the Fifth Circuit<sup>68</sup> concluded that "[the district court] lacked the authority to enjoin generically all future modifications [of the program at issue]."<sup>69</sup> Furthermore, the *Kepner-Tregoe* court interpreted the Copyright Act's preemptive effect to encompass all "legal and equitable rights that fall within the scope of copyright law."<sup>70</sup> Reasoning that "copyright law creates a standing injunction against works that are substantially similar copies of protectable portions of copyrighted materials,"<sup>71</sup> the court of appeals concluded that the district court's injunctive power was limited to future works that were substantially similar to the copyrighted work at issue.<sup>72</sup>

Although this decision limits the scope of future works injunctions, it does endorse the issuance of such injunctions. Common sense dictates that any modification will result in a new copyright. Despite confining the injunction to modifications of the copyrighted work, the *Kepner-Tregoe* court also contributed to the creation of a

permanent injunction to future television broadcasts on basis of *Pacific & Southern Co.* court's "a copyright/the copyright" distinction), *aff'd without op.*, 983 F.2d 236 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 1068 (1994).

*Basic Books, Inc. and Princeton University Press, Inc.*, two of the more recent cases, probably will have the greatest impact upon the public. "Course packets" are compilations of text material selected for student purchase by professors. When a professor wishes to study a wide array of books or articles in a course, but requiring students to purchase each source would be prohibitively expensive, the professor designates material for copying. A duplication business, here Kinko's and Michigan Document Services, copies the material and binds it, making it available for student purchase. The issuance of these injunctions and the courts' rejection of fair use claims will have, as anyone who has made copies at Kinko's recently will know, a profound effect on both the academic community and the public.

<sup>67</sup> The district court enjoined "further copying, producing, distributing, and/or selling the MPR program or any modifications thereof. . . ." *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, Civ. A. No. H-90-804, 1992 WL 281474 at \*7, 22 U.S.P.Q.2d (BNA) 1788 (S.D. Tex. Jan. 9, 1992), *aff'd as modified*, 12 F.3d 527, 529 U.S.P.Q.2d (BNA) 1747 (5th Cir.), *cert. denied*, 115 S. Ct. 82 (1994).

<sup>68</sup> 12 F.3d 527 (5th Cir. 1994).

<sup>69</sup> *Id.* at 538.

<sup>70</sup> *Id.* at 538 n.24. Giving such effect to section 301 would preclude a reliance on equity in issuing injunctions to protect future works.

<sup>71</sup> *Id.* at 538 n.25.

<sup>72</sup> *Id.*

federal common-law copyright, albeit to a lesser degree.<sup>73</sup>

Perhaps the most notable lesson to be gleaned from examining the future works injunctions is the inability of courts to appreciate, and honor, the conception of federal copyright law as a limited statutory monopoly.<sup>74</sup> Despite the existence of statutory mandates regarding copyrightability, registration and injunctions, courts have, in an eagerness to achieve "equitable results," fashioned remedies that emasculate copyright policy.

### III. NATURE OF AUTHORITY TO ISSUE COPYRIGHT INJUNCTIONS

The argument that federal courts create federal common-law copyright when issuing future works injunctions rests upon the premise that a court's authority to issue copyright injunctions is wholly statutory. To demonstrate the validity of this premise, one must examine the nature and purpose of statutory copyright. Such an examination entails, of necessity, a brief discussion of copyright history. This historical examination, when taken in conjunction with the constitutional purpose of copyright, manifests the validity of this premise.

Prior to examining the history of the American statutory copyright, it is appropriate to examine the effects of the English

<sup>73</sup> In the most recent future works case, *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 30 U.S.P.Q.2d (BNA) 1798 (8th Cir. 1994), the plaintiff appealed denial of a permanent injunction to prevent future copying of its copyrighted photographs. Although the trial court refused to issue the injunction on the grounds that the plaintiff failed to present a live controversy, thus depriving the court of jurisdiction, the Eighth Circuit reversed and remanded, ordering the trial court to issue the sought-after injunction.

Relying on § 502(a)'s use of "a copyright," the court of appeals observed that injunctive relief could extend beyond registered copyrights and to copyrights that were not at issue in the particular litigation. Furthermore, the traditional breadth of copyright injunctions, when taken in conjunction with the court's ability to frame an injunction that protects "works not yet in existence," *id.* at 1349 (citing *Pacific & Southern Co. v. Duncan*, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984)), served as the basis for the Eighth Circuit's reasoning. Yet, by pointing to an ability to protect "future infringement of works owned by the plaintiff but not in the suit," *id.* (citing *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990)), the *Olan Mills* court seems to have relied on inapplicable law. In *Walt Disney Co.*, however, the broad scope of the injunction was attributable to the defendant's apparent willingness to infringe the copyrights of other Disney characters. Indeed, a vast expanse separates a scenario, like in *Walt Disney Co.*, between future infringement of extant works and future infringement of works not yet in existence, as in *Olan Mills Co.*

<sup>74</sup> See *infra* notes 143-150 and accompanying text.

heritage upon American copyright. "The vital fact is that the stationers' copyright lasted for almost two centuries and clearly provided the basic legal structure that its successor, the statutory copyright, inherited and carried forward—first in England, then in the United States."<sup>75</sup>

#### A. ENGLISH DEVELOPMENT OF STATUTORY COPYRIGHT

From 1557 to 1710 the Stationers Company effectively controlled, through monopoly, the printing of books in England.<sup>76</sup> Although the Licensing Act of 1662 and its subsequent extensions sanctioned the Stationers' monopoly of the booktrade, and indeed, made printing in violation of the Stationers' copyright an offense, the Statute of Anne<sup>77</sup> transformed the copyright scheme. First, the focus of protection shifted from the publisher to the author.<sup>78</sup> Second, the statute created a public domain<sup>79</sup> through the requirement that a new work be created in order to acquire copyright protection.<sup>80</sup> Third, the limited term of the copyright<sup>81</sup> further

<sup>75</sup> PATTERSON & LINDBERG, *supra* note 12, at 21.

<sup>76</sup> For detailed examinations of the Stationers and their copyright, see generally BENJAMIN KAPLAN, *AN UNHURRIED VIEW OF COPYRIGHT* 3-9 (1966); L. RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 28-71 (1948) [hereinafter PATTERSON, *HISTORICAL PERSPECTIVE*]; PATTERSON & LINDBERG, *supra* note 12, at 20-27; Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1135-40 (1983); L. Ray Patterson, *Copyright and "the exclusive Right" of Authors*, 1 J. INTELL. PROP. L. 1, 9-14 (1993) [hereinafter Patterson, "exclusive Right"]; L. Ray Patterson, *The Statute of Anne: Copyright Misconstrued*, 3 HARV. J. ON LEGIS. 223, 234-35 (1966) [hereinafter Patterson, *Copyright Misconstrued*].

<sup>77</sup> 8 Anne, c. 19, § 1 (1710).

<sup>78</sup> See, e.g., Preamble, 8 Anne, c. 19 (1710) ("Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting . . . books and other writings, without the consent of the *authors* . . . to their very great detriment, and too often to the ruin of them and their families. . . .") (emphasis added); *id.* § 1 ("the *author* of any book or books already printed . . . shall have the sole right and liberty of printing . . . for the term of one and twenty years") (emphasis added); *id.* (author of any book or books already composed, and not printed and published . . . shall have the sole liberty of printing and reprinting . . . for the term of fourteen years. . . .") (emphasis added).

<sup>79</sup> Patterson, *Copyright Misconstrued*, *supra* note 76, at 239.

<sup>80</sup> 8 Anne, c. 19, § 1 (1710).

<sup>81</sup> The term of protection for previously unpublished works was 14 years. *Id.* The author, upon expiration of the original 14 year period, could renew the copyright for an additional 14 year term. *Id.* Works that had been published prior to the enactment of the statute were eligible for protection for a term of 21 years. *Id.*

strengthened the public benefit. By eliminating the perpetual copyright, the work was accessible to all upon expiration of the copyright term. Finally, the existence of the statute itself embodied the assumption that no adequate right existed at common law.<sup>82</sup>

Despite the dramatic transformation the Statute of Anne engendered, it remained unclear to what extent the statute encompassed all of "the author's interest in his work after publication."<sup>83</sup> Fifty-six years after the promulgation of the statute, however, the King's Bench faced this question directly in *Millar v. Taylor*.<sup>84</sup> A majority of the judges ruled that the Statute of Anne did not define the author's copyright. Instead, they concluded that common law mandated the author's entitlement to a perpetual copyright despite the existence of the statute.<sup>85</sup>

Although the decision in *Millar* was not appealed, the question of common-law copyright surfaced again in *Donaldson v. Becket*. The House of Lords reversed the injunction at issue, overturned *Millar* and limited the author's common-law copyright to unpublished works. After publication, the copyright statute provided the only source of protection. With a terse order "[t]hat the Decree be reversed without costs of suit,"<sup>86</sup> the rejection of common-law copyright in England was complete. This history remains significant, however, not only for its role in shaping American statutory

<sup>82</sup> Abrams, *supra* note 76, at 1141-42. Furthermore, the statute provided no protection if the author did not comply with the terms of the statute. PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 76, at 147.

<sup>83</sup> Patterson, *Copyright Misconstrued*, *supra* note 76, at 239.

<sup>84</sup> 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769). Andrew Millar purchased the rights to James Thompson's poem, "The Seasons," in 1729. Millar complied with the statutory requirements and utilized the protection provided by the statute for the full term. Subsequently, Robert Taylor printed the poem. Millar brought the action in 1767. Justice Willes phrased the questions the action presented as "1st. Whether the copy of a book, or literary composition, belongs to the author, by common law; 2d. Whether the common law-right of authors to the copies of their own works is taken away by 8 Ann. c. 19." 4 Burr. at 2311, 98 Eng. Rep. at 206; *see also* 4 Burr. at 2336, 98 Eng. Rep. at 219 (Aston, J.) (phrasing questions as whether author has a common law right, whether act of publishing work "takes away" his copyright, and whether author's right "is taken away from him, or restrained, by the Statute of Queen Ann"). In other words, the King's Bench addressed the existence of a common-law copyright and whether this copyright was preempted by the Statute of Anne. Abrams, *supra*, note 76, at 1153.

<sup>85</sup> 4 Burr. at 2407, 98 Eng. Rep. at 257.

<sup>86</sup> 17 PARL. HIST. ENG. 1003 (1813).

copyright but also to serve as a reminder of the potential harm that perpetual common-law copyright engenders.<sup>87</sup>

## B. AMERICAN HISTORY OF STATUTORY COPYRIGHT

1. *Introduction.* Because the Copyright Clause<sup>88</sup> provides Congress with the authority to promulgate federal copyright law, any discussion of American copyright must acknowledge the significance of this explicit grant of congressional power. Moreover, the Copyright Clause was a limitation on, as well as a grant of, congressional power. Accordingly, common-law copyright became a matter of state law whereas statutory copyright became a matter of federal law. This grant of, and limitation on, congressional power shaped two later developments—the federal preemption of copyright<sup>89</sup> and the statutory focus of American copyright.<sup>90</sup>

2. *Copyright Acts and Relevant Case Law—Prior to 1976.* Congress modelled the first federal copyright statute, passed in 1790,<sup>91</sup> on the Statute of Anne. Limiting protection to maps, charts and books,<sup>92</sup> the statute provided for fourteen year terms

<sup>87</sup> PATTERSON & LINDBERG, *supra* note 12, at 29-30.

<sup>88</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." U.S. CONST. art. I, § 8, cl. 8.

<sup>89</sup> See 17 U.S.C. § 301 (1988) (codifying federal preemption of copyright).

A power 'to promote the progress of science and useful arts by securing, for a limited time, to authors and inventors the exclusive right to their respective writings and discoveries'.

The utility of this power will scarcely be questioned. . . The States cannot separately make effectual provision for [the copyright of authors and the right of useful inventions], and most of them have anticipated the decision of this point by laws passed at the instance of Congress.

THE FEDERALIST NO. 43, at 271-72 (James Madison) (Clinton Rossiter ed., 1961).

<sup>90</sup> See PATTERSON & LINDBERG, *supra* note 12, at 51 ("The framers . . . knew, of course, that Congress could grant only statutory rights."); PATTERSON, HISTORICAL PERSPECTIVE, *supra* note 76, at 194 ("The idea of statutory privilege was obviously in the minds of the framers, because the clause gave Congress the power to enact a copyright statute."); *but see* ABRAMS, *supra* note 76, at 1175 ("The constitutional language neither explicitly endorses nor prohibits common law copyright protection.") The Supreme Court determined the fate of American common law copyright in *Wheaton v. Peters*, 33 U.S. (5 Pet.) 591 (1833). For further discussion of this landmark development, see *infra* notes 103-111 and accompanying text.

<sup>91</sup> Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (1790) (amended 1802) (repealed 1831).

<sup>92</sup> *Id.* § 1.



of protection to United States citizens and residents, and restricted renewal terms to authors.<sup>93</sup> The statute defined copyright infringement to encompass a variety of offenses,<sup>94</sup> and provided protection subject to the fulfillment of various formalities.<sup>95</sup>

Prior to the 1831 revision of the Copyright Act,<sup>96</sup> Congress granted federal courts the power to issue injunctions in actions concerning copyright.<sup>97</sup> The 1831 Act expanded the categories of copyrightable subject matter<sup>98</sup> but retained certain formalities from the 1790 act.<sup>99</sup> Federal courts could grant injunctions "according to the principles of equity."<sup>100</sup> In construing both the 1819 and 1831 Acts, the Supreme Court observed that "[t]here being no common law of copyright in this country, whatever rights are possessed by the proprietor of the copyright must be derived from some grant thereof, in some act of congress. . . ."<sup>101</sup> The Court concluded that because the 1819 Act did not extend equity powers to forfeiture,<sup>102</sup> the jurisdiction of the court was limited to powers granted by statute.

<sup>93</sup> *Id.*

<sup>94</sup> Infringement included printing, reprinting or publishing of a copyrighted work, importing copyrighted works or knowingly selling infringing works and provided for forfeitures and fines for violations. *Id.* § 2.

<sup>95</sup> Compliance with statutory formalities, deposit of a copy of the work with the clerk of the district court and delivery of a copy to the Secretary of State, entitled the author to protection under the statute. *Id.* §§ 3-4, 1 Stat. 124.

<sup>96</sup> Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (1831) (repealed 1870).

<sup>97</sup> Act of Feb. 15, 1819, ch. 19, 3 Stat. 481 (1819) (repealed 1870). The statute provided:

[T]he circuit courts . . . shall have original cognisance, as well in equity as at law, of all actions . . . arising under any law of the United States, granting or confirming to authors . . . the exclusive right to their respective writings . . . and upon any bill in equity, filed by any party aggrieved in any such cases, shall have authority to prevent the . . . violation of the rights of any authors . . . secured to them by any laws of the United States, on such terms and conditions as the said courts may deem fit and reasonable.

*Id.* at 481-82.

<sup>98</sup> Protection expanded to encompass musical compositions, prints, cuts, and engravings. Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436 (1831) (repealed 1870).

<sup>99</sup> The prerequisites of registration and deposit with the Secretary of State continued. *Id.* § 4, 4 Stat. 437.

<sup>100</sup> *Id.* § 9, 4 Stat. at 438.

<sup>101</sup> *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 454 (1854).

<sup>102</sup> *Id.* at 455.

Shortly after Congress passed the 1831 Act, the Supreme Court issued its first copyright decision, a pronouncement which would forever shape American copyright law, in *Wheaton v. Peters*.<sup>103</sup> Reasoning that a common law copyright after publication would grant the author a perpetual monopoly, the majority concluded that the author could not claim such a copyright after publication.<sup>104</sup> The Court firmly dispelled any notions about the existence of a federal common law.<sup>105</sup> Furthermore, even if a common-law copyright after publication had existed in England, the Court concluded that such a right had not been adopted in Pennsylvania.<sup>106</sup>

After rejecting Wheaton's claim to common-law copyright after publication on the basis of Pennsylvania law, the Court reasoned

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<sup>103</sup> 33 U.S. (8 Pet.) 591 (1834). The action arose when Richard Peters, Henry Wheaton's successor as reporter for the United States Supreme Court, proposed to publish "The Cases Decided in the Supreme Court of the United States, From its organization to the close of January term 1827." Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective of Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1365 n.423 (1985). Because copyright royalties composed a substantial percentage of a reporter's income, Peters' proposal to condense Wheaton's reports would diminish, if not eliminate, sales of Wheaton's volumes. PATTERSON, *HISTORICAL PERSPECTIVE*, *supra* note 76, at 203-04. Wheaton and his publisher, Donaldson, brought an action in 1831 on the basis of the Copyright Act and Pennsylvania common law. Although the Circuit Court of Pennsylvania initially granted Wheaton an injunction, it later dissolved the injunction on two grounds. Denying the statutory claim on the basis of Wheaton's failure to comply with the requirement of deposit with the Secretary of State, Judge Hopkinson rejected Wheaton's common-law claim; concluding that federal common law did not exist and that the states had not adopted the claimed English common-law copyright. *Wheaton v. Peters*, 29 F. Cas. 862, 871-72 (No. 17486) (C.C.E.D. Pa. 1832). Wheaton appealed to the Supreme Court.

<sup>104</sup> That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or by improperly obtaining a copy endeavours to realise [sic] a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.

*Wheaton*, 33 U.S. (8 Pet.) at 657.

<sup>105</sup> "It is clear, there can be no common law of the United States. . . . There is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union. The common law could be made a part of our federal system, only by legislative adoption." *Id.* at 658.

<sup>106</sup> *Id.* at 660.

that because Congress had created the author's right,<sup>107</sup> the right must be analyzed under the Copyright Act of 1790. Relying on its earlier conclusion that Congress had created the copyright, the Court concluded that not only did Congress have the power to prescribe conditions for copyright protection,<sup>108</sup> but an author seeking copyright protection must adhere strictly to the terms of the statute.<sup>109</sup>

Despite the Court's unanimous agreement that judicial opinions cannot be copyrighted,<sup>110</sup> the *Wheaton* decision's landmark status derives from its rejection of a common-law foundation for copyright protection. Copyright is a creature of statute.<sup>111</sup> Thus, Congressional action defines an author's rights under copyright.

The 1870 revision expanded the scope of copyrightable subject matter to include dramatic compositions, photographs or negatives thereof, painting, drawing, chromo, statue, statuary and "models or designs intended to be perfected as works of the fine arts. . . ."<sup>112</sup> Moreover, the statute provided that an action for copyright infringement could not be maintained unless the copy bore a notice of copyright,<sup>113</sup> which could only be obtained upon registration.<sup>114</sup> Thus, maintenance of an infringement action required registration of the copyright.

The Copyright Act of 1909<sup>115</sup> departed substantially from prior statutes in terms of its scope of protection and the requirements

<sup>107</sup> "Congress, then, by this act, instead of sanctioning an existing right, as contended for, created it. This seems to be the clear import of the law, connected with the circumstances under which it was enacted." *Id.* at 661.

<sup>108</sup> This right . . . does not exist at common law—it originated, if at all, under the acts of congress. *No one can deny that when the legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law.*

*Id.* at 663-64 (emphasis added).

<sup>109</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 665 (1834). The Court remanded the case with instructions to determine *Wheaton's* compliance with the requirement that copies be deposited with the Secretary of State. *Id.* at 667-68.

<sup>110</sup> *Id.* at 668.

<sup>111</sup> *Abrams*, *supra* note 76, at 1185.

<sup>112</sup> Act of July 8, 1870, ch. 230, § 86, 16 Stat. 198, 212 (1870) (repealed 1909).

<sup>113</sup> *Id.* § 97, 16 Stat. at 214.

<sup>114</sup> *Id.*

<sup>115</sup> Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (repealed 1978).

for, and methods of, enforcement of this statutory protection. Section four extended copyright protection to "all the writings of an author."<sup>116</sup> Copyright protection attached upon publication instead of upon registration.<sup>117</sup> Furthermore, one could not maintain an action for copyright infringement prior to compliance with the registration and deposit requirements.<sup>118</sup> Submission of a copyright registration certificate constituted prima facie evidence of the registration in an infringement action—an incentive for compliance.<sup>119</sup>

Although the 1909 Act retained a provision permitting injunctions comparable to previous statutes,<sup>120</sup> an additional section provided that an infringing party "shall be liable [t]o an injunction restraining such infringement [of the copyright]."<sup>121</sup> On its face, the statute provided that an injunction is available only for a copyrightable work and that injunction must be directed at infringement of the copyright at issue.

*3. Importance of Early American Copyright Law.* The history of statutory copyright in England and the United States indicates the rejection of national/federal common-law copyright. As *Donaldson* demonstrates, the Statute of Anne, precursor to American copyright statutes, supplanted the author's common-law copyright.

In the United States, the Copyright Clause of the Constitution explicitly empowers Congress, not the courts, to promulgate copyright legislation. And, after *Wheaton*, a federal common-law copyright cannot exist. The additional contributions of the *Wheaton* Court—copyright as a statutory grant and strict compliance with congressional conditions placed on copyright protection—underscore the significance of the recent departures from these principles by

<sup>116</sup> *Id.* § 4, 35 Stat. at 1076.

<sup>117</sup> *Id.* § 10, 35 Stat. at 1078. Section 2 provided that the Act did not "annul or limit the right of the author or proprietor of an unpublished work, at common law or at equity." *Id.* § 2, 35 Stat. at 1076. Taken in conjunction with section 10, the statute created a dual system of copyright protection—federal statutory protection for published works and state common-law protection for unpublished works.

<sup>118</sup> Act of Mar. 4, 1909, ch. 320, § 12, 35 Stat. 1075, 1078 (1909) (repealed 1978).

<sup>119</sup> *Id.* § 55, 35 Stat. at 1086.

<sup>120</sup> See *id.* § 36, 35 Stat. at 1084 (granting power "to grant injunctions to prevent and restrain the violation of any right secured by said laws, according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable").

<sup>121</sup> *Id.* § 25(a), 35 Stat. at 1081.

courts that issue permanent injunctions to protect future works.

Furthermore, the provisions of the pre-1976 Copyright Acts demonstrate the significance placed by Congress on certain statutory conditions; the requirements of registration prior to maintaining an infringement action, the limits placed on issuance of injunctions and the imperative that a work be copyrightable before it is eligible for statutory protection.

## C. COPYRIGHT ACT OF 1976<sup>122</sup>

1. *Requirements for Copyrightability.* Section 102(a)<sup>123</sup> of the Act defines the limits of copyrightability and, consequently, eligibility for federal statutory protection. The statute provides, in pertinent part, that "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>124</sup> A statutory definition of "fixed" appears in section 101.<sup>125</sup>

According to the House Report which accompanied the Act, fixation serves as the boundary between state common law or statutory protection and federal statutory protection.<sup>126</sup> Thus,

<sup>122</sup> 17 U.S.C. §§ 101-810 (1988).

<sup>123</sup> *Id.* § 102(a).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* § 101. The definition provides:

A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

*Id.*

<sup>126</sup> Under the bill, the concept of fixation is important since it not only determines whether the provisions of the statute apply to a work, but it also represents the dividing line between common law and statutory protection . . . an unfixed work of authorship . . . would continue to be subject to protection under State common law or statute but would not be eligible for Federal statutory protection under section 102.

H.R. REP. NO. 1476, 94th Cong., 2d Sess. 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665. See also HOUSE COMM. ON THE JUDICIARY, REPORT OF THE REGISTER OF COPYRIGHTS

where a work is not fixed, the provisions of the Copyright Act simply do not apply; rendering the work ineligible for federal statutory protection. Consequently, future works, which by virtue of the fact that they do not exist are not fixed, do not fall within the purview of statutory protection.

2. *Preemption.* Congress preempted all state laws equivalent to copyright in section 301.<sup>127</sup> Thus, only works that are “fixed in a tangible medium of expression” may be protected by the federal copyright statutes whereas only works that are not fixed may be protected by state common law or statute. Legislative history indicates that “a work would obtain statutory protection *as soon as* it is ‘created’ or, as that term is defined in section 101, when it is ‘fixed in a copy . . . for the first time.’”<sup>128</sup> Therefore, a work that is not fixed—a future work—cannot obtain statutory protection.<sup>129</sup> Protecting future works through permanent injunctions results in federal common-law copyright; a result seemingly antithetical to congressional intent.<sup>130</sup>

ON THE GENERAL REVISION OF THE COPYRIGHT LAW, 87TH CONG., 1ST SESS. 41 (Comm. Print. 1961), *reprinted in* 3 GROSSMAN, *supra* note 55, at 41 (observing that “the [revised copyright] statute would not apply to a work . . . which the author has not fixed in any tangible form.”)

<sup>127</sup> 17 U.S.C. § 301(a) (1988).

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

*Id.* § 301(a). Congress did provide, however, that “works of authorship not fixed in any tangible medium of expression” are protectable under state common law or state statute. *Id.* § 301(b)(1); *see* *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232 (1964) (prohibiting state from using unfair competition law to extend patent-like protection to lamp not protected by federal law); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 238 (1964) (noting, in dicta, that state law causes of action outside scope of federal intellectual property protection not preempted).

<sup>128</sup> H.R. REP. NO. 1476, *supra* note 126, at 129, *reprinted in* 1976 U.S.C.C.A.N. at 5745 (emphasis added).

<sup>129</sup> *See, e.g.,* *Dodd v. Fort Smith Special School Dist. No. 100*, 666 F. Supp. 1278, 1283, 4 U.S.P.Q.2d (BNA) 1395 (W.D. Ark. 1987) (“Fixation is now the trigger mechanism which terminates common law copyright and activates federal statutory copyright.”) (citation omitted).

<sup>130</sup> *But cf.* Jessica D. Litman, *Copyright, Compromise and Legislative History*, 72 CORNELL L. REV. 857, 903 (1987) (attributing difficulties in interpreting legislative history to fact Congress “revised the copyright law by encouraging negotiations between interests affected by copyright, by trusting those negotiations to produce substantive compromises, and by

3. *Registration As a Prerequisite for Maintaining an Infringement Action.* Section 411(a)<sup>131</sup> carries forward the requirement in section 12 of the 1909 Act<sup>132</sup> of copyright registration prior to instituting an action for infringement.<sup>133</sup> Requirements for live television transmissions appear in section 411(b).<sup>134</sup> Registration is a jurisdictional requirement. The only exception is section 411(b)(1) for purposes of obtaining an injunction. This exception indicates that otherwise injunctions are not available for future works.

4. *Injunctive Remedy.* If a copyright owner seeks an injunction to prevent infringement, section 502(a)<sup>135</sup> controls. This provision grants injunctive power to "[a]ny court having jurisdiction of a civil action arising under this title. . . ."<sup>136</sup> The court "may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."<sup>137</sup> Available legislative history regarding section 502(a) does little to clarify the power to grant injunctions. The House Report merely reiterates the court's power to, on the basis of discretion, prevent

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ultimately enacting those compromises into law"); see also Jessica Litman, *Copyright, Legislation and Technological Change*, 68 OR. L. REV. 275, 278 (1985) (attributing Copyright Act's failure to accommodate technical change to congressional reliance on industry representatives for statutory drafting).

<sup>131</sup> 17 U.S.C. § 411(a) (1988).

<sup>132</sup> Act of Mar. 4, 1909, ch. 230, § 12, 35 Stat. 1075, 1078 (1909) (repealed 1978).

<sup>133</sup> 17 U.S.C. § 411(a) (1988). With the exception of non-U.S. works, "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." *Id.*

<sup>134</sup> In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if . . . the copyright owner—

(1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and  
(2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

*Id.* § 411(b).

<sup>135</sup> *Id.* § 502(a).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

infringement by granting an injunction.<sup>138</sup> In a study submitted as part of the copyright revision,<sup>139</sup> the author noted that the propriety of injunctive remedies for copyright infringement had gone unquestioned.<sup>140</sup> The primary consideration in issuing injunctions seems to be whether additional injury to the plaintiff is likely.<sup>141</sup>

#### D. NATURE AND PURPOSE OF COPYRIGHT

Any discussion of the nature and purpose of copyright must begin with the Copyright Clause. As indicated by the delegation of power to Congress,<sup>142</sup> copyright is a creature of statute<sup>143</sup> and only Congress possesses the requisite power to define the scope of copyright. Indeed, on numerous occasions, courts have emphasized

<sup>138</sup> H.R. REP. NO. 1476, *supra* note 126 at 160, reprinted in 1976 U.S.C.C.A.N. at 5776.

<sup>139</sup> STAFF OF THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SEN. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION: STUDY NO. 24, REMEDIES OTHER THAN DAMAGES FOR COPYRIGHT INFRINGEMENT 115 (Comm. Print 1960) (William S. Strauss), reprinted in 8 GROSSMAN, *supra* note 55, at 115.

<sup>140</sup> The permissive nature of this grant of injunctive power "was done advisedly." James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, 18 HOFSTRA L. REV. 983, 994 & nn.85-87 (1990). A survey of law review literature regarding copyright injunctions indicates that approval of this permissive grant arises out of concern about mandatory injunctions, not the scope of copyright injunctions. Indeed, the primary concern copyright injunctions engender appears to be the limits such injunctions would place on fair use. See, e.g., *id.* at 995-96 (arguing that public interest of access to information through fair use should be taken into account when courts issue copyright injunctions); Tiffany D. Trunko, Note, *Remedies for Copyright Infringement: Respecting the First Amendment*, 89 COLUM. L. REV. 1940, 1956 (1989) (advocating bifurcated approach towards liability and remedy as means for advancing policies of first amendment and copyright laws); see also *infra* note 160 (noting implications for fair use under 17 U.S.C. § 107 (1988)).

<sup>141</sup> See, e.g., 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.06[B], at 14-98 to 14-99 (1994) ("[A] permanent injunction is issued only after liability is established . . . Nonetheless, [permanent] injunctive relief ordinarily will not be granted when there is no probability or threat of continuing or additional infringements.") (citations omitted); 2 PAUL GOLDSTEIN, COPYRIGHT § 11.2, at 275 (1989) (noting requirement that plaintiff demonstrate likelihood of recurrent infringement "is not particularly rigorous").

<sup>142</sup> "Congress shall have Power . . .", U.S. CONST. art. 1, § 8, cl. 8.

<sup>143</sup> *Krafft v. Cohen*, 117 F.2d 579, 580 (3rd Cir. 1941) ("Copyright . . . is wholly a creature of statute."); see also *Copyright Law Revision: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyrights of the Sen. Comm. on the Judiciary*, 89th Cong., 1st Sess. 101 (1965), reprinted in 8 GROSSMAN, *supra* note 55, at 101 (statement of John Schulman, Chairman for Revision of Copyright Law, American Bar Association) ("[T]he basic rights of the copyright proprietor and his remedies against infringement are only those provided by statute.").



the statutory nature of copyright.<sup>144</sup> Thus, this delegation of power constitutes, and defines, the nature of copyright as a statutory monopoly. Further strengthened by the explicit rejection of federal common-law copyright in the 1976 copyright revision,<sup>145</sup> federal courts do not possess the authority to create federal copyright through common law. Therefore, the parameters of the 1976 Copyright Act limit the role of the federal courts in the copyright arena.

Yet, this statutory monopoly itself contains inherent limits; limits embodied in the Constitution's grant of power.<sup>146</sup> These limits—promotion of learning,<sup>147</sup> protection of the public domain,<sup>148</sup> and benefit to the author<sup>149</sup>—represent the policies underlying American copyright law. Shaped, in part, by English copyright history, the promotion of these policies serves as the foundation for American copyright jurisprudence.<sup>150</sup>

<sup>144</sup> See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("As the text of the Constitution makes plain, it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted. . . ."); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("But the copyright is the creature of the federal statute passed in the exercise of the power vested in Congress. As this Court has repeatedly said, the Congress did not sanction an existing right but created a new one."); *Security-First Nat'l Bank v. Republic Pictures Corp.*, 97 F. Supp. 360, 365, 89 U.S.P.Q. (BNA) 231 (S.D. Cal. 1951) ("It is evident . . . that copyright is . . . the creature of statute and possessing only the characteristics which the statute has endowed it with."), *rev'd on other grounds*, 197 F.2d 767 (9th Cir. 1952).

<sup>145</sup> 17 U.S.C. § 301 (1988).

<sup>146</sup> *Patterson*, "exclusive Right", *supra* note 76, at 4.

<sup>147</sup> "To Promote the Progress of Science. . . .", U.S. CONST. art. 1, § 8, cl. 8.

<sup>148</sup> "by securing for limited Times . . .", *Id.*; see 18 AM. JUR. 2D *Copyright and Literary Property* § 1 (1985) ("The monopoly privileges that Congress may authorize under the copyright clause of the Constitution are neither unlimited nor primarily designed to provide a special private benefit; rather, the limited grant is a means by which an important public purpose may be achieved."); 1 GOLDSTEIN, *supra* note 141, § 1.1, at 5 ("The constitutional clause empowering Congress to enact a copyright statute reflects the belief that property rights, properly limited, will serve the general public interest in an abounding national culture."); see also *Mazer v. Stein*, 347 U.S. 201, 219, 100 U.S.P.Q. (BNA) 325 (1954) ("The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort is the best way to advance public welfare. . . ."); *United States v. Paramount Pictures*, 334 U.S. 131, 158, 77 U.S.P.Q. (BNA) 243 (1948) ("The copyright law . . . makes reward to the owner a secondary consideration.")

<sup>149</sup> "by securing . . . to Authors . . . the exclusive Right . . .", U.S. CONST. art. 1, § 8, cl. 8.

<sup>150</sup> As noted by the Supreme Court in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 186 U.S.P.Q. (BNA) 65 (1975):

The immediate effect of our copyright law is to secure a fair return for

## IV. ARGUMENTS AGAINST FEDERAL COMMON-LAW COPYRIGHT

## A. THE CONSTITUTION

By virtue of the Copyright Clause,<sup>151</sup> an analysis of the creation of federal common-law copyright through the issuance of injunctions to protect future works must begin with constitutional considerations. The creation of this federal common-law copyright is unconstitutional in five aspects. First, the protection of that which is not created defies the originality requirement articulated in *Feist Publications, Inc. v. Rural Telephone Service Co.*<sup>152</sup> Second, extending copyright protection to works which do not exist emasculates the limitation of protection to authors. Third, this expansion circumvents the “writings” requirement. By definition, a work that has not been created cannot be a writing. Fourth, federal common-law copyright protection evades the “limited times” requirement. Finally, the formulation of rights by common law

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the ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ‘The sole interest of the United States and the primary object in conferring the monopoly,’ this Court has said, ‘lie in the general benefits derived by the public from the labors of authors.’

(citation omitted). See also *Gates Rubber Co. v. Bando Chem. Indus., Inc.*, 9 F.3d 823, 829, 28 U.S.P.Q.2d (BNA) 1503 (10th Cir. 1993) (“Copyright policy is meant to balance protection, which seeks to ensure a fair return to authors and inventors and thereby to establish incentives for development, with dissemination, which seeks to foster learning, progress and development.”). In *United States v. Billy*, 406 F. Supp. 726, 730, 191 U.S.P.Q. (BNA) 717 (E.D. Pa. 1975), the court characterized copyright law as:

a compromise between competing social policies—one favoring the widest possible dissemination of new ideas and new forms of expression, and the other giving writers and artists enough of a monopoly over their works to ensure their receipt of fair material rewards for their efforts. The first policy predominates, which means that the system of rewards is to be no more extensive than necessary in the long run to elicit a socially optimal amount of creative activity.

See also *CNN v. Video Monitoring Servs. of Am., Inc.*, 940 F.2d 1471, 1478, *vacated for rehearing en banc*, 949 F.2d 378 (11th Cir. 1991) (describing copyright as bargain in which authors receive exclusive right to reproduce, for limited time, their writings in exchange for author’s dissemination to public to facilitate learning).

<sup>151</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.” U.S. CONST. art. 1, § 8. cl. 8.

<sup>152</sup> 499 U.S. 340, 345 (1991).

that are not protected by statute usurps congressional control of copyright law.<sup>153</sup>

"The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author."<sup>154</sup> Common sense dictates that it is impossible to ascertain the originality of that which does not exist. Thus, by extending copyright protection to future works through injunctions, courts disregard this fundamental requirement.<sup>155</sup> Because "[t]he originality requirement is constitutionally mandated for all works,"<sup>156</sup> the refusal to adhere to this requirement, evidenced through protection to future works, fails to satisfy the constitutional mandate; rendering the creation of federal common-law copyright unconstitutional.<sup>157</sup>

Furthermore, " 'an author', in a constitutional sense, [means] 'he to whom anything owes its origin; originator; maker.' "<sup>158</sup> A work that does not exist has neither an origin nor an originator. But, by protecting future works, courts that issue such injunctions frustrate

<sup>153</sup> Arguably, permanent injunctions to protect future works operate as prior restraints. See generally *Near v. Minnesota*, 283 U.S. 697, 719 (1931) (striking down prior restraint on publication as violation of press freedom). In extending copyright protection to future works, a court is effectively exercising broad control over a defendant's expression prior to the manifestation of a copyrightable expression. A more detailed discussion of this problem, however, is beyond the scope of this paper. But see 3 NIMMER & NIMMER, *supra* note 141 § 14.06[C], at 14-102 to 14-104 (observing that, although injunctive scope should be "coterminous with . . . infringement," injunctive remedy could, if exercised broadly, "alter copyright into an engine of suppression, in contravention of its goal to promote the progress of science and threatening to encroach on First Amendment values").

<sup>154</sup> *Feist*, 499 U.S. at 345.

<sup>155</sup> Courts that grant these injunctions on the basis of equity are, instead, relying on the "sweat-of-the-brow" theory that the *Feist* decision explicitly rejected. *CNN*, 940 F.2d at 1481 (citing *Feist*, 499 U.S. at 351-59).

<sup>156</sup> *Feist*, 499 U.S. at 347 (quoting L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 763 n.155 (1989)).

<sup>157</sup> As observed by the Eleventh Circuit Court of Appeals in *CNN*, the future works injunctions may have the effect of permitting copyright owners to gain protection for "public domain materials, an impermissible and significant departure from existing law." *CNN v. Video Monitoring Servs. of Am., Inc.*, 940 F.2d 1471, 1481, *vacated for reh'g en banc*, 949 F.2d 378 (11th Cir. 1991).

<sup>158</sup> *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)). See also 1 NIMMER & NIMMER, *supra* note 141 § 2.01[A], at 2-9 ("Originality means . . . that the work owes its origin to the author, i.e., is independently created and not copied from other works.").

both the explicit constitutional requirement of an "author" and the originality requirement implicit in the term "author."

The protection of future works exceeds the constitutional limitation of copyright protection to "Writings." Not only must an indispensable originality exist in a writing,<sup>159</sup> but the actual requirement also must be satisfied.<sup>160</sup> A work that does not exist is neither a writing nor can it, until it exists, satisfy the originality requirement.

Additionally, the protection extended to future works is potentially limitless in duration. Although the statutory term will attach upon fixation, it is possible that the combination of pre- and post-fixation lengths of protection could exceed that afforded by statute. It is in this respect that courts which issue such injunctions exceed the constitutional requirement of "securing for Limited Times."<sup>161</sup> Moreover, Congress premised enactment of section 301 upon effectuating compliance with this constitutional mandate.<sup>162</sup>

<sup>159</sup> *Feist*, 499 U.S. at 346-47 (quoting *The Trade-Mark Cases*, 100 U.S. 82, 94 (1879)).

<sup>160</sup> See, e.g., Melville B. Nimmer, *The Subject Matter of Copyright Under the Act of 1976*, 24 U.C.L.A. L. REV. 978, 987 (1977) ("Fixation in tangible form is not merely a statutory condition to copyright. It is also a constitutional necessity. That is, unless a work is reduced to tangible form, it cannot be regarded as a 'writing' within the meaning of the constitutional clause authorizing federal copyright legislation."); see also Zechariah Chafee, *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 504 (1945) (observing that constitutional requirement of "writings" precludes copyright protection for "ideas still in the author's head"). It is in this manner that permanent injunctions to protect future works fall afoul of the idea/expression dichotomy. First articulated by the Supreme Court in *Baker v. Selden*, 101 U.S. 99, 104-05 (1879), and incorporated into the current statute at 17 U.S.C. § 102(b) (1988), this doctrine provides that whereas an idea may not be protected by copyright, the expression of that idea is clearly eligible for copyright protection. By issuing a future works injunction, a court protects works that do not exist. Moreover, until that work comes into being, it is the author's idea that gains protection, in direct contravention of the long-honored idea/expression dichotomy.

Additionally, the protection of future works through permanent injunctions prevents a defendant from articulating a fair use claim under 17 U.S.C. § 107 (1988). A thorough discussion of the fair use implications posed by such injunctions is, however, beyond the scope of this paper.

<sup>161</sup> See Saul Cohen, *Duration*, 24 U.C.L.A. L. REV. 1180, 1185 (1977) (observing that because of limited times provision, "from the very beginning copyright protection under federal law has been and must be for a limited period").

<sup>162</sup> See, e.g., H.R. REP. NO. 1476, *supra* note 126, at 130, *reprinted in* 1976 U.S.C.C.A.N. at 5746 (noting enactment of section 301 "would also implement the 'limited times' provision of the Constitution"); see also REGISTER OF COPYRIGHTS, 87TH CONG., 1ST SESS., REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 40 (Comm. Print 1961), *reprinted in* 3 GROSSMAN, *supra* note 55, at 40 (acknowledging perpetual protection accorded under

Finally, and perhaps most importantly, this federal common-law copyright protection for future works usurps the congressional mandate furnished in the Constitution. After all, the Constitution provides that “Congress shall have power”<sup>163</sup> not, “the federal courts shall have power.” An author has no right to protection where Congress, empowered by the Constitution, has chosen not to extend it. Also, because copyright is a creature of statute, a court cannot grant a right to copyright protection that Congress has declined to create. Furthermore, where Congress has chosen to extend protection and enforcement of protection subject to conditions such as fixation and registration,<sup>164</sup> a court cannot circumvent these prerequisites. Indeed, *Wheaton v. Peters*<sup>165</sup> demands that such conditions be honored through strict compliance. The *Wheaton* Court first articulated that American copyright law is the creation of Congress and Congress alone.<sup>166</sup> Congress controls the monopoly privileges that copyright protection bestows.

The monopoly privileges *that Congress may authorize* are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose is achieved. It is intended to motivate the creative activity of authors . . . by the provision of a special reward, and to allow the public access to the

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common-law copyright collides with ‘limited times’ dictate of Constitution). Under common law, copyright protection is perpetual—inherently not a limited time.

<sup>163</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>164</sup> See *supra*, notes 122-141 and accompanying text (discussing statutory prerequisites in Copyright Act of 1976).

<sup>165</sup> 33 U.S. (8 Pet.) 591 (1834); see *supra* notes 103-111 and accompanying text.

<sup>166</sup> *Wheaton*, 33 U.S. (8 Pet.) at 661; see also *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 346 (1908) (“[C]opyright [protection] under the Federal law is wholly statutory, and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred under article 1, § 8 of the Federal Constitution.”); *Freeman v. Trade-Register, Inc.*, 173 F. 419, 421 (C.C.W.D. Wa. 1909) (“The law of copyright in the United States is entirely statutory. All the conditions prescribed by Congress are important and essential and must be observed, or there is no right of action.”).

products of their genius after the *limited period* of exclusive control.<sup>167</sup>

In short, the creation of federal common-law copyright by courts that issue permanent injunctions to protect future works subverts the nature of copyright—a limited statutory monopoly—as it has existed to date. The sweeping protection these courts provide is neither limited nor statutory. Clearly, then, this protection is not constitutional.

## B. CONGRESSIONAL REQUIREMENTS

Because “it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . to give the public appropriate access to their work product,”<sup>168</sup> any analysis of this federal common-law copyright must examine the scope of protection that Congress has granted. *Wheaton v. Peters*<sup>169</sup> mandates strict compliance with statutory requirements.

Section 102<sup>170</sup> of the Copyright Act provides that “[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>171</sup> But what does this provision mean? According to the House Report issued with the Act, fixation in tangible form is “a basic condition of copyright protection . . . an

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<sup>167</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (emphasis added). Nine years earlier the Court had emphasized this point in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 186 U.S.P.Q. (BNA) 65 (1975):

The limited scope of the copyright holder's *statutory* monopoly, like the *limited copyright duration* required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.

*Id.* at 156 (emphasis added).

<sup>168</sup> *Sony Corp. of Am.*, 464 U.S. at 429.

<sup>169</sup> 33 U.S. (8 Pet.) 591 (1834).

<sup>170</sup> 17 U.S.C. § 102(a) (1988).

<sup>171</sup> *Id.*

unfixed work of authorship . . . would not be eligible for Federal statutory protection under section 102.<sup>172</sup>

Thus, it is clear that if a work is not fixed, it is not copyrightable.<sup>173</sup> If it is not copyrightable, it cannot be afforded protection under the federal statutory scheme.<sup>174</sup> Yet, courts that issue injunctions to protect future works circumvent this basic requirement, resulting in the creation of a federal common-law copyright. Despite the unavailability of protection under the statutory scheme due to a lack of fixation, the courts that issue these injunctions take advantage of the remedial provisions.

Section 411(a) mandates the registration of the copyright prior to instituting an action for infringement.<sup>175</sup> Requirements for live television transmissions appear in section 411(b).<sup>176</sup> This man-

<sup>172</sup> H.R. REP. NO. 1476, *supra* note 126, at 52, *reprinted in* 1976 U.S.C.C.A.N. at 5665. Professors Nimmer contend that a situation in which an author seeks copyright protection for an unfixed work could never arise:

Clearly an intellectual creation which is merely in the mind of the author may not be regarded as property capable of copyright. To state this proposition, however, amounts to nothing more than an intellectual exercise since practically there could be no copying (and hence no need to invoke copyright) of a work which has never been expressed in any form.

1 NIMMER & NIMMER, *supra* note 141, § 2.02, at 2-18.3.

<sup>173</sup> See Ralph S. Brown, *Unification: A Cheerful Requiem for Common Law Copyright*, 24 U.C.L.A. L. REV. 1070, 1105 (1977) ("If a work is not fixed, it is not in federal copyright.").

<sup>174</sup> See *Engineering Dynamics, Inc. v. Structural Eng'g Software, Inc.*, 785 F. Supp. 576, 581, 21 U.S.P.Q.2d (BNA) 1524 (E.D. La. 1991) (noting that ascertaining enforceability of copyright requires analysis of originality, copyrightability and fulfillment of statutory formalities).

<sup>175</sup> 17 U.S.C. § 411(a) (1988). With the exception of non-U.S. works, "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." *Id.*

<sup>176</sup> In the case of a work consisting of sounds, images, or both, the first fixation of which is made simultaneously with its transmission, the copyright owner may, either before or after such fixation takes place, institute an action for infringement under section 501, fully subject to the remedies provided by sections 502 through 506 and sections 509 and 510, if . . . the copyright owner—

- (1) serves notice upon the infringer, not less than ten or more than thirty days before such fixation, identifying the work and the specific time and source of its first transmission, and declaring an intention to secure copyright in the work; and
- (2) makes registration for the work, if required by subsection (a), within three months after its first transmission.

*Id.* § 411(b).

date of registration is jurisdictional.<sup>177</sup> If the copyright owner does not satisfy this condition precedent, a court has no jurisdiction, which prevents an infringement action from proceeding. This jurisdictional prerequisite underscores this creation of federal common-law copyright. Not only do courts continue an infringement action but also fashion an injunctive remedy, allegedly on the basis of the same copyright act which should have prevented the court from hearing the claim.

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<sup>177</sup> "Under the bill . . . a copyright owner who has not registered his claim can have a valid cause of action against someone who has infringed his copyright, but he cannot enforce his rights in the courts until he has made registration." H. REP. NO. 1476, *supra* note 126, at 157, reprinted in 1976 U.S.C.C.A.N. at 5773. See also *CNN v. Video Monitoring Servs. of Am., Inc.*, 940 F.2d 1471, 1480, vacated for reh' en banc, 949 F.2d 378 (11th Cir. 1991) (observing that § 411(a) requirement must be satisfied before court has jurisdiction over enforcement action); *Quincy Cable Sys., Inc. v. Sully's Bar, Inc.*, 650 F. Supp. 838, 850-51, 1 U.S.P.Q.2d (BNA) 1722 (D. Mass. 1986) ("Although recitation of the fact that copyrights have been registered appears to be a mere technicality, it is a prerequisite to the court's jurisdiction.") (citations omitted); *Strout Realty, Inc. v. Country 22 Real Estate Corp.*, 493 F. Supp. 997, 999, 212 U.S.P.Q. (BNA) 145 (W.D. Mo. 1980) ("If plaintiff fails to plead and prove the fact of registration, then it is not entitled to enforce its rights under the 1976 Act."); *Burns v. Rockwood Distrib. Co.*, 481 F. Supp. 841, 848-49 & n.14, 209 U.S.P.Q. (BNA) 713 (N.D. Ill. 1979) (dismissing defendant's counterclaim for failure to satisfy "the jurisdictional prerequisites of copyright registration . . .").

One trial court took a novel approach to the future works injunction dilemma. *Olan Mills, Inc. v. Linn Photo Co.*, 795 F. Supp. 1423, 1429-30, 21 U.S.P.Q.2d (BNA) 1401 (N.D. Iowa 1991), *rev'd*, 23 F.3d 1345 (8th Cir. 1994). Noting that "a court may issue a declaratory judgment only when there is an 'actual controversy' between the parties," *id.* at 1429, the court observed that the plaintiff could not seek, through a declaratory judgment action, to protect future copyright works where plaintiff acknowledged it did not register its copyright. Moreover, the inability of plaintiff to cite authority for permitting a declaratory judgment action for unregistered works and the absence of "an independent base for federal jurisdiction" under 28 U.S.C. § 2201 led to the conclusion that a declaratory judgment would be inappropriate. *Id.*

Reversed on appeal, *see supra* note 73, the trial court raised an interesting point. Because the Constitution limits the jurisdiction of federal courts to actual "cases or controversies", U.S. CONST. art. 3, § 2, this provision provides independent support for arguing that future works injunctions have no constitutional legitimacy. Where, as noted by the *Olan Mills* trial court, a work does not exist, a court faces an "abstract question 'based upon the possibility of a factual situation that may never develop.'" *Hendrix v. Poonai*, 662 F.2d 719, 722 (11th Cir. 1981). Thus, to assume that a defendant, permanently enjoined from infringing the work at issue and facing the potential threat of draconian damages, would infringe future copyrighted works owned by plaintiffs requires a federal court to not only engage in crystal ball gazing but also to exceed the constitutional limits of its jurisdiction.



In the past years, however, efforts at repealing section 411 have been intense.<sup>178</sup> Proponents of rescission reason that the current registration requirement "discriminates against United States authors, who unlike their foreign counterparts, have to go through the time and expense of preparing copyright registrations."<sup>179</sup> They conclude that elimination of this prerequisite will eradicate this discrimination, and also will prevent the imposition of formalities upon American authors by Berne Convention countries.<sup>180</sup> The potential impacts of repealing section 411 include increased difficulty in ascertaining copyrighted materials, conceivably creating a multitude of inadvertent infringers.<sup>181</sup> Furthermore, as noted by the Librarian of Congress, repeal of section 411 would irreversibly harm the Library's function of facilitating "the growth and exchange of ideas by making the nation's intellectual and creative output available for study."<sup>182</sup>

Section 502(a)<sup>183</sup> grants injunctive power to "[a]ny court having jurisdiction of a civil action arising under this title. . . ." <sup>184</sup> The court "may . . . grant temporary and final injunctions on such terms

<sup>178</sup> See, e.g., 140 CONG. REC. H9281, H9282 (daily ed. Sept. 20, 1994) (introducing H.R. 4307, Copyright Reform Act of 1993) (repealing § 411(a)); 139 CONG. REC. H10308 (daily ed. Nov. 20, 1993) (introducing H.R. 897, Copyright Reform Act of 1993); 139 CONG. REC. S1618 (daily ed. Feb. 16, 1993) (introducing S. 373, Copyright Reform Act of 1993).

<sup>179</sup> 139 CONG. REC., *supra* note 178, at H10310.

<sup>180</sup> *Id.*

<sup>181</sup> Arthur J. Levine & Jeffrey L. Squires, *Notice, Deposit and Registration: The Importance of Being Formal*, 24 U.C.L.A. L. REV. 1232, 1254 (1977) ("A more important function of registration, however, is the maintenance of a complete and accurate public record of who owns what.").

<sup>182</sup> 139 CONG. REC. E810, E811 (daily ed. Mar. 30, 1993) (Statement of James H. Billington). One recently introduced bill, H.R. 4307, addressed this concern by requiring the Librarian of Congress to submit, within three years, a report detailing the Act's effects on "the acquisitions of the Library of Congress." 140 CONG. REC., *supra* note 178, at H9283. See also STAFF OF THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE SEN. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION: STUDY NO. 17, THE REGISTRATION OF COPYRIGHT 40-45 (Comm. Print 1960) (Benjamin Kaplan), *reprinted* in 1 GROSSMAN, *supra* note 55, at 40-45 (discussing values of copyright registration); see also *Copyright Law Revision: Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks and Copyrights of the Senate Comm. on the Judiciary*, 89th Cong. 1st Sess. 56 (1965), *reprinted* in 8 GROSSMAN, *supra* note 55, at 56 (statement of Ramsey Clark, Deputy Attorney General, U.S. Department of Justice) (questioning "the advisability of permitting an infringement suit where no registration has occurred").

<sup>183</sup> 17 U.S.C. § 502(a) (1988).

<sup>184</sup> *Id.*

as it may deem reasonable to prevent or restrain infringement of a copyright.”<sup>185</sup> This provision “reasserts the discretionary power of courts to grant injunctions . . . to prevent or stop infringements of copyright.”<sup>186</sup> Indeed, “the principles upon which injunctions are granted or withheld in the field of copyright are those followed in all other fields of law.”<sup>187</sup>

Accordingly, an examination of another area of the law in which the court’s discretion to issue injunctions has been challenged may prove fruitful. In two cases involving water law and injunctions,<sup>188</sup> the Supreme Court addressed the issue of equitable discretion in a statutory context. These cases demonstrate the Supreme Court’s unwillingness to issue injunctions that exceed clearly delineated statutory parameters.

TVA presented the issue of whether completion of the Tellico Valley Dam should be enjoined to protect the snail darter. Despite noting that work on the dam was “80% complete”<sup>189</sup> when litigation commenced, the Court concluded that an injunction was the appropriate remedy.<sup>190</sup> The Court reasoned that “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities.”<sup>191</sup> Thus, a court could not perform the routine equitable balancing<sup>192</sup> attendant to issuing injunctions. Moreover, the Court observed that where “Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought.”<sup>193</sup>

<sup>185</sup> *Id.*

<sup>186</sup> H. REP. NO. 1476, *supra* note 126, at 160, reprinted in 1976 U.S.C.C.A.N. at 5776.

<sup>187</sup> STAFF OF THE SEN. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., COPYRIGHT LAW REVISION, STUDY NO. 24: REMEDIES OTHER THAN DAMAGES FOR COPYRIGHT INFRINGEMENT 116 (Comm. Print 1960) (William S. Strauss), reprinted in 3 GROSSMAN, *supra* note 55, at 116.

<sup>188</sup> *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978).

<sup>189</sup> TVA, 437 U.S. at 166.

<sup>190</sup> *Id.* at 172.

<sup>191</sup> *Id.* at 194.

<sup>192</sup> *Id.* at 193 (citations omitted).

<sup>193</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 194 (1978).

In *City of Milwaukee*,<sup>194</sup> the Supreme Court refused to issue an injunction to prevent discharge of untreated sewage into Lake Michigan.<sup>195</sup> By enacting the Federal Water Pollution Control Act Amendments of 1972,<sup>196</sup> Congress had preempted the federal common law of nuisance by occupying the field.<sup>197</sup> Accordingly, the Court rejected reliance "on federal common law 'by judicially decreeing what accords with common sense and the public weal' when Congress has addressed the problem."<sup>198</sup>

These two decisions, albeit interpreting water law, are instructive in delineating the limits of a federal court's discretion in issuing future works injunctions. Where Congress has decided that the "order of priorities"<sup>199</sup> in the copyright arena depends upon "fixation in any tangible medium of expression,"<sup>200</sup> a federal court cannot exceed these boundaries in the name of equity and judicial economy. Similar to the eradication of federal common-law of nuisance in *City of Milwaukee*, Congress has precluded development of federal common-law copyright.<sup>201</sup> Therefore, federal courts must abide by the Supreme Court's admonition to obey congressional instructions.<sup>202</sup> Indeed, the constitutional basis of

<sup>194</sup> *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981).

<sup>195</sup> *Id.* at 309.

<sup>196</sup> *Id.* at 310.

<sup>197</sup> *Id.* at 317.

<sup>198</sup> *Id.* at 315.

<sup>199</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1978).

<sup>200</sup> 17 U.S.C. § 102(a) (1988).

<sup>201</sup> 17 U.S.C. § 301 (1988).

<sup>202</sup> *But see Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (finding violations of Federal Water Pollution Control Act do not require injunction where other remedies available, statutory scheme contemplated exercise of discretion and no support in legislative history for denial, by Congress, of equitable discretion). One author advocates a narrow reading of *Weinberger* because of the disposition of the case, the anomalous result if not read in context of *TVA* and *City of Milwaukee*, and that "broad equitable discretion . . . would contravene congressional intent." Daniel A. Farber, *Equitable Discretion, Legal Duties, and Environmental Injunctions*, 45 U. PITT. L. REV. 513, 525-27 (1984). Farber contends that, if *Weinberger* is given this narrow reading, the decisions support the proposition that courts are "agents of Congress with a mandate to enforce congressional policy decisions." *Id.* at 527. Furthermore, he advocates analysis of the role injunctions play in a statutory scheme as the primary guides for courts. *Id.* at 544.

Professor Schoenbrod would contend, however, that § 502(a) exemplifies legislation that "fails to define explicitly the degree of equitable discretion permissible." Daniel S. Schoenbrod, *The Measure of an Injunction: A Principle to Replace Balancing the Equities and Tailoring the Remedy*, 72 MINN. L. REV. 627, 633 (1988). Through application of his

federal copyright law underscores the need for federal courts to honor congressional intent.<sup>203</sup>

Thus, in order for a court to issue an injunction under this section, "a copyright" must be at issue. Also, for "a copyright" to be at issue, the work must be fixed. Furthermore, for a court to have jurisdiction over the infringement action in order to issue an injunction, the work must be registered.<sup>204</sup>

Yet, courts that issue permanent injunctions to protect future works ignore these commands.<sup>205</sup> Even if an injunction could issue for infringement of a copyright that is not the copyright at

proposed principle, he argues, courts will utilize equity to satisfy the law.

The injunction should require the defendant to achieve the plaintiff's rightful position unless (a) different relief is consistent with the goals of the violated rule and (b) the case involves a factor justifying departure from the rule that was not reflected in its formulation, but the injunction may never aim to achieve more than the plaintiff's rightful position.

*Id.* at 694.

Application of this principle invariably would lead to the cessation of future works injunctions. By issuing an injunction to prohibit a defendant's infringement, a court will be achieving the plaintiff's rightful position. A different result—a future works injunction—is not consistent with the Copyright Act's limitation of federal statutory protection to fixed works. Even though the potential for future infringement may present concerns not contemplated by Congress, a future works injunction places a plaintiff in a better-than-original position.

<sup>203</sup> *But see* Dowling v. United States, 473 U.S. 207, 216 (1985) ("A copyright, like other intellectual property, comprises a series of carefully defined and carefully delimited interests to which the law affords correspondingly exact protections."); *see also* Bobbs-Merrill v. Straus, 210 U.S. 339, 346 (1908) ("The copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred. . . .").

<sup>204</sup> *See, e.g.,* International Trade Management v. United States, 553 F. Supp. 402, 403 (Cl. Ct. 1982) ("Considerations of judicial economy raised by plaintiffs carry little weight where jurisdiction is in issue. The court cannot assert jurisdiction . . . simply because it considers Congress' decision to withhold jurisdiction to be unwise or uneconomical . . . it is not for this court to second-guess Congress. . . .").

<sup>205</sup> Professors Nimmer appear to agree with the issuance of injunctions to protect future works:

Moreover, when there has been a history of continuing infringement of a number of plaintiff's works and a significant threat of future infringement remains, a permanent injunction may even issue that applies not only to the works as to which infringement has already been adjudicated, but also to any other works presently owned by plaintiff, or any works which may in the future be owned by the plaintiff.

3 NIMMER & NIMMER, *supra* note 141, § 14.06[B], at 14-100. Interestingly, this position on injunctions against future works seems to contradict their position on copyrightability of unfixed works, *see supra* note 172.

issue in the action, the work must be copyrightable for a copyright to exist at all. In this context, the work is not copyrightable because it does not yet exist, and thus, cannot be fixed. It is inconceivable that Congress intended, by granting discretion to the courts, to permit protection by common law to that which it chose not to protect statutorily.

### C. STATUTORY RECOMMENDATIONS

By virtue of the congressional monopoly over copyright, any effort to remedy the problem posed by courts issuing injunctions to protect future works must occur statutorily. A proposed revision of section 502 is as follows:

(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright. *An injunction shall not issue to prevent or restrain infringement of a work that is not fixed at the time the infringement action is commenced.*

Such a revision would prevent the issuance of injunctions to protect future works and eliminate the burgeoning growth of federal common-law copyright.

### V. CONCLUSION

Copyright in the United States has been a creature of statute. As mandated by the Constitution and reinforced by the Supreme Court in its first pronouncement on copyright law, the nature of copyright as a limited statutory monopoly seemed unquestionable.

Despite the facial clarity of the statutory copyright protection extended by Congress, over the past fourteen years a startling development has occurred. Through the issuance of permanent injunctions to protect future works, courts have created a federal common-law copyright, antithetical to both the Constitution and the Copyright Act of 1976. These courts have done that, which on

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the face of the statute, seems impossible. They have relied on the statutory copyright protection embodied in the act to protect that which the statute explicitly exempts from protection. These courts extend copyright protection to works which are not copyrightable because they do not exist, and, therefore, cannot be fixed. Taking refuge in semantic gymnastics and platitudes of judicial economy, the creation of federal common-law copyright threatens the limited statutory monopoly—the foundation of American copyright law for the past two hundred years. This creation of federal common-law copyright has gone unchallenged. It must be challenged if this foundation is to remain intact.

**KRISTINA ROSETTE**

