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## AMERICAN CORPORATE COPYRIGHT: A BRILLIANT, UNCOORDINATED PLAN

*Paul J. Heald\**

At first glance, American copyright law and policy seem to be dictated entirely by a monolithic block of corporate rightsholders. Over the last twenty years, powerful interests including Disney, the American Society of Composers, Authors, and Publishers (ASCAP), Microsoft, and the American Motion Picture Association (AMPA), have successfully lobbied Congress for copyright term extensions, copyright restoration, software anticircumvention legislation, protection against audio bootlegging, and a series of bilateral and international agreements designed to increase protection for American copyright owners overseas.<sup>1</sup> Even the failure to protect databases in America, widely touted as a victory for the public interest, has been driven by opposition from large corporate database gatherers. Serious public debate over issues raised by corporate influence on copyright policy is limited to academic conferences, Internet bloggers, and the occasional letter to the editor. The Sonny Bono Copyright Term Extension Act (CTEA), a piece of legislation that will cost consumers untold billions over the next twenty years, encountered so little opposition that it was passed by Congress with a voice vote.<sup>2</sup>

Indeed, the U.S. Supreme Court's endorsement of CTEA in *Eldred v. Ashcroft*<sup>3</sup> suggests a nearly complete capitulation to copyright lobbyists, resulting in a Copyright Act that resembles the Internal Revenue Code. Like American tax law, copyright law might now be accurately characterized as a series of statutes with no coherent underlying theory, a code that merely reflects which factions have sufficient political power to obtain an exception or a subsidy. The absence of internal coherence, however, does not render the American situation unworthy of study. Important lessons, especially for non-industrialized "pirate" jurisdic-

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<sup>1</sup> See 17 U.S.C. §§ 302-304, 104A, 1101, 1201 (2000).

<sup>2</sup> See Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), (d), 112 Stat. 2827, 2828 (1998) (codified at 17 U.S.C. §§ 302, 304 (2000)).

<sup>3</sup> 537 U.S. 186, 65 U.S.P.Q.2d (BNA) 1255 (2003).

tions, can be uncovered with a little work. A quick look at *Eldred* reveals the starkest example of corporate control over copyright policy.<sup>4</sup> Yet one can also find within the United States a hodge-podge of regulations, legislation, and judge-made rules that relieve *local* consumers from the most onerous costs of the over-protection of copyrights.<sup>5</sup> An examination of the entire situation in the United States reveals a brilliant, but casually coordinated, dual treatment of copyright: One set of rules for U.S. consumers, and a different set intended for the rest of the world. The present strategy allows rightsholders to capture rents from abroad while minimizing costs at home, but it also suggests counter-strategies for the developing world.

The Supreme Court's treatment of CTEA in *Eldred v. Ashcroft* is a good place to begin the story. In 1998, Congress unconditionally extended the term of copyright protection for existing works for twenty additional years.<sup>6</sup> Without the extension, over the subsequent twenty years, every book, film, and musical composition published between 1928 to 1948 would have fallen into the public domain in the United States. In return for retaining this vast, twenty-year income stream, copyright owners were asked to part with nothing; the grant was entirely unconditional. A group of small publishers and a choir director (my wife) brought suit, arguing that an unconditional extension of rights in existing works was unconstitutional.<sup>7</sup>

The most convincing argument that Congress lacked the power to grant such an extension was based on the language of the intellectual property clause of the Constitution, which reads: "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>8</sup> Prior to *Eldred*, the Court had consistently viewed this language as authorizing Congress to strike an economic bargain with authors on the public's behalf. For example, it had stated, "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"<sup>9</sup> Continental lawyers will recognize here the utilitarian rationale for copyright protection that has long coexisted uneasily with moral rights theories and that has

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<sup>4</sup> *See id.*

<sup>5</sup> *See infra* notes 16-46 and accompanying text.

<sup>6</sup> Copyright Term Extension Act, *supra* note 2, § 102.

<sup>7</sup> *See Eldred*, 537 U.S. 186.

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

<sup>9</sup> *Mazer v. Stein*, 347 U.S. 201, 219, 100 U.S.P.Q. (BNA) 325, 333 (1954).

helped justify the exclusion of such rights in Article 9(1) of the TRIPS Agreement.<sup>10</sup>

A utilitarian *quid pro quo* theory of copyright, where the state is authorized to provide incentives for authors, rather than to make gifts to publishers, cannot justify an unconditional extension of the copyright term in an existing work. One cannot provide an incentive to create a work that already exists. However, if CTEA were struck down, Mickey Mouse would now be in the public domain, so the Court engaged in an astounding about face: “[W]e reject the proposition that a *quid pro quo* requirement stops Congress from expanding copyright’s term in a manner that puts existing and future copyrights in parity.”<sup>11</sup> The gift given by Congress to Disney, and a host of other corporate owners, was affirmed by a 7-2 vote of the Court, sounding the death knell for the utilitarian theory of copyright in the United States.<sup>12</sup> This development should not be missed by those negotiating with the United States over issues as diverse as moral rights and rights to geographical indications.

To those familiar with the role of the U.S. government in advocating the rights of its copyright owners before the World Intellectual Property Organization, the World Trade Organization, and in bilateral negotiations with trading partners around the world, the success of the corporate copyright lobby before Congress and the Supreme Court might come as no surprise. After all, corporate copyright owners have been driving U.S. foreign policy for years. Observers should not draw the conclusion, however, that *Eldred* evinces a commitment on the part of the United States to extract maximum rents from its own consumers. To be sure, CTEA imposes significant costs on local interests, but a wide variety of legal safeguards—for the time being—continue to protect American consumers from the full brunt of the copyright lobby’s TRIPS Plus and Berne Plus worldwide strategy.<sup>13</sup> In other words, although *Eldred* nicely exposes corporate influence over copyright, one must look deeper at American law to appreciate the entire U.S. situation.

*Eldred* notwithstanding, U.S. copyright law is riddled with exceptions that dilute the local rights of copyright owners.<sup>14</sup> When these exceptions are viewed

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<sup>10</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(1), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Result of the Uruguay Round vol. 31, 33 I.L.M. 1125, 1197 [hereinafter TRIPS].

<sup>11</sup> *Eldred*, 537 U.S. at 217; see also *id.* at 216 (“We note, furthermore, that patents and copyrights do not entail the same exchange, and that our reference to a *quid pro quo* typically appear in the patent context.”).

<sup>12</sup> See *id.*

<sup>13</sup> See TRIPS, *supra* note 10; Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised at Paris, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221.

<sup>14</sup> See *infra* notes 16-46 and accompanying text.

together, it becomes easier to understand why American consumers have yet to organize to defend their interests, and why they remain uninterested in the effects of U.S. copyright policy abroad. In the late nineteenth and early twentieth centuries, public outrage over the behavior of prominent monopolists led to the adoption of strong and effective competition laws and the establishment of federal regulation of mergers and acquisitions.<sup>15</sup> A parallel sense of public rebellion against copyright monopolies has failed to emerge in twenty-first century America. The following list of legal doctrines helps to explain why.

1. *The Altai Test for Software Infringement.* Strong protection for the ideas expressed in computer programs would lead to significant anticompetitive effects. For example, if the first publisher of a tax preparation program were allowed an exclusive right to market a product with that function, it could charge a significantly higher price than if it were faced with multiple competitors in the field. After flirting with broad protection in the 1980's, the U.S. Courts of Appeal have unanimously adopted some version of the test for software infringement presented in *Computer Associates International, Inc. v. Altai, Inc.*<sup>16</sup> The test famously requires the jury to "dissect" the protected and allegedly infringing programs, "filter out" a wide variety of unprotected features from the protected program, and "compare" the allegedly infringing program with the "golden nugget" of protected expression that remains after dissection and filtration.<sup>17</sup> The case permits developers to assemble a competing software program by all but the most blatantly duplicative means. Copyright law is such a poor means of stifling competition in the United States that a recent survey by Ronald Mann reveals that venture capitalists in the software industry do not rely on copyrights in making investment decisions.<sup>18</sup> Only a patent might signal a competitive edge. Strong competition has kept software prices in the United States below the antagonism level of most consumers. In fact, much important and useful software is available for free, such as Internet browsers and digital photography software.

2. *Treatment of Databases.* In 1991, the Supreme Court declared that facts contained in publicly available databases could be freely extracted and used, as long as original aspects of the selection, coordination, and arrangement of the borrowed-from work were not duplicated.<sup>19</sup> This concept of "thin" protection

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<sup>15</sup> See Clayton Act, ch. 323, 38 Stat. 730, 730-740 (1914) (codified in scattered sections of 15 U.S.C.); Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (2000).

<sup>16</sup> 982 F.2d 693 (2d Cir. 1992).

<sup>17</sup> *Id.* at 706.

<sup>18</sup> Ronald Mann, *The Myth of the Software Patent Thicket: An Empirical Investigation of the Relationship Between Intellectual Property and Innovation in Software Firms* (Feb. 2004), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=510103](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=510103).

<sup>19</sup> *Feist Publ'ns, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 348-49, 18 U.S.P.Q.2d (BNA) 1276, 1279 (1991).

for databases facilitated the Internet explosion throughout the 1990's. An hour spent surfing on the Internet best illustrates the massive borrowing and reuse of information encouraged by *Feist*. A brief peek at the travel and real estate markets tells an especially vivid story. Competition is fierce in both fields, where multiple web-sites, all deriving information from the same data sources, compete to offer the best services to consumers.<sup>20</sup> Comparative pricing web sites may provide an even better example. Pay a visit to <http://www.mysimon.com>, enter a product name or model (try Olympus "Camedia C-50" digital zoom camera), and the Mysimon web crawler will extract prices and product information from multiple databases and provide a long list of competing Internet sellers. *Feist* has helped make the Internet a happy place for American consumers.

3. *Contributory Liability Rules.* The growth of the Internet has also been fueled by the failure of U.S. courts to hold Internet service providers (ISPs) broadly liable for infringement committed by their customers. American consumers use America On-Line, Microsoft Network, or a variety of broadband service providers to commit massive amounts of copyright infringement. Although the *Napster* decision shows a judicial willingness to hold web sites contributorily liable when they facilitate infringement through peer-to-peer file sharing or knowingly make protected works available for download,<sup>21</sup> web site operators can simply move their servers outside the physical confines of the U.S. to escape liability. The ongoing success of infringing web sites is assured by the virtual immunity of ISPs that provide access services to their users. ISP immunity is further complemented by rules protecting the anonymity of ISP customers. As one district court recently held, Congress has not authorized federal courts to issue a general subpoena allowing copyright owners to search through ISP records to look for infringers.<sup>22</sup> The Internet has grown in large part because its primary architects have not had to worry about the uses to which it can be put. This is not true in other jurisdictions—for example, Germany—where courts have been willing to hold ISPs liable even when they do not knowingly facilitate infringement.<sup>23</sup>

4. *Competition Law.* Microsoft is still a force to be reckoned with, but the decision in *United States v. Microsoft Corp.*<sup>24</sup> exposed a multitude of the software

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<sup>20</sup> Compare, for example, <http://www.expedia.com>, <http://www.travelocity.com>, <http://www.hotels.com>, and <http://www.cheapflights.com> (last visited Feb. 17, 2005).

<sup>21</sup> See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 57 U.S.P.Q.2d (BNA) 1729 (9th Cir. 2001).

<sup>22</sup> See *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 66 U.S.P.Q.2d (BNA) 1555 (D.D.C. 2003).

<sup>23</sup> Patricia Jacobus, *AOL Found Guilty of Allowing Music Bootlegs*, CNETNEWS.COM, Apr. 12, 2000, at <http://news.com.com/2100-1023-239175.html?legacy=Chet> (last visited Apr. 7, 2005).

<sup>24</sup> 253 F.3d 34 (D.C. Cir. 2001).

giant's anticompetitive practices and cowed its behavior in ways noticeable to consumers. For example, the case revealed Windows 95 and Windows 98 were deliberately programmed to give users problems when they chose Netscape as their browser instead of Microsoft Internet Explorer.<sup>25</sup> Dedicated Netscape users know that newer versions of Windows no longer cause their computers to crash when they use their browser of choice. The full effects of the litigation are not clear, and Microsoft still has a huge share of the market for operating systems in the United States, but it has slowed Microsoft's most aggressive attempts to expand its monopoly at the expense of American consumers. One proposed remedy, the forced revelation of the Windows source code, may have had a singularly salutary effect. Finally, American consumers remain content with Microsoft for a reason wholly unrelated to legal doctrine. The Microsoft Windows operating system is bundled with the purchase of new personal computers, so consumers do not see how much they pay for the software.

At this point, it is worth noting that the first four doctrines mentioned above have significant positive spillover effects internationally. Foreign consumers, as well as Americans, benefit from competition within the American software market and their visits to American web sites. They probably even benefit from the extra-territorial reach of U.S. competition law, insofar as it protects U.S. firms competing with Microsoft overseas. Other doctrines discussed below have significantly fewer spillover effects internationally.

5. *Exhaustion and Sham Licenses.* Large American software producers would like to stop the resale of their products. They do not want competition developing in the form of a secondary market for software. Section 109 of the Copyright Act, however, provides that the first sale of a copyrighted work produced in the United States exhausts the rights of the seller as to the particular copy sold.<sup>26</sup> If Intuit sells a copy of TurboTax for \$29.95, then the buyer has the right to use it to do his taxes and then resell it to a friend for \$9.95, even if it costs Intuit a subsequent full-priced sale. For this reason, Intuit does not purport to sell copies of the software. The shrinkwrap packaging around the CD-ROM states that the payment of \$29.95 merely buys a license to use the CD-ROM, subject to various restrictions, including a prohibition on reselling the CD-ROM. As long as the terms are visible, the act of opening the shrinkwrap purports to bind the buyer to the terms of a license.

American courts, however, have been quite aggressive in policing the terms of these so-called "licenses." Borrowing from a long line of cases that distinguish between sham leases and authentic leases in the personal property context,<sup>27</sup> the

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<sup>25</sup> *Id.* at 47.

<sup>26</sup> 17 U.S.C. § 109 (2000).

<sup>27</sup> *See* U.C.C. § 1-201(b)(37) (2000).

“sham license” doctrine as applied to software contracts directs courts to examine the economic realities of a given transaction to reveal whether it is, in essence, a true license or a sale. The labels used by the parties are irrelevant, and many courts have found that “licenses” to transferees of software are really sales.<sup>28</sup> Because they bear all the attributes of a sale (such as one-time purchase price encompassing the full value of the good, most subsequent risk of loss born by the buyer, no continuing monitoring of the good by the seller), they are treated as sales for the purposes of exhaustion doctrine.<sup>29</sup> Therefore, resale in violation of the terms of the sham license is permitted. Although very few consumers are aware of the sham license doctrine, they experience its monetary benefits whenever they buy used or unbundled software.

6. *Sovereign Immunity.* According to the Supreme Court in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, Congress lacks the power to make states liable for copyright infringement.<sup>30</sup> Since states have historically not been substantial infringers, this may seem like a minor development. The case, however, has a real impact at public educational institutions. Many professors require their students to purchase customized “course packs” of photocopied materials rather than multiple textbooks for a class. For example, because no publisher sells a good textbook for my course on Law and Literature, I have developed a set of photocopied materials that draw from a wide variety of sources. Before *Florida Prepaid*, I obtained permissions for longer excerpts, but now the university copy center will assemble the course packs with no questions asked. The cost to my students is now one-third the amount they used to pay for the same materials. Empirical data on photocopying practices of teachers at public elementary, secondary and post-secondary institutions is lacking, as is data on the awareness of sovereign immunity. It may be that *Florida Prepaid* merely blessed an expansive view of fair use or a state of blissful ignorance which already existed, but there is little doubt that public school coffers are fatter now than they would be in a world of effective copyright protection.

7. *Fair Use.* Even in the absence of a doctrine of sovereign immunity, one can make a strong argument that the photocopying done to assemble an educational course pack is a privileged fair use under section 107 of the Copyright Act.<sup>31</sup> Although the course pack issue is far from settled, the fact that such a practice is theoretically defensible illustrates the breadth of the fair use exception. In the United States, an amorphous four-part test permits a wide variety of unauthorized copying. Whether copying is fair will be determined in light of: The purpose and

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<sup>28</sup> See, e.g., *Softman Prods. Co. v. Adobe Sys. Inc.*, 171 F. Supp. 2d 1075 (C.D. Cal. 2001).

<sup>29</sup> *Id.* at 1085.

<sup>30</sup> 527 U.S. 627, 51 U.S.P.Q.2d (BNA) 1081 (1999).

<sup>31</sup> 17 U.S.C. § 107 (2000).



character of the use (considering whether the use is transformational or nontransformational, or whether the use is noncommercial or commercial); the nature of the copyrighted work (whether the work is fact-intensive or creative); the amount used; and the effect of the copying on the potential market for the work.<sup>32</sup> For example, under the fair use doctrine, the slavish copying of computer object code is permissible when the purpose is to discover interoperability protocols or to extract unprotected elements of the program.<sup>33</sup> Used in this way, the fair use doctrine can enhance competition and lower prices. As used by consumers, it is a convenient rationalization for necessary, everyday uses of protected materials. For example, my wife photocopies music for her choir that has been ordered, but is late in arriving. Every jurisdiction has some form of a fair use doctrine, but the American version is famously broad, certainly much broader than what is mandated by the Berne Convention.<sup>34</sup>

8. *Photocopy Machines in Libraries.* Unlike other jurisdictions that tax library photocopy machines, or copies made on them, in order to compensate copyright owners,<sup>35</sup> U.S. law renders photocopying inexpensive and easy by providing immunity to libraries that post a written warning over their machines.<sup>36</sup>

9. *Taxation of Blank Media and Internet Commerce.* With the exception of obsolete digital taping technology, the United States does not tax blank media or copying equipment in order to compensate copyright owners for lost revenue. In addition, Congress has extended its moratorium on the taxation of Internet commerce.<sup>37</sup> Compared to other jurisdictions with aggressive taxation schemes, Congress is effectively subsidizing the transfer of goods that can be copied or delivered electronically. Copyright law has not stood in the way of legal policies designed to keep access to goods and delivery inexpensive for consumers.

10. *Treatment of Legal Materials.* Cases, statutes, and regulations promulgated at all governmental levels are unprotected by copyright law.<sup>38</sup> Access to them is cheap and easy.<sup>39</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 24 U.S.P.Q.2d (BNA) 1561 (9th Cir. 1992).

<sup>34</sup> *Cf.* 17 U.S.C. § 107; Berne Convention for the Protection of Literary and Artistic Works, *supra* note 13, art. 10.

<sup>35</sup> *See* Eugen Ulmer & Hans Hugo von Rauscher, *Germany (Federal Republic)*, in INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 422-23 (Stephen M. Stewart & Hamish Sandison eds., 2d ed. 1989).

<sup>36</sup> 17 U.S.C. § 108(f) (2000).

<sup>37</sup> Internet Tax Freedom Act, Pub. L. No. 105-277, 12 Stat. 2681-719 (1998).

<sup>38</sup> *See* *Wheaton v. Peters*, 33 U.S. 591 (1834).

<sup>39</sup> *See, e.g.*, FindLaw.com, at <http://www.findlaw.com> (last visited Feb. 16, 2005).

11. *The First Amendment.* The Constitution lurks in the background of several U.S. copyright doctrines—including the fair use doctrine. It was unsuccessfully invoked in *Eldred*, but it provides significant consumer benefits in areas other than copyright term extension. For example, copyright law excepts performances of copyrighted works during religious services.<sup>40</sup> Churches need not pay for the right to sing or play copyrighted works. Although seemingly a minor exception, a contrary rule enforcing copyrights in this context in the United States would be very controversial. More importantly, the First Amendment provides strong protection for parody. In a recent high profile case, an appellate court upheld the right of an author to publish a full length version of *Gone With the Wind*<sup>41</sup> from the perspective of a slave in Scarlett O'Hara's household.<sup>42</sup> The book, entitled *The Wind Done Gone*,<sup>43</sup> represents the sort of critical expression that American consumers expect to be able to enjoy. In particular, parody is a popular art form on television and in film. Strong protection of copyrights in the parody context would be sure to raise strong public protest. Americans are mostly willing to respect copyrights and pay the full price for the entertainment they enjoy. They are certainly willing to tolerate laws that discourage the pirating of music, books, and films, but they would be utterly unwilling to suffer a law that denied an author or artist the right to borrow heavily from a copyrighted work in order to make fun of it.

12. *Home-Style Music System Exception.* Not only is parody a staple of American culture, but the right to hear background music in bars, restaurants, and shops is apparently so fundamental that Congress has been unwilling to amend Section 110(5) of the Copyright Act<sup>44</sup> to conform with its obligations under the TRIPS Agreement. In the United States, businesses that play broadcast music over "home-style" stereo systems are exempt from paying royalties to the owners of the music or the recordings.<sup>45</sup> When the European Union complained on behalf of rights organizations representing uncompensated copyright owners, the World Trade Organization ruled that the Section 110(5) exemption was not in compliance with TRIPS.<sup>46</sup> Rather than ask Congress to amend U.S. law to remove the exception, the U.S. government has agreed to pay compensation on

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<sup>40</sup> See 17 U.S.C. § 110(3) (2000).

<sup>41</sup> MARGARET MITCHELL, *GONE WITH THE WIND* (MacMillian 1936).

<sup>42</sup> *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 60 U.S.P.Q.2d (BNA) 1255 (11th Cir. 2001).

<sup>43</sup> ALICE RANDALL, *THE WIND DONE GONE* (Houghton Mifflin 2001).

<sup>44</sup> 17 U.S.C. § 110(5) (2000).

<sup>45</sup> *Id.*

<sup>46</sup> Report of the Panel, *United States—Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000).

behalf of U.S. businesses in order to keep radios playing freely for American consumers.

*Conclusion.* Although CTEA, the Digital Millennium Copyright Act, and U.S. foreign policy all evidence the strong influence of corporate America, the many exceptions listed above seem to indicate that its control over the law is far less than complete. Before concluding that the United States has struck some sort of harmonious balance of public and private interests, two facts must be noted. First, most of the exceptions serve powerful business interests in the United States. The *Altai* test, for example, is endorsed by many computer software firms as mirroring an accepted culture of borrowing within the industry. The failure to protect databases has been driven in significant part by influential database firms in the United States. The lack of contributory liability is applauded by the U.S. telecommunications industry. Every software and hardware firm, except Microsoft, thinks ratcheting up antitrust scrutiny is a good idea. The Internet commerce tax moratorium and the home-style music system exception are both backed by large and well financed business coalitions. Despite apparent broad exceptions, the shape of copyright protection seems to be driven primarily by corporate interests, albeit of a diffuse and uncoordinated nature.

Second, even the exceptions that some large businesses do not like—sovereign immunity for state governments, exhaustion rules and, to a certain extent, fair use—help keep the sleeping giant of the American public quiescent and unconcerned about overreaching copyright owners. As long as copyright law does not weigh too heavily on the average American, an anticorporate backlash like that seen in the antitrust era will not repeat itself. More importantly, Americans will remain blissfully unconcerned about overreaching by corporate copyright owners overseas as the brilliant, organic strategy of American copyright law slowly unfolds.

Finally, at least two important lessons can be learned by the rest of the world, in particular by the non-industrialized “pirate” jurisdictions that have drawn so much attention from copyright owners and, therefore, the U.S. government. First, the list of exceptions above shows that creative tools of resistance are available. The list, and other exceptions too numerous to detail, provide a blueprint for lowering the cost of copyright law to local consumers.<sup>47</sup> To the extent that a nation resents having to amend its law to comply with TRIPS and the Berne Convention, it should consider the permissive options illustrated by the internal American approach.

A final important lesson springs from the insight that all works protected by copyright are not created equal. A nonindustrialized country has a much greater

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<sup>47</sup> See Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 MINN. L. REV. 249 (2003).

need to access computer software and textbooks than the latest Hollywood thriller or MTV hit. Pirate jurisdictions, therefore, should seriously consider bargaining for concessions in the software market by promising strict and effective enforcement of foreign copyrights in music, film, and video games. Such a bargaining strategy might have multiple benefits. Currently, in many countries, unauthorized copies of American music and films sell for the same rock bottom price as those produced by local artists. As long as pirate copies of American works are plentiful and cheap, local artists cannot price compete. But, if only authentic American CDs and DVDs can be sold, then their prices will increase significantly, driven by scarcity and the desire of their owners to maximize profits. Only when American and other foreign works are strongly protected can local musicians and film makers price compete and develop their markets. It is no coincidence that the Indian film industry, Malian musicians, and Lebanese dress designers are pushing for stronger protection of copyrights in their countries. Similarly, it is clear that allowing copyright piracy fuels American cultural imperialism. As long as cheap pirate copies of American cultural products are available, they will be consumed in massive quantities. The consequence of increased protection for American owners will be what the monopolist always demands, decreased supply and higher prices. In other words, copyright law should be recognized as a powerful tool to resist American culture. Given the internal benefits of increasing protection for foreign cultural works, delivering such protection in return for concessions concerning software and textbooks seems a promising negotiating strategy.

