KNOWLEDGE, CULTURAL PRODUCTION, AND CONSTRUCTION OF THE LAW: 
AN IDEOGRAPHIC RHETORICAL CRITICISM OF <COPYRIGHT>.

Suzanne V. L. Berg

A Dissertation
Submitted to the Graduate College of Bowling Green
State University in partial fulfillment of
the requirements for the degree of

DOCTOR OF PHILOSOPHY

December 2013

Committee:
Michael L. Butterworth, Advisor
Kristen Rudsill
Graduate Faculty Representative
Victoria Smith Ekstrand
Joshua D. Atkinson
ABSTRACT

Michael L. Butterworth, Advisor

Copyright is in theory a neutral legal instrument, but in practice copyright functions as an ideological tool. The value of creative content in culture vacillates between the rhetorical poles of progress and profit within copyright law. This study is an ideographic rhetorical critique of <copyright>. Ideographs are rhetorical containers of ideology that publics use to define various aspects of culture. Some ideographs are contained within the dialogue of a topic. I argue five terms that make up the ideographic grammar of <copyright>: public domain, fair use, authorship, ownership, and piracy. The public domain is the space where <copyrighted> material enters when the term of protection expires. The public domain expresses the ideology that creative material belongs to the people who consume content. Fair use is the free speech exception to copyright law that allows for certain types of infringement. Fair Use is the ideology in which the use of creative work belonging to others must be fairly represented. Authorship is how an author creates content and how an audience consumes it. Authorship is an ideology focused on progress towards the process of creating content as motivated by an author. The question at the center of authorship is who controls content: the author or the public. Ownership takes the question of authorship one-step further by invoking material property. Ownership is the embodiment of the idea that management, control, and profit of copyright are more valuable than original creation. The Corporate Public is focused on ownership of content, because ownership is a legal condition of property where a person or group can profit. Piracy, which appears most often in any discussion of copyright law, is an intentional theft of copyrighted work(s). <Piracy> is a battleground between content theft and the people who publically resist copyright.
DEDICATION

To my two William Bergs: The one who got me here and the one who just arrived.
ACKNOWLEDGMENTS

Family
Bill Berg- Saying that I could not have done this without you is an understatement. Five years ago I sent you an email broaching the idea of returning to grad school. You knew it would be hard, lonely, and far away from our families, but you didn’t falter. You knew this was my next step well before I did. Thank you for being the definition of a supportive partner and dynamic parent.
William Berg, III-The amount that I love you astounds me every day. I could not have you in the office while I tried to work because I just wanted to stare at you the whole time. Thank you for sleeping though the night at such a young age and listening to me read critical rhetoric to you to clear out my head.
Mom-I love you so much. Thank you for your constant stream of praise. You have never shied away from showing me how much you love me. Thank you for the cards, frequent visits and for being proud of me even though you are rightly suspicious of graduate education. I hope I am just as clear with my love for you.
Dad-You always wanted me to be a lawyer and instead I became a critic of the language of law. I think my route pays better. I know how proud you are of me because other people tell me how much you brag about me.
Izzy-Thank you for taking my long, rambling phone calls and indulging my ranting about our shared love of pop culture.
Bill and Mary-Thank you for letting me kidnap your son and always being nothing but supportive of our choices.
To Jim and Marlene Rudy-I did not know how proud you were of me until I got your phone call after I defended my dissertation. I love you both so much and I know that every hard day of my life, I remember I have never worked as hard as Jim Rudy.
To Rae Loen and Carl Taylor-I am a lucky person in academia because I am not a first-generation graduate student. You both provided examples of what graduate work could do for an individual. Thank you for asking hard questions about what I was doing, telling me how proud you were, and always sending postcards from where you were visiting that week.
To Nikki, Kristi, Brett, Katie, Megan, and Sara-I know you may have not felt our absence the way we have felt it. But we are sorry for all of the birthdays and hockey games we missed in the last four years. In many ways I was doing this for you.

To My Committee
Dr. Michel Butterworth-I know I was never your easiest or most fun advisee. None of this comes easy to me and I spent several years trying to bend myself into the rhetorician that I thought I needed to be. It took until the last few months of this project when I finally understood what you were saying the whole time: The models are not always helpful, each person needs to find their own way through, and just be clear about how they got there. It took me a lot of false starts and terrible drafts to figure out what that looked like for me. I learned how to read through your criticism to find the tools to make me a better (but not great) writer and critic. The amount of pride I have of being part of the line of Butterworth advisees cannot be undersold.
Dr. Victoria Smith Ekstrand-You are one of the most supportive women I have ever met. I will always keep your email notes thanking me for comments, work, and other little things that we did throughout our time at BG. You always made me feel like I was being seen in a
fundamental way that I did not even know I needed. That being said, you were always the person in the room who asked me the hardest questions and I think I am trying to still answer them.

Dr. Joshua Atkinson—Thank you for being a great mentor in academic work. As your research assistant I saw the nuts and bolts of pulling good academic work together for publication. I appreciated the smart political way you view publishing. Thank you for choosing me to be your assistant—even though you spelled my name wrong.

Dr. Kristen Rudisill—Thank you for your input on the scope and process of this project. Your detailed copy editing was immensely helpful in the final draft. I look forward to exploring the outlaw hero of piracy in a future draft.

Academic Supporters and Friends

Dr. Marne Austin—Thank goodness we moved into the same apartment complex! We needed each other so much over the last four years. I am so happy to see the person you have become from the eleven-year-old who sat next to me on the first day of orientation. Your mind is unmatched!

Wonda Baugh—Thank you for your easy smile and joyous energy for all things. You made my life easier by simply being close. Your unwavering support of both good and bad ideas made my last three years easier.

Dr. Jim Berg—To the Dr. Berg with the three degrees in reading from the Dr. Berg with three degrees in talking, thank you for being a resource to me simply because I married your nephew.

Dr. Dan Cronn-Mills—My life would be completely different if it were not for you and a sign I saw in the student union in 1999. Thank you for pushing me forward and rooting for me on all fronts. Thank you for always being a cheerleader.

Heather Diersen—Thank you for your willingness to search WestLaw after I got too angry. You have had a big year, which will only certainly get bigger. The notes you sent me were posted on my wall for me to look at every day. Thank you for your quiet text messages that let me know you were thinking of me. Thank you for being such a kind person.

Dr. Sandra Faulkner—You were not on my committee, but you did everything short of reading my dissertation. Thank you for serving as a role model and mentor on a range of projects at my time in BG. You challenged me to examine the way I think and approach all of my work. Your guidance fundamentally changed the way I examine the world.

Dr. Anne Gerbensky Kerber—First, thank you for your fine editing eye in the waning weeks of this dissertation. Second, thank you for helping me think out all sorts of issues of academic life. You have provided me with a road map of success for over ten years. I am so lucky that you are one of my closest friends.

Erica Baye Goembel—We met in Pierre in 1991(?), in short, you are my oldest friend. We are forever thankful that you and Dallas (and technically Thomas) came out to visit us that first summer. Over the last few months when I thought I could not do this, I thought of you. If you could work a demanding job, get a nursing degree, and raise Thomas, then I could do this.

Dr. Craig Vicko—Thank you for being an emotional sounding board for the last two years. The ability to sit in your office and digest some of this content along with other issues was an essential part of my ability to work on this project. I know it is your job, but I am often shocked at how much better talking to you made me feel.
Chris Medjesky—Thank you for the lunches. Thank you for the faith in my knowledge before I knew what I was doing. Thank you for always being a resource for my rhetorical and pedagogical needs. You are the definition of a true colleague.

Nikki Medjesky—Our Thai food breaks were an essential part of my graduate education. Thank you for taking the time to hang out with another grad student because I know we are insufferable.

Adrienne Meier—Matt and I often discussed that our respective spouses are often the reason people want to spend time with us. Although Northwest Ohio was our shared purgatory, your kitchen in Malinta, OH will always be one of my favorite places.

Matt Meier—One of your greatest assets as an academic is you see how diverse views are needed in theory and recognized their significance. I try to model that in my own interactions but you live it in such a real and genuine way. Thank you for being a great colleague.

Ellen Nelson—Our almost weekly talks about all of the issues in our lives was always a bright spot in my weeks. We both had eventful years and it was nice to know that you were rooting for me almost as much as I was rooting for you.

Dr. Yeon Ju Oh—I hope one day I can be as sharp as you. I know we appreciate the overlap in our work and the different ways we approached free culture research. Thank you for reading parts of my diss and being a great friend.

Katie and Joe Santjer—As I am writing this, your family is expanding. What I know, is that kid is the luckiest boy in the world to find parents like you. Without you Katie, I would have never met Bill and all of our lives would be different. Thank you for coming out to see us and being great friends.

Valerie Schoepf—You were one of the few people who knew about my grad school ambitions. We discussed our futures that would take us far from the St. Paul Farmer’s Market. I miss the availability to hang out with you and your large book of restaurant coupons. Thank you for being such a wonderful friend.

Brion White—Thank you for always making my day better. Your non-sequiturs always kept me on my toes and made me laugh in the darkest days of academic work. Your ability to read through work has always impressed me and your knowledge of Dawson’s Creek has always scared me.

Lisa Woronzoff—Thank you for hanging out with a woman who dresses like a soccer mom. It was wonderful to share those drives to concerts together and work on Culture Club. Thank you for being such a great neighbor.
# TABLE OF CONTENTS

INTRODUCTION. THE STOP ONLINE PIRACY ACT AND THE PROTECT INTELLECTUAL PROPERTY ACT AS SITES OF CONFLICT OVER COPYRIGHT ..........1

Situating Copyright in Rhetorical Theory ...............................................................5

An Overview of Ideographic Rhetorical Criticism ....................................................10

The Ideograph ........................................................................................................13

Material Rhetoric ....................................................................................................14

Constitutive Rhetoric ...............................................................................................15

An Overview of Intellectual Property Law ......................................................................16

Theoretical Components of Copyright .....................................................................21

Tensions with Copyright: The Digital Millennium Copyright Act ..........................25

Public Sphere Theory ...............................................................................................29

Rhetorical Critiques of the Institutional Criteria .....................................................32

The Rhetorical Public Sphere ..................................................................................36

The Reticulate Publics ............................................................................................38

The Digital Counterpublic ......................................................................................41

<Copyright> .............................................................................................................44

Chapter Overview ..................................................................................................49

Notes .......................................................................................................................53

CHAPTER ONE: <FAIR USE> AND THE <PUBLIC DOMAIN>. THE RESTRICTIONS ON THE RHETORICAL LEGACY OF DR. MARTIN LUTHER KING, JR. ................................. 67

Fair Use and the Legal, Corporate, and Legislative Publics .....................................71
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Mimesis</em> and <em>&lt;Authorship&gt;</em></td>
<td>128</td>
</tr>
<tr>
<td>Remix as <em>Mimesis</em></td>
<td>132</td>
</tr>
<tr>
<td>Peer Collaboration as <em>Mimesis</em></td>
<td>134</td>
</tr>
<tr>
<td>Bureaucratization of the Imaginative</td>
<td>140</td>
</tr>
<tr>
<td><em>UMG Recording v. MP3.com</em></td>
<td>142</td>
</tr>
<tr>
<td>Rhetorical Code</td>
<td>144</td>
</tr>
<tr>
<td>Concluding Remarks</td>
<td>148</td>
</tr>
<tr>
<td>Notes</td>
<td>149</td>
</tr>
</tbody>
</table>

**CHAPTER THREE: THE MATERIAL, CRIMINAL AND ECONOMIC COMPLEXITIES OF *<PIRACY>* IN THE PUBLIC SPHERE. THE RIAA WITCH HUNT.**  

- Defining Piracy                                                      | 161  |
- The Ideographs of the *<Pirate>*                                     | 162  |
  - The Corporate Public and the *<Pirate as a Villain>*               | 164  |
  - The Digital Counterpublic and the *<Pirate as Outlaw Hero>*        | 166  |
  - There Can Be Only One: Conflict between *<Pirate as Outlaw Hero>*  | 170  |
    and *<Pirate as Villain>*                                           |      |
- The Lasting Effects of the Ideograph                                 | 173  |
  - Material Loss                                                      | 174  |
  - Criminal Damage                                                     | 176  |
  - Economic Loss                                                       | 182  |
- The Activism of the Digital Counterpublic                             | 188  |
  - Open Source Software                                               | 189  |
  - Creative Commons                                                    | 191  |
INTRODUCTION.

THE STOP ONLINE PIRACY ACT AND THE PROTECT INTELLECTUAL PROPERTY ACT AS SITES OF CONFLICT OVER COPYRIGHT

On January 18, 2012 Wikipedia and dozens of other websites shut down for twenty-four hours in protest of two bills in the United States Congress, the Stop Online Piracy Act (SOPA) and the Protect Intellectual Property Act (PIPA). Although these two bills were written with the intent of protecting creative work online, two particular issues arose. First, SOPA required a website to shut down immediately under any alleged copyright violation. This policy superseded due process already in place concerning online copyright violation, a cease and desist notification called a takedown notice. Second, requiring an entire website to shut down demonstrates a fundamental misunderstanding of Internet infrastructure. This portion of SOPA is so vague it could require an entire website, like Google, to shut down for a single copyright violation. This point is of considerable importance because Google received 7,725,253 takedown notices in the first six months of 2012. Finally, SOPA and PIPA were written to privilege “old” media over “new” media. The bills protected film, music, and literature online, but did not address how innovation is fostered in digital forms. PIPA outlawed recording cover songs and posting them online. Given that one of the biggest stars in the world, Justin Bieber, was discovered after he posted videos of himself singing cover songs on YouTube, it is clear that the people writing this legislation fundamentally misunderstood how the Internet works. SOPA and PIPA served as examples of the tensions surrounding the public negotiation on copyright law.

Two stakeholders, Representative Lamar Smith (R-TX) and Motion Picture Association of America (MPAA) President Chris Dodd, argued that SOPA and PIPA were the next generation of copyright laws. Representative Smith, the lead sponsor of SOPA, argued the
premise of the bill is that protection of property and censorship of content are not mutually exclusive. In the early days of the outcry against the bill he stated that the SOPA does not attack content providers or Internet entrepreneurs. Smith argued:

The bill in no way censors the Internet. It only targets activity that is already illegal, and only targets foreign websites that are dedicated to illegal or infringing activity. In fact, it is similar to laws that already govern websites based in the U.S.\textsuperscript{7}

Smith wrote SOPA with the intention of finding the most effective way to protect copyrighted content from international piracy. SOPA and PIPA were written to protect the intellectual property needs of media corporations, as indicated by the former Senator Dodd. He once stated, “There were those in the technology community who chose Hollywood as an opponent, when we're just one of a number of industries being assaulted by theft of our intellectual property.”\textsuperscript{8}

Many media corporations made a top-down decision to support SOPA and PIPA without feedback from employees or others. A letter to Congress was signed by 626 corporations, all who supported SOPA and PIPA. The corporations wanted to protect their intellectual property ranging from photography to tattoos, exercise programs, drug manufacturing, and fashion design. Four of the six transnational media corporations were on the list of signees (NBC Universal, News Corporation, Time Warner, and Viacom).\textsuperscript{9}

Graham Meikle, in 2002, feared corporate control of the Internet. He claimed the future of the Internet is a closed system run by corporate interests. Using America Online as a key example, Meikle stated, “Like other mega-portals, AOL aims to corral its users into pre-selected sites from which AOL generates advertising revenue.”\textsuperscript{10} Laws such as SOPA and PIPA are the embodiment of Meikle’s fear for the future of the Internet. However, Meikle was wrong; the Internet is not filtered through mega-portals. The next generation of programing, called Web 2.0, is notable because of its asynchronous interaction, peer collaboration, and embrace of free/low
cost user labor. A few of the best examples of Web 2.0 technology include YouTube, Wikipedia, and Facebook. Web 2.0 is not a new form of the Internet but a user-centered variation in development where people with little to no experience could interact and create on the Internet. Web 2.0 technologies have proved to be easier to use and more collaborative than earlier iterations of the Internet. The activism surrounding the SOPA/PIPA Blackout is a key example of the democratic spirit that Web 2.0 provides the public.

The first discussion of a blackout evolved from conversations on Reddit, and debates within the online encyclopedia, Wikipedia. Reddit is a social news site that is predicated on a high level of user interactivity. Reddit’s process of posting news and other information is unique because users will rate posts by voting up or down; the more “up votes,” the higher the content placement on the main page. This creates a constantly changing homepage and addictively interactive content. Reddit held an almost month-long vote on a blackout and Wikipedia editors did the same. Alexis Ohanian, the co-founder Reddit, argued that in many cases SOPA and PIPA make digital labor and innovation impossible,

Both SOPA and PIPA are threats not just to the U.S. economy and not just all the jobs that this tech sector creates. If they had existed, Steve Huffman and I could have never started Reddit. It’s frustrating to see legislation that was written by lobbyists, and not technologists, perhaps become law. The post that started the discussion of the Reddit blackout was not started by one of the founders, but a user and, the up/down votes supporting the Blackout were not overwhelmingly popular: 14,815 users voted and 8,440 were initially in favor of the Blackout. Wikipedia is a free encyclopedia built on a Wiki, a Web 2.0 software platform which allows editors to write and edit content asynchronously. Of all of the websites that went dark, Wikipedia is the most significant because it is the sixth most visited site on the Internet and most popular website to participate in
the Blackout. Jimmy Wales, the founder of Wikipedia, mentioned the vote for the Blackout was close:

The community vote on the choice of US-only blackout versus global blackout was 479 to 591 in favour of going global, so while there was a solid majority, it wasn't the overwhelming majority that we had for the whole concept. It seems to have been somewhat of a tough choice for many people.

The discussions over the Blackout showed the nascent signs of deliberative democratic ideas in a digital context.

SOPA and PIPA contributed to the launch of a significant wave of Internet activism; the proof is in the hundreds of YouTube videos, blog posts, and other digital content. This activism informed public opinion; the results of the one-day protest included 162 million people seeing and interacting with the Wikipedia Blackout, 7 million signatures on Google’s petition against SOPA and PIPA, 1.5 million emails and 90,000 phone calls to members of Congress, all calling for the defeat of the legislation. Congressional support for the bills dried up by Friday, January 20, 2012. Copyright was intended as a limited protection for creative content; now it preserves economic incentives for creative content for more than one hundred years. This dissertation theorizes the relationship between rhetoric and copyright law. Copyright is an engine for the free expression of culture and an open avenue for profit. Copyright is how people protect the content they create; but that content changes as it becomes part of culture and the public interacts with it. If copyright is written to benefit media corporations, how does that change the way publics interact with culture? How is content changed? My intent is to illuminate the rhetorical construction of copyright and how it changes our interaction with culture. The following section examines the rhetorical components of copyright and how I am approaching the analysis.
Situating Copyright in Rhetorical Theory

Before I begin discussing copyright and rhetoric, I must situate myself within rhetorical theory and criticism. I define myself as a critical rhetorician, but I come to that as a person trained in classical rhetorical theory. The foundation of rhetoric is based on Aristotle’s definition as “the faculty of observing in any given case the available means of persuasion.” 16 This definition was an attempt to resist Plato’s declaration that rhetoric is cookery. 17 Dismissing rhetoric does not take away its significance; it only causes problems. Aristotle wanted people to see rhetoric as something that should be studied because knowing how people respond to different rhetorics makes us better persuaders. Edwin Black’s book *Rhetorical Criticism* is an important moment of change in contemporary rhetorical theory. Aristotle’s definition was in many ways limited to analyzing public address, although it is not the only means of persuasion. In response to this, Black started moving away from analyzing public address and challenged rhetoricians to examine the persuasive effects of a variety of discourses. 18 Black followed this work with the Second Persona, where he argued the focus of rhetorical criticism should not be on the rhetor, but on the audience who sits in judgment of the speech. Rhetorical criticism requires a public to interact with the text, event, or action. 19 The public needs to be foregrounded in any rhetorical criticism.

I further complicate my position as a rhetorical scholar with a critical rhetoric approach. Raymie McKerrow argues that the obsession with rehabilitating the field based on Plato’s critique does not serve the present. Critical rhetoric is defined as an engaged practice with consequences; it is not detached or divorced from emotion, but based on a need to illuminate the problems with power in discourse:

A critical rhetoric seeks to unmask or demystify the discourse of power. The aim is to understand the integration of power/knowledge in society—what possibilities for change
the integration invites or inhibits and what intervention strategies might be considered appropriate to effect social change.\textsuperscript{20}

McKerrow focuses on two general areas: critique of domination and critique of freedom. The critique of domination is grounded in an exploration of ideology as a sustained social practice. Ideology, in some cases, serves as a way to dominate or control the public and the critique of domination questions the validity of ideology. The critique of freedom welcomes a state of permanent critique. McKerrow argues multiple analyses of the same rhetorical action/event and later re-evaluation of those analyses to learn from the ways in which power is reinscribed. Kent A. Ono and John M. Sloop argue critical rhetoric requires a \textit{telos}, a “sustained critical practice,” which disciplines the work of the rhetorician as a commitment to change and improvement of the world, the discipline, and the critic.\textsuperscript{21} Part of this \textit{telos} requires a moment of pause in the perpetual critique that allows the rhetorician to make an evaluation \textit{in situ}, within the context of contemporary culture.\textsuperscript{22} With this in mind, I view rhetoric as all available means of communication with an attempt to influence publics; as a critical rhetorician, I examine how power relationships are constructed and maintained through a variety of rhetorical channels. I focus on the relationship between publics and digital media, especially on how copyright law influences the lived practice of publics. The examination and critique of copyright is one way of interrogating these relationships.

A rhetorical text is the vessel that moves analysis of any criticism. The available options for a rhetorical text are vast; the original rhetorical texts of public speech are still popular, but the field has broadened to examine, among other things, media, sports, and landscapes. Rhetorical criticism of the law is well documented, ranging from media coverage to the cases themselves.\textsuperscript{23} Marouf Hasian, Jr., Celeste Condit, and John Louis Lucaites argue that the law is not immutable and requires closer academic scrutiny, "in practice, the law is neither a rationally constructed
discourse nor simply a dominant ideology, but rather an active and protean component of a hegemonically crafted rhetorical culture." What makes copyright rhetorical is that it is a law written for the consumption of the public. Copyright is the legal mechanism for the production of culture and knowledge. The rhetorical study of copyright serves as an instrument of distributing a specific ideology within the public. To analyze the law there are a number of texts that I can study ranging from the different iterations of the law to Congressional testimony, to interviews with various stakeholders, and to significant commentary on the issue. I approach these texts through an engaged close reading as defined by Barry Brummett, “close reading is the mindful, disciplined reading of an object with a view to deeper understanding of its meaning.”

Copyright has a deeper meaning than its face value as a way to control and profit from content.

Taking my cue from the practice of critical rhetoric, I approach copyright through the theoretical lens of ideological criticism. Ideology is used in rhetorical theory to examine the relationship of the normalizing structures of social life that become the situated material form of ideology and take on the structure of any number of public discourses. Michael Calvin McGee argues that the normalizing structures embody language, thought, and action. McGee states, “when one appears to ‘think’ and ‘behave’ collectively, therefore, one has been tricked, self-deluded, or manipulated into accepting the brute existence of such fantasies as ‘public mind’ or ‘public opinion’ or ‘public philosophy.’” Locating ideology is often difficult because it is fluid, discursive, and based on complicated power relationships. Ideologies are complicated because they are fraught with tensions that come from a number of entities, all with a stake in the discussion. Rhetoricians can identify ideology in discourse and a variety of other forms. For example, Catherine Palczewski examines the cultural tensions demonstrated with early twentieth century anti-suffrage postcards. The cards function as visual ideographs that signify the norms of
These cards were intended to exacerbate fears of women crossing into the public (masculine) realm. These cards demonstrated a particular ideology but only scratched the surface of the complicated gender, religious, and economic climate of turn-of-the-century America. The value of creative content in culture is torn between the rhetorical poles of progress and profit within copyright law. This study is an ideographic critique, in which I examine the construction of the law, discourses surrounding the law, and various public statements by stakeholders in order to illuminate the tension within the concept of copyright.

Copyright is in theory a neutral legal instrument, but in practice copyright functions as an ideological tool. Copyright is a term of the law, but Congress controls how copyright is applied to the public. Corporations have a vested interest in how copyright is applied to the public because they own many copyrighted properties. The result is a series of rhetorical acts with the intent to influence the outcome and the public perception of copyright law. For example, the lobbying actions of corporations on the copyright law have helped shape the outcome of the law. Lawrence Lessig alludes to Disney pushing for changes in the term of protection every time Mickey Mouse is about to pass into the public domain. Gerard Hauser articulates this problem with lobbying and the social contract that Congress has with the public:

In theory a democracy is supposed to arrive at policy decisions on the basis of egalitarian principle in which the strongest ideas carry the day. However, from its inception, democratic politics has almost always been strongly influenced by well-organized lobbies.

The issue that Hauser is attempting to illuminate is the rhetorical nature of deliberation within the public. Jürgen Habermas developed public sphere theory to understand how people gather to discuss solutions to social problems. Hauser combines public sphere and rhetorical theory to develop the rhetorical public sphere as a way to examine the discourse of publics around a
rhetorical situation. I argue there are four rhetorical publics which work to define copyright: the Legal Public, Legislative Public, Corporate Public, and the Digital Counterpublic.

I examine the rhetorical dimensions of copyright law in contemporary culture, with particular attention to the rhetorical production of ideographs that shape public knowledge of copyright. I will focus on a period of fifteen years, starting with the passage of the Digital Millennium Copyright Act (DMCA) in 1998 and ending in January 2013 with the response to the suicide of Aaron Swartz. There are three areas from which I will pull specific artifacts that highlight the conflicts of the various publics. First, I will examine laws and various Congressional testimonies surrounding those laws. Specifically I will look at the Copyright Statute and the laws that were used to form it, including the Copyright Act of 1909, the Copyright Act of 1976, DCMA, and the Sonny Bono Copyright Term Extension Act (CTEA). Second, I will examine legal cases concerning copyright law. Primarily, I will look at cases decided by the Supreme Court including Golan v. Holder, Eldred v. Ashcroft, Campbell v. Acuff-Rose, Feist v. Rural, and Sony v. Universal Studios. I will also examine significant lower court cases like Stephanie Lenz v. Universal Music Corporation, Bridgeport Music, Inc. v. Dimension Films, Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., Vanna White v. Samsung, and Grand Upright Piano vs. Universal. Finally, I will explore acts of resistance to copyright law. In the discussions of the law and legal cases, the Digital Counterpublic is often marginalized. Rarely does the Digital Counterpublic challenge the copyright law, (like the case of Eldred v. Ashcroft). More often the Digital Counterpublic is prosecuted by the law (Campbell v. Acuff-Rose Music and Bridgeport Music, Inc. v. Dimension Films). Acts of resistance are how the Digital Counterpublic fights against the other publics. Acts of resistance range in organization, aesthetics, and activism in part because the Digital Counterpublic is the most
diverse public and the active participants have a range of skills and access to capital. Examples of acts of resistance are open source software, the free culture movement, and creative/resistance content of musicians and artists, remix/mash-up content. In this proposal I will provide overviews of ideological rhetoric, intellectual property law, and public sphere theory, all to move towards developing the ideograph of <copyright> and understanding how it is constructed by various publics.

**An Overview of Ideological Rhetorical Criticism**

The *German Ideology* changed the way social theorists looked at the lived experiences of people and provided a heuristic by proposing that ideology is material. Karl Marx and Freidrich Engels state, “The production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life.” Ideology is not some intangible idea that exists externally from a person; ideology is found in the words people use to describe their world, in the tools they work with, and in the objects they treasure. Philip Wander argues that rhetorical criticism and ideology can be theorized together as an ideological turn by saying “An ideological turn in modern criticism reflects the existence of crisis, acknowledges the influence of established interests and the reality of alternative worldviews and commends rhetorical analyses not only of the actions implied but also of the interests represented.” Wander wants critics to go further than the mere analysis of political discourse to examine and critique the lived experiences of publics. This lived experience is what motivates my work in ideological criticism and elsewhere because the material existence of publics grounds rhetorical practice and aids in the construction of ideology. For my work, rhetoric is not an instrumental function, but a way to understand the constitutive nature of the decisions we make and thoughts the culture shares. A rhetorician’s job is, in Wander’s view, to
be “situated in the midst of social and political struggle and what these struggles mean to real people.” Within this section on ideological rhetoric, I will discuss the significance of the ideological turn, the third persona, the establishment of the ideograph in rhetorical criticism, and the contributions my work will make to rhetorical theory and criticism.

Rhetoric spent most of the twentieth-century analyzing only public address using a style that Black called Neo-Aristotelian, meaning the author maintained an objective distance from the text and analysis. The format lends a universal style to all authors, and there is one primary question: “is a speech successful?” Wander offered, with the ideological turn, a paradigm shift in rhetorical criticism. Wander challenged the issue of objectivity in rhetorical criticism because it avoided the fundamental questions of how people lived. Wander asked, “Why ignoring the murder of men, women, and children following from actions justified in public address should count as a triumph of scholarly restraint.” Ignoring pain and hegemony gains nothing for the critic or anyone else. Wander believed rhetoricians should focus on what he calls “Being-in-History,” a situated space of understanding rhetoric within a cultural context. Recognizing and detailing the context of a given event does not reject objectivity, but recognizes the pluralism of answers in any rhetorical moment. The ideological turn was a controversial idea for many rhetoricians. Sharon Crowley argued that “objectivity” is the ideology of academic work. From such a conception, objectivity is illuminated as elitist and, in combination with neo-Aristotelian analysis, a quantity of texts are ignored because they do not fit acceptable conventions. Crowley did not dismiss that ideological critics struggle with issues of objectivity verses subjectivity. The difference with ideological critics is that they are as self-reflective as possible. Crowley stated, “Ideological criticisms make superior claims on our attention because they acknowledge that all criticism is embedded in its practitioners’ values and that any criticism must necessarily be
The heart of ideographic criticism reveals that there is no either/or in theory or practice. Ideological criticism is a recognition of the both/and, the multiplicity of answers to the same question.

Wander built on ideology by adding to Black’s work for the third persona. Black argued there are two personas of rhetoric. The first persona (I) is the relationship between the rhetor and the text. The second persona (You) is the intended audience for a rhetorical act/event. He called the audience the “implied auditor,” an audience that sits in judgment. Black argued, because of neo-Aristotelian theory, the first persona is well-understood. Black wanted the analysis of the audience to go beyond the response or make up people listening to a speech, but to look deeper. Black stated, “The technical difficulty of making moral judgments of rhetorical discourse is that we are accustomed to think of discourse as objects, and we are not equipped to render moral judgments of objects.” Black also started an early discussion of the effect on ideology on the intended audience and how ideology informs an individual’s world view. Wander introduced the third persona (It), the ignored or alienated audience.

The third persona directs our attention to beings beyond the claims of the morality and the bonds of compassion…it bursts the limits of technical reason to join the intellectual and the artistic with the political and social. Properly understood, it involves the unity of humanity and wholeness of the human problem.

Wander expands on Black’s analysis by connecting it to Marxist theory. Dana Cloud and Joshua Gunn highlight the historical ties of Wander’s analysis, arguing, “Wander extends Black’s approach by suggesting ideological movement can also be tracked by attending to the audiences excluded by a given rhetorical address.” Through ideology, Wander found a way to analyze public discourse as a material form that influences public. In the following section I will review the theoretical issues of the ideograph within rhetorical theory and explain the significance of material and constitutive rhetoric as parts of the ideograph.
The Ideograph

Ideology is discursive and power moves through various rhetorical sites and texts. One way to examine how ideology is understood is through ideographs. Ideographs are words or phrases that McGee calls the “building blocks” of ideology. McGee stated, “The important fact about ideographs is that they exist in real discourse, functioning clearly and evidently as agents of political consciousness.” Ideographs are words or phrases that McGee calls the “building blocks” of ideology. McGee stated, “The important fact about ideographs is that they exist in real discourse, functioning clearly and evidently as agents of political consciousness.” A phrase like “Freedom of Expression” is not simply a group of words but an ideological link about the value of creativity and dissent for citizens in the United States. Using the phrase <Freedom of Expression> in discourse is an embodiment of a constitutive action. In short, discourse is material and ideas are communicated through discourse, which makes ideas material through discourse. McGee introduced the concept of materialism to rhetorical criticism and gave the vocabulary to examine its use. As Cloud and Gunn state, “his prescription to study rhetorical processes as constitutive rather than simply reflective or expressive of history helped to introduce materialism in name to rhetorical studies.” The ideograph works in rhetorical criticism as a vessel to critique meaning and interaction between ideologies.

To study an ideograph a rhetorician must do three things: isolate the ideograph, examine the ideograph diachronically, and account for the synchronic nature of the ideograph(s). First, a rhetorician must isolate the ideograph within language. An ideograph exists as an unquestionable fact that is defined tautologically; for example <freedom> is unquestionably a good thing and it is defined as being free. Further, McGee defines ideographs as paramorphic, “even when the term changes its signification in particular circumstances, it retains a formal, categorical meaning, a constant reference to its history as an ideograph.” The ideograph is situated in the present, but maintained by a historical definition that assists how it is framed, which requires
diachronic and synchronic analysis. Diachronic or vertical structures examine the historic use of an ideograph. This is primarily done through analysis of various historical texts. An ideograph exists in the present because of its successful use throughout the past. The synchronic or horizontal structure of the ideograph examines the ideograph in present use. The usage of an ideograph in the present reveals the use of other ideographs that are used to support and clash with the primary ideograph. McGee used the example of how <Rule of Law> was used in Peter Rodion’s speech justifying the impeachment of Richard Nixon. The synchronic ideographs that supported his work were <public trust>, <freedom of speech>, and <trial by jury>. An ideographic criticism identifies the tensions within our perception of reality versus the actual existence of a social reality.

**Material Rhetoric**

There are two parts to my analysis of ideology: materialism and constitutive rhetoric. The material nature of ideology is loaded into words, objects, places, and events. All of these common actions ground our experience and reify how ideology is not a study of the esoteric. The materialism of ideology asserts that thought has weight. Recognizing the material weight of discourse helps illuminate how rhetoric is used to rally/divide/harm people. Ronald Greene advocates focusing material rhetoric on the “technologies of deliberation,” an approach to examining discourses of power within situated action. One example is performing a close reading of Congressional testimony, which is a situated text that reflects action and the material discourses of power. Greene uses the logic of articulation to show how material issues are manifested in rhetoric and then institutionalized. He states that, “the point is that a logic of articulation opens the possibility of studying how rhetorical practices traverse a number of different structures for the purpose of making judgments and planning reality.” The
technologies of deliberation welcome a study of material forms and how ideology is manifested in rhetoric.

**Constitutive Rhetoric**

Constitutive rhetoric examines how an audience is formed. An audience is not formed out of thin air; instead, ideology brings people together to form publics. As Cloud and Gunn summarized, “ideology is first and foremost what we do first and assign meaning to later.”

Constitutive rhetoric uses ideology as a path to understand how people become collective subjects. As Maurice Charland argues, “Persuasive discourse requires a subject-as-audience who is already constituted with an identity within an ideology.” Charland united ideology and constitutive rhetoric with the audience by examining the movement for sovereignty in Quebec. Charland borrowed Althusser’s term “interpellation” to describe how constitutive rhetoric makes the audience identify with the discourse. Charland’s key example is how people living in Quebec became the *Québécois*. He argued that the audience was interpellated within a policy document called the White Paper that identified the movement as a historical outgrowth of the founding of Quebec. The movement had a foundation and clear history that gave people a view of the material experience of being the *Québécois*. Constitutive rhetorics are the natural next step of the material conception of rhetoric: discourse is ideological because we recognize it as material. Therefore, people can be ideological because we recognize them as material.

The rhetorical study of ideology provides the tools to examine how ideologies are formed, disseminated, and embedded in cultural and personal dogma. Ideology is the critical study of ideas and examines the situated nature of what a public values. Ideological rhetorical criticism examines what is most central to the lives of people and the work embodies a sustained critical practice. I use ideology to examine copyright because it is a fundamental construction of
how people engage with culture. People engage with copyright every day and do not understand how the various practices are built to restrict their use of materials. The disconnection over copyright is that people are more willing to change their practices then learn there are other options. However, culture and the production of culture are constrained by the laws written to protect it. I see this as a fundamental issue of ideology and the rhetorical construction of its laws. The following section is a primer on intellectual property law and copyright.

An Overview of Intellectual Property Law

In the following section, I will provide a brief history of copyright starting with the English political economy that required the Statute of Anne, the embrace of copyright by the framers of the American Constitution, and how copyright changed based on time and shifts in forms of reproduction. Property law protects the real, physical forms of property (like houses, horses, and other material objects). Intellectual property protects the intangible assets of a person or group. Intellectual property law is a type of property law and serves as the backdrop for contextualizing my argument. There are three types of intellectual property law: trademark, patent, and copyright. Trademark is a relatively new form of intellectual property that works through a registration system to denote a specialized logo or form of sign to identify a particular service. Trademark is unique because of the system of registration that allows a company to maintain a trademark for centuries. For example, the German beer company Löwenbräu has maintained its trademark since the fourteenth century. Patent law protects the work of scientific invention for a limited period. Currently patents last for twenty years after the claim is filed. Patent was the earliest form of intellectual property. Early patent control was regulated by a royal decree called Letters Patent, from the King or Queen of England to a selected manufacturer, publisher, or group, in the early thirteenth century.
Copyright is the primary focus of my analysis and it is, first and foremost, a property right. *Black’s Law Dictionary* states that copyright is:

A property right in an original work of authorship (such as a literary, musical, artistic, photographic, or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work for a limited term. 

The definition of copyright is significant because of two elastic clauses which guide the law: “fixed in any tangible medium of expression” and “limited term.” The function of “fixed in any tangible medium of expression” allows for a great deal of space for technology and human ingenuity to change how creative work is produced. “Limited term” requires that any copyright must end. In theory, copyright serves as both an economic incentive to content creators and legal protection by granting sole control over the use of a creative content. This is the definition of copyright that is embraced by multiple publics; however, this definition comes from five hundred years of debates surrounding political economy, changes in governmental structures, and negotiations.

Copyright demonstrates the tension between progress and profit; these issues have plagued copyright law since its inception. Progress is focused on improving art, science, and culture through people and a copyright is a reward for their work. A copyright is a property right, meaning a content creator or owner controls, protects, and profits from the content. For many legal scholars and defenders of copyright, the law is an incentive to profit on copyrighted work is the only reason people create content. Copyright exists to lend a balance to the creative progress/innovation of a content creator and his or her economic rights. The tension began with the invention of the printing press, which shifted publishing from an exclusive privilege into a common practice. The Guttenberg printing press produced its first Bibles in 1455. The British Parliament passed the Statute of Anne, the first copyright law, in 1710. The 255 years in between
were responsible for the diffusion of innovation, the cultural rise in literacy, and the foundation of literary piracy. Writing was not seen as a craft until writing could be mass-produced with the rise of the printing press. In the seventeenth century England, the accessibility to produce written work was maintained by the patent system and publishers called the Stationers, who maintained a strict monopoly on written works, like Shakespeare’s plays, to keep prices high and competition low and as a system of censorship.\textsuperscript{56}

This system fell apart during the English Civil War and the rise of the Commonwealth. Copyright was codified sixty years after the fall of the Commonwealth with the Statute of Anne. In those sixty years, a number of different publishing structures were attempted, including a return to the Stationer’s system. But the government and the public began to understand that creative content needed its own form of legal protection. Groups of publishers took advantage of the lack of regulation after the English Civil War and were given the label of “literary pirates.” Adrian Johns, a historian of intellectual property law, argued that literary piracy invented copyright law, “literary pirates were outsiders against whom a form of propriety could be defined, defended, and upheld as fundamental to order.”\textsuperscript{57} This identification of pirates is a rhetorical foil to protect the norms of property law. In short, piracy created intellectual property law. The Statute of Anne was the first attempt to define the protection necessary for creative work and the first time a protection of intangible work was formalized in a legal frame.\textsuperscript{58}

The opening lines of the Statute of Anne claim its utopian intentions broadly, reading “an act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies.”\textsuperscript{59} The Statute of Anne established the foundations of copyright law by creating the limited term and the public domain. The limited term was an economic incentive for authors because copyright does not last forever. Authors could not profit upon a single work
indefinitely; they had to continue to contribute to culture. The law established the limited period at fourteen years. At the end of the limited period, the work entered the public domain where anyone could publish the work without permission from the author. Although this is called the first copyright law, the word “copyright” does not appear. Legal scholar Lyman Ray Patterson argued that “copy” is the equivalent term for the contemporary definition of copyright. The Statute of Anne recognized, for the first time, the significance of authors and gave them power over their work.

The success of the Statute of Anne at enforcing or creating intellectual property law is uneven when looking at historical records. Johns argued that it was a piece of confusing paper and other legal scholars cited that its importance in establishing contemporary intellectual property laws cannot be undersold. The proof of the success of intellectual property law, especially within my analysis, is that patent and copyright laws were seen as significant enough to be included in the U.S. Constitution. Condit and Lucaites argued the establishment of property clauses in the U.S. Constitution was important to the founding of the United States because owning property was something rare for the European immigrants. Property claims in families went to the first born male child in the landed gentry, leaving the remaining siblings adrift. People not in the upper class rarely had access to property. Immigrating to America literally opened up space to own property. Early in the revolutionary period, liberty and property were rhetorically linked together. Condit and Lucaites stated,

Liberty was not always linked to Property, but the link was common and important. Therefore we should take the colonists’ repeated insistence on the importance of Liberty as implying, fundamentally, an insistence on the right to Property.

Property, within the United States, is conceived of as a fundamental right and people are willing to fiercely protect what belongs to them, intangible or not.
Copyright law has been amended every time a new form of reproduction upset the balance of the status quo. The Copyright Act of 1909 was written to address the rise in mechanical music players like phonographs and piano rolls.\textsuperscript{63} The Copyright Act of 1976 created the language “fixed in any tangible medium of expression.” This is a significant addition because it formally recognized the legal protection of film and radio; these forms of technology were purposely excluded from the discussion in 1909.\textsuperscript{64} The phrasing is also significant because it clearly delineated copy protection for all forms of mechanical reproduction. The most amendment to the copyright statute is the DMCA that was passed in 1998, took a different approach because the age of digital reproduction had begun. Digital reproduction produces identical replications of various forms of art. An album from a popular band will sound the same if someone buys it from a store, downloads it from iTunes, or illegally obtains it from the Pirate Bay.\textsuperscript{65} Digital reproduction allows people to buy art with fewer motions, often without leaving the house, at more affordable prices than its mechanical counterparts. The benefit of digital reproduction to the public is the increased access to art. Digital reproduction also provides a way for the Corporate Public to control copyrighted materials after sale. The DMCA created a provision for the Corporate Public to track the use of online media called Digital Rights Management (DRM) code. Copyright is, in part, a form of control over content and legal scholar Jessica Litman finds the length of this control in the DMCA troubling,\textsuperscript{66}

The goal of copyright law is to place all feasible control over works of authorship firmly in the hands of copyright owners, new digital technology offers us the opportunity for the first time to come very close to perfecting the system.\textsuperscript{66}

Before attending to this future, it is useful to conduct a more careful examination of copyright law.
Theoretical Components of Copyright

Within this section, I provide a list of important terms for understanding who is involved in copyright issues. I also introduce the two elastic clauses of copyright. Copyright law protects different types of people and the forms in which they produce work. Five terms are relevant to how people create and manage work that is protected by copyright: content, content creators, content owners, content consumers, and content consumer/producer. Content is the end product of the creative output that is covered by copyright law. To be considered content, it must be “fixed in any tangible medium of expression.” A representative anecdote of content is the classic song “Happy Birthday to You” (HBTY). A content creator produces a unique product that is desirable to the public. The content creators for HBTY are sisters Mildred Hill and Patty Hill Smith. HBTY was spawned from a long collaboration; the sisters published the song in 1893 under the name “Good Moring to All.” Eventually the sisters wrote alternative lyrics which became HBTY and the new lyrics were copyrighted in 1935. A content owner is the person(s) who manages the scope of the content. The content creator and content owner are not necessarily the same because a content creator will often sell content to an owner as they can protect content better. Time Warner bought HBTY in 1988 from the Birch Tree Group because they could not keep up with alleged copyright infringements. A content owner is the person(s) who manages the scope of the content. The content creator and content owner are not necessarily the same because a content creator will often sell content to an owner as they can protect content better. Time Warner bought HBTY in 1988 from the Birch Tree Group because they could not keep up with alleged copyright infringements. Content consumers are people who pay and interact with content. Most content is bought and consumed without consideration for how it is made. Content consumers are essential to the interaction because they make the content valuable. HBTY has been a vital part of American culture for more than one hundred years; the song has great value to content consumers and owners. An unauthorized rendition of HBTY costs at least $5,000; the content owner, Time Warner, furiously protects any public performance of the song
because the song nets around $2 million a year.\textsuperscript{69} The true irony is that 88% of the song’s lyrics are in the title and the other 12% is the person’s name and the word “dear.”

Rhetoric and copyright interact by defining a fusion identity: the \textit{content consumer/producer}, an identity of the digital age. Content consumer/producers are people who consume media and use the same media to create new content. The content is often called a remix or mash-up, which is a reference to how different forms of media are combined to produce content. Lessig argues for the significance of remix in culture by borrowing the technical editing language,

Remix is an essential act of [Read/Write] RW creativity…the critical point to recognize is that the RW creativity does not compete with or weaken the market for the creative work that gets remixed. These markets are complementary, not competitive.\textsuperscript{70}

Remix is part of the evolution of content creation; the media is not the end product for consumption, but is the instrument to create new content. The intention of copyright is to provide legal protection of creative work for a limited period. Copyright is not a tool to prevent people from making mash-ups or a pure good to protect all people from theft of creative work; it is a neutral legal instrument needed in our culture to protect content creators and their work. The tension within copyright is focused on managing two end products of creative work: profit and progress. Within this section, I will detail two elastic clauses of copyright law: “fixed in any tangible medium of expression,” and the limited term of protection.

First, any form of copyrighted work must fit into the elastic clause of “fixed in any tangible medium.” Intellectual property focuses on the intangible aspects of property; however, even the intangible needs to be fixed for others to learn and collaborate. The focus on the real and tangible aspects of expression is important to this analysis for two primary reasons: the focus on creative acts and aura. Creativity is a wholly misunderstood process because on its best days
it is messy. The process of creation is different from one person to another and the end product of that creativity is both unique and not. The pages of a book are wholly original except when we borrow genre, tropes, and other ideas. Words themselves are unoriginal because letters and word combinations are finite. One problem with this elastic clause is that it can be too inclusive. If copyright law protects any fixed work in any tangible medium that means the tiniest creation is protected: grocery lists, film clips, and song snippets. The problem is that copyright infringement cases protect the smallest violation with the same energy as sizable thefts.

The tangible medium of expression protects a range of experiences and forms of art. Walter Benjamin examined the modes of production of art and the ways in which art is changed when copies are experienced over the original. The aura is the relationship between a person and an experience with art and the aura is missing in reproduction of copies. The function of the aura is about presence and authenticity of the experience within a moment. Standing within the walls of the Sistine Chapel has more meaning then owning a poster and taping it on the ceiling. Further, the energy produced in making a copy often negates the authenticity of the art. Taking pictures or video at a concert distracts from the real experience of the moment in an attempt to save the moment via a mechanical or digital reproduction. Copyright protects the original work “fixed in any tangible medium of expression,” meaning that the original possess the aura. However, copyright ownership allows copies to exist, and how does this change the experience of art? What, then, becomes the aura of art? Benjamin’s primary concern was what this change meant,

To an ever greater degree the work of art reproduced becomes the work of art designed for reproducibility. From a photographic negative, for example, one can make any number of prints; to ask for the “authentic” print makes no sense. But the instant the criterion of authenticity ceases to be applicable to artistic production, the total function of art is reversed.
Benjamin gets to the heart of the issue of copyright: if art is constantly reproducible, what is an authentic experience? Is listening to a vinyl record the most real form of music fandom? Is reading a book a more authentic way to learn? These are old questions that remain relativity unanswered within mechanical reproduction because the primacy of the aura is still privileged in many art forms. No one argues that a picture of a painting is more significant than the painting. But there is no primacy of aura when it comes to reading a book. However, all of these material experiences people seek to preserve. This preservation of the material experience is essential to understanding the tensions in the age of digital reproduction.

Second, the limited term focuses on how long a copyright can be controlled by the content creator or owner. The key to understanding this elastic clause is that copyright must expire, but the length of time before copyright expires is up for debate. The length of copyright provides a causal link to the production of creative content. There is some debate over the length of the limited term. The Constitution states that the term of copyright is limited, but leaves the length of the term up to Congress. The original term of protection was fourteen years as granted by the Statute of Anne. The term of protection has changed over the last five hundred years and some change is expected due to changes in mechanical and distribution. However, the term of protection changed more in the last one-hundred years than in the previous four-hundred combined. The term of protection changed from fifty-six years in 1900 to more than one-hundred years by the year 2000. William F. Patry called this the radical expansion of copyright. The current term of protection lasts for the author’s life plus seventy-five years and ninety-five years for works of corporate authorship. Further, the Copyright Act of 1976 extended the term and reset the clock for the term of protection and this happened again with the Sonny Bono Copyright Term Extension Act (CTEA). No material has entered the public domain since 1922.
This means the copyright for the lyrics of HBTY ends in 2030, 95 years after the copyright was filed and eighty-four years after the last surviving co-author, Patty Hill Smith, died.76

Intellectual property activists face the common problem that most people do not have a stake in the discussion of copyright until they are forced to. For example, Stephanie Lenz was not well-versed in copyright or media law when she made a twenty-nine second video of her young son dancing to Prince’s “Let’s Go Crazy.” Lenz posted the video on YouTube to share with her family and friends. Three months later, YouTube received a takedown notice from the song’s owner, Universal Music Corporation, and the video was removed. Lenz, with support of the Electronic Frontier Foundation (EFF), filed a counter-notification claiming that the video fell under fair use and sued Universal for misrepresentation of the DMCA.77 Lenz’s case took three years and was heard by three different courts. She won her case, but it is one of few success dealing with fair use and copyright. Furthermore, a win for one is not a win for all because each fair use case is reviewed in a vacuum. Litman argues, “there is no hard and fast rule setting forth how much of a work may be used [for fair use]--despite popular perceptions, there has never been any magic number of words one may quote or notes one may copy.”78 Content owners have stacked the deck against content consumers in part due to the structures of the DMCA.

Tensions with Copyright: The Digital Millennium Copyright Act

Within this section I review the legal structures of the Digital Millennial Copyright Act (DMCA) including takedown notices and Digital Rights Management code. The most recent copyright legislation is the DMCA.79 The focus of the DMCA is to bring copyright into the twenty-first century. There is a wealth of criticism focused on the DMCA, but I give the legislators some leeway because there was no way to predict the scope of the diffusion of innovation within the Internet. The shape of copyright for content creators and consumers did not
change significantly for four-hundred years; but in the rise of recording and mass media, copyright needed to change. What the DMCA is able to provide for corporations is a material way to protect their copyrights. Enforcing copyright law in the early days of the office copier, cassette recorder, and VCR was nearly impossible. The rise of the Internet provided a way to disseminate copyrighted material but it also provided a way to track the same material. Some supporters of the radical expansion of copyright believe that the only way innovation can exist is through financial incentives. This argument frames creative and scientific output as the instrumental means to profit. This ideology may not represent all creative people, but it does represent some transnational media corporations who protect their creative holdings. The DMCA provides two forms of copyright enforcement: takedown notices and Digital Rights Management (DRM) code.

Takedown notices are the component of DMCA giving legal power to content creators/owners to send cease and desist letters to any person or corporation who allegedly infringes copyright law. The takedown notice is an effective tool for content creators/owners to serve as a first line of defense for protecting copyright; it is cheap and efficient at removing possibly infringing content. There are two issues with how takedown notices are distributed. First, some argue that takedown notices remove content without due process and function as a “guilty before proven innocent” penalty. A content creator is penalized for breaking a law, even if the infringement is fair use. Second, often the person(s) who posted the infringing content cannot be identified; so the takedown notice is sent to a second party. Enough people know how to hide personal information, like Internet Protocol (IP) addresses, that takedown notices are often sent to Internet companies (Comcast, Verizon), hosting services (YouTube, GoDaddy), or search engines (Google). This process is condoned by the DMCA, even if it does not reach the
root problem of the infringement. According to the DMCA, “If, upon receiving a proper notification, the service provider promptly removes or blocks access to the material identified in the notification, the provider is exempt from monetary liability.” Most companies pull or block content as soon as a takedown notice is received without bothering to check if the material violates copyright law. Blocking access to the content provides a legal cover for the organization which does not have full knowledge of what people post.

Most media companies use the combination of copyright infringement sniffing search bots and legal associates to stop the smallest violations of copyright. The Corporate Public is staffed with expensive lawyers and unlimited resources to prosecute copyright violators to the fullest extent of the law. The case in which Time Warner sued the Girl Scouts of America for signing HBTY without permission is a single example of overzealous copyright protection by a media company. The law is not on the side of the consumers. The Corporate Public, through special interest groups and lobbying, formed the DMCA into a service for corporations. Cassandra Imfeld and Victoria Smith Ekstrand found evidence of this underhanded collaboration during the deliberation on the bill:

Between February and May of 1998, the online service provider liability provision went from 500 words to 4,000 words. In doing so, it reflected significant new protections for copyright holders, requiring online service providers to have agents ready to receive copyright complaints from copyright holders and offering detailed subpoena powers for copyright holders who believed their work was the subject of online infringement. The Corporate Public used its money and political influence to change government regulation in its favor. To rebuff and increase awareness of people’s rights on the Internet, several law schools and EFF started the Chilling Effects Clearinghouse, which collects and categorizes takedown notices. The Chilling Effects Clearinghouse provides a needed service to challenge or even
subvert the system because the media industry utilizes takedown notices for more than enforcing copyright legislation.  

Digital Rights Management (DRM) code is the other means to enforce the DMCA. DRM code is a type of embedded code to track and restrict use of copyrighted materials, like preventing a system from making a digital copy or using a non-approved player. Most CDs made since 1998, all DVDs, some MP3 downloading services, and some e-books are programmed with DRM protection. DRM is presented as a protection for consumers against illegal downloading and copying by tracking personal use. Neil Weinstock Netanel elaborated on the dark-side of the economic logic behind DRM: that the Corporate Public wants a pay for play system. Netanel stated, “Only if they are armed with hermetic control will copyright holders be able to eliminate copyright’s deadweight loss by tailoring prices to consumers’ ability and willingness to pay.”

However, the Corporate Public will not have that and does not have that from DRM code because DRM does not work at maintaining copy protection. The most effective DRM code protects digital content like CDs and DVDs purchased by people who do not understand their technology. Apple was lauded in the post-Napster era for opening the iTunes digital download service for its easy-to-use interface and affordable content. However, Apple’s DRM code is the most restrictive of all the forms of copy protection. iTunes users have a difficult time burning music to CDs and MP3s stop working if they are shared on too many devices. Users are dependent on Apple software to use their music. The music industry supported Apple because it was a great model to protect its profits.

Copyright law should maintain a balance between profit and progress; however, the restrictions within the DMCA move the pendulum to focus on profit over progress. The reason takedown notices and DRM code exist is because the Corporate Public has a persistent fear
concerning economic losses attributed to piracy. Napster fueled the first generation of piracy; as the speed of the Internet increased, piracy moved on to television, movies, and video games. The Corporate Public argues they are victim of a piracy campaign that has cost millions in lost revenue and jobs. Copyright is the central idea of warring publics who all have something at stake within the discussion. The following section will provide an overview of public sphere theory to show how publics interact and antagonize one another.

**Public Sphere Theory**

Public Sphere Theory was created by Jürgen Habermas to examine the discursive space of how people discuss ideas and turn from private individuals into a public. Within this section, I will review the specific components of public sphere theory and the institutional criteria. Habermas argued that the most opportune time for the public sphere was within coffeehouse gatherings of European men in the late eighteenth century. These norms establish the complex inner workings of a public and how publics to work discursively on issues significant to their needs. In my analysis of the bourgeois public sphere recognizes Habermas’ idealism by looking at the coffeehouse as a metaphor for how people gathered into publics. Treating the coffeehouse as a metaphor helps focus on the idealism of the public sphere. Within the metaphor, the public sphere is space for critical dialogue where people learned, argued, and worked for social causes; this public started long before anyone entered and will continue long after we leave. This is not a controversial analysis but one that maintains Habermas’ outlook despite the wealth of criticism heaped upon public sphere theory. The reason public sphere theory resonates is because it is malleable and questions what brings people together. The concept of public sphere illuminates how publics and action are formed. Within this section, I will provide some keys to understanding the public sphere, Habermas’ institutional criteria for the public sphere, and
Gerard Hauser’s critiques of the institutional criteria before highlighting the public sphere as important heuristic.

There are three important issues to highlight to understand public sphere theory: the public/private distinction, the monolithic public, and rational-critical debate. First, Habermas starts with the etymological changes as he defined his use of particular words. “Public” was defined as open use and accessibility for all. The public sphere was first defined in relation to private information; some knowledge is public and free for all people to know, like that content in government documents, whereas people are private and possess information unknown to the public. Habermas builds upon the public/private distinction and European history to show how the bourgeois public sphere came into existence when it did. Habermas argued,

The bourgeois public sphere may be conceived above all as the sphere of private people come together as a public; they soon claimed the public sphere regulated from above against the public authorities themselves, to engage them in a debate over the general rules governing relations in basically privatized but publicly relevant sphere of commodity exchange and social labor.

The bourgeois public sphere was an informed group of private citizens without immediate claims to leadership that would discuss issues of governance and rose to be the middle ground where public and private met, quite literally, for coffee.

When discussing the work of Habermas, it is important to note that “private” exists in multiple and disparate forms and “public” is a singular and unified existence. As far as Habermas is concerned, there are thousands of private people and only one public. There are many criticisms of public sphere theory that I will touch upon, but the most significant is the criticism of the monolithic public. Habermas still held to the idea that there is a singular public good. This singular focus is reflective in the makeup of the bourgeois public sphere: affluent European men who met in coffeehouses. I chose this phrasing specifically to reflect some of the issues that
Habermas ignored when setting up the public sphere. First, the word “affluent” recognizes the people in these rooms are educated people who have the social and economic freedom to meet in coffeehouses. Second, as far as Habermas is concerned, only European countries had these discussions, specifically England, France, and Germany. The United States was absent from the public sphere because American culture in the eighteenth and nineteenth centuries focused on nation building. Finally, only men participated in the public sphere because they were the only people with the social and economic freedom to spend time discussing social issues. Women had to tend the home and coffeehouses did not allow them.

Habermas theorized if private people could come into a public discussion and hear arguments about issues based on their merits alone the public would agree on a rational and fair decision. This process is the rational-critical debate and it is the foundation of the public sphere. The rational-critical debate focuses on how people within the public sphere are willing to ignore their personal beliefs and make a decision based on the quality of the argument. This is an idealized process because in reality it is nearly impossible to separate people from their beliefs. One of the best examples of something similar to rational-critical debate is the Supreme Court. Ideally, the Justices come into the chambers as receptive to the case before them and render a judgment based on the merits of the case. However, personal beliefs still create internal and external conflict. In later works, Habermas recognized some of the criticism against the rational-critical debate and presented the ideal speech situation as an alternative. The ideal speech situation is based on a procedural code where people contribute to an informed and rational discussion. These three concepts frame many of the issues of the public sphere and will assist in understanding the institutional criteria and the criticism of Habermas’ work.
Rhetorical Critiques of the Institutional Criteria

Habermas addressed three institutional criteria that made up the ground rules of the bourgeois public sphere. In the following section, I will briefly review the institutional criteria and follow with the rhetorical critiques. The three institutional criteria are a disregard of status, discussions of common concern, and inclusivity. First, the disregard of status requires people in the public sphere to be equals. As Habermas states, “they preserved a kind of social intercourse that far from presupposing the quality of status, disregarded of status all together.”93 The assumption here is that people could gather in these coffeehouses and discuss the issues of the day without judgment of wealth, education, and social standing. Within the public sphere, an individual’s worth is measured by the quality of their argument. Second, the public sphere is brought together over issues of common concern. Habermas argues, “The domain of ‘common concern’ which was the object of public critical attention remained a preserve in which church and state authorities had the monopoly of interpretation.” The issues of common concern in the bourgeois public sphere were contemporary heuristics of religion, governance, and economy. However, the common concern of a public needs to be situated and fluid, which respects the ways a public changes within culture. Third, inclusivity focuses on the idea of bracketing social status. Bracketing is part of the rational nature of the public sphere that people can willingly look beyond political bias and social concerns to only see the merits of an argument. Habermas argued that people, through bracketing, can be exclusive in their inclusivity by saying, “However exclusive the public might be in any given instance, it could never close itself off entirely and become consolidate as a clique.” Bracketing allows new people into the public continuously without judgment. 94
If rhetoric is all available means of communication with an attempt to influence publics, then rhetoric can be based in fear, emotion, and other non-rational forms of argumentation. Part of the intention of the public sphere is to have discursive space without a rhetorical influence. Gerard Hauser has six critiques of the institutional criteria to move towards a more rhetorical public sphere. First, the public sphere is inherently exclusive because it under-theorizes how other publics are formed. Hauser stated, “[The public sphere] conceals the ways in which particular, often marginalized public arenas form and function.” Habermas’ project focused on transformation of the monolithic, bourgeois public sphere but other scholars argued that he ignored the existence of other public spheres. Nancy Fraser contended that there were several publics and Counterpublics of marginalized people agitating for a voice in the discussion. Hauser followed this with his second critique of the monolithic public. He argued, “The model of a unitary public sphere neglects the lattice of actually existing public spheres.” The heart of these critiques focuses on inclusivity verses exclusion. The idea that a public can be inclusive through exclusivity is oxymoronic. The bourgeois public sphere gathered with all of the knowledge of its time to make the best decisions for the community and the world, resulting in myopic cultural policies, any number of abuses to the middle class, and the repression of women. The problem is that the private men in the public coffeehouse never thought to look for other views.

Third, Hauser contended that not all people in a public care about the same issues and there is no need for equal focus from all parties. He stated, “The principle of disinterest excludes those sub spheres whose members are decidedly interested.” Part of the contention within this critique is that not every person in the bourgeois public sphere shared the same level of interest and commitment. Part of the problem focuses on what Habermas defined as the issues of
common concern and what Habermas’ considered private issues. Religion, governance, and the economy are shared public issues, but within them, there are other problems that at this time were considered private problems. A deeper analysis of class, race, and sex illuminates these issues of superstructure that obscure the base. For the bourgeois public sphere, questions of domestic abuse, sexuality, and economic inequality were considered private matters.

The final criticisms focus on rhetoric and the criticism of the rational-critical debate. Fourth, Habermas argued that the public sphere is space for rational-critical debate, but who defines what is rational? Hauser posed that question by asking who is left out of the debate, “the criterion of communication rationality contributes to the exclusionary character of the public sphere by constraining access.” This critique returns to the idea that bracketing forms of inequality only reinforces inequality. The gathering of any group requires a cultural acceptance of social practices, ranging from issues of decorum or deference to people in power. The idea that the bourgeois public sphere resisted issues of class is unrealistic. The unbracketing of people within a public improves the dialogue and participation because people do not have to avoid the fundamental nature of their existence. Hauser furthered his analysis of bracketing inequality with his fifth critique, “the norm of warranted assent to be achieved by generalizable argument is contrary to the particularly of public issues.” When the people within the public sphere speak, whom do they speak for? Habermas believed they have agreed on the best decision for all, but if so many voices are left out of the debate, how can that be assessed? If not everyone can participate in the conversation, then how can the conversation be truly useful? The rational-critical debate is not meant to be a rhetorical situation; instead, it is meant to be a space where people absorb knowledge. Habermas did not intend for the rational-critical debate to be rhetorical or deliberative. The heart of rational-critical debate is that reason will always win in an
argument; why is a “rational” argument stronger than an argument with pathos? The answer is that pathos lacks validity where rational arguments make sense based on their merits.

Habermas was concerned with communication, but he wanted to avoid rhetoric because people can be persuaded through non-rational means. Habermas’ continued focus on rational thought within the structure of the ideal speech situation shows how he was trying to form reasoned discourse without rhetoric. Hauser critiques this in his final point—“the model of the ideal speech is at odds with conditions of diversity that defines society.” The most glaring problem with the ideal speech situation is there is no space for people to “agree to disagree.” Everyone must exit the ideal speech situation in a state of perpetual rational agreement. Nevertheless, not everyone agrees on the issues of common concern and not everyone agrees on the matters of private concern. There cannot be a monolithic and constant state of agreement. This problem is exacerbated through inclusion; examining the issues of common concern within the ideal speech situation with culturally based views changes the scope of the debate. How can people have a rational discussion about the economy without a discussion of the minimum wage or migrant labor? How can a rational discussion about governance occur without an examination of how the governing body does not reflect the populous? Rationality is only a standard when people can divorce themselves from their place in culture. Further, it is irrational to believe that people can speak or learn better without recognizing their place within culture.

The issue that makes the public sphere a significant heuristic is the focus leadership as a group. Arguing a group of privileged people can make decisions about the world without being representative of the public is not new. Plato argued that the Philosopher Kings were able to do the same thing because the demos needed someone to think for them. The Divine Right of Kings institutionalized the same line of thought. An oligarchy of privileged people cannot make
informed decisions about the public: the bourgeois public sphere does not represent the public. The men welcomed into the doors of the coffeehouses met a particular status because passing through the door required a hierarchy. The bourgeois public sphere does not need to be a historical fact to be a significant theoretical idea. Oliver Boyd-Barrett argued the greater idea of public is less with governance and more with philosophy: “It is about the formation of a sense of the ‘public,’ not as an abstract principle, but as a *culturally-embedded social practice*.” The public sphere is an idea which looks at what brings people together to share ideology within a given time. Understanding the public sphere as a culturally-embedded social practice allows us to look at social groups and how they are situated in a given time. The public sphere is a significant heuristic for understanding how publics foster change and/or maintain the status quo. These norms establish the complex inner workings of a public and how publics to work discursively on issues significant to their needs. The following section will introduce the added complexity of the rhetorical public sphere.

**The Rhetorical Public Sphere**

Rhetorical scholarship on the public sphere starts with Thomas B. Farrell and Hauser. Farrell examined the philosophical foundations of rhetoric and communication theory. His focus on Habermas was about illuminating a pragmatic approach to the philosophy of the Frankfurt school. Farrell stated, “My claim here is that Habermas’s project on discourse ethics, together with his practical placement of the public sphere, offers a basis for synthesizing the normative component of practical wisdom and a rhetoric goaded by emancipatory reason.” Farrell evaluated how various claims throughout Habermas’ work overlap with rhetorical theory, including the ideal speech situation/the rhetorical situation and validity claims/symbolic action. The overlap between the two is a focus on public discourse and improvement of democracy.
Hauser found a common ground between Habermas, critical theory, rhetoric, and democracy by privileging dialogue. The model Hauser worked through examines how dialogue forms democratic action,

A rhetorical model of the Public Sphere would adapt Habermas’s observation on locating such associative spaces to read: Whatever private citizens exchange view on a public concern, some portion of the Public Sphere is made manifest in their conversation. These dialogues are not focused on complicated issues, but can reflect the everyday issues of people and that is where the ideology of a public is made. Building a public is a process and that is the analysis Hauser used to build the rhetorical public sphere with his “institutional criteria.”

The rhetorical public sphere is based on discourse; critical norms come from real discursive practices. Some exchanges require bracketing of specific issues, and the communication must be conductive to build shared judgments. This flexibility to build coalition and dialogue moves people from individuals who share beliefs to a functioning public. Many publics share discursive voices and build different ideologies. That interchange builds a greater dialogue and has significant rhetorical value. Hauser called this multiple, discursive system the reticulate public sphere and showed how publics work together and against each other in an overlapping system.

Hauser argued there are five institutional criteria that define how the reticulate public sphere works: permeable boundaries, activity, contextual language, believable appearance, and tolerance. The permeable boundaries allow other publics into a discussion on similar terms. Further, the boundaries demonstrate the tension between the stakes of each public. Hauser stated, “The borders of these spheres are alive with tension between openness and control to the possibilities and the realities of a discursive space in which social actors meet to discover their common world.” The permeable boundaries are active spaces of rhetorical involvement and construction between publics. Activity of publics requires vocal and/or instrumental action on
the primary issue. Activity requires the public to engage with other publics to develop an interest or opinion. Activity takes a number of forms—protests, congressional hearings, advertising campaigns, etc.—all in an attempt to change the hearts and minds of others. Contextualized language requires publics to attempt to share similar terms and ideas in the dialogue between publics. This may be the most difficult part of the reticulate public sphere because language can be a complicated power struggle between publics. According to Hauser “the contest over which language shall have currency in the reticulate arenas of the Public Sphere contains the struggle between dominate and dissidence societies to appropriate historicity.” Believable appearance focuses on the social mores of what social interactions look and sound like. There are a given set of rules, written and unwritten, for interacting on the terms of a given public. Tolerance recognizes that people within the public and outside of the public do not share a monolithic identity. The rhetorical work through tolerance focuses on forms of concordance between publics. Hauser argued, “Meanings likely to have rhetorical salience are those which produce solutions that interdependent partners regard as acceptable for their own reasons.” These norms establish the complex inner workings of a public and how publics to work discursively on issues significant to their needs. In the following section, I will outline the reticulate publics who define copyright.

The Reticulate Publics

I argue there are four publics that work together and against each other to define the tensions within copyright: the Legal Public, Legislative Public, Corporate Public, and Digital Counterpublic. The laws, court decisions, and legal scholarship surrounding copyright law define the Legal Public. The permeable boundaries of the Legal Public are contested in court rooms. The ultimate form of the Legal Public is the Supreme Court, however many copyright decisions
are made in lower courts. Activity is the weakest point of the Legal Public because action is contained to court decisions and legal briefs. A few legal scholars are publicly agonistic, but some of their activism overlaps with the activity of the Digital Counterpublic. The strongest point for the Legal Public is contextualized language. The Legal Public defines the language of copyright. Most of the ideographic grammar of this project starts with definitions from the Legal Public. The contextualized language is a primary disadvantage for other publics because of the complexity of the law.\textsuperscript{112} The believable appearance for the Legal Public is not a difficult sell because people with law degrees are often respected as experts.\textsuperscript{113} Tolerance and the Legal Public work well together because the results of court cases are seen as fair and reasoned judgments of an issue.

The Legislative Public is made up of members of the United States Congress because they are the primary architects of copyright laws. The permeable boundaries of the Legislative Public are complicated because availability to speak to Congress is not open to the public.\textsuperscript{114} Members of the Legislative Public can speak to Congress; other speakers are often specifically chosen stakeholders of the Legal and Corporate Publics. The activity of the Legislative Public requires holding hearings, choosing representative stakeholders, and evaluating what needs to be included in copyright law. The contextualized language of the Legislative Public follows the rule of the Legal Public. However, the Legislative Public often struggles with the terminology of technological change. Often members of the Digital Counterpublic malign this generational struggle.\textsuperscript{115} The believable appearance of the Legislative Public is full of internal tension. Initially, membership in the Legislative Public is a high honor because the individual is elected by the people of their district or state to represent their needs. However, Congress over the last decade has been fraught with low national approval numbers.\textsuperscript{116} The criteria of tolerance
vacillate in the Legislative Public depending on who is in power at any given time. This tolerance has more to do with how ideological differences are processed at particular periods.

The Corporate Public is influential in the construction of copyright laws. The boundaries of the Corporate Public are the least permeable of all of the publics. The Corporate Public is primarily defined as representative members of the transnational media corporations. Members of the Corporate Public are often called to testify in congressional hearings on copyright legislation. The Corporate Public is incredibly active in creating media and policy to support its needs in the copyright discussion. There are several advertising campaigns that the Corporate Public produces focusing on the loss associated with digital piracy.\textsuperscript{117} The Corporate Public hires lawyers to enforce copyright law, engineers to create complicated forms of DRM code, and programmers to develop bots to search the Internet for possible copyright violations. In the history of copyright discussion in Congressional hearings, members of the Corporate Public have proven to be excellent rhetors. The late MPAA President, Jack Valenti, spoke with great authority and pathos about the plight of the Corporate Public in the face of mechanical and digital piracy for almost forty years. Valenti was effective at using the contextualized language of the debate for his ends. The issue of believable appearance is also an advantage to the Corporate Public because representative members of the transnational media corporations, the MPAA, and the Recording Industry Association of America (RIAA) form it. The place where the Corporate Public is the weakest is tolerance, because of the lengths they go to enforcing copyright law. Unlike the Legal, Legislative, and Digital Counterpublic, the Corporate Public has the means to inform and enforce copyright law. The Corporate Public has the most money and loudest voice within discussions of copyright.
The Digital Counterpublic

The Digital Counterpublic is an alternative place where the Legal, Legislative, and Corporate Publics malign it or ignore it entirely. The only way any of the publics will confirm the existence of the Digital Counterpublic is when a member is being sued; but even then, that person is separated from the collective public. Nancy Fraser examines how marginalized social groups worked against the Westphalian public, which is why she called them “subaltern counterpublics,” initially defined counterpublics.\(^\text{118}\) Michael Warner provided a definition of counterpublic that focuses on how the public is defined by its marginalized status compared to other publics. He stated, “a counterpublic maintains at some level, conscious or not, an awareness of its subordinate status. The cultural horizon against which it marks itself off is not just a general or wider public by a dominant one.”\(^\text{119}\) This is the key to an understanding of the complexity of the Digital Counterpublic; it is different because it exists as an afterthought compared with the more dominant publics. The actions of the Digital Counterpublic range in public and illegality depending on the expertise of the person. There are cases where members of the Digital Counterpublic use their knowledge to build non-profits and organizations to distribute knowledge about the problems with copyright law. Other members choose to actively pirate content, start torrent sharing sites, or participate in hacking projects, which work against copyright law. This engagement/disengagement is a provocative area of analysis to see the development of ideology and cultural norms.

The Digital Counterpublic has the highest stake in the copyright dialogue, but it is often ignored in other publics because of their permeable boundaries. The Digital Counterpublic is the largest public because it includes Internet entrepreneurs, some musicians, open source software developers, remix artists, and pirates. The Digital Counterpublic truly embodies Hauser’s
argument about active publics, “A diverse and active public is more likely than its mass
counterpart to differentiate between the glitz of a public relations satisfied with images and
competent rhetoric seeking to articulate shared reality.”120 The Digital Counterpublic can work
within the contextualized language of the copyright law and often has the advantage of the
contextualized language of the Internet and digital reproduction. The weakest area for the Digital
Counterpublic is the issue of the believable appearance, because many within the Digital
Counterpublic are flagrant violators of copyright law as a pro-active resistance and a critique of
the law. Many within the Digital Counterpublic have only known a world of digital reproduction
where copyright law breaks down. Lessig’s concern with copyright is how the law is built
without these people in mind, “Criminalizing an entire generation is too high a price to pay for
almost any end. It is certainly too high a price to pay for a copyright system crafted more than a
generation ago.”121 The Digital Counterpublic is not the most welcoming and tolerant public.
Problems with sexism and people who are not “genuine” members are attacked in a variety of
material forms.122 The issue is that the Digital Counterpublic is protective of their space and
becomes volatile when their space is challenged. The reaction to SOPA and PIPA is a positive
example of tolerance and action from the Digital Counterpublic. These publics coexist and define
the scope of copyright law.

The Digital Counterpublic is odd because individuals such as Harvard Law professor
Lawrence Lessig and rapper Chuck D share the same space. The Digital Counterpublic is a
complicated group of people who are hailed together with similar interests. Lessig works as a
committed member of Legal Public when he argued Eldred’s case in front of the Supreme Court;
the conclusion of the case was the moment of hailing for Lessig, welcoming him into the Digital
Counterpublic. Musicians are often members of the Digital Counterpublic based on their
experiences with producing creative work under the control of the Corporate Public. However, most members of the Digital Counterpublic do not have law degrees or fame to assert their ideology in court cases or congressional hearings. The Digital Counterpublic is inherently different from the Legal, Legislative and Corporate Publics.

A public, any public, is directed by its history. The Legal and Legislative Publics have histories that are thousands of years old and the history narrates the just cause of their actions. The Corporate Public is relatively young, but the public is directed by the foundational ideas of capitalism. There is a purpose and history to the publics: the Legal Public protects the public, the Legislative Public guides the public, and the Corporate Public provides goods for the public. Each one fulfills a need for the masses. Warner argued that this view is often skewed, “Dominant publics are by definition those that can talk their discourse pragmatics and their life worlds for granted, misrecognizing the indefinite scope of their expansive address as universality or normalcy. Counterpublics are spaces of circulation in which it is hoped that the poesis of scene making will be transformative, not replicative merely.” Dominant publics can have too much power, and counterpublics appear to serve as a valence in a hope of making a change. The Digital Counterpublic does not have a firm direction based on its history and purpose. Although the history of computing goes back to the mid-nineteenth centuries and the theories of Ada Lovelace, the Digital Counterpublic does not start to exist until the late twentieth century. The rise of Napster is the popular source of most people’s interpellation into the Digital Counterpublic, which means that the illegal downloading of copyrighted content was the formative moment for many people. Theft leaves an indelible mark on the Digital Counterpublic because violating the law inherently places a person in opposition to normalcy. The fact that a counterpublic often functions subversively does not change the fact that it is a public. The study
of counterpublics exists to recognize how a public, with philosophies that differ from the norm, still influences society. The reticulate public sphere provides an effective theoretical relationship to analyze copyright as an ideograph.

<Copyright>

In the afterword of their study of <Equality>, Condit and Lucaites made a statement about the situated nature of the study of ideology and rhetoric, “There is no necessary and natural form of equality. Whatever the word ‘equality’ turns out to mean, then, it is necessarily a function of the interaction between its past and present usages for a particular rhetorical culture.” The meaning of language is negotiated over time and nothing is fixed. The focus of rhetoricians critiquing ideology is not on dismissing it, but adding depth to how various publics interpret, engage, and embody ideology. Wander set the scene for the rhetorical criticism of ideology stating, “Criticism takes an ideological turn when it recognizes the existence of powerful vested interests benefiting from and consistently urging policies and technology that threaten life on this planet, when it realizes that we search for alternatives.” Ideographs function as a “method” for rhetoricians to examine how ideology exists in language. Ideographs are a way of interrogating how ideology is formed over time. McGee stated:

The concepts “rhetoric” and “ideology” may be linked without poetic metaphors, and that the linkage should produce a description and an explanation of dominate ideology, of the relationship between the “power” of a state and the consciousness of its people.

An ideograph is a term or phrase that has greater meaning than the sum of its parts.

James Jasinski argued that identifying ideographs is easy, but understanding the complexities of the meaning of an ideograph is a difficult project: “Gleaning ideographs in text is one thing; unpacking their function-understanding how they shape consciousness or enable and constrain decision and action-is a much more difficult and complicated project.” The
ideograph has served rhetorical theory and criticism as a rich area of analysis. The first major ideographic analysis was Condit’ and Lucaites’ focus on <equality> through early American history to the late twentieth century. Other scholars explored how ideographs are used in political campaigns and legal discussions. Ideographs also proved to be theoretically flexible. Janis Edwards and Carol Winkler examined political cartoons that included a representation of the flag raising on Iwo Jima and argued the image worked as a visual ideograph. Edwards and Winkler connected the two ideas by showing how visual rhetoric can use multiple messages to reinforce ideology, “Visual ideographs like the Iwo Jima image can embody icons such as the American flag to bolster tenets of the ideology at work.” Their analysis opened a completely new level within ideographic criticism to study visual rhetoric. Most of my analysis will examine the textual components of <copyright>.

The foundation of my ideographic critique is grounded in critical, material, and constitutive rhetorics. My critical rhetorical approach to ideographs focuses on how discourse changes based on their use in public deliberation. Joshua Ewalt provided a clear example of how this approach works in his analysis of the ideograph <heritage> at the Homestead National Monument of America. He examined the placement of the museum, the shape of the building, and the materials within the walls to examine how <heritage> is constructed for the visitor. Ewalt focused on how the museum is combination of critical rhetoric, ideographic criticism, and engaged critique. The use of the engaged critique allows the theorist to make a politically aware argument about the issue and its place in rhetoric. Gunn and Lucaites defined the engaged critique in rhetoric, “from a rhetorical vantage, of course, we would underscore the sense in which politics concerns public arguments about the appropriate use of power.” The engaged critique is the focus of <copyright>; what is at stake is the domineering use of power to control a
public for profit over progress. <Copyright> is about more than the creative work of individuals; rather it is about how culture values creative output and what collaboration means for future generations.

Ideographs focus on the fundamental issues of how ideas affect life in a material way. The material rhetorical approach recognizes that language, ideas, and experiences have weight and meaning. Cloud and Gunn pointed out the significance of McGee’s theoretical associations when setting up the ideograph stating, “Adopting a Marxist lexicon, McGee’s essay made a signal move in the field by positing the rhetorical artifact itself as material, rather than tethering the text to and explaining it in terms of economic social relations.” Ideographs must be material to show how the language is loaded with meaning. A term like “pirate” is more effective than “copyright violator” because the history connected to “pirate” changes the discourse. In some ways, we are born into a world of ideographs that we learn how to use through experiencing social life. God and Devil terms are ideographs that we learn as children and as we move through life, we use more ideographs. Ideographs are rhetorical containers of ideology that publics use to define various aspects of culture. Some ideographs are contained within the dialogue of a topic. For example, over time, terms that support copyright, like the public domain and fair use, have taken on a meaning of their own in defending or denigrating <copyright>.

The constitutive aspects of ideographs focus on how various people are hailed into publics. To be part of a public, an individual must be in a position to be part of that public, and some publics are harder to be a part of than others. A person with no legal education could not be part of the Legal Public and a person with no interest in the Internet could not be part of the Digital Counterpublic. Charland stated, “One must already be an interpellated subject and exist as a discursive position in order to be part of the audience of a rhetorical situation in which
persuasion could occur.” Charland has set up a tautology of how people are hailed into a public and ideographs work in the same tautology. If a person is part of a public, they reify the experiences and language of the public. Ideographs reaffirm their identity and lived experience. Condit and Lucaites added to the constitutive nature of ideographs. They mentioned, “because ideographs are abstractions; and thus lack any rigidly defined meaning, creative rhetors craft their meaning-in-use as they employ them in public discourse to persuade audience of the public nature of historically specific beliefs and action.”134 People choose to participate in a specific public because it reifies their worldview through language. They fill that language with a meaning that fits their worldview. For example, a person committed to creativity will focus on how <copyright> constructs concepts of authorship and person who is focused on monetizing content is committed to an ownership focus on <copyright>. The constitutive focus of <copyright> is a question of publics. How is a person hailed into a public? How does identification in one public change an individual’s relationship with <copyright>? The analysis within critical, material, and constitutive rhetorics frames my approach within ideographic criticism. Within the following sections, I will examine the diachronic and synchronic analysis for <copyright>.

<Copyright> shapes the conversation about the value of content, and the diachronic structure of the ideograph helps define why publics are so focused on it. The period for establishing the diachronic structures of <copyright> starts with the establishment of Article I, Section 8, Clause 8 of the U.S Constitution known as the Copyright Clause. It reads:

That Congress has the 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.”135

Legal and Legislative Publics maintained the discourse on <copyright> and made important choices which reflect the diachronic structures of copyright. First, copyright exists to “promote
progress” as a collective good for the creators and the consumers. Second, the primary tension of copyright is between progress and profit. The most recent revisions to <copyright> show how parameters were expanded to focus on profit. In 1976, the expanded definition included all work “fixed in any tangible medium of expression.” This shift in terminology focused on progress and helped copyright look forward, towards digital production. However, the changes in the term of protection shifted copyright towards the tension of profit. The diachronic issues within <copyright> continue to value progress but favor profit. However, the problem inherent within the diachronic analysis of <copyright> is: who defines what is progress and what is profit?

The purpose of the synchronic analysis is to identify the ideographic grammar that supports <copyright>. I argue five terms that make up the ideograph grammar of <copyright>: public domain, fair use, authorship, ownership, and piracy. The public domain is the space where copyrighted material enters when the term of protection expires. The public domain expresses the ideology that creative material belongs to the people who consume content. Fair use is the free speech exception to copyright law which allows for certain types of infringement. Fair Use is the ideology in which the use of creative work belonging to others must be fairly represented. Fair use is a companion term to the public domain. Both terms come from the law, they address how to appropriate content outside of copyright law, and both are treated as ideals by people who want reform to copyright law. Authorship is how an author creates content and how an audience consumes it. Authorship is an ideology focused on progress towards the process creating content as motivated by an author. The question at the center of authorship is who controls content: the author or the public. Ownership takes the question of authorship one-step further through material property. Ownership is the embodiment that management, control, and profit of copyright are more valuable than original creation. The Corporate Public is focused on
ownership of content, because ownership is a legal condition of property where a person or group can profit. Piracy, which appears most often in any discussion of copyright law, is an intentional theft of copyrighted work(s). <Piracy> is a battleground between the evils of content theft and the people who publically resist copyright. The five terms that make up the ideographic grammar of <copyright> are the focus of the chapters of my dissertation: <Public Domain>/<Fair Use>, <Ownership>/<Authorship>, and <Piracy>.

Chapter Overview

Chapter one examines <fair use> and the <public domain> as two legal terms that attempt to preserve the rights for public use of copyright. Both the <public domain> and <fair use> are used as a way to show how <copyright> can work as a public good. First, I look at the complexities of fair use within the law by teasing out factors for determining fair use and the limitations of the doctrine. I argue that the Legal, Corporate, and Legislative Publics do not interact with the ideograph of <fair use>; instead, the publics utilize the legal definition of fair use. I look at each public and examine the implications of their treatment of fair use. The Digital Counterpublic works under the ideograph of <fair use> as an inclusive way to protect creative work in contemporary culture. I examine the implications of the Digital Counterpublic and their development of <fair use>. The <public domain> has a different development in copyright and culture. Fair use receives a great deal of attention from activists and other stakeholders in copyright, but the <public domain> is largely ignored by all publics. I examine the <public domain> and the meaning of its absence from the discourse. I further this analysis by looking at the Supreme Court cases of Eldred v. Ashcroft and Golan v. Holder.

In chapter two, I look at <authorship> and <ownership> as two parallel ideographs. <Authorship> is a high theory concept defined by Roland Barthes and Michel Foucault that
focuses on how content is seen and treated after publication. The law is structured with a limited term as an incentive for authors to continue to innovate. The concept of <authorship> is designed to be temporary and exists to foster the next generations of creators. <Authorship> changes in the public because it is out of the control of the author. For this very reason, <ownership> is more preferred in legal contexts. Litman used the example of homoerotic Star Trek fan fiction and other fan art that people are sued over because the work violates <copyright> <ownership>. Paramount, the corporate owners of Star Trek, did not want homoerotic Star Trek fiction tainting the brand even if it developed more interest in the series. An author cannot control a piece of art after the fact. <Ownership> is all about control, which is furthered as part of the neoliberalization of culture because everything is for sale and owning property is the only way to protect it. These terms are not in opposition to each other, but they represent two paradigms of theorizing about content creation. <Authorship> is an idea embraced and written about by critical theorists, and <ownership> is a concept from the legal perspective. The result is that <authorship> is conflated to mean the same thing as <ownership> in copyright law. I further the examination by looking at the rhetorical concepts of mimesis and the bureaucratization of the imaginative

Chapter three will examine the conflict between the Corporate Public and the Digital Counterpublic through the ideograph of <piracy>. I will examine the definitions of piracy diachronically in the history of copyright law before examining the specifics of the <pirate> as an ideograph and identity. Patry pointed out that Piracy sets the deck against content users, by saying “the current piracy campaign is intended to create a negative association with all acts not authorized by copyright owners.” The true focus of understanding the significance of <piracy> is its polarizing effect. I examine how the <pirate> is used to explain the failings in the Corporate
Public through material, criminal, and economic conditions. I follow this examination with the place of the Digital Counterpublic and their struggle with identity of the <pirate>. The Digital Counterpublic vacillates between embracing the <pirate> and realizing the limitations of the ideograph. Christine Harold warned about the nature of this association, “I have suggested here that the pirating strategy of ‘theft’ however unwittingly, perpetuates the very notion of property that it rejects.” Harold argued that <piracy> is counter-intuitive to finding a realistic solution to <copyright>. In this position, people who view themselves as pirates reify the illegal and untrustworthy aspects of the pirate ideograph. I conclude the chapter by showing how the Digital Counterpublic has the tools for changing <piracy> and <copyright>.

The final chapter of my dissertation reviews the meaning of this exploration and criticism of <copyright> and what that means to the four publics that define it. <Copyright> started out as a law designed with egalitarian intentions to bring knowledge to the public. Over the years, <Copyright> has evolved into something more than a law in the way it changes the outcome of creative, business, and academic work. This project is an interdisciplinary reflection of <copyright> and its place in culture, law, and rhetoric. I use critical rhetoric and ideological criticism to examine <copyright> because it is an amalgam of the public’s understanding of creativity, ownership, and freedom. My analysis will expand the scope of rhetoric, law, and the public sphere in digital contexts. I will also provide a foundation for understanding how the use of software code functions rhetorically. Most importantly, I will examine what makes <copyright> rhetorical. The effect <copyright> has on publics is significant, but <copyright> is rhetorical because it is a means to influence publics and maintain power within the lived practice of people.
Notes


4 Lemley, Levine, & Post, Electronic Frontier Foundation.


9 Letter to Congress in Support of Legislation, Chamber of Commerce Global IP Center, September 22, 2011 available at http://www.theglobalipcenter.com/sites/default/files/pressreleases/letter-359.pdf. Transnational media corporations (TNMC) are a product of media deregulation, so a media company could buy large amounts of market share at the local, national, and international levels. TNMC own a vast range of media products ranging from television, cable, film, music, publishing, and various subsidiaries (theme parks, retail stores, etc.). As of the writing of this project, there are six TNMC: Bertelsmann, Comcast, Disney, News Corporation, Time Warner, and Viacom.


22 Ono & Sloop, Communication Monographs, 50-51.


28 Within in ideographic criticisms brackets are used (<>) to offset a word from the text.


32 Hauser, *Vernacular Voices*, 57-81.

33 I have chosen this period a manageable area to perform research.

34 The copyright statute serves as a text of a manageable size to perform this project.


36 All of these cases serve as notable cases dealing with the evolution of different parts of copyright law. Lenz v. Universal Music Corporation, 572 F Supp. 2d 1150 (ND California 2008); Bridgeport Music, Inc. v. Dimension Films, 230 F. Supp.2d at 841, (2005); Newton v. Diamond 349 F.3d 591 (9th Cir. 2003); Estate of Martin Luther King, Jr., Inc. v. CBS, Inc. 194 F.3d 1211 (11th Cir. 1999); Vanna White v. Samsung Electronics America, 989 F.2d 1512 (US


40 Edwin Black, Rhetorical Criticism: A Study in Method, 2nd ed. Madison: University of Wisconsin Press, (1978), 27; Herbert A. Wichelns established the differences between literary and rhetorical criticism and provided a method of evaluating speeches. His form was a strict analysis reflective of the connections to literary criticism and Greco-Roman theory: a combination of the five canons of rhetoric (Invention, Arrangement, Style, Memory, and Delivery or in Latin, Inventio, Dispostio, Elocutio, Memoria, and Actio) and the three types of proof (Ethos, Pathos, and Logos); Herbert A. Wichelns, “The Literary Criticism of Oratory,” in Readings in Rhetorical Criticism, (State College, PA: Strata, 2010), 3-28.

41 Wander directed most of this criticism at Forbes Hill who became the poster child for neo-Aristotelian criticism in a series of essays surrounding Richard Nixon’s “Great Silent Majority” speech where he criticized three scholars who eschewed the neo-Aristotelian format. The three essays are Robert P. Newman’s analysis was based on falsehood and rhetorical turns of phrase to comfort the Silent Majority, Hermann G. Stelzner’s argued that Nixon was incorporating the classic quest myth to convince the public the journey is worth the cost, and Karlyn Kohrs Campbell performed a highly critical analysis of the speech to examine how Nixon used the speech to perpetuate the classic myths of America. Robert P. Newman, “Under the Veneer:

42 Wander, Central States Communication Journal, 8.


44 Black, Readings in Rhetorical Criticism, 77.


47 McGee, Quarterly Journal of Speech, 7.

48 Cloud & Gunn, Western Journal of Communication, 410.

49 McGee, Quarterly Journal of Speech, 10.

50 McGee, Quarterly Journal of Speech, 13.


52 Cloud & Gunn, Western Journal of Communication, 416.


54 Ashley Packard, Digital Media Law, (West Sussex, UK: Blackwell, 2010), 162.

56 The Stationer’s Company also served a censorship role.


58 The patent system, which technically came before copyright, was not a legal system by a decree from the English Crown.


60 Lyman Ray Patterson, Copyright in Historical Perspective, (Nashville: Vanderbilt University, 1968), 4-5.


65 The Pirate Bay is a Swedish run peer-to-peer network where users can download torrents, digital files that contain large amounts of compressed data (like film, music, & other media).

67 The melody for “Happy Birthday to You” had already entered the public domain when the new lyrics were copyrighted in 1935.


72 Benjamin, para. 11.

73 U.S. Constitution, art. 1, sec. 1, cl. 8.

74 *The Statute of Anne*, The Avalon Project

75 Patry, *Moral Panics & Copyright Wars*, 78.

76 Collins, *Slate*.

78 Litman, *Digital Copyright*, 199


80 Takedown notices have received this moniker from the language in the DMCA establishing a formal process of rebuking violators through a cease and desist letter, and the violators are supposed to ‘takedown’ the offending material.

81 DMCA, 12.


85 Neil Weinstock Netanel, *Copyright’s Paradox*, (Oxford: Oxford University, 2008), 156.


87 Burke’s parlor metaphor is my basis for this example. The parlor is a metaphor on the idealized academic discussion, the public sphere is the idealized space for public good.


89 Habermas, *The Structural Transformation of the Public Sphere*, 1.

90 Habermas, *The Structural Transformation of the Public Sphere*, 27.

91 Health Care as the exemplar, Citizen United as the failure.

93 Habermas, *The Structural Transformation of the Public Sphere*, 36.

94 Habermas, *The Structural Transformation of the Public Sphere*, 36-37.


96 Hauser, *Vernacular Voices*, 46.

97 Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” *Habermas & the Public Sphere*, (Boston: MIT, 1999), 116.


99 Hauser, *Vernacular Voices*, 49.

100 Hauser, *Vernacular Voices*, 51.

101 Hauser, *Vernacular Voices*, 52.

102 Hauser, *Vernacular Voices*, 53.


106 Hauser, *Vernacular Voices*, 64.


108 Hauser, *Vernacular Voices*, 77-80.
Litman laments this issue of the complexity of copyright law. “Our current copyright law is a descendent of the copyright laws in force a century ago, which were designed to bring order to the interaction among affected industries. Because affected industries, and their lawyers, were invited to draft those rules themselves, the law became so technical, detailed, and counterintuitive that those industries now need to bring their copyright lawyers along to tell them how to play.” Litman, Digital Copyright, 73-74.

Despite the thousands of lawyer jokes that exist.

Working on a small scale is often quiet effective. The massive letter and email campaigns for SOPA and PIPA are evidence of that. MoveOn’s 50 Ways to Love Your Country provides narratives of individuals who spoke with members of Congress and helped pass legislation that the Representative may have not passed otherwise.

There are still memes, jokes, and t-shirts mocking former Alaska Senator Ted Stevens who passionately argued that the Internet “was a series of tubes.”


Fraser, *Habermas & the Public Sphere*, 123. Fraser argues “[Counter publics] signal that they are parallel discursive arenas where members of subordinated social groups invent and circulate counterdiscourses to formulate oppositional interpretations of their identities, interests and needs.”


Hauser, *Vernacular Voices*, 78.


Condit & Lucaites, *Crafting Equality*, 218.


Condit & Lucaites, *Crafting Equality*.


133 Cloud & Gunn, Western Journal of Communication, 409.

134 Condit & Lucaites, Crafting Equality, xiii

135 U.S. Constitution, art. 1, sec. 1, cl, 8.

136 The term “ideographic grammar” is borrowed from Ewalt, Western Journal of Communication, 373.


139 Christine Harold, *OurSpace*, (Minneapolis: University of Minnesota, 2007), 153.
Chapter One: <Fair Use> and the <Public Domain>.

The Restrictions on the Rhetorical Legacy of Dr. Martin Luther King, Jr.

Martin Luther King, Jr., is one of the most significant rhetors of the twentieth century and his work articulated the plight of oppressed people. The strict licensing requirements and cost to reprint parts of King's sermons or the famous "I Have a Dream" speech have caused a number of problems. Most notably, the series *Eyes on the Prize*, a fourteen-hour documentary that tracks the action and activism of the Civil Rights movement, struggled with copyright licensing issues with the King estate and other content creators. The educational impact of the given content is not significant to the King estate. A case in point: When Bruce Gronbeck was working on an early iteration of his public speaking textbook in the 1970s, the costs for reprinting parts of “I Have a Dream” exceeded the entire budget for the publication of his text. Thirty years later, his colleague, Kembrew McLeod, wrote,

> I sent the King estate an e-mail inquiry about reprinting four sentences from ‘I Have a Dream’ in a scholarly book . . . The only way I could reprint those four sentences was to hand over two hundred dollars and adhere to nine other restrictive contractual stipulations.³

A content creator or owner has the freedom to license and or deny the publication of derivative works. This secures the right of an owner to protect their work during the limited term of copyright. The problem with this policy is a chilling effect on people who are critiquing the original work and/or seeking to build upon that work in transformative ways.

There are two points of frustration considering King's work and the irony of his closed estate. The first issue is that King's work borrowed from a variety of sources. The "I Have a Dream" speech used language and metaphors from the Bible, Negro spirituals, and the 1952 Republican National Convention address of Archibald Carey, Jr., who borrowed his conclusion from the song "My Country Tis of Thee,” which has strong allusions to the Declaration of
Independence. King’s writing voice crosses cultures for broad appeal, which is one of the reasons his work resonates today. McLeod argues this is a result of King's standpoint within both the cultures of academia and African oral tradition. His unique style was not free of controversy, considering he was posthumously accused of plagiarism in his dissertation. The problem with his writing was poorly attributed paraphrasing and quotations. While this is a significant problem in a doctoral dissertation, this same borrowing serves as a constitutive moment in speaking. No one on the Washington Mall thought King was claiming he wrote “My Country Tis of Thee,” and many understood the similarity between his conclusion and the work by Carey. King generated his work through an amalgam of culture and ideology. His work serves as a key example of the ideal of fair use in practice. Fair use is an exception within copyright law for free speech. A content creator can borrow parts of copyrighted content to critique the original content or to build a larger argument. King used a variety of sources to critique the hegemony of the Civil Rights era through freedom of speech. Fair use is part of the lived practice of the public. Fair use is an essential part of the daily lives of academics, such as using quotations of other authors to build an argument or sharing a video in class to provide a teachable moment. The freedom to use copyrighted works without permission is the part of the purpose of fair use. Culture is referential and fair use is the part of copyright law, which allows people to build content out of culture.

The second point of contention returns to the struggle between public knowledge and private property in the case of “I Have a Dream.” In 1999, the Eleventh Circuit Court settled a long held dispute about the ownership of the speech in the Estate of Martin Luther King Jr. v. CBS. “I Have a Dream” was performed for 200,000 people present on the Washington Mall and was recorded by a variety of television programs. CBS argued the speech was part of the public
domain, a legal space for creative content that has passed out of copyright or cannot be copyrighted because it is common knowledge. In this context, CBS argued a combination of circumstances made this speech part of the public domain: The historical significance of the moment, the size of the public that consumed the speech and a dispute over when the speech was filed in the copyright office. The benefit of “I Have a Dream” existing in the public domain meant the public could use the speech without legal penalty. The King estate argued “I Have a Dream” was covered by copyright law under the public performance clause. The true question the court had to resolve was: Is the speech common and public enough to fall into the public domain or did it require the continued private protection of copyright? The Eleventh Circuit Court of Appeals sided with the King estate. Judge Anderson stated:

A performance, no matter how broad the audience, is not a publication; to hold otherwise would be to upset a long line of precedent. This conclusion is not altered by the fact that the Speech was broadcast live to a broad radio and television audience and was the subject of extensive contemporaneous news coverage.8

The court argued the public-ness of the speech did not eliminate the need for copyright protection. The public domain is culturally valuable, and King used public domain work to build his speeches. The problem at the heart of this case was who should own the rhetorical legacy of Martin Luther King, Jr.: The public or a private company?

The tensions within the rhetorical legacy of Martin Luther King, Jr., demonstrate two concepts of the legal geography of copyright law: fair use and the public domain. Fair use is a relatively contemporary invention of copyright law by serving as the free speech exception to copyright law. In other words, the public does not need to pay for permission for every citation in a book and can freely criticize copyrighted content. The public domain is an older term, returning the formation of the Statute of Anne. The public domain is a space where the public can freely use content that is not held under copyright. The names “fair use” and the “public
domain” are particularly significant: Unlike <piracy>, <authorship>, and <ownership>, fair use and the public domain are terms within copyright law. Each term has an extensive meaning within the law. However, fair use and the public domain are given names with a simple implied meaning. Naming is a powerful force in rhetoric. In the words of Raymie McKerrow, “Naming is the central symbolic act of a nominalist rhetoric.” Each term has an extensive meaning within the law. However, fair use and the public domain are given names with a simple implied meaning. Fair use and the public domain are defined by their names; the name “fair use” means using copyrighted materials fairly and the “public domain” is an area of copyrighted materials available for public use. Later in this chapter, I will provide the legal definition of each term and a more extensive ideograph. Examining the ideology of copyright under these terms holds to the original intent of fair use and the public domain. The structure of these terms has shifted from their initial inception into law to a point where they are in danger of being irrelevant. Ascribing to the terminology remains faithful to both the historical meaning and the contemporary activism surrounding these terms.

Fair use and the public domain are sites of dispute within copyright law and serve rhetoric by functioning as part of the ideographic grammar of copyright. The discourse surrounding each location examines the ideal of how the public should value and use copyrighted materials. The intricacy of this analysis is focused on how each ideograph is used by different publics. Dana Cloud argues, “the analysis of ideographs is less a critique of how immediately successful a rhetor's strategies are than an account of the ways in which political rhetors dip into, add to, and reshape the shared cultural stock of ideographs.” The public uses the ideographs of fair use and the public domain politically to discuss the value of content creation. Fair use and the public domain hold important places in copyright and culture. However, the contemporary
forms show how the doctrines are devalued in current legislation, and some scholars fear the intent is to remove them altogether.11 The Digital Millennium Copyright Act (DMCA) is the location where the terms are eclipsed by content owners and their need to protect their copyright. <Fair use> and the <public domain> are worth protecting because they establish grey areas of both protecting and producing content. The focus on protection of copyright encloses the fair use and the public domain into an area where their usefulness for the public is rendered almost irrelevant, unless an individual can hire a lawyer to protect their use. The rhetorical site of <fair use> and the <public domain> is the question of the availability for the public to use copyrighted content in a fair way that contributes to culture. In the remainder of this chapter, I will illuminate how <fair use> and the <public domain> are used to make political arguments about the needs of <copyright> by specific publics. What is at stake in the discourse surrounding <fair use> and the <public domain> is a question of how copyrighted content is consumed by culture: Is the use fair to the public and is there a healthy culture for creating new content?

**Fair Use and the Legal, Corporate, and Legislative Publics**

EduBlogs is a community of education blogs used at variety of universities and secondary schools. Similar to systems like Desire2Learn and Blackboard, Edublogs is used to distribute information, encourage student-teacher interaction, and enact knowledge through writing. The community is familiar with fair use because the reuse if educational content maybe held as an exception to copyright law. However, any use of copyrighted material is subject to legal prosecution even if it is clearly fair use. Edublogs built a policy dealing with questions of copyright infringement; the organization asks any legal question to be directed to the blog owner first before taking other steps. Edublogs’ copyright policy reads, “We ask for this because we find that the majority of copyright violations are a result of a misunderstanding of fair use in
education. This method ensures that the educator or student in question can learn from their mistakes.”12 In October 2012, the textbook company Pearson sent a takedown notice dealing with Edublogs to their server host, ServerBeach. In response to the query, ServerBeach shut down the entire community of 1.45 million blogs without informing the blog owners. Pearson’s claim dealt with a blog post written in 2007 that included Beck’s Hopelessness Scale, a tool for testing depression written in 1974.13 Person wanted $120 for the reprint.14 This example may seem extreme, but that was only true due to the size of the takedown, not its voraciousness or frequency. There is no way to know how many takedown notices are sent every day, but corporate data indicates the number is significant. For instance, Google received 14,868,580 takedown notices in April 2013 alone.15 The examination of fair use as an ideograph will reveal how different publics pursue fair use and the issues within the law complicating fair use.

Definition of Fair Use

Fair use is not high theory; rather, it is about the everyday use of copyrighted culture. The idea first appeared after the Statute of Anne with the case of Gyles v. Wilcox, where a dispute over publishing rights and abridgment made the court establish “fair abridgment” as a practice of borrowing content from another source so long as the second work is significantly different.16

Fair use was further elaborated on in the case Folsom v. Marsh when Justice Joseph Story rejected Charles Folsom’s claim of fair use when he borrowed 353 pages of a twelve-volume biography of George Washington to produce his own two-volume account. Story states:

We must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.17

Fair use existed in principle until it was codified in the Copyright Act of 1976 as a way to address issues of free speech within copyright. The copyright statute states:
The fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.\textsuperscript{18}

Although there is no internal debate about what fair use is, there is a great deal of debate over what fair use means and how to apply it. Neil Weinstock Netanel sees the need for fair use as an exception to copyright, but recognizes the application of fair use fails free speech and the public. Netanel states: “Far from serving as the robust free speech safeguard that courts often imagine, fair use has come to be an exceedingly feeble, inconstant check on copyright holders’ proprietary control.” In the scope of the law, fair use exists to preserve the room for free speech, but the courts need to follow through.

Not all borrowing of copyrighted goods is fair use. The Copyright statute lays out four conditions for courts to judge if a case is fair use or not. These conditions are not totalizing, as the Supreme Court ruled in \textit{Campbell v. Acuff-Rose Music}; this is not a check list, but the conditions are to be treated as guiding factors for determining fair use.\textsuperscript{19} The first condition focuses on the “purpose and character of use,” which considers whether the use is derivative and/or transformative.\textsuperscript{20} Derivative work borrows from the original content in such a way that it clearly references the original or is based upon the original. The conflict with Edublogs is an example of derivative use because the author of the blog was borrowing Beck’s Hopelessness Scale in its entirety. The author was not recasting the work or even using it in an inventive form. Transformative use requires the secondary work to take a significant departure from the original work, although there may still be a referent to the original work. The question of transformative use is the primary focus of collage artists and musicians because their work often takes a small part of an original work or parts of multiple works to produce significantly different work. A
case in point: Sampling uses dozens of techniques to transform work into new content. DJ Vadim explains two different schools of thought on sampling,

One guy makes a photocopy of the Mona Lisa—that’s P. Diddy, who just samples the choruses of songs. The other guy takes the same painting, chops it up, and it doesn’t even look like the Mona Lisa anymore. He’s made it into a cow, or a spaceship. That’s what sampling can be like.  

Not only does this serve to demonstrate how sampling is viewed within the community, but it also demonstrates the difference between derivative and transformative use. The more transformative a work, the more likely the use will be fair.

The second condition examines the nature of the copyrighted work, asking whether the use interferes with or damages the original work. What makes this condition interesting is that it is divorced from value of the work. The judge is not allowed to examine the value of the work, only the issue of the copyright. In The Estate of Martin Luther King, Jr. v. CBS, the judge briefly articulates this point, “With respect to the significance of the Speech in terms of newsworthiness and history, the case law again suggests that this feature should not play a substantial role in the analysis.” Content like “I Have a Dream” is socially significant and useful, but that does not make it exempt from copyright law. This was a primary contention in the Edublogs dispute: Pearson wanted to protect its intellectual property or at least obtain a fee for its use. However, does posting the Beck’s Hopelessness Scale on an education blog interfere with or damage the original work? James Farmer, the founder and CEO of Edublogs, took issue with Pearson’s claims for this reason: “But clearly Pearson isn’t making enough money already, and intends to, rather that [then] let this 38-year old work be shared, discussed, used, even in a way that might save some people’s lives, on the internet.” In the case of Edublogs, it is likely there was no damage done to the Beck’s Hopelessness Scale within this context.
The third condition looks at the amount of the copyrighted work used by the secondary work. The Copyright office explains, “There is no specific number of words, lines, or notes that may safely be taken without permission. Acknowledging the source of the copyrighted material does not substitute for obtaining permission." There is no magic number concerning the acceptable amount of copyrighted work in a fair use case. A number of challenges to fair use were dismissed under the *de minimis* threshold, an agreement that some infringement is too small for a court to consider. In 2005, the US Court of Appeals eliminated the *de minimis* threshold for digital sampling in *Bridgeport Music, Inc. v. Dimension Films*. The case examined NWA’s “100 Miles and Runnin” which sampled a guitar arpeggio from Funkadelic’s “Get off Your Ass and Jam.” Judge Ralph B. Guy, Jr., who decided the case, recognized the complexity in front of him. Sampling changed the dynamic of the song, even though the sample is only three seconds long. If samples that short made that much of a difference, the *de minimis* threshold could not stand. Judge Guy states:

> For the sound recording copyright holder, it is not the “song” but the sounds that are fixed in the medium of his choice. When those sounds are sampled they are taken directly from that fixed medium. It is a physical taking rather than an intellectual one.

It was not just any arpeggio; it was the arpeggio from Funkadelic. What Guy attempted to articulate with his decision is that sampling used content small enough to meet the *de minimis* threshold, but this practice posed a much larger problem for copyright law. Kembrew McLeod and Peter DiCola, who are focused on the significant contributions sampling provides culture and popular music, argue that the *de minimis* threshold did not need to be eliminated. “The court did not consider, or explicitly cast aspersions on, the possibility that N.W.A.’s sample of ‘Get off Your Ass and Jam’ constituted fair use.”

The final condition is how the fair use will affect the public value of the original copyrighted work. The fear with issues of fair use is, how does it change or harm the public
value of the original work? In the case of Edublogs, little value is lost over a thirty-year-old mental health assessment that is featured in many textbooks. The central legal claim within these cases is focused on a violation of a property claim, meaning the Legal Public is protecting the rights of copyright holders first. Fair use is not a right or a privilege. Rather, it is space that exists to forgive a specific copyright violation. Netanel calls this the “Blackstonian property-centered view of fair use” named for William Blackstone, an eighteenth century British jurist who took the most narrow view of copyright infringement. Netanel argues that courts keep reifying Blackstone’s views:

Courts have repeatedly invoked the bare possibility of licensing in potential markets for the copyright holder’s work to deny fair use and have insisted that while evidence of market harm generally dooms a fair use claim, the absence of such evidence in no way guarantees that the use will be deemed fair.\textsuperscript{30}

None of these four conditions are weighted more than any other. However, the value of a copyright owner’s claim of fiduciary loss is a clear reason why people try copyright infringement cases in the first place.

**Drawbacks to Fair Use**

Fair use is more complicated than outlined in the copyright statute. There are two drawbacks to claiming fair use: The affirmative defense and the case-by-case basis. Fair use is an affirmative defense, as defined by *Black’s Law Dictionary*, “A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true.”\textsuperscript{31} An affirmative defense means the wrongdoing falls into a loophole of approved guilt, like self-defense. A claim of fair use in a copyright case requires defendants to accept they are guilty of violating copyright law. The problem with the affirmative defense is the burden of proof is shifted from the plaintiff to the defendant: The claim of fair use is an admittance of guilt, so the defendant must effectively prove to the court that copyright
infringement constitutes fair use. Second, fair use is determined by a judge on a case-by-case basis. Unlike other copyright claims, there is no availability to set precedent with a fair use decision. Fair use cases are unpredictable and difficult to try because the case ultimately hinges on the way a judge reads the doctrine. Patricia Aufderheide and Peter Jazi, authors of a field guide for filmmakers about fair use, advise, “Judicial interpretation is a critically important piece of understanding where ‘normal’ is in using fair use.”\textsuperscript{32} Aufderheide and Jazi point out there are trends in judicial interpretation, and knowing the climate of that interpretation can serve the content creator.

The practice of fair use seems like a simple process: Build upon the work of others for the progress of culture. Fair use is a doctrine of free speech, but it is a puzzle for content creators, owners, and jurists alike. Justice Alex Kozinski states, "The problem is that we ask courts to engage in a nuanced query to determine whether something is fair use, but don’t provide any way for them to give a nuanced answer."\textsuperscript{33} Fair use cases are difficult for a judge to decide because each case is full of slight differences and nuanced analysis of content. The content creator sees their use as transformative, but one of the original authors sees the work as a violation of their original work and both parties can be right. The greatest limitation to fair use is the expensive litigation of a copyright infringement case. Lessig summarizes the choices for content creators when dealing with fair use:

You either pay a lawyer to defend your fair use rights or pay a lawyer to track down permissions so you don’t have to rely upon fair use rights. Either way, the creative process is a process of paying lawyers—again a privilege, or perhaps a curse, reserved for the few.\textsuperscript{34}

Effectively trying a copyright infringement case requires a great deal of money and time. The money is required to pay attorney’s fees and the depositions of experts. Time is required because there are often multiple appeals in fair use cases, often all the way up to the Supreme Court like
the cases of *Sony Corp. of America v. Universal City Studios, Inc.*, *Campbell v. Acuff-Rose Music*, and *Harper & Row v. Nation Enterprises*. It is rare that a defendant will choose a fair use case because it is an affirmative defense and finding loopholes is often more defendable. For example, in *Grand Upright Piano v. Warner Bros.*, Biz Markie had a clear fair use case, but the lawyers tried to argue that “Alone Again (Naturally)” was filed properly with the copyright office. Fair use is an exception to free speech, but challenging the issue in court is difficult for the average content creator.

Although fair use is intended to protect the practices of free speech and limited use of the public, the original intent of the doctrine is different from its contemporary existence. Lessig states fair use no longer performs its intended role:

> The law has the right aim; practice has defeated the aim. This practice shows just how far the law has come from its eighteenth-century roots. The law was born as a shield to protect publishers’ profits against the unfair competition of a pirate. It has matured into a sword that interferes with any use, transformative or not.

Fair use is different because the practice of trying copyright infringement cases is vastly different. Changes in the copyright statute allow for different approaches to deciding and challenging infringement cases. The purpose of fair use means different things to different publics. The opinion of fair use by a given author is wholly dependent on which public she or he identifies with. Fair use, under the strict legal definition, is used by the Legal, Corporate, and Legislative Publics to enforce the law and create policy. By looking at how each of these publics utilized fair use both with and against the public, the site of these rhetorical disputes becomes clearer.

**The Legal Public and Fair Use**

The Legal Public views fair use as the caveat for free speech in copyright law. In his ten-volume book on copyright, Melville Nimmer summarized the problems with copyright and free
speech as a “largely ignored paradox.” Nimmer’s intent is to recognize that copyright is managed by owners who want to control their content and acknowledge that control is often at odds with people’s free speech rights. The policies of the DMCA have streamlined the chilling effect on speech. There are a number of examples of media outlets using copyright protection as a defense to silence criticism. For instance, National Public Radio (NPR) tried to shut down an ad by Stand for Marriage Maine, which used a short clip of an NPR interview to criticize the issue of same sex marriage. Additionally, the National Organization for Marriage produced an ad that featured actors who pretended to be afraid of gay rights. Rachel Maddow featured the leaked audition videos for this ad on her show, which the organization tried to have removed. CBS attempted to remove a clip featuring Katie Couric from a John McCain ad and NBC wanted a satirical campaign ad removed because of a short clip featuring Tom Brokaw. The point of fair use is to bypass copyright law for cases of free speech. When takedown notices were formalized into copyright law, it also created a legal process for chilling free speech.

Some legal experts see the problem with fair use in terms of how it was codified. The authors of the Copyright Act of 1976 set four criteria to evaluate fair use, but did not place a value on the results. Further, there is no ability to set precedents with fair use, each case is evaluated in a vacuum no matter how similar the content or use. Kozinski calls the results of the fair use doctrine an example of how Congress punted the issue to the courts. The courts have decided a number of important fair use cases. Supreme Court cases such as Harper and Row v. Nation Enterprises and Salinger v. Random House were cases that looked at quotations borrowed from unpublished manuscripts and reprinted popular media without permission. For instance, The Nation magazine quoted large sections of President Gerald Ford's unpublished memoir that was under-contract at Harper and Row. In contrast, Random House was working with an
author to publish a biography of J.D. Salinger. Contested material within the biography included paraphrased language from personal letters Salinger wrote to a variety of people, letters that were maintained in a public archive at Harvard University. Both cases found that President Ford and Salinger had the right to protect their work from other profit-driven enterprises.⁴³

Later fair use cases, like *Vanna White v. Samsung Electronics* and *Dr. Seuss Enterprises v. Penguin Books*, highlighted issues of satire/parody. Judge Kozinski decided the *White v. Samsung* case, where the media company produced an ad with a robot turning letters in Wheel of Fortune-esq game. Kozinski found the portrayal to be fair use, stating, "Overprotecting intellectual property is as harmful as underprotecting it . . . Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture."⁴⁴

In a similar case, Dr. Seuss Enterprises was able to destroy the existence of *The Cat NOT in the Hat!*, a parody of Seuss’ *The Cat in the Hat* book, but focused on the O.J. Simpson trial. The Ninth Circuit sided with Dr. Seuss Enterprises on the issue that the book was a parody, which is not protected by fair use, whereas satire is protected.⁴⁵ What is notable about the *Dr. Seuss Enterprises v. Penguin Books* is fair use cases began to follow that same principle. Fair use cases were decided on the economic value, not the issues of free speech. Ned Snow argues the problem with fair use cases is not their content, but the fact they are decided by judges. He states, "fair use may be decided as a matter of law, but only where doing so serves its speech protective function. On appeal, courts should defer to a jury finding that favors the fair user."⁴⁶ Many judges make decisions on precedent and the rule of law, but fair use cases do not have precedents and the doctrine is skeletal. Snow argues fair use need to be decided by juries, because they are not bogged down in the legal minutia that is harming fair use.
Two rhetors of the Corporate Public have made public statements arguing that there is no such thing as fair use. The first is former Motion Picture Association of America President, Jack Valenti, who informed two news outlets: “Fair use is not a law. There’s nothing in the law.” Valenti believes that fair use is not included within copyright law, instead it is a protection outside of the law. He clarifies his point:

There is no fair use to take something that doesn't belong to you. That's not fair use. If you're a professor in a classroom, you show *Singing in the Rain* to your class. You can fast forward it, and there's no performance fee for that. That's fair use. Now, fair use is not in the law. People are taking fair use and changing it to unfair use and claiming that it's fair use.

Valenti sees fair use as a protection for education, but not creation of new content. The problem with Valenti’s claims is fair use is part of the law. It has been part of the copyright statute since 1976 and was used to protect consumer’s rights in cases like *Sony v. Universal*. Second, Cary Sherman, the President of the Recording Industry Artists of America, reified Valenti’s stance. Sherman takes a less aggressive stance than Valenti on fair use by changing the conversation to how corporate ownership is a public good. Sherman states, “Instead of redefining fair use to promote a short-term free-for-all, let's embrace the existing concept to allow for long-term growth of technology, while valuing and protecting the content it carries. That benefits us all.”

Sherman argues fair use is not as valuable as copyright as whole, yet preserving the status quo will benefit everyone. Both rhetors ignore the issues of free speech and copyright, most likely because they cannot defend against it.

The Corporate Public has a great deal of power in challenging fair use because of the number of lawyers needed to follow-up on the plethora of copyright violations. The DMCA is structured in such a way the disparate members of the Corporate Public can send out at least 14.8 million takedown notices in a month. Fair use is written with no bright line test or limitations on
what is and is not fair use, meaning the Corporate Public can challenge any use and the burden is on the defendant. The noise band, Negativland, provides an example of how free speech is stifled in fair use challenges of the Corporate Public. Negativland is most famous for the 1991 “U2” single, which featured a profanity-filled outtake of Casey Kasem, the host of American Top 40, trying to introduce a U2 song. The track is spliced together over a cover of “I Still Haven’t Found What I’m Looking For” played on a kazoo-sounding synthesizer. Don Joyce, a member of Negativland, explained the Casey Kasem tape was a gift from someone after a show. “We had never heard it before and it was amazingly funny, so immediately when we hear things like that we say we can make something out of this.” U2’s label, Island Records, sued Negativland for everything relating to the album, from the profits of the song to the copyright. Fighting a copyright infringement suit requires money and time: The Corporate Public has both, but the average content creator has neither. Although Negativland had a fair use case, their record company did not have the money or time to fight the battle. McLeod argues this is the response for most people when faced with an overwhelming foe, “Backed by litigation war chests of millions of dollars, intellectual-property owners can swat away and squash unflattering commentary by intimidating those who can’t afford a lengthy court battle (which is most of us).”

At this point, the Corporate Public risks becoming its own worst enemy because most copyright infringement cases occur between members of the Corporate Public. The cases often involve media companies versus other media companies, such as Bridgeport Music, Inc. v. Dimension Films, Sony v. Universal, and Harper and Row v. Nation Enterprises. The other form is powerful individual brands/incorporated estates against media companies like The Estate of Martin Luther King, Jr., v. CBS, Salinger v. Random House, Vanna White v. Samsung
Electronics, and Dr. Seuss Enterprises v. Penguin Books. These copyright infringement cases often result in large punitive damages for the defendant and a new way the public has to reckon with the intricacies of copyright. The case of Grand Upright Music, Limited v. Warner Brothers Records Incorporated examined the use of sampling in popular music. The case was predicated on claiming the sampling was equivalent to stealing from the original musician. This case is significant because the practice of sampling within popular music went from a common practice to an illegal act. Following the decision, sampling was only acceptable if artists obtained legal permission for every sample. What makes this complicated is that often artist one is sampled by artist two, so when artist three wants sample artist two, he or she needs to get approval from artist one as well. Bruce Gronbeck and Kembrew McLeod attempted to do this with Martin Luther King, Jr. The Fox network wanted to charge filmmaker Jon Else $10,000 for four seconds of a Simpsons episode that appeared in the background of a documentary film on stagehands who worked on Wagner’s Ring Cycle.53

The Legislative Public and Fair Use

The Legislative Public is stuck between the views of the Legal and Corporate Public. The Legislative Public is made of professional politicians, farmers, educators, community activists, law enforcement professionals, and a variety of other professional and vocational careers outside of being a member of Congress. The largest single professional population of Congress is lawyers at 32%.54 The predominance of lawyers changes the focus of legislation like copyright. Litman is critical of the construction of copyright law by her lawyers:

That has permitted the copyright law to be drawn as a complex, internally inconsistent, wordy, and arcane code, since the only folks who really needed to know it were folks for whom copyright lawyers were an item of essential overhead.55

Her argument examines how lawyers make the law complex as a way to keep them relevant and employed. The Legislative Public seems to be limited by the self-interest of some members. For
example, U.S. Representative Mary Bono (R-CA) speaks on behalf of her late husband and the act named after him, the Sonny Bono Copyright Extension Act:

Actually, Sonny wanted the term of copyright protection to last forever. I am informed by staff that such a change would violate the Constitution. I invite all of you to work with me to strengthen our copyright laws in all of the ways available to us. As you know, there is also [then-MPAA president] Jack Valenti’s proposal for term to last forever less one day. Perhaps the Committee may look at that next Congress.56

Rep. Bono is uniquely situated in the discourse: As the widowed spouse of a famous musician, she has a stake in the length of copyright. However, she furthers the debate on copyright by making light of the intent of the statute and Constitution. The Legislative Public is stuck between the focus of the Legal Public and desires of the Corporate Public because the members of Congress are playing multiple roles.

Fair use is an exception to copyright which means the law does not need to protect it, but even jurists agree that there is a problem with that definition. In *Bridgeport Music, Inc. v.*

*Dimension Films*, Judge Guy practically begs the Corporate Public to lobby to change fair use:

If this is not what Congress intended or is not what they would intend now, it is easy enough for the record industry, as they have done in the past, to go back to Congress for a clarification or change in the law. This is the best place for the change to be made, rather than in the courts, because as this case demonstrates, the court is never aware of much more than the tip of the iceberg.57

The way the case law stands, many contemporary practices (e.g., sampling, collage art, and remix) fall into the grey area between outright copyright violation and a possible fair use exemption. Although there are many notable fair use cases, few are as significant as *Sony v. Universal Studios* because of how the case defended the fair use rights of consumers. Justice Stevens states:

We acknowledged the public interest in making television broadcasting more available. Concededly, that interest is not unlimited. But it supports an interpretation of the concept of “fair use” that requires the copyright holder to demonstrate some likelihood of harm before he may condemn a private act of timeshifting as a violation of federal law.58
Most fair use cases are disputes over small amounts of copyrighted materials between two parities. What the Supreme Court did in *Sony v. Universal Studios* was legalize the lived practice of people and a new way of consuming copyrighted materials. A number of legal conditions that are supposed to serve the law holds fair use back. The ideology of fair use takes a more egalitarian approach to the creation and consumption of copyrighted content.

<Fair Use>

The rhetorical structure of fair use is focused on how laws affect the public. The intent of fair use is to allow for public use and criticism without seeking permission. Fair use is a part of the structure of copyright law: The public interacts with copyright, but does so often without thinking about what it means or how it changes their use of creative content. Changes in copyright and digital production have shifted how the public consumes content. Within a rhetorical context, the fair use doctrine functions as the critique of domination of copyright. As McKerrow states, “The focus of a critique of domination is on the discourse of power which creates and sustains the social practices which control the dominated.”59 The fair use doctrine is in place to allow a rhetorical space for critique of content and culture where content creators can work on content that may contradict the intent of the author. For example, many early fair use cases examined sampling in rap music, at a time the music was seen as offensive and jarring to a “mainstream”—i.e., adult, Caucasian—public. The rise of rap music and sampling was an attempt to reconcile two types of popular art. Chuck D, one of the original members of Public Enemy, reflects on why sampling was used in rap music, “Sampling basically comes from the fact that rap music is not music. It’s rap over music. So vocals were used over records in the very beginning stages of hip-hop in the ’70s to the early ’80s.”60 Beyond music, fair use provides
rhetorical space to produce a variety of content including news content, various forms of collage art, and academic writing.

The name “fair use” holds significant impact on identifying <fair use>. McLeod summarizes, “Fair use is an intuitively named statute, because it is designed to enable uses of copyrighted material that are considered, quite simply, fair.”\textsuperscript{61} The ideograph of fair use is less focused on the legal intentions of the doctrine and more focused on how fair use is embodied in lived practice. \textit{<Fair Use> is the ideology that the use of creative work belonging to others must be fairly represented; the use must be fair.} <Fair use> holds a place in rhetorical culture of education, critique, and building upon culture in significant ways. Cultural production communicates the attitudes, values, and beliefs of the public, but the content is fragmented and borrows from a variety of copyrighted sources to make a given point. Fair use may be an ideograph built on the sum of its parts but <fair use> in action is a manifestation of support for vernacular forms of content creation.

Fair use is a doctrine recognized by the Legal, Legislative, and Corporate Publics as the free speech exception to copyright law. For the Digital Counterpublic, <fair use> is a critical posture against culture, neoliberalism, and copyright. The content from culture, including news reports, video, and other intellectual property, is the tool for the critique. These vernacular forms allow content creators to produce content that the public already identifies with. Gerard Hauser states, “The manifestations of public spheres are often the dialogues of everyday life, and their conversational character alerts us to the limitations of the ancient rhetorical prototype of public deliberation as the discursive model for such arenas.”\textsuperscript{62} The content created within the Digital Counterpublic articulates Hauser’s point and provides a space for the public to deliberate through collaboration. Lessig calls this tendency Read/Write creativity and it is seen in the proliferation
Gregg Gillis who performs the mash-artist Girl Talk, provides an example of how to place music in conversation with each other to make a point. In the final moments of the album *All Day*, Gillis overlaps “One Day” by UGK and “Imagine” by John Lennon. Bun B of UGK raps over the melodic piano of “Imagine” reflecting about difficult life of African American men. Despite the morose details, he is hopeful and focused on seizing opportunities, “Cause one day you here but the next day you gone.” A few seconds later, Lennon joins in singing the final chorus of the song, “Imagine all the people sharing all the world/You may say/I’m a dreamer, but I’m not the only one/I hope someday you’ll join us/And the world will live as one.” Many music reviewers have read into the meaning of this conclusion, but one thing is clear: Gillis uses <fair use> and vernacular art to make a point about unity in culture.

**<Fair Use> and the Digital Counterpublic**

The Digital Counterpublic holds the view that fair use is the ideal caveat for creative expression in digital media. Lessig, continuing in his dual role as legal critic and activist on the state of copyright, states, “Fair use is a critically important safety valve within copyright law. But it remains, perhaps necessarily, an extraordinarily complicated balancing act, and a totally inappropriate burden for most amateur creators.” Lessig argues the significance of fair use for content creators while warning people of the limitations statute. Christine Harold argues activists use fair use to make a point about the privatization of culture. She states, “By defiantly pirating copyrighted or trademarked cultural property, these activists hope to call attention to the ways in which these categories have served increasingly to deny public access to the imagery and rhetoric that shape public life.”

McLeod crystallizes Harold’s argument through his own activism. He was an active participant in Grey Tuesday, a public and illegal release of DJ Danger
Mouse’s mash up album *The Grey Album*, on a variety of websites. McLeod was served with a takedown notice for his participation and refused to remove the album from his personal website. He states, “I took that risk because I felt a responsibility to show that fair use exists in practice, not just in theory. For me, it would have been ethically wrong to act as a detached academic while others took the fall, because if anyone could make a fair-use case, it’s me.” Grey Tuesday was held on February 24, 2004, and McLeod has still refused to remove *The Grey Album* from his website.

The advantage the Digital Counterpublic has in the discourse surrounding <fair use> is the fight over common use. <Fair use> has an extensive definition and legal conditions that make it a doctrine within copyright law. However, the ideograph <fair use> is built on the term itself, without formal knowledge of the background. Celeste Michelle Condit and John Louis Lucaites state, “Rhetors who employ ideographs in public discourse seek to achieve the assent of a particular audience and thus are constrained to use such terms in ways that are more or less consistent with the rhetorical culture.” The Digital Counterpublic has the upper hand in the public view of <fair use> because of the simplicity of principle. All use of copyrighted materials should be fair and in the culture, an easy idea to understand. Greg Gillis argues this point:

I understand fair use as having fairly strict criteria. Are you ripping people off? Are people buying your music instead of someone else’s? Or is your music becoming something new and not negatively impacting the original artist? If so, then you can potentially use it without asking for permission.

Although the intent of <fair use> under the Legal Public means something more complicated; the assumed intent of <fair use> by the Digital Counterpublic embodies the lived practice of content creators and consumers.

<Fair use> works as a stance of fairness and resistance toward a copyright system that is stacked against content creators and consumers. However, <fair use> is limited in how people
can use it to reshape copyright law. <Fair use> is not a solution to copyright, it works more like Audre Lorde’s argument about the master’s tools will never dismantle the master’s house; fair use cannot and will not destroy copyright law because it is part of the whole. <Fair use> is part of copyright, therefore the availability for any group to use it as a true protest is limited. <Fair use> does serve the Digital Counterpublic as a tool to critique the inherent contradictions of ownership in copyright law. The most obvious contradiction is the radical expansion of copyright which extends copyright ownership for over one hundred years. One of the issues <fair use> illuminates is how different culture would be without the changes to the term of copyright. Often an issue dealing with <fair use> ends in a question about the public domain. Only a small amount of content has entered the public domain in almost thirty years and this has changed the way culture produces content. An examination of the <public domain> will reveal a space of collaboration that is rendered ineffective by changes in copyright law.

**The Public Domain**

Film is a unique medium wherein a filmmaker can bring a story to life; to do this filmmakers and screenwriters often borrow from existing stories from literature (*Gone With the Wind*), life stories/events, (*Titanic*), and sequels/series (*Star Wars*). Often films are part of a series of retellings of an iconic story; the 2012 film *Les Miserables* is a movie musical based on the original Broadway musical that is based on the original novel by Victor Hugo; and there are at least two other film versions of the same story. The retelling of stories is a long tradition and film is only the most recent medium to participate. Beyond films based on established narratives, many films employ genre tropes. For example, *Avatar* is the most financially successful film of all time, but the plot of the film is a familiar genre tale of white privilege and race: a damaged white man is healed by bonding with a cultural “other”; similar films are *Dances with Wolves*.
and *The Last Samurai*. George Lucas embraced the “hero’s journey” genre trope for *Star Wars*. The oral tradition of storytelling and myth making is alive and well in filmmaking, with examples such as the *Ten Commandments, Ben-Hur,* and *Snow White and the Seven Dwarves*; these stories are part of the folklore of various cultures, meaning they are part of the public domain. A work that exists in the public domain is beneficial for culture because others can significantly build upon it. Boatema Boateng discusses the contradiction of folklore and copyright: “A fundamental challenge in this protection of folklore under copyright law arises from the standard premise, within intellectual property law, that such cultural production belongs in the public domain.” A story from the public domain provides a built-in consumer audience.

In the early 2000s a new type of film started to develop: the reboot, a concept wherein a film or series is remade from similar source material. Reboots have proven popular to studios for the same reason films from the public domain are popular: a built-in audience that knows the film. Many of these reboots involve comic book heroes or stories from science fiction, both of which have the flexibility for retroactive continuity changes to explain new faces and timeline gaps. As popular and profitable as these films are, the true winners are the media companies who save money and profit from this marking shift. Often the studio already owns the copyright, so the process of approval is streamlined. The result of the success of these films is that more reboots are made and fewer original films are produced. The top twenty films of 2012 included four rebooted franchises, plus the *Amazing Spiderman*, which was rebooted only five years after the last *Spider Man* film. Reboots are meaningless alone, they must be examined within their cultural context; in 2012 fifteen of top twenty grossing films of were based on previous literature (including reboots) or part of a series. In 2011, only two films of the top twenty were original content: *Bridesmaids* and *Rio*. This ratio is startling compared with 2000 where nine of the top
twenty films were based on original content. There are many reasons why this shift in production happened, beyond the public’s clear love of familiar content. One issue is that copyright law changed in 1998 closing access to the public domain for the foreseeable future. The public domain is pertinent to cultural production; two of the top films produced in 2012 were based on content in the public domain: Snow White and the Huntsman and Les Miserables. A healthy public domain allows content creators to build creative work on the shared cultural memory of earlier content creators. The radical expansion of copyright changed how content enters the public domain.

The public domain is a rhetorical space for communal use of creative work that starts after the copyright has expired. The public domain is defined by Black’s Law Dictionary as “the realm of publications, inventions, and processes that are not protected by copyright or patent. Things in the public domain can be appropriated by anyone without liability for infringement.” Lessig gives a more colloquial definition as a “lawyer-free zone” where content creators can freely borrow without asking for permission. James Boyle complicates view of the public domain by including abstract ideas: “material might be in the public domain because it was never capable of being owned.” The theory of relativity cannot be copyrighted, because it is universal, even though it is a, relatively, new idea. Jessica Litman adds a caveat about “orphan works” and other failures of copyright owners to protect their work. “[Material has] been forfeited by failure to comply with a statutory condition for copyright. The public domain comprises material that the public is free to use in any way it pleases.” The term itself invokes a sense of open collaborative space where the great creative works of culture exist for people to read and borrow without penalty. The public domain does not have a physical existence, but is an ideological space that most of the public does not understand. The Legal Public and Digital
Counterpublic have a relatively detailed understanding of how the public domain affects culture. Most people do not care about the public domain because their last experience with it was the literature they were forced to read in high school. The combination of a lack of understanding of what the public domain is and the lack of a location means few people notice when parts of the public domain are taken away.

The <Public Domain>

A healthy public domain functions as a vast collection of public knowledge and creativity, however, the contemporary public domain does not reflect the state of culture. January 1 every year is when new material enters the public domain around the world, but not in the United States. The Sonny Bono Copyright Term Extension Act (CTEA) reset the clock for all material held under copy protection, “Any copyright still in its renewal term at the time that the Sonny Bono Copyright Term Extension Act becomes effective shall have a copyright term of 95 years from the date copyright was originally secured.” January 1, 2019 is the first day new material can enter the public domain. Boyle defines this issue as part of the enclosure of the commons, the privatization of knowledge and culture for continued profit through intellectual property law, “The big point about the enclosure movement is that it worked; this innovation in property systems allowed an unparalleled expansion of productive possibilities.” By calling it an “enclosure” he is reifying the issues of location in understanding the public domain. The public domain exists as a space whether or not people use it. Maintaining a copyright is an active process to profit on creative work, keeping something enclosed means the creative work is cared for and managed. For example, the fairy tale Cinderella exists in the public domain. The derivative work of Disney’s Cinderella is an enclosed creative work and the Disney Corporation takes great care in managing it. Almost three generations of the public know the songs and
visualizations of the Disney cartoon fairy tale long before they know anything about Hans Christen Anderson. One version of Cinderella is not superior to another, but Disney is certainly maintaining better control.

What is at stake with the public domain is how the public values the production of culture. The enclosure of the public domain illuminates the lean towards a neoliberal approach to culture. Robert McChesney states, “Neoliberalism, put crudely, refers to the doctrine that profits should rule as much of social life as possible, and anything that gets in the way of profit making is suspect if not condemned.” The danger in pushing the public domain out of the conversation about copyright is that it reinforces the ideology of neoliberalism. The limitations of the public domain are a consequence of neoliberalism. Before the Copyright Act of 1976, copyright required a two-pronged registration system; copyright protection lasted for 56 years, but half way through the content owner needed to re-register. The consequence of this system is that many copyright owners did not register for their second term of protection. At this time, most copyrighted works entered the public domain after 32 years. If the term of protection had not changed, a whole range of significant culture would exist in the public domain: Raiders of the Lost Ark, the code for Apple’s earliest operating system, and the music of the John Lennon. McGee argues the purpose of ideographs is to reflect our cultural values, “Because these terms are definitive of the society we have inherited, they are conditions of the society into which each of us is born, material ideas which we must accept to ‘belong.’” The ideograph of the public domain is focused on resisting the neoliberalization of copyright: the <public domain> expresses the ideology that creative material belongs to the people who consume content; the domain of creative work belongs to the public. The <public domain> reveals the struggle between progress
and profit. However, the <public domain> is not an active part of the discourse like <fair use>. What happens when the discourse surrounding the <public domain> is silenced?

The Absence of the <Public Domain>

Baz Luhrman’s adaptation of *The Great Gatsby* premiered in May 2013 to become the fourth film adaptation of the story. The original novel by F. Scott Fitzgerald, written in 1925, continues to articulate the American obsession with class aspirations and wealth. The early versions of *The Great Gatsby* demonstrate the limitations of copyright and the <public domain>. The first *Great Gatsby* was a silent film released in 1926 and a “lost film” because there are no known existing copies. Film archivists are trying to save many of these films, but they are running into a problem with copyright law because some of the films are “orphan works” meaning the original content owners cannot be identified. Jennifer Jenkins argues for loosening the copy protection of early films, “The difficulty of access to orphan films is a matter of crisis because these works are literally disintegrating.” Our cultural history of film is disappearing because of the restrictions of copyright law. Content ownership also silences creative work; Paramount made a second version of *The Great Gatsby* in 1949 and effectively buried it so the studio could produce the 1974 version. The third version highlights how a story can be invigorated by culture. *G* reimagines *The Great Gatsby* with a hip-hop twist in the trendy Hamptons. What makes this version unique is the inclusion of race, along with class, as a motivating factor in the story. Roger Ebert said, “The movie is intrinsically interesting when it touches on class differences in the African-American community.” The reimagining of *The Great Gatsby* is the opportunity that the public domain offers content creators, but Fitzgerald’s work is not in the public domain. The only way to produce content involving *The Great Gatsby*
is to pay licensing fees. *The Great Gatsby* is a prime example of content that belongs in the <public domain>, but the content is locked in copy protection until 2021.\textsuperscript{102}

The lament of copyright scholars and activists is how healthy the public domain could be if the CTEA had not extended the term of protection. On January 1, 2013 cultural content from 1956 should have entered the public domain including: Winston Churchill’s *A History of the English-Speaking People*, Fred Gibson’s *Old Yeller*, Cecil B. DeMile’s *The Ten Commandments*, Alfred Hitchcock’s *The Man Who Knew Too Much*, Johnny Cash’s “Walk the Line,” and several songs by Elvis. As the law stands, this content will not enter the public domain until 2052.\textsuperscript{103} Perhaps this focus on the past and the <public domain> could be is a little wrongheaded. Many copyright scholars agree that the changes in the term of copyright are almost impossible to reverse. The nostalgic view of copyright and the <public domain> highlights the culture that could have been. The content that should have entered the public domain in 2013 is from 1956, meaning a larger portion of film history belongs in the public domain, as opposed to under copy protection, along with radio shows, and early rock music. The <public domain> is an excellent resource for content creation and the various iterations of the works of Shakespeare are one example that proves this. The Internet provides a new form of dissemination of public domain work with libraries of digital books like Google Books and Project Gutenberg; this is what the public domain provides at its most ideal and functional state.\textsuperscript{104} To remain vibrant, the public domain needs texts, music, and art, and as it stands now it does not reflect contemporary culture.

The public domain is problematic because it exists as a quasi-public/private space. There is a fundamental confusion over what is a public domain work and what is not. This distinction is clear from the view of copyright activists. However, average people do not concern themselves
with the difference. A bookshelf holds works from the public domain and the private on equal standing: both books are bought by the owner at the same store and read in the same way. A book is a book, a song is a song, art is art; the legal distinction is outside the purview of most consumers. In the section on <fair use>, I examined the discourses surrounding each public and term. The <public domain> is not discussed by the public; it is treated like an afterthought because no matter how long the term of ownership is extended, the <public domain> still exists. The Legal Public and the Digital Counterpublic continue to use the term but it is mostly ignored by the Legislative and Corporate Publics. Rhetorically, the elimination of the <public domain> from the discourse is significant. McKerrow states, “Absence is as important as presence in understanding and evaluating symbolic action.” Marginalizing the <public domain> in discourse performs two functions: first, it keeps the public from understanding the benefits of the <public domain> and second, it reinforces the neoliberal focus of contemporary culture.

The <public domain> is a term that many copyright scholars, librarians, and lawyers understand, but it confuses the actual public. Boyle argues that often the public domain is seen as outdated and people do not care about defending it. “To the extent that we think about property’s outside, it tends to have a negative connotation; we want to get stuff out of the lost-and-found office and back into circulation as property.” The view of copyright from scholars and activists is that we are attempting to protect all work that can enter the public domain, but that logic suffers from an image problem. McLeod explains,

Those who lament the expansion of intellectual property and the enclosure of the Internet’s public domain can occasionally sound like Libertarian cowboys who are repulsed by how the beautiful wide-open spaces have been fenced in by government (or corporate) regulation. At their worst, they come off like free-market yahoos whose primary mission is to protect the personal liberties of the programmer.

Contemporary political culture surrounding the discussion of copyright is polarized around protecting intellectual property from pirates. The result is copyright law that is focused on
building extreme copy protections and reinforcing a system that is based on paying for culture indefinitely. The combination of a lack of public understanding and the benefit of a neoliberal economic model benefits the Corporate public. Jack Valenti used his role as President of the Motion Picture Association of America to attack the <public domain> through obfuscation. Valenti stated, “A public domain work is an orphan. No one is responsible for its life. But everyone exploits its use, until that time certain when it becomes soiled and haggard, barren of its previous virtues.”

Valenti’s argument is significant for its false assertions on the public domain and the anti-woman undertones. The central focus of his argument is that copy protection is the only way to protect and advance culture and he continues to shift the focus of the discourse towards a neoliberal model of copyright.

_Eldred v. Ashcroft_

The <public domain> is the base unit for understanding what happens after copyright ends. The public interacts with the <public domain> every day and does not understand the scope of the problem. Alan B. Albarran states, “The will of the people is manifested through many rights, such as the right to voting in the election process. But there are many other ways ordinary citizens can influence regulatory processes aside from electing officials to office.”

The activism of the Digital Counterpublic is the primary form to change the focus of copyright and the <public domain>. The Supreme Court case of _Eldred v. Ashcroft_ provides a strong example of the activism of the Digital Counterpublic. Eric Eldred, a retired computer programmer, posted various public domain texts on the Internet in 1995. Eldred published these public domain texts as a hobby, until 1998 when he posted Robert Frost’s _New Hampshire_ on his site. The conflict that arose was the passage of the CTEA, which extended the term of copyright ownership to the life of the author plus seventy years or ninety-five years for a
corporate author. The work of various public domain authors was locked into an ownership system for almost two hundred years. The most immediate concern for Eldred was that CTEA reset the term for existing copyrights. Suddenly, Eldred’s publication of *New Hampshire* and any other text published after 1923 was a violation of copyright law.

At this point, Eldred interpellated into the Digital Counterpublic by protesting the law through civil disobedience and maintained his site. Lessig became involved because he questioned the Constitutionality of the extension of copyright. Copyright law has two firm requirements: a creative work must be fixed and the term of copyright must end. Congress determines when copyright ends and the issue with CETA is that it was the most recent extension of the terms of copyright. Lessig states,

> In the past forty years, Congress has gotten into the practice of extending existing terms of copyright protection. What puzzled me about this was, if Congress has the power to extend existing terms, then the Constitution’s requirement that terms be ‘limited’ will have no practical effect.¹¹¹

This is the central contention of *Eldred v. Ashcroft*, that the continued extension of copyright is unconstitutional. Much of Lessig’s focus was on the lobbying efforts of members of the Corporate public, specifically the Disney corporation. In 1998, several early Disney films were set to enter the *public domain* and it is estimated the Disney spent around $800,000 on various reelection campaigns.¹¹² Correlation is not causation, but Disney’s support for extending copyright seems hypocritical because the animated works that built Disney into a powerhouse were based on *public domain* stories from authors like Hans Christian Anderson. The Supreme Court rejected his claim 7-2, Justice Ruth Bader Ginsberg wrote the majority opinion, “In that 1998 legislation, as in all previous copyright term extensions, Congress placed existing and future copyrights in parity. In prescribing that alignment, we hold, Congress acted within its authority and did not transgress constitutional limitations.”¹¹³ They lost the case and this
illuminates the nature of the copyright: the term of ownership is a Pandora’s Box and we might not have a way of exercising what we let out.

The <public domain> is stagnant because there is no way to build on the recent past. The next material that will enter the <public domain> will be ninety-six years old. The fear when discussing the public domain is what will happen to it in the coming years. The heart of the challenge in *Eldred v. Ashcroft* is that Congress has the power to extend copy protection indefinitely, so what will happen in the near future? *Steamboat Willie* is set to enter the <public domain> in 2023, will Disney and others within the Corporate Public push for another extension of copy protection? Will the Legislative Public go along with the request? The future does not look bright, especially after the decision of *Golan v. Holder*. The challenge to the Supreme Court was over the Constitutionality of an international copyright treaty where work that was in the <public domain> (the representative anecdote for the case is the Russian opera, *Peter and the Wolf,*) returned to copy protection. The Court decided in favor of the international treaty; Justice Ginsburg wrote the majority opinion, “Neither the Copyright and Patent Clause nor the First Amendment, we hold, makes the public domain, in any and all cases, a territory that works may never exit.” The future of the <public domain> seems grim.

**Concluding Remarks**

<Fair use> and the <public domain> are two terms of the Legal Public that articulate the idea that information should be free. I have demonstrated within this chapter that the Legal, Legislative, and Corporate Publics have worked to gerrymander <fair use> and the <public domain> to near uselessness. Despite these limitations, the Digital Counterpublic seeks new forms of activism to critique the practices of copyright law. Davis Schneiderman states, “For most of human history, the creation of culture was always a shared phenomenon: an activity
connected to spiritual sustenance and a mutual confirmation of values between the creators and their community." The ideological focus of <fair use> and the <public domain> have utopian goals towards a vibrant culture and the work of the Digital Counterpublic hopes to sustain that.

Martin Luther King, Jr. understood the significance of language and the power of speech. Locking his work in copy protection prevents people from building on his work.
Notes


6 [Joke about perfect as possible Chicago Style]


8 Estate of Martin Luther King, Jr., Inc. v. CBS, 8.


16 *Gyles v. Wilcox*, 26 ER 489 (Court of Chancery, England 1740).


20 Copyright Law of the United States, 19.


22 Estate of Martin Luther King, Jr v. CBS, 11.

23 Farmer, WPUMORG, para. 23.


26 Newton v. Diamond, 349 F. 3d 591 (9th Cir. 2003).


28 McLeod & DiCola, Creative License, 140-141.

29 Copyright Law of the United States, 19.

30 Netanel, Copyright's Paradox, 64-65.


36 Lessig, *Free Culture*, 111.


41 Kozinski, *Journal of the Copyright Society of the USA*, 515


44 Vanna White v. Samsung Electronics America, 989 F. 2d 1512 (9th Cir. 1993),1.


53 Lessig, *Free Culture*, 97.


57 *Bridgeport Music, Inc. v. Dimension Films*, 805


61 McLeod, Freedom of Expression, 84.


65 Girl Talk, All Day, 3:11-5:11; UGK, Ridin' Dirty, 3:00-3:04;,


68 Lessig, Remix, 225.

69 Christine Harold, Ourspace: Resisting the Corporate Control of Culture, (Minneapolis, MN: University of Minnesota, 2007), 124.

70 McLeod, Freedom of Expression, 155


Warner Bros; *Dances with Wolves*, directed by Kevin Costner, (1990; Los Angeles, CA: Orion Pictures).


84 *Snow White and the Huntsman*, directed by Rupert Sanders, (2012; Century City, CA: Roth Films); *Les Miserable*, 2012.

85 *Black’s Law Dictionary*, p. 1243.
86 Lessig, *Free Culture*, 24

87 James Boyle, *The Public Domain: Enclosing the Commons of the Mind*, (New Haven, CT: Yale University, 2008), 38


90 Boyle, 45


93 I was born 32 years ago too.


106 Boyle, xiv.


108 Copyright term extension act: hearing on H.R.989 Before the subcommittee on courts and intellectual property of the house committee on the judiciary, 104th Congress


113 Eldred v. Ashcroft, 537 U.S. 186 (2003), 2


Philip Roth took to the pages of the New Yorker to discuss his status as a credible source on his own writing. He was upset with the Wikipedia entry on his book *The Human Stain*, specifically some content on the protagonist Colman Silk.¹ The Wikipedia entry cites a number of secondary sources arguing that Roth based the character of Colman Silk on Antole Broyard, a literary critic at the *New York Times* who hid his racial background for most of his professional life. Roth claimed this argument was nothing more than literary gossip. The early action within the novel is based on the experiences of a friend, a professor at Princeton named Melvin Tumin who faced academic censure after a comment he made while taking attendance in his Sociology class was perceived as a racial slur.² This interaction provides the rising action for the first part of Roth’s story of a good man who misspoke and is revealed to have a more complicated history. Despite Roth’s protests, the Wikipedia editors refused to remove the information, because Wikipedia privileges secondary sources as a way to verify claims:

> Wikipedia articles should be based on reliable, published secondary sources and, to a lesser extent, on tertiary sources. Secondary or tertiary sources are needed to establish the topic’s notability and to avoid novel interpretations of primary sources, though primary sources are permitted if used carefully³

This policy is in place to insure that users are not adding their own perspectives to an entry. Also the use of secondary sources helps build an entry that is reflective of the most significant research on a topic. In many ways, the author of the book is not the only authority and does not get to provide the last word on its content.⁴
Roth is right: his intent has a great deal of meaning to the audience and the text. However, Roth remained silent on the inspiration for Silk for over a decade. Wikipedia is also right because it is attempting to document the scope of culture. Sometimes conflict of authorship requires recognizing ideas that an author(s) may disagree with. One of the issues with authorship is the interpretation of the audience; an audience may not understand the work as the author intended, but is able to construct meaning out of the text nonetheless. Jessica Litman argues this point about the lack of control an author has over a copyrighted work after it is part of the public. “Copyright owners do not own any of the ideas expressed in their works. They have no ownership of the functional or factual aspects of their works. They have no claim to any compensation when their readers learn and use their teachings.”5 An author cannot control how an audience interprets work. The characters of a book or narratives of a song are containers for consumers to fill with their own thoughts and assumptions. Brett Ashley Kaplan forms a compelling argument about the connections between Broyard and Roth’s characterization of Silk:

Roth was careful to choose a man who cultivated a persona that broadcasted a rich array of ambiguous signs as his template for Coleman precisely so that he could drive home his point that all coming of age involves adopting, in Broyard’s terms, a set of fictions about the self. Because he demonstrated the performativity of race, Broyard offered a perfect model for Roth’s main character.6

*Philip Roth Studies* is a peer-reviewed journal, meaning that Kaplan formed a significant argument that is supported by others within the literature community. The disagreement of one person does not discredit Kaplan’s analysis, even when that person is the author.

The discussion between Roth and Wikipedia demonstrates the tension between authorship and ownership. Authorship and ownership are analogs for progress and profit that are used to discuss the material actions of content creators and owners. Authorship and ownership are ideological abstractions that motivate creative work; each articulates a different value of what
creative work requires. I argue that <authorship> and <ownership>⁷ are two ideographs of the ongoing debate within copyright, representing progress and profit respectively. The copyright clause of the Constitution articulates this point, stating, “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.”⁸ <Authorship> is focused on how copyright can help with the progress of culture and creative content. <Ownership> is an argument that copyright is the reward for content creation. Authors, in their myriad forms, are the engines of innovation in copyright, and authorship is focused on how creative work pushes culture in new directions. Without a creator, there can be no content, and without content, there is no culture. Mark Rose argues the Statute of Anne formalized the recognition of the author as a figure valued by culture. He states, “In the Statute of Anne, the author was established as a legally empowered figure in the marketplace well before professional authorship was realized in practice.”⁹ Authors often give their content to an owner for various forms of protection. Ownership is motivated by a need to control content. An owner possesses work and controls its use, in as many forms as possible, in the future.

In the following pages, I will provide context-specific definitions and ideographs, but it is important to note their purpose within the ideographic grammar of copyright. The conflict within this chapter is over the ideological value of these abstractions. <Authorship> and <ownership> are not in competition with each other, but they represent the value of different approaches to <copyright>. John Louis Lucaites and Celeste Michelle Condit argue finer points about the use of the <equality> by Martin Luther King, Jr., and Malcolm X. “The tension created by King’s cultural typal rhetoric and Malcolm X’s counter-cultural rhetoric functioned to produce a revised and emancipatory conception of cultural equality.”¹⁰ Both King and Malcolm X used <equality>
in their discourse, but the word had dissimilar meanings. To understand <authorship> and <ownership> in their rhetorical context, I will examine four issues. First, I will provide definitions, context, and ideographs for <authorship> and <ownership>. Second, I will show how <authorship> and <ownership> are valued within the law. Third, I will discuss the function of mimesis in <authorship>. Finally, I will look <ownership> within the Burkean term, “bureaucratization of the imaginative.”

Authorship

Authorship establishes the ideological and theoretical underpinnings of how a person creates content. That content is not based strictly in literature, but in any creative field where a person or group of people work towards one central creative goal. Within this section, I define the scope of authorship and its place in <copyright>. In an age where books cover the walls of our homes and offices, it is hard to imagine there was a time when books were scarce. Before the Guttenberg printing press, the only books were printed by hand and took an excruciatingly long time to produce. People wrote books, but only in the most literal sense, as scribes who transcribed the Bible or other canonical texts. Rose argues books were privileged objects and their value transcended the book itself. As literacy became more common because of the rise of the printing press, thoughts on books and authorship began to change. The author emerged within debates over different forms of labor. The printers, who ran the presses to produce books and pamphlets, were seen as highly skilled labor and authors were seen as unskilled labor.

Adrian Johns argues printers freely appropriated the works of authors without permission, because the skill of arranging the letters on the printing press was more valued then arranging them on a page. “Precisely when authorship took on a mantle of public authority, through the crafts of the printed book, its violation came to be seen as a paramount transgression-as an
offense against the common good akin to the crime of the brigand, bandit, or pirate.” Authors gained notoriety and power in this conflict when the ability to synthesize words into art was held in higher esteem. The importance of the author was established by the British Parliament in the Statute of Anne, in what Rose argues was kind of an accident, but provided a significant step forward:

It is unlikely that [authorial property] was examined in any great detail during the deliberations over the statute…The Statute of Anne, then, did not settle the theoretical questions behind the notion of literary property. Still it did represent a significant moment in the process of cultural transformation.13

This legal recognition established the author as a significant force for cultural production. Copyright and authorship are terms that have similar histories because both were codified with the Statue of Anne in what Jessica Reyman calls the critical theory of authorship.14

Definition

Originality is a central focus of authorship and the creation of content. As Rosemary Coombe argues, “Copyright laws protect works, understood to embody the unique personalities of their individual authors, and the expressive component of the original is so venerated that even a reproduction or imitation of it is deemed a form of theft.”15 Originality is what makes creative content worth copyright because authors bring their own voices to content. In 1991, the Supreme Court decided the case of Feist v. Rural, the defining case on originality in copyright. Rural Telephone Service had the license to provide the phone books for towns in Northwest Kanas. Feist Publications had licensed larger towns and was working on moving into Rural Telephone’s service area. Feist was caught copying parts of the directory and sued by Rural for copyright infringement of the telephone listings. The question within Feist et al v. Rural is an examination of labor and originality, called the “sweat of the brow” doctrine where originality is equal to
effort. Sandra Day O’Connor wrote the majority decision for the court and outlined how the “sweat of the brow” is an insufficient way to judge originality in copyright:

In other words, did Feist, by taking 1,309 names, towns, and telephone numbers from Rural's white pages, copy anything that was "original" to Rural?…The selection, coordination, and arrangement of Rural's white pages do not satisfy the minimum constitutional standards for copyright protection. As mentioned at the outset, Rural's white pages are entirely typical . . . This decision should not be construed as demeaning Rural's efforts in compiling its directory, but rather as making clear that copyright rewards originality, not effort.\(^\text{16}\)

If Rural had ordered the names, addresses, and phone numbers of the people of Lenora, Kansas in iambic pentameter, they may have had a case for originality. Nevertheless, the systematic nature of the documentation was not original but did fulfill the base line for effort. Originality requires a combination of thought and effort in the creation of content.

It is important to note that originality is a dynamic concept. In some cases, originality is based on coming up with an idea that no one has seen or heard before. However, that is not the only way to manifest originality, as it also can come from looking at ideas that overlap and then are interpreted through the lens of the author. For example, Robert Olen Butler was inspired to write his 2008 book *Severance* after two ideas overlapped in this head: When a person is in a heightened emotional state, they speak on average at 160 words per minute and when a head is decapitated from a body, it is theorized the person remains conscious for ninety seconds. Butler combined those two ideas into sixty-two stories about the last thoughts in the life of famous historical and fictional decapitations.\(^\text{17}\) Butler’s stories are a demonstration of how creative work comes from external inspiration. Originality does not always come from a space of perfect absence or divine inspiration.

The definition of the *author* that supports an ideographic study comes from Martha Woodmansee. “By ‘author’ we mean an individual who is the sole creator of unique ‘works’ the originality of which warrants their protection under laws of intellectual property known as
‘copyright’ or ‘authors’ rights.’

The author is the figure who transcends content to create work that is valuable to culture. Woodmansee’s definition walks a line of defining the author and reaffirming the problematic notion of the romantic conception of the author. The idea of the romantic conception of the author is about a vision of content creation as a pure art that comes from a divine place of inspiration. The author is treated as a revered figure of creative wisdom who works alone in a vacuum and originality oozes from a fount of creative genius. Scholars are critical of the romantic conception of the author because it does not reflect how creative work is actually produced. Boatema Boateng and Kembrew McLeod both criticize the Romantic conception of the author as a western ideology that was imposed upon the world.

Rose was inspired to write his analysis of authorship after being asked to testify as an expert witness in copyright infringement cases. “I became conscious of the contradictions between the romantic conception of authorship-the notion of the creative individual-that underlies copyright and the fact that most work in the entertainment industry is corporate rather than individual.” The romantic conception of the author limits the view of the production of creative content and dismisses the realities of how work is produced.

The romantic conception of the author places the author at the center of the work that can cause a problem because creative work always has the danger of being misinterpreted. Jonathan Blow provides a case of how the romantic conception of the author constrains the work. Blow created the video game Braid; a combination of a puzzle and platform game where Tim, the protagonist, must rescue a princess from a monster. There are distinctive stylistic features that make the game dynamic. Most notably, to complete tasks the player can run Tim’s actions in reverse, meaning unlike classic video games where there is only a single way to complete a goal, each gamer’s work is unique because of how the user can manipulate time. But the game is not
as it seems, for the monster is Tim and the “Princess” has set the game’s traps to prevent him from harming her. Jean Snow reflects on how the game mechanics affects the conclusion of the game:

And the way gameplay—the control over time—is actually used to narrate part of the ending gives you that much more of an appreciation for everything that went into getting you through the game. After I finished, I sat there in silence for a few minutes, reeling from what I had just experienced. 22

The game has been a runaway success and has created a market for independently produced video games. However, Blow was frustrated by the public response to the game because people did not understand his vision for a variety of reasons. What was unique about Blow’s obsession with his authorship is that he seemed to respond to every negative critic personally. In every comment section of almost every video game review, Blow takes a moment to speak his piece or correct an error in the review.23

Instead of praising the perfect author, Roland Barthes introduces authorship as a concept where the content creator is a vessel for the final product. “Outside of any function other than that of the very practice of the symbol itself, this disconnection occurs, the voice loses its origin, the author enters into his own death, writing begins.”24 Barthes argues the second that pen is put to paper the author does not matter. The author does not matter, because the interpretation of the work by the public matters more. The value of the public view of creative content lasts longer than life of the author and the term of protection. <Copyright> is designed to be temporary, hence the term of protection, as an incentive for authors to continue to innovate. Michel Foucault makes a similar point, concluding, “Perhaps the time has come to study not only the expressive value and formal transformations of discourse, but the mode of its existence.”25 Copyright protects the author and his or her ability to create, but authorship is fleeting. Examining the
changes in a given text through different forms can illuminate any number of issues in the
evolution of knowledge production.

I argue the ideograph of <Authorship> is best articulated through what Foucault calls the
“author-function,” which he summarizes with four features. First, Foucault looks at copyright
and other legal protections of authorship. “[Creative content] are object of appropriation: the
form of property they have become is a particular type whose legal codification was
accomplished some years ago.” Foucault argues content comes from a place of collaboration but
the content must also be original enough to hold its own copyright. The second point confirms
that authorship is mutable. “’Author-function’ is not a universal or constant in all discourse.”
Authorship will not always look the same throughout time, the content may change, but the
authorship will maintain similarities. The third feature of authorship is focused on the process of
creation. “’Author-function’ is that it is not formed spontaneously through the simple attribution
of a discourse to an individual. It results from a complex operation whose purpose is to construct
the rational entity we call the author.” Authorship is an arduous process and the result is better
because of it. The final feature of authorship reflects on the persona of the author. “That author is
a particular source of expression who, in more or less finished forms, is manifested equally well,
and with similar validity, in a text, in letters, fragments, drafts, and so forth.”

All authors have their own voices that permeate their work and consumers of content seek out those voices. The
ideograph embodies the process of author: <Authorship> is an ideology focused on the process
of creating content as motivated by an author. <Authorship> must focus on the process of being
an author and the progress of cultural production.
<Authorship> is focused on how content creators produce cultural work. The question at the center of <authorship> is the value of creative content for culture: is the author’s view more valuable than the interpretation of the public? As a concept, <authorship> does not judge forms of content or estimate how necessary the work is within culture. This is how high art and popular culture can occupy the same space. Not all creative content is equally valuable, but <authorship> does not judge the quality of work, simply that the work exists. <Authorship> is focused on the material labor of the content creator. The purpose of the final product is the realm of <ownership>.

Ownership

Authorship has a well-documented history of the how the term came into being. Ownership did not need to be invented to understand a specific relationship property or labor. Ownership exists because property exists; there is no lengthy debate about how this term came to be or the meaning of the term fixed. The definitive meditation on property comes from John Locke where he establishes property as a natural right. “Man being born, as has been proved, with a title to perfect freedom, and an uncontrolled enjoyment of all the rights and privileges of the law of nature.” Locke argues people have the right to turn the world into what we need it to be. Property and ownership are equal terms, especially when discussing issues of material property. A person owns property; whether that property is a house, small animal, or a book. Intellectual property introduces a new form of labor into the mix. The change in labor did not cause a great deal of strife for issues of property or ownership until this contemporary debate over copyright. The only change between property and intellectual property is the term of ownership. Property is managed and distributed by the will of the owner, meaning that property can be shared within a family for centuries. Intellectual property is intentionally limited by a
term of ownership. Rose states the limited term was created by the Legislative Public because of
the monopolies of ownership within the Stationer’s system. Property and ownership are firmly
planted in capitalist notions of profit. Copyright is a materially different form of property and
requires a different consideration of ownership.

Definition

Authorship and ownership exist as separate ideas for a simple reason: not all content
creators own their work. There is a lot of grey area between total authorship and total ownership.
Authors often lack the ability to distribute and protect their work, so they form a relationship
with an owner (publishing company, record label, etc.). However, much of the content we
consume is created by committee. Who is the content creator for film: The writer, the director,
the actors, or the producer? A film is made under the “work for hire” provision in copyright. “A
work prepared by an employee within the scope of his or her employment; or a work specially
ordered or commissioned for use as a contribution to a collective work.” Work made for hire
covers a substantial base of creative and functional work within culture, going beyond film to
music, textbooks, journal publishing, and any form of work that can be called a “compilation.”
This creates a system where another party, through licenses, can own part of a work where the
profits of specific work are split between the author and owner. A producer owns a film and
everyone else is compensated through licensing and contracts that sell their authorship in the
process. Copyright appears to serve the content creators, and as long as it continues that
appearance, there is minimal public outcry. Litman states, “To the extent that the public
considers copyright law at all, it appears to think that the law is designed to benefit authors for
creating new works and thus to promote the progress of knowledge and art.”
The ability to own property is an external construction between an individual and society. To own a home, it is not enough to reside in the house to claim ownership; there is an agreed-upon process requiring legal paper work and a contract for payment. Property and ownership are not fixed terms, but social constructions that evolved over time. Celeste Michelle Condit and John Louis Lucaties demonstrate this by identifying the rhetoric behind the social construction of slavery on African population in early America. Locke’s philosophy of natural law was one of the foundational ideologies for the formation of the United States. Locke did not support slavery, but argued the enslavement of a captured population is a natural right. That public stance allowed the exclusion of African people’s rights along with the population of indentured servants. However, these categories were not equal. “Where Africans were not excluded from the rights of freemen on the grounds that they were legal captives, they were excluded on the basis of their racial lineage, for they were not English.”31 The African population of early America was socially constructed as the property of the English population. As morally bankrupt as it is seen to be now, this action seemed justified at the time. Any rhetorical culture takes a great deal of time, activism, and reflection to change. The lack of reflection on the meaning of property and ownership is part of the problem within copyright law. Coombe expresses concern over the ideology of the law:

I suggest that the law operates hegemonically—it is at work shaping social worlds of meaning—not only when it is institutionally encountered, but when it is consciously and unconsciously apprehended…people’s anticipations of law (however reasonable, ill informed, mythical, or even paranoid) may actually shape law and the property rights it protects.32

The ideograph of ownership has shaped copyright to be focused on material property over an open culture.

The central definition of ownership is provided by *Black’s Law Dictionary*, “The bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to
others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable.”

Ownership is the central idea to all conceptions of property, but the definition overlooks how ownership within intellectual property is different. Ownership is under-theorized in legal and ideological contexts and I argue this absence is the cause behind many of the problems with <copyright>. My definition reflects the relationship that both the Legal and Corporate Publics have worked into copyright law:

Ownership is the legal and economic permission given by an author to manage the operations of a copyrighted work. My definition of ownership is focused on the relationship between authors and their ability to distribute and manage content. An author cannot manage the publication and distribution of a work alone. Even in the digital age, legitimacy comes with the relationship between an owner and author. This relationship is not without critique. Coombe makes a point about the legal issue of ownership, noting, “Many constitutional theorists recognized the dangers of corporate control and concentration of ownership and the effects of free market principles in limiting the cultural resources, information, and modes of argumentation available to us in a consumer society.”

The prevalence of ownership is part of the influence of neoliberal policies on copyright. The expansion of copy protection allows owners to control their work for longer periods and request high licensing fees all in the name of the free market.

Copyright is intended as a way to balance profit and progress. Rose argues that discussions of property, ownership, and copyright are marred by that tension. “All forms of property are socially constructed and, like copyright, bear in their lineaments the traces of the struggles in which they were fabricated.”

One of the simplest ways to see the evolution and dominance of ownership within copyright law is to look at the text itself. Within the Statute of
Anne, a one-page law, the term “owner” never appears; “author” appears five times. What this represents is how the primary concern of the first copyright law was to establish what makes an author is significant. The opening paragraph of the statute articulates this point:

Whereas printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families.36

The Statue of Anne did not need to articulate ideas of ownership because those were well understood under the Stationer’s system.

The Copyright Law of the United States shows how the ideographs of <authorship> and <ownership> have changed in the last five hundred years. “Authorship” is used thirteen times within the 351 page document, but is never given a firm definition. “Ownership” is used fifty-three times, including a definition of “copyright owner” and an entire chapter called “Copyright Ownership and Transfer.”37 This is tacit evidence of the dominance of ownership within the current conception of copyright. One of the strongest examples of the hierarchy of ownership over authorship is the first term in the chapter on ownership and transfer. The early part of the chapter is focused on how ownership changes hands through several evolving definitions. The first definition in this section called initial ownership meaning: “Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.”38 All ownership belongs to the author until the author wants to develop that work into something lucrative. Ownership is tied to the ability to generate profit from creative works, thus ownership of copyrighted content becomes an incentive. The ideology of ownership is fundamentally connected to property as a natural right. Ownership has less to do with what can be done with content than what can be made from it. This leads to the ideograph of ownership: <Ownership> is the embodiment that management, control, and profit
of copyright are more valuable than original creation. Ownership is the ideology and practice of how copyright is controlled within our culture. The principles of ownership are not new to copyright, because the tension about monopolies and culture has always existed, as noted by a variety of writers. Ownership is focused on profit and control of copyrighted works.

The Relationship between Ownership and Authorship

The issue motivating the content within this chapter is the relationship between authorship and ownership. However, articulating the relationship between the two is difficult. As I have laid out in the previous sections, authorship has a long history and debate about its meaning in culture and ownership does not. This gives the illusion that authorship is a superior term, however, ownership was established as a natural right and does not require theoretical debates over what it is and is not. Ownership is the ability to own property, intellectual or otherwise. Michael Calvin McGee states that an examination of two ideographs produces an understanding of how the each is used by the different rhetors or publics. “One can therefore precisely define the difference between the two communities in part, by comparing the usage of definitive ideographs.”39 I argue ownership and authorship are paradigmatic reflections of legal and critical epistemologies. Additionally, I contend that within the Legal Public, ownership and authorship are conflated to mean the same thing. This parallel relationship dismisses the work of authors to focus solely on owners which provides an unbalanced copyright law.

The paradigm concept is useful here because it shows the blind spots of how lawyers and scholars are disciplined. Our work is so specialized that we often miss important details that help us develop a greater set of ideas. Thomas Kuhn analyzes this issue by looking at the field of physics. “On the road to professional specialization, a few physical scientists encounter only the
basic principles of quantum mechanics... What quantum mechanics means to each of them depends upon what courses he has had, what texts he has read, and which journals he studies.”

Our scope is limited by not having the ability to be as well-informed as we need to be on any given topic. <Ownership> dominates the discussion of copyright, because lawyers dominate the discussion of copyright. <Authorship> is a difficult term to define because its meaning and action are ephemeral. <Ownership> has not changed in any substantial form. There is no new way to own content, and even pirated content still requires a claim of ownership. <Ownership> reflects the objectivist philosophy of the legal field and <authorship> is a rhetorical production of writing.

Accepting the paradigmatic issues and identifying the relationship between <authorship> and <ownership> requires an examination of the copyright statute. Within the text of the legal statute of copyright law, it is quickly revealed that ownership becomes the primary term for defining copyright. <Ownership> becomes the totalizing term that eclipses authorship. It is easy to conflate the ideas of <authorship> and <ownership> because the difference is negligible to the public. <Ownership> and <authorship> do not compete against each other in rhetorical terms because they are dependent on each other. Although <ownership> is seen as a superior term that conquers the discourse on copyright it cannot exist without <authorship>. <Ownership> produces nothing original; it is a management system for creative output. <Authorship> drives <ownership’s> ability to exist.

The shift towards <ownership> in retrospect seems like hubris in the face of the growth of digital technology. The Digital Millennium Copyright Act (DMCA) went into effect in October 1998 with a primarily text-based Internet that ran on 56k modems. At that time, a system of takedown notices and Digital Rights Management (DRM) code seemed relativity
manageable. In less than a year, the nature of copy protection in the digital age was thrown into harsh relief, because Napster began operating in June 1999. The DMCA seems to be an attempt to apply seventeenth-century solutions to twenty-first century problems. Celeste Michelle Condit observes how money changes people’s opinions about their stake in a public discussion:

Almost a third of these people spend the last quarter of their lives as ‘capitalists’ rather than ‘workers’ (due to pension plans rooted in the stock and bond markets) and the overwhelming majority spend the last years of their lives as recipients of government wealth redistribution programs.41

Condit is comparing the differences between the American consumer verses the average Italian citizen that Antonio Gramsci wrote when developing the theory of cultural hegemony. What makes this a pertinent part of the discussion of <authorship> and <ownership> is questioning who is invested in making changes to copyright law. No matter how it is analyzed, both authors and owners gain from changes in copyright law. The Legal and Legislative Publics have lost track of the balance in copyright because the Corporate Public has a high stake in maintaining <ownership> indefinitely. The shift towards profit over progress forgets about the needs of the public. The public does not share in the progress and profit and we are left to pay for creative content for a longer period.

Mimesis and <Authorship>

“Good artists borrow, great artists steal,” is a classic axiom attributed to both Pablo Picasso and T.S. Eliot. The irony of the statement is the indeterminate <authorship> of a culturally relevant phrase. Foucault warned that one of the consequences of authorship is that the author would matter less and less over time. Rather, the ideas the author articulated remain as the lasting impression. “The author’s name is not a function of a man’s civil status, nor is it fictional; it is situated in the breach among the discontinuities, which gives rise to new groups of discourse and their singular mode of existence.”42 Within telling and retelling of stories the author is often
lost to history, yet the loss does not affect the story. The authors of *Gilgamesh*, *Beowulf*, and countless other cultural myths are all lost to history, but the stories remain relevant. What is more significant is how these stories have inspired other great works by creating normative structures and genres, like the hero’s journey, to tell similar tales. There is a rhetorical term for this process of copying and retelling: *mimesis*, which is a way to seek out the perfection of the natural world through imitation. *Mimesis* is connected to the use of artistic or poetic language within a discourse. As Michael Leff states, “The goal of poetic is *mimesis*, and all poetic discourse must find direction from this mimetic function. Thus, all elements of the poetic art must cohere in service to this single, overarching goal.” I argue *mimesis* is a mirror to \(<\text{authorship}\>\) in contemporary copyright, in that content creation is a synthesis of a variety of work in subtle and obvious forms. *Mimesis* is an avenue to understand how content takes on its own meaning after the death of the author. I examine *mimesis* in four parts. First, I review the rhetorical literature surrounding *mimesis*. Second, I demonstrate how *mimesis* has been defined and treated in the Legal Public. Third, I discuss how music uses *mimesis*. Finally, I explore peer content creation on the Internet as a form of *mimesis*.

*Mimesis* is defined by Plato as a form of aesthetics that serves as an imitation of Truth. Plato uses beds as metaphor for *mimesis*. He argues there are three beds: One that comes from nature, meaning created by God; a second made by a carpenter; and, the third, made by a painter. The carpenter modeled his work on the bed from nature and the painter made an interpretation of the carpenter’s work. The problem with the version of the bed made by the painter is that it is three times removed from the work of nature. Plato argues that distance from Truth can cause irreparable damage to the public.

The real artist, who knew what he was imitating, would be interested in realities and not in imitations; and would desire to leave as memorials of himself works many and fair;
and, instead of being the author of encomiums, he would prefer to be the theme of them.\textsuperscript{45}

Plato is focused on how any form of art and Truth is obscured by the existence of the author/artist. If the public finds any truth in art, they are finding a shadow of truth. Plato is forever concerned the public is not intelligent enough to know the difference between truth and artifice. His criticism here rings true of his eternal insult that rhetoric is mere cookery. Thomas Farrell argues Plato did not stop here, but critiqued the style and process of every form of art and mimicry. “Plato did not offer his indictment as a single sweeping dogma designed to decimate all the arts indiscriminately. Rather, his own monistic vision of Truth was adapted differently to the sensory appears represented by each type of art under discussion.”\textsuperscript{46} Plato wanted consistency of Truth. Art cannot provide consistency because it is reinterpreted through the artist. Copies of truth are not Truth.

Aristotle follows Plato and provides a search for Truth that is not based on an elite class of ruling philosophers. First, Aristotle broadened the definition of \textit{mimesis} to include medicine and science along with a variety of art forms. Second, Aristotle looks at \textit{mimesis} as a form of identification through art. Through \textit{mimesis}, the public can respond to Truth because we can see it better through something that gives us distance. Aristotle argues this point through an examination of poetry over history.

Poetry, therefore, is a more philosophical and a higher thing than history: for poetry tends to express the universal, history the particular. By the universal, I mean how a person of a certain type will on occasion speak or act, according to the law of probability or necessity; and it is this universality at which poetry aims in the names she attaches to the personages.\textsuperscript{47}

Members of the public relate more to artistic work over history because they can see themselves within the text. The lack of truth breeds an immediacy that history lacks. Plato’s frustration with \textit{mimesis} is how people identify with artistic interpretations of truth. What Aristotle understands is
there is value in how a public identifies with that truth. However, for Aristotle, *mimesis* is part of poetry and poetry is not rhetoric. Ekaterina V. Haskins argues the distinction is to protect the audience. “Aristotle conceives of poetry in terms of representation rather than performance or audience identification because he seeks to insulate a properly conditioned, ethical human agent from the contingencies and excesses of performance.”48 Both Plato and Aristotle believed art had a great deal of power over public culture. However, the public found comfort in the art and the repetition from *mimesis*. Although the work might be an imitation, which does not mean it was not real or significant. A copy of copy of a copy might cause distance from truth, but what if that third copy is the public’s first experience with truth?

A suitable answer may lie in a more contemporary example. Sampling started in the 1970s and the culture of music sampling grew with technology. For most of the 1970s and 1980s, music sampling was something only people with advanced knowledge of music and access to equipment could do. Rap groups, like Public Enemy, freely borrowed portions of songs because sampling entire songs was illegal. Things began to change in the early 1990s when Biz Markie borrowed under thirty seconds from Gilbert O’Sullivan’s song “Alone Again (Naturally)” for the track “Just a Friend.” O’Sullivan and his record company (Grand Upright Music) sued Markie and Warner Brothers for copyright infringement. Markie tried to purchase the right to sample the song, but was refused. Because sampling was not seen as a problem before, the record company released the song anyway. This conflict played out in the lawsuit *Grand Upright Music, Limited v. Warner Brothers Records Incorporated*. It is an interesting legal decision because it questions the use of sampling as a form of mechanical reproduction and the practice of obtaining copyright permission. The prosecution argued sampling was equivalent to stealing from the original musician. The case by Grand Upright Music was so convincing that
the first line of Judge Kevin Thomas Duffy’s summary judgment recites the seventh commandment, stating, “‘Thou shalt not steal.’ has been an admonition followed since the dawn of civilization. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.” Sampling without permission is illegal and obtaining permission costs between $100 and $5,000 per sample. This ruling created a legal structure where artists needed to obtain legal permission for every sample. What makes the permissions process complicated is that often artist one is sampled by artist two, so when artist three wants to sample artist two, he or she needs to get approval from artist one as well.

Remix as Mimesis

The rise of the Internet opened cultural appropriation to people who had the know-how to produce media content. Low-cost computer hardware combined with open source software helped blur the lines between content consumer and content producer. Remix is a contemporary form of mimesis using music, video, and other forms of popular art to create. What makes remix significant for <authorship> is the idea of standing on the shoulder of giants. Creative people often borrow various ideas from other creative people and the borrowing is often obscured.50 Remix artists also borrow and elaborate, but instead of hiding the process of mimesis, they are transparent with the work. Digital technology has provided an avenue that makes the creation and consumption of remixes easier for the public to see and understand. One of the strongest examples of remix as mimesis is Greg Gillis who performs under the name Girl Talk. His most recent album All Day is 71 minutes long and samples over 373 songs. Ian Cohen, a reviewer for Pitchfork, said, “Gillis has figured out exactly what he was put on this earth to do--transforming five decades of pop music into seamless, well-paced mixes, and then, live, turning those mixes
into a sweaty, tribal celebration of pop music itself.” Gillis is one voice of remix culture who is defining the nature of that type of media.

Girl Talk takes tracks of various musicians and puts them into conversation with each other. Gillis is deliberate with his musical choices; he combines contemporary rappers with classical rock and vulgarity of Lil’ Kim with bubble gum energy of the Jackson 5. This kind of juxtaposition is not unique: Aerosmith and Run DMC proved that with “Walk This Way.” However, the way Gillis situates his choices of music and times is what makes his <authorship> significant. In the opening track of All Day, “Oh No,” Gillis remixes Black Sabbath’s “War Pigs” with Ludacris’ “Move Bitch.” Ozzy Osborne, Sabbath’s lead singer, and Ludacris could attempt to perform this live, but that would be a different experience. The unique moment of <authorship> from Gillis is the situated moment of this remix. Black Sabbath was at a creative and commercial peak in 1970 and “War Pigs” is a noteworthy representation of this period. “Move Bitch” may not be the creative peak of Ludacris’ work, but it is representative of popular music over thirty years later. For both artists, the remix serves as a time capsule of their work. Further, many artists are unable to collaborate with one another because someone has died. The track “Steady Shock” allows Drake, OutKast, and the Three 6 Mafia to collaborate with Kurt Cobain. In a telling moment in “Oh No,” The Doors, Aaliyah, J-Kwon, and the Ramones all collaborate even though everyone is dead except for two members of the Doors and J-Kwon. The combination of these tracks take situated moments of <authorship> and gives them a new presence. As disparate moments of <authorship>, they held significance. Instead of creating music with instruments, Gillis uses the <authorship> of others as his instrument.

This relationship of mimesis and <authorship> is played out even further by collaborations based on Girl Talk’s work. On YouTube, a small collection of video artists
attempt to make music videos of Girl Talk tracks with footage of the artists singing and rapping with each other. These videos are aided by the creation of Toob, annotated YouTube videos where the addition of various samples can be visually tracked. Toob was created by Travis McLeskey to follow along with Girl Talk’s rapid-fire samples. McLeskey is a software engineer, who was inspired by Girl Talk’s collaborative style to produce something with his expertise, “I realized that the combination of Girl Talk’s sample-based music + data about it + an ultra-lenient license (Creative Commons) meant that someone could probably make it so you could watch the samples while you listened to the music.” Toob includes several of the fan produced YouTube videos. One of Gillis’ intentions with his mash-ups is that the entire album is supposed to represent a single track of music. Photographer Jacob Krupnick took that idea to its furthest point by making a full-length music video for All Day. Girl Walk//All Day follows a young woman as she dances her way across all five boroughs of New York. The mimesis of Girl Walk//All Day goes beyond the association between music and dance. The protagonist of the video, dancer Ann Marsen, is a classically trained ballerina who started developing her own style by attending every dance class in New York. Krupnick states Marsen’s style is her own, “It’s more like watching a chameleon on fast forward. She’s playing with her body movement the way a rapper might play with words.” Her dance style combined with Gillis’ music inspired Krupnick to create Girl Walk//All Day. The purpose of <authorship> is to inspire creation in others. Mimesis and remix provides an avenue for the public to create through the creative work of others.

Peer Collaboration as Mimesis

Peer collaboration in <authorship> is a test of the death of the author. Participation in peer collaboration means that there is no single credit for the work or one person’s pride for creating information. Wikipedia is a strong example of how peer collaboration has shifted the
consumption and production of knowledge. Jimmy Wales, in an act of accidental creation, started Wikipedia in 2001. Wales wanted to start an online encyclopedia with content written by Ph.Ds with a formal peer review process. The name “wiki” in Wikipedia comes from a type of software where people could work asynchronously on the same project on the same site. Barbara Warnick discusses the significance of wikis as a platform for building knowledge:

> Wikis, unlike blogs or discussion boards, offer a radical approach to authorship in that they are Web pages that anyone can edit. Thus their texts are authored by various contributors editing others’ writing rather than by any specific author or authors.  

People from all walks of life and experience began to develop Wikipedia into a dynamic system of cultural information. Wikipedia has grown since its creation in 2001 to the sixth most popular site on the Internet. The Wikipedia statistics entry tracks every change and addition to the site by the second. On average, there are over three edits every second and, as of February 28, 2013 at 10:26 AM, there were 596,443,556 changes made to Wikipedia since the creation of the site. There are several thousand editors making major and minor changes to Wikipedia every day. Wikipedia is a repository of public knowledge ranging from high theory to the lowest forms of popular culture. The site documents its entire history, every conflict and change, with complete openness.

Peer collaboration requires dozens of participants from different lifestyles and areas of expertise to maintain the information on one entry. No single person gets credit for what is done and the information is maintained in a unified voice. This environment is intended to be invitational so that all people with knowledge are welcomed to participate. After a person signs up to be an editor and is logged into the site, notifications appear on entries, pointing out the lack of citations on an entry, issues of voice, and the need for elaboration. The principles set forth in the five pillars of Wikipedia to provide editors with guidance on how to interact and open enough to provide debate about what should/should not be included:
Wikipedia is an encyclopedia
Wikipedia is written from a neutral point of view
Wikipedia is free content that anyone can edit, use, modify, and distribute
Editors should treat each other with respect and civility
Wikipedia does not have firm rules. 68

Wikipedia works as a democratic system and with the five pillars as its constitution. This loosely-directed structure helps coalesce the <authorship> of the text. The first pillar is the simplest direction, "Wikipedia is an encyclopedia."69 An encyclopedia is a repository of facts, not arguments, not critical analysis, and not speculation. It is a clear principle about what needs to be included in the millions of entries on the site. What makes Wikipedia a unique place is that knowledge is always in flux, always expanding. Andrew Famiglietti states:

Wikipedia's text is always in the process of being produced. Unlike a traditional encyclopedia that, once it is published, establishes the information presented in its articles as fixed objects of knowledge, at least until such a time as properly authorized experts are assembled to produce a new edition, Wikipedia, has no fixed editions, rather the information on the site remains fluid, alterable at any time.70

Traditional encyclopedias were out of date by the time the text arrived at a library. For Wikipedia, an entry is never complete; it only requires fewer edits to maintain its truth.

The second pillar is an attempt to maintain a unified voice through such a massive project: "Wikipedia is written from a neutral point of view."71 The neutral point of view is the assumption that the strongest way to ensure the site is accurate and contextualized is through a rhetorical distance provided by a neutral voice. The neutral voice is a controversial stance in rhetorical and feminist theory because not taking a stance is still viewed as taking a particular stance.72 The point of the neutral voice is not to silence or cover for historical/contemporary ills, but to provide information to the public. Yochai Benkler argues the neutral voice is the primary point of unification within Wikipedia and it is also the most difficult feature to learn:

The important point is that Wikipedia requires not only mechanical cooperation among people, but a commitment to a particular style of writing and describing concepts that is far from intuitive or natural to people. It requires self-discipline. It enforces behavior it
requires primarily through appeal to the common enterprise that participants are engaged in.\textsuperscript{73}

The neutral voice is about making the text approachable for the public. The voice allows people to consume the knowledge on Wikipedia as what it is, a surface level source of general knowledge, like the Encyclopedias that lined the shelves of our houses and libraries of a different age. Further, the issue of voice is the primary site of \textit{mimesis} in peer collaboration. Each editor is trying to achieve a similar level of language and that is performed through copying the work of others.

The third pillar is an invitation for collaborative authorship: "Wikipedia is free content that anyone can edit, use, modify, and distribute."\textsuperscript{74} Wikimedia, the non-profit that oversees the Wikipedia group of sites, is proactive about the importance of this principle. Since 2011, Wikimedia is working to welcome more women in editing, because the lack of focus from women creates a document that does not accurately reflect the culture. \textit{The New York Times} reported an internal study by the Wikimedia Foundation, the United Nations University, and Maastricht University that only 13\% of the editors of Wikipedia are women.\textsuperscript{75} Wikipedia treated this mistake as a call for women editors to fix this oversight. As an organization, Wikipedia is immensely reflective of their errors and tries to fix them quickly. Jimmy Wales intends the pillars of Wikipedia to be flexible and to welcome a culture of improvement:

\begin{quote}
Whatever rules we have in Wikipedia, they ought to be, more or less, discernible by any normal, socially adept adult who thinks about what would be the ethical thing to do in this situation…If there’s something that’s counterintuitive, it shouldn’t really be a rule.\textsuperscript{76}
\end{quote}

Wikipedia understands the lack of gender parity among its editors is a problem which needs to be resolved. The first study on gender parity was published in 2011. Every winter, Wikimedia publishes the results of a new survey of editors to check its progress on gender parity.\textsuperscript{77}
The fourth pillar of Wikipedia is focused on maintaining human dignity, "Editors should interact with each other in a respectful and civil manner." Editors of Wikipedia come from a variety of knowledge bases and skill levels. To produce a document as detailed as Wikipedia the editors must do their best to respect each other’s voices. Of all of the pillars, maintaining civility might be the most difficult. The anonymity of the Internet often brings out the worst in some members of the public. The controversy over Kate Middleton’s wedding dress is one example of the struggle with civility. The entry was initially created on April 29, 2011, and over the course of several days, the entry was moved and deleted several times. Sometimes the information became part of the entry on the Royal Wedding or on the entry of Middleton herself. Every Wikipedia entry has a “Talk” page, where an ongoing discussion of issues related to editing and inclusion goes on. One of the primary discussions on Middleton’s talk page was about the significance of a single dress on a single person. Wikipedia editor Eric Cable reflected on the significance of how royal fashion affects contemporary dress,

Are you suggesting this article should not exist? That it does not meet notability standards? That is absurd. This dress will be remembered for decades. It will influence wedding dress designs for long, long time, not unlike the fact that brides wear white today because Queen Victoria wore white . . . almost 200 years ago. This is an interesting, well-written, and well-referenced article.

The editors debated what knowledge was significant to devote a space and effort to maintain visibly for the public. Part of the civility issue within this entry and talk page returns to the issue of gender parity in editing. One editor admits he struggles with recognizing the importance of the dress because he knows so little about fashion design and construction and recommends that as an avenue to improve the entry. The editors take their unpaid duty as protectors of knowledge seriously, because one bad entry or one useless citation tarnishes the whole system.

The fifth and final pillar points out that all rules are up for debate, "Wikipedia does not have firm rules." To make the site work, there needs to be risk-taking, debate, and action; the
only way to do that is to work like there are no rules, because the entire action is social experiment. Timothy Messer-Kruse, a faculty member at Bowling Green State University, became publicly embroiled with Wikipedia editors when he tried to change parts of the entry on the Haymarket Affair based on evidence from his academic book about the incident. Messer-Kruse’s conflict with Wikipedia editors demonstrated two misunderstandings of peer collaboration. First, Messer-Kruse was said to be acting as a “sock puppet,” or someone who uses Wikipedia to promote their work. Second, Messer-Kruse struggled with the value of a certain type of <authorship>. Roth believed the voice of the author should hold more weight on Wikipedia. Messer-Kruse thought his academic credentials should hold more weight. However, Messer-Kruse’s book was a single contrary voice among dozens of academic books and journal articles on the Haymarket Affair. Even in academia, when one person presents a new theory or research it needs to be tested and corroborated. Messer-Kruse believed that because of his status as an academic, his contributions should be placed above those of the Wikipedia editors. Rebecca Rosen points out that the interpretation of history is not fixed and the Wikipedia editors were correct in their prudence:

The process of how history is taught and revised over time is a slow one, whether in a book, online, or in people's minds. If Wikipedia hesitated to change its article ahead of the scholarly consensus, that is an artifact of academia's own inability to quickly adopt a new consensus, not a failing of Wikipedia.

Despite the lack of civility, a conflict over who can and cannot edit, and disputes over neutrality; Wikipedia is still an encyclopedia and Messer-Kruse’s book is included in the Haymarket Affair entry. There is even a Wikipedia biography entry about him and his accomplishments. <Authorship> is not an organized process, it is messy and peer collaboration reinforces that issue.
Bureaucratization of the Imaginative

Bureaucratization of the Imaginative is a demonstration of how copyright and <ownership> function rhetorically. Copyright is the governmental system that manages creative and intellectual output by providing legal protection for material property created through immaterial labor. Copyright is an order applied to a creative system and <ownership> is the firm management of that system. <Ownership> shepherds a creative work from an author into something of value for a public. Kenneth Burke uses a metaphor to explain this idea called the Bureaucratization of the Imaginative.

An imaginative possibility is (usually at the start utopian) is bureaucratized when it is embodied in the realities of a social texture, in all the complexity of language and habits in the proper relationships, the methods of government, production and distribution, and in the development of rituals that re-enforce the same emphasis.89

Copyright law is an example of the bureaucratization of the imaginative because it starts as a utopian ideal of how to manage creative property within culture. The management in <ownership> is where the Bureaucratization of the Imaginative starts to break down. The spirit of the original law and the intention within the Constitution is to manage creative and intellectual output for the good of the public. However, the more <ownership> restrictions put into place within copyright law, the more the public is put at a further distance from the imaginative. Burke states, “A bureaucratic order approaches the stage of alienation in proportion as its ‘unintended by-products’ become a stronger factor than the original purpose.”90 The shifts in copyright law are so broad that anything can be copyrighted, thus exceeding the intended purpose of copyright. <Ownership> restrictions are forcing the public to be alienated by its own culture by changing our interactions with creative and intellectual material. As copyrighted material moves into digital forms, <ownership> will track various use and control how a user is allowed consume material.
At the center of ownership and digital technology is a question of control. Who controls a product: The copyright owner or the consumer? Before tablet PCs and smartphones, the answer was the consumer. The rules for ownership are shifting with in digital technology and Litman expresses concern for what this control of copyright breeds for consumers:

Technology now permits copyright owners of works in digital format to monitor and meter the consumption of their works…Copyright is now seen as a tool for copyright owners to use to extract all the potential commercial value from works of authorship, even if that means that uses that have long been deemed legal are now brought within the copyright owner's control.91

Litman is discussing the hermetically-sealed ownership of digital technology. Shrink-wrap contracts and end-user license agreements92 are changing ownership from personal property to corporate control. One of the first changes is the rhetorical shift from the consumer-owner to a user. Apple performs the rhetorical shift in one of its contracts by defining the user as “You.”93 By using informal pronouns, Apple forms a personal relationship with “You” and serves the secondary purpose of making the relationship seem reciprocal. The terms of ownership proves the relationship between “You” and Apple is one-sided,

Apple retains all rights, title, and interest in and to the Apple Software and any Updates it may make available to You under this Agreement… The parties acknowledge that this Agreement does not give Apple any ownership interest in Your Applications.94

The person who spent around $300 on a tablet or a phone is not the “owner” of the product, only a user. Apple is not the only company using a combination of copyright law and digital technology to track users. Amazon, Facebook, Google, Microsoft, most websites, and any business where the use of a key fob provides the consumer with a discount, are all tracking the actions and behaviors of users.

For instance, iTunes offers a feature that tracks the metadata of a consumer’s music use. An individual can see how many times he or she has listened to a song, when was it skipped, and when the track was added or purchased.95 The metadata is not just for the good of the consumer,
it is part of the control of digital <ownership>. Apple uses that data to track an individual’s use of various Apple products in hopes of using the data to sell more Apple products. Metadata is offered to the user as a bonus, but this surveillance of use is what digital <ownership> provides the public. Of course, Apple is only a representative anecdote, many organizations and the US government are all tracking metadata. Previously, copyright owners could not control or track their work after it left the store. Digital technology provides the Corporate Public with knowledge of how much was consumed, when, how often, and prevents people from sharing the content. The true extent of the Bureaucratization of the Imaginative is the hermetically controlled <ownership> shaped by the Legal, Legislative, and Corporate Publics through the DMCA. Lawyers shape the law through court decisions and write the contracts to maintain <ownership> of property. The following sections examine how the Bureaucratization of the Imaginative in the Legal, Legislative, and Corporate Publics. *UMG Recording v. MP3.com* is an example of how <ownership> was shaped through court decisions. Rhetorical code and tethered appliances are an example of how contracts are used to shape <ownership> into the hermetically sealed form that benefits the Corporate Public.

*UMG Recording v. MP3.com*

The issues of <ownership> within copyright are immutable and change with the dynamics of the culture at a given time. In terms of the public sphere, the Corporate Public is working for its own interests instead of the interests of the public. Bell Labs was a key developer of various technologies in the mid-twentieth century. But as much as Bell Labs innovated, they still silenced other technology to prevent it from changing current practices. For example, in 1934 Clarence Hickman invented a magnetic storage system that recorded and replayed messages. This invention was marketed to the public in the 1960s as the answering machine. Bell
buried Hickman’s invention because they feared how the ability to record conversations would change telephony and their business model. This is not an uncommon reaction; NBC did the same thing to cable television and the legal structure of the DMCA attempts to do the same to the Internet. The Corporate Public will work to maintain a system, like a form of technology or an economic model, even though the improvement will benefit the public. As Burke laments, “There will be a class of people who a have a very real ‘stake in’ the retention of the ailing bureaucratization.” This system of preserving the known over the unknown often works against self-interest. For example, the Corporate Public lobbied and attempted to block the production of the Beta Max player which resulted in the Supreme Court case of Sony v. Universal. Alex Kozinski points out that the VCR changed the movie industry for the better, “As everyone now recognizes, it was the best thing that could have happened to the movie industry. Far from wiping out the incentive to make movies, the home VCR has revitalized the industry.” The fight to maintain a system overlooks the innovation of something that can improve the needs of the public and develops new revenue for the Corporate Public.

The Corporate Public works very hard at maintaining the copyright system to benefit their needs and goals. This issue is clear within legal cases like UMG Recordings v. MP3.com. MP3.com was a post-Napster music site that trafficked in legal music downloads. To use MP3.com, a user had to buy a CD and create an account on the site. That account allowed a user to download an MP3 version of the album. Users could download the MP3s as many times as they wanted, from anywhere they wanted. At this time, most standard computers possessed the ability to rip a CD into MP3s, so the use of MP3.com was relatively redundant. However, ripping a CD was in the same legal grey area as illegal downloading, and MP3.com claimed to be a legal alternative to a cultural need. Judge Jed Rakoff asserted the purpose of copyright was a defense
for <ownership>. “Copyright, however, is not designed to afford consumer protection or convenience but, rather, to protect the copyright holders' property interests.” This guided a number of issues in the case, like reaffirming the scope of fair use. The significance of this case is the firm doctrine concerning digital copies. The technology for making digital copies was growing and forbidding people from making copies of material that they own was impossible. The case allowed consumers to own digital versions of content if the consumer also owned a hard copy of the same item. This redundancy for the consumer provided the Corporate Public with the needed proof of <ownership>.

Rhetorical Code

Writing this sentence requires code to communicate from the keyboard to the central processing unit (CPU) to the screen that a given set of interactions occurred. This interaction, between my creative presence and the computer’s production, is an interaction based on code. There are varieties of coding languages that are used as a textual interface for a user/programmer to tell the computer how to act. After the code is written, it is sent through a compiler to convert the programmer’s intentions into machine language time code, the foundational code of all computers. Any action on a computer is a transaction between billions of ones and zeros that are compiled and decompiled to make all hardware and software on a computer work together. Code is the method computers use to communicate messages and commands and has rhetorical potential, in that it challenges the material conceptions of all of the available means of persuasion. Code is a site of construction and <ownership> that is unseen by most publics but it is valued as a fundamental part of our contemporary social order. Lessig offers proof of this assessment, beyond any colloquial experience with a poor functioning mouse or a slowly dying hard drive. Lessig states, “Codes constitute cyberspaces; spaces enable and disable individuals
and groups. The selections about code are therefore in part a selection about who, what, and, most important, what ways of life will be enabled and disabled.” Our collective need for digital goods has fostered a dependency on code.

Code does not itself communicate, but its use controls the way people can participate in culture, communicate with others, and enact lived practice. Code is a tool that programmers use to enact a goal. Most publics will only see the veil of words, colors, and animation that is the end product of a combination of programming languages. Code is not untouchable or unbearable to the general population; that knowledge can be self-taught, which is why, in part; technology entrepreneurs such as Bill Gates, John Carmack, and Linus Torvalds are publicly lauded. Chantal Benoit-Barné examines some issues of the rhetorical functions of code, but she focuses on the user side and not the programming side. Most code is written with the intent to make life easier for the computer and user. Rhetorical code must be written with intent to constrain the behavior of a public. DRM code is the quintessential example of rhetorical code because it reinforces ownership. DRM is written into the DMCA to track the use of copyrighted materials. DRM code works in a number of different ways: it checks to make sure the disk is in when playing a video game, it tracks how many times a user has listened to a song on iTunes, and it restricts copying and sharing without permission. DRM is rhetorical code because it manages the ownership of various digital goods.

DRM code is not only a series of ones and zeroes that track the use of copyrighted work it is the embodiment of ownership and material control. The way we consume culture is significant and this conflict with copyright is the embodiment of Raymie McKerrow’s argument that focuses on presence and absence within symbolic action. Not all rhetorical action is speech, text, or action; what is absent from the discourse is equally important as important as
what is present. <Ownership> is demonstrated through presence and absence in the Federal Bureau of Investigation (FBI) warning and DRM code. The FBI warning plays before copyrighted VHS and DVD movies. This thirty-second warning is a less-than-subtle <ownership> message that changed the way people interacted with media. Digital technology changes this relationship, because the rhetorical message is implicit rather than explicit. The message about copyright is built into digital technology in the form of DRM code. This code changes the way people interact with mediated content. The FBI warning is still played before movies and serves as an explicit warning to viewers of the five years in prison and $50,000 in fines they will pay if they violate the law. DRM code enforces the same laws, but instead of an explicit warning, the purchase of DRM-embedded content is an implicit agreement between the users and owners. The public may not understand how or why code affects their lives, but that does not change the presence of its control or the tacit acceptance of it. As McKerrow states, “answers to specific questions may only be partial statements, accurate insofar as they are expressed, but certainly not the answers that would be given if other questions were asked.”

Because something is unsaid does not mean it is less significant than a verbal utterance. A greater issue is the <ownership> potential of embedded code in portable technology, because the more mobile the code, the more <ownership> becomes part of our daily lives.

Tethered appliances are an example of rhetorical code and part of a new, generation of <ownership> where software is tied to a dedicated, hardware that prevents users from making changes to the system. Examples range from the Apple iPod, the Amazon Kindle, and gaming systems like the Microsoft XBOX, Sony Playstation, and Nintendo Wii. The devices are desirable because they are easy to use and almost impossible for luddites to break because they are closed systems. Jonathan Zittrain uses the word “appliance” to illuminate comparisons
between our mediated hardware and other household goods, such as dishwashers and toasters. Users have options and control over common appliances; if the dishwasher breaks there are a variety of ways to fix it and owners do not need to buy a toaster that is the same brand as their microwave to make sure the kitchen works. Zittrain is focused on illuminating the more abstract differences between appliances and tethered appliances:

Yet tethered appliances are much more powerful than traditional appliances. Under the old regime, a toaster, once purchased, remains a toaster...A shift to smarter appliances, ones that can be updated by—and only by—their makers, is fundamentally changing the way in which we experience our technologies. Appliances become contingent: rented instead of owned, even if one pays up front for them, since they are subject to instantaneous revision.110

Tethered appliances are expensive, borrowed systems that change without the permission of the users because buying a tethered product is an <ownership> contract under which the Corporate Public can and will make changes without permission of the user. The Corporate Public makes decisions about what is and is not allowed for users to do to their devices. Tethered appliances are marketed as a way to protect the consumer and the Corporate Public. That knowledge is considered the “truth” and users are allowed to witness it.

Ted Strifhas argues tethered appliances tie users into long-term labor because “tethered appliances oblige you to enter into enduring relationships with corporate custodians, who make it their responsibility to manage the inner-workings of these devices.”111 Apple users do regularly fight against <ownership> through jailbreaking, a way of opening up the operating system of an Apple product to use other programs. As Mike Keller explains, “Through jailbreaking, or hacking a device to bypass DRM restrictions, you can run ‘unauthorized’ software and tweak the operating system. iPhone hackers coined jailbreaking in reference to breaking the iPhone out of Apple's iTunes ‘jail.’”112 The earliest jailbreaks were developed for the iPhone. Users wanted an iPhone but were locked into contracts with other service providers. Jailbreaking a phone allowed
a user to use the iPhone with any carrier. Apple tries to prevent jailbreaking through warranties, but clearly that does not work for a number of users who are brought together to collaborate and improve the technology for their needs. The restrictive power can be productive to people within the system. However, not all users are willing or knowledgeable about how to resist tethered systems. DRM code exists to control the actions of users. As the technology gets smaller and more portable, the issues of tethered appliances affect more of the public.

**Concluding Remarks**

The tensions within *authorship* and *ownership* are a common problem with the protection of content. *Authorship* reflects a need to let content exist and evolve through the actions of the public. *Ownership* is a desire to protect all things for as long as possible, because the public cannot be trusted. However, no matter how much DRM code is used to hermetically seal content into *ownership*, the public will continue to create new work based on creative content. Jailbreaking, Wikipedia, and remix culture prove that there is no perfect mousetrap to contain culture. Alex Kozinski reflects on the protective nature of copyright owners and how they are holding culture back:

> It’s your creation if you keep it secret. Once you release it to the rest of us, it enters our minds and becomes ours as well . . . I suspect that copyright holders would actually be better off in a system in which everyone was allowed to exploit the work. When set free to do so, people will find ways to extract value from intellectual properties that original authors, too fearful of sullying their creations, would never dream of.¹¹³

The problem at the center of *ownership* is that it limits creation through collaboration. *Authorship* and *ownership* are values of copyright; both are seeking to improve the condition of culture, but through different means.
Notes


4 Roth, The New Yorker, para. 2.


7 I will list Authorship and Ownership in alphabetical order in nearly all occasions.

8 U.S. Constitution, art. 1, sec. 1, cl, 8.

9 Mark Rose, Authors and Owners: The Inventors of Copyright, (Cambridge, MA: Harvard University, 1993), 4.


11 Mark Rose, Authors and Owners, 13.


20 Rose, vii.


28 Rose, *Authors and Owners*, 44.


37 *Copyright Law of the United States*.

38 *Copyright Law of the United States*, 201.


Foucault, *Language, Counter-Memory, Practice*, 123.


For example, people have stolen the plot lines of Shakespeare’s plays to tell a more contemporary story. Jane Smiley’s *A Thousand Acres* uses the setting of a twentieth century Iowa farm to play out the family drama of *King Lear*.


Girl Talk, “This is Remix,” *All Day*, 2010, Illegal Art.
53 “RUN DMC with Steven Tyler & Joe Perry, "Walk This Way," *Raising Hell*, 1986, Profile/Arista Records.


Edits are performed by a combination of editors and programmable bots that correct basic facts and grammar. This combination works together to insure the content of Wikipedia is as accurate as possible.


70 Andrew Famiglietti, Hackers, Cyborgs, And Wikipedians: The Political Economy and Cultural History of Wikipedia, (PhD diss, Bowling Green State University, 2011).


79 YouTube Comments and Mommy Blogs are the primary locations for the failure of civility.


82 ibid, para. 4.

83 Although there are over 12,000 words devoted to the television show *Buffy the Vampire Slayer*.


It is a short entry.


Burke, *Attitudes Toward History*, 226.


Shrink-Wrap contracts are legal agreements that a consumer agrees to simply by opening the package. End License User Agreements are contracts that a consumer must sign to use the product they are buying.


Apple Inc., *iPhone Developer Program License Agreement*, 5.


Burke, *Attitudes Toward History*, 226.

Alex Kozinski, “What’s So Fair about Fair Use?” *Journal of the Copyright Society of the USA* 46, (Summer 1999): 529.

101 UMG Recordings, Inc. v. MP3.com, 352.

102 A short and incomplete list of code languages: Java, C++, Assembly, and BASIC

103 The machine language time code is more colloquially referred to as binary code.


105 Bill Gates is the founder of Microsoft, John Carmack is a video game programmer who created the software engines for the *Doom* series, *Quake* and *Wolfenstein*, and Linus Torvalds is credited with the invention of the Linux kernel and founder of Linux.


109 Closed systems are computer programs where all of the code is proprietary and owned by a corporation.


113 Kozinski, *Journal of the Copyright Society of the USA*, 529.
CHAPTER THREE: THE MATERIAL, CRIMINAL AND ECONOMIC COMPLEXITIES OF <PIRACY> IN THE PUBLIC SPHERE.

The RIAA Witch Hunt.

The Recording Industry Association of America (RIAA) made the unprecedented decision in 2003 to sue music consumers. Four years after Napster popularized peer-to-peer downloading, the RIAA went on the offensive to fight theft with lawsuits. The RIAA found alleged pirates with a combination of tracking software attached to MP3 files in a variety of peer-to-peer clients. The campaign was aimed at catching tech-savvy college students and other young adults, the alleged perpetrators of most piracy. Jessica Reyman analyzes the shortsightedness of the RIAA campaign, stating, “The purported goal of these lawsuits, and particularly ones geared towards adolescents, teenagers, and college-aged file shares, was ‘education.’” The rhetorical justification for the RIAA actions asserted that suing users was a campaign about the dangers of piracy. The first subpoenas were sent to 261 users and by the end of the campaign in 2008, it was reported that the RIAA filed between 18,000-35,000 lawsuits. There were a number of cases where the effectiveness of the RIAA’s tactics was called into question, such as the prosecution of 12 year-old Brianna LaHara and 66 year-old Sarah Ward. An early problem in these cases was identifying the correct defendant. There were several examples where accounts were hacked. For example, Ward was sued for allegedly downloading Snoop Dogg tracks with KaZaA, a peer-to-peer client for Windows; the problem is that she owned a Mac. The Internet Protocol (IP) address had downloaded the music, but Ward did not commit the crime. Most people elected to settle their cases, but some, like Jammie Thomas, fought the charges. Thomas received a cease-and-desist letter in 2005 and when her case was finally settled in September 2012, she had to pay a penalty of $222,000. In the end, the RIAA
only caught a fraction of pirates and came nowhere near making back the millions of dollars it claimed it lost to downloading. But that was not the point, the RIAA wanted to create a culture of fear surrounding digital piracy.

There is no lenience for a first-time offender within copyright law; any error, no matter how small, can be prosecuted to the fullest extent of the law. The Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 established the legal damages for piracy; for statutory damages, the fine is up to $30,000 and up to $150,000 for willful infringements. For example, Thomas was convicted of statutory damages and her penalty was set at $9,250 for the twenty-four songs she pirated. These legal battles serve as a primary site within the public sphere where the value of copyright and piracy is evaluated. The questions in the contemporary legal cases are focused on how piracy harms copyright. It is important to note that most people, including pirates, agree that piracy is an illegal act. Piracy requires a person to knowingly experience a form of media without fulfilling the social contract of paying for the experience. Popular culture representations of the pirate paint a fraught picture. Captain Hook reigns as an evil figure with comic elements. The Dread Pirate Roberts is a rakish hero who uses myth to his advantage. The most contemporary form of a pirate is the anti-hero Captain Jack Sparrow is a man who chooses his lifestyle as a way to be free of the constraints of nineteenth century culture. The common identification between all of these figures and numerous others, both real and fictional, is that they are people who choose to live apart from the social order. What remains unasked is who is a pirate and what does piracy provide to the public?

Piracy is a loaded term full of moral judgment about a particular behavior. Piracy merits rhetorical analysis because piracy functions ideologically in the discourse surrounding copyright and as a result provides a way of examining how publics shape and contest discourse. What
makes <piracy> a unique ideograph is that it defines the actions of a group of people who exist outside the bounds of the public. As I established in the Introduction, the Digital Counterpublic has the highest stake in the copyright dialogue, but it is often lost among other publics because of its permeable boundaries and lack of formal leadership. Other publics privilege the language of the public sphere, including those that I have defined as the Legal, Legislative, and Corporate Publics. The Digital Counterpublic, meanwhile, privileges the language of the Internet, which at times mirrors the public sphere and at other times constitutes alternative discourses. The Digital Counterpublic performs a variety of activism including remixes, sampling, and peer production/editing. However, the external forces of the public sphere threaten to totalize these actions and reduce them to piracy. The result is that <piracy> is used by the Legal, Legislative, and Corporate Publics to dismiss the activism of the Digital Counterpublic. This chapter will focus on three issues of <piracy>: How the definition of <piracy> changes the public sphere, the lasting effects of the <piracy> and the significance of the activism of the Digital Counterpublic.

**Defining Piracy**

Finding a definition of piracy is a difficult task because there is no single, cohesive definition of the term. The problem is piracy is a term loaded with a moral judgment about property theft. *Black’s Law Dictionary* buries piracy in the fourth definition of the term: “the unauthorized and illegal reproduction or distribution of materials protected by copyright, patent, or trademark law.”\(^{12}\) The Legislative Public neglects a definition of piracy in many cases: there is no definition of piracy within the texts of the Digital Millennium Copyright Act (DMCA), the Stop Online Piracy Act (SOPA), or the Protect IP Act (PIPA).\(^{13}\) In this project, *I define piracy as an intentional theft of copyrighted work(s). A person who knowingly commits an act of piracy is a pirate.* This definition requires a significant inclusion and exclusion. The critical inclusion is
that a pirate is not defined by age, sex, or location. A person who pirates material only needs to have access and expertise to do so. This inclusion is significant because the identity of the pirate is skewed towards a masculine orientation as a result of popular culture. The exclusion recognizes there is a difference between a non-pirate and pirate. The law recognizes there is a difference between a statutory and the willful infringement; meaning there is a population of people who commit piracy without knowing it is piracy. Stephanie Lenz is the key example of someone who is not a pirate: She is a mother who took a video of her son dancing to Prince’s “Let’s Go Crazy.” She was served with a takedown notice for her thirty-second video and she spent three years fighting and, ultimately, winning her legal battle.14

Copyright law is written to prosecute all forms of infringement to the fullest extent of the law. Many people who violate copyright law do it without knowledge that they are committing a crime and/or their work is an example of fair use, like Lenz. There is no Ignorantia juris non excusat within copyright law, only a lesser penalty of statutory damage, which costs a mere $30,000 per violation. Piracy is an act of willful infringement under the law. Any person who identifies him or herself as a pirate intentionally risks $150,000 per violation. Copyright infringement is a significant crime and the penalties are there for a reason. However, the penalties are excessive for prosecuting average citizens. Most of the cases that the RIAA brought against consumers were settled for amounts between $3,000-5,000.15 Piracy stands out as an action against copyright infringement because it is willful. Pirates are taking a risk, at great personal toll, to illuminate the inconsistencies of copyright.

The Ideographs of the <Pirate>

A study from the Social Science Research Council showed that 70% of 18-29 year-olds pirate some form of media.16 Pirates are well aware that their actions are illegal, so why do they
continue? The late chairman of the Motion Picture Association of America (MPAA), Jack Valenti, gave a lecture at Stanford University where 90% of the students at the talk confessed to illegally downloading music. When pressed, one student argued that it was acceptable because everyone was doing it. Valenti concludes his argument with a convincing question that alludes to the diminished capacity of the pirate, “What kind of moral platform will sustain this young man in his later life?” He argues that pirates are not mature enough to be reflective about the consequences of their actions. However, the answer is more complex. As Reyman argues young adults and college students are cast in the vacillating roles of the naïve perpetrator or the unrelenting criminal. In her words, “These rhetorically constructed roles do more than inform students of the consequence of illegal filing sharing; they also work to shape students’ perceptions of ‘digital citizens,’ redefining their relationship to technology and to cultural production on the Internet.” Pirates thus exist in a world not of their own definition, but one which constitutes them and their actions as either to be dismissed as childish or to be discredited as criminal. The ideograph of <piracy> is focused on the theft of property for a purpose: <Piracy> is a resistant posture where participants work against the law by using copyrighted works in illegal forms, ranging from theft of media to creating new content with copyrighted content. <Piracy> as a tool of change is meant to work against the childish associations of the public.

Adrian Johns analyzes the evolution of <piracy> and its relationship to intellectual property and argues <piracy> is not a byproduct of copyright law. As he notes, “The very concept of intellectual property did not really exist until the mid-nineteenth century, by which point there had been over 150 years of denunciations of ‘piracy.’” <Piracy>, in action and philosophy, came before the creation of intellectual property law. The first intellectual property
law was the Statute of Anne in 1710, but acts of literary <piracy> existed before the law. The purpose of using a term such as <piracy> was to cast aspersions on the character of individuals who participated in the action. William Patry observes the rhetorical change, “Metaphors such as pirate are used for the very grown-up purpose of branding one side in a debate as evil, and the other side as good.”

The ideograph of the pirate departs from <piracy> because ideographs are constructed in a specific way to support an interpretation of people, actions, and events. The pirate is the fraught figure that the public both accepts and rejects, depending on its place in culture. Celeste Michelle Condit and John Louis Lucaties argue that, “Rhetors who employ ideographs in public discourse seek to achieve the assent of a particular audience and thus are constrained to use such terms in ways that are more or less consistent with the rhetorical culture.”

An ideograph must not depart from a shared cultural meaning. Michael Calvin McGee asserts that ideographs are meant to be descriptive of our social conditions. Therefore, a pirate is always offset from the norms of the public which allows a variety of narratives to attack the pirate. Pirate is strained as an ideograph because Corporate Public and the Digital Counterpublic define it differently. The Corporate Public treats the <pirate as a villain> and the Digital Counterpublic treats the <pirate as a hero>.

The Corporate Public and the <Pirate as a Villain>

*The <pirate as villain> is an ideological position that treats <piracy> as an action that is harmful to the public.* The Corporate Public reifies the <pirate as a villain> through synchronic structures to focus on the diminished capacity of participants. Only a person of diminished capacity seeks to damage anything. The focus on neoliberal conceptions of <ownership> within the Corporate Public privileges material property and causes tension with digital <ownership>. Reyman states, “The RIAA and the MPAA rely on this idea of a natural, absolute property right
of a copyright owner to support the concept of ‘theft’ that pervades their discourse.” The <pirate as villain> is a construct that allows the Corporate Public to be a victim. In this way <piracy> is a brilliant rhetorical tool for the Corporate Public: the <pirate as villain> allows the Corporate Public to act as a victim of property crime, and it functions as a scapegoat for all changes in media. To show how the <pirate as villain> has evolved, I will review of the rhetoric of Jack Valenti. His fiery rhetorical style was a guiding voice in shaping much of contemporary copyright law and branded the way the <pirate as villain> is viewed today.

The Corporate Public performs as the victim to the <pirate as villain>. The discourse surrounding the Supreme Court case Sony Corporation of America v. Universal City Studios, Incorporated provides important insight. Sony developed the Betamax player, a home video system with the ability to “time-shift,” or record live television, allowing viewers to watch at his or her convenience. Sony was only a hardware company at the time and media companies had a problem with the public having the ability to record television at leisure, so Sony was sued by Universal for secondary copyright infringement. In 1984, the Supreme Court sided with Sony, essentially legalizing home video recording. Justice John Paul Stephens wrote the majority opinion, noting, “[The] home videotape recorder was capable of substantial noninfringing uses; thus, manufacturers’ sale of such equipment to general public did not constitute contributory infringement of respondents’ copyrights.” Technology that gives the home viewer the ability to time-shift was classified as <fair use>. The result of Sony v. Universal welcomed a generation of recording technologies ranging from the multi-track cassette recorder, the re-writable CD-ROM, and digital video recorder (DVR). Valenti, who sided against Sony, was publicly frustrated with the case and made some inflammatory claims. In testimony to the House Judiciary Committee, he argued, “I say to you that the VCR is to the American film producer and the American public
as the Boston Strangler is to the woman home alone.\textsuperscript{26} Within this brief quotation, Valenti articulated the violent tendencies of the <pirate as villain>. Our contemporary memory of the pirate is closer to cartoon pirates, but real pirates are violent criminals. Valenti is linking the <pirates who rape and pillage> to the <pirates who record Dynasty to watch it later>. When laid out in-text the synecdoche seems absurd, but his argument is that the public is a victim against the overwhelming force of the <pirate as villain>.

Acting as the victim in against the <pirate as villain> is an interesting rhetorical choice. The Corporate Public has a great deal of power in the form of lobbyists, lawyers, and money to protect copyrighted content. The <pirate as villain> is the scapegoat for the public sphere when examining the problems with copyright. Kenneth Burke argues the scapegoat is needed to explain situations that are outside of the control of the rhetor. “The conditions are set for catharsis by the scapegoat including the ‘natural’ invitation to ‘project’ upon the enemy any troublesome traits of our own that we would negate.”\textsuperscript{27} The Corporate Public can claim it is the victim by creating a scapegoat of the <pirate as villain>. This explains why Valenti reinforces a status of victimhood, ranging from clearly violent metaphors to protective claims where he is serving as a messenger preventing doom.

The Digital Counterpublic and the <Pirate as Outlaw Hero>

*The <pirate as outlaw hero> is the ideological position that <piracy> is not the crime that harms the public and the policies enforced by the Legal, Legislative, and Corporate Publics are far more dangerous.* Understanding the effectiveness of the <pirate as outlaw hero> is part of understanding the distinction between public and private. In Habermas’s conception of the public sphere there is a distinct public and private. Public concerned the world at large and private happened in the home. This conception is rightly critiqued as myopic because it ignores how
private issues influence public decisions. Michael Warner argues that the public and private will always be linked together, but in fraught forms, “Public and private sometimes compete, sometimes complement each other, and sometimes are merely parts of a larger series of classifications that include, say, local, domestic, personal, political, economic, or intimate.”

Personal information, such as pregnancy and sexual orientation, reveals the complementary, yet problematic issues between public and private. Once the information is made known, it opens individuals into a mix of conversations concerning private aspects of public life. These conversations are both helpful and alienating on an individual level. When the same conversations play a role in forming policy concerning health conditions and sexual orientation, the discussion welcomes in a multitude of voices that are often much less helpful and far more alienating.

The Digital Counterpublic includes hackers, lawyers, students, musicians, scholars, and many others working to address the problems of copyright law. Public activism requires members of the Digital Counterpublic to participate in public sphere conversations such as court cases and Congressional hearings. Private activism requires members of the Digital Counterpublic to participate in hacking and piracy. The division between activism creates some conflict within the Digital Counterpublic. First, hacking and piracy get more attention from the media. A Congressional hearing where Chuck D is invited to speak about sampling and copyright is not as interesting as The Pirate Bay, a Swedish run file-sharing network that is used to obtain pirated content. Second, the members of the Digital Counterpublic who participate on the public level often have to defend the actions of the private levels. For example, Alex Ohanian, the co-founder of the social news site Reddit, is often invited to speak on about the significance of being a steward of the Internet. Ohanian is an excellent representative of the
Digital Counterpublic: he is smart, industrious, and understands the needs of the group. Reddit was a key site of discourse surrounding the SOPA/PIPA protests and the feature “I Am A” (AMA) is a stop for people looking to engaging with the Digital Counterpublic, including President Obama. However, Ohanian and his co-founders must address the racist and sexist underbelly of subreddits (a discussion space created by users). Reddit sanctions these controversial spaces as freedom of speech. Reddit general manager, Erick Martin, states, “Having to stomach occasional troll Reddit like picsofdreadkids or morally [questionable] Reddits like jailbait are part of the price of free speech on a site like this.”

The Digital Counterpublic has the ability to use the gaps between public and private for exploitive purposes. For example, the hacker collective, Anonymous, uses its knowledge to make private information public. To that end, Anonymous has exposed hypocrisy when dealing with institutions imposing policies that restrict the public, specifically with issues of surveillance and Internet censorship. Anonymous will expose private individuals who perform reprehensible acts, such as child pornographers and rapists. The Digital Counterpublic uses subversive action to make a point about the problems in the public sphere and, within the scope of copyright. Warner states, “a counterpublic, against the background of the public sphere, enables a horizon of opinion and exchange; its exchanges remain distinct from authority and can have a critical relation to power.” The Digital Counterpublic speaks truth to power for diverse locations. One of the problems with <piracy> as constructed by the public sphere, and how it is enacted by some within the Digital Counterpublic, is that <piracy> is inherently selfish. Watching a film or buying a CD without paying for it is illegal and requires punishment; this is the hard truth many within the Digital Counterpublic avoid. To resist the view that their work is illegal many in the Digital Counterpublic embrace the ideograph of the <pirate as hero> who treats the act of
piracy as a noble quest to save creative content. The Digital Counterpublic embraces Robin Hood as the mythic figure who is most fitting for the pirate as hero because Robin Hood saves Maid Marion (creative content) and steals from the rich (transnational media corporations) to give to the poor (the public sphere).

One way for the Digital Counterpublic to resist some of the more problematic issues of identifying with the pirate as hero is to reaffirm the purpose of piracy. Copyright is fixed on profit instead of the intended balance between profit and progress. The Digital Counterpublic uses piracy as a tool to shift the balance of copyright. Looking at the Digital Counterpublic requires an investigation of public and private means within the context of copyright law. The answer is simple: nothing in copyright is public. Even the public domain is not public, an issue proven by the results of Golan v. Holder, in which the Supreme Court upheld a ruling that allowed works already in the public domain to return to copyright. Jessica Litman laments that “the copyright model is based on a balance between the uses copyright owners are entitled to control and other uses they simply are not entitled to control.” Litman is pointing out that some uses of copyrighted materials are private and some are public. If I rip the pages out of a dozen books and rearrange them into a new, narrative that is a private reappropriation of copyright. The copyright owners may not like what I have done, but there is no way to stop my private use. If I take my work into a public forum and claim the reappropriation as my own, that is when copyright is violated.

The public sphere has a specific hierarchy that is built into numerous structures. The Legal Public provides the clearest example of how the hierarchy is played out: to be a lawyer an individual needs to get a specific education to be trained how to think. Over time some lawyers distinguish themselves to become judges, and each level of the judiciary has specific processes
that set themselves apart. There is no centralized structure for people within the Digital Counterpublic to ascend. The Digital Counterpublic is diffuse and allows members to work collectively or individually. This is common within organizations that are focused on social change. The actions of highly collective groups, such as the Electronic Frontier Foundation (EFF) and Creative Commons, replicate the hierarchies of the public sphere as activism within the system. Individualistic groups like Anonymous and many remix artists perform activism without any approval, often working against their own self-interest, and putting themselves at risk. Sitting between both these structures the Digital Counterpublic also defines an area between public and private, between individualistic and collective, between progress and profit. From this location, the Digital Counterpublic embodies the <pirate as hero> to illuminate the grey areas of copyright. The people in the Digital Counterpublic are working towards a greater purpose. This allows the Digital Counterpublic to have a united focus on copyright without a central structure.

There Can Be Only One: Conflict between <Pirate as Outlaw Hero> and <Pirate as Villain>

Although the <pirate as outlaw hero> seems like a desirable identity for the Digital Counterpublic, it is inherently flawed. As Mary E. Stuckey and Joshua R. Ritter state, “Ideographs work best when they are unnoticed—when their use seems so natural and so inevitable that the response is not so much persuasion as recognition, an identification that is persuasion.” The <pirate as hero> identity is built on accepting the <pirate as villain>. Any activism that uses <piracy> embraces the <pirate as villain> before enacting the action of <pirate as hero>. Christine Harold is highly critical of the <pirate as outlaw hero> model.

Too much of the rhetoric meant to oppose intellectual property perpetuates authorship as the domain of an individual auteur, and property as something defined by scarcity…unfortunately, this leaves activists and artists with little more than the subaltern identity of the pirate-who, although is free in some senses, most often survives by stealing bits and pieces of property from the kingdom while leaving the monarchy intact.
Harold recognizes how theft of property is used as activism, but <piracy> as a tool marginalizes the Digital Counterpublic. In truth, the <pirate as outlaw hero> does not solve the problems of copyright and continues to serve as the scapegoat for the Corporate Public. Anonymous provides a key example of how some of the most controversial and inflammatory activism of the Digital Counterpublic is heroically villainous. Anonymous uses a variety of modalities to generate action, maintain membership, and document their work. Anonymous has a mission and they do not shrink from their actions. They sign their work to explain exactly why they attacked Sony, major US banks, and the Federal Sentencing Commission. Anonymous wants to illuminate the by drawing the eyes of the world to the social space of the Internet.

The <pirate as outlaw hero> requires the activist to commit illegal acts and perform the role of the hero. Anonymous is an interesting organization because they are lauded and penalized for their activism. The actions surrounding the Steubenville, OH rape case is a key example. In August 2012, a teen girl went to a party and drank alcohol until she was unconscious. Subsequently, two players on the Steubenville High School football team raped her. The two teen boys and other friends documented the assault with their cell phones and shared the evidence with others through various forms of social media. In the days and months after the rape, the town of Steubenville rallied around the players to protect them from their rape victim. This included members of the community refusing to participate with the grand jury and suing a crime blogger who pursued the case. Starting in December 2012, members of Anonymous gathered data about various members of the Steubenville High School football team, their coaches, the principle, and the sheriff. The data was gathered through hacking the email, Facebook, Twitter, and Instagram accounts of various accomplices. Anonymous used the tactics of the <pirate as outlaw hero> to illuminate the crimes of the two primary suspects Ma’lik
Richmond and Trent Mays. The problems in the case were significant, but the question remains if Anonymous helped the victim or prevented a fair trial.\(^\text{43}\) The evidence Anonymous provided did not necessarily aid in the conviction of Richmond and Mays; but it changed the story from a small town tragedy to a national headline.

The results of Anonymous’ <pirate as outlaw hero> activism were mixed. Richmond and Mays were tried as minors and found guilty. A Steubenville graduate, Michael Nodianos, was publicly dismissed from Ohio State University as a result of his participation.\(^\text{44}\) Members of Anonymous also committed crimes to elevate the profile of the problems in Steubenville. Deric Lostutter, known as KYAnonymous, was indicted under the Computer Fraud and Abuse Act for hacking the Steubenville High School Website.\(^\text{45}\) The ongoing prosecution of Lostutter articulates the tension with <pirate as villain> and <pirate as outlaw hero>. Lostutter could face up to ten years in prison for his alleged hacking; Richmond and Mays each received one year of juvenile detention, Mays was also charged with child pornography for disseminating pictures of the rape. The rapists will serve a minimum of one year in juvenile detention and the hacker who elevated the profile of the story may serve ten years in prison. The disparity in these prosecutions illuminates a number of issues with contemporary rape culture by showing the disparate values between computer crime and sexual assault. Part of this disparity is reinforced because of the difference between being tried as juvenile offender and an adult. Anonymous is a unique case because they commit crimes for the public good. However, no matter how just the cause, the <pirate as hero> is still a villain and will be treated like a villain. Lostutter embodies the <pirate as hero> because he tried to help right a wrong; in performing that action he is also the <pirate as villain>. Anonymous works to expose hypocrisy and sex criminals; the average <pirate as outlaw hero> downloads *Game of Thrones* so he or she does not have to pay for HBO.\(^\text{46}\) Most <piracy>
is theft for the sake of theft, which allows the Corporate Public to continue to define the
<piracy> for the public; the Digital Counterpublic reifies the view.

**The Lasting Effects of the Ideograph**

No matter if the pirate is a villain, an outlaw hero, or anything else, the term continues to
provide a moral judgment on the discourse surrounding copyright. Copyright law protects the
output of creative people as a reward for innovation. There are varieties of ways for individuals
to make a profit and creative work is unique because it is ephemeral. Farmers plow their land and
care for their livestock; later they will sell the end product of their labor for a profit. Copyright
provides a similar means to profit; an author spends several months or years’ writing a book and
it is sold for a profit. Copyright also protects an individual’s ability to profit. Farmers protect
their means to a profit with barbed wire and careful management. But in an emergency, farmers
have law enforcement and governmental assistance to protect their property from damage.
Copyright law serves the same purpose because it is a form of property law. Further, it ties
copyright to the philosophies of John Locke and the Labor Theory of Property. Locke argued
that people were given the world and it is up to people to make the world useful to them. He
writes, “Though the earth, and all inferior creatures, be common to all men, yet every man has a
property in his own person: this nobody has any right to but himself. The labour of his body, and
the work of his hands, we may say are properly his.” Creative work comes from the same labor
of body and hands, so the loss of protection is damaging to the creator. The focus on damages
reinforces the victim status of the Corporate Public in the face of <pirates>. The MPAA cites a
study from the Institute for Policy Innovation (IPI) that argues $58 billion is lost annually as a
result of <piracy>. The accuracy of this number is highly debatable, but the MPAA uses this
study to validate their victim status. The Corporate Public loses the gross domestic product of
Luxembourg every year and it refuses or cannot do anything to stop it. I will explain three categories of damage of piracy: material loss, criminal loss, and economic loss.

Material Loss

Piracy is focused on a material gain for the pirates and loss for the Corporate Public. Understanding the push and pull within the material function of piracy is examining the connection to art and how various media change the experience. Walter Benjamin provides the foundational analysis of mechanical reproduction and artistic expression. Mechanical reproduction is a method that produces copies of art. Benjamin examines how mechanical reproduction changes the nature of art and how people interact with that change. He argues that mechanical reproduction is a massive public good. The final product is easy to replicate and provides access to art for a wider audience. Benjamin states:

Mechanical reproduction of art changes the reaction of the masses toward art. The reactionary attitude toward a Picasso painting changes into the progressive reaction toward a Chaplin movie. The progressive reaction is characterized by the direct, intimate fusion of visual and emotional enjoyment with the orientation of the expert. Such fusion is of great social significance. The greater the decrease in the social significance of an art form, the sharper the distinction between criticism and enjoyment by the public.

In short, the freedom of access to artistic forms benefits the public. Millions of people will never see the Sistine Chapel, but access to pictures is invaluable. Access to creative work is the opportunity mechanical reproduction provides to the public.

There is a period where a specific form of mechanical reproduction is embraced as the definitive way to experience art. The film experience is a material event requiring attendance to a theater. At the 2006 Academy Awards, Sid Ganis, the President of the Academy of Motion Picture Arts and Sciences articulated this point.

I bet you none of the artists nominated tonight have ever finished a shot in a movie, stood back and said ‘That's going to look great on DVD!’ Because there is nothing like the experience of watching a movie in a darkened theatre, looking at images on an eye
enveloping screen, sound coming at you from all directions and sharing the experience with total strangers who have been brought together by the story they are seeing.  

But what makes this the ideal? The history of film is only a little more than one hundred years old and designed to replicate attending live theater. There is a tension between maintaining the ideal of an experience versus a new experience. There is a similar argument for vinyl records as the ultimate way to listen to music. Michele Catalano focuses on the visceral qualities of vinyl:

    It’s about my sensory relationship with albums. The way a record feels in my hands, the symmetry and pattern of the grooves, even the imperfections—the scratches and skips—are part of what makes vinyl matter so much to me and what makes each individual album unique to its owner.  

Vinyl is privileged because of how the music is tied to unique experiences for each listener.

Benjamin calls this phenomenon the cult of the aura, which is a call back to a time when art held a central role in religious devotion:

    We know that the earliest art works originated in the service of a ritual – first the magical, then the religious kind. It is significant that the existence of the work of art with reference to its aura is never entirely separated from its ritual function.  

The question presented by the cult of the aura is what is being worshipped, the art or the ritual? Privileging the ritual is dangerous because the population cares more for the ritual than the art. When a specific material experience, like vinyl records, is deemed the ultimate form art, it returns to the cult of the aura. The conversation stops being about art and aura and is replaced with a cultural nostalgia for a material experience. In truth there is no “correct” way to experience art, only a bias in how people believe the aura of a given medium should be experienced.

    Mechanical reproduction has served as a benefit and bane to content creators and owners. The benefit is an expanded availability of people to purchase content, often at more affordable prices. The bane is the inability for the content creators and owners to control the work after purchase. Someone can borrow a book or a group of people can watch a movie; all of these
people experience a copyrighted work without paying for permission. Digital media has only made this problem worse. Media that are digitally recorded and produced do not suffer from a loss of quality. Every MP3, CD, or DVD sounds the same and the way the artists intended. One of the issues related to consuming pirated material is the loss of quality. Pirated movies are often clandestinely filmed in an active movie theater, so videos include noise from the other theater patrons, the view of the screen is subject to placement of the person filming, and any audio issues of the theater are exacerbated by the microphone of the recorder. These issues are not unique to film; the loss of quality was notable in the popularity of cassette dubbing. However, the loss of quality is acceptable for the gain in content. The loss of quality in piracy is a sticking point for the MPAA and the RIAA because the quality of the art is part of the experience. Part of the price of admission to any form of media is paying for high production quality that cannot be replicated by home viewing; this, in part, explains the rise of the 3-D viewing experience. Films such as Avatar and the Life of Pi are notable because they reinforce a film experience that can only occur in a theater.

This search for authenticity in an experience reveals the tension within material damage and piracy. Protection from the theft of property is a primary feature of property law and copyright is a property law. However, an illegal download is not the same as stealing the same content from a store. When creative content is stolen from a store there are fewer available for sale. With digital content, legal or otherwise, there is no physical loss of items. A million downloads can come from a single file, whether that file is on iTunes or the Pirate Bay. Lessig links the arguments between the gain of material experiences and the physical loss of material:

The difference is, of course, that when you take a book from Barnes & Noble, it has one less book to sell. By contrast, when you take an MP3 from a computer network, there is not one less CD that can be sold. The physics of piracy of the intangible are different from the physics of piracy of the tangible.
The physical loss is different and penalties are different. Stealing a CD or DVD from a store is a $25 loss for the store. An illegal download does not change the amount of CDs or DVDs in circulation, but the damage is worth thousands of dollars. In short, the content is identical but the punishment is vastly different.

Criminal Damage

The criminal loss of <piracy> is made of a unique composition of violent imagery and falsehoods that are often portrayed, literally, in grainy footage. The best example is an early anti-piracy public service announcement called “You Wouldn’t Steal a Car.” The ad compares pirates to deadbeats and criminals with nothing to contribute to the public. The focus of anti-piracy ads is that good citizens do not violate copyright law; they pay for media, while pirates are ruining the various media experiences for the public. The ad features several nameless male assailants acting out a series of property crimes ranging from stealing a car to a DVD. Each of these actions is framed by preceding text informing the audience that “You Wouldn’t Steal a Handbag” or “You Wouldn’t Steal a Television.” This is framed around a faceless young woman who, we are lead to assume, is illegally downloading a movie. The text surrounding her actions focuses on how copyrighted materials have an intangible quality, but are still held to the same principles of theft: “Downloading pirated films is stealing, stealing is against the law.” The ad ends with the young woman cancelling her download and picking up her backpack to leave. The following text concludes the video, “PIRACY: IT’S A CRIME.” The ad links <piracy> and property crime and focuses on the criminal aspects of <piracy> as a deterrent.

With shaky camera work and a pulsing backbeat, this ad continues the figurative exploitation of the criminal and physical damage caused by <pirates>. First, the ad is included in many DVDs, so the ad is locked into the home viewing experience. Second, the ad is parodied in
several media contexts. The British Television Series the *IT Crowd* has a mock ad that starts in the same way, claiming that the viewer would not steal a handbag or a car. The video takes an odd twist with the murder of a police officer and some inappropriate things that happen with his stolen helmet. The video ends with a young woman downloading a movie at her computer, but an FBI agent has a handgun and silencer aimed at her head. In the final shot, the woman is slumped over her keyboard as it fills with blood. A second example is from the animated series, *The Boondocks*, where the character Granddad sneaks into a movie with his grandsons and the neighbor girl, Jazmine. The cartoon version of the ad shares the same blasting soundtrack and jumpy titles, but the violence is highly escalated, featuring a Caucasian man beating an elderly woman in a darkened alley. The text narrating the ad follows the action of the video, “Stealing movies is a felony, it’s just like robbing the elderly, or murder.” This ad serves to traumatize Jazmine who is burdened with immense guilt for sneaking into the movie. This ad also serves an intertextual purpose, because the film the cast has snuck into see is *Soul Plane 2: The Blackjacking*. Rampant <piracy> of the film *Soul Plane* is blamed for the film’s poor box office performance. This claim crystalizes the issue of criminal damage from <piracy>; *Soul Plane* was poorly received due to <piracy>, not because it was a bad movie that was insulting to African-Americans.

The key connection in these advertisements, whether or not they are developed in jest, is the focus on realistic violence. The violence in these ads shares the same verisimilitude as a prime time television, which makes it palatable for the public to accept. Further, the connection between violence and <piracy> provides a path for the public to understand what motivates a person to a range of violent acts. What makes this so effective is that these ads are usually included before movies and DVDs. This placement causes a redundancy in anti-piracy content:
These ads address the people who pay to view the content, non-pirating public. This reinforces the divide between the public and the <piracy>, to insure that the Digital Counterpublic is left out of the discourse. The connection between <piracy> and theft is not enough to insure public identification over time. The need to make the level of violence meet the economic costs requires a darker and more violent link. Not long after 9/11, the violent focus in <piracy> shifted to include a connection to terrorism.

The link between <piracy> and terrorism is tenuous at best, but it demonizes <piracy>. The connection follows the logic of a syllogism:

Organized crime profits from piracy
Organized crime supports terrorism
Therefore, piracy supports terrorism.

Marybeth Peters, the Register of Copyrights, defines the scope of how organized crime utilizes <piracy> and the connection to terrorism.

Much of the foreign piracy about which we are speaking today is done by for-profit, criminal syndicates. Factories throughout China, Southeast Asia, Russia, and elsewhere are churning out millions of copies of copyrighted works, sometimes before they are even released by the right holders. These operations are almost certainly involved in other criminal activities. Several industry reports in recent years suggest that dueling pirate operations have carried out mob-style "hits" against their criminal competitors. And, although the information is sketchy at best, there have been a series of rumored ties between pirating operations and terrorist organizations.61

Peters ties all pirates together through a combination of technology and violence. She tries to differentiate between foreign piracy (the for-profit gang based enterprise) and domestic piracy (individual peer-to-peer downloaders), yet the rhetorical division does not hold up under scrutiny. For example, most peer-to-peer sites base their servers in countries with lax copyright enforcement, like Sweden, Hong Kong, or New Zealand. Although most “domestic” pirates are not carrying out hit on other pirates, the allegation that <pirates> are violent criminals or are
associated with violent criminals strengthens the <pirate as villain>. The tie between <piracy> and terrorism is only a rhetorical link, but a lasting association that continues to damage the Digital Counterpublic.

In 2003 the Judiciary Committee for the House of Representatives held a hearing about the links between piracy, organized crime, and terrorism. The hearing was notable due to the focus on terrorism, but most speakers either avoided the topic or distanced themselves from making specific claims linking terrorism and <piracy>. Film producer Joan P. Boresten Vidov addressed the committee over concerns about <piracy> in Russian film markets. However, she made it clear that she was not addressing issues of terrorism. Boresten Vidov states, “I have a number of issues to discuss, but here at the outset let me make clear that my comments do not purport to make any linkage between piracy and organized crime and terrorism.”

Gary R. Johnson made a similar claim concerning his research organization and the Russian Federation. The only person who made a claim uniting <piracy> and terrorism was Deputy Assistant Attorney General John G. Malcolm, who concludes his testimony on the complicated issues the Department of Justice was working with in respect to organized crime and <piracy>,

I want to close by briefly discussing terrorism. Earlier I noted that organized crime syndicates are frequently engaged in many types of illicit enterprises, including supporting terrorist activities. On this point, I want to be crystal clear. Stopping terrorism is the single highest priority of the Department of Justice. We are constantly examining possible links between traditional crimes and terrorism, and we will continue to do so.

Malcolm’s claim was that money from organized crime goes to support terrorism, and some of that money comes from <piracy>. However that does not mean terrorists are committing <piracy>. This is the only statement in 156 pages of Congressional testimony that comes close to reifying the title of the hearing.

A 2009 study by the Rand Corporation, and funded by the Motion Picture Industry, expands on the connections between organized crime, terrorism, and <piracy>. The conclusion
of these findings prove that various organized crime groups are using <piracy> as a way to generate profit, but they cannot prove there is a clear claim that terrorist organizations are using the same methods. However, the absence of firm evidence does not prove there is no connection. The Rand Corporation report makes the tenuousness of its link clear early in the report:

> It presents detailed case studies from around the globe in one area of counterfeiting, film piracy, to illustrate the broader problem of criminal—and perhaps terrorist—groups finding a new and not-much-discussed way of funding their nefarious activities. Within the testimony of several experts establishes a relatively clear history of organized crime.66

The link between terrorism and <piracy> is weak, but it serves a rhetorical purpose by adding to the discourse surrounding the war on terror. The action and inaction of cultures worldwide was evaluated under the polarizing doctrine of President George W. Bush’s declaration, “You’re either with us or you are against us in the fight against terror.”67 Supporters of the United States were lauded without reflection. The public reaction to 9/11 showed a culture in shock and the xenophobic behavior of the time was a coping mechanism. Paul Achter discusses the struggles of language and labeling immediately after the attacks,

> While there are ethical limits to rhetoric that turns any humans, even criminals, into animals, contravening cultural pressures for politically correct language made it arguably more difficult to condemn and understand the actions of the extremists who perpetrated the acts of terrorism on 9/11.68

There was no language in a post-9/11 world to respectfully disagree. The only language available was charged with frustration, sorrow, and hate. Although the first Judiciary Committee hearing about terrorism and <piracy> was not held until 2003, this polarizing rhetoric still had the power to cast aspersions on the Digital Counterpublic.

The significance of terrorism and terrorists in a post 9/11 world cannot be overstated. Linking <piracy> to terrorism can shift the ideograph from asocial twelve year-olds to foreboding terrorists. This link between <piracy> and terrorism could not happen organically;
instead the House Judiciary Committee and the Office of Copyright forced the link. The tenuous nature of the link between <piracy> and terrorists does not matter, because the in a post 9/11 world a link was all that was necessary. Dana Cloud argues a similar point when she looks at how the people in Afghanistan were framed in pictures and news reports after 9/11.

In the naturalization of what are necessarily partial rhetorical fictions, an image of an Afghan man with weapons, for example, reduces the man to the image of the terrorist when he, his life, and his reasons for taking up arms are probably more complex than the snapshot. Metonymically, the connotations of terrorism attach to Afghan men in general.\textsuperscript{69}

Her claim is that photography of Afghans were used to label an entire country as terrorist. Within Cloud’s argument, there is no room for innocents in a country run by terrorists. Every person is guilty of crimes against America for being born in Afghanistan and, later, Iraq. <Piracy> is connected to terrorism because the US government said that <piracy> is connected to terrorism. The complexity of the system no longer matters.

Economic Loss

In May 2012, the RIAA claimed the shuttered peer-to-peer client, LimeWire, owed the organization $72 trillion. RIAA’s claim, was absurd because all of the economies of Earth are estimated to be worth only $60 trillion.\textsuperscript{70} The $72 trillion was an incorrect citation from the summary decision of \textit{Arista Records v. Lime Group}, where Judge Kimba M. Wood argued the damage claim from the RIAA was unrealistic. The RIAA argued that at least 11,000 songs were illegally shared and downloaded through LimeWire hundreds, possibly thousands, of times. Wood states, “If Plaintiffs were able to pursue a statutory damage theory predicated on the number of direct infringers per work, Defendants’ damage could reach into the trillions.”\textsuperscript{71} The RIAA seemed to take Wood’s statement seriously and attempted to claim the extreme number imaginable. Wood’s ruling stated that LimeWire owed damages based only on a single violation per work, resulting in a settlement for $105 million. The \textit{Arista Records v. Lime Group} case
points out one of the problems with critiquing the economic damage of <piracy>: the numbers do not add up. Rob Reid, former chairperson of Rhapsody Digital Music, analyzes the MPAA’s claim that $58 billion lost annually to <piracy> by comparing it to the material effect of crop loss. “This is the equivalent to the entire American corn crop failing along with all of our fruit crops, as well as wheat, tobacco, rice, [and] sorghum.” This statement is an attempt to contextualize the absurdity of the $58 billion allegedly lost to <piracy>. The issue at hand it is the numbers are difficult to understand and quantify effectively.

There are two problems with tracking the economic damage of <piracy>. The first problem returns to the struggle with material loss. If digital content does not have a corporeal form and exists simultaneously as one copy and a million copies, then the problems with economic damages expand exponentially. This problem is highlighted in the Arista Records v. Lime Group case. The second problem for tracking economic damage deals with the expanse of the media market. Looking at one industry, in this case film, tracking profit and loss get complicated. In 2012, the domestic gross of the United States film industry was $10,523,233,015, a four hundred million dollar increase since 2010, and a one billion dollar increase since 2006. However, these numbers only reflect the domestic gross; the amount of money the films made internationally is not available, neither is home video/rental sales, or cross merchandising. Box office revenues are made public, but there is no reason for a film company to make its total film revenue records public because they are private corporations. The number that the public is rarely privy to is how much money the film cost to make. These numbers are available with some distance from the event. The only thing the buying public knows for sure about the cost of the film is the ticket price at the theater.
Tracking the money gets more problematic when looking at other industries like music. Despite the RIAA’s series of lawsuits, the industry still struggles with illegal downloading. A study from the Cooperative Association for Internet Data Analysis (CAIDA) found no change in peer-to-peer traffic from 2002-2004, proving that the RIAA lawsuits did little to quell piracy.\(^7\) The problem is the music industry is missing data. First, the music industry is in the middle of a paradigm shift in how to calculate music sales. The system to divine what music is popular and profitable is difficult to track between hard copy, digital, and streaming sales.\(^7\) Second, many musicians have avoided the major record labels in the last decade and have chosen to forge their own path. With the effectiveness of digital recording, many musicians can make music without buying studio time and can avoid major record labels by selling through their own websites, iTunes, and Amazon.\(^6\) None of this is calculated by the industry and none of needs to be; it proves how tracking the economic damage of pirates is difficult.

The issue of job loss provides a more persuasive argument for economic damage, especially in the economic downturn. The IPI claims over 373,375 jobs were lost to pirates across the Corporate Public.\(^7\) The need to protect jobs is addressed in two PSAs about piracy. The first, called “How to Steal an American Job,” is an informative video on the actions of the agency of Immigration and Customs Enforcement (ICE) which carries out the prosecution of a number of intellectual property crimes.\(^7\) The second ad campaign is called “Piracy Doesn’t Work in NYC,” which is focused on the media industry within New York City.\(^9\) Both ads focus on different aspects of job loss. The ICE video makes a causal link between International piracy and job loss. The “Piracy Doesn’t Work in NYC” campaign is focused on job loss within creative productions in New York City which employs 21% of workers.\(^8\)
The ICE was created in 2003 by combining the enforcement powers of the US Customs Service and Immigration. The mission of the organization is vast, ranging from prosecuting smuggling, money laundering, trade violations, child pornography, human trafficking, immigration violations, and intellectual property. The ad was produced as part of a series of YouTube videos that were meant to bring awareness to the various programs and successes of the ICE. The video is filmed in an ICE storage warehouse where seized counterfeit goods and other violating material is kept. Unlike other PSAs that focus on the issues of copyright or <piracy>, this video takes a broader approach by examining all intellectual property violations that the ICE prosecutes. ICE director John Morton guides the five-minute video. The video starts out with a series of stock photos of factories and workers, while Morton narrates:

Here’s how to steal an American job… Take an American product, an American innovation, and copy it. Shoes, bags, jerseys, electronics, pills, DVD's – just knock 'em off on the cheap. Set up a fake website. Pretend you're selling high-priced goods. Take your product to the port, put it on a ship to America… Don't worry about the workers at the American companies you're underselling. Why should you care if they ever find another other job in today's tough economy?81

The video offers Intellectual Property Rights (IPR) enforcement as a solution to a loss of American jobs. The ICE is in charge of IPR enforcement, which requires a crackdown on imports/exports, websites that distribute illegal content, and raids on alleged distributors.

This video makes some grand claims about what is and is not intellectual property theft. Morton uses knock-off handbags as his first example. However, replicating designer fashion is not a violation of intellectual property law. Clothing is an example of a useful article, “An object that has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information”82. There is no way to copyright a pair of pants or the construction of a jacket. The only intellectual property protection provided to fashion is the trademark protection of their logo. Fashion designers recognized a loophole and used it to build a layer of copy
protection: by using their logo as a pattern for purses, shoes, and other goods. This means that ICE is enforcing trademark violations for mistakes in the patterns of fake designer handbags.

Second, Morton briefly holds up an adapter, a computer chip that can be installed in video game consoles or computers. He argues, “[An adapter] allows you to hack into video games and steal the game for free. That's illegal, that's IP theft.” But adapters are not illegal in the United States because they perform a number of non-infringing functions. The point of their inclusion in the video is to provide relatable examples of the actions of ICE. The intention of the video is to show how ICE works to protect American jobs and trumpets their success at keeping international thieves at bay. Morton declares in the video, “But I'm proud to say that the IPR Center and all of its partners have done phenomenal work this year. And every time they make a bust, every time they make an arrest, an American job is saved.” However, unlike the detailed lists of indictments and arrests, no evidence is provided to support the claim that jobs are saved by the actions of ICE.

The ads prepared by “Piracy Doesn’t Work in NYC” are all versions of the same scenario. Comedian Tom Papa acts as a carnival barker declaring that he is giving away free movies. A young woman browses the movies and is prepared to take a few, before she is told there is a catch: taking the movies means a woman holding a boom microphone will lose her job. The shortest version of the video ends with the woman contemplating whether or not to take the videos. The longer version, her decision to not take the movies is made clear, but there is a second character. A man in a business suit peruses the table and balks at the idea that if he takes one of these pirated movies, that boom mic operator will lose her job. The man argues, “I don’t know her…You are making this so literal…” Papa attacks the man’s character over his lack of empathy: “Why, because you have no soul…You’re what’s wrong with everything.”
The man in the suit is the bad guy because he is contributing nothing to society. He is willing to steal movies for his own pleasure rather than worry about the greater need of preserving the job of a fellow human being. The woman weighs the need to watch pirated content against the needs of some else. She is a good person and a respected member of the public sphere.

What makes this argument so effective is the relationship between job loss and the economic downturn. However, linking the job loss to <piracy> is equally as difficult as tracking the economic loss. The best example requires returning to the number of 373,375 jobs lost across the Corporate Public to <pirates>. For the number from IPI to be correct there needs to be negative employment in the Corporate Public since the rise of Napster. However, according to the Bureau of Labor and Statistics, only 351,000 people worked in both the music and film industry in 1998. The most recent reports from the Bureau of Labor Statistics state the music industry grew to 269,400 and the film industry grew to 189,000. These numbers alone compensate for the alleged job loss. Howard Gantman, the spokesperson for the MPAA, told the New York Times these numbers are representative of loss of jobs surrounding the Corporate Public, like the floral industry, transportation, and catering. This answer opens a confusing argument because now the definition of “job” is expanded to more than a person’s career, but includes individual acts of a job (making floral bouquets and providing food). The difficulty is in identifying who or what is causing damage to the Corporate Public.

The Corporate Public has attempted to illuminate a causal relationship between <pirates> and damage. However, the actual damage caused by <pirates> is a shifting target because of the issues within the material, criminal and economic damage is uncertain. The major truth is that <piracy> has an effect on the Corporate Public, but these effects are debatable. Blaming all of the problems of Corporate Public on <pirates> is far easier than accounting for a changing
culture. However, the numbers are uncertain for <piracy> too. There are no hard numbers of how many <pirates> exist and how much illegal media is available for download. There are surveys of young adults that are meant illuminate the problems with <piracy>, but the pirates go beyond teens and college students. The teens that made Napster popular are now in their thirties and have aged out of surveys that examine <piracy> in young adults. The problem of identifying the culprits is as difficult as identifying how much damage is caused by them. The Digital Counterpublic proves that it is more complicated than who is and who is not a pirate. The discussion of copyright and requires a diverse effort across many platforms to change the system. The activism of the Digital Counterpublic proves that there is a multitude of solutions without changing the law.

**The Activism of the Digital Counterpublic**

The Digital Counterpublic is more productive than <piracy>, under any definition, permits. The problem is the activism of the Digital Counterpublic does not have a strong rhetorical presence. For example, much of the activism of the Digital Counterpublic is part of the “free culture movement” which looks to change the state of copyright in America. Lessig was the champion of the movement, by starting chapters at schools where he worked. The free culture movement does not have a higher profile for a myriad of reasons. One reason is that their leader, Lessig, has moved on from battling copyright laws to fighting intuitional corruption. A misreading of the name “free culture” is also a problem because the name lends itself to the more negative aspects of <piracy>. Lessig explains the choice of the name:

> We come from a tradition of “free culture”—not “free” as in “free beer” (to borrow a phrase from the founder of the free software movement), but “free” as in “free speech,” “free markets,” “free trade,” “free enterprise,” “free will,” and “free elections.”92

There is no doubt that the name free culture is accurate to the intentions of the movement. However, part of the free culture movement is focused on addressing why <piracy> is an
acceptable practice for change. This is where the name “free culture” fails, because it requires too much in-depth analysis to understand the meaning of the movement. It is easier to associate free culture-as in “free beer”-because of how the organization uses piracy as a tool. The Digital Counterpublic has a variety of activists and activities that are more notable and helpful than piracy. Focusing on the success of the Digital Counterpublic will go a long way to elevating the rhetorical weight of the public. I will examine open source software and Creative Commons as areas of activism that were inspired by the need to create free of the restrictions of copyright.

Open Source Software

Open source is a software platform where the code is freely available for users and developers within a collaborative culture. Linux is the most well-known open source platform. Finnish software engineer Linus Torvald invented Linux by accident; he was working on a UNIX program when he realized he had built an operating system kernel. The kernel is the “brain” that makes all of the parts of the software and hardware work together. Linux was released in 1991 and it was a revolution for people programming at the time. The only thing like it was UNIX, but a programmer needed to work for a lab or specific university to use it. E. Gabriella Coleman establishes the scene and desire for the average programmer at the time.

Linux was released as a public good and was also produced in public fashion through a volunteer association. Most significantly, hackers were able to run Linux on mass-produced personal computers at home, spending more quality one-on-one time than before with an architecture that even now, still demands an active and dedicated partner.

Linux welcomed the chaos of diffuse voices and the ability for those voices to build something together.
Linux software developer Eric Raymond wrote about what made Linux different in a metaphor he called the *Cathedral and the Bazaar*. Both the cathedral and bazaar are philosophies of how to eliminate problems or “bugs” from an operating system. Cathedrals existed for centuries as situated objects of perfection; they are meticulous works of complexity, beauty, and reverence. Raymond argues that software programmers working for closed systems, such as Apple and Windows, are cathedral builders. In his words, “In the cathedral-builder view of programming, bugs and development problems are tricky, insidious, deep phenomena. It takes months of scrutiny by a dedicated few to develop confidence that you've winkled them all out.” Cathedral builders are working to manufacture systems that will work for the masses, but built by the few. Linux is a different type of architecture--a bazaar--a busy place of constant change. From the outside the bazaar looks like chaos, but working within it the chaos takes on a pattern that allows people to get what they need out of the system and learn how to fix the issues that do not work. There are hundreds of people developing Linux software, all with different levels of skill and abilities. They are building a software platform that will work for them first. Building a system for the masses creates a different product. Linux demonstrates there are multiple ways to build an operating system and working with volunteers changes the way people are willing to complete a project.

The classical public sphere embraced the metaphor of the coffee house as the location for change and growth. There is no single location for these conversations within the Digital Counterpublic. The conversations within the Digital Counterpublic take place in asynchronous, online forms. This distance between contacts allows for the different modalities of attachment and detachment. To understand how this works in the Digital Counterpublic I will look at Linus’s Law and Anonymous. Raymond’s analysis establishes nineteen rules that recognize the
advantages of Linux development; the rule that stands out is the eighth rule, “Given a large enough beta-tester and co-developer base, almost every problem will be characterized quickly and the fix to someone. Or, less formally, ‘Given enough eyeballs, all bugs are shallow.’ I dub this ‘Linus’s Law.’”96 This statement shows the development of the attachment and detachment within the Linux community. All developers are working to build Linux and the only way to do that is to engage with the text on its terms. Often a developer cannot see bugs in his or her program because of their own attachment to the work. But working in the Linux architecture welcomes others to provide their input and improve the whole.

Creative Commons

Lessig is the most visible face of copyright activism by using counterpublic logic to work in the public sphere. Lessig is unlike other Digital Counterpublic individuals (Richard Stallman, Linus Torvald, and Gregg Gillis) or groups (Anonymous) who can never adequately appeal for attention in the public sphere. He is educated and trained within the public sphere as a professor of constitutional law with a unique understanding of how to work his counterpublic sensibilities into the public sphere. Lessig is the unofficial spokesperson for the Digital Counterpublic. Lessig took on the mantel of copyright activism because he was representing the community of content creators who used the media as their medium of creation. Lessig pleaded his case to the Supreme Court. Now he is trying to change lobbying practices in Congress, and all of this was started through activism in the Digital Counterpublic.97 He is working to make realistic policy change to challenge the assumptions of government. The problem with lobbying and other extra-legal change is they move at a glacial pace. Lessig saw that this was a problem, because content creators were being sued and served with takedown notices for clear examples of <fair use>. The solution was to present content creators with a choice for copyright control, until a more useful
copyright existed. Creative Commons is a copyright registry system for content creators to choose the rights that they want to protect. Lessig explains the creation and purpose of Creative Commons,

Its aim is to build a layer of reasonable copyright on top of the extremes that now reign. It does this by making it easy for people to build upon other people’s work, by making it simple for creators to express the freedom for others to take and build upon their work. Simple tags, tied to human-readable descriptions, tied to bulletproof licenses, make this possible.98

Creative Commons is an informed choice about copyright. The process to place any creative work in creative commons takes less than five minutes. A content creator answers three questions and Creative Commons provides the license which protects a creator’s work, but provides allowances for collaboration and other forms of sharing.99 Creative Commons is proof that the public can respond to the way changes in copyright. As of 2008, there are over 130 million Creative Commons licenses protecting a range of creative work including YouTube, Wikipedia, 200 million photos on the hosting service Flickr, two albums by Nine Inch Nails, and broadcast footage from Al Jazeera.100

Concluding Remarks

One of the central questions of copyright is "Can we put the genie back in the bottle?" In other words, can the Digital Counterpublic change copyright into something that serves the needs of building a healthy culture. If people can continue to profit on their creative work for almost three generations, why would anyone want to change the system? There are a range of projects that are focused on fixing the problems of copyright though work in the legal and Legislative Publics. However, the work is expensive, takes a long time, and has a high probability of failure. Creative Commons is the proof of how the Digital Counterpublic is working to challenge the restrictions of the state. The spirit of copyright law is focused on maintaining the balance between profit and progress and the current laws do not maintain a balance. The Digital
Counterpublic may use subversive tactics to change the system, but that does not mean it is wrong.

**Notes**

1 MP3 is the abbreviated form for MPEG-1, a compressed audio file that became a popular way to use, distribute, and listen to music starting in the late 1990.


5 Hacking is the illegal act of obtains information and/or content through the Internet.

6 An IP address is a 32 digit number label that is attached to every device (computer, printer) on a network and it is needed for the various forms of hardware to communicate.


10 Sandoval, *CNET*, para. 5.


13 Often the legal term “infringement” or “infringing” is used in place of “piracy,” however the bills do not provide a formal definition of those either.


20 William F. Patry, *Moral Panics and Copyright Wars*, (New York: Oxford University, 2009), 91


24 Colloquially called “the Betamax case.”


31 An short list of controversial subreddits include: /r/jailbait (a collection of provocative picture of teens), /r/creepshots (a collection of Photos of women taken without their consent), and
/r/findbostonbombers (a series of posts meant to help authorities find Tamerlan and Dzhokhar Tsarnaev, but functioned more like a witch hunt).


35 Warner, Publics and Counterpublics, 56.


47 John Locke, Two Treatise on Government, (Bel Air, CA: MacMay, 2009), Kindle Locations 2041-2043.


However, a variety of live recordings of musicians have become treasured examples of preserving the unique action of a particular live event.


Lessig, *Free Culture*, 64.

59 The Boondocks,”…Or Die Trying,” Season 2 Episode 1, (Originally aired October 8, 2007).

60 Gabriel Snyder, "'Plane Hijacked?," Daily Variety, 283 (July 9, 2004).


63 Joan Borsten Vidov, Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives, 64.

64 Gary R. Johnson, Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives, 120.

65 John G. Malcolm, Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives, 33.


69 Dana Cloud, “‘To Veil the Threat of Terror’: Afghan Women and the <Clash of Civilizations> In the Imagery of the U.S. War on Terrorism,” *Quarterly Journal of Speech* 90 (August 2004), 290.


77 Siwek, *The True Cost of Copyright Industry Piracy to the US Economy*, 2.


79 Piracy Doesn’t Work in NYC, *The Choice*, December 17, 2010, available at http://youtu.be/EUABOIe5SWo. These videos are related because when ICE takes down a website for intellectual property violations, a link is provided to a modified version of the “Piracy Doesn’t Work in NYC” ad. The ad is edited with specific references to New York are removed http://youtu.be/6YScoXn31Mg.


81 Immigration and Customs Enforcement, http://youtu.be/Y1d4xjU8DpQ, 00:02-00:00:36


83 Immigration and Customs Enforcement, http://youtu.be/Y1d4xjU8DpQ, 00:01:36.


86 Piracy Doesn’t Work in NYC, *The Choice*, http://youtu.be/EUABOle5SWo, 00:00:21-00:00:32.

87 Piracy Doesn’t Work in NYC, *The Choice*, http://youtu.be/EUABOle5SWo, 00:00:35-00:00:45.


92 Lessig, *Free Culture*, XIV.

93 It is not a good idea to let lawyers start or name social movements.


99 “About the Licenses,” *Creative Commons*, available at http://creativecommons.org/licenses/.

CONCLUSION

<Copyright> and the Effects of its Ideographic Grammar

To conclude this project I will review several aspects of the larger text, including the copyright primer, the reticulate public sphere, and the ideographic grammar of copyright. Copyright is the part of intellectual property law focused on protecting creative content in its many forms. The first copyright was the Statute of Anne which established that a necessary protection of authors for a limited period. The Copyright Clause was included in the Constitution and reads:

That Congress has the 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.”

The key issues in the copyright clause define the tensions of copyright: The progress of culture and the exclusive right to profit from that progress. Progress is focused on improving art, science, and culture through people and a copyright is a reward for their work. For many legal scholars, copyright is seen as an incentive or reward to content creators. Copyright provides creator a way to profit off of their content. Copyright exists to balance these poles of progress and the profit. Culture is constantly changing and copyright must change as well. The copyright statute was revised five times over the history of the United States: 1790, 1831, 1909, 1976, and 1998. My analysis is focused on the changes in copyright statute from 1909 to present because within the last one hundred years the term of copyright changed from fifty-six years to over two hundred years. William F. Patry called this the radical expansion of copyright. This change in the limited term disrupts the balance of copyright to favor the profit over progress. The limited term was an economic incentive for authors because copyright did not last forever. Authors could not profit upon a single work indefinitely; they had to continue to contribute to culture. Copyright is in theory a neutral legal instrument, but in practice copyright functions as an
Copyright is rhetorical because the law is written for the consumption of the public. Copyright is the legal mechanism for the production of culture and knowledge. The rhetorical study of copyright serves as an instrument of distributing a specific ideology within the public. Copyright is defined and redefined by the four reticulate counterpublics: The Legal Public, Legislative Public, Corporate Public, and the Digital Counterpublic. The laws, court decisions, and legal scholarship surrounding copyright law define the Legal Public. Copyright was initially created by the Legal public with the Statute of Anne. The contemporary iterations of copyright are strained by the specificity of the legal language that makes up the statute. Lawrence Lessig and Jessica Litman, both law professors, blame the Legal Public for crafting a law that is not useful to the public, but only useful to lawyers. The question of who copyright is written for is an issue of the Legislative Public, which is made up of members of the United States Congress. The copyright clause of the U.S. Constitution dictates that Congress gets to make and pass copyright laws. The question within the Legislative Public returns to the balance between profit and progress. A copyright that is balanced between profit and progress benefits the public as a whole. A copyright that favors profit over progress forms a system that ignores the needs of the public for the needs of content owners. The Corporate Public is primarily defined as representative members of the transnational media corporations and has the most money and loudest voice within discussions of copyright. The Corporate Public has the money to use lobbyists to influence Congressional representatives in discussions of copyright. Jack Valenti performed this role throughout his tenure as the head of the MPAA. The Corporate
Public can also try expensive copyright infringement cases in the court. The Corporate Public has pleaded its case concerning <copyright> from takedown notices to Supreme Court cases, all in attempt to keep <copyright> focused on profit.

The Legal, Legislative, and Corporate Publics all control how <copyright> is formed, applied, and used in the public. The problem is that the Publics do not represent the needs of the public. The public continues to pay higher cable prices, shell out movie tickets for reboots and sequels, and buy another version of the *White Album* without reflecting on the redundant nature of culture. <Copyright> is only one component of this problem with consumption problem in culture. The Digital Counterpublic enters the fray with a resistant posture to critique and run in opposition to the overarching ideology of <copyright>. The Digital Counterpublic has the highest stake in the copyright dialogue, but it is often ignored in other publics because of their permeable boundaries. The Digital Counterpublic is the largest public because it includes Internet entrepreneurs, musicians, open source software developers, remix artists, and pirates. The members of the Digital Counterpublic are the most diffuse and varied public who work towards changing <copyright> in different ways. Gregg Gillis uses his role as Girl Talk to ask questions about <copyright> and <fair use> through hip-hop mash-ups. Editors of Wikipedia are working towards a foundation of knowledge that is free for the public to use and change as needed. Anonymous uses the Internet as an open space for public criticism. Academics like Lessig, Litman, and McLeod are using their positions to challenge how <copyright> is viewed within their own disciplines and how that is reified by the public. <Copyright>, in its current conception, harms creativity in the digital age and prevents the growth of culture. <Copyright> seems to run in opposition to the original conception of the law as “an act for the encouragement
of learning.” The Digital Counterpublic uses activism and <piracy> to illuminate the hypocrisy of a culture that is limited in its ability to create new content.

Ideology is used in rhetorical theory to examine the relationship of the normalizing structures of social life that become the situated material form of ideology and take on the structure of any number of public discourses. Michael Calvin McGee argues that the normalizing structures embody language, thought, and action. Ideographs are a rhetorical form to isolate the function of ideology in discourse. Dana Cloud argues, “the analysis of ideographs is less a critique of how immediately successful a rhetor's strategies are than an account of the ways in which political rhetors dip into, add to, and reshape the shared cultural stock of ideographs.”

The public uses the ideographs politically to discuss the value of content creation. Ideographs are a useful way of examining how the public uses words in discourse and how those words have power. An ideograph exists in the present because of its successful use throughout the past which gives it a present meaning. To examine <copyright>, I needed to explore the component parts of its grammar: <fair use>, the <public domain>, <authorship>, <ownership>, and <piracy>. Each part of the grammar illuminates an issue within the wider scope of the value of <copyright>. The ideographs represent a specific area or theoretical issues within <copyright>. I will review the ideographic grammar from each chapter. <Fair use> and the <public domain> are ideographs that come from the law. <Authorship> and <ownership> come from critical theory and philosophy. <Piracy> is a dismissive cultural term that has evolved alongside <copyright>.

Fair use and the public domain are sites of dispute within copyright law and serve rhetoric by functioning as part of the ideographic grammar of copyright. The discourse surrounding each location examines the ideal of how the public should value and use copyrighted materials. Both the <fair use> and <public domain> are used as a way to show how <copyright>
can work as a public good. Fair use is the legal doctrine written into the Copyright Act of 1976 that is meant to act as a free speech exception to copyright law. Fair use is negative defense in legal cases, an area of approved guilt. The Legal, Legislative, and Corporate Public do not treat fair use as an ideograph. Instead, fair use is used by the Publics to reinforce the profit driven mechanisms of <copyright>. The Digital Counterpublic uses fair use as an ideograph by rejecting much of the overarching legal precedent and focusing on the meaning of the words.

*Fair Use* is the ideology that the use of creative work belonging to others must be fairly represented; the use must be fair. The Digital Counterpublic uses *<fair use>* as an avenue of activism to illuminate inconstancies in <copyright>. The public domain is both a location and an idea. The public domain was formally created in the Statute of Anne as a metaphoric location where content goes after it has passed out of copyright. The public domain as an idea is a cultural trust of knowledge that is free for the public to build upon for creative work. The ideograph of the public domain is focused on resisting the neoliberalization of copyright: *the public domain* expresses the ideology that creative material belongs to the people who consume content; the domain of creative work belongs to the public. The *public domain* reveals the struggle between progress and profit. The public domain is problematic because it exists as a quasi-public/private space. There is a fundamental confusion over what is a public domain work and what is not. This distinction is clear from the view of copyright activists. However, average people do not concern themselves with the difference.

Michael Calvin McGee states that an examination of two ideographs produces an understanding of how the each is used by the different rhetors or publics. “One can therefore precisely define the difference between the two communities in part, by comparing the usage of definitive ideographs.” I look at *<authorship>* and *<ownership>*., under the conditions set by
McGee, as two parallel ideographs. <Authorship> is a high theory concept defined by Roland Barthes and Michel Foucault that focuses on how content is seen and treated after publication. The ideograph embodies the process of author: <Authorship> is an ideology focused on the process of creating content as motivated by an author. <Authorship> must focus on the process of being an author and the progress of cultural production. The concept of <authorship> is designed to be temporary and exists to foster the next generations of creators. <Authorship> changes in the public because it is out of the control of the author. Ownership is the central idea to all conceptions of property, but the definition overlooks how ownership within intellectual property is different. Ownership is under-theorized in legal and ideological contexts and I argue this absence is the cause behind many of the problems with <copyright>. Ownership is focused on control and the neoliberalization of culture: because everything is for sale and owning property is the only way to protect it. This leads to the ideograph of ownership: <Ownership> is the embodiment that management, control, and profit of copyright are more valuable than original creation. <Ownership> is the ideology and practice of how copyright is controlled within our culture. These terms are not in opposition to each other, but paradigms of content creation. <Authorship> is an idea embraced and written about by critical theorists, and <ownership> is a concept from the legal perspective. The result is that <authorship> is conflated to mean the same thing as <ownership> in copyright law.

Piracy merits rhetorical analysis because piracy functions ideologically in the discourse surrounding copyright and as a result provides a way of examining how publics shape and contest discourse. What makes <piracy> a unique ideograph is that it defines the actions of a group of people who exist outside the bounds of the public. The term “pirate” is used to dismiss people who work against <copyright>. Patry pointed out that Piracy sets the deck against content
users, by saying “the current piracy campaign is intended to create a negative association with all acts not authorized by copyright owners.”

Pirates thus exist in a world not of their own definition, but one which constitutes them and their actions as either to be dismissed as childish or to be discredited as criminal. The ideograph of <piracy> is focused on the theft of property for a purpose: <Piracy> is a resistant posture where participants work against the law by using copyrighted works in illegal forms, ranging from theft of media to creating new content with copyrighted content. <Piracy> as a tool of change is meant to work against the childish associations of the public. An ideograph must not depart from a shared cultural meaning. Michael Calvin McGee asserts that ideographs are meant to be descriptive of our social conditions. Therefore, a pirate is always offset from the norms of the public which allows a variety of narratives to attack the pirate. Pirate is strained as an ideograph because Corporate Public and the Digital Counterpublic define it differently. The Corporate Public treats the <pirate as a villain> and the Digital Counterpublic treats the <pirate as an outlaw>. I examine how the <pirate> is used to explain the failings in the Corporate Public through material, criminal, and economic conditions. I follow this examination with the place of the Digital Counterpublic and their struggle with identity of the <pirate>. The Digital Counterpublic vacillates between embracing the <pirate> and realizing the limitations of the ideograph.

In the earliest draft of this dissertation, Google received 7,725,253 takedown notices in the first six months of 2012. I note in Chapter one that a year later, Google received 15,984,690 in the month of May 2013; from July to December 2012, the number of takedown notices that Google received seemingly doubled each month. As of this writing, March 2013 marked the highest number of takedown notices received since Google began tracking the data. There was a brief down-shift in December 2012 when Google amended their takedown notice policies, so
Google clients such as Blogger and YouTube tracked their own takedown notices. The question is: why is there an increase in takedown notices? There is a myriad of reasons and several are laid out within this document. A large number of the requests come from music and film companies who are protecting their property. The Corporate Public assisted in the formation of takedown notices for this purpose. A growing area of takedown notices is from the arena of publishing. With the proliferation of digital readers, there is a need to protect the written word, no matter how obscure. EduBlogs experienced this change and even I received a takedown notice for a journal article posted on a research wiki. The Digital Counterpublic may be better at pirating and sharing content than ever before. Or, the Corporate Public may have improved its ability to track and find copyright violations. An examination of organizations sending takedown notices illuminates a striking finding: Among the usual suspects of the Corporate Public (e.g., RIAA, British Recorded Music, Disney, NBC Universal, and Fox), there is a rising number of law firms and copy protection companies who are also sending thousands of takedown notices a month. Degban, Mark Monitor, Takedown Piracy, and Remove Your Media are top-rated content protection organizations. The truth of why there is a massive change in takedown notices is likely a combination of all of these reasons.

What the Google Transparency Report illuminates is the fight over copyright is ongoing. The purpose of this project is to examine copyright, not a legal tool for the delineation of property, but as an ideograph. Copyright, as a law, was designed with egalitarian intentions to bring knowledge to the public. Over the years, copyright became the legal instrument that manages the tension between profit and progress, the limitations of copyright are subject to revision by the reticulate publics, so long as the revisions do not violate the Constitution. Copyright provides for a public that creates content for the improvement of
culture and evolved into an ideological tool that changes the outcome of creative, business, and academic work. Copy protection is about the protection of property from various forms of theft, not about protecting one kind of content over another. One of the most important issues of copyright is that it is a protection of content is broad; there is no judgment of quality or value of said content. However, the broadening of copy protection and policy allows copyright to evolve beyond the Statute of Anne. The need to protect various forms of literature, art, music, film, video and a growing number of code-based technology demonstrates how copyright still is significant in the twenty-first century. There is even a growing debate over copyright in space, after Canadian astronaut Chris Hadfield recorded a cover of David Bowie’s “Space Oddity” and posted it on YouTube.18

Directions for Future Research

There are a number of directions for the future research on copyright, ideology, and rhetoric. Within this text, there are several places where a single paragraph may become the thumbnail sketch for a future essay. In this concluding segment, I would like to mention three ideas that did not fit into the scope of this project, but are worthy of further exploration. The first project is an examination of the discourse surrounding each revision of copyright using the rhetorical theory of concordance. Concordance as an aspect of rhetorical theory recognizes that peace is negotiated between stakeholders, but that peace is not perfect or permanent. Condit states “Concord is neither harmonious nor inevitably fair or equitable, it is simply the best that can be done under the circumstances.”19 She works through hegemony as way to view ideology and dominate political theory. Hegemony in the most basic terms is consent to power; that power can be governance and/or accepting the ideologies that surround the public. The power structure of hegemony can be examined in a variety of forms, incorporating the negotiated text of copyright law. Concordance provides an important point within the ideological rhetorical
criticism: To illuminate that not all discussions have the aim of a perfect solution, but a stopgap for the moment. “The critics’ goal is therefore not to debunk or delegitimate a group and its discourse, but rather to judge the multivocal accommodation that has been reached on one or more of many available criteria.”

I will use concordance as an avenue to critique the negotiated peace between progress and profit over the last century of copyright law. Between the creation of the copyright clause in the Constitution and the present day, there are six revisions to copyright: The Copyright Act of 1790, the Copyright Act of 1831, the Copyright Act of 1909, the Copyright Act of 1976, the Digital Millennium Copyright Act, and the Sonny Bono Copyright Extension Act. It is important to note four of the six revisions occurred in the twentieth century. All hold a distinct place in copyright because these laws dealt with significant changes in mechanical, and later digital, reproduction.

A second line of inquiry might examine the Digital Counterpublic as an agonistic democracy. Chantal Mouffe provides a definition of agonism by showing how it is different from antagonism.

Antagonism proper - which takes place between enemies, that is, persons who have no common symbolic space - and what I call 'agonism', which is a different mode of manifestation of antagonism because it involves a relation not between enemies but between 'adversaries', adversaries being defined in a paradoxical way as 'friendly enemies', that is, persons who are friends because they share a common symbolic space but also enemies because they want to organize this common symbolic space in a different way.

Agonism is focused on how conflict has the potential to bring positive change. Agonism provides the Digital counterpublic with a stronger support for a range of engagement by supporting both the public and private activism. William E. Connolly argues for the practice of agonistic democracy which he defines as “a practice that affirms the indispensability of the identity to life, disturbs the dogmatization of identity and folds care for the protean diversity of human life into the strife and interdependence of identity/difference.”

Agonistic democracy
resists the standards of the status quo to reveal other options to the masses. The Digital Counterpublic works within the agonistic democracy. The problem is most of the Digital Counterpublic’s actions are defined externally as <piracy>. Music sampling is not <piracy>, peer production and editing is not <piracy>, creating new licensing standards is not <piracy>. Illegally obtaining copyrighted materials is the only form of <piracy>. <Piracy> is one vehicle of agonistic democracy. Agonistic democracy provides the Digital counterpublic with is a way to communicate the goals and actions of the group to the public sphere. One conflict is that agonism is meant to counter the philosophy of the public sphere. My argument will explore whether (and how) counterpublics and agonism explore similar tensions.

The third project is focused on vernacular rhetorics and the consumption of viral media. Vernacular rhetoric is part of public sphere theory, especially how it is conceived by Gerard Hauser. Vernacular rhetorics examine the importance of everyday objects and things that are taken for granted. Hauser states, “The argument then extols communication as the means for reasserting commonality. But communication depends on the appeals to the common ground of shared interest.”24 The growing trend of viral media and globalization proves the effectiveness of building a global American culture. One example is the sudden popularity of Psy is proof of how the public embraces vernacular rhetoric. The song “Gangnam Style” serves as a critique of posturing over wealth within Korean culture.25 Gangnam is a wealthy neighborhood in Seoul and serves the epicenter of thoughtless materialism. In 2010, the average Korean family carried a debt burden reaching 155% of their disposal income. This is comparable to the debt burden of the average United States family before the sub-prime crash of 2008 at 138%.26 The song’s lyrics spend a great deal of time discussing drinking coffee. This is meant to satirize a particular class of wealth-obsessed women, Max Fisher explains “They're called Doenjangnyeo, or ‘soybean
paste women’ for their propensity to [s]crimp on essentials so they can over-spend on conspicuous luxuries, of which coffee is, believe it or not, one of the most common.”

What makes the song truly vernacular is the music video that translated internationally with rap and hip-hop video tropes (excessive wealth, attractive women), a dance that was easy to replicate, a chorus that appealed to an English-speaking audience, and the identification of a Western-looking heroine. The song appeals to the globalized lifestyle of the public through the vernacular aspects of American life.

Concluding Thoughts: How <Copyright> is Changing Now

There are clear forms of change happening within the public and many of those changes are related to the Digital Counterpublic and <copyright>. The first issue is the change in economic structures on the Internet with sharing and hybrid economies. A constant problem with the advent of the Internet is how to make a profit from content. Newspapers and later television news used the commercial model to maintain profitability. The commercial economic model does not work in the same way on Internet. The Digital Counterpublic found economic alternatives to maintaining profitability: The sharing economy and the hybrid economy. The point of a sharing economy is that no money is exchanged for the services of participants, only improvements and content to the media site/organization. People are motivated to participate based on organizations and issues that they identify with and the action is political because of peoples’ willingness to donate their time for free. As Lessig argues, “contributors are motivated not by money, but by the fun or joy in what they do.”

This argument sounds trite, but how else did Linux grow from the idea of Linus Torvald into a legitimate operating system? Participants are working to build something and willing to take on labor which goes unpaid, but not undervalued, to build something of merit.
The hybrid economy combines the commercial economy and the sharing economy. Lessig states, “The hybrid is either a commercial entity that aims to leverage value from a sharing economy, or it is a sharing economy that builds a commercial entity to better support its sharing aims.”29 The sharing economy is dependent on free labor with a free final product. The hybrid economy twists that model by creating a pay structure to provide for basic support. The hybrid economy shares this model with annual public radio fund drives; an organization will set up a way to tithe donations to help with the needs of the site. Every year, Wikipedia has an annual fund drive around the end of December to provide financial support for servers and other upkeep.30 This drive allows the site to run without charging for use. Both the sharing and hybrid models prove the Digital counterpublic is based on a system of participatory merit. The choice to give time or money to an organization using a shared or hybrid economic model is a political statement about how much an individual values a project. It is a personal act with significant political ramifications.

The second issue deals with the life and death of activist: Aaron Swartz, a programming prodigy. At sixteen he co-developed the Really Simple Syndication (RSS) feed and was an early developer for Reddit. Swartz was another young man who so perfectly embodied the ideograph of the <pirate>: a young adult with amazing computer abilities who was alienated from his peers out of his own actions. He was also a young man committed to the idea of the freedom of information. When challenged on his philosophy on information and freedom, Swartz turned to the work of Thomas Jefferson to prove his point. “Jefferson may have been the first to say, in essence, “Information wants to be free!” (Jefferson attributed this will to nature, not information, but the sentiment was the same.) Thus, all those people who dismiss this claim as absurd have some explaining to do.”31 Swartz also understood people needed to create tension for copyright
to change. He challenged people to take up stunts against the laws that constrict information, like contesting the DMCA’s tacit endorsement of code as speech by fighting for Seth Schoen to publish his haiku that reveals how to break DRM protection on DVDs and CDs. Swartz was a member of the Digital counterpublic who worked as an agent for copyright to change.

Swartz is arguably best known for borrowing the MIT library to download thousands of academic articles from the JSTOR database. This example of private, individual activism was a stunt to expose the hypocrisy of academic publishing and copyright. Swartz was embodying the idea of freedom of information; academics have a myriad of reasons for locking their knowledge in proprietary scholarly journals that prevents the public from accessing their knowledge.\(^{32}\) Swartz used his knowledge as a computer expert to download the articles and release them to the public. The state of Massachusetts charged him with two counts of wire fraud and eleven violations of Computer Fraud and Abuse Act (CFAA). Swartz faced a maximum of thirty-five years in prison, a required payment of one million dollars, forfeiture of all assets, and paid restitution to the court. Swartz was only twenty-six when he committed suicide, but in his short time he changed the landscape of the Internet.\(^{33}\)

A year after the SOPA/PIPA Blackout, the Digital Counterpublic had a reason to rally again. Anonymous hacked the Federal Sentencing Commission and the Massachusetts Institute of Technology in Swartz’s name.\(^{34}\) Lessig made a grand return to copyright activism.\(^{35}\) There are many changes that the Digital Counterpublic are working on, the most significant at this point is Aaron’s Law, a bill with the intent to change the CFAA. The original bill was written in 1986 and last revised in 2008, but the bill is flawed due to its broadness. For example, violating the terms of service on any website, like sharing a Netflix account or lying about one’s physical appearance on Match.com, would result in jail time and fines.\(^{36}\) EFF points out that until April 3,
2013, it was a violation for any person under the age of eighteen to read *Seventeen Magazine* online.37 The penalties for CFAA far out weight the crimes, returning to the example of the Steubenville football players jail time versus the member of Anonymous who helped expose them.

Aaron’s Law is significant for a number of issues, but one of the most interesting concerning my project is that Senator Ron Wyden, Representatives Zoe Lofgren and Jim Sensenbrenner worked with the Reddit community and EFF to build the new law into something useful.38 The Legislative Public is working with the Digital Counterpublic to make a change that is significant to the public. The essential understanding of the public sphere is that all people have a voice and that voice needs to be heard. Rosemary Coombe states, “The distinctive feature of the public sphere is that any member of the public enters in principle, on equal terms and that communication and deliberation take place.”39 The death of Aaron Swartz has galvanized the Digital Counterpublic and made other groups listen to what they are saying. Deliberation is taking place and <copyright> is one more place of discussion.
Notes

1 U.S. Constitution, art. 1, sec. 1, cl. 8.

2 The copyright statute serves as a text of a manageable size to perform this project.

3 Patry, *Moral Panics & Copyright Wars*, 78.


5 U.S. Constitution, art. 1, sec. 1, cl. 8.


10 Patry, *Moral Panics & Copyright Wars*, 94.


21 The Act in 1790 served to codify the Constitutional clause and is very similar to the Statue of Anne. The 1831 act was an expansion of the needs and policies in the 1790 act.


29 Lessig, *Remix*, 177.


33 Swartz's suicide is blamed on the prosecution of the US Government and the state of Massachusetts, but his own history of depression was a significant contributor to his death.


37 Dave Maass, Kurt Opsahl, & Trevor Timm, Until Today, If You Were 17, It Could Have Been Illegal To Read Seventeen.com Under the CFAA, Electronic Frontier Foundation, April 3, 2013, available at https://www.eff.org/deeplinks/2013/04/until-today-if-you-were-17-it-could-have-been-illegal-read-seventeencom-under-cf aa. Every teenage girl knows that by the time you are seventeen, you really should have moved on to Cosmo.


REFERENCES


*The Boondocks,* “…Or Die Trying.” Season 2 Episode 1, originally aired October 8, 2007.


Dobrusin, Max. email to the author, October 5, 2012.


Folsom v. Marsh, 9 F. 342 (1841).


Gyles v. Wilcox, 26 ER 489 (Court of Chancery, England 1740).


“International Copyright Piracy: A Growing Problem with Links to Organized Crime and Terrorism.” *Hearing before the Subcommittee on Courts, the Internet, and Intellectual Property of the Committee on the Judiciary House of Representatives*. March 13, 2003 available at:


*The IT Crowd*. “Moss and the German.” Season 2 Episode 3, (Originally aired September 7, 2007).


Kozinski, Alex. “What’s So Fair about Fair Use?” *Journal of the Copyright Society of the USA* 46. (Summer 1999): 515-530.


Newton v. Diamond. 349 F. 3d 591 (9th Cir. 2003).


Patterson, Lyman Ray. *Copyright in Historical Perspective*, Nashville: Vanderbilt University, 1968.


http://catb.org/~esr/writings/homesteading/cathedral-bazaar/ar01s04.html.


*The Statute of Anne.* The Avalon Project, April 10, 1710, available at

http://avalon.law.yale.edu/18th_century/anne_1710.asp.


U.S. Constitution. art. 1. sec. 1. cl. 8.


Vanna White v. Samsung Electronics America. 989 F. 2d 1512 (9th Cir. 1993).


