

Digitize, Democratize: Libraries and the Future of Books

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I would like to make a case for the Digital Public Library of America (DPLA) by contrasting two tendencies that run through the history of books: democratization and commercialization. To put it so baldly, however, runs the risk of stranding the argument on some remote, moral high ground, and I want to do the opposite. By discussing down-to-earth contingencies and pragmatic considerations, I want to follow a path that will lead through difficult terrain toward an elevated goal: a library that will make our country's cultural heritage accessible and free of charge, not only to our countrymen and women, but to everyone in the world.

That, I admit, has a utopian ring to it, and I might as well confess at the outset to some sympathy with utopianism. It challenges the assumption that the way things are is the way they have to be and that the everyday, workaday world is firmly fixed in what we take to be reality. History shows that things can fall apart, sometimes in a way that releases utopian energy. Revolutions often produce such an effect, and therefore I will cite some revolutionary changes, even though it raises the danger of confusing history with homily.

Let me begin by invoking the ideal of openness. It is a happy notion, which calls up felicitous associations: "open-minded," "open markets," "open covenants openly arrived at," the "Song of the Open Road." In the world of libraries, openness has a particularly positive ring, thanks to the movement for Open Access, which promises to open up books and journal articles for the benefit of everyone.

Yet libraries have frequently been closed. From what little we know about the ancient library of Alexandria, it functioned primarily to store texts, not to make them available to readers. It admitted a few scholars, but its main purpose probably was to embody the magnificence of the Ptolemaic dynasty.¹ Some of the ancient libraries of China also magnified the glory of the emperors and preserved books by removing them from readers. In order to assemble his Four Treasuries Library, the

* The following text was delivered on April 2, 2012 as the 25th Horace C. Manges Lecture at the Columbia University School of Law. Because it was conceived as a lecture rather than as a scholarly article, I have not modified its relatively informal tone, and I have kept footnotes to a minimum. I would like to thank the School of Law and its Kernochan Center for Law, Media and the Arts for inviting me to give the lecture. My thanks go as well to Professor Jane C. Ginsburg, who provided some helpful criticism of my argument. Of course, I alone am responsible for whatever errors and misinterpretations may occur in it.

1. A HISTORY OF READING IN THE WEST 10 (Guglielmo Cavallo & Roger Chartier eds., Lydia G. Cochrane trans., Univ. of Mass. Press 1999) (1995). See generally LUCIANO CANFORA, THE VANISHED LIBRARY (Martin Ryle trans., Univ. of Cal. Press 1990) (1989) (explaining the history of the library of Alexandria).

Emperor Ch'ien-lung appropriated books from his subjects on a gigantic scale during an "inquisition" from 1772 to 1788. They provided material for encyclopedias and anthologies that reinforced his authority, and anything remotely critical of the Ch'ing dynasty or favorable to the Mings—at least 2,320 books produced between 1550 and 1750—was burned.² The Communist regime in Czechoslovakia used the country's libraries to purge literature rather than to preserve it.³ In 1954, it ordered all local librarians to cleanse their shelves of works that fit into categories that ranged from the expected ("fascism" and "pornography") to the bizarre ("formalism," "ruralism" and "snobbism").⁴ The regime got rid of 7,500 works.⁵ The history of libraries has a dark side. Far from demonstrating uninterrupted democratization in access to knowledge, it sometimes illustrates the opposite: "Knock and it shall be closed."



As testimony to this theme, I would like to cite Thomas Hardy's great last novel, *Jude the Obscure*. Its hero, Jude Fawley, is a working class lad consumed with the ambition to penetrate the closed world of learning, which is epitomized by Christminster, a lightly fictionalized version of Oxford University. Having taught

2. LUTHER CARRINGTON GOODRICH, *THE LITERARY INQUISITION OF CH' IEN-LUNG* 61, 144 (Paragon Book Reprint Corp. 1966) (1935).

3. See generally PETR ŠÁMAL, *SOUSTRUŽNÍCI LIDSKÝCH DUŠÍ LIDOVÉ KNIHOVNY A JEJICH CENZURA NA POČÁTKU PĚDESÁTÝCH LET 20. STOLETÍ (S EDICÍ SEZNAMŮ ZAKÁZANÝCH KNIH)* (2009). I am grateful to Jonathan Bolton for this reference.

4. *Id.* at 59–60, 72–73.

5. *Id.* at 59–60.

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himself Latin and Greek, Jude deserves to be admitted into one of the university's colleges. But the barriers of class kept him out. He works as a stonemason and never gets beyond repairing the walls that shut the colleges off from the outside world.



When I was a student at Oxford, sixty-five years after Hardy published his novel, the walls still looked formidable. The massive gate of my college slammed shut at 10:00 p.m. in the evening, and if you had not made it inside, you had to climb over one of the walls—a daunting experience, as the walls were ten to fifteen feet high and bristled at their top with spikes and shards of glass. A few secret passes existed, but even they were treacherous, as can be seen from the above photograph, which shows me posing with a friend at one of my favorite entry points, where you had to slip between rows of fixed and revolving spikes.⁶

Most Oxford libraries are walled inside the colleges. Even the university's Bodleian Library has the air of a fortress with crenellations and iron gates, as the following photograph illustrates.

6. Photographer: David Winter, 1962. Unless otherwise noted, all photographs have been provided to me by friends for use in this Article.



The other photos show spikes and walls that prevent outsiders from interrupting the intellectual life that goes on inside the colleges. Today, of course, Oxford's walls generally look quaint, and the most important barriers to knowledge are invisible. Libraries often keep outsiders outside by all sorts of measures—from locked doors and turnstiles to restrictive qualifications for entry, payment to obtain a reader's card and an atmosphere of intimidation. Ordinary folk hesitate to brave these barriers. They are kept at a distance by the learned elite, who wear an air of effortless superiority, which corresponds to the social sifting that the French sociologist Pierre Bourdieu identified as "distinction." Oxford students captured this intellectual hauteur in verse, which they aimed at Benjamin Jowett, the master of Balliol College, who was also reviled in *Jude the Obscure*:

Here come I, my name is Jowett
All there is to know I know it
I am master of this college
What I know not is not knowledge.⁷

(Perhaps the Czechs were right to purge "snobbism.")

7. THE OXFORD DICTIONARY OF QUOTATIONS 61 (Elizabeth Knowles ed., 5th ed. 1999) (attributing similar verse to students at Balliol College in the late 1870s). I quote the somewhat different version which I knew as a student in Oxford.



A countertendency gathered force in the Age of Enlightenment, when spreading light became identified with reading books. The French Royal Library began to admit readers in 1692, although not very many (the royal librarian often gave them lunch on Thursdays). The British Museum was opened to the public in 1759. In the United States, the first large public library, established in Boston in 1848, allowed any citizen to borrow books and take them home to read. The New York Public Library opened its great collections in 1911 to anyone who walked in from the street. It served as an informal university for generations of immigrants who wanted both instruction and access to the literature in their native languages. Andrew Carnegie financed the creation of thirty-nine branch libraries throughout New York, while paying \$40 million to build 1,697 community libraries everywhere in the country between 1886 and 1919.

It would be misleading, however, to conclude that everyone in the United States has access to our common cultural heritage—or the bulk of it as represented by the books, prints, films and recordings accumulated in our libraries, archives and museums. We have only recently reached a point where this material can be made available on a grand scale, thanks to digitization and the Internet. We now have it in our power to create a digital library that will aggregate the holdings of our greatest research libraries and make them accessible to everyone. We have the funds, the technology, the know-how and the determination to make it happen. We face obstacles, of course. How to link up data from incompatible sources in one, interoperable system? How to curate the material and preserve it for future generations? How to overcome illiteracy and the grinding poverty that keeps most of the world's population beyond the boundaries of book culture? I do not want to minimize those difficulties; but, putting them aside for the moment, I would like to concentrate on one problem that tends to go unnoticed because it pervades our world so thoroughly that we accept it like the air we breathe, as if it were an inexorable element of everyday life. It is the power of commercialization. Commercial interests have blocked off channels of communication, and they are exacting tolls for access to information—all information, including the most valuable kind, which we can build into knowledge. “The field of knowledge,” Thomas Jefferson said, “is the common property of mankind.”⁸ But since

8. LEWIS HYDE, *COMMON AS AIR: REVOLUTION, ART, AND OWNERSHIP* 15 (2010) (quoting Thomas Jefferson).

Jefferson's day, business interests increasingly have appropriated the cultural commons.

If you are beginning to squirm in your seats with an uncomfortable feeling, wondering if you are about to be harangued by a starry-eyed academic who does not know the difference between a business plan and a bowtie, let me assure you that I respect the economics of publishing, the hard facts of library budgets, the imperative of sustainability and the drive of digital entrepreneurs. As an example of the hard realities that I have taken as my subject, permit me to inform you about the current cost of academic journals: \$29,113 for a year's subscription to the *Journal of Comparative Neurology*, \$23,446 for *Brain Research*, \$19,999 for *Biochimica et Biophysica Acta*. The price of scholarly periodicals has increased by four times the rate of inflation since the mid-1980s. It is still increasing, at rates of 4 to 9 percent, depending on the field, while library budgets are decreasing, and the consumer price index remains relatively stable.⁹ Three big corporations—Elsevier, Wiley-Blackwell, and Springer—publish 42 percent of all academic journal articles. In 2010 Elsevier's profit margin was 36 percent on revenues of £2 billion.¹⁰ These publishers have a stranglehold on the market, and they squeeze all the money they can get out of research libraries, which have to pay the bills from constantly diminishing resources and do so by cutting back on the purchase of books. (One year's subscription to the *Journal of Comparative Neurology* costs the equivalent of 300 monographs.)



9. See generally LIBR. J. (surveying current trends in scholarly journal prices in its April issue each year); ASS'N OF RESEARCH LIBRARIES, ARL STATISTICS 2009–2010, available at www.arl.org/stats/annualsurveys/arlstats (providing statistics on the collections, expenditures and service activities of member libraries).

10. George Monbiot, *The Knowledge Monopoly Racketeers Make Murdoch Look Like a Socialist: Academic Publishers Charge Vast Fees to Access Research Paid for by Us. Let's Throw off These Parasitic Overlords*, GUARDIAN, Aug. 30, 2011, at 27.

As the amount of knowledge is increasing, therefore, the proportion of it available to the public is decreasing. Of course, public funds subsidized most of that research in the first place, so you might think that the public should have access to the results of the research. The National Institutes of Health (NIH) acted on that principle in 2007, when the U.S. Congress required that articles based on NIH grants be made available from an open-access repository, PubMed Central. But lobbyists for the publishers blunted that requirement by getting the NIH to accept a twelve-month embargo to prevent public accessibility long enough for them to cream off the demand. Not content with that victory, the lobbyists tried to abolish the NIH mandate in the Research Works Act, a bill introduced in Congress in November 2011 and championed by Elsevier. The bill was withdrawn four months later following a wave of public protest, but the lobbyists are still at work, trying to block the Federal Research Public Access Act, which would make all publicly funded research available to the public. That knowledge belongs in the public domain, but private interests want to appropriate it, just as entrepreneurs fenced off common land during the enclosure movement in early modern England.

The early modern period provides some perspective on the inroads of commercialization today because it was during that era that culture became imbued with consumerism. Not that one should imagine any age when cultural goods were costless or any society where intellectual exchange took place, free of conflicting interests, in an idyllic agora. Even Homer had to sing for his supper. But the interplay of two phenomena, intellectual property and commercial interests, is especially instructive if one considers the early history of copyright. I would therefore like to take a look at England and France during the seventeenth and eighteenth centuries and then return to the DPLA and copyright issues today.



Notions of intellectual property remained ambiguous until (and sometimes after) states passed copyright legislation: Britain in 1710, Denmark in 1741, France, 1793, and Prussia, 1794. The French case is particularly instructive.¹¹ As printing spread through the kingdom in the late fifteenth and sixteenth centuries, the exclusive right to reproduce a text depended on a privilege granted by the king for periods that varied from six months to ten years. By the seventeenth century, privileges had to be accompanied with the approbation of a censor and registered with the Parisian guild of booksellers and printers. The guild's interests coincided with those of the state. At the high tide of Colbertism, and with the intervention of Colbert himself, the state gave the guild members the exclusive right to print and sell books; while monopolizing the book trade, they policed it, inspecting imports and book shops for illegal works. They exercised their power so ruthlessly that they crushed their competitors in the provinces and gained nearly total control of the publishing industry by 1700. A royal edict of 1723, extended to the entire kingdom in 1744, confirmed both the hegemony of the Parisian guild and the will of the king to perpetuate it.¹² Privilege, royal absolutism and the dominance of a commercial elite went together.

Meanwhile, however, the economy was expanding and the book trade along with it. A flourishing literature, which could not win the approbation of the censors, streamed to publishers outside France, who also pirated the privileged books of the Parisian guild and did a thriving trade inside the kingdom through an underground distribution system manned by their allies among the provincial booksellers. The officials responsible for overseeing the book trade—especially C.G. de Lamoignon de Malesherbes and Antoine Gabriel de Sartine, who served as *directeurs de la librairie* from 1750 to 1763 and from 1763 to 1774, respectively—struggled to stop the drain of capital. They even sympathized with the Enlightenment and opened loopholes in the privilege system—quasi-legal authorizations known as *permissions tacites* and *simples tolerances*—in order to stimulate domestic production. Malesherbes deplored the “odious monopoly” of the Parisian guild.¹³ He attributed the edict of 1723 to the guild's lobbying and hoped to reform the system by new edicts, which would treat authors more liberally and provincial booksellers more equitably. Sartine prepared the way for reform by a series of studies, including a remarkable survey of all the printers and booksellers in France in 1764. In August 1777, when at last the crown issued a new general code for the book trade, it embraced modern notions of economic competition, trimmed back the power of the Parisian guild and celebrated authors for their contribution to culture. But it stopped short of endorsing the concept of copyright.

11. See generally 2 HISTOIRE DE L'ÉDITION FRANÇAISE: LE LIVRE TRIOMPHANT 1660–1830 526 (Henri-Jean Martin & Roger Chartier eds., 1984) (discussing the passing of copyright legislation in France).

12. FRANÇOIS-ANDRÉ ISAMBERT ET AL., 21 RECUEIL GENERAL DES ANCIENNES LOIS FRANÇAISES: DEPUIS L'AN 420 JUSQU'À LA REVOLUTION DE 1789 246–51 (Paris, Belin-Leprieur 1830), available at <http://babel.hathitrust.org/cgi/pt?id=coo.31924026120216>.

13. CHRETIEN GUILLAUME DE LAMOIGNON DE MALESHERBES, MEMOIRES SUR LA LIBRAIRIE ET SUR LA LIBERTE DE LA PRESSE 158 (Roger Chartier ed., 1994) (1809).

On the contrary, it reaffirmed the principle of privilege as a “grace” granted to an author by the king. The author could cede it to a bookseller for a sum of money (royalties did not exist at that time), but the bookseller could not exploit it for a period longer than the author’s life. To extend a privilege beyond that limit would be “to convert the enjoyment of a grace into a right of property.”¹⁴

The edicts of 1777 illustrate the conceptual as well as the institutional obstacles to modernizing the book industries under the *Ancien Régime*. The crown clung to an antiquated model in which a guild did business by monetizing the grace of the king. Enlightenment thinkers, who generally published their books outside France, rejected the premises of the entire system. They advocated authors’ rights, including freedom from censorship and full proprietorship in the products of their labor. Condorcet went so far as to argue that ideas themselves should be free and therefore unconstrained by exclusive rights of property.¹⁵ Diderot represented a more common view—namely, that authors should enjoy perpetual rights to the texts they created:

What kind of property can belong to a man if he does not own the work of his mind, the sole product of his education, of his studies, of his nightly labors, his time, his research, his observations, his most beautiful moments, the most beautiful instants of his life, his innermost thoughts, the sentiments of his heart, that portion of himself that is the most precious and that immortalizes him?¹⁶

This passage expressed the new concept of genius and the growing prestige of writers, which would culminate in the “*sacre de l’écrivain*” in the early nineteenth century.¹⁷ But Diderot embedded it in a memorandum addressed to Sartine, who was then contemplating reforms that would restrict the power of the Parisian guild. Diderot wrote the memorandum at the behest of his publisher, André-François Le Breton, who was then syndic (chief officer) of the guild. For all its eloquence, his argument could be interpreted as lobbying in favor of the guild’s interests. At that time, authors could obtain a privilege for their work, but they could not legally

14. A. J. L. JOURDAN ET AL., 25 RECUEIL GENERAL DES ANCIENNES LOIS FRANÇAISES: DEPUIS L’AN 420 JUSQU’A LA REVOLUTION DE 1789 109 (Paris, Belin-Leprieur 1826), *available at* <http://babel.hathitrust.org/cgi/pt?id=hvd.32044100853217>.

15. Condorcet rejected the Lockean notion that a literary work was a kind of property that belonged to its author as fully as a field cultivated by its owner:

En effet, on sent qu’il ne peut y avoir aucun rapport entre la propriété d’un ouvrage et celle d’un champ, qui ne peut être cultivé que par un homme. . . . Ainsi ce n’est point ici une propriété dérivée de l’ordre naturel et défendue par la force sociale. . . . Ce n’est pas un véritable droit, c’est un privilège [sic]. . . . Tout privilège [sic] est donc une gêne imposée à la liberté, une restriction mise aux droits des autres citoyens; dans ce genre il est nuisible non seulement aux droits des autres qui veulent copier, mais aux droits de tous ceux qui veulent avoir des copies. . . .

MARQUIS DE CONDORCET, FRAGMENTS SUR LA LIBERTE DE LA PRESSE (1776), *reprinted in* 11 OEUUVRES DE CONDORCET 253, 308–09 (M. F. Arago ed., 1847). *See generally* Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793*, 30 REPRESENTATIONS 109, 115–16 (1990) (discussing Condorcet and intellectual property).

16. DENIS DIDEROT, LETTRE SUR LE COMMERCE DE LA LIBRAIRIE 57 (Librairie Fontaine 1984) (author’s translation from French).

17. *See generally* PAUL BENICHO, LE SACRE DE L’ECRIVAIN, 1750–1830: ESSAI SUR L’AVENEMENT D’UN POUVOIR SPIRITUEL LAÏQUE DANS LA FRANCE MODERNE (Gallimard 1996) (1973).

profit from it unless they sold it to an official bookseller who, as a member of the guild, enjoyed the exclusive privilege of selling books. If, as Diderot argued, the privilege were perpetual, it would be far more valuable than if it were limited to the usual nine or ten years. The crown refused to make such a concession. In fact, it failed to implement most of the reforms that it proclaimed in 1777. The Parisian oligarchy protested, lobbied, blocked action with a lawsuit and continued to dominate the publishing industry until 1789.¹⁸ It took a revolution to break its monopoly and to convert the archaic notion of privilege into a modern concept of copyright. The revolutionaries proclaimed the liberty of the press in 1789. They abolished guilds in 1791. And they passed a copyright law in 1793, which limited the exclusive right to sell a text to the lifetime of the author plus ten years. Of course, the story does not stop there, but this abridged version should be enough to illustrate the interpenetration of economic interests and legal principles in the early history of intellectual property in France.



A similar mixture of commercial and cultural factors marked the history of books in England a century earlier.¹⁹ In 1644, Milton expressed the same view of authorship that Diderot was to develop in 1763:

For books are not absolutely dead things, but do contain a potency of life in them to be as active as that soul was whose progeny they are; nay, they do preserve as in a vial

18. Raymond Bim, *The Profit in Ideas: Privilèges en Librairie in Eighteenth-Century France*, 4 EIGHTEENTH-CENTURY STUDIES 131, 131, 168 (1970–1971).

19. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 994–95, 1023 (1990) (arguing persuasively that there were important parallels between the French and Anglo-American versions of copyright law during the revolutionary period).

the purest efficacy and extraction of that living intellect that bred them. . . . A good book is the precious life-blood of a master spirit, embalmed and treasured up on purpose to a life beyond life.²⁰

But Milton wrote in the midst of a revolution, not on the eve of one. Unlike Diderot, he did not bend his argument to support the privileges of a guild, namely the London Company of Stationers established in 1557. On the contrary, he heaped scorn on the “old patentees and monopolizers in the trade of bookselling.”²¹ He called for liberty of the press—within limits, for no libelous, atheistic and Catholic works were to be tolerated—and he treated the guild as an obstacle to liberty.

Like its Parisian counterpart, the Company of Stationers controlled publishing and the book trade by virtue of a monopoly granted by the crown.²² It, too, functioned as a custodian of literary property by keeping a registry, in which it entered licenses for the exclusive right to sell copies of a book. According to licensing acts, renewed regularly by Parliament, books had to be approved by a censor or licenser before they could be registered and published. They could also be licensed by means of patents issued through the royal court of Star Chamber. But in challenging the power of the crown after 1640, the Long Parliament abolished Star Chamber and let the licensing act elapse. For a brief period from 1641 to 1643, the Company feared that it would lose the legal basis for its exclusive “rights to copies.” It therefore lobbied Parliament to renew the licensing act. After Parliament complied in 1643, Milton discovered that his tracts on divorce could not be published legally until a licenser had approved them. His protest, *Areopagitica*, fell on deaf ears, although it has echoed through the centuries as one of the earliest manifestos for the liberty of the press.

The restoration of the Stuarts in 1660 did not augur well for liberty. In 1662 a particularly severe licensing act reinforced the monopoly of the Company of Stationers with provisions for censoring texts and policing the book trade that smacked of the absolutism then being developed under Louis XIV, the protector of the Stuarts, in France. In 1688 the next round of revolution swept away the proto-absolutist, Stuart state and with it, seven years later, pre-publication censorship. Once again the licensing act had expired, and again the Company of Stationers lobbied to restore it. But Parliament had become increasingly wary of the Company’s commercial hegemony. When John Locke examined the proposed bill

20. JOHN MILTON, *AREOPAGITICA* 6–7 (1792), available at <http://find.galegroup.com.ezproxy.cul.columbia.edu/ecco/infomark.do?&source=gale&prodId=ECCO&userGroupName=columbia&tabID=T001&docId=CW107379967&type=multipage&contentSet=ECCOArticles&version=1.0&docLevel=FASCIMILE>.

21. *Id.* at 67.

22. For a survey of the literature on copyright and the history of books in Britain, see 4 *THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN 1557–1695* 9–10 (John Barnard & D. F. McKenzie eds., 2008); 5 *THE CAMBRIDGE HISTORY OF THE BOOK IN BRITAIN 1695–1830* 328 (Michael F. Suarez & Michael L. Turner eds., 2010). A more detailed discussion of the licensing acts and copyright can be found in JOHN FEATHER, *A HISTORY OF BRITISH PUBLISHING* 31 (1988); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 12 (1993); Simon Stern, *Copyright, Originality, and the Public Domain in Eighteenth-Century England*, in *ORIGINALITY AND INTELLECTUAL PROPERTY IN THE FRENCH AND ENGLISH ENLIGHTENMENT* (Reginald McGinnis ed., 2008).

for renewed licensing, he did not invoke the natural rights that he had defended in his *Second Treatise on Civil Government*. He deplored the perpetuation of a monopoly. True, he opposed the bill on the grounds that every man should be free to publish his views and answer for them afterwards. But his main concern was to break the power of the Company of Stationers, which he despised as “dull wretches who do not soe much as understand Latin.”²³ The antimonopoly view prevailed in Parliament, which put an end to prepublication censorship by refusing to renew the licensing act in 1695.

Although the lapse of licensing can be seen in retrospect as a great victory for the freedom of the press, it appeared at the time to be primarily a triumph over a commercial lobby—and a limited one at that, for the Company of Stationers continued to dominate the book trade without relying on acts of Parliament. Its members had not bothered to register most of the books they published in the seventeenth century, because they could shut out competitors. They also owned shares in a cartel known as the English Stock, which gave them a monopoly on steady sellers like almanacs, and an oligarchy within the Company dominated the wholesale trade by combinations known as congers. But the end of licensing threatened to open the way to competition because it meant that most works would fall into the public domain as soon as their licenses expired. Anxious to secure a legal basis for their exclusive rights to copies, the Company lobbied Parliament again, and Parliament complied by creating the first law of copyright, a term that did not spread through the English language until the 1730s. But Parliament did not give the lobbyists everything they wanted, far from it. As indicated by its title, the Statute of Anne, passed in 1710, promised to promote a public good: “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies during the Times therein mentioned.” It limited those times to fourteen years, renewable once, for new works and to twenty-one years in the case of works whose licenses had not yet expired.²⁴

The new rules of the game came into play in 1731, when the first copyrights expired. But the members of the Company of Stationers attempted to undo the action of Parliament by invoking what they took to be a general principle inherent in common law. When an author created a work, they argued, he acquired an unlimited right to the product of his labor. If he sold the work to a publisher, the publisher owned it in perpetuity, as if he had bought a parcel of land. The argument ran parallel to Diderot’s case for perpetual rights, and it gained momentum as the prestige of authors increased throughout the eighteenth century. Leading jurists, such as William Murray (later Lord Mansfield), defended famous

23. Locke added: “[O]ur Company of Stationers having the monopoly here by this act and their patents slubber them over cheapest” JOHN LOCKE, 5 THE CORRESPONDENCE OF JOHN LOCKE 787, 788 (E.S. de Beer ed., 1976), available at http://library.nlx.com/xtf/view?docId=locke_c/locke_c.05.xml;chunk.id=div.el.locke.v5.2;toc.depth=1;toc.id=:brand=default (referring to sullyng their printing and cutting costs).

24. HARRY HUNT RANSOM, THE FIRST COPYRIGHT STATUTE: AN ESSAY ON AN ACT FOR THE ENCOURAGEMENT OF LEARNING 1710 (1956), available at <http://hdl.handle.net/2027/mdp.39015009195507>. A reproduction of the statute as originally printed and a transcription thereof are available at <http://www.copyrighthistory.com/anne.html>.

writers, like Alexander Pope, on the grounds that they should enjoy unlimited rights to their literary property. But behind that argument, the political elite continued to detect the danger of a commercial monopoly, and in *Donaldson v. Beckett*, a decisive case before the House of Lords in 1774, copyright was limited to fourteen years, renewable once.



The Founding Fathers faced the same need to weigh the relative importance of commerce and culture when they drafted the United States Constitution. They followed British precedent in Article I, Section 8, Clause 8, which gives Congress 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 first federal copyright law, passed in 1790, set those limits at fourteen years, renewable once, exactly as in the Statute of Anne, and it, too, presented itself as “An Act for the Encouragement of Learning.” From the beginning, therefore, the Anglo-American tradition of copyright struck a balance between two considerations: the public good, defined as the promotion of learning, and private interests, limited to a relatively short period in which authors and publishers could profit from sales.

Have we got the balance right today? The Sonny Bono Copyright Term Extension Act of 1998 set the limits of copyright at the author’s life plus seventy years, or 95 years from publication in the case of works created by corporations, such as Disney. Jack Valenti, the head lobbyist for the Hollywood interests that pushed the law through Congress, was asked whether he actually favored perpetual copyright. Certainly not, he reportedly replied: “Copyright should last forever

minus one day.” The law has tipped so far in the favor of private interests that most books will not enter the public domain for more than a hundred years. The vast majority of works published in the twentieth century have fallen into a “black hole,” as librarians call it. They cannot be digitized and made available free of charge on the Internet without violating copyright. Having recovered from their setback in the Age of Enlightenment and rewritten copyright law to their own advantage, commercial interests are now redesigning the digital landscape. The Internet and the World Wide Web were meant to be open to all, but private corporations have appropriated so much digital territory and erected so many fences around it that the public is being excluded from what should be its own domain.

I defer to the experts in this law school, who know far more about copyright than I do. But I think it fair to conclude that the early history of copyright took place in a context where economic interests outweighed abstract principles. Commercialization accompanied copyright from its origins—and necessarily so, for books are objects with commercial value, publishers have always struggled to profit from them, and the struggle has involved exploiting every possible advantage, whether through guilds, cartels, monopolies or lobbies. The discourse on authorship, even in the hands of great writers like Milton and Diderot, is haunted by the specter of monopoly. Book history in general is more Balzacian than Jeffersonian—a tale of *Illusions perdues*, especially if one expects it to follow a progressive trajectory that will lead to a happy ending in the present. The issue today is not whether economic interests should displace democratization or vice versa, but rather how we can find a just equilibrium between the two. If access to knowledge has been closing, how can we open it up?



Photographer: Anders Sandberg

Consider Google Book Search. Originally, it was a great idea. Thanks to its technological wizardry, its energy, its wealth and its sheer chutzpah, Google set out to digitize all the books in the world's greatest research libraries. But at first, it provided only a search service. You searched for a subject, and Google showed you where it appeared in a particular book with snippets of a few sentences—accompanied by some discreet advertisements—to illustrate its use. Sometimes Google even told you where you could find the book in a nearby library. Librarians were delighted, and readers, amazed. But in working its way through the libraries' collections shelf by shelf toward a goal of digitizing every book in existence, Google stepped over the line that divided books in the public domain from copyrighted books. In 2005 the Authors Guild and the Association of American Publishers sued Google for copyright infringement. For three and a half years, the parties negotiated over a deal that would satisfy the interests on both sides. When they announced the result by filing a settlement with the United States District Court for the Southern District of New York on October 28, 2008, the search service had metamorphosed into a commercial library, which would sell subscriptions for access to its digital database. Google would get 37 percent of the profits; the authors and publishers, 63 percent. The libraries, which had provided the books free of charge to Google in the first place, were being asked to buy back access to the digitized version of their own books at prices which would be set by Google and the plaintiffs and could escalate as disastrously as the prices of academic journals. The public was not consulted, and no public authority was empowered to oversee the enterprise.

On March 23, 2011, the District Court judge rejected the settlement. Among his objections, he noted the danger, pointed out in two memoranda submitted by the Department of Justice, that Google Book Search could stifle competition in violation of the Sherman Antitrust Act. Although he set conditions for revising the settlement, they do not conform to Google's business plan, and therefore it seems that the settlement is dead. Google will find plenty of lucrative uses for the information it has accumulated, but it failed in its attempt to create a closed, commercial library greater than anything ever imagined. Its failure demonstrates the limits to commercialization in the modern age of information—and also the dangers, for it seemed for a while that a commercial enterprise could fence off an enormous stretch of our common culture in order to exploit it for its own profit. Google had threatened to dominate the world of digitized books even more thoroughly than the Parisian booksellers' guild and the London Company of Stationers had monopolized the trade in printed books three centuries earlier.

I think there are two lessons to be learned from Google Book Search: first, that it is possible to build a macro-digital library; second, that such a library should be designed and run for the public good. On October 1, 2010, long before the court refused to endorse the settlement between Google and the plaintiffs, a group of leaders from foundations, libraries and the field of computer science met at Harvard to discuss the possibility of creating a Digital Public Library of America—that is, a non-commercial library that would make the cultural heritage of America available to all Americans and to everyone in the world with access to the Internet. The

foundations would combine forces to provide the funds; the libraries would cooperate to furnish the books. We created a steering committee and a secretariat located at Harvard's Berkman Center. Grants from the Sloan and the Arcadia foundations covered initial expenses, and six workgroups scattered across the country tackled the most important problems: What would be the scope and content of the DPLA's holdings? What sort of public should it envisage serving? How would its technical infrastructure be designed? How would it develop a sustainable business model? How would it be organized and governed? And how would it address legal problems, especially the constraints imposed by copyright?



Of all these problems, the hardest is the last. We know that we want the DPLA to serve a broad constituency: not just faculty in research universities, but students in community colleges, ordinary readers, K-through-12 school children and seniors in retirement communities—anyone and everyone with an interest in books. We are perfecting a technical prototype, which will link the holdings of many research libraries in a single distributed system. We have opened a search for an executive director; we are working on plans to set up administrative headquarters; and we are creating a nonprofit organization in conformity with the 501(c)(3) provision of the Internal Revenue Code. The DPLA will be up and running within a year, and its initial holdings will include, among other things, a dazzling array of special collections far richer than anything available through Google. But how can it include books covered by copyright?

We have not found a solution to this problem, but in the time remaining I would like to discuss a few possibilities as they appear from my nonlawyerly perspective. We have learned from the history of copyright that we must accommodate the legitimate interests of the book industry—not to mention other industries involved with other kinds of cultural products, such as images, recordings and film. For my part (but I am expressing my own opinion, not that of the DPLA's steering committee), I think the DPLA should exclude books currently in the marketplace. It should create a moving wall to prevent its collections from spilling into

commercial circuits. By advancing a year at a time, the wall would maintain a distance of five or ten years between the DPLA and books that are still in print. I admit that the notion of a book “in print” is obsolete, because publishers now work with electronic copy and keep their backlists in digital databases so that they can make any book available through print-on-demand or digital delivery to e-readers. But most books cease to sell after a few months, and their potential to produce revenue dries up completely within a few years. The rare book that maintains its commercial value over a long time could be excluded from the DPLA by an opt-out arrangement with the publisher and author. Far from threatening the economic interests of rights holders, the DPLA might in this way win their cooperation. True, opt-out provisions look dubious in court, and then-District Court Judge Denny Chin resoundingly rejected the opt-out clauses of the Google Book Search settlement.

How then can the DPLA cope with the general problem of including books that are covered by copyright but are out of print, or “commercially unavailable” as Google put it in the settlement? This vast category probably includes at least a million orphan books (those whose rights holders cannot be found after a diligent search), published for the most part between 1923 and 1964. It also includes many millions published in the United States since 1964, the point at which U.S. copyright now covers all books, and millions more published in Europe, where the claims of rights holders could stretch back to 1870, according to some calculations.²⁵

Could the DPLA make all these books available without exposing itself to litigation by invoking Section 107 of the Copyright Act of 1976—that is, the doctrine of fair use? Google apparently meant to defend itself by a fair use argument when it was limiting its speculation to a search service. The DPLA might get more mileage out of that argument, because it is a nonprofit organization devoted to the public good. It could claim that its use of digital files was not only fair but also “transformative” in that it reworked a physical object, which once had commercial value, into an electronic ingredient of an open-access database intended for education, study and other noncommercial uses that benefit the public.²⁶ Some recent cases in the Ninth and Fourth Circuit Courts seem to support this view, but others in the Second Circuit do not. Where case law will lead is therefore hard to say, but courts seem increasingly aware of the need to adjust views derived from the world of print to the new conditions of electronic communication. In a recent and important decision in the United States District Court for the Southern District of New York, Judge Harold Baer, Jr. endorsed

25. ANNA VUOPALA, DG EUR. COMM’N, ASSESSMENT OF THE ORPHAN WORKS ISSUE AND COSTS FOR RIGHTS CLEARANCE 5 (2010), available at http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf.

26. Patricia Aufderheide & Peter Jaszi, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT (2011); Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526; Pamela Samuelson, *Reforming Copyright Is Possible. And It’s the Only Way to Create a National Digital Library*, CHRONICLE OF HIGHER EDUC. (July 9, 2012), <http://chronicle.com/article/Reforming-Copyright-Is/132751/>.

arguments for fair use by relating them to “the basic purpose of copyright—to provide a limited monopoly for authors primarily to encourage creativity”²⁷ I read his opinion as an affirmation of what copyright was meant to do according to the United States Constitution and the original Copyright Act of 1790. But I am a historian, not a lawyer, and most of my law professor friends still warn me that the concept of transformativeness looks dubious, despite its adoption in a code of best practices issued by the Association of Research Libraries.²⁸ Moreover, fair use is a peculiarly American doctrine, and it does not apply in countries outside the United States where the DPLA would want to make its holdings available.

It might be more effective to argue that the DPLA would not damage any market, because the demand for the out-of-print books had dried up. Voluntary agreements could provide compensation for the rights holders of the rare works that continued to sell after five or ten years. And should any right holder who had not made such an agreement come forward with a credible claim, the book would be instantly removed from the DPLA’s holdings, and compensation would be paid. Risk could be mitigated by legislation that would limit the penalty for making old, out-of-print books accessible. In fact, one could imagine a moving wall at the far end of the timespan, when books would begin to fall into the public domain: the older the book, the smaller the sum to be awarded in a case of copyright infringement.

As things now stand, however, the penalty for copyright infringement can exceed \$100,000 per title. The DPLA could be vulnerable to ruinous litigation because its holdings would consist of books digitized on a mass scale, and it would not be able to do “due diligence” in locating and notifying everyone who held their copyrights, especially in the case of orphan works. How then can it minimize the risk? A Copyright Office Report of 2006 recommended Congressional action that would limit damages according to certain criteria, such as the age of a book and the potential market for it. But the report did not hold out any possibility of escaping the crippling requirement for a book-by-book search to identify rights holders.

One way around this difficulty might be through collective rights management organizations (CMOs), which have taken hold in Europe.²⁹ Composed of members with rights to certain kinds of works, such as out-of-print books, the organization is legally authorized to negotiate licenses on behalf of its members and also for nonmembers with similar interests. It collects fees for the licenses and distributes the payment to the rights holders, who can opt out of participating if they choose to do so. In Denmark, forty-four groups of this kind participate in Copydan, the successor to an arrangement to pay authors for photocopying their works in the

27. *Authors Guild v. HathiTrust*, 11 CV 6351, slip op. at 9 (S.D.N.Y. filed Oct. 10, 2012).

28. Jonathan Band, *Educational Fair Use Today*, ASS’N OF RESEARCH LIBRARIES 2 (Dec. 2007), <http://www.arl.org/bm~doc/educationalfairusetoday.pdf>; ASS’N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 15 (Jan. 2012), available at <http://www.arl.org/bm~doc/code-of-best-practices-fair-use.pdf>.

29. These extended collective licensing regimes have flourished especially in Scandinavia. See Lucie Guibault & Stef Van Gompel, *Collective Management in the European Union*, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 135, 135 (Daniel Gervais ed., 2d ed. 2010).

1970s. Kopinor in Norway administers payments according to the number of pages of a digitized text that are read (but not downloaded) on a computer located in Norway. Similar systems exist in Sweden, Finland and the Netherlands. On March 1, France passed a law that opens the way to mass digitization of out-of-print books through the intermediary of a CMO which represents publishers who possess rights to the print, but not to an electronic version of works on their backlists. While providing for the possibility of new online editions of those books, the law will allow the Bibliothèque nationale de France to digitize and make accessible orphan books published before 2001 from its own holdings after a waiting period of ten years.³⁰ If the DPLA could benefit from this kind of system, it would be protected from exposure to litigation and relieved of the requirement to search for all the rights holders of all copyrighted out-of-print books, orphans included.

Finally, we could fall back on voluntarism. This country includes hundreds of thousands of authors who have published books that ceased to sell many years ago. Those authors would welcome an opportunity to give their books new life. They want readers. Many of them, especially in the academic world, never set out to make money from their publications in the first place. They want to communicate their ideas. They could license their rights to the DPLA, which would digitize their books, curate them, preserve them and make them available free of charge to the entire world. This strategy could complement a general effort, now underway, to create an Authors Alliance, which would make works available free of charge through a mechanism similar to a Creative Commons license.³¹

Please forgive me, if I am overloading my argument with legalistic detail. I had to follow it where it led. Our quick tour through history brought us face to face with some arcane aspects of contemporary law—inevitably, for the problems of copyright extend back three centuries. The past haunts the present. But it also can provide some inspiration. Our concern with legal entanglements should not blind us to the utopian energy that has driven democratization from the time of the Founding Fathers. Given the opportunity, authors, publishers and readers of all kinds will rally to the cause. Their commitment can fuel the other force that shaped the Republic from its beginning: I mean the pragmatic, can-do spirit that actually gets things done.

Therefore, I would like to conclude with a promise. We *will* get it done. We will raise the funds; we will design the technology; we will organize the administration; we will even (with the help, I hope, of scholars like the distinguished professors at the Columbia University School of Law) work through the legal problems; and we will get the DPLA up and running by April 2013.

30. *Loi du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXème siècle*, VIE PUBLIQUE (Mar. 9, 2012), <http://www.vie-publique.fr/actualite/panorama/texte-vote/loi-du-1er-mars-2012-relative-exploitation-numerique-livres-indisponibles-du-xxeme-siecle.html>.

31. Pamela Samuelson has proposed this idea in a paper, not yet published. Pamela Samuelson, Concept Paper for the Authors Alliance: "Speaking for Authors Who Write to Be Read" (June 8, 2012) (unpublished article).