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SKRIPSI

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0504001832**

**FAKULTAS HUKUM
PROGRAM REGULER
DEPOK
DESEMBER 2009**



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SKRIPSI

Diajukan sebagai salah satu syarat untuk memenuhi gelar Sarjana Hukum

**RAMA PUTRA
0504001832**

**FAKULTAS HUKUM
PROGRAM STUDI ILMU HUKUM
PROGRAM KEKHUSUSAN IV
(HUKUM TENTANG KEGIATAN EKONOMI)
DEPOK
DESEMBER 2009**

HALAMAN PERNYATAAN ORISINALITAS

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Judul Skripsi : Copyleft Sebagai Tanggapan Terhadap Doktrin
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Telah berhasil dipertahankan di hadapan Dewan Penguji dan diterima sebagai bagian dari persyaratan yang diperlukan untuk memperoleh gelar Sarjana Hukum pada Progran Studi Reguler, Fakultas Hukum, Universitas Indonesia

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KATA PENGANTAR

Segala puji dan syukur penulis panjatkan kepada Allah SWT atas berkat dan karunia-Nya sehingga Penulis dapat menyelesaikan skripsi dengan judul **“Copyleft Sebagai Tanggapan Terhadap Doktrin Copyright yang Eksesif”** Penulisan skripsi ini dilakukan dalam rangka memenuhi salah satu syarat untuk menjadi Sarjana Hukum Program Kekhususan IV (Hukum tentang Kegiatan Ekonomi) pada Fakultas Hukum Universitas Indonesia.

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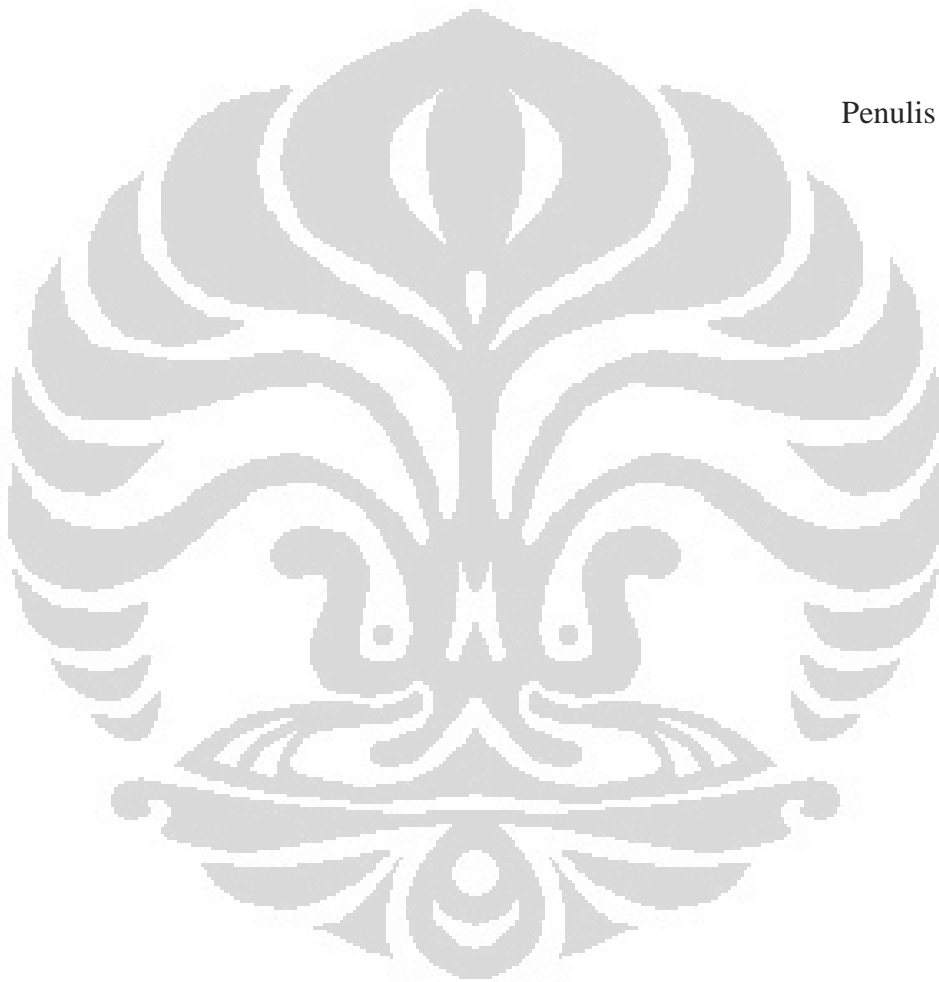
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Depok, 30 Desember 2009

Penulis



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Dibuat di : Depok
Pada Tanggal : 30 Desember 2009

Yang menyatakan

(Rama Putra)

ABSTRAK

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Program Studi : Hukum
Judul : Copyleft Sebagai Tanggapan Terhadap Doktrin Copyright yang Eksesif

Skripsi ini membahas awal mula kemunculan beserta implementasi gerakan *Copyleft* yang ditimbulkan sebagai akibat dari pelaksanaan hukum Hak Cipta yang berlebihan, dimana pelaksanaan hukum Hak Cipta tidak lagi melindungi sebagian maupun keseluruhan dari tujuan utama perlindungan Hak Cipta. Tujuan utama perlindungan ciptaan dimaksud yaitu dengan melindungi aspek investasi pada suatu ciptaan, dan mendorong terjadinya iklim inovasi di tengah masyarakat. Gerakan *Copyleft* dimaksud merupakan suatu sistim distribusi ciptaan yang pertama kali muncul berdasarkan prinsip *Free Software* sebagai tanggapan terhadap timbulnya *proprietary software*. Kemudian *copyleft* dimanifestasikan dalam bentuk perjanjian lisensi yang memungkinkan terjadinya pemanfaatan ciptaan tanpa adanya pembatasan-pembatasan untuk sebagaimana yang diatur dalam perjanjian lisensi Hak Cipta pada umumnya.

Kata kunci :
Copyleft, Hak Cipta, Perjanjian Lisensi, Software

ABSTRACT

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Program Studi : Law
Judul : Copyleft As Response Towards Excessive Copyright Doctrine

This Thesis analyze the origin and the implementation of copyleft movement which came out as a result of excessive copyright enforcement, where such enforcement has no longer protect the primary concerns of Copyright protection partially and/or as a whole. The primary concerns of copyright protection are to protect the investment aspect on creation, and stimulating innovative condition among society. Copyleft movement originated first according to the free software principal as a response to proprietary software. Therefore copyleft movement is furthermore manifested through the form of license agreement which enables beneficial conduct of a creation without restrictions as mentioned inside copyright licenses in general.

Key words:

Copyleft, Copyright, License Agreement, Software

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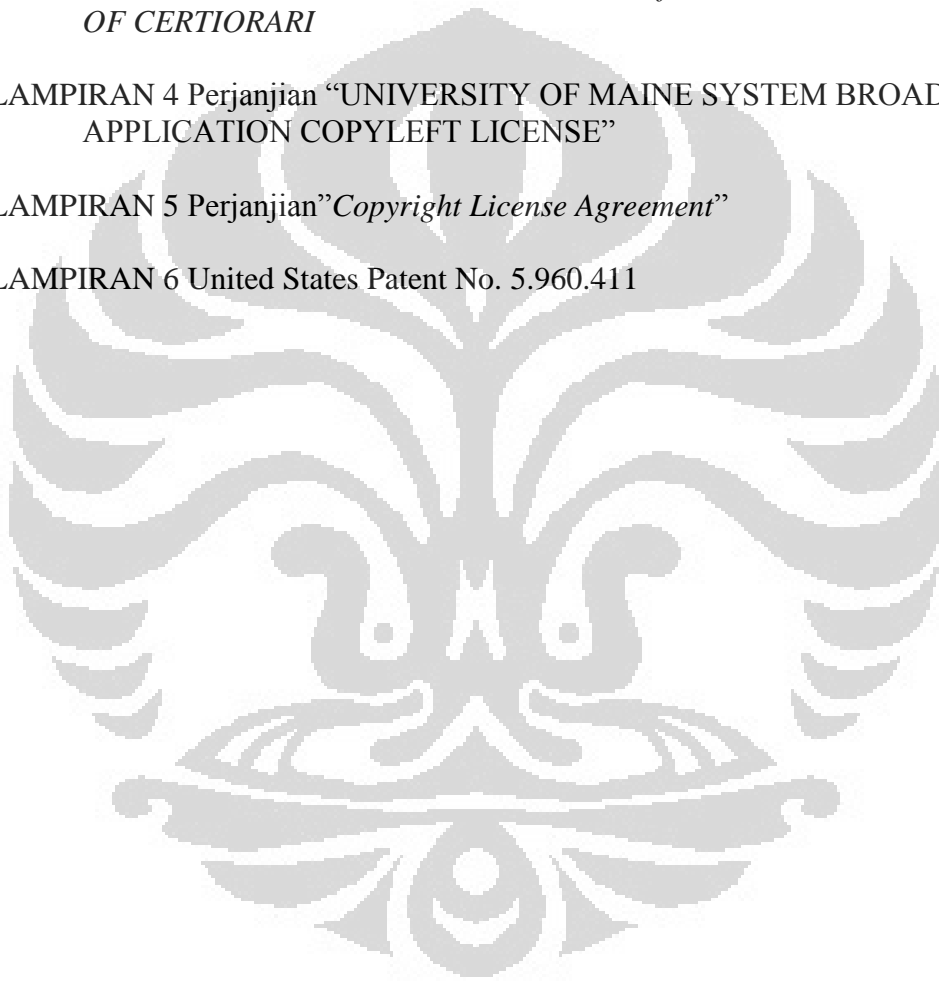
LAMPIRAN 2 Kasus *Eric Eldred, et. Al v. John D. Ashcroft, No. 01-618, Supreme Court of the United States*

LAMPIRAN 3 *Eric Eldred, et al. V. John D. Ashcroft, PETITION FOR A WRIT OF CERTIORARI*

LAMPIRAN 4 Perjanjian “UNIVERSITY OF MAINE SYSTEM BROAD APPLICATION COPYLEFT LICENSE”

LAMPIRAN 5 Perjanjian”*Copyright License Agreement*”

LAMPIRAN 6 United States Patent No. 5.960.411



BAB 1

PENDAHULUAN

1.1. LATAR BELAKANG

Richard Stallman mendirikan *Free Software Foundation*, sejak bulan Oktober tahun 1985 dengan tujuan untuk mendukung gerakan *Free Software*. Gerakan *Free Software* yang diprakarasi oleh Richard Stallman ini bertujuan untuk menyebarkan prinsip kebebasan (*Freedom*) dalam pengembangan *software* komputer tanpa adanya pembatasan yaitu dari segi penggunaan, perbanyakan, pemodifikasian, dan distribusi.¹

Dalam pelaksanaannya, upaya untuk merealisasikan prinsip kebebasan sebagaimana disebut diatas tersebut sering disalah-artikan dengan benturan terhadap perlindungan akan hak kebendaan tertentu, atau pelanggaran terhadap hak eksklusif suatu ciptaan. Dalam aspek kebendaan yang melekat pada pihak pencipta *software*, terdapat suatu hak eksklusif yang ditujukan untuk mencegah adanya penyalah-gunaan terhadap hasil ciptaan tersebut yang antara lain dilakukan melalui pembajakan, plagiarisme, dan berbagai bentuk penyalah-gunaan lainnya. Suatu ciptaan berupa *software* dapat dianggap sebagai benda terlepas dari bentuk fisiknya yang tidak nyata. Atas dasar alasan tersebutlah terbentuk sebuah perlindungan atas ciptaan yang telah dituangkan dalam bentuk hasil karya. Perlindungan terhadap karya tersebut di Indonesia diatur oleh Undang-undang No. 19 Tahun 2002 tentang Hak Cipta .

¹ GNU Operating System, "Overview of The GNU System", < <http://www.gnu.org/gnu/gnu-history.html>>, Diunduh tanggal 1 Mei 2009.

Hak Kekayaan Intelektual adalah pengakuan hukum yang memberikan pemegang hak atas kekayaan intelektual untuk mengatur penggunaan gagasan-gagasan dan ekspresi yang diciptakannya untuk jangka waktu tertentu. Istilah "kekayaan Intelektual" mencerminkan bahwa hal tersebut merupakan hasil pikiran atau intelektualitas, dan bahwa hak kekayaan intelektual dapat dilindungi oleh hukum sebagaimana bentuk hak milik lainnya.² Esensi dari kekayaan intelektual yang dilindungi Hak atas Kekayaan Intelektual adalah proses berpikir penciptanya, oleh karena itu hak kebendaan yang melekat pada proses intelektual tersebut adalah benda yang tidak berwujud.³

Suatu ciptaan tidak dapat dilindungi apabila masih belum mempunyai suatu manifestasi fisik. konsep hukum Hak Cipta mengenal pembedaan yang tegas antara suatu ide dan perwujudan dari ide bersangkutan. Hal tersebut dapat dilihat dalam penjelasan Undang-undang No. 19 Tahun 2002 tentang Hak Cipta huruf I. Umum, yang berbunyi:

"...Perlindungan Hak Cipta tidak diberikan kepada ide atau gagasan karena karya cipta harus memiliki bentuk yang khas, bersifat pribadi, dan menunjukkan keaslian sebagai Ciptaan yang lahir berdasarkan kemampuan, kreativitas, atau keahlian sehingga Ciptaan itu dapat dilihat, dibaca, atau didengar."⁴

Sebagai contoh, perkembangan papan mainan atau game komputer. Seseorang mungkin memiliki ide mengenai game tersebut, namun jika ide tersebut tidak diwujudkan dalam bentuk program komputer misalnya, ide tersebut tidak memperoleh perlindungan Hak Cipta. Saat ide tersebut telah diwujudkan dalam bentuk yang

² Rachmadi Usman, *Hukum Atas Hak Kekayaan Intelektual*, (Bandung: PT. Alumni, 2003), hal. 2.

³ H. Adami Chazawi, *Tindak Pidana Hak Atas Kekayaan Intelektual (HAKI)*, (Malang: Bayumedia, 2007), hal. 3.

⁴ Indonesia (a), *Undang-Undang Hak Cipta*, UU No.19 tahun 2002, LN No.85 tahun 2002, TLN No.4220, Penjelasan Umum.

khas/nyata, baru akan diperoleh perlindungan Hak Cipta.⁵ Namun dalam perkembangannya, tidak sedikit permasalahan yang timbul dimana pemegang hak eksklusif terhadap sebuah karya malah menyalahgunakan haknya, khususnya dalam ruang lingkup Hak Cipta. Penyalahgunaan tersebut antara lain terindikasi dengan beberapa hal, antara lain dengan tertutupnya kemungkinan untuk mempelajari esensi dari ciptaan dimaksud, maupun sebagai hambatan yang mahal dalam pengalihan teknologi yang dibutuhkan negara berkembang untuk meningkatkan pembangunan ekonomi dan kesejahteraan sosialnya.⁶

Contoh nyata perlindungan Hak Kekayaan Intelektual yang berlebih tersebut terlihat dalam industri *Software*. Hak Cipta dianggap memegang peranan dalam perlindungan *Software* dalam ruang lingkup yang terbatas. Pada awalnya, perlindungan Hak Cipta terhadap *Software* tidak selalu dipatuhi. Masyarakat membeli program dan menggunakannya untuk berbagai komputer dimana hal tersebut merupakan pelanggaran terhadap perjanjian penggunaan lisensi yang melekat dalam program komputer tersebut. Penggunaan program komputer yang dibeli secara sah disalah gunakan dengan menciptakan program baru yang menggunakan potongan maupun bagian-bagian dari program komputer dimaksud.⁷

Fakta tersebut diatas menimbulkan gerakan yang beranggapan bahwa Hak Kekayaan Intelektual tidak dibutuhkan, dan kompetisi merupakan hal yang mendorong inovasi. Contoh konkrit gerakan tersebut terlihat dengan munculnya *Open Source software*. Seringkali *Software* ini dipopulerkan berdasarkan perjanjian lisensi yang bertolak belakang dengan perjanjian Hak Cipta pada umumnya, yang dalam beberapa

⁵ Timothy Lindsey et al., *Hak Kekayaan Intelektual Suatu Pengantar*, (Bandung: PT. ALUMNI BANDUNG, 2006), hal. 105.

⁶ *Ibid.*, hal. 59.

⁷ Michelle Boldrin, dan David K. Levine, *Against Intellectual Monopoly*, (Washington: Cambridge University Press, 2008), hal. 16.

kasus, mewajibkan siapapun yang berniat menjual *Software* tersebut agar memberikan kesempatan kepada pesaingnya untuk memperbanyak *software* tersebut. Gerakan dimaksud adalah gerakan *Copyleft* yang merupakan komitmen dari pengembang *Software* untuk menghindari monopoli intelektual dan beroperasi dalam kondisi kompetisi bebas.⁸

Salah satu realisasi *copyleft* terwujud dalam bentuk *open source software*. Yang dimaksud dengan *Open Source software* adalah sebuah program komputer dimana *source code* dan beberapa hak yang hanya terbatas untuk pemegang *copyright* software tersebut, dibuat tersedia berdasarkan lisensi *software* yang di dalamnya terdapat pengaturan yang memperbolehkan siapa saja untuk menggunakan, memperbanyak, memodifikasi, dan mendistribusikan hasil perbanyakannya baik yang telah dimodifikasi maupun belum dimodifikasi tersebut.⁹

Masyarakat pada umumnya tidak menangkap esensi dari gerakan *Copyleft* dimaksud, dan cenderung menyamakan *Copyleft* dengan pembajakan *software*¹⁰. Dalam bab-bab selanjutnya, penulis akan menjelaskan segala aspek terkait *Copyleft* dengan harapan agar mata masyarakat dapat lebih terbuka dan tidak terjadi miskonsepsi terhadap masalah *Copyleft* dengan kaitannya terhadap perlindungan Hak Kekayaan Intelektual.

Gerakan *copyleft* timbul seiring dengan meningkatnya pengaplikasian hak eksklusif terhadap ciptaan. Bagi sebagian orang, hak eksklusif dianggap sebagai faktor penghambat yang dapat menghilangkan prinsip kebebasan dan kebersamaan. Kata

⁸ *Ibid.*, Hal. 18.

⁹ Rod Dixon, *Open Source Software Law*, (Boston: Artech House, 2004), hal. 1-3.

¹⁰ KPLI Solo, "Open Source Software (OSS) dan Implementasi di Lapangan", <<http://solo.linux.or.id/2009/04/open-source-software-oss-dan-implementasi-di-lapangan.html>>, Diunduh tanggal 1 Mei 2009.

"*copyleft*" sendiri merupakan pelesetan terhadap kata "*copyright*" dimana kata "*right*" yang diartikan sebagai kanan diganti dengan "*left*" yang diartikan sebagai kiri. Selain interpretasi sebagai kata arah pergerakan (kanan dan kiri), kata "*left*" juga diartikan sebagai "ditinggalkan" dimana karya yang *copyleft* tersebut harus ditinggalkan dalam bentuk sebelumnya dan tidak dapat diikutsertakan dalam *copyright* berikutnya.¹¹

Gerakan *copyleft* semakin dikenal di masyarakat seiring dengan peningkatan pengetahuan masyarakat akan ilmu pengetahuan dan teknologi. Namun mengingat masih banyak terdapat kesalahpahaman yang disebabkan oleh kurangnya pengertian masyarakat secara mendalam mengenai gerakan *copyleft*, maka penulis tertarik untuk melakukan penelitian lebih lanjut mengenai masalah tersebut. Pembahasan mendalam akan dilakukan pada bab selanjutnya.

1.2. POKOK PERMASALAHAN

Mengacu pada latar belakang yang telah diuraikan, penulis membatasi permasalahan yang akan dibahas sebagai berikut:

1. Bagaimana bentuk pelaksanaan *Copyright* yang dapat dipandang tidak wajar dan bertentangan dengan tujuan pengaturan hukum Hak Cipta?
2. Bagaimana dampak dari sistem Hak Cipta dan sistem *Copyleft* terhadap perkembangan pembuatan program komputer?
3. Bagaimana kedudukan *Copyleft* menurut hukum Hak Cipta?

1.3. TUJUAN PENELITIAN

¹¹ Budi Rahardjo, *Apakah Negara Berkembang Memerlukan Sistem Perlindungan HKI?*, Lampiran Makalah, hal. 48.

Berdasarkan latar belakang dan pokok permasalahan yang telah diuraikan, penelitian ini secara umum bertujuan untuk mengetahui pelaksanaan hukum *Copyleft* sebagai tanggapan terhadap eksesifitas yang ditimbulkan oleh Hak Atas Kekayaan Intelektual, khususnya Hak Cipta.

Adapun yang menjadi tujuan khusus dari penelitian ini adalah sebagai berikut:

1. Menjelaskan bentuk pelaksanaan *Copyright* yang dapat dipandang tidak wajar dan bertentangan dengan tujuan pengaturan hukum Hak Cipta.
2. Menjelaskan dampak dari sistem Hak Cipta dan sistem *Copyleft* terhadap perkembangan pembuatan program komputer.
3. Menjelaskan kedudukan *Copyleft* menurut hukum Hak Cipta.

1.4. DEFINISI OPERASIONAL

1. Hak Cipta adalah hak eksklusif bagi Pencipta atau penerima hak untuk mengumumkan atau memperbanyak Ciptaannya atau memberikan izin untuk itu dengan tidak mengurangi pembatasan-pembatasan menurut peraturan perundang-undangan yang berlaku.¹²
2. Hak eksklusif adalah hak yang semata-mata diperuntukkan bagi pemegangnya sehingga tidak ada pihak lain yang boleh memanfaatkan hak tersebut tanpa izin pemegangnya.¹³

¹² Indonesia (a), *op cit.* ps. 1 angka (1)

¹³ *Ibid.*, penjelasan ps. 2 ayat (1)

3. Pemegang Hak Cipta adalah pencipta sebagai Pemilik Hak Cipta, atau pihak yang menerima hak tersebut dari Pencipta atau pihak lain yang menerima lebih lanjut hak dari pihak yang menerima hak tersebut.¹⁴
4. Hak ekonomi adalah hak untuk mendapatkan manfaat ekonomi atas Ciptaan serta produk Hak Terkait.¹⁵
5. Hak moral adalah hak yang melekat pada diri Pencipta atau Pelaku yang tidak dapat dihilangkan atau dihapus tanpa alasan apapun, walaupun Hak Cipta atau Hak Terkait telah dialihkan.¹⁶
6. Lisensi adalah izin yang diberikan oleh Pemegang Hak cipta atau Pemegang Hak Terkait kepada pihak lain untuk mengumumkan dan/atau memperbanyak Ciptaannya atau produk Hak Terkaitnya dengan persyaratan tertentu.¹⁷
7. *Copyleft* adalah salah satu bentuk lisensi dan dapat digunakan untuk memodifikasi suatu karya yang dilindungi Hak Cipta seperti Tulisan, lagu, maupun *software*. Lisensi dimaksud mengatur bahwa siapa saja yang mendistribusikan ulang suatu *software* dengan atau tanpa modifikasi apapun berkewajiban untuk melanjutkan kebebasan untuk memperbanyak, dan memodifikasi lebih lanjut.¹⁸
8. *Software* adalah program/aplikasi yang berguna untuk menjalankan operasi komputer beserta aplikasi lainnya termasuk sistem operasi komputernya

¹⁴ *Ibid.*, ps. 1 angka (4).

¹⁵ *Ibid.*, penjelasan umum.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, Ps. 1 angka (14).

¹⁸ GNU Operating System, "What is Copyleft?", <<http://www.gnu.org/copyleft/>>, Diunduh tanggal 1 Mei 2009.

9. *Open Source Software* adalah metode yang digunakan terhadap suatu *software* dimana *Source Code* untuk *software* dimaksud diberikan bersama dengan *Software* pada saat pendistribusiannya sehingga prinsip *free* dapat terpenuhi.
10. *Source Code* adalah sekumpulan informasi yang tertulis dalam bahasa pemrograman yang dapat dibaca oleh manusia, dan memungkinkan para pembuat program untuk memberi instruksi kepada computer.
11. *Free Software* adalah konsep *software* yang dapat digunakan, diperbanyak, dimodifikasi, dan disebarluaskan tanpa pembatasan, atau sedikit pembatasan yang semata-mata hanya memastikan penerima *software* hasil modifikasi maupun non-modifikasi, juga melakukan redistribusi.
12. *GNU* adalah *Operating System* dari suatu computer yang secara keseluruhan terdiri dari gabungan *free software*.
13. *Operating system* adalah program yang menjembatani antara pengguna komputer dengan komputer, dan berfungsi sebagai perantara yang menerjemahkan instruksi dalam bahasa manusia ke bahasa komputer dan sebaliknya.

1.5. METODOLOGI PENELITIAN

Metodologi yang digunakan dalam penulisan skripsi ini adalah metode penelitian normatif. Dilihat dari sifat penelitiannya, penelitian ini bersifat eksploratoris, atau penelitian menjelajah yang bertujuan untuk mencari data awal tentang suatu gejala.¹⁹ Gejala yang dimaksud adalah mengenai *Copyleft* sebagai tanggapan terhadap doktrin *copyright* yang eksekutif. Pendekatan yang digunakan adalah pendekatan kualitatif

¹⁹ Sri Mamudji et al., *Metode Penelitian dan Penulisan Hukum*, (Jakarta: Badan Penerbit Fakultas Hukum Universitas Indonesia, 2005), hal. 4.

yang menghasilkan data analitis-preskriptif yaitu memberikan jalan keluar atau saran untuk mengatasi suatu permasalahan.²⁰

Dalam proses penulisan karya tulis ini, penulis mengumpulkan data melalui buku-buku dan karya tulis yang berkaitan dengan permasalahan *Copyleft* dan *Copyright*²¹, sumber-sumber yang berasal dari Internet, serta peraturan perundang-undangan yang mengatur mengenai Hak Kekayaan Intelektual termasuk Undang-undang Hak Cipta, *The Konvensi Bern (Berne Convention)*, dan Perdagangan dari Hukum Atas Hak Kekayaan Intelektual (*Agreement on Trade-Related Aspects of Intellectual Property Rights/TRIPs*).²² Penulis menggunakan jenis data sekunder yang digunakan untuk memperoleh dan menjelaskan bahan hukum yang berkaitan dengan pokok bahasan

1.6. SISTEMATIKA PENULISAN

Sistematika penulisan skripsi ini dibagi menjadi lima bab. Dalam tiap bab menguraikan beberapa sub bab dengan pokok-pokok pembahasan utama yang terkandung dalam bab. Secara garis besar, sistematika penulisan skripsi ini adalah sebagai berikut:

1. Bab 1 merupakan Pendahuluan yang terdiri dari Latar Belakang Permasalahan, Pokok Permasalahan, Tujuan Penelitian, Definisi Operasional, Metodologi Penelitian, dan Sistematika Penulisan.
2. Bab 2 merupakan pembahasan mengenai *Copyright & Author's Right* yang terdiri dari Pengertian Sejarah *Copyright*, , Pembedaan Antara *Author's Right*

²⁰ *Ibid.*, hal. 4.

²¹ Dalam buku *Metode Penelitian dan Penulisan Hukum*, penulis mengklasifikasikan sumber-sumber yang berasal dari buku maupun karya tulis tersebut sebagai sumber data sekunder/bahan pustaka dalam bidang non hukum. Baca *Ibid*, hal. 29.

²² Dalam buku *Metode Penelitian dan Penulisan Hukum*, penulis mengklasifikasikan sumber-sumber yang berasal dari sumber data sekunder/pustaka hukum dilihat dari kekuatan mengikatnya. Baca *Ibid.*, hal. 31.

Dengan *Copyright*, Hak Cipta Di Indonesia, dan Dampak Negatif Yang Ditimbulkan Oleh Hak Atas Ciptaan.

3. Bab 3 merupakan pembahasan mengenai Tinjauan Umum *Copyleft* yang terdiri dari Awal Mula Kemunculan *Copyleft* Dalam Bidang Hak Kekayaan Intelektual, Pengaruh Munculnya *Copyleft* Terhadap *Copyright* dan *Author's Right*, Pelaksanaan Hak Atas Kekayaan Intelektual Dalam Dunia Praksis, Permasalahan Hak Cipta Dan Hak Paten Pada *Software*, dan Peran *Open Source Software* dalam menghadapi permasalahan *Proprietary Software*.
4. Bab 4 merupakan analisis mengenai Kedudukan *Copyleft* Menurut Hukum Hak Cipta yang terdiri dari *Copyleft* Sebagai Perbuatan Hukum, Legalitas *Copyleft*, dan Manfaat *Copyleft*.
5. Bab 5 merupakan kesimpulan dan saran penulis. Kesimpulan dari pembahasan yang ada pada bab-bab sebelumnya akan diuraikan dalam Bab V ini.

BAB 2

COPYRIGHT & AUTHOR'S RIGHT

2.1. SEJARAH *COPYRIGHT*

Keaslian suatu karya, baik berupa karangan atau ciptaan merupakan suatu hal yang esensial dalam perlindungan hukum Hak Cipta. Berarti karya tersebut harus merupakan karya orisinal yang dibuat oleh penciptanya. Dengan demikian maka sebelum diberikannya perlindungan Hak Cipta terhadap suatu ciptaan, maka otentisitas dari ciptaan tersebut terhadap penciptanya harus dapat dibuktikan terlebih dahulu. Hal tersebut disebutkan dalam Pasal 1 ayat (3) Undang-undang Hak Cipta, yang berbunyi:

“Ciptaan adalah hasil setiap karya Pencipta yang menunjukkan keasliannya dalam lapangan ilmu pengetahuan, seni, atau sastra.”

Dalam hukum positif Indonesia, hak pencipta disebut sebagai *author's right*, sejak diberlakukannya *Auteurswet 1912 Stb. 1912 No. 600*; yang kemudian digunakan istilah Hak Cipta dalam peraturan perundangan selanjutnya.²² Awalnya, istilah Hak Cipta berasal dari negara yang menganut sistem hukum *common law*, dan dikenal dengan istilah *Copyright*, sedangkan di negara Eropa yang menganut sistem hukum *civil law* seperti Prancis, dikenal istilah *droit d'auteur*.

Perlindungan Hak Cipta telah muncul sejak sebelum abad ke-15, pada biara-biara di Inggris. Rahib yang berada di biara-biara tersebut membuat suatu karya tulis. Karena pada masa itu belum ada alat penggandaan, maka rahib-rahib tersebut bertindak

²² Endang Purwaningsih, *Perkembangan Hukum Intellectual Property Rights, Kajian Hukum Terhadap Hak Atas Kekayaan Intelektuan dan Kajian Komparatif Hukum Paten*. (Bogor: Ghalia Indonesia, 2005), hal. 1.

sebagai penulis sekaligus bertindak sebagai pembuat salinan, yang membuat salinan karya tulis dengan menggunakan tangan. Pada umumnya, pembuatan salinan tulisan yang dilakukan rahib-rahib tersebut bukanlah bertujuan untuk mendapatkan uang. Meskipun demikian, pada masa itu sudah ada kesadaran untuk melindungi hak seorang penulis. Hal tersebut terlihat dari suatu kejadian dimana seorang biarawan menyalin kitab mazmur yang merupakan karya gurunya tanpa izin, dan menyebabkan guru dari biarawan tersebut menuntut pengembalian salinan karyanya.²³

Belum ditemukannya mesin cetak pada masa itu menjadi dasar bahwa alasan moral adalah satu-satunya alasan untuk melindungi Hak Cipta seorang pencipta. Seorang penjiplak melakukan penyalinan dengan menggunakan tulisan tangan, sehingga dianggap, baik pencipta maupun penjiplak tidak mengeluarkan biaya untuk suatu ciptaan yang sama. Keduanya sama-sama menggunakan tenaga dan fisik yang sama yaitu menulis dengan tenaga tangan dan tidak ada biaya tambahan yang harus dikeluarkan.²⁴

Kehadiran mesin cetak di Inggris mendorong pesatnya pertumbuhan usaha percetakan di negara tersebut. Pada tahun 1518, hak khusus di bidang percetakan pertama kalinya diberikan kepada Richard Pynson dengan memberikan kepadanya hak untuk melarang pihak lain mencetak naskah pidato. Awalnya penerima hak istimewa tersebut adalah pengusaha percetakan, yaitu dalam bentuk hak untuk melakukan perbanyakkan dalam bentuk salinan atau *the right to make copies*. Hak tersebut bersifat istimewa karena dalam jangka waktu tertentu, hanya penerima hak itu saja yang dapat melakukan sendiri percetakan buku yang dikuasainya. Pada tahun 1709 lahir Undang-undang Hak Cipta pertama di Inggris, yakni *Statute of Anne* atau *The Act of Anne*.

²³ Otto Hasibuan, *Hak Cipta Di Indonesia, Tinjauan Khusus Hak Cipta Lagu, Neighbouring Rights dan Collecting Society*, (Bandung: PT. Alumni, 2008), hal. 31.

²⁴ *Ibid*, hal. 32.

Undang-undang ini mengakui bahwa pencipta buku adalah satu-satunya pemilik hak untuk menerbitkan dan mencetak bukunya.²⁵

Secara perlahan Hak Cipta semakin mengarahkan perlingkungannya terhadap hak pencipta dalam dua aspek, yaitu moral dan ekonomis. Ruang lingkup ciptaan yang dilindungi oleh Hak Cipta tidak lagi terbatas pada karya tulis, tapi juga mencakup bidang-bidang lain seperti lukisan, ukiran, dan lagu. Pada tahun 1911, lahirlah Undang-undang Hak Cipta yang baru di Inggris, yang disebut *The Copyright Act of 1911*. Undang-undang ini telah memperkenalkan ketentuan-ketentuan yang terdapat dalam Konvensi Bern yang lahir pada tahun 1886.²⁶

Terdapat sejumlah perjanjian internasional/traktat yang berkaitan dengan Hak Cipta²⁷, yaitu:

- a. Konvensi Bern (*The Berne Convention*) untuk perlindungan karya sastra dan seni;
- b. Perjanjian umum mengenai Tarif dan Perdagangan (*The General Agreement on Tariffs and Trade (GATT)*), yang mencakup perjanjian internasional mengenai Aspek-aspek yang dikaitkan dengan Perdagangan dari Hukum Atas Hak Kekayaan Intelektual (*Agreement on Trade-Related Aspects of Intellectual Property Rights/TRIPs*);
- c. Konvensi Hak Cipta Universal (*The Universal Copyright Convention (UCC)*);

²⁵ *Ibid*, hal. 35.

²⁶ *Ibid*.

²⁷ Timothy Lindsey, *op cit.*, hal. 98.

- d. Konvensi Internasional untuk perlindungan para pelaku (*performer*), produser rekaman suara dan lembaga penyiaran (*The Rome Convention*);
- e. Traktat Hak Cipta WIPO (*WIPO Copyright Treaty/WCT*);
- f. Traktat Pertunjukan dan Rekaman Suara WIPO (*WIPO Performances and Phonograms Treaty/ WPPT*).

Sampai saat ini, Indonesia baru meratifikasi *The Bern Convention 1886* yang telah diratifikasi dengan Keputusan Presiden No. 18 Tahun 1997, *WIPO Performances and Phonograms Treaty/WPPT* yang telah diratifikasi dengan Keputusan Presiden No. 74 Tahun 2004, dan *WIPO Copyright Treaty/WCT* yang telah diratifikasi dengan Keputusan Presiden No, 19 Tahun 1997.²⁸

2.1.1. Konvensi Bern (*The Berne Convention*)

Konvensi ini diadakan pada tahun 1886 dan diselenggarakan oleh Organisasi Kekayaan Intelektual Dunia (*World Intellectual Property Organization/ WIPO*). Indonesia menjadi anggota Konvensi Bern pada tahun 1997. Konvensi tersebut melindungi ciptaan-ciptaan para pencipta dari negara-negara anggota, yaitu:

- a. Karya tertulis seperti buku dan laporan;
- b. Musik;
- c. Karya-karya drama seperti sandiwara dan koreografi;
- d. Karya seni seperti lukisan, gambar dan foto;
- e. Karya-karya arsitektur; dan

²⁸ Otto Hasibuan, *op cit.*, hal.36.

- f. Karya sinematografi seperti film dan video.

Konvensi Bern juga mengatur perlindungan atas:

- a. Karya-karya adaptasi, seperti terjemahan karya tulis dari satu bahasa ke bahasa lain, karya adaptasi dan aransemen music; dan
- b. Kumpulan/koleksi, seperti ensiklopedia dan antologi.²⁹

2.1.2. *Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs)*

Dengan adanya perjanjian internasional tentang aspek-aspek yang dikaitkan dengan perdagangan kekayaan intelektual, maka perlindungan terhadap ciptaan menjadi lebih luas, mencakup:

- a. Karya-karya yang harus dilindungi menurut Konvensi Bern;
- b. Program komputer;
- c. Kumpulan data/informasi;
- d. Pertunjukan-pertunjukan (berupa pertunjukan langsung, disiarkan atau perekaman gambar pertunjukan);
- e. Rekaman suara; dan
- f. Penyiaran.³⁰

²⁹ Timothy Lindsey, *op cit.*, hal. 99.

³⁰ *Ibid.*

2.2. PEMBEDAAN ISTILAH *COPYRIGHT* DAN *AUTHOR'S RIGHT*

Sistem hukum *Civil Law* tidak menggunakan istilah *Copyright* namun menggunakan istilah *Author's Right*, yang menegaskan suatu Hak eksklusif pada suatu karya, yang dihasilkan oleh pembuat dari karya tersebut. Dalam hubungannya dengan hak eksklusif yang dipegang pihak selain pencipta, diatur dalam Hak Terkait atau yang juga dikenal dengan istilah *Neighbouring Rights*. Dalam konteks hukum nasional Prancis yang notabene menganut sistem hukum *Civil Law*, juga digunakan istilah *French Author's Law* dan bukan *French's Copyright Law*. Sedangkan *Copyright* yang diterapkan pada sistem hukum *Common Law* di satu sisi dapat digunakan dalam cakupan perlindungan yang lebih luas, yaitu mencakup perlindungan terhadap hak pencipta, pelaku peran, produsen dan penyiar.³¹

Salah satu perbedaan signifikan antara *Copyright* dengan *Author's Right* adalah hak yang melekat pada seorang pencipta atau *Author's Right* merupakan hak yang tidak dapat dialihkan. Apabila seorang penulis menulis suatu karya dan menandatangani perjanjian pengalihan hak dengan pihak lain, misal pihak penerbit, maka hak penulis tetap melekat pada karyanya tersebut. Hal ini diatur dalam Undang-undang Hak Cipta Indonesia dan juga dikenal dengan nama Hak Moral.³² Sehingga dengan adanya Hak Moral, tidak ada pengalihan hak yang mutlak atau "alienasi" dari suatu hak atas ciptaan. Hal tersebut juga diutarakan oleh Alistair Kelman, seorang ahli dalam bidang Hak Atas Kekayaan Intelektual, sekaligus seorang praktisi hukum Inggris:

"You can no more sell your author's rights in what you create than you can (legally) sell your soul"

³¹ J, A. K. Sterling "Creator's Right and the Bridge between Author's Right and Copyright", <<http://people.mokk.bme.hu/~bodo/szabalyozas/irodalom/Creator.doc>>, Diunduh tanggal 1 Juni 2009.

³² Indonesia (a), *op cit.*, Pasal 24.

Author's Right penting sebagai perlindungan terhadap hak penulis yang menjadikan hak tersebut tidak dapat dialienasi atau dialihkan karena kecenderungan kekuatan ekonomi yang dimiliki oleh pihak penerbit. Hal ini yang menjadi perdebatan diantara penerbit-penerbit di negara Inggris, terhadap permasalahan yang timbul yang disebabkan oleh tuntutan sebuah penerbit majalah komputer di Inggris yang mengirimkan surat tertulis kepada setiap kontributor lepasnya untuk mengalihkan segala hak terkait atas seluruh tulisan-tulisan mereka di masa yang akan datang tanpa adanya tambahan imbalan apapun.³³

Amerika Serikat dan Inggris sebagai negara yang menganut sistem hukum *Common Law* kemudian mendefinisikan *Copyright* sebagai Hak Kepemilikan atau *Property Right*, sedangkan Eropa Kontinental sebagai negara-negara yang menganut sistem hukum *Civil Law*, mendefinisikan *Author's Right* sebagai Hak Asasi atau *Human Rights*.³⁴ Sedangkan Indonesia sebagai negara yang menganut sistem hukum *Civil Law*, merumuskan Hak Cipta dengan istilah *Author's Right* dan menggabungkannya dengan *Copyright*. Hal tersebut didasarkan pada penolakan terhadap penggunaan istilah *Copyright* yang merupakan aturan hukum yang lebih menekankan pada perlindungan kapitalis sekaligus sebagai bentuk penghindaran terhadap hukum *Author's Right* yang semata-mata hanya melindungi pembuat suatu karya, karena dianggap mengesampingkan aspek investasi dan bisnis.

Berdasarkan hal-hal tersebut diatas, maka digabungkanlah kedua istilah asing tersebut dan dirumuskan dalam suatu istilah hukum yang baru yaitu "Hak Cipta"³⁵. Namun kegagalan dalam penerjemahan kata "Hak Cipta" kedalam bahasa asing

³³ Creators Right Alliance, "The Publishers' Attack on Freelance Rights", <<http://media.gn.apc.org/c-rights.html#attack>>, diunduh tanggal 1 Juni 2009.

³⁴ Creators Right Alliance, "Author's Rights versus Copyright", < <http://media.gn.apc.org/c-rights.html>>, diunduh tanggal 1 Juni 2009.

³⁵ Otto Hasibuan, *op cit.*, hal. 30.

menyebabkan istilah Hak Cipta diterjemahkan menjadi Copyright kedalam bahasa asing, walaupun memiliki esensi yang cukup berbeda dibandingkan istilah *Copyright* aslinya. Pengaturan mengenai *Moral Right* yang merupakan perwujudan dari istilah *Author's Right* tersebut diimplementasikan dengan adanya pengaturan mengenai Hak Moral yang diatur dalam Pasal 24 Undang-undang Hak Cipta. Sedangkan perwujudan dari istilah *Copyright* diwujudkan dengan adanya perlindungan Hak Terkait dalam Undang-undang Hak Cipta.

Dalam perumusan Hak Cipta, penolakan terhadap penggunaan istilah *Copyright* didasarkan pada keengganan penggunaan aturan hukum yang menekankan kepada obyek Perlindungan. Hak Cipta mengatur perlindungan karya-karya intelektual di bidang sastra atau tulis (literary) termasuk ilmu pengetahuan, dan seni. Pasal 1 dan Pasal 2 Konvensi Bern memberikan jbaran obyek tadi secara lebih rinci, dan antara lain meliputi buku, pamphlet, kuliah, pidato, khotbah, dan karya tulis lainnya yang sejenis, naskah drama termasuk drama musikal, koreografi, lagu (dengan atau tanpa musik) rekaman music, sinematografi, lukisan, gambar, arsitektur, patung, pahat, fotografi, peta, terjemahan, bunga rampai, saduran, dan program computer yang dianggap sebagai karya di bidang ilmu pengetahuan.³⁶ Obyek tersebut tetap sama, walaupun selain *Copyright*, Hak Cipta juga pernah disebut "*Author's Right*". WIPO menjelaskan hal tersebut lebih lanjut:

"In most European languages other than English, copyright is called author's rights. The expression 'copyright' refers to the main act, which in respect of literary or artistic creations, may be made only by the author or with his authorization. That act is the making of copies of the literary or artistic work, such as a book, a painting, a sculpture, a photograph, a motion picture. The second expression, 'author's rights' refers to the person who is the creator of the artistic work, its author, thus underlining the fact, recognized in most laws, that the author has specific rights in his creation, for example, the right to prevent a

³⁶ World Intellectual Property Organization, Berne Convention for the Protection of Literary and Artistic Works, WIPO Publication No. 287 (E), Geneva, 1995

*distorted reproduction, which can be exercised only by himself, whereas other rights, such as the right to make copies, can be exercised by other persons, for example, a publisher who has obtained a license to this effect from the author.*³⁷

Apabila diterjemahkan, maka kutipan dari WIPO tersebut diatas memiliki pengertian sebagai berikut:

“Dalam sebagian besar bahasa-bahasa Eropa selain bahasa Inggris, *copyright* disebut sebagai *author’s right*. Penggunaan istilah ‘*copyright*’ merujuk kepada tindakan utama, yang mana sehubungan dengan ciptaan artistik dan karya tulis, hanya dapat dibuat oleh penciptanya, maupun yang diberikan izin olehnya. Tindakan perbanyakannya suatu karya artistik dan karya tulis yaitu buku, lukisan, pahatan, foto, maupun gambar bergerak. Penggunaan istilah kedua, yaitu ‘*author’s right*’ merujuk kepada orang yang merupakan pencipta, maupun penulis dari suatu karya artistik, yang sedemikian rupa menggaris-bawahkan fakta, diatur dalam sebagian besar kaidah hukum, bahwa pencipta memiliki hak-hak spesifik terhadap ciptaannya, misalnya, hak untuk mencegah pembuatan ulang yang menyimpang, yang dapat dilakukan hanya oleh dirinya sendiri, bahwa sesungguhnya hak-hak lainnya, seperti hak untuk membuat perbanyakannya, dapat dilakukan oleh orang lain, misalnya sebuah penerbit yang telah mendapatkan lisensi untuk melakukannya dari pihak pencipta.”

Istilah “Hak Cipta” yang digunakan di Indonesia dapat diartikan sebagai *Author’s Right*, sebagaimana halnya dengan istilah “*Copyright*” yang kemudian lebih dikenal secara umum dalam wacana internasional, secara konseptual menampung elemen pokok yang semula dikandung masing-masing dalam dua istilah asing berbeda tadi.

Dalam masalah obyek ini penting diperhatikan bahwa pengaturan dan perlindungan yang diberikan Hak Cipta diarahkan pada perwujudan akhir atau bentuk nyata karya intelektual saja, dan tidak pada ide atau inspirasi yang melatar-belakanginya. Bentuk akhir dan nyata tersebut adalah bentuk yang dapat dilihat, didengar, dan/atau

³⁷ *Ibid.*, hal. 17.

dibaca. Perlindungan diberikan kepada pencipta dari tindakan pemakaian atau penggandaan/perbanyak bentuk asli ciptaan oleh pihak lain tanpa persetujuannya.³⁸

Hak Cipta di Indonesia merupakan *Author's Right* apabila dilihat dari perlindungan terhadap obyek ciptaan suatu pencipta. Hal tersebut telah ditegaskan dalam Pasal 24 Undang-undang Hak Cipta yang mengatur mengenai Hak Moral. Prinsip *Human Rights* yang melekat pada *Author's Right* juga dapat tercermin dalam pencantuman pasal 33 huruf a Undang-undang Hak Cipta, yang berbunyi:

“Jangka waktu perlindungan bagi hak Pencipta sebagaimana dimaksud dalam:

a. Pasal 24 ayat (1) berlaku tanpa batas waktu...”

Bahkan dalam Undang-undang Hak Cipta Indonesia, perlindungan terhadap Hak Moral dapat dilakukan tanpa batas waktu. Namun perlu diingat bahwa hal tersebut hanya berlaku terhadap Hak Moral dari pencipta, dan tidak berlaku terhadap Hak Komersilnya. Pasal 33 huruf a tersebut menyebutkan secara eksplisit bahwa perlindungan tanpa batas waktu hanya merujuk kepada pasal yang menyebutkan mengenai Hak Moral. Namun hal tersebut diatas sudah dapat mengindikasikan bahwa dalam hukum Indonesia, Hak Cipta dapat ditafsirkan sebagai *Author's Right*.

Perbedaan signifikan yang membedakan antara *Copyright* dengan *Author's Right* dapat terlihat yaitu dalam hal pengimplementasian *Moral Rights*, posisi perlindungan suatu karyawan perusahaan yang dalam kapasitasnya menghasilkan suatu karya untuk kepentingan tempat kerjanya, dan terhadap kriteria perlindungan.

2.3. HAK CIPTA DI INDONESIA

³⁸ Chisum, Donald. S. and Jacobs, Michael A., *Understanding Intellectual Property Law*, New (York: Matthew Bender & Co. Inc, 1992), hal. 3.

Hukum Hak Cipta bertujuan melindungi ciptaan-ciptaan para pencipta yang dapat terdiri dari pengarang, artis, musisi, dramawan, pemahat, dan *programmer* komputer. Hak Cipta adalah sejenis kepemilikan pribadi atas suatu ciptaan yang berupa perwujudan dari suatu ide pencipta di bidang seni, sastra, dan ilmu pengetahuan.³⁹

Pasal 1 ayat (1) Undang-undang Hak Cipta menyebutkan definisi Hak Cipta sebagai berikut:

“Hak Cipta adalah hak eksklusif bagi Pencipta atau penerima hak untuk mengumumkan atau memperbanyak Ciptaannya atau memberikan izin untuk itu dengan tidak mengurangi pembatasan-pembatasan menurut peraturan perundang-undangan yang berlaku.”

Dengan demikian, hak memperbanyak suatu ciptaan merupakan hak eksklusif dari pencipta atau seseorang kepada siapa pencipta memilih untuk mengalihkan hak perbanyakannya dalam batasan hukum yang berlaku. Perlindungan Hak Cipta tidak diberikan kepada ide atau gagasan karena karya cipta harus memiliki bentuk yang khas, bersifat pribadi dan menunjukkan keaslian sebagai ciptaan yang lahir berdasarkan kemampuan, kreativitas, atau keahlian sehingga ciptaan itu dapat dilihat, dibaca, atau didengar.⁴⁰ Dengan kata lain konsep Hukum Hak Cipta mengenal pembedaan yang tegas antara suatu ide dan perwujudan ide sebagaimana yang disebutkan dalam Pasal 9 ayat (2) TRIPs, yaitu:

“Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.”

³⁹ *Ibid*, hal. 96.

⁴⁰ Indonesia (a), *op. cit.*, Penjelasan Umum.

Sedangkan contoh perbedaan antara ide dan manifestasi realisasi dari ide, adalah sebagai berikut⁴¹:

- a. Informasi yang terdapat dalam buku ajar (*textbook*) universitas mengenai proses ilmiah tidak memperoleh perlindungan Hak Cipta. Namun kata-kata yang digunakan pengarang, termasuk gambar dan ilustrasi lainnya, memperoleh perlindungan Hak Cipta.
- b. Ide penulisan dan pementasan suatu drama mengenai suatu kejadian yang mengundang kontroversi di saat ini tidak memperoleh perlindungan Hak Cipta. Namun, kata-kata dalam suatu pementasan drama, musik, dan benda-benda lain yang digunakan dalam drama tersebut dan didasarkan dari ide tadi mendapat perlindungan Hak Cipta.

Pasal 12 Undang-undang Hak Cipta menyebutkan ciptaan yang dilindungi oleh Hak Cipta, yaitu:

- a. Buku, Program Komputer, pamflet, perwajahan (*lay out*) karya tulis yang diterbitkan, dan semua hasil karya tulis lain;
- b. Ceramah, kuliah, pidato, dan Ciptaan lain yang sejenis dengan itu;
- c. Alat peraga yang dibuat untuk kepentingan pendidikan dan ilmu pengetahuan;
- d. Lagu atau musik dengan atau tanpa teks;
- e. Drama atau drama musical, tari, koreografi, pewayangan, dan pantomim;

⁴¹ Timothy Lindsey, *op cit.*, hal. 105.

- f. Seni rupa dalam segala bentuk seperti seni lukis, gambar, seni ukir, seni kaligrafi, seni pahat, seni patung, kolase, dan seni terapan;
- g. Arsitektur;
- h. Peta;
- i. Seni batik;
- j. Fotografi
- k. Sinematografi;
- l. Terjemahan, tafsir, saduran, bunga rampai, *database*, dan karya lain dari hasil pengalihwujudan.⁴²

2.3.1. Hak Ekonomi

Dalam kerangka perlindungan Hak Cipta, hak-hak dalam Hak Cipta dibagi menjadi dua kelompok besar, yaitu Hak ekonomi dan Hak moral. Hak ekonomi berhubungan dengan kepentingan ekonomi pencipta misalkan hak untuk mendapatkan pembayaran royalti atas penggunaan berupa pengumuman dan perbanyakan terhadap ciptaan yang dilindungi oleh Hak Cipta.

Dalam Undang-undang Hak Cipta, hak ekonomi dibagi menjadi dua bagian utama, yaitu hak untuk mengumumkan ciptaan, dan hak untuk memperbanyak ciptaan. Hal tersebut dituangkan dalam Pasal 2 ayat (1) Undang-undang Hak Cipta, yang berbunyi:

⁴² Indonesia (a), *op. cit.*, ps. 12.

“Hak Cipta merupakan hak eksklusif bagi Pencipta atau Pemegang Hak Cipta untuk mengumumkan atau memperbanyak Ciptaannya, yang timbul secara otomatis setelah suatu ciptaan dilahirkan tanpa mengurangi pembatasan menurut peraturan perundang-undangan yang berlaku.”

Berdasarkan Pasal 2 ayat (1) tersebut diatas, dapat diuraikan lebih lanjut hak-hak yang berkaitan dengan hak mengumumkan, dan hak memperbanyak. Pasal 1 ayat (5) Undang-undang Hak Cipta lebih lanjut mengatur mengenai apa yang dimaksud dengan pengumuman. Menurut pasal tersebut, hak-hak yang terkait dengan hak mengumumkan yaitu⁴³:

- a. Hak membacakan;
- b. Hak menyiarkan;
- c. Hak memamerkan;
- d. Hak menjual;
- e. Hak mengedarkan; dan
- f. Hak menyebarkan.

Sedangkan, menurut Pasal 1 ayat (6), hak-hak yang terkait dengan hak memperbanyak yaitu⁴⁴:

- a. Hak menambah jumlah (menggandakan); dan
- b. Hak mengalihwujudkan.

⁴³ *Ibid*, ps. 1 angka (5).

⁴⁴ *Ibid*, ps. 1 angka (6).

Hak ekonomi pada dasarnya dimiliki oleh setiap pencipta, namun hak ekonomi yang dapat diberikan oleh pencipta kepada pihak terkait lainnya dalam bentuk hak eksklusif. Secara umum setiap negara, minimal mengenal, dan mengatur hak ekonomi tersebut berdasarkan konvensi dan hukum Hak Cipta tiap negara, meliputi enam macam hak, yaitu:

a. *Reproduction Right*

Reproduction Right merupakan hak atas perbanyakan, yaitu menambah jumlah sesuatu ciptaan dengan pembuatan yang sama, hampir sama atau menyerupai ciptaan tersebut dengan mempergunakan bahan-bahan yang sama maupun tidak sama, termasuk mengalihwujudkan sesuatu ciptaan. *Reproduction Right* ini juga mencakup perubahan bentuk ciptaan satu ke ciptaan lainnya, misalnya rekaman musik, pertunjukan drama, juga pembuatan duplikat dalam rekaman suara dan film.⁴⁵ Hak ini diakui dalam Konvensi Bern dan *Universal Copyright Convention*.

b. *Adaptation right*

Adaptation right merupakan hak untuk mengadakan adaptasi, dapat berupa penerjemahan dari bahasa satu ke bahasa lain, aransemen musik, dramatisasi dari nondramatik, mengubah menjadi cerita fiksi dari karangan nonfiksi atau sebaliknya.⁴⁶ *Adaptation Right* diatur dalam konvensi Bern, dan *Universal Copyright Convention*.

c. *Distribution Right*

⁴⁵ Muhamad Djumhana dan R. Djubaedillah, *Hak Milik Intelektual Sejarah, Teori dan Prakteknya di Indonesia*, (Bandung: PT. Citra Aditya Bakti,2003), hal. 67.

⁴⁶ *Ibid.*, hal. 68.

Distribution right adalah hak yang dimiliki pencipta untuk menyebarkan kepada masyarakat setiap hasil ciptaannya. Penyebaran tersebut dapat berupa bentuk penjualan, penyewaan, atau bentuk lain yang maksudnya agar ciptaan tersebut dikenal oleh masyarakat.⁴⁷ *Distribution Right* hanya diatur dalam hal yang berhubungan dengan sinematografi dalam konvensi Bern.

d. *Public Performance Right*

Public Performance right berarti hak untuk mempertunjukkan di muka umum sebuah sandiwara berdasarkan naskah tulisan sendiri atau musik ciptaan sendiri. Pencipta memiliki hak eksklusif untuk mengadakan pertunjukan. Persoalannya di sini adalah kata “di muka umum”. Di muka umum tidak mencakup kegiatan berlatih seorang diri atau mengadakan pertunjukan di depan anggota keluarga sendiri. Di muka umum berarti di depan sejumlah besar orang yang tidak tertentu atau tertentu. Ini berlaku tidak saja bagi pertunjukan secara langsung tetapi juga bagi pemutaran rekaman suara, cakram padat (CD), dan sebagainya, di depan umum atau menggunakan penguat suara untuk menyiarkan sebuah pertunjukan kepada orang-orang di luar gedung atau teater.⁴⁸

Performance right dimiliki para pemusik, dramawan, maupun seniman lainnya yang karyanya dapat terungkap dalam bentuk pertunjukan. Yang dimaksud pertunjukan adalah termasuk untuk penyajian kuliah, pidato khotbah, baik melalui visual atau presentasi suara, juga menyangkut penyiaran film, dan rekaman suara pada media televisi, radio dan tempat lain yang menyajikan

⁴⁷ *Ibid.*

⁴⁸ Hozumi, *op. cit.*, hal. 16.

tampilan tersebut.⁴⁹ *Public Performance Right* diatur dalam konvensi Bern dan *Universal Copyright Convention*.

e. *Broadcasting Right*

Broadcasting right adalah hak untuk menyiarkan yang bentuknya berupa mentransmisikan suatu ciptaan oleh peralatan tanpa kabel. *Broadcasting Right* diatur dalam konvensi Bern dan *Universal Copyright Convention*.

f. *Cablecasting Right*

Cablecasting right merupakan hak yang memberi izin untuk menyiarkan suatu karya dengan menggunakan kabel. Ada dua bentuk penyiaran dengan kabel, yaitu: *cable retransmission* yaitu kegiatan penyiaran dengan cara pentransmisian kembali, dan *cable origination* yaitu pentransmisian asli dengan kabel sebuah karya. *Cable retransmission* ditempatkan sebagai bagian dari *broadcasting right* dalam konvensi Bern, sedangkan *cable origination* ditempatkan sebagai bagian dari *Public Performance Right*.⁵⁰

Pencipta Suatu Karya atau Ciptaan pada awalnya adalah pemegang hak cipta atas karyanya tersebut. Pengalihan kepemilikan bisa dilakukan melalui proses penyerahan atau pemberian lisensi kepada seseorang. Apabila suatu ciptaan dibuat oleh karyawan pemerintah dan karya tersebut menjadi bagian sehari-hari tugas karyawan tersebut, maka pemegang hak cipta biasanya adalah pemerintah. Apabila pencipta suatu ciptaan adalah orang tidak dikenal dan hasil ciptaan tersebut belum dipublikasikan, maka pemerintah Indonesia menjadi pemegang Hak Cipta atas ciptaan tersebut.⁵¹ Selain

⁴⁹ Djumhana, *Hak Milik Intelektual Sejarah, Teori dan Prakteknya di Indonesia, op.cit.*, hal. 70.

⁵⁰ Otto Hasibuan, *op cit.*, hal. 74.

⁵¹ Indonesia (a), *op. cit.*, pasal. 11 Angka (1).

itu Pemerintah Indonesia juga memiliki Hak Cipta atas kebudayaan yang terkenal, seperti legenda rakyat, cerita kepahlawanan, dan kerajinan tangan.⁵²

2.3.2. Hak Moral (*Moral Rights*)

Hak moral merupakan hak yang melindungi kepentingan pribadi si pencipta. Hak moral tidak dapat dipindahkan kepada orang lain, karena sifatnya personal ke pencipta. Tetapi pada saat pencipta meninggal dunia, hak moral dapat beralih ke ahli waris pencipta. Meskipun hak ekonomi dalam ciptaan dialihkan kepada pihak lain, hak moral dalam ciptaan tetap ada pada pencipta.⁵³

Pengaturan mengenai hak moral⁵⁴ dapat ditemukan dalam pasal 24 dan 25 Undang-undang Hak Cipta. Dalam ketentuan itu disebutkan bahwa:

- a. Pencipta atau ahli warisnya berhak menuntut pemegang hak cipta supaya nama pencipta tetap dicantumkan dalam ciptaannya.
- b. Tidak diperbolehkan mengadakan perubahan terhadap suatu ciptaan kecuali dengan persetujuan pencipta atau ahli warisnya, hal ini berlaku juga terhadap perubahan judul dan anak judul ciptaan, pencantuman dan perubahan nama atau nama samaran pencipta.
- c. Pencipta tetap berhak mengadakan perubahan pada ciptaannya sesuai dengan kepatutan dalam masyarakat.⁵⁵

⁵² *Ibid*, Pasal. 10

⁵³ World Intellectual Property Organization, *Creative Expression an Introduction to Copyright and Related Rights for Small and Medium-sized Enterprises*, (Geneva: World Intellectual Property Organization, 2006), hal. 17.

⁵⁴ Ketentuan mengenai hak moral juga terdapat dalam *Article 6bis Berne Convention for the Protection of Literary and Artistic Works* yang disahkan melalui Keputusan Presiden Nomor 18 Tahun 1997 Tentang Pengesahan *Berne Convention for The Protection of Literary and Artistic Works* (Konvensi Berne Tentang Perlindungan Karya Seni dan Sastra). Pengaturan hak moral dalam konvensi ini secara garis besar telah dituangkan dalam Undang-undang Hak Cipta.

Hak mencantumkan nama pencipta berarti pencipta memiliki hak untuk menentukan apakah nama pencipta dicantumkan atau tidak, dan apakah nama sebenarnya atau nama samarannya yang digunakan.⁵⁶ Pencipta memiliki hak untuk melindungi integritas ciptaannya dan judul ciptaannya dari distorsi⁵⁷, mutilasi atau perubahan-perubahan lain tanpa izin pencipta. Jika suatu karya digunakan merusak reputasi pencipta, ini dianggap melanggar hak moral pencipta, karena itu harus dijaga jangan sampai hal ini terjadi.⁵⁸

Perlindungan hak moral dalam Undang-undang Hak Cipta dicantumkan dalam Pasal 55 yang berbunyi :

“Penyerahan Hak Cipta atas seluruh Ciptaan kepada pihak lain tidak mengurangi hak Pencipta atau ahli warisnya untuk menggugat yang tanpa persetujuannya :

- a. meniadakan nama Pencipta yang tercantum pada Ciptaan itu;
- b. mencantumkan nama Pencipta pada Ciptaannya;
- c. mengenai atau mengubah judul Ciptaan; atau
- d. mengubah isi Ciptaan”.⁵⁹

2.3.3. Hak Cipta Sebagai Hak Kebendaan.

Hukum Hak Cipta bertujuan melindungi ciptaan-ciptaan para pencipta yang dapat terdiri dari pengarang, artis, musisi, dramawan, pemahat, programmer komputer

⁵⁵ Indonesia (a), *op. cit.*, ps. 24 dan ps. 25.

⁵⁶ Tamotsu Hozumi, *Buku Panduan Hak Cipta Asia [Asian Copyright Handbook]*, diterjemahkan oleh Masri Maris (Jakarta: Ikatan Penerbit Indonesia, 2006), hal. 23.

⁵⁷ Distorsi berarti perubahan karakter dari bentuk asli.

⁵⁸ Hozumi, *op. cit.*, hal. 24.

⁵⁹ Indonesia (a), *op. cit.*, ps. 55.

dan sebagainya. Pada dasarnya, Hak Cipta adalah sejenis kepemilikan pribadi atas suatu ciptaan yang berupa perwujudan dari suatu ide pencipta di bidang seni, sastra, dan ilmu pengetahuan.⁶⁰ Menurut Kitab Undang-undang Hukum Perdata, maka kepemilikan tersebut dapat dikategorikan sebagai benda bergerak tak berwujud

Hak milik dalam hukum perdata lebih dikenal dengan sebutan *eigendom*, yang dapat diartikan sebagai milik pribadi. Dalam sistem Kitab Undang-undang Hukum Perdata hak *eigendom* adalah hak atas sesuatu benda yang pada hakekatnya selalu bersifat sempurna. Yang dimaksud dengan *eigendom* menurut pasal 570 Kitab Undang-undang Hukum Perdata yaitu:

“Hak untuk menikmati manfaat suatu kebendaan dengan leluasa, dan dengan kedaulatan sepenuhnya berbuat bebas terhadap kebendaan itu, asal tidak bertentangan dengan undang-undang atau peraturan umum yang ditetapkan oleh penguasa yang berwenang dan tidak mengganggu hak-hak orang lain; kesemuanya itu dengan tak mengurangi kemungkinan pencabutan hak tersebut demi kepentingan umum berdasarkan atas ketentuan undang-undang dan dengan pembayaran sejumlah ganti rugi”⁶¹

Seorang pemegang Hak Cipta memiliki suatu kekayaan intelektual yang bersifat pribadi dan memberikan kepadanya sebagai Pencipta untuk mengeksploitasi hak-hak ekonomi dari suatu Ciptaan yang tergolong dalam bidang seni, sastra, dan ilmu pengetahuan. Pasal 1 ayat (1) Undang-undang No. 19 Tahun 2002 tentang Hak Cipta memuat definisi Hak Cipta, yaitu:

⁶⁰ Timothy Lindsey, *op Cit.*, hal. 96.

⁶¹ Frieda H. Hasbullah, *Hukum Kebendaan Perdata, Hak-hak yang memberi kenikmatan Jilid 1*, (Jakarta: Ind-Hill-Co), Hal. 88.

“Hak Cipta adalah hak eksklusif bagi pencipta atau penerima hak untuk mengumumkan atau memperbanyak ciptaannya atau memberikan izin untuk itu dengan tidak mengurangi pembatasan-pembatasan menurut peraturan perundang-undangan yang berlaku”.

Dengan demikian, Hak Cipta didefinisikan sebagai hak eksklusif bagi para pencipta untuk mengumumkan atau memperbanyak suatu ciptaan untuk memberikan izin kepada pihak lain untuk melakukan hal yang sama dalam batasan hukum yang berlaku.⁶² Batasan hukum yang dimaksud adalah sebatas pada izin yang diberikan oleh pencipta kepada pihak yang diberikan hak eksklusif terhadap suatu ciptaan dimaksud. Dari hal tersebut diatas dapat dipahami bahwa Hak Cipta termasuk dalam definisi benda secara luas yaitu segala sesuatu yang dapat dihaki oleh orang, yang apabila dilihat dari sifatnya, dapat dianggap sebagai benda bergerak tidak berwujud.

2.3.4. Hak Terkait

Hak terkait (*Neighbouring Rights*) merupakan hak eksklusif bagi pelaku yang terdiri dari artis film/televisi, pemusik, penari, pelawak, produser rekaman, dan lembaga penyiaran untuk menyiarkan atau memperbanyak. Pasal 49 Undang-undang Hak Cipta menyebutkan bahwa pelaku, produser rekaman suara, maupun lembaga penyiaran memiliki hak untuk memberikan izin atau melarang pihak lain untuk menyiarkan dan memperbanyak rekaman suara, rekaman bunyi, rekaman gambar pertunjukan, dan karya siaran.⁶³

Konsep perlindungan Hak terkait pertama kali muncul setelah ditemukannya televisi dan radio. Perlindungan terhadap rekaman dan penyiaran melalui radio dan televisi menurut konsensus yang berada dalam konvensi Roma, tidak berada dalam skala

⁶² *Op Cit*, hal. 97.

⁶³ Indonesia (a), *op. cit.*, pasal. 49.

perlindungan yang sama seperti ciptaan umum yang dilindungi oleh Hak Cipta.⁶⁴ Contoh nyata perlindungan terhadap Hak terkait adalah dengan perlindungan terhadap isi dari cakram optik (*optical disc*), yang meliputi cakram padat (*compact disc*), cakram laser (*laser disc*), cakram padat video (*video compact disc*) dan cakram padat lainnya menurut Peraturan Pemerintah RI No. 29 Tahun 2004 tentang sarana Produksi Berteknologi Tinggi untuk Cakram Optik.

Pendokumentasian dan perbanyak terhadap suatu ciptaan, misalnya pada lagu umumnya dilakukan dengan menggunakan media cakram optik. Hak penyanyi dan pemusik lagu tersebut, hanya terbatas pada izin yang diberikan oleh pencipta lagu, sehingga hak penyanyi dan pemusik sebagai pelaku terbatas pada lagu yang dimainkan. Hal tersebut yang dinamakan Hak Terkait yang menyebabkan pelaku bebas memberikan izin atau melarang pihak lain yang tanpa persetujuannya membuat, memperbanyak, atau menyiarkan rekaman suara dan/atau gambar pertunjukannya. Sedangkan hak lain yang termasuk kedalam Hak Cipta seperti *Reproduction Right* atau hak untuk memperbanyak dalam jumlah massal, tidak dimiliki oleh pelaku.

Hak terkait telah diatur dalam Konvensi Roma tahun 1961, sedangkan bidang rekaman telah diatur khusus dalam *Convention for the Protection of Phonograms Against Unauthorized Duplication of Their Phonograms 1971*. Sedangkan di Indonesia, telah diatur dalam Pasal 43 Undang-undang No. 12 Tahun 1997 tentang Hak Cipta yang kemudian diperbaharui dalam Pasal 49 Undang-undang No. 19 tahun 2002 tentang Hak Cipta. Pemilik hak-hak yang berkaitan dengan hak cipta ini meliputi pelaku yang menghasilkan karya pertunjukan, produser rekaman, serta lembaga penyiaran yang menghasilkan karya siaran. Pada dasarnya, hak ini dimaksudkan untuk memberi izin

⁶⁴ Timothy Lindsey, *op cit.*, hal. 103.

atau melarang orang lain yang tanpa persetujuannya memperbanyak ciptaan yang dilindungi oleh Hak Cipta.⁶⁵

2.4. DAMPAK NEGATIF YANG DITIMBULKAN OLEH HAK ATAS CIPTAAN

Pada mulanya perlindungan terhadap kekayaan intelektual yang kemudian memberikan hak monopoli pada penemu, dapat berjalan dengan baik karena tidak banyak orang yang mau menjadi penemu. Insentif dalam bentuk hak monopoli diperlukan. Namun saat ini dapat dilihat bahwa pendekatan ini sudah tidak tepat lagi.

Bagi negara berkembang seperti Indonesia, perlindungan Hak Atas Kekayaan Intelektual diharapkan menjadi salah satu daya tarik untuk mendatangkan investasi. Namun perlu diingat bahwa perlindungan ini seiring dengan berkembangnya iklim investasi terlihat semakin menguntungkan satu pihak yang memiliki kapasitas untuk menikmati perlindungan Hak Atas Kekayaan Intelektual dimaksud, sedangkan pada saat yang sama merugikan pihak lain yang tidak sepenuhnya memahami atau memiliki kapasitas untuk terlindungi oleh Hak eksklusif tersebut. Berikut ini beberapa pandangan mengenai keburukan perlindungan Hak Atas Kekayaan Intelektual, khususnya yang terkait dengan kemampuan negara berkembang

2.4.1. Komersialisasi Dari Kepemilikan Lisensi Hak Cipta

2.4.1.1 Kasus *Metro Goldwyn Mayer v. Grokster*

Sejumlah perusahaan besar yang bergerak di bidang hiburan, dipimpin oleh *Metro Goldwyn Mayer Inc.* (MGM), secara bersama-sama mengajukan gugatan terhadap beberapa produsen *software* yang dianggap mengembangkan dan menyediakan *software* yang memungkinkan terjadinya pembajakan terhadap ciptaan-ciptaan yang hak

⁶⁵ Endang Purwaningsih, *op cit.*, hal. 5.

intelektualnya dimiliki oleh MGM dan penggugat lainnya. Salah satu pihak tergugat adalah *Grokster, Ltd.*, sebagai pihak yang menciptakan, mengembangkan, dan mendistribusikan *peer to peer software* yang memungkinkan terjadinya penyediaan berbagai macam data termasuk data musik dan film secara elektronik. Pihak penggugat berpendapat bahwa *software* yang disediakan oleh *Grokster, Ltd.* memungkinkan terjadinya suatu pelanggaran hukum, sehingga menganggap pihak tergugat bertanggung jawab terhadap implikasi yang ditimbulkan oleh tersedianya *software* dimaksud.⁶⁶

Menanggapi hal tersebut, *Grokster Ltd.* dan pihak tergugat lainnya mengemukakan bahwa tersedianya data-data yang dapat diperbanyak secara legal, tidak menjadikan perusahaan pembuat dan pengembang *software* bertanggung jawab terhadap perbanyak data-data dimaksud secara ilegal. Argumen tergugat dilandasi dengan ilustrasi perusahaan produsen mobil. Apabila suatu perusahaan produsen otomotif menciptakan suatu mobil yang dapat mencapai kecepatan melebihi kecepatan maksimum berkendara, tidak masuk akal apabila setiap kali terjadi pelanggaran terhadap batas kecepatan dimaksud, produsen mobil dianggap bertanggung jawab.

Terlepas dari tanggapan tergugat, Mahkamah Agung Amerika Serikat memutuskan bahwa pihak yang mendistribusikan suatu perangkat yang dapat mendorong terjadinya pelanggaran Hak Cipta, yang diindikasikan oleh hal-hal yang baik secara langsung maupun tidak langsung mengarah ke arah pelanggaran Hak Cipta, bertanggung jawab terhadap pelanggaran yang dilakukan oleh pihak ketiga.⁶⁷ Sejak Putusan tersebut dijatuhkan, website *Grokster, Ltd.* di alamat <http://www.Grokster.com/> mengalami perubahan sebagai berikut:

⁶⁶ Michelle Boldrin, dan David K. Levine, *Against Intellectual Monopoly*, (Washington: Cambridge University Press, 2008), hal. 110.

⁶⁷ Lihat putusan *Metro-Goldwyn-Mayer Studios Inc. ET AL. v. Grokster, Ltd., ET AL. Certiorari to the United States Court of Appeals for The Ninth Circuit* Kasus dilampirkan dalam Lampiran 1

“The United States Supreme Court unanimously confirmed that using this service to trade copyrighted material is illegal. Copying copyrighted motion picture and music files using unauthorized peer-to-peer services is illegal and is prosecuted by copyright owners. There are legal services for downloading music and movies. This service is not one of them

Your IP address is 70.238.155.121 and has been logged. Don't think you can't get caught. You are not anonymous... ”⁶⁸

Apabila diterjemahkan, maka kutipan ayat tersebut diatas memiliki pengertian sebagai berikut:

“Mahkamah Agung Amerika Serikat secara bulat memberitahukan bahwa menggunakan jasa ini untuk melakukan pertukaran material yang dilindungi oleh hak cipta adalah perbuatan melanggar hukum. Memperbanyak data lagu dan gambar bergerak yang dilindungi oleh hak cipta dengan menggunakan jasa jaringan antar pengguna yang tak terdaftar adalah perbuatan melanggar hukum dan dapat dituntut oleh pemegang hak cipta. Terdapat jasa-jasa yang diperbolehkan untuk mengunduh lagu dan film. Jasa ini bukan merupakan salah satunya.

IP address anda adalah 70.238.155.121 dan telah terdeteksi. Jangan berpikir anda tidak dapat ditangkap, anda tidak tanpa identitas”.

Peringatan tersebut dikutip dari putusan yang dikeluarkan oleh Mahkamah Agung Amerika Serikat. Munculnya peringatan tersebut secara tidak langsung membuat konsumen yang menggunakan *software* yang dibuat oleh *Grokster, Ltd.* menjauh dan enggan menggunakannya.

2.4.1.2. Komersialisasi Bisnis Software

Di Indonesia, terdapat permasalahan Hak Cipta pada dunia musik, video, buku dan software. Indonesia saat ini termasuk dalam daftar negara yang perlu diperhatikan dalam hal pembajakan software. Software yang banyak dibajak adalah sistem operasi (*operating system*) Microsoft Windows dan software aplikasi lainnya seperti Microsoft

⁶⁸ Michelle Boldrin, *op cit.*, hal. 112.

Office untuk aplikasi perkantoran, Adobe Photoshop untuk memproses grafik, dan masih banyak lainnya. Kunci utama dari pembajakan software ini adalah karena mudahnya membuat duplikasi dari software.

Software disimpan dalam bentuk digital. Untuk menduplikasi software, cukup dengan meng-copy data-data tersebut. Salah satu keunggulan sistem digital adalah data-data dapat disimpan dan juga diduplikat secara sempurna tanpa pengurangan kualitas. Jika kita merekam kaset dari kaset, akan ada penurunan kualitas. Demikian pula jika kita memperbanyak dokumen kertas dengan cara fotocopy. Hasil fotocopy dari dokumen tersebut turun kualitasnya dari berkas aslinya. Namun jika kita membuat duplikat disket, CDROM, atau DVD, tidak ada perbedaan antara sumber aslinya dengan hasil duplikatnya. Teknologi untuk membuat data digital ini menjadi sangat terjangkau sehingga berakibat terhadap mudah dan murah nya pembuatan duplikat software.

Problem utama dari pembajakan software adalah harga software asli yang sangat mahal dan diluar jangkauan kemampuan konsumsi dalam negeri, terutama bagi para mahasiswa yang paling banyak menggunakan software. Perusahaan software, yang notabene perusahaan besar di luar negeri, tidak mau menjual produknya dengan harga yang terjangkau oleh orang Indonesia. Harga sebuah sistem operasi atau program aplikasi bisa mencapai US\$ 300.00 Sementara itu harga cakram padat (*compact disc*) kosong (*blank*) kurang lebih hanya Rp. 3000,- untuk tiap kepingnya. Perbedaan harga yang demikian menyebabkan munculnya software bajakan.

Masalah lain yang berkaitan dengan Hak Cipta dan Hak Terkait muncul pada ciptaan yang didokumentasikan dalam cakram optik. Produser musik cenderung memilih *Digital Rights Management* (DRM) yang menyebabkan, diskriminasi harga terhadap suatu benda yang sama dapat dilakukan. Pada umumnya DVD orisinil yang dijual bebas memiliki enkripsi data berupa kode negara, yang menyebabkan DVD tersebut tidak dapat diputar pada pemutar DVD yang tidak dapat memproses enkripsi data tersebut.

Perlindungan DRM pada DVD tersebut mencegah adanya penjualan DVD yang lebih murah di negara-negara dengan proteksi enkripsi data tersebut, terutama di negara asalnya.⁶⁹ Di Indonesia, masalah terkait perlindungan DRM tersebut diatur dalam Pasal 5 Keputusan Presiden No. 29 Tahun 2004 tentang Cakram Optik, yang berbunyi:⁷⁰

”Cakram Optik Isi yang diimpor harus memiliki kode produksi dari negara asal yang terdiri dari:

- a. kode *stamper*;
- b. kode *cetakan*.”

Dari Keputusan Presiden tersebut, dapat dilihat bahwa Indonesia secara langsung mendukung adanya perlindungan DRM.

Hal yang serupa terjadi pada penggunaan Ipod dan Itunes yang diproduksi oleh Apple Inc. Ipod merupakan *hardware* pemutar data berformat MP3, WAV, AAC, dan sebagainya. Sedangkan Itunes merupakan program yang berguna untuk mensinkronisasikan data-data dimaksud dari komputer ke dalam Ipod dimaksud. Apple Inc. Menerapkan prinsip DRM terhadap penggunaan Ipod dan Itunes. Ipod tidak dapat memutar data yang dimasukkan kedalam *hardware*nya apabila tidak diproses melalui Itunes. Ipod dapat digunakan sebagai *harddrive* untuk transfer data, namun apabila tidak dilakukan melalui Itunes, maka Ipod tidak dapat digunakan sebagaimana mestinya, yaitu memutar lagu, atau video dengan format yang didukung oleh *hardware* Ipod.

⁶⁹ *Ibid*, hal. 71.

⁷⁰ Digital Rights Management (DRM) adalah suatu istilah yang mengacu kepada kontrol terhadap akses teknologi yang dapat digunakan oleh pengembang *hardware*, penerbit, pemegang Hak Cipta, maupun perorangan yang mencoba untuk membatasi penggunaan kontens digital dan perangkat-perangkat digital. Contoh dari pengaplikasian DRM adalah pada *Advanced Access Content System (AACCS)* pada *High Definition DVD*, dan *Blu-Ray Discs*. <<http://news.bbc.co.uk/2/hi/technology/6337781.stm>>, diunduh pada tanggal 23 Juni 2009

Pada awal munculnya komputer, software biasanya dikaitkan (bundled) dengan perangkat kerasnya (hardware). Software pada masa itu memang lebih banyak dikembangkan oleh penggemar komputer atau peneliti di kampus-kampus dan lebih banyak dipertukarkan secara gratis. Pada perkembangannya, software akhirnya dijual terpisah dari hardware yang kemudian menyebabkan timbulnya bisnis software.⁷¹

2.4.1.3. Kasus Penggunaan Karakter Disney pada Taman Kanak-kanak

Pada tahun 2002, sebuah taman kanak-kanak di Amerika Serikat menyediakan gambar tokoh kartun Disney yang dicat pada tembok-tembok kelasnya dalam rangka proses pembelajaran sekaligus sarana hiburan bagi anak-anak balita yang berada di taman kanak-kanak tersebut. Namun Walt Disney Corporation mengetahui hal itu dan kuasa hukum mereka mengirimkan surat yang menjelaskan hal tersebut adalah pelanggaran Hak Cipta, sekaligus meminta agar taman kanak-kanak tersebut menghilangkan segala gambar dinding yang berhubungan dengan tokoh kartun Disney di taman kanak-kanak tersebut. Apabila hal tersebut tidak dilakukan, maka akan mengakibatkan Disney mengajukan kasus ini lebih jauh ke pengadilan dimana proses beracaranya dapat menyebabkan bankrutnya taman kanak-kanak tersebut. Walaupun anak-anak yang berada di taman kanak-kanak tersebut sampai memohon agar tidak dihilangkannya gambar-gambar di dinding taman kanak-kanak tersebut dalam suatu siaran televisi nasional, juru bicara Disney mengklaim bahwa taman kanak-kanak tersebut adalah organisasi yang bertujuan untuk meraup keuntungan, dan tidak membedakannya dengan organisasi pencari keuntungan lainnya. Mereka menyatakan bahwa setiap pelanggaran oleh siapapun akan diatasi dengan cara yang sama⁷².

⁷¹ Lawrence Lessig, *Free Software, Free Society, Selected Essays of Richard M. Stallman*, (Boston: Free Software Foundation, 2002), hal. 13

⁷² David M. Berry, *Copy, Rip, Burn*, (London: Pluto Press, 2008), hal. 2.

2.4.1.4. *Walt Disney Company* Sebagai Penyebab Perpanjangan Perlindungan Hak Cipta

Walt Disney Company sebagai salah satu perusahaan pemegang Hak Cipta terbesar atas ciptaan-ciptaan terkenal, menjadi penyebab perpanjangan terhadap perlindungan Hak Cipta menjadi seumur hidup pencipta, ditambah tujuh puluh tahun setelah pencipta suatu ciptaan meninggal dunia, dan perlindungan hak cipta sepanjang 120 tahun bagi ciptaan yang diciptakan oleh perusahaan, atau 95 tahun setelah diumumkannya ciptaan. Perpanjangan tersebut dituangkan dalam *Sonny Bono Copyright Term Extension Act (Sonny Bono Act)* atau yang juga dikenal dengan nama *Mickey Mouse Protection Act*. Perpanjangan tersebut menambah 20 tahun perlindungan Hak Cipta terhadap ciptaan dari perlindungan Hak Cipta oleh *Copyright Act of 1976* yang mengatur durasi perlindungan sepanjang lima puluh tahun sejak pencipta meninggal dunia, dan 75 tahun bagi ciptaan yang diciptakan oleh perusahaan.

Awal teretusnya *Sonny Bono Act* tersebut didasarkan pada karakter-karakter fiksi yang sebagian besar berasal dari *Walt Disney Company*, berdasarkan *1976 Copyright Act*, akan segera menjadi *public domain* pada awal tahun 2000, karena batas perlindungan maksimum sepanjang 56 tahun sudah berlalu. Karakter-karakter yang telah disebutkan sebelumnya dianggap membawa keuntungan yang besar bagi perusahaan. Perusahaan-perusahaan pemegang Hak Cipta kemudian melakukan lobi terhadap Kongres Amerika Serikat, yang menyebabkan ditanda-tanganinya *Sonny Bono Act* pada tanggal 27 Oktober 1998 oleh mantan presiden Amerika Serikat, Bill Clinton.⁷³

Bagi seorang pencipta yang memiliki keterbatasan usia, penambahan jangka waktu perlindungan Hak Cipta merupakan hal yang kurang dapat dipetik hasilnya secara signifikan. Namun lain halnya bagi suatu ciptaan yang diciptakan oleh suatu perusahaan yang memiliki hak intelektual terhadap suatu karakter terkenal seperti Mickey Mouse

⁷³ Michelle Boldrin, *op cit.*, hal. 104.

seperti *Walt Disney Company*, atau lagu, maupun film yang diproduksi jauh di masa lampau oleh seniman, maupun musisi yang telah lama meninggal.⁷⁴ Penambahan jangka waktu perlindungan Hak Cipta terhadap suatu ciptaan yang telah ada secara otomatis memberikan dampak ketergantungan masyarakat terhadap perusahaan tersebut untuk dapat menikmati ciptaan yang telah lama ada. Hal tersebut tentu saja tidak bertujuan untuk meningkatkan kreatifitas, terutama dari pihak-pihak yang menjadikan ciptaan dimaksud sebagai sumber inspirasi antara lain penulis, pengarang cerita, ilustrator lepas maupun orang-orang yang memanfaatkan berakhirnya masa perlindungan Hak Cipta untuk menciptakan suatu karya baru.

Pertimbangan yang muncul terkait dengan upaya untuk memperpanjang perlindungan Hak Cipta yaitu bahwa upaya untuk melakukan perbanyakan ulang terhadap ciptaan yang kurang sukses di pasaran tidak membawa keuntungan finansial yang signifikan bagi perusahaan. Ciptaan dimaksud mungkin dapat menjadi sumber keuntungan bagi penerbit kecil, produsen musik, maupun pembuat karya baru yang terinspirasi dari ciptaan tersebut. Namun bagi perusahaan sebesar *Walt Disney Company*, untuk mengupayakan agar ciptaan yang kurang sukses tersebut dapat banyak tersedia dianggap bukan sebagai hal yang menguntungkan bagi perusahaan, bahkan dianggap dapat mengganggu publikasi terhadap ciptaan yang sukses. Dengan kata lain dengan adanya perpanjangan perlindungan terhadap ciptaan, perusahaan dapat menentukan ciptaan mana yang dapat dan tidak dapat beredar luas di masyarakat.⁷⁵

Perusahaan penerbit kecil di Amerika Serikat banyak yang memanfaatkan ciptaan-ciptaan lama yang telah memasuki *public domain* sebagai sumber utama keuntungan mereka. Misalkan yang dilakukan oleh *Dover Publications* yang menerbitkan ulang karya klasik seperti buku karangan Charles Dickens, Miguel De

⁷⁴ *Ibid.*, hal. 101.

⁷⁵ *Ibid.*, hal. 104.

Cervantes, dll. Hal tersebut menyebabkan ciptaan-ciptaan yang telah berusia lebih dari lima puluh tahun tersebut tersedia dengan harga yang variatif. Namun lain halnya bagi perusahaan penerbit besar yang menganggap lebih baik apabila ciptaan-ciptaan klasik tersebut tidak tersedia secara bebas. Mereka menganggap permintaan yang tinggi terhadap terbitan baru yang diproduksi mahal dan lebih murah, dapat menyebabkan turunnya permintaan terhadap terbitan terbatas dengan pengemasan yang lebih mahal. Dengan kata lain, pemegang hak atas ciptaan klasik dapat menentukan harga agar ciptaan-ciptaan klasik tersebut dapat dinikmati oleh masyarakat.⁷⁶

Pemberlakuan *Sonny Bono Act* tersebut menyebabkan tanggapan negatif, terutama dari pihak-pihak yang menganggap hal tersebut akan menyebabkan suatu ciptaan semakin lama untuk memasuki *public domain*. Dalam kasus *Eldred v. Ashcroft*, gugatan diajukan oleh kelompok yang bergantung kepada *public domain* secara komersil maupun non-komersil, termasuk diantaranya adalah *Dover Publications*, penerbit-penerbit transkrip musik, *American Association of Law Libraries*, *College Art Association*, dan *Free Software Foundation*.⁷⁷

2.4.2. Permasalahan Dalam Hak Atas Karya Tulis

Sebelum dapat dinikmati oleh pembacanya, suatu karya tulis yang diterbitkan untuk khalayak ramai pada umumnya telah melewati proses yang erat kaitannya dengan hubungan timbal balik antara penulis dengan penerbit, dari karya tulis tersebut. Proses dimaksud melibatkan pihak-pihak yang memiliki kepentingannya masing-masing terhadap karya tulis tersebut. Kepentingan yang berbenturan satu sama lain tersebut menciptakan suatu permasalahan. Pada praktiknya, penulis artikel jurnal biasanya menyerahkan Hak Cipta atas artikelnya kepada penerbit secara gratis atau hampir gratis. Bahkan di negara maju penulis yang membuat artikel ilmiah dengan reputasi

⁷⁶ *Ibid.*

⁷⁷ Lihat kasus *Eric Eldred, Et. Al v. John D. Ashcroft, No. 01-618, Supreme Court of the United States*. Kasus dilampirkan dalam Lampiran 2.

internasional bahkan kadangkala mengeluarkan biaya yang tidak sedikit kepada penerbit agar artikel ciptaannya disebar-luaskan oleh penerbit.

Penulis-penulis tersebut lebih mementingkan penyebaran karyanya seluas-luasnya tanpa mementingkan manfaat ekonomi yang mungkin didapat dari artikel yang mereka tulis. Selain itu kadangkala dibuatnya suatu artikel merupakan prasyarat tertentu dari suatu tuntutan pekerjaan, misalkan pembuatan artikel ilmiah merupakan syarat utama kenaikan pangkat sebagai peneliti atau dosen. Sama halnya dengan pembuatan karya tulis ilmiah yang dilakukan oleh mahasiswa sebagai prasyarat untuk kelulusan mereka dari universitas tempat mereka melakukan perkuliahan.

Penerbit memiliki kewajiban untuk menyebarluaskan karya penulis dimaksud, sehingga penerbit akan selalu berusaha untuk meningkatkan kualitas isi, tampilan, dan pengemasan suatu tulisan, dan menyebarluaskannya dalam jumlah besar. Penerbit dapat meningkatkan mutu suatu tulisan dengan penyediaan editor, perancang layout, *reviewer* profesional, bahkan sampai dengan penyediaan lokasi yang disediakan khusus untuk membahas suatu karya tulis yang akan mereka sebarluaskan. Dengan demikian terlihat jelas bahwa penerbit memiliki kekuasaan yang besar terhadap penulis. Bahkan penerbit dapat meminta kepada penulis yang sudah dikenal untuk menulis topik sesuai dengan apa yang mereka kehendaki yang menurut mereka mempunyai nilai jual yang tinggi.

Penyerahan Hak Cipta oleh penulis kepada penerbit sudah berlangsung berabad-abad. Misalnya yang terjadi pada Elsevier Science yang telah berada dalam bisnis penerbitan selama lebih dari satu abad, dan jurnal-jurnal pertama yang diterbitkan pada tahun 1665 oleh *Academie Francaise* di Paris dan *Royal Society of London for the Promotion of Natural Knowledge*.⁷⁸ Untuk semua karya tersebut, yang memegang hak eksklusif untuk memperbanyak, mengalihkan, mendistribusikan, menerjemahkan,

⁷⁸ M. Nentwich, (*Re-*) *de-commodification in academic knowledge distribution?*., Kutipan dari Makalah Konferensi ESA kelima, SSTNET sesi keempat dalam "*Commodification of Knowledge*", tanggal 1/9/2001, Helsinki University, Hal. 4-5.

mengadaptasikan, membuat pertunjukan, dan memperagakan adalah pihak penerbit. Sehingga penulis tidak memiliki hak untuk melakukan hal-hal tersebut. Kewenangan penerbit bahkan tidak berhenti sampai disana, yang ditunjukkan dengan penerbit juga berhak untuk memindah-tangankan hak eksklusif yang dimilikinya kepada penerbit lain.

Penyerahan tersebut mengakibatkan penulis suatu karya harus meminta izin bahkan membayar kepada penerbit untuk menggunakan dan menyebarluaskan karyanya sendiri, yang tertuang dalam kutipan berikut:

”A professor of English recently expressed dismay at having to ‘unpublish’ two of his articles so that he could make them available to his students in a packet of readings without having to pay royalties to his publisher.”⁷⁹

Penyerahan Hak Cipta kepada penerbit juga mempersulit penulis untuk mengalihmediakan, dan menyebarluaskan karyanya sendiri. Tanpa adanya izin dari penerbit, penulis tidak dapat mempublikasikan karyanya dalam jurnal, baik jurnal pribadi maupun jurnal untuk segmen konsumen yang berbeda. Dengan penyerahan Hak Cipta kepada penerbit dapat menyebabkan terhambatnya penyebaran informasi.

Selain dari permasalahan yang merugikan penulis, kesulitan juga dialami oleh perpustakaan-perpustakaan yang memiliki anggaran dana terbatas. Hal tersebut terutama dirasakan perpustakaan yang berlangganan database elektronik. Di samping biaya lisensi yang tidak murah yang harus dibayarkan setiap tahun, kendala yang harus dihadapi perpustakaan adalah tertutupnya akses ke database elektronik tersebut pada saat langganan dihentikan.

Penggunaan dan perbanyakkan terhadap suatu ciptaan yang berhubungan dengan ilmu pengetahuan dan sastra, namun itupun melalui kewenangan tunggal Menteri

⁷⁹ *Ibid*, hal. 3.

Pendidikan dan Kebudayaan, dimana harus melalui pertimbangan Dewan Hak Cipta. Apabila tidak ada izin yang timbul maka suatu ciptaan tidak dapat digunakan atau diperbanyak walaupun untuk kepentingan pendidikan dan pengetahuan. Hal tersebut tercermin dalam bunyi Pasal 16 ayat (1) Undang-undang Hak Cipta tersebut yang berbunyi :

- ”(1) Untuk kepentingan pendidikan, ilmu pengetahuan, serta kegiatan penelitian dan pengembangan, terhadap Ciptaan dalam bidang ilmu pengetahuan dan sastra, Menteri setelah mendengar pertimbangan Dewan Hak Cipta dapat:
- a. mewajibkan Pemegang Hak Cipta untuk melaksanakan sendiri penerjemahan dan/atau Perbanyak Ciptaan tersebut di wilayah Negara Republik Indonesia dalam waktu yang ditentukan;
 - b. mewajibkan Pemegang Hak Cipta yang bersangkutan untuk memberikan izin kepada pihak lain untuk menerjemahkan dan/atau memperbanyak Ciptaan tersebut di wilayah Negara Republik Indonesia dalam waktu yang ditentukan dalam hal Pemegang Hak Cipta yang bersangkutan tidak melaksanakan sendiri atau melaksanakan sendiri kewajiban sebagaimana dimaksud dalam huruf a;
 - c. menunjuk pihak lain untuk melakukan penerjemahan dan/atau Perbanyak Ciptaan tersebut dalam hal Pemegang Hak Cipta tidak melaksanakan kewajiban sebagaimana dimaksud dalam huruf b.”⁸⁰

Pasal tersebut memiliki dampak bahwa penggunaan ciptaan apapun dengan dalih untuk kepentingan pendidikan dan ilmu pengetahuan tidak dapat dilakukan secara sepihak oleh pengguna suatu ciptaan tanpa adanya izin dari Menteri Pendidikan dan Kebudayaan. Perlunya suatu izin tersebut menurut penulis akan menimbulkan masalah baru yaitu bertambahnya pekerjaan bagi Departemen Pendidikan dan Kebudayaan, sekaligus menjadi penghambat yang menyulitkan bagi setiap orang yang ingin mempelajari sesuatu hal hanya karena takut melanggar suatu Hak Cipta.

⁸⁰ Indonesia (a), *op cit.*, Pasal 16 ayat (1).

Dalam kasus *Eldred v. Ashcroft*, sebagaimana telah disebutkan dalam bagian sebelumnya, selain adanya kerugian secara komersil yang dialami oleh pihak penggugat, juga disebutkan bahwa adanya *Sonny Bono Act* dapat menyebabkan terhambatnya pengalihan suatu ciptaan ke dalam *public domain*. Terhambatnya pengalihan tersebut dapat menghambat kemajuan ilmu pengetahuan dan penggunaan karya seni yang bermanfaat. Penggugat menyebutkan argumennya dalam *Eldred v. Ashcroft, on Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit petition for a writ of certiorari*, yaitu:

*"This case is about the limits on Congress' Copyright Clause power. The Constitution gives Congress the power to "promote the Progress of science" by granting "exclusive Right(s)" to Authors for limited Times..."*⁸¹

Berdasarkan argumen tersebut, kongres Amerika Serikat mempunyai kuasa untuk memberikan hak khusus bagi pencipta dalam perkembangan ilmu pengetahuan. Berdasarkan argumen tersebut, penulis menganggap hal tersebut merupakan suatu keistimewaan yang hanya akan dimiliki oleh beberapa pihak saja, dan mengesampingkan kepentingan umum.

2.4.3. Aspek Pidana Dalam Undang-undang Hak cipta

Setiap tindak pidana yang ditentukan oleh pembentuk undang-undang mengandung suatu kepentingan hukum yang hendak dilindungi. Demikian juga jika pembentukan undang-undang Hak atas Kekayaan Intelektual merumuskan tindak pidana dalam Undang-undang Hak Cipta. Perlindungan hukum Hak Cipta adalah perlindungan

⁸¹ Lihat *Eric Eldred, et al. V. John D. Ashcroft, PETITION FOR A WRIT OF CERTIORARI.*, dilampirkan dalam Lampiran 3 karya tulis ini.

hukum mengenai kepemilikan dan penggunaan Hak Cipta dari penyerangan terhadap pihak yang tidak berhak.⁸²

2.4.3.1 Ketentuan pidana dalam Undang-undang Hak Cipta

Pasal 72 ayat (1) menyebutkan:

”Barangsiapa dengan sengaja dan tanpa hak melakukan perbuatan sebagaimana dimaksud dalam Pasal 2 ayat (1) atau Pasal 49 ayat (1) dan ayat (2) dipidana dengan pidana penjara...”⁸³

Sedangkan Pasal 2 ayat (1) menyebutkan:

”Hak Cipta merupakan hak eksklusif bagi Pencipta atau Pemegang Hak Cipta untuk mengumumkan atau memperbanyak ciptaannya...”

Apabila kedua pasal tersebut ditafsirkan, maka terdapat unsur-unsur yang memenuhi aspek pidana dalam Undang-undang Hak Cipta, yaitu:

1. Unsur kesalahan

Kata ”dengan sengaja” secara tegas mengandung arti bahwa pelaku ingin mewujudkan perbuatan yang dilarang dalam rumusan. Arti sengaja dalam Pasal 72 ayat (1) jo Pasal 2 ayat (1) adalah pelaku hendak mengumumkan dan atau memperbanyak hak ciptaan orang lain, dan bukan hak yang dimilikinya.⁸⁴

2. Unsur melawan hukum

⁸² H. Adami Chazawi, *op cit.*, hal. 6.

⁸³ Indonesia (a), *op cit.*, ps. 72 angka (1).

⁸⁴ H. Adami Chazawi, *op cit.*, hal. 19.

Kata tanpa hak dalam Pasal tersebut mencerminkan bahwa sifat melawan hukum perbuatan mengumumkan dan/atau memperbanyak ciptaan hak orang lain adalah melawan hukum obyektif. Pembuktian perlawanan terhadap hukum obyektif adalah diumumkan dan diperbanyaknya ciptaan yang merupakan hak dari pihak lain oleh pelaku. Jika unsur melawan hukum dihubungkan dengan unsur kesalahan, maka sifat melawan hukum juga menjadi tujuan kesengajaan. Hal tersebut disebabkan untuk mengumumkan dan memperbanyak suatu ciptaan yang merupakan hak orang lain memerlukan kesadaran pelaku. Perbuatan pelaku tersebut harus dapat dibuktikan bahwa ciptaan yang diumumkan dan diperbanyak merupakan ciptaan orang lain, dan bukan dirinya.⁸⁵

3. Unsur perbuatan

Unsur perbuatan terbagi menjadi dua, yaitu mengumumkan dan memperbanyak. Pasal 1 ayat (5) Undang-undang Hak Cipta menyebutkan definisi pengumuman adalah pembacaan, penyiaran, pameran, penjualan, pengedaran, atau penyebaran suatu ciptaan dengan menggunakan alat apapun, dengan cara apapun.⁸⁶ Pengumuman bukan merupakan tindak pidana formil melainkan tindak pidana materiil, yaitu untuk selesainya suatu tindak pidana pengumuman, diperlukan adanya akibat dari perbuatan. Hal tersebut sama dengan pasal pencurian dalam Kitab Undang-undang Hukum Pidana.

Sedangkan yang dimaksud dengan perbanyakkan menurut Pasal 1 ayat (6) adalah penambahan jumlah suatu ciptaan, baik secara keseluruhan, maupun bagian yang sangat substansial dengan menggunakan bahan yang sama atau tidak sama, termasuk pengalihwujudan secara permanen maupun temporer.⁸⁷ Sama dengan pengumuman,

⁸⁵ *Ibid*, hal. 20.

⁸⁶ Indonesia (a), *op cit.*, ps. 1 angka (5).

⁸⁷ *Ibid*, ps. 1 angka (6)

diperlukan adanya akibat dari tindakan tersebut. Wujud konkret dari perbuatan-perbuatan tersebut merupakan hal utama yang menjadi dasar penerapan ketentuan pidana sebagaimana dimaksud dalam Pasal 72 ayat (1) jo Pasal 2 ayat (1).⁸⁸

4. Unsur obyek

Obyek tindak pidana dalam pasal 72 ayat (1) jo Pasal 2 ayat (1) adalah ciptaan orang lain. Hubungan antara seorang pencipta dengan ciptaannya adalah dalam bentuk Hak Cipta. Hak Cipta merupakan hak eksklusif bagi pemegangnya, berarti tidak ada pihak yang dapat memanfaatkan hak tersebut tanpa adanya kehendak dari pemegang hak tersebut.⁸⁹ Pemberian izin dari pemegang Hak Cipta akan menghapuskan sifat melawan hukum perbuatan oleh pihak yang bukan merupakan pemegang Hak Cipta.⁹⁰

Berbeda dengan perlindungan paten atau merek, perlindungan terhadap Hak Cipta terlahir sejak terciptanya suatu ciptaan dengan sendirinya. Perlindungan Hak Cipta terhadap suatu ciptaan terlahir tanpa perlu adanya pendaftaran. Pendaftaran Hak Cipta dianggap bersifat fasilitatif dan hanya merupakan formalitas.⁹¹ Sedangkan suatu pendaftaran Hak Cipta pada Direktorat Jendral Hak atas Kekayaan Intelektual dapat digunakan oleh pencipta atau pemegang Hak Cipta untuk mempertahankan Hak Cipta dalam hal terjadinya sengketa hukum Hak Cipta.

2.4.3.2 Permasalahan dalam dunia jurnalistik

Ketentuan pidana dalam Undang-undang Hak Cipta dianggap dapat mendistorsi kemerdekaan pers. Dalam dunia jurnalistik, wartawan menjalankan tugasnya antara lain

⁸⁸ H. Adami Chazawi, *op cit.*, hal. 22.

⁸⁹ Indonesia (a), *op cit.*, Penjelasan ps. 2 angka (1).

⁹⁰ H. Adami Chazawi, *op cit.*, hal. 23.

⁹¹ Rachmadi Usman, *op cit.*, hal. 138.

dengan mengutip naskah, maupun mengambil gambar atau foto. Kadangkala dalam melakukan perbuatan tersebut, terdapat permasalahan pelanggaran Hak Cipta. Contoh nyata ada pada kasus yang menimpa Warsito Wahono S.E. selaku Pemimpin Redaksi Majalah "Indonesia What's On". Majalah tersebut dalam edisi no. 138 tahun 1998 memuat sebuah artikel mengenai Ny. Dewi Soekarno disertai sejumlah fotonya yang dikutip dari buku "Madame D'syuga" yang telah beredar sebelumnya. Perbuatan tersebut dianggap melanggar ketentuan dalam Pasal 44 ayat (1) Undang-undang No. 12 Tahun 1997 tentang Hak Cipta, yang mengatakan:

"Barang siapa dengan sengaja dan tanpa hak mengumumkan atau memperbanyak suatu ciptaan atau memberi izin untuk itu, dipidana dengan pidana penjara paling lama 7 (tujuh) tahun dan atau denda paling banyak Rp. 100 juta."

Berdasarkan ketentuan tersebut, majelis hakim menghukum terdakwa Warsito Wahono S.E. dengan vonis satu tahun penjara. Hukuman tersebut bagi kalangan pers dianggap sebagai distorsi terhadap kemerdekaan pers, sekaligus sebagai penghambat terhadap arus informasi terhadap publik.⁹²

Dengan adanya perubahan terhadap Undang-undang No. 12 Tahun 1997 melalui Undang-undang No. 19 Tahun 2002 tentang Hak Cipta, perlindungan terhadap kepentingan pers atas gambar atau foto yang diambil tidak mengalami perubahan signifikan. Hal tersebut ditunjukkan dalam ketentuan Pasal 19 ayat (1), yang berbunyi:

⁹² R.H. Siregar, *Efektifitas Peran Pers Dalam Menunjang Pemajuan dan Perlindungan HAM*, <<http://www.lfip.org/english/pdf/bali-seminar/Efektifitas%20peran%20pers%20-%20rh%20siregar.pdf>>, diunduh tanggal 23 Juni 2009.

”Untuk memperbanyak atau mengumumkan Ciptaannya, Pemegang Hak Cipta atas Potret harus terlebih dahulu mendapatkan izin dari orang yang dipotret, atau izin ahli warisnya...”⁹³

Pasal 19 ayat (2) lebih lanjut menyebutkan bahwa:

”Jika suatu Potret memuat gambar 2 (dua) orang atau lebih untuk Perbanyak atau Pengumuman setiap orang yang dipotret, apabila Pengumuman atau Perbanyak itu memuat juga orang lain dalam Potret itu, Pemegang Hak Cipta harus terlebih dahulu mendapatkan izin dari setiap orang dalam Potret itu...”⁹⁴

Ketentuan dalam ayat (2) tersebut menegaskan kesulitan yang dihadapi dalam dunia jurnalistik. Apabila pada praktiknya dilakukan pengambilan potret ratusan orang, maka apabila ditafsirkan secara gramatikal dari ayat tersebut, pemegang Hak Cipta atas potret tersebut diwajibkan meminta izin terlebih dahulu terhadap ratusan orang di dalamnya apabila berkeinginan untuk menyiarkan ataupun memperbanyak potret hasil ciptaannya.

⁹³ Indonesia (a), *op cit.*, Ps. 19 angka (1).

⁹⁴ Indonesia (a), *op cit.*, Ps. 19 angka (2).

BAB 3

TINJAUAN UMUM COPYLEFT

3.1. AWAL MULA KEMUNCULAN *COPYLEFT* DALAM BIDANG HAK KEKAYAAN INTELEKTUAL

3.1.1. Komunitas Free Software Pertama

Pada awal mula perkembangannya, software merupakan hasil karya *programmer* yang hanya bisa dipahami dan dijalankan oleh *programmer* yang menciptakan software tersebut. Para *programmer* tersebut saling terhubung satu sama lain dalam satu wadah komunitas tertentu, yang dari komunitas tersebut juga banyak menghasilkan perentas-perentas atau “*hacker*”. Komunitas tersebut memiliki maksud dan tujuan agar tukar-menukar informasi dan pengetahuan dapat terjadi baik di antara sesama anggota komunitas tersebut, maupun antara komunitas dengan masyarakat awam yang buta akan masalah pemrograman maupun software.

Hal tersebut mendasari dibukanya *source code* bagi program-program yang menarik dan tidak umum oleh para pengembang program itu sendiri. Setiap orang dapat membaca *source code* dari suatu program tersebut, mengubah, maupun menjadikan sebagian atau keseluruhan dari program tersebut menjadi suatu program baru.⁹⁵, Yang kemudian dikenal dengan nama *Free Software*. Komunitas dimaksud dikenal juga dengan nama *MIT Artificial Intelligence Lab (AI Lab)* dimana *AI Lab* menggunakan suatu Operating System yang dinamakan *Incompatible Timesharing System (ITS)*, dan merupakan Operating System bagi computer-computer berkapasitas besar pada masanya. Saat itu *AI Lab* dianggap sebagai surga bagi para *programmer* karena

⁹⁵ Lawrence Lessig, *Free Software, Free Society, Selected Essays of Richard M. Stallman*, (Boston: Free Software Foundation, 2002), hal. 17

kebebasannya dalam menyebarkan pengetahuan. Membuat dan mengembangkan program bagi *hacker* pada saat itu dianggap sebagai suatu hal yang lumrah dan menjadi tolok ukur kepuasan. Sebagai ilmuwan, hasil penemuan dan kreasi mereka dapat tersedia bagi siapapun untuk dieksploitasi yang hanya memiliki batasan berupa kreatifitas orang yang menggunakan dan mengeksploitasinya.

Namun kondisi tersebut berubah pada awal tahun 1980an, Diawali dengan usaha beberapa *hacker* untuk mendirikan suatu perusahaan bernama Symbolics, yang mencoba untuk mengganti *Free Software* yang digunakan di *AI Lab* dengan Software buatan mereka. Pada tahun 1981, Symbolic menyewa seluruh peneliti di *AI Lab* dan memperkenalkan sistem upah sebagai penghargaan dari Software yang mereka kembangkan. Saat ini adalah saat dimana suatu Software telah beralih dari sarana penyebaran ilmu pengetahuan, menjadi suatu komoditas ekonomi. Era ini merupakan era dimana pengembangan Software dilakukan secara tertutup dan rahasia, atau yang juga disebut era *Proprietary Software*.⁹⁶ Sistem upah yang dikenalkan oleh Symbolic tersebut bertentangan dengan semangat para hacker di *AI Lab* karena dengan adanya sistem ini, *Source Code* dari suatu Software kemudian diproteksi sebagai suatu rahasia.

Alhasil hal tersebut menyebabkan runtuhnya komunitas *AI Lab* yang diikuti dengan tidak digunakannya *ITS*. Sedangkan pada masa tersebut bermunculan komputer-komputer yang lebih modern seperti VAX atau *The 68020* dengan Operating System yang berbeda, namun bukan merupakan *Free software*. Bahkan untuk mendapatkan salinan dari program tersebut seseorang harus lebih dahulu menanda-tangani suatu perjanjian kerahasiaan atau yang juga disebut dengan *Non-disclosure Agreement*. Peraturan yang dibuat oleh pemilik perusahaan dari *proprietary software* tersebut adalah:

⁹⁶ *Proprietary Software* adalah software yang dimiliki oleh seseorang atau perusahaan yang biasanya merupakan pengembang dari software dimaksud. Dalam penggunaannya terdapat pembatasan, dan *Source code* dari software tersebut tidak pernah diberikan oleh pengembangnya. “*Property Software Definition*”, <[http:// www.linfo.org/proprietary.html](http://www.linfo.org/proprietary.html)>, diunduh tanggal 7 Juni 2009.

*“If you share with your neighbor, you are a pirate. If you want any changes, beg us to make them”*⁹⁷

Ide dari *Proprietary Software* yang melarang untuk membagi atau merubah software dianggap sebagai sebuah konsep yang antisosial dan tidak etis. Contoh yang terjadi saat itu adalah seorang *programmer* yang menolak memberikan *Source Code* dari program control untuk printer yang dimiliki oleh *AI Lab* yang diakibatkan dari ditandatanganinya Perjanjian kerahasiaan yang telah disebutkan sebelumnya.

Berdasarkan hal tersebut, Richard Stallman, seorang *programmer* dari *AI Lab* yang juga merupakan seorang lulusan dari Harvard dengan peringkat *Magna Cum Laude* dalam bidang Fisika pada tahun 1974, menciptakan sebuah Operating System yang kompatibel dengan UNIX⁹⁸, yang kemudian diberi nama GNU yang berasal dari “*GNU’s Not Unix*”. GNU Software tersebut merupakan software yang *free* bukan dalam artian gratis melainkan dalam arti *freedom* atau kebebasan sesuai dengan kalimat yang dikutip dari Richard Stallman yang berbunyi:

*“...’Free’ in Free Software should be thought as ‘free in speech’, not ‘free as in beer’ ...”*⁹⁹,

yang berarti kebebasan untuk merubah *source code* dari software tersebut dan mendistribusikannya baik dengan atau tanpa perubahan sebagai software program derivatif.¹⁰⁰ Tujuan dari GNU Software adalah untuk memberikan kebebasan bagi orang

⁹⁷ Lawrence Lessig, *op cit.*, hal. 18

⁹⁸ UNIX adalah sebuah Operating system yang dikembangkan oleh AT&T Bell Labs pada tahun 1960. UNIX didesain sebagai sistem operasi yang portable, *multi-tasking*, dan *multi-user*. “*What IS UNIX?*”, <http://www.unix.org/what_is_unix.html>, diunduh tanggal 7 Juni 2009.

⁹⁹ Dennis M. Kennedy, “*A Primer on Open Source Licensing Legal Issues: Copyright, Copyleft, and Copyfuture*”, <<http://www.denniskennedy.com/opensource/mk.pdf>>, diunduh tanggal 7 Juni 2009.

¹⁰⁰ Rod Dixon, *op cit.*, hal. 26.

yang menggunakannya sedangkan pada saat yang bersamaan mencegah dijadikannya GNU Software sebagai *Proprietary Software*. Sehingga digunakanlah suatu istilah dalam pendistribusiannya yang kemudian disebut sebagai *Copyleft*. *Copyleft* menggunakan hukum yang berlaku bagi sebuah lisensi Copyright, namun dengan cara memutar-balikan hukum yang berlaku pada Copyright untuk memenuhi tujuan yang berkebalikan dari fungsi asli dari Copyright tersebut, yaitu bukan untuk memprivatisasi suatu Software, namun untuk menjaga agar suatu Software tetap *free* atau bebas.¹⁰¹

Richard Stallman kemudian membuat dan mengembangkan GNU *General Public License* (GPL), sebuah konstruksi hukum dari GNU Software dengan pola distribusi *Copyleft*. Pola tersebut ditunjukkan dengan cara dalam pendistribusian GPL, dilampirkan suatu pemberitahuan yang menyebut secara eksplisit mengenai kebebasan dalam penggunaan, perbanyakan, modifikasi, atau pendistribusian ulang dari derivatif Software tersebut.¹⁰² Seiring dengan banyaknya permintaan dan meningkatnya keterlibatan sumber daya manusia terkait dengan proyek GNU tersebut, dalam rangka pencarian dana, pada tahun 1985 Richard Stallman mendirikan sebuah yayasan yang dinamakan *Free Software Foundation*. Yayasan tersebut mendapat keuntungan dari donasi dan penjualan hasil perbanyakan dari *Free Software*, yang diantaranya juga dilakukan dengan penjualan CD-ROM berisikan Source Code dan sebagainya. Yayasan tersebut kemudian menghasilkan banyak Software GNU.

Selain perkembangan GPL yang diprakarsai oleh Richard Stallman, muncul pengembang *Open Source Software* lain yang juga berkiblat kepada Operating system UNIX. Dalam hal pengembangan *Free Software*, Andrew S. Tanenbaum menganggap UNIX memiliki harga yang terlalu tinggi untuk dapat didapatkan oleh konsumen pengguna PC rumahan. Andrew S. Tanenbaum yang merupakan seorang profesor

¹⁰¹ Lawrence Lessig, *op cit.*, hal. 22

¹⁰² Michael Stutz, "Applying Copyleft To Non-Software Information", <<http://gnu.gds.tuwien.ac.at/philosophy/nonsoftware-copyleft.html#what>>, diunduh tanggal 7 Juni 2009.

Belanda kelahiran Amerika Serikat menemukan solusi dalam bentuk MINIX yang kemudian *Source Codenya* dapat ditemukan dalam bukunya¹⁰³. Salah satu orang yang membaca buku tersebut adalah Linus Trovaldi yang mengembangkan suatu program *Open Source* bernama LINUX. Besarnya jumlah komunitas yang menggunakan LINUX dan mengembangkannya, maka LINUX sampai saat ini memiliki keunggulan *update* yang cepat bahkan dalam hal pemanfaatan Hardware yang baru saja diluncurkan ke pasaran. Sebagai contoh, setelah Intel Xeon® Microprocessor pertama kali dikenalkan, LINUX sudah dapat digunakan bersama *Processor* tersebut.¹⁰⁴ Sejak 2005 penggunaan LINUX semakin banyak diterapkan pada *Super Computer* yang memiliki teknologi tercanggih dalam hal memproses data.

3.1.2. Sejarah Awal Industri Software

Industri Software merupakan sebuah industri yang masih tergolong muda dan ditandai dengan cepatnya perkembangan teknologi. Industri tersebut terbentuk dari pergeseran-pergeseran paradigma teknologi yang terjadi dalam kurang dari lima puluh tahun perkembangannya. Sejak pertengahan era 1950an hanya sedikit perusahaan-perusahaan yang bergerak di bidang tersebut yang masih bertahan hingga saat ini, dimana kebanyakan perusahaan-perusahaan yang bertahan tersebut umumnya adalah perusahaan yang telah berdiri sejak tiga puluh tahun yang lalu.

Campbell-Kelly merupakan salah satu perusahaan dimaksud yang mengklasifikasikan tiga kategori utama dari perusahaan software berdasarkan model operasinya, yaitu: Pengembang Software, Produsen Software Perusahaan, dan Produsen Software Pasar. Pada awalnya muncul Pengembang Software, yang dapat dikatakan

¹⁰³ Andrew S. Tanenbaum, *Operating Systems Design and Implementation*, (Massachusetts: Prentice Hall, 2006), hal. 639.

¹⁰⁴ Ragib Hasan, “*History of Linux*”, <<https://netfiles.uiuc.edu/rhasan/linux/#LinuxToday>>, diunduh tanggal 7 Juni 2009.

menjadi pilar utama dari industri software pada era tahun 1950an dengan menjual proyek-proyek software berskala besar kepada pemerintah Amerika Serikat dan perusahaan-perusahaan besar di Amerika Serikat. Pada awal tahun 1960an, industri tersebut mengalami pergeseran menjadi produk-produk software dan dikembangkan sampai ke benua Eropa dan negara-negara lainnya di dunia. Namun yang berjasa dalam penyebaran produk-produk software tersebut sampai dengan pengguna awam pada awalnya adalah IBM, yang juga disebut sebagai pemonopoli alamiah industri software, Setelah IBM melakukan “*Unbundle*” atau pemisahan software dari hardware, maka software yang sebelumnya pada masa itu merupakan satu kesatuan dengan hardware, menjadi sebuah komoditi sendiri. Dampak nyata yang terjadi saat itu adalah produk-produk software dengan target market masyarakat atau pasar berkembang sangat pesat. Perusahaan-perusahaan baru berbasis produk software pun bermunculan.¹⁰⁵

Produk-produk software tersebut menjadi sebuah katalis terhadap titik balik dari industry Software pada saat itu. Bentuk baru dari industry Software yang lebih terpusat pada target pasar pengguna PC rumahan timbul. Diawali dengan penjualan *Proprietary Software* yang kemudian diikuti dengan jasa terkait dengan penjualan Software dimaksud. Pada akhir tahun 1990an, batasan antara Produsen Software dengan target perusahaan maupun dengan target pasar pengguna rumahan semakin tipis. Pertumbuhan informasi yang pesat melalui internet dan maraknya penggunaan *Open Source Software* makin menjembatani antara perusahaan dengan Pasar Pengguna Tahap Akhir.¹⁰⁶

3.2. PENGARUH MUNCULNYA *COPYLEFT* TERHADAP *COPYRIGHT* DAN *AUTHOR'S RIGHT*

¹⁰⁵ Campbell-Kelly, Martin, *From Airline Reservations to Sonic the Hedgehog, A History of the Software Industri*. (Cambridge: MIT Press, 2003), hal. 118-119.

¹⁰⁶ MikkoValimaki, *The Rise of Open Source Licensing, A Challenge to the Use of Intellectual Property in the Software Industry*, (Finland: Turee Publishing, 2005), hal. 14.

Telah disebutkan sebelumnya bahwa istilah “*Copyright*” dapat digunakan dalam cakupan yang luas. Istilah tersebut dapat merujuk kepada keseluruhan kaedah hukum yang melindungi suatu karya ciptaan penulis, pelaku peran, produser, dan penyiar. Dimana di sisi lain, istilah “*Author’s Right*” lebih ditekankan kepada perlindungan penulis dari suatu karya sehingga lebih disebut sebagai perlindungan terhadap *Human Right*. Sedangkan untuk pelaku peran, produser, maupun penyiar lebih terlindungi dengan hukum yang terkait, yaitu *Neighbouring Right* atau yang lebih dikenal dengan istilah Hak Terkait dalam Undang-undang Hak Cipta. Lahirnya *Copyleft* menimbulkan dampak terhadap kedua Hak eksklusif tersebut, yaitu:

3.2.1. Pengaruh Copyleft terhadap *Copyright*

Negara-negara penganut sistem hukum *Common Law* menekankan segi hak kekayaan intelektual dari *Copyright*, yang apabila diartikan secara harfiah berarti “hak untuk memperbanyak”. Dalam konsep tersebut, yang menjadi inti dari suatu perlindungan *Copyright* adalah aspek Hak Komersil dari suatu ciptaan. Hal tersebut menaikan nilai hak kekayaan intelektual atas suatu ciptaan, namun mengecilkan perlindungan terhadap penciptanya. Seperti telah dijelaskan sebelumnya, perlindungan *Copyright* kepada suatu karya memungkinkan diberlakukannya perlindungan terhadap investasi, selayaknya praktik-praktik yang dilakukan oleh pihak penerbit. Hak Komersil terhadap suatu ciptaan merupakan hak yang dapat dialihkan. Hal tersebut dirumuskan dalam bentuk perjanjian lisensi sesuai dengan pasal 45 Undang-undang Hak Cipta. Sedangkan perlindungan terhadap pemegang hak tersebut ada dalam Bab VII tentang Hak Terkait dalam Undang-undang tentang Hak Cipta.

Dengan adanya suatu sistem distribusi yang dinamakan *Copyleft*, maka pengalihan *Copyright* yang dilakukan dengan lisensi dan seharusnya bertujuan untuk membatasi terhadap apa yang tidak boleh dilakukan, seolah-olah menjadi tidak berlaku. *Copyright* dialihkan dengan perjanjian lisensi yang merupakan perjanjian, sehingga

perjanjian tersebut merupakan suatu undang-undang kepada para pihak yang membuatnya, dalam hal ini pemberi hak dan penerima hak. Asas kebebasan berkontrak mengakibatkan para pihak yang terikat dalam suatu perjanjian bebas menentukan isi dari perjanjian selama tidak bertentangan dengan syarat sahnya perjanjian menurut pasal 1320 Kitab Undang-undang Hukum Perdata.¹⁰⁷ Terkait dengan asas tersebut, dalam perjanjian lisensi *Copyleft*, pemberi hak menuangkan klausul yang memperbolehkan setiap orang yang menjadi penerima hak untuk menggunakan, memperbanyak, memodifikasi, dan mendistribusikan derivatifnya kepada pihak lain. Hal tersebut tercermin dari kutipan perjanjian lisensi *Copyleft* di bawah ini:

“Background

The concept of “copyleft”, as generally understood, is use of a copyright notice to permit unrestricted redistribution and modification of a work, provided that all copies, and derivatives retain the same permission. This Licensing approach is directly responsible for recent massive voluntary information resource sharing and production, such as the recent production of free software by tens of thousands of individuals working independently and in collaboration with each other. Among the benefits of the use of this licensing approach include the following

- (i) The work may be freely distributed but the identity of the original author is always maintained and the identity of contributors to derivative works are maintained;*
- (ii) The same license must be applied to all derivative works which prevents any future value-adding author from capturing any ownership in the past contributions of others;*
- (iii) Fees may not be charged for ownership interests yet fees may be charged for transmission allowing creation of revenue streams and thus incentives to facilitate distribution;*
- (iv) No further restrictions may be imposed on the original work or on any derivative works;*

¹⁰⁷ Indonesia (b), *Kitab Undang-undang Hukum Perdata [Burgerlijk Wetboek]*, diterjemahkan oleh R. Subekti dan R.Tjitrosudibio, cet. 31, (Jakarta: Pradnya Paramita, 2001), ps. 1320.

(v) *Enforcement may be through any person in the chain of derivative rights; and*

(vi) *Liability exposure is minimized for all value-adders.*¹⁰⁸

Dari kutipan klausul ayat (ii), disebutkan bahwa setiap hasil derivatif dari suatu dimodifikasi yang dialihkan dibawah perjanjian lisensi ini harus tetap memiliki kekuatan mengikat yang sama, yang berguna untuk mencegah claim pihak lain terhadap hasil modifikasi ciptaan yang dialihkan dengan perjanjian lisensi tersebut yang dibuat oleh penerima lisensi sebelumnya. Pada dasarnya prinsip dasar dari *Copyright* adalah perlindungan terhadap suatu karya, yang secara esensial berarti memungkinkan terjadinya eksploitasi terhadap suatu karya yang haknya telah dialihkan ke pihak penerima hak. Dengan adanya perjanjian lisensi *copyleft* ini juga mencegah terjadinya pembatasan lebih lanjut terhadap suatu karya, baik asli maupun turunannya, sesuai dengan ayat (iv) perjanjian lisensi diatas tersebut.

Sedangkan pada paragraf awal dari perjanjian lisensi tersebut disebutkan bahwa yang dimaksud dengan konsep *Copyleft* secara umum adalah penggunaan pemberitahuan *Copyright* dengan tujuan memperbolehkan pendistribusian ulang dan modifikasi dari suatu ciptaan yang tidak dilarang, berlaku apabila setiap hasil perbanyak dan hasil turunan dari ciptaan tersebut dilanjutkan di bawah izin yang sama. Izin dimaksud adalah perjanjian lisensi *Copyleft* tersebut.

3.2.2. Pengaruh *Copyleft* terhadap *Author's Right*

Berbeda dengan konsep yang dianut negara dengan sistem hukum *Common Law*, negara-negara yang tunduk pada *Civil Law*, menolah konsep hak atas suatu karya

¹⁰⁸ Dikutip dari Perjanjian “UNIVERSITY OF MAINE SYSTEM BROAD APPLICATION COPYLEFT LICENSE”. Perjanjian selengkapnya dilampirkan pada halaman Lampiran 4 dari karya tulis ini

sebagai instrument kapitalisme, sehingga konsep perlindungan yuridis terhadap suatu ciptaan dilindungi dengan *Author's Right* atau yang juga dikenal dengan istilah *Droit d'auteur* atau hak pencipta. Implikasi yang ditimbulkan *Copyleft* terhadap *Author's Right* tentu saja berbeda dilihat dari segi perlindungannya, walaupun esensi dari kedua konsep tersebut adalah sama, yaitu perlindungan yuridis terhadap suatu kepemilikan.

Author's Right merupakan perlindungan terhadap Hak Moral suatu pencipta, dan merupakan perlindungan terhadap hak asasi si pencipta. Dalam kaitannya dengan *Author's Right*, *Copyleft* memiliki tujuan untuk mencegah terjadinya monopoli terhadap suatu ciptaan maupun derivatifnya dengan memastikan bahwa suatu ciptaan tersebut tetap bebas untuk diperoleh dan dimanfaatkan. Perlindungan tersebut secara konkrit tercermin dalam ayat (i) perjanjian lisensi *Copyleft* sebagaimana telah dicantumkan pada bagian sebelumnya, yaitu:

“...*(i) The work may be freely distributed but the identity of the original author is always maintained and the identity of contributors to derivative works are maintained;...*”

Secara eksplisit ayat tersebut menegaskan bahwa setiap hasil ciptaan yang didistribusikan ulang, baik utuh sesuai aslinya maupun derivatif, akan selalu mencantumkan nama pencipta, atau pengarangnya, dengan kata lain obyek dari perjanjian lisensi tersebut tidak mengesampingkan hak yang timbul dari kontribusi pembuatnya.¹⁰⁹ Dengan kata lain, *Copyleft* dapat memperkuat perlindungan terhadap *Author's Right*, dan mengangkat beberapa aspek penting yang harus dipertimbangkan dalam perlindungan Hak Atas Kekayaan Intelektual, yaitu keseimbangan hak dan

¹⁰⁹ Copyleft “*All Rites Reversed*”, < <http://fusionanomaly.net/copyleft.html>>, diunduh tanggal 9 Juni 2009.

kewajiban, dan pengecualian dan pembatasan terhadap Hak Atas Kekayaan Intelektual.¹¹⁰

3.3. PELAKSANAAN HAK ATAS KEKAYAAN INTELEKTUAL DALAM DUNIA PRAKSIS

Hak Atas Kekayaan Intelektual merupakan wadah dari berbagai perwujudan hak yang berbeda dan sangat beragam layaknya pola pikir manusia.¹¹¹ Hak Atas Kekayaan Intelektual adalah produk dari pikiran manusia, yang dituangkan dalam bentuk penemuan, sebuah sistem konsep, karya tulis, karya seni, program komputer maupun prosesnya, suatu desain, proses industrial, suatu nama yang membedakan antara satu produk dengan produk lainnya, atau suatu informasi berharga yang dijaga kerahasiaannya.

Hak Atas Kekayaan Intelektual umumnya hanya melindungi orang yang mampu membayar untuk hak tersebut¹¹², dan mengkondisikan orang yang tidak memiliki kesempatan untuk terpaksa menyerahkan karyanya.¹¹³ Misalnya seperti yang terjadi pada kebanyakan kontributor-kontributor media cetak, dimana mereka diharuskan mengalihkan segala haknya kepada pihak penerbit..

Dalam penelitian dan ilmu pengetahuan, perlunya Hak Atas Kekayaan Intelektual banyak dipertanyakan. Salah satu contoh adalah pertimbangan bahwa Hak

¹¹⁰ Yang dimaksud dengan aspek yang harus dipertimbangkan adalah tiga aspek pertimbangan perlindungan Hak Atas Kekayaan Intelektual dilihat dari segi filosofis, yaitu keseimbangan hak dan kewajiban, pengecualian dan pembatasan terhadap HAKI, dan konsep baru tentang *Copyleft*. Hukum Online “*Melacak Kembali Konsep Hak Kekayaan Intelektual*”, <<http://hukumonline.com/detail.asp?id=17010&cl=Berita>>, diunduh tanggal 9 Juni 2009

¹¹¹ Garrett Breen et al., *Intellectual Property Law, Professional Practice Guides* (London: Cavendish Publishin Limited, 2003), hal. 1.

¹¹² David. M. Berry, *op cit.*, hal. 2.

¹¹³ M. Nentwich, *op cit.*, hal. 4.

Atas Kekayaan Intelektual dianggap mengurangi produktivitas penelitian dalam artian rumit dan tidak dapat diantisipasi. Pengalihan pengetahuan mengenai substansi kimia suatu obat dari suatu farmasi dengan akademisi terhambat dengan adanya hak-hak paten terhadap obat-obatan yang dipegang oleh farmasi tersebut.¹¹⁴ Oleh sebab itu dibutuhkan kerjasama antara farmasi dengan akademisi yang akan mempelajari substansi obat-obatan yang haknya dipegang oleh farmasi tersebut, yang tidak bukan dan tidak lain dituangkan dalam bentuk perjanjian lisensi.

3.3.1. Monopoli Intelektual

Seiring dengan perkembangannya, Hak atas Kekayaan Intelektual dianggap makin melenceng dari konsep awalnya yang bertujuan untuk mempromosikan sebuah konsep ideal dalam perkembangan dan kemajuan, penciptaan pasar yang bersih dari pelanggaran hak, akses yang mudah dan murah kepada informasi, maupun perkembangan kebudayaan. Hak-hak yang seharusnya memiliki daluarsa dan batasan yang jelas terhadap monopoli, telah beralih menjadi semacam sumber kekayaan abadi bagi perusahaan. Bukannya mendorong, hal tersebut malah dianggap mengekang generasi selanjutnya untuk berkarya.¹¹⁵ Salah satu bentuk penyelewengan konsep awal Hak atas Kekayaan Intelektual ditunjukkan dengan claim perlindungan *copyright* terhadap suatu ciptaan yang diambil dari ranah *public domain*.

Public domain menyimpan berbagai macam ciptaan berharga yang berasal dari ciptaan-ciptaan yang jangka waktu perlindungan Hak atas Kekayaan Intelektualnya telah mencapai daluarsa. Dengan menjual hasil perbanyakan terhadap suatu ciptaan yang diambil dari *public domain*, seseorang dapat mendapat keuntungan. Katakanlah yang terjadi pada karya klasik berjudul *Don Quixote* karya Miguel De Cervantes yang

¹¹⁴ Lipinski CA. “*The Anti-Intellectual Effects of Intellectual Property*”, <<http://www.ncbi.nlm.nih.gov/pubmed/16829159>>, diunduh tanggal 9 Juni 2009

¹¹⁵ *Ibid.*, hal. 8.

pertama kali diterbitkan pada tahun 1700. Perlindungan Hak Cipta terhadap buku karangan Cervantes tersebut telah berakhir bertahun-tahun yang lalu. Salah satu penerbit yang menerbitkan judul tersebut adalah Wordsworth Editions, Ltd., suatu perusahaan penerbit yang berada di London. Namun penerbit tersebut cenderung melakukan hal yang dilarang untuk dilakukan, yaitu melakukan klaim *copyright* terhadap karya klasik tersebut, hal ini ditunjukkan dengan adanya kalimat:

*“All rights reserved. This publication may not be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of the publishers.”*¹¹⁶

Penggunaan klaim tersebut, merupakan salah satu bentuk lisensi yang dicantumkan bersamaan dengan perbanyakannya suatu ciptaan. Sama halnya dengan *User License Agreement* pada kontens yang berada pada media CD. Sebelum pengguna dapat mengakses kontens dalam CD tersebut, mereka harus terlebih dahulu memencet tanda “OK” yang berarti pengguna menyetujui klaim *copyright* yang ada. Apabila pengguna tidak melakukannya, maka kontens dalam CD tersebut tidak dapat dibuka.

Pada dasarnya ciptaan yang berada dalam ranah *public domain* akan tetap berada dalam *public domain*. Agar klaim *copyright* dapat diperoleh, maka harus ada penambahan hal baru kedalam karya tersebut, misalkan catatan dari editor, maupun ilustrasi tambahan. Namun seharusnya ciptaan aslinya tetap menjadi ciptaan yang berada di *public domain*. Dengan adanya klaim *copyright* dalam buku tersebut, maka penerbit telah melakukan intimidasi pada publik dengan memaksa mereka untuk

¹¹⁶ Miguel De Cervantes, *Don Quixote*, trans.P. A. Motteux (London: Wordsworth Editions, 1993).

membayar terhadap hal yang seharusnya bersifat *free* dalam artian bebas bagi tiap orang untuk menggunakannya.¹¹⁷

3.3.2. *Creative Commons*

3.3.2.1. *Creative Commons* Sebagai Manifestasi Gerakan *Copyleft*

Istilah *Creative Commons* merupakan istilah yang timbul berdasarkan anggapan bahwa perlindungan *copyright* secara keseluruhan tidak membawa manfaat dalam menikmati dan penyebaran suatu ciptaan. Istilah tersebut mengemukakan agar perlindungan yang diberikan Hak Cipta terhadap suatu ciptaan dapat dilakukan dengan lebih fleksibel.¹¹⁸ *Creative Commons* dilakukan melalui lisensi berbentuk *Creative Commons License* yang memungkinkan para seniman dan pelaku bisnis yang berpartisipasi dalam lisensi tersebut memastikan penggunaan, modifikasi, dan pengumuman, kembali ciptaan mereka.

Creative Commons merupakan buah pemikiran dari Larry Lessig, Hal Abelson, dan Eric Eldred. Para pencipta dari suatu ciptaan, dapat memilih untuk membagi ciptaannya dengan masyarakat dalam kondisi-kondisi tertentu. Pencipta dapat memperbolehkan tiap orang untuk memperbanyak, namun dilarang untuk merubah ciptaannya dalam bentuk apapun, untuk memastikan agar ciptaan yang telah disediakan untuk masyarakat, tidak berubah bentuk dari aslinya. Pada waktu yang lain, seorang pencipta memperbolehkan setiap orang untuk melakukan apapun kepada ciptaannya termasuk menciptakan derivatifnya selama tidak dilakukan untuk mencari untung.¹¹⁹

¹¹⁷ Stephen Fishman., *The Public Domain, How to Find & Use Copyright-free Writings, Music, Art & More* (United States: Delta Printing Solutions, 2008), hal. 25.

¹¹⁸ Creative Commons, “[FAQ - Is Creative Commons against copyright?](http://wiki.creativecommons.org/FAQ)”.
<<http://wiki.creativecommons.org/FAQ>>., Diunduh tanggal 1 Desember 2009.

¹¹⁹ Boyle, *op cit.*, hal 181

Dalam bukunya, James Boyle mengemukakan bahwa *Creative Commons License* Memiliki keunikan tersendiri yang menunjukkan bahwa setiap ciptaan di bawah lisensi *creative commons* memiliki hal pembeda yang dapat berguna bagi siapa saja yang bertujuan untuk memanfaatkan data, namun menghindari risiko melakukan pelanggaran *copyright* atau Hak Cipta. Hal tersebut ditunjukkan dalam:

*“The textbooks, photos, films, and songs have a tasteful little emblem on them marked with a “cc” which, if you click on it, links to a “Commons Deed”, a simple one-page explanation of the freedoms you have. There are even icons-a dollar with a slash through it, for example....”*¹²⁰

Dengan adanya kondisi-kondisi khusus yang diberikan oleh pencipta suatu ciptaan dengan menggunakan lisensi *creative commons*, pencipta dapat memastikan penyebaran karyanya dapat berjalan dengan baik karena pencipta dapat dengan bebas menentukan kondisi-kondisi yang berlaku terhadap ciptaannya. Kemudahan masyarakat pengguna untuk mendapatkan suatu ciptaan, dengan sendirinya akan menaikkan penilaian masyarakat terhadap ciptaan sekaligus penciptanya.

3.3.2.2. Konsep Dasar Creative Commons

Perlindungan Hak Cipta merupakan perlindungan yang muncul dengan sendirinya pada saat suatu ciptaan dilahirkan.¹²¹ Sebagaimana yang berlaku pada suatu karya tulis. Pada saat karya tulis tersebut telah selesai ditulis, sesaat setelah pena yang digunakan untuk menulis diangkat, atau sesaat setelah karya tulis disimpan dalam *hardware* komputer, sejak saat itulah perlindungan Hak Cipta berlaku. Dan disaat yang sama itulah siapapun selain pencipta tidak berhak memperbanyak maupun mengumumkan karya dimaksud. Dengan berkembangnya teknologi jaringan situs internet atau yang juga dikenal dengan istilah *World Wide Web*, jutaan orang meletakkan

¹²⁰ *Ibid.*

¹²¹ Indonesia (a), *op. cit.*, pasal. 2 ayat (1).

karya mereka pada situs tersebut, namun tetap saja tidak banyak hal yang dapat dilakukan untuk menggunakan ciptaan-ciptaan tersebut.¹²²

Karya yang diletakan di situs internet tersebut dapat digunakan hanya dalam sebatas penggunaan yang wajar. Namun masalah timbul seiring dengan kebutuhan. Katakanlah terdapat suatu gambar yang menarik untuk dijadikan kartu pos, dan seseorang yang ingin mewujudkan karya yang notabene diletakan di sebuah situs umum dalam bentuk kartu pos harus terlebih dahulu meminta izin terhadap pemegang hak gambar tadi, yaitu pencipta. Masalah baru timbul apabila tiap orang di dunia berkewajiban untuk meminta izin terlebih dahulu atas penggunaan karya seseorang. Hal tersebut akan sangat merepotkan mengingat halangan yang sangat lumrah terjadi dalam berkorespondensi antara lain hambatan jalur komunikasi, halangan bahasa yang digunakan, maupun mahalnya biaya untuk melakukan komunikasi oleh orang yang bahkan dapat dikatakan tidak dikenal secara pribadi sama sekali.

Creative Commons dianggap sebagai suatu cara untuk mengakali struktur dari perlindungan Hak Cipta dengan menciptakan struktur yang berbeda, sesuai kutipan berikut:

*“...to replace “all rights reserved” with “some rights reserved” for those wished to do so. It tried to do for culture what the General Public License had done for software.”*¹²³

Penciptaan struktur yang berbeda seperti yang dimaksud diatas diwujudkan dengan bentuk pembatasan terhadap perlindungan Hak Cipta yang berlaku, melalui penggunaan lisensi. Dengan kata lain *Creative Commons License* merupakan salah satu manifestasi dari gerakan *copyleft* sama halnya dengan *General Public License* pada *GNU software*.

¹²² Boyle, *op cit.*, hal 182.

¹²³ *Ibid.*

3.4. PERMASALAHAN HAK CIPTA DAN HAK PATEN PADA *SOFTWARE*

3.4.1. Program Komputer menurut Undang-undang No. 19 Tahun 2002 tentang Hak Cipta

Perlindungan Hak Cipta terhadap program komputer di Indonesia diatur dalam pasal 30 Undang-undang Hak Cipta.¹²⁴ Lebih lanjut pasal tersebut mengatur mengenai jangka waktu perlindungan terhadap program komputer adalah selama 50 tahun sejak ciptaan tersebut pertama kali diumumkan. Hal tersebut sangat menguntungkan apabila dilihat dari sudut pandang pihak yang membuat dan mengembangkan suatu program komputer, terutama dari pembatasan penggunaan oleh pengguna yang diatur dalam pasal 15 huruf (g). Pada pasal tersebut diatur mengenai hal-hal yang dianggap bukan sebagai pelanggaran Hak Cipta, lebih lanjut bagian dari pasal tersebut berbunyi:

“g. pembuatan salinan cadangan suatu Program Komputer oleh pemilik Program Komputer yang semata-mata untuk digunakan sendiri”

Pasal tersebut berdampak terhadap kepentingan seorang pembeli yang hanya memiliki hak sebatas untuk menggunakan dan mengambil manfaat dari program komputer tersebut. Apabila kemudian pembeli tersebut menggandakan program komputer tersebut baik untuk tujuan komersil maupun non-komersil, maka dia akan dianggap telah melanggar Hak Cipta. Hal ini menjadi masalah apabila kepentingan penggandaan tersebut dilakukan untuk kepentingan pendidikan, sebagaimana telah dijelaskan sebelumnya. Pasal 16 ayat (1) Undang-undang Hak Cipta menyebutkan bahwa untuk kepentingan pendidikan membutuhkan izin dari Menteri Pendidikan dan Kebudayaan dengan persetujuan dari Dewan Hak Cipta, yang malah mempersulit pengetahuan. Pada dasarnya, pembeli suatu program komputer berhak atas kelangsungan penggunaan atau pemanfaatan program komputer tersebut, sehingga jika media penyimpan *copy* program komputer rusak, maka pembeli dapat meminta produsen untuk

¹²⁴ Indonesia (a), *op. cit.*, pasal. 30.

mengkopi kembali program tersebut tanpa mengeluarkan biaya pembelian lagi. Karena pembeli tetap berhak terhadap program komputer tersebut, sehingga jika dia harus membayar maka itu bukan merupakan pembayaran atas program komputer yang tak berwujud tersebut, namun pembayaran atas media penyimpanan program komputer yang rusak.¹²⁵

Seperti yang telah disebutkan sepintas sebelumnya, perlindungan suatu program komputer berlaku selama 50 tahun sejak pertama kali diumumkan. Yang membedakannya dengan karya lain seperti buku maupun karya tulis lainnya, adalah perlindungan terhadap program komputer yang diciptakan oleh orang tidak diatur sepanjang hidup penciptanya. Hal tersebut masuk akal mengingat program komputer adalah sesuatu yang dinamis dan selalu berkembang sesuai dengan kebutuhan masyarakat. Bahkan 50 tahun sudah terlalu lama. Dalam jangka waktu 50 tahun suatu program sudah mengalami perubahan dan pemodifikasian sangat pesat. Tidak mustahil program yang diumumkan 50 tahun yang lalu saat ini sudah tidak digunakan lagi, bahkan sudah tidak dikenal oleh generasi pengguna komputer sekarang, Contoh konkritnya adalah program Lotus 123 yang kurang lebih 10 tahun yang lalu begitu dikuasai oleh para pengguna namun sekarang jarang sekali ada pengguna yang masih menggunakan program ini untuk dijalankan pada komputernya.¹²⁶

3.4.2. Pengalihan Perlindungan Hak Cipta Terhadap *Software* Menjadi Perlindungan Hak Paten.

Masalah baru muncul dengan adanya keinginan sejumlah negara Uni-Eropa untuk mengubah perlindungan *Software* dari rezim Hak Cipta menjadi rezim Hak Paten. Jika hal ini diakui maka dapat berakibat besar terhadap pengembang *Open Source*

¹²⁵ Net Firms. “Pembatasan Hak Cipta Untuk Program Komputer”, <<http://cloofcamp.netfirms.com/gpl/node15.html>>, diunduh tanggal 9 Juni 2009

¹²⁶ *Ibid.*

Software.¹²⁷ Hal tersebut dapat terjadi karena dalam substansi perlindungan Hak Paten, yang dilindungi dari *Software* bukan *Software*nya melainkan mekanisme dari proses algoritma *Software* tersebut, atau langkah-langkah yang dieksekusi suatu *Software*. Algoritma sangat terkait dengan matematik, sehingga yang dipatenkan adalah suatu rumus matematik. Hal ini menjadi masalah karena rumus matematika adalah suatu konsep yang abstrak untuk dipatenkan. Patent *Software* ini baru diakui di beberapa negara, salah satunya adalah Amerika Serikat. *Software* boleh dikatakan tidak tidak disebutkan secara eksplisit sebagai kategori obyek yang dapat dipatenkan menurut definisi bagian 101 *Title 35* dari *United States Code*¹²⁸, yaitu:

“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”

Ayat tersebut memberikan definisi yang sangat luas dengan kata “*useful process*” dan kalimat “*subject to the conditions and requirements of this title*” yang berarti sesuai dengan kondisi yang berkembang. Pada akhirnya suatu proses matematika yang belum pernah ditemukan dan memenuhi aspek inventif serta dapat diaplikasikan kedalam industri dapat dipatenkan. Masalah selanjutnya adalah *Software* tidak memiliki manifestasi secara fisik diluar simbol-simbol pada kertas atau , dimana diasumsikan paten hanya berlaku terhadap manipulasi suatu obyek.¹²⁹ Dalam putusan *Gottschalk v. Benson* (1972)¹³⁰ dan *Parker v. Flook* (1978)¹³¹, Mahkamah Agung Amerika Serikat

¹²⁷ Ahmad M. Ramli, *op cit.*, hal. 7-8.

¹²⁸ Legal Information Institute, *U.S. Code Collection, Title 35, Part I, Chapter 10 § 101*, <http://www.law.cornell.edu/uscode/35/usc_sec_35_00000101----000-.html>, diunduh tanggal 10 Juni 2009.

¹²⁹ Ben Klemens, *Math You Can't Use, Patents, Copyright, and software*, (DC: Brookings Institution Press, 2006), hal. 44.

¹³⁰ The Oyez Project, *Gottschalk v. Benson*, 409 U.S. 63 (1972), <http://www.oyez.org/cases/1970-1979/1972/1972_71_485> diunduh tanggal 9 Juni 2009.

memutuskan bahwa patentabilitas hanya terlihat apabila dituangkan pada bentuk fisik mesin. Namun hal tersebut berubah pada putusan Mahkamah Agung Amerika Serikat terhadap kasus *Diamond v. Diehr* (1981)¹³².

a. Kasus *Diamond v. Diehr* (1981)

Dalam kasus *Diamond v. Diehr* (1981), Teknisi James Diehr dan Theodore Lutton menemukan sebuah pengembangan tekanan pada vulkanisasi karet dengan mengontrol tekanan. Dengan proses penghitungan berulang-ulang dari pengukuran temperatur dan membandingkan proses vulkanisasi dengan menggunakan komputer, dapat ditentukan secara tepat sehingga memaksimalkan hasil vulkanisasi karet tersebut. Pengkaji paten, menilai setiap program komputer sebagai obyek yang tidak dapat dipatenkan sesuai dengan putusan *Gottschalk v. Benson* (1972). Namun pengadilan banding membalikan keutusan pengkaji paten tersebut, dan memerintahkan terbitnya paten terhadap program komputer tersebut. Komisioner paten kemudian mengeluarkan petisi agar Mahkamah Agung Amerika Serikat mengkaji ulang keputusan ini. Di hadapan Mahkan Agung Amerika Serikat, kuasa hukum penemu, berargumen bahwa program komputer tersebut berharga untuk dilindungi dengan paten.

Mahkamah Agung Amerika Serikat memutuskan bahwa sebuah mesin yang mengubah materi secara fisik dibawah kendali program komputer adalah suatu obyek paten. Sebagai tambahan, tanpa mengesampingkan putusan terdahulu pada kasus *Gottschalk v. Benson* (1972), tetap memutuskan bahwa prosedur matematis tidak dapat dijadikan obyek paten. Sejak adanya putusan tersebut, aplikasi paten

¹³¹ The Oyez Project, *Parker v. Flook* , 437 U.S. 584 (1978), <http://www.oyez.org/cases/1970-1979/1977/1977_77_642> diunduh tanggal 9 Juni 2009.

¹³² The Oyez Project, *Diamond v. Diehr* , 450 U.S. 175 (1981), <http://oyez.org/cases/1980-1989/1980/1980_79_1112>, diunduh tanggal 9 Juni 2009.

software mulai membanjiri kantor paten di Amerika Serikat sampai dengan saat ini.

b. Kasus *Amazon 1-click Purchasing* dan dampaknya terhadap pengembang *Software*.

Salah satu contoh paten *Software* lainnya yang memiliki dampak langsung terhadap perkembangan *Software* adalah patenan sistem *1-click Purchasing*¹³³ oleh *Amazon*, dimana dengan satu klik pada *mouse*, data seorang pembeli dapat langsung ditampilkan atau diikutsertakan dan diproses pembeliannya. Secara teknis, hal ini diimplementasikan dengan menggunakan “*Cookies*”¹³⁴ pada *web browser*. Hal ini sangat sederhana dan telah diaplikasikan oleh banyak *programmer*.¹³⁵ Sederhananya proses *1-click Purchasing* tersebut, menyebabkan perlu dipertanyakan perlunya patenan proses yang sederhana tersebut. Setiap orang yang mencoba mengembangkan suatu *Software* dengan pola sederhana yang sama, walaupun hasil akhirnya berbeda dengan yang dibuat oleh *Amazon*, akan dianggap melanggar Hak Paten. Hal ini buruk bagi perkembangan teknologi informasi, dan hal ini pulalah yang menyebabkan pengembang *Software* di Amerika Serikat pindah ke negara lain yang tidak mengatur paten *Software* hanya agar dapat meneruskan pekerjaannya mengembangkan *Software*.

¹³³ Lampiran mengenai berkas paten sistem *1-click Purchasing* dilampirkan pada Lampiran 3 dari karya tulis ini.

¹³⁴ Yang dimaksud dengan “*Cookies*”, adalah sebuah pesan yang diberikan kepada *web browser* oleh *web server*. *Browser* tersebut kemudian menyimpan pesan tersebut dalam bentuk *text file*. Pesan tersebut dikirimkan kembali ke *web server* tiap kali *web browser* melakukan permintaan untuk mengakses suatu halaman dari *web server*. Expedient, *Web Browser Cookies*, <<http://help.expedient.com/browsers/cookies.shtml>>, diunduh tanggal 9 Juni 2009.

¹³⁵ Budi Rahardjo, *op cit*.

Pasal 16 ayat (1) Undang-undang No. 14 Tahun 2001 tentang Paten, mengatur mengenai Paten Proses, yang berbunyi¹³⁶:

- “(1) Pemegang Paten memiliki hak eksklusif untuk melaksanakan Paten yang dimilikinya dan melarang pihak lain yang tanpa persetujuannya:
- a. dalam hal Paten-produk: membuat, menggunakan, menjual, mengimpor, menyewakan, menyerahkan, atau menyediakan untuk dijual atau disewakan atau diserahkan produk yang diberi Paten;
 - b. dalam hal Paten-proses: menggunakan proses produksi yang diberi paten untuk membuat barang dan tindakan lainnya sebagaimana dimaksud dalam huruf a”

Penjelasan Pasal 16 tersebut menyebutkan bahwa yang dimaksud dengan proses adalah mencakup proses, metode atau penggunaan, contohnya adalah proses pembuatan tinta, dan proses pembuatan tisu. Dalam hal ini program komputer dapat dianggap tidak termasuk dalam definisi proses menurut Undang-undang Paten, karena seperti telah dijelaskan sebelumnya, proses algoritma yang merupakan proses eksekusi suatu program komputer tidak memiliki manifestasi fisik. Sehingga penulis berpendapat sejauh ini belum ada perlindungan paten terhadap program komputer di Indonesia.

Undang-undang Paten tersebut secara spesifik juga menyebutkan invensi yang tidak diberikan paten pada Pasal 7 huruf (c)¹³⁷, yang berbunyi:

“...c. teori dan metode di bidang ilmu pengetahuan dan matematika...”

Dengan sendirinya proses eksekusi program komputer yang merupakan mekanisme proses algoritma matematika, menjadi suatu obyek yang dikecualikan dari perlindungan paten. Namun bukan berarti pasal tersebut menjadi perlindungan mutlak,

¹³⁶ Indonesia (b), *Undang-Undang Paten*, UU No.14 tahun 2001, LN No.57 tahun 1994, TLN No. 3564, ps. 16 angka (1).

¹³⁷ *Ibid*, ps. 7 huruf (c).

apabila melihat kasus sebelumnya dalam putusan Kasus *Diamond v. Diehr* (1981), bukan tidak mungkin Indonesia suatu saat akan mengadaptasi keberlakuan hukum tersebut, misalnya dengan melakukan perubahan terhadap Undang-undang Paten dengan menambahkan definisi proses pada Pasal 16 maupun penjelasannya, ataupun penyesuaian Undang-undang Paten yang disesuaikan dengan kondisi dan perkembangan masyarakat dan ilmu pengetahuan, seperti yang ada dalam definisi bagian 101 *Title 35* dari *United States Code*.

3.5. PERAN *OPEN SOURCE SOFTWARE* DALAM MENGHADAPI PERMASALAHAN *PROPRIETARY SOFTWARE*

Proprietary Software adalah *Software* yang dimiliki oleh perorangan maupun perusahaan yang menciptakan atau mengembangkannya. Dalam penggunaannya, terdapat pembatasan-pembatasan yang jelas, dan akses terhadap *Source Codenya* selalu menjadi rahasia atau tidak diberikan secara bebas. *Software* yang bukan merupakan *Proprietary Software* meliputi *free software* dan *public domain software*. *Free software*, secara umum memiliki kesamaan dengan *Open Source Software* dan dapat tersedia bagi siapa saja tanpa dipungut biaya dengan pembatasan minimal. *Free software* harus dibedakan dengan *freeware* yang merupakan salah satu bentuk dari *proprietary software*. *Freeware* ditawarkan tanpa biaya kepada orang yang ingin menggunakannya, namun selayaknya *proprietary software*, terdapat pembatasan dalam penggunaan dan *source code* terhadap *freeware* tidak diberikan kepada penggunanya. Contoh nyata *freeware* adalah *Adobe Acrobat Reader* dan *Microsoft Internet Explorer*.

Sedangkan yang dimaksud dengan *public domain software* adalah *Software* yang telah didonasikan kepada *public domain*¹³⁸ oleh pemegang haknya. Dengan begitu,

¹³⁸ Yang dimaksud dengan *Public Domain* adalah ketidakberlakuan perlindungan *Copyright* untuk sebuah karya seperti buku, lukisan, foto, film, sajak, artikel, potongan music, desain prodak, atau program komputer. Linfo, *Public Domain Definition*, < <http://www.linfo.org/publicdomain.html>>, diunduh tanggal 9 Juni 2009.

Software yang telah didonasikan tersebut tidak lagi dilindungi oleh Hak Cipta dan dapat digunakan oleh siapa saja untuk kepentingan apapun dengan pembatasan yang sangat minim. Terlepas dari adanya *Free software* dan *public domain software*, *proprietary software* tetap bertahan dalam industri *Software* karena target pasarnya menyempit dan bertujuan untuk kepentingan pengguna yang secara spesifik berani membayar harga yang mahal untuk menggunakan *proprietary software*. Sedangkan peran *Open Source Software* dapat terlihat untuk kepentingan pengguna yang tidak sanggup membayar harga yang mahal tersebut,

3.5.1. Pemahaman Terhadap *Open Source Software* dan Pembedaannya Dengan Plagiarisme

Pembajakan terjadi kapanpun dan dimanapun, dimana ada suatu komoditas yang mempunyai nilai ekonomis, terlindungi atau tidak, selalu akan ada upaya pembajakan, terutama apabila komoditas tersebut merupakan sesuatu yang sudah dikenal masyarakat luas. Targetnya pun bermacam-macam mulai dari tas dari merek terkenal, produk makanan sehat, sampai dengan program komputer. Pembajakan adalah perampokan, sebuah pelanggaran terhadap Hak Cipta, oleh karena itu apapun yang dilindungi oleh Hak Cipta dapat dibajak, dan hampir semua hal yang berharga untuk dilindungi dengan Hak Cipta berharga untuk dibajak.¹³⁹ Plagiarisme adalah tindakan penyalahgunaan, pencurian/perampasan, penerbitan, pernyataan, atau menyatakan sebagai milik sendiri sebuah pikiran, ide, tulisan, atau ciptaan yang sebenarnya milik orang lain. Adapun yang menjadi contoh dari suatu perbuatan plagiarisme adalah:

- a. Mengakui karya orang lain sebagai hasil karya sendiri;
- b. Mengambil ide milik orang lain tanpa memberikan kredit terhadap pemilik aslinya;
- c. Mengutip tanpa memberitahukan sumbernya;

¹³⁹ Paul Craig, *Software Piracy Exposed*, (U.S.A: Syngress Publishing, 2005), hal. 3.

- d. Mengambil struktur kalimat namun mengganti kata-katanya;
- e. Mengambil suatu karya secara keseluruhan dan menggantinya dengan nama sendiri;

Dari contoh perbuatan yang merupakan plagiarisme tersebut, maka suatu perbuatan plagiarisme dapat disamakan dengan pembajakan. Dewasa ini banyak terjadi pembajakan program komputer, yang disebabkan meningkatnya kebutuhan masyarakat terhadap komputer meningkat tapi tidak diikuti dengan kemampuan membeli *proprietary software* dengan harga yang terjangkau. Masyarakat yang tidak mempunyai cara untuk memenuhi kebutuhannya akhirnya berpaling kepada *Software* bajakan yang didistribusikan melalui media yang murah, misalnya *Compact Disc* atau CD bajakan.

Pembajakan terhadap *Software* dalam Undang-undang Hak Cipta diatur dalam Pasal 72 ayat (3) Undang-undang Hak Cipta.¹⁴⁰ Adapun bunyi dari ayat tersebut adalah:

- “(3) Barangsiapa dengan sengaja dan tanpa hak memperbanyak penggunaan untuk kepentingan komersial suatu Program Komputer dipidana dengan pidana penjara paling lama 5 (lima) tahun dan/atau denda paling banyak Rp. 1.000.000.000,00 (satu miliar rupiah)”

Dilihat dari substansinya, sistem distribusi *Copyleft* sama sekali tidak menyentuh unsur pembajakan Hak Cipta sesuai dengan pengaturan Pasal 2 dan Pasal 49 ayat (1) dan (2) Undang-undang Hak Cipta. Pendistribusian *Copyleft* dilakukan dengan menggunakan lisensi, yang merupakan perjanjian. Pasal 45 ayat (1) Undang-undang Hak Cipta menyebutkan mengenai pengaturan lisensi tersebut yang berbunyi:

- “(1) Pemegang Hak Cipta berhak memberikan Lisensi kepada pihak lain berdasarkan surat perjanjian Lisensi untuk melaksanakan perbuatan sebagaimana dimaksud dalam pasal 2.”

Dengan adanya pasal tersebut, berarti menjelaskan dua hal penting terkait *Copyleft*, yaitu: Pertama, *Copyleft* merupakan bentuk dari perjanjian lisensi dimana

¹⁴⁰ Indonesia (a), *op cit.*, ps. 72 angka (3).

perjanjian tersebut dilakukan berdasarkan persetujuan pemegang hak, sedangkan pada dasarnya pembajakan adalah suatu pemanfaatan terhadap ciptaan seseorang dimana hal tersebut dilakukan diluar persetujuan penciptanya. Kedua, bentuk nyata dari sistem distribusi *Copyleft* dilakukan dengan menyertakan pemberitahuan bersama dengan suatu ciptaan, yang memungkinkan siapapun yang menggunakan, memperbanyak, memodifikasi, dan mendistribusikan ulang ciptaan tersebut terbebas dari tuntutan pembajakan maupun plagiarisme bahkan sampai ke hasil derivatifnya. Suatu ciptaan yang *Copyleft* dianggap telah dibajak apabila pemberitahuan dalam lisensi *Copyleft* tersebut tidak dipenuhi oleh penggunaanya selayaknya *proprietary software*. Namun, *Copyleft* pada prinsipnya dianggap dibajak apabila pendistribusiannya dihentikan, atau salah satu penggunaanya menyimpan hasil perbanyakannya baik asli maupun derivatif untuk kepentingan komersil pribadi. Hal tersebut yang membedakan *Copyleft* dengan pembajakan atau plagiarisme.

3.5.2. Prinsip *Free Software*

Dalam mengartikan *Free Software*, *free* tidak mencerminkan nilai yang harus dikeluarkan untuk mendapatkan *Software* tersebut, melainkan kebebasan untuk mengganti *source code* dan mendistribusikan ulang sesuai aslinya maupun sebagai derivatif *Free software* tersebut tidaklah gratis dan untuk mendapatkannya dikenakan biaya. Hal ini mungkin membingungkan, dan terlihat ironis bagi masyarakat awam, sebagai sesuatu hal dapat diberi label sebagai *Free software*, namun memiliki harga. Menurut Richard M. Stallman, *Free software* merupakan permasalahan kemerdekaan, bukan permasalahan finansial. Untuk dapat mengerti mengenai konsepnya, masyarakat harus berpikir *free* dalam “*free speech*” atau kebebasan berpendapat dan bukan “*free beer*” atau bir gratis.¹⁴¹ Dari dua kata tersebut dalam istilah bahasa Inggris menggunakan

¹⁴¹ Lawrence Lessig, *op cit.*, hal. 43

kata yang sama yaitu *free*, namun apabila kedua kata-kata tersebut diartikan kedalam bahasa Indonesia, maka terlihat perbedaan arti yang signifikan.

Aspek penting dari *Free software* adalah kebebasan penggunaan dan pemanfaatan *Software* yang *free*. Yaitu kebebasan untuk menjalankan, memperbanyak, mempelajari, mengubah, dan menambahkan sesuatu ke dalam *Software* tersebut. Tepatnya kebebasan tersebut dibagi menjadi empat arti penting¹⁴², yaitu:

- “a. *Freedom 0: The freedom to run the program, for any purpose*
- b. *Freedom 1: The freedom to study how the program works, and adapt it to your needs. (Access to the source code is a precondition for this.)*
- c. *Freedom 2: The freedom to redistribute copies so you can help your neighbor.*
- d. *Freedom 3: The freedom to improve the program, and release improvements to the public, so that the whole community benefits. (Access to the source code is a precondition for this)”*

Kebebasan dalam menjalankan suatu program komputer berarti kebebasan bagi tiap orang untuk menjalankannya dalam sistem komputer apapun, untuk tujuan pekerjaan apapun selama tidak bertentangan dengan undang-undang, dan yang terpenting adalah tanpa perlu adanya pemberitahuan atau permohonan izin kepada pihak pencipta atau pengembang *Software* program komputer itu. Sehingga dapat dikatakan *Free software* lebih memberikan gambaran jelas mengenai penyebarluasan aspek teknologi seperti *source code*, dan hak eksklusif, sehingga menjadi tujuan utama untuk menyediakan aksesibilitas yang lebih terhadap suatu ciptaan.

Dalam Undang-undang Hak Cipta, pengaturan tertulis tersebut dapat terlaksana dengan adanya pengaturan Pasal 45 ayat (1), yang berbunyi:

¹⁴² *Ibid.*

- “(2) Kecuali diperjanjikan lain, lingkup lisensi sebagaimana dimaksud pada ayat (1) meliputi semua perbuatan sebagaimana dimaksud dalam Pasal 2 berlangsung selama jangka waktu Lisensi diberikan dan berlaku untuk seluruh wilayah Negara Republik Indonesia”¹⁴³

Kata-kata “kecuali diperjanjikan lain” pada ayat tersebut menunjukkan bahwa ada kondisi *default* terhadap perlindungan Hak Cipta. Apabila diperjanjikan lain dalam suatu perjanjian lisensi, maka yang berlaku adalah apa yang tertuang dalam perjanjian tersebut. Dengan kata lain, kata *free* dalam istilah *Free software* justru memenuhi tujuan utama dari Hak Cipta dengan mengatur secara jelas secara tertulis apa yang dapat dianggap sebagai penggunaan wajar disaat perlindungan Hak Cipta berlaku terhadap suatu hasil karya teknologi.¹⁴⁴

3.5.3. Pendekatan Non-finansial Yang Melekat Pada *Open Source Software*.

Pada tahun 1984, Richard Stallman, memulai GNU *project*. Proyek tersebut bertujuan hanya agar setiap orang yang membutuhkan tidak perlu membayar untuk mendapatkan suatu *Software*. Stallman berpendapat ilmu pengetahuanlah yang sesungguhnya menyebabkan berjalannya suatu program komputer. Sehingga apa yang dinamakan dengan *source code*, haruslah tersedia secara bebas. Stallman juga berpendapat, apabila tidak demikian maka dunia komputer beserta aspek-aspek terkait komputerisasi seperti *software*, dan lain-lain hanya akan dikuasai oleh beberapa orang yang sangat berkuasa.¹⁴⁵

Open Source Software dapat dianggap sebagai sebuah *Software* yang *open source*, apabila memenuhi kriteria dalam *open source definition*. Yang menjadi hal

¹⁴³ Indonesia (a), *op cit.*, ps. 45 angka (2).

¹⁴⁴ Rod Dixon, *op cit.*, hal. 26.

¹⁴⁵ Chris DiBona, et al., *Open Sources: Voices from the Open Source Revolution*, (Sebastopol: O’Reilly & Associates, 2000), hal. 5.

penting dalam *open source definition* tidak terbatas pada akses kepada *source code* suatu *Software*, melainkan harus memenuhi kriteria-kriteria berikut¹⁴⁶:

a. *Free Redistribution*

Sebuah lisensi *open source* tidak dapat melarang pihak manapun untuk menjual atau memberikan secara cuma-cuma sebagai komponen dari distribusi *Software* secara keseluruhan, yang mengandung program dari beberapa sumber yang berbeda. Berdasarkan lisensi *open source*, royalti atau pendapatan finansial lainnya dari penjualan tersebut tidak berlaku.

b. *Source Code*

Suatu program harus menyertakan *source code*, dan harus memperbolehkan distribusi *source code* dimaksud. Dalam hal program dimaksud tidak didistribusikan dengan *source codenya* maka harus ada keterangan yang jelas dimana *source code* program tersebut dapat diperoleh. *Source code* yang diberikan harus dalam bentuk yang memungkinkan sedemikian rupa sehingga *programmer* dapat memodifikasi program tersebut.

c. *Derived Works*

Lisensi tersebut harus memperbolehkan modifikasi dan produk turunan atau derivatif, untuk didistribusikan di bawah syarat dan ketentuan yang sama dengan *Software* aslinya.

d. *Integrity of the Author's Source Code*

Lisensi tersebut dapat melarang pendistribusian *source code* yang telah dimodifikasi apabila lisensi memperbolehkan distribusi *patch file*¹⁴⁷ bersama

¹⁴⁶ Chris DiBona, et al, *op cit.*, hal. 148 –151.

dengan *source code* dengan pertimbangan agar dapat memodifikasi program pada saat waktu pembuatan.

e. *No Discrimination Against Person or Groups*

Lisensi tersebut tidak diperkenankan membeda-bedakan antara satu orang dengan lainnya, maupun satu kumpulan orang dengan lainnya.

f. *No Discrimination Against Field of Endeavor*

Lisensi tersebut tidak diperkenankan melarang siapapun untuk menggunakan *Software* dimaksud dalam suatu bidang yang spesifik. Misalnya pelarangan penggunaan program dalam bidang bisnis, atau bidang rekayasa genetika.

g. *Distribution of License*

Hak yang melekat kepada *Software* dimaksud harus berlaku bagi siapapun yang menerima hasil distribusi *Software* tanpa adanya lisensi tambahan dari pihak-pihak tersebut.

g. *License Must Not Be Specific to a Product*

Hak yang melekat pada program dimaksud tidak boleh bergantung pada fakta bahwa program merupakan bagian dari distribusi *Software* secara khusus. Apabila Program tersebut diekstraksi dari pelaksanaan distribusi tersebut dan digunakan atau didistribusikan kembali dalam cakupan lisensi, maka pihak manapun yang menerimanya memiliki hak yang sama dengan pihak yang melakukan hal tersebut diatas.

¹⁴⁷ Yang dimaksud dengan *Patch File* adalah sebuah *text file* yang terdiri dari daftar perbedaan-perbedaan dan diciptakan dengan menjalankan program *diff* yang serupa dengan aslinya dan memperbaharui *file*.

h. *License Must Not Contaminate Other Software*

Lisensi tersebut tidak diperkenankan mengatur mengenai pembatasan *Software* lainnya yang didistribusikan bersama *Software* yang dilindungi oleh lisensi dimaksud. Sebagai contoh, sebuah lisensi tidak dapat menegaskan di dalamnya bahwa yang dapat didistribusikan bersama dengan *Software* lisensi tersebut, semuanya merupakan *Open Source Software*.

Berdasarkan *open source definition* diatas tersebut dapat dilihat dengan seksama bahwa *Open Source Software* bukanlah sesuatu *Software* yang gratis. Untuk mendapatkannya pengguna harus mengeluarkan imbalan berupa uang senilai tertentu. Namun nilai tersebut bukan digunakan dalam aspek komersialisasi, namun lebih kepada bentuk apresiasi pemberi hak. Definisi tersebut menggambarkan bahwa tujuan utama *Open Source Software* bukanlah aspek komersil, melainkan pengembangan ilmu pengetahuan. Hal ini masuk akal, karena apabila tujuan awal dari pembuat *Open Source Software* adalah aspek komersil, maka seharusnya dia bisa mendapat lebih banyak uang dengan menyembunyikan *source code* ciptaannya, yang notabene dengan dilakukannya hal tersebut akan menghilangkan esensi dari *Open Source Software* dan berubah menjadi *proprietary software*.

BAB 5

PENUTUP

5.1. KESIMPULAN

Setelah melakukan analisa terhadap permasalahan Hak Cipta yang terjadi di Indonesia maupun negara lain dalam kaitannya dengan sistem distribusi hak berupa *Copyleft*, maka dapat disimpulkan bahwa:

- 5.1.1. Pertama, perlindungan Hak Atas Kekayaan Intelektual, khususnya dalam bidang Hak Cipta memiliki dua tujuan utama, yaitu melindungi investasi terhadap suatu ciptaan, dan menciptakan kondisi yang mendorong kemajuan ilmu pengetahuan dan teknologi. Namun seiring dengan perkembangannya, terjadi ketidak-wajaran dalam perlindungan hak tersebut. Ketidak-wajaran dianggap terjadi apabila Hak Cipta dalam pelaksanaannya tidak lagi berjalan dengan berdasarkan dua tujuan utama yang telah disebutkan sebelumnya. Manifestasi ketidak-wajaran tersebut timbul dalam berbagai bentuk, antara lain perpanjangan jangka waktu perlindungan Hak Cipta yang diperpanjang oleh *Sonny Bono Copyright Term Extension Act* yang mencegah tersedianya suatu ciptaan dalam *public domain* untuk waktu yang lama.

Hal tersebut menimbulkan kerugian bagi masyarakat yang memanfaatkan ciptaan yang berada di *public domain*, antara lain penerbit tertentu yang menjual kembali karya klasik dunia seperti yang dilakukan oleh Wordsworth classic Ltd., maupun para pengguna yang bertujuan untuk mempelajari, atau mengumumkannya dalam bentuk seni pertunjukan seperti teater. Sedangkan dalam kasus lainnya seperti ancaman gugatan Disney terhadap taman kanak-kanak yang menggunakan

gambar tokoh Disney pada tembok taman kanak-kanak tersebut merupakan dampak yang ditimbulkan dari perlindungan yang berlebih, dimana sebenarnya apa yang dilakukan oleh taman kanak-kanak tersebut tidak mengakibatkan kerugian kepentingan yang wajar kepada Disney.

- 5.1.2. Kedua, Pada awal mulanya program komputer merupakan sesuatu yang diciptakan oleh *programmer* komputer yang tersedia bagi sesama *programmer* maupun pengguna pada umumnya untuk kepentingan kemajuan ilmu pengetahuan. Namun seiring dengan perkembangan teknologi, program komputer tidak lagi dianggap sebagai sesuatu yang berguna untuk ilmu pengetahuan saja tapi telah menjadi suatu komoditas yang dapat diperdagangkan. Dengan masuknya program komputer sebagai salah satu bentuk ciptaan yang dapat dilindungi oleh undang-undang Hak Cipta, maka terciptalah program komputer yang dilindungi oleh hak eksklusif, atau yang juga dikenal dengan nama *proprietary software*.

Beberapa *programmer* yang memiliki visi untuk menghentikan praktik komersialisasi program komputer kemudian mengembangkan suatu sistem distribusi program komputer yang masih berada dalam kaidah hukum Hak Cipta, namun memungkinkan terjadinya penggunaan komputer tanpa batasan seperti yang terjadi pada *proprietary software*. Berdasarkan tujuan tersebut maka timbullah sistem distribusi yang dikenal dengan istilah *copyleft* yang memungkinkan penggunaan program komputer sekaligus pemanfaatannya semaksimal mungkin oleh masyarakat untuk kepentingan ilmu pengetahuan dan teknologi, yang tetap membawa keuntungan komersil bagi pembuatnya.

- 5.1.3. Ketiga, *Copyleft* merupakan sistem distribusi yang merupakan bagian dari hukum yang mengatur tentang Hak Cipta, dan bukan merupakan perlawanan terhadap aturan yuridis Hak Cipta, mengingat sistem distribusi *Copyleft* dilakukan dengan

cara perjanjian lisensi yang memiliki bentuk yang tidak lumrah namun sah menurut syarat sahnya perjanjian. Pasal 45 ayat (1) Undang-undang Hak Cipta menyebutkan:

“...Pemegang Hak Cipta berhak memberikan Lisensi kepada pihak lain berdasarkan surat perjanjian Lisensi untuk melaksanakan perbuatan sebagaimana dimaksud dalam Pasal 2.”

Ayat tersebut menunjukkan bahwa pencipta memiliki hak apabila dia berkehendak untuk mengalihkan haknya kepada pihak lain yang dituangkan dalam bentuk lisensi. Lisensi merupakan perjanjian yang menurut hukum Indonesia selama bentuknya tidak diatur oleh undang-undang maka pihak yang membuatnya bebas untuk membuat bentuk perjanjian sesuai kehendaknya. Hal ini sesuai dengan asas kebebasan berkontrak dan ditunjukkan dalam pasal 1338 Kitab Undang-undang Hukum Perdata yang berbunyi:

“Semua perjanjian yang dibuat secara sah berlaku sebagai undang-undang bagi pihak yang membuatnya...”

Dengan kata lain, *Copyleft* dapat dianggap sebagai anti-thesis terhadap *copyright*, namun bukan dalam artian melanggar kaidah hukum *Copyright* seperti pembajakan. Melainkan semata-mata *Copyleft* adalah bentuk lebih lanjut dari *Copyright* dengan adanya esensi yang sama berupa perjanjian lisensi namun dalam sistematika yang berbeda.

5.2. SARAN

Setelah mendapat beberapa kesimpulan sebagaimana telah dijabarkan diatas, maka terkait dengan pengaturan Hak Atas Kekayaan Intelektual khususnya Hak Cipta, maka muncul beberapa hal yang perlu disampaikan, yaitu:

- 5.2.1. Kepada Pemerintah selaku pembuat undang-undang, hendaknya melakukan pembaharuan terhadap Undang-undang Hak Cipta yang berlaku, antara lain mengenai definisi kerugian yang wajar, karena tolok ukur kerugian yang wajar sebagaimana disebutkan dalam Penjelasan Pasal 15 huruf (a) Undang-undang No. 19 Tahun 2002 tentang Hak Cipta sulit ditentukan dan masih menjadi perdebatan. Diharapkan pula Pemerintah akan mengkaji terlebih dahulu mengenai dampak *Copyright Term Extension Act* terhadap iklim inovasi dan masyarakat bilamana Pemerintah di masa yang akan datang berniat untuk meratifikasi *Copyright Term Extension Act* dimaksud.
- 5.2.2. Kepada pencipta selaku pemegang hak cipta, agar tidak hanya mengupayakan perlindungan terhadap ciptaannya, namun juga melihat dampaknya bagi masyarakat. Dampak yang ditimbulkan terhadap masyarakat antara lain terhadap kesejahteraan masyarakat terutama dari sektor usaha kecil menengah yang mencari penghidupan dari sektor *public domain*. Pencipta suatu ciptaan juga sebaiknya melihat dampak dari perlindungan ciptaannya terhadap kemajuan ilmu pengetahuan dan teknologi. Penggunaan lisensi *copyleft* terhadap suatu ciptaan dapat menjamin perlindungan terhadap suatu ciptaan namun dengan menjamin penggunaan ciptaan tersebut untuk kepentingan ilmu pengetahuan dan kepentingan khalayak ramai. Akan sangat positif apabila para pencipta mendistribusikan ciptaannya dengan menggunakan lisensi *copyleft*.
- 5.2.3. Kepada investor selaku pihak yang membutuhkan perlindungan terhadap investasinya yang berupa ciptaan. Hendaknya melihat aspek kepentingan masyarakat dan juga kepentingan dari keluarga pencipta yang telah ditinggalkan oleh pencipta. Sebaiknya investor tidak membuat perjanjian yang mencegah anggota keluarga pencipta untuk menikmati hak materiil dari suatu ciptaan secara utuh, sekaligus mencegah terjadinya alienasi suatu ciptaan yang dapat

menghalangi pengetahuan masyarakat akan suatu ciptaan dan secara tidak langsung mematikan inovasi.

- 5.2.4. Kepada masyarakat pengguna selaku pihak yang telah mendapatkan keuntungan atas pemakaian suatu ciptaan, diharapkan agar sadar terhadap hak eksklusif yang dimiliki pencipta dan tidak menggunakan ciptaan di luar penggunaan yang wajar terhadap ciptaan tersebut. Diharapkan dalam penggunaan ciptaan yang didistribusikan dengan menggunakan lisensi *copyleft* agar dimanfaatkan sesuai dengan kaidah yang diperbolehkan yang berlaku dalam lisensi dimaksud, dengan semaksimal mungkin untuk mendorong inovasi-inovasi baru dikemudian hari.
- 5.2.5. Kepada seluruh pihak yang terkait dengan hak cipta, agar duduk bersama untuk mendapatkan solusi yang terbaik mengenai pelaksanaan hukum hak cipta dalam hukum positif di Indonesia, agar dikemudian hari tidak terjadi contoh-contoh ekseseifitas Hak Cipta seperti yang telah dijabarkan sebelumnya pada masyarakat Negara Republik Indonesia.

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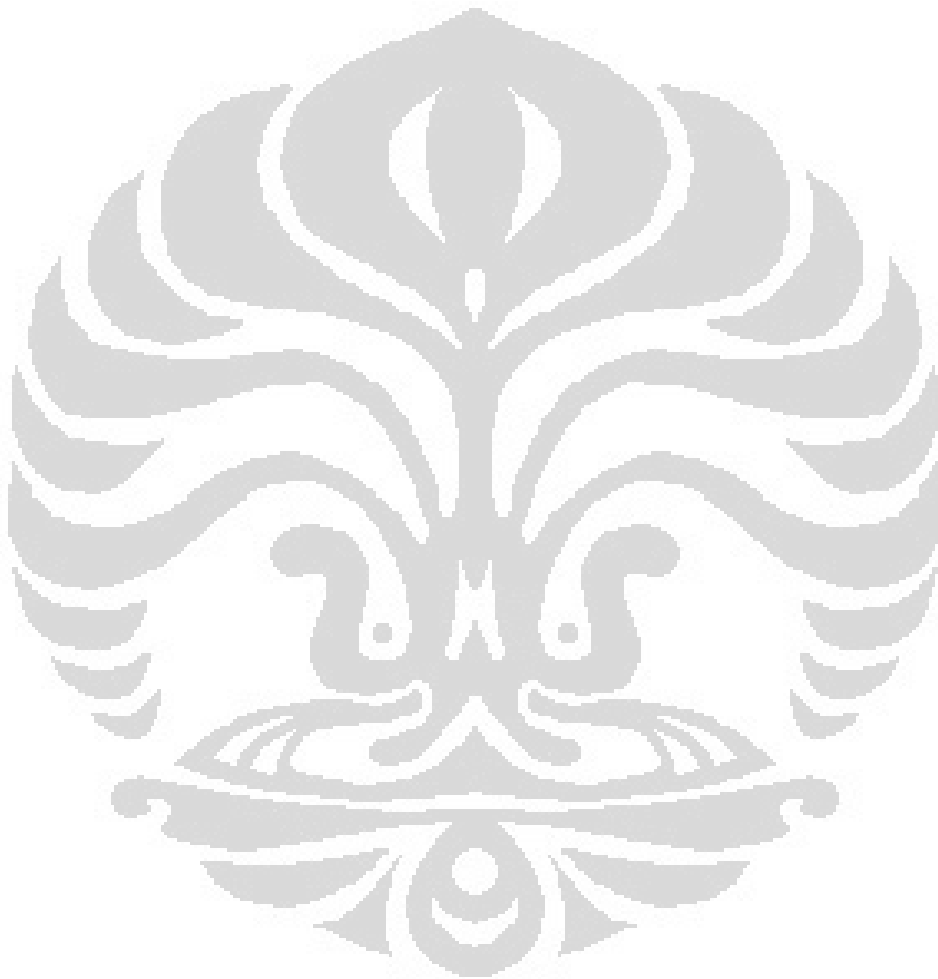
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8. **Validity of Works.** Licensee admits the validity of all copyrights for the Work and all associated registrations and acknowledges that any and all rights that might be acquired by Licensee because of its use of the Work shall inure to the sole benefit of Licensor, provided that this Paragraph 8 shall not entitle Licensor to all or any portion of the profits or revenues from Licensee's permitted uses hereunder, except for the fees described in Paragraph 4.

9. **Notices.** Any notice, demand or request required or permitted to be given under the provisions of this Agreement shall be in writing and delivered personally or by registered or certified mail, return receipt requested, with postage prepaid and addressed to the following persons and addresses, or to such other addresses or persons as any party may request by notice in writing to the other such party:

Licensee:

Licensor- Hirst Arts Fantasy Architecture
710 W. 7 th Street
Sedalia MO 65301

with a copy to: Joseph L. Johnson, Esq.
Lathrop & Gage L.C.
1845 S. National Ave.
Springfield, MO 65808
Facsimile: 417-886-9126

Any such notice shall be effective when received.

10. **Insurance.** Upon the reasonable request of Licensor, Licensee agrees to provide to Licensor proof of general liability insurance, in any minimum amount which is required by the State in which Licensee is incorporated. Said insurance policy shall provide coverage to any third party for injuries claimed to arise from the products advertised and sold by Licensee which relate to the Work and shall also contain a general advertising liability clause, insofar as such clause is allowed by Federal or State law. The insurance policy shall provide coverage to Licensee for indemnification of Licensor under the terms of Paragraph 6 herein.

11. **Arbitration.** All disputes arising from the terms of this Agreement may be subjected to binding arbitration upon consent of both parties, with one arbitrator selected by each party, and a third arbitrator selected by the two chosen arbitrators. This Agreement shall be governed by and construed in accordance with, the laws of the State of Missouri without regard to the conflicts of laws rules thereof and any arbitration shall be brought in Missouri using Missouri laws.

12. **Independent Business Relationship.** Licensor and Licensee are independent contractors and are not and shall not be construed as joint venturers, partners, employer/employee, or agents of the other, and neither shall have the power to bind or obligate the other, except as set forth in this Agreement.

13. **Miscellaneous.**

(A) This Agreement constitutes the entire agreement and understanding of the parties with respect to the subject matter hereof, superseding any and all prior agreements, understandings, negotiations, and discussions. No amendment, alteration, modification, or waiver of this Agreement shall be binding unless evidenced by an instrument in writing signed by the party against whom enforcement thereof is sought.

(B) In the event it becomes necessary for either party to file a suit to enforce this Agreement or any provisions contained herein, and either party prevails in such action, then such prevailing party shall be entitled to recover, in addition to all other remedies or damages, reasonable attorney's fees and court costs incurred in such suit.

(C) If any provision of this Agreement, or the application of such provision to any person or circumstance shall be held invalid, the remainder of this Agreement, or the application of such provisions to any other persons or circumstances, shall not be affected thereby.

(D) This Agreement may be executed in several counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same document.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the date first above written.

LICENSEE:

By: _____

LICENSOR:

By: _____
Bruce Hirst
Hirst Arts Fantasy Architecture

UNIVERSITY OF MAINE SYSTEM BROAD APPLICATION COPYLEFT LICENSE (proposed)

Background

The concept of "copyleft", as generally understood, is use of a copyright notice to permit unrestricted redistribution and modification of a work, provided that all copies and derivatives retain the same permission. This licensing approach is directly responsible for recent massive voluntary information resource sharing and production, such as the recent production of free software by tens of thousands of individuals working independently and in collaboration with each other. Among the benefits of the use of this licensing approach include the following:

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END OF TERMS AND CONDITION

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

METRO-GOLDWYN-MAYER STUDIOS INC. ET AL. *v.*
GROKSTER, LTD., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

No. 04–480. Argued March 29, 2005—Decided June 27, 2005

Respondent companies distribute free software that allows computer users to share electronic files through peer-to-peer networks, so called because the computers communicate directly with each other, not through central servers. Although such networks can be used to share any type of digital file, recipients of respondents' software have mostly used them to share copyrighted music and video files without authorization. Seeking damages and an injunction, a group of movie studios and other copyright holders (hereinafter MGM) sued respondents for their users' copyright infringements, alleging that respondents knowingly and intentionally distributed their software to enable users to infringe copyrighted works in violation of the Copyright Act.

Discovery revealed that billions of files are shared across peer-to-peer networks each month. Respondents are aware that users employ their software primarily to download copyrighted files, although the decentralized networks do not reveal which files are copied, and when. Respondents have sometimes learned about the infringement directly when users have e-mailed questions regarding copyrighted works, and respondents have replied with guidance. Respondents are not merely passive recipients of information about infringement. The record is replete with evidence that when they began to distribute their free software, each of them clearly voiced the objective that recipients use the software to download copyrighted works and took active steps to encourage infringement. After the notorious file-sharing service, Napster, was sued by copyright holders for facilitating copyright infringement, both respondents promoted and marketed themselves as Napster alternatives. They receive no revenue

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from users, but, instead, generate income by selling advertising space, then streaming the advertising to their users. As the number of users increases, advertising opportunities are worth more. There is no evidence that either respondent made an effort to filter copyrighted material from users' downloads or otherwise to impede the sharing of copyrighted files.

While acknowledging that respondents' users had directly infringed MGM's copyrights, the District Court nonetheless granted respondents summary judgment as to liability arising from distribution of their software. The Ninth Circuit affirmed. It read *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417, as holding that the distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. Because the appeals court found respondents' software to be capable of substantial noninfringing uses and because respondents had no actual knowledge of infringement owing to the software's decentralized architecture, the court held that they were not liable. It also held that they did not materially contribute to their users' infringement because the users themselves searched for, retrieved, and stored the infringing files, with no involvement by respondents beyond providing the software in the first place. Finally, the court held that respondents could not be held liable under a vicarious infringement theory because they did not monitor or control the software's use, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement.

Held: One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, going beyond mere distribution with knowledge of third-party action, is liable for the resulting acts of infringement by third parties using the device, regardless of the device's lawful uses. Pp. 10–24.

(a) The tension between the competing values of supporting creativity through copyright protection and promoting technological innovation by limiting infringement liability is the subject of this case. Despite offsetting considerations, the argument for imposing indirect liability here is powerful, given the number of infringing downloads that occur daily using respondents' software. When a widely shared product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, so that the only practical alternative is to go against the device's distributor for secondary liability on a theory of contributory or vicarious infringement. One infringes contributorily by intentionally

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inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise the right to stop or limit it. Although “[t]he Copyright Act does not expressly render anyone liable for [another’s] infringement,” *Sony*, 464 U. S., at 434, these secondary liability doctrines emerged from common law principles and are well established in the law, *e.g., id.*, at 486. Pp. 10–13.

(b) *Sony* addressed a claim that secondary liability for infringement can arise from the very distribution of a commercial product. There, copyright holders sued Sony, the manufacturer of videocassette recorders, claiming that it was contributorily liable for the infringement that occurred when VCR owners taped copyrighted programs. The evidence showed that the VCR’s principal use was “time-shifting,” *i.e.*, taping a program for later viewing at a more convenient time, which the Court found to be a fair, noninfringing use. 464 U. S., at 423–424. Moreover, there was no evidence that Sony had desired to bring about taping in violation of copyright or taken active steps to increase its profits from unlawful taping. *Id.*, at 438. On those facts, the only conceivable basis for liability was on a theory of contributory infringement through distribution of a product. *Id.*, at 439. Because the VCR was “capable of commercially significant non-infringing uses,” the Court held that Sony was not liable. *Id.*, at 442. This theory reflected patent law’s traditional staple article of commerce doctrine that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. 35 U. S. C §271(c). The doctrine absolves the equivocal conduct of selling an item with lawful and unlawful uses and limits liability to instances of more acute fault. In this case, the Ninth Circuit misread *Sony* to mean that when a product is capable of substantial lawful use, the producer cannot be held contributorily liable for third parties’ infringing use of it, even when an actual purpose to cause infringing use is shown, unless the distributors had specific knowledge of infringement at a time when they contributed to the infringement and failed to act upon that information. *Sony* did not displace other secondary liability theories. Pp. 13–17.

(c) Nothing in *Sony* requires courts to ignore evidence of intent to promote infringement if such evidence exists. It was never meant to foreclose rules of fault-based liability derived from the common law. 464 U. S., at 439. Where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*’s staple-article rule will not preclude liability. At common law a copyright or patent defendant who “not only expected but invoked [infringing use] by advertisement” was liable for infringement.

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Kalem Co. v. Harper Brothers, 222 U. S. 55, 62–63. The rule on inducement of infringement as developed in the early cases is no different today. Evidence of active steps taken to encourage direct infringement, such as advertising an infringing use or instructing how to engage in an infringing use, shows an affirmative intent that the product be used to infringe, and overcomes the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use. A rule that premises liability on purposeful, culpable expression and conduct does nothing to compromise legitimate commerce or discourage innovation having a lawful promise. Pp. 17–20.

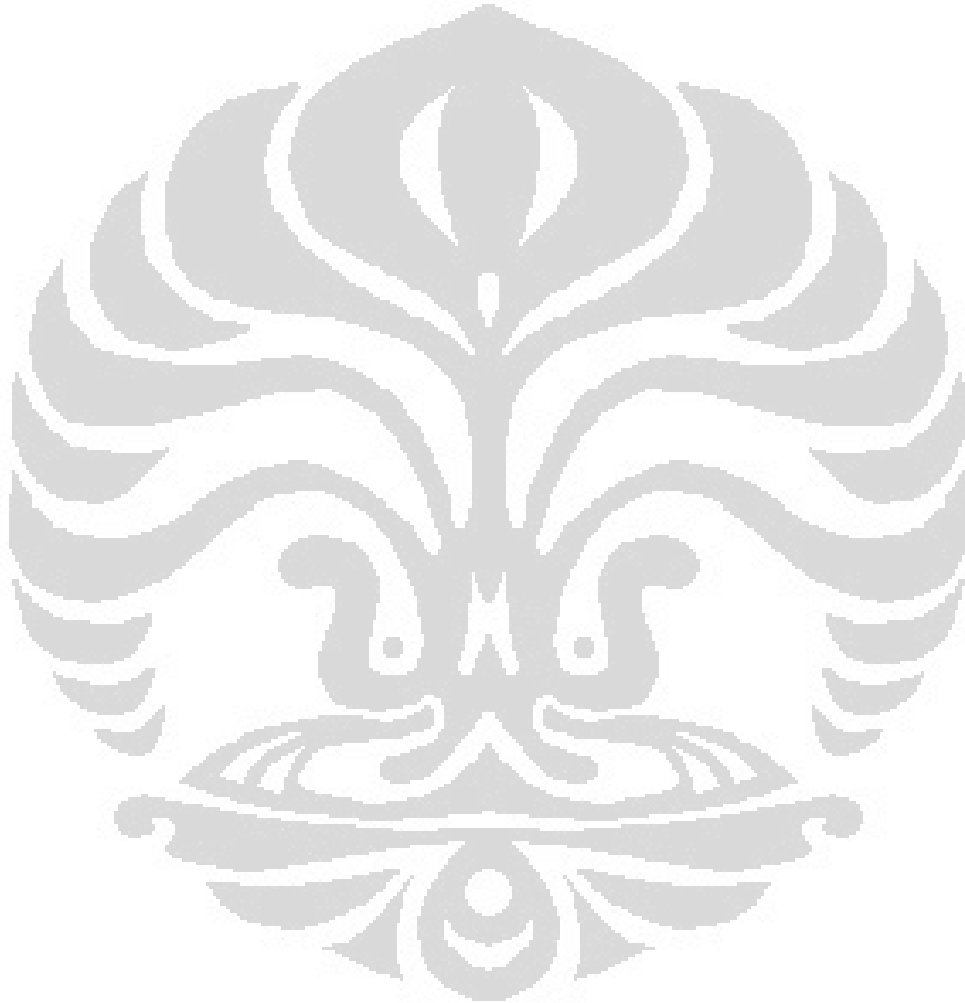
(d) On the record presented, respondents’ unlawful objective is unmistakable. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. MGM argues persuasively that such a message is shown here. Three features of the evidence of intent are particularly notable. First, each of the respondents showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. Respondents’ efforts to supply services to former Napster users indicate a principal, if not exclusive, intent to bring about infringement. Second, neither respondent attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated that failure as irrelevant because respondents lacked an independent duty to monitor their users’ activity, this evidence underscores their intentional facilitation of their users’ infringement. Third, respondents make money by selling advertising space, then by directing ads to the screens of computers employing their software. The more their software is used, the more ads are sent out and the greater the advertising revenue. Since the extent of the software’s use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing. This evidence alone would not justify an inference of unlawful intent, but its import is clear in the entire record’s context. Pp. 20–23.

(e) In addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory requires evidence of actual infringement by recipients of the device, the software in this case. There is evidence of such infringement on a gigantic scale. Because substantial evidence supports MGM on all elements, summary judgment for respondents was error. On remand, reconsideration of MGM’s summary judgment motion will be in order. Pp. 23–24.

380 F. 3d 1154, vacated and remanded.

Syllabus

SOUTER, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which REHNQUIST, C. J., and KENNEDY, J., joined. BREYER, J., filed a concurring opinion, in which STEVENS and O'CONNOR, JJ., joined.



Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 04–480

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,
PETITIONERS *v.* GROKSTER, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 27, 2005]

JUSTICE SOUTER delivered the opinion of the Court.

The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product. We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.

I
A

Respondents, Grokster, Ltd., and StreamCast Networks, Inc., defendants in the trial court, distribute free software products that allow computer users to share electronic files through peer-to-peer networks, so called because users' computers communicate directly with each other, not through central servers. The advantage of peer-to-peer networks over information networks of other types shows up in their substantial and growing popularity. Because they need no central computer server to mediate the exchange of information or files among users, the high-

bandwidth communications capacity for a server may be dispensed with, and the need for costly server storage space is eliminated. Since copies of a file (particularly a popular one) are available on many users' computers, file requests and retrievals may be faster than on other types of networks, and since file exchanges do not travel through a server, communications can take place between any computers that remain connected to the network without risk that a glitch in the server will disable the network in its entirety. Given these benefits in security, cost, and efficiency, peer-to-peer networks are employed to store and distribute electronic files by universities, government agencies, corporations, and libraries, among others.¹

Other users of peer-to-peer networks include individual recipients of Grokster's and StreamCast's software, and although the networks that they enjoy through using the software can be used to share any type of digital file, they have prominently employed those networks in sharing copyrighted music and video files without authorization. A group of copyright holders (MGM for short, but including motion picture studios, recording companies, songwriters, and music publishers) sued Grokster and StreamCast for their users' copyright infringements, alleging that they knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works in violation of the Copyright Act, 17 U. S. C. §101 *et seq.* (2000 ed. and Supp. II).² MGM sought

¹Peer-to-peer networks have disadvantages as well. Searches on peer-to-peer networks may not reach and uncover all available files because search requests may not be transmitted to every computer on the network. There may be redundant copies of popular files. The creator of the software has no incentive to minimize storage or bandwidth consumption, the costs of which are borne by every user of the network. Most relevant here, it is more difficult to control the content of files available for retrieval and the behavior of users.

²The studios and recording companies and the songwriters and music publishers filed separate suits against the defendants that were con-

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damages and an injunction.

Discovery during the litigation revealed the way the software worked, the business aims of each defendant company, and the predilections of the users. Grokster's eponymous software employs what is known as FastTrack technology, a protocol developed by others and licensed to Grokster. StreamCast distributes a very similar product except that its software, called Morpheus, relies on what is known as Gnutella technology.³ A user who downloads and installs either software possesses the protocol to send requests for files directly to the computers of others using software compatible with FastTrack or Gnutella. On the FastTrack network opened by the Grokster software, the user's request goes to a computer given an indexing capacity by the software and designated a supernode, or to some other computer with comparable power and capacity to collect temporary indexes of the files available on the computers of users connected to it. The supernode (or indexing computer) searches its own index and may communicate the search request to other supernodes. If the file is found, the supernode discloses its location to the computer requesting it, and the requesting user can download the file directly from the computer located. The copied file is placed in a designated sharing folder on the requesting user's computer, where it is available for other users to download in turn, along with any other file in that folder.

In the Gnutella network made available by Morpheus, the process is mostly the same, except that in some versions of the Gnutella protocol there are no supernodes. In these versions, peer computers using the protocol commu-

solidated by the District Court.

³Subsequent versions of Morpheus, released after the record was made in this case, apparently rely not on Gnutella but on a technology called Neonet. These developments are not before us.

nicate directly with each other. When a user enters a search request into the Morpheus software, it sends the request to computers connected with it, which in turn pass the request along to other connected peers. The search results are communicated to the requesting computer, and the user can download desired files directly from peers' computers. As this description indicates, Grokster and StreamCast use no servers to intercept the content of the search requests or to mediate the file transfers conducted by users of the software, there being no central point through which the substance of the communications passes in either direction.⁴

Although Grokster and StreamCast do not therefore know when particular files are copied, a few searches using their software would show what is available on the networks the software reaches. MGM commissioned a statistician to conduct a systematic search, and his study showed that nearly 90% of the files available for download on the FastTrack system were copyrighted works.⁵ Grokster and StreamCast dispute this figure, raising methodological problems and arguing that free copying even of copyrighted works may be authorized by the rightholders. They also argue that potential noninfringing uses of their software are significant in kind, even if infrequent in practice. Some musical performers, for example, have gained new audiences by distributing their copyrighted works for free across peer-to-peer networks, and some

⁴There is some evidence that both Grokster and StreamCast previously operated supernodes, which compiled indexes of files available on all of the nodes connected to them. This evidence, pertaining to previous versions of the defendants' software, is not before us and would not affect our conclusions in any event.

⁵By comparison, evidence introduced by the plaintiffs in *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (CA9 2001), showed that 87% of files available on the Napster filesharing network were copyrighted, *id.*, at 1013.

Opinion of the Court

distributors of unprotected content have used peer-to-peer networks to disseminate files, Shakespeare being an example. Indeed, StreamCast has given Morpheus users the opportunity to download the briefs in this very case, though their popularity has not been quantified.

As for quantification, the parties' anecdotal and statistical evidence entered thus far to show the content available on the FastTrack and Gnutella networks does not say much about which files are actually downloaded by users, and no one can say how often the software is used to obtain copies of unprotected material. But MGM's evidence gives reason to think that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the FastTrack and Gnutella networks each month, the probable scope of copyright infringement is staggering.

Grokster and StreamCast concede the infringement in most downloads, Brief for Respondents 10, n. 6, and it is uncontested that they are aware that users employ their software primarily to download copyrighted files, even if the decentralized FastTrack and Gnutella networks fail to reveal which files are being copied, and when. From time to time, moreover, the companies have learned about their users' infringement directly, as from users who have sent e-mail to each company with questions about playing copyrighted movies they had downloaded, to whom the companies have responded with guidance.⁶ App. 559–563, 808–816, 939–954. And MGM notified the companies of 8 million copyrighted files that could be obtained using their software.

Grokster and StreamCast are not, however, merely passive recipients of information about infringing use.

⁶The Grokster founder contends that in answering these e-mails he often did not read them fully. App. 77, 769.

The record is replete with evidence that from the moment Grokster and StreamCast began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.

After the notorious file-sharing service, Napster, was sued by copyright holders for facilitation of copyright infringement, *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (ND Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (CA9 2001), StreamCast gave away a software program of a kind known as OpenNap, designed as compatible with the Napster program and open to Napster users for downloading files from other Napster and OpenNap users' computers. Evidence indicates that "[i]t was always [StreamCast's] intent to use [its OpenNap network] to be able to capture email addresses of [its] initial target market so that [it] could promote [its] StreamCast Morpheus interface to them," App. 861; indeed, the OpenNap program was engineered "to leverage Napster's 50 million user base," *id.*, at 746.

StreamCast monitored both the number of users downloading its OpenNap program and the number of music files they downloaded. *Id.*, at 859, 863, 866. It also used the resulting OpenNap network to distribute copies of the Morpheus software and to encourage users to adopt it. *Id.*, at 861, 867, 1039. Internal company documents indicate that StreamCast hoped to attract large numbers of former Napster users if that company was shut down by court order or otherwise, and that StreamCast planned to be the next Napster. *Id.*, at 861. A kit developed by StreamCast to be delivered to advertisers, for example, contained press articles about StreamCast's potential to capture former Napster users, *id.*, at 568–572, and it introduced itself to some potential advertisers as a company "which is similar to what Napster was," *id.*, at 884. It broadcast banner advertisements to users of other

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Napster-compatible software, urging them to adopt its OpenNap. *Id.*, at 586. An internal e-mail from a company executive stated: “We have put this network in place so that when Napster pulls the plug on their free service . . . or if the Court orders them shut down prior to that . . . we will be positioned to capture the flood of their 32 million users that will be actively looking for an alternative.” *Id.*, at 588–589, 861.

Thus, StreamCast developed promotional materials to market its service as the best Napster alternative. One proposed advertisement read: “Napster Inc. has announced that it will soon begin charging you a fee. That’s if the courts don’t order it shut down first. What will you do to get around it?” *Id.*, at 897. Another proposed ad touted StreamCast’s software as the “#1 alternative to Napster” and asked “[w]hen the lights went off at Napster . . . where did the users go?” *Id.*, at 836 (ellipsis in original).⁷ StreamCast even planned to flaunt the illegal uses of its software; when it launched the OpenNap network, the chief technology officer of the company averred that “[t]he goal is to get in trouble with the law and get sued. It’s the best way to get in the new[s].” *Id.*, at 916.

The evidence that Grokster sought to capture the market of former Napster users is sparser but revealing, for Grokster launched its own OpenNap system called Swaptor and inserted digital codes into its Web site so that computer users using Web search engines to look for “Napster” or “[f]ree filesharing” would be directed to the Grokster Web site, where they could download the Grokster software. *Id.*, at 992–993. And Grokster’s name is an apparent derivative of Napster.

⁷The record makes clear that StreamCast developed these promotional materials but not whether it released them to the public. Even if these advertisements were not released to the public and do not show encouragement to infringe, they illuminate StreamCast’s purposes.

StreamCast's executives monitored the number of songs by certain commercial artists available on their networks, and an internal communication indicates they aimed to have a larger number of copyrighted songs available on their networks than other file-sharing networks. *Id.*, at 868. The point, of course, would be to attract users of a mind to infringe, just as it would be with their promotional materials developed showing copyrighted songs as examples of the kinds of files available through Morpheus. *Id.*, at 848. Morpheus in fact allowed users to search specifically for "Top 40" songs, *id.*, at 735, which were inevitably copyrighted. Similarly, Grokster sent users a newsletter promoting its ability to provide particular, popular copyrighted materials. Brief for Motion Picture Studio and Recording Company Petitioners 7–8.

In addition to this evidence of express promotion, marketing, and intent to promote further, the business models employed by Grokster and StreamCast confirm that their principal object was use of their software to download copyrighted works. Grokster and StreamCast receive no revenue from users, who obtain the software itself for nothing. Instead, both companies generate income by selling advertising space, and they stream the advertising to Grokster and Morpheus users while they are employing the programs. As the number of users of each program increases, advertising opportunities become worth more. Cf. App. 539, 804. While there is doubtless some demand for free Shakespeare, the evidence shows that substantive volume is a function of free access to copyrighted work. Users seeking Top 40 songs, for example, or the latest release by Modest Mouse, are certain to be far more numerous than those seeking a free Decameron, and Grokster and StreamCast translated that demand into dollars.

Finally, there is no evidence that either company made an effort to filter copyrighted material from users' downloads or otherwise impede the sharing of copyrighted

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files. Although Grokster appears to have sent e-mails warning users about infringing content when it received threatening notice from the copyright holders, it never blocked anyone from continuing to use its software to share copyrighted files. *Id.*, at 75–76. StreamCast not only rejected another company’s offer of help to monitor infringement, *id.*, at 928–929, but blocked the Internet Protocol addresses of entities it believed were trying to engage in such monitoring on its networks, *id.*, at 917–922.

B

After discovery, the parties on each side of the case cross-moved for summary judgment. The District Court limited its consideration to the asserted liability of Grokster and StreamCast for distributing the current versions of their software, leaving aside whether either was liable “for damages arising from *past* versions of their software, or from other past activities.” 259 F. Supp. 2d 1029, 1033 (CD Cal. 2003). The District Court held that those who used the Grokster and Morpheus software to download copyrighted media files directly infringed MGM’s copyrights, a conclusion not contested on appeal, but the court nonetheless granted summary judgment in favor of Grokster and StreamCast as to any liability arising from distribution of the then current versions of their software. Distributing that software gave rise to no liability in the court’s view, because its use did not provide the distributors with actual knowledge of specific acts of infringement. Case No. CV 01 08541 SVW (PJWx) (CD Cal., June 18, 2003), App. 1213.

The Court of Appeals affirmed. 380 F. 3d 1154 (CA9 2004). In the court’s analysis, a defendant was liable as a contributory infringer when it had knowledge of direct infringement and materially contributed to the infringement. But the court read *Sony Corp. of America v. Uni-*

versal City Studios, Inc., 464 U. S. 417 (1984), as holding that distribution of a commercial product capable of substantial noninfringing uses could not give rise to contributory liability for infringement unless the distributor had actual knowledge of specific instances of infringement and failed to act on that knowledge. The fact that the software was capable of substantial noninfringing uses in the Ninth Circuit's view meant that Grokster and StreamCast were not liable, because they had no such actual knowledge, owing to the decentralized architecture of their software. The court also held that Grokster and StreamCast did not materially contribute to their users' infringement because it was the users themselves who searched for, retrieved, and stored the infringing files, with no involvement by the defendants beyond providing the software in the first place.

The Ninth Circuit also considered whether Grokster and StreamCast could be liable under a theory of vicarious infringement. The court held against liability because the defendants did not monitor or control the use of the software, had no agreed-upon right or current ability to supervise its use, and had no independent duty to police infringement. We granted certiorari. 543 U. S. ___ (2004).

II

A

MGM and many of the *amici* fault the Court of Appeals's holding for upsetting a sound balance between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies by limiting the incidence of liability for copyright infringement. The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off. See *Sony Corp. v. Universal City Studios, supra*, at 442; see generally Gins-

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burg, Copyright and Control Over New Technologies of Dissemination, 101 Colum. L. Rev. 1613 (2001); Lichtman & Landes, Indirect Liability for Copyright Infringement: An Economic Perspective, 16 Harv. J. L. & Tech. 395 (2003).

The tension between the two values is the subject of this case, with its claim that digital distribution of copyrighted material threatens copyright holders as never before, because every copy is identical to the original, copying is easy, and many people (especially the young) use file-sharing software to download copyrighted works. This very breadth of the software's use may well draw the public directly into the debate over copyright policy, Peters, Brace Memorial Lecture: Copyright Enters the Public Domain, 51 J. Copyright Soc. 701, 705–717 (2004) (address by Register of Copyrights), and the indications are that the ease of copying songs or movies using software like Grokster's and Napster's is fostering disdain for copyright protection, Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 724–726 (2003). As the case has been presented to us, these fears are said to be offset by the different concern that imposing liability, not only on infringers but on distributors of software based on its potential for unlawful use, could limit further development of beneficial technologies. See, e.g., Lemley & Reese, Reducing Digital Copyright Infringement Without Restricting Innovation, 56 Stan. L. Rev. 1345, 1386–1390 (2004); Brief for Innovation Scholars and Economists as *Amici Curiae* 15–20; Brief for Emerging Technology Companies as *Amici Curiae* 19–25; Brief for Intel Corporation as *Amicus Curiae* 20–22.⁸

⁸The mutual exclusivity of these values should not be overstated, however. On the one hand technological innovators, including those writing filesharing computer programs, may wish for effective copyright protections for their work. See, e.g., Wu, When Code Isn't Law, 89 Va. L. Rev. 679, 750 (2003). (StreamCast itself was urged by an associate

The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast's and Grokster's software. When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement. See *In re Aimster Copyright Litigation*, 334 F. 3d 643, 645–646 (CA7 2003).

One infringes contributorily by intentionally inducing or encouraging direct infringement, see *Gershwin Pub. Corp. v. Columbia Artists Management, Inc.*, 443 F. 2d 1159, 1162 (CA2 1971), and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304, 307 (CA2 1963).⁹ Although

to “get [its] technology written down and [its intellectual property] protected.” App. 866.) On the other hand the widespread distribution of creative works through improved technologies may enable the synthesis of new works or generate audiences for emerging artists. See *Eldred v. Ashcroft*, 537 U. S. 186, 223–226 (2003) (STEVENS, J., dissenting); Van Houweling, *Distributive Values in Copyright*, 83 Texas L. Rev. 1535, 1539–1540, 1562–1564 (2005); Brief for Sovereign Artists et al. as *Amici Curiae* 11.

⁹We stated in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984), that “the lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn’ [R]easoned analysis of [the *Sony* plaintiffs’ contributory infringement claim] necessarily entails consideration of arguments and case law which may also be forwarded under the other labels, and indeed the parties . . . rely upon such arguments and authority in support of their respective positions on the issue of contributory infringement,” *id.*, at 435, n. 17 (quoting *Universal City Studios, Inc. v. Sony Corp.*, 480 F. Supp. 429, 457–458 (CD Cal. 1979)). In the present case MGM has argued a vicarious liability theory, which allows imposition of liability when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer, even if the

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“[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,” *Sony Corp. v. Universal City Studios*, 464 U. S., at 434, these doctrines of secondary liability emerged from common law principles and are well established in the law, *id.*, at 486 (Blackmun, J., dissenting); *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62–63 (1911); *Gershwin Pub. Corp. v. Columbia Artists Management, supra*, at 1162; 3 M. Nimmer & D. Nimmer, Copyright, §12.04[A] (2005).

B

Despite the currency of these principles of secondary liability, this Court has dealt with secondary copyright infringement in only one recent case, and because MGM has tailored its principal claim to our opinion there, a look at our earlier holding is in order. In *Sony Corp. v. Universal City Studios, supra*, this Court addressed a claim that secondary liability for infringement can arise from the very distribution of a commercial product. There, the product, novel at the time, was what we know today as the videocassette recorder or VCR. Copyright holders sued Sony as the manufacturer, claiming it was contributorily liable for infringement that occurred when VCR owners taped copyrighted programs because it supplied the means used to infringe, and it had constructive knowledge that infringement would occur. At the trial on the merits, the evidence showed that the principal use of the VCR was for “time-shifting,” or taping a program for later viewing at a more convenient time, which the Court found to be a fair, not an infringing, use. *Id.*, at 423–424. There was no

defendant initially lacks knowledge of the infringement. See, e.g., *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F. 2d 304, 308 (CA2 1963); *Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F. 2d 354, 355 (CA7 1929). Because we resolve the case based on an inducement theory, there is no need to analyze separately MGM’s vicarious liability theory.

evidence that Sony had expressed an object of bringing about taping in violation of copyright or had taken active steps to increase its profits from unlawful taping. *Id.*, at 438. Although Sony's advertisements urged consumers to buy the VCR to "record favorite shows" or "build a library" of recorded programs, *id.*, at 459 (Blackmun, J., dissenting), neither of these uses was necessarily infringing, *id.*, at 424, 454–455.

On those facts, with no evidence of stated or indicated intent to promote infringing uses, the only conceivable basis for imposing liability was on a theory of contributory infringement arising from its sale of VCRs to consumers with knowledge that some would use them to infringe. *Id.*, at 439. But because the VCR was "capable of commercially significant noninfringing uses," we held the manufacturer could not be faulted solely on the basis of its distribution. *Id.*, at 442.

This analysis reflected patent law's traditional staple article of commerce doctrine, now codified, that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. 35 U. S. C. §271(c); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U. S. 476, 485 (1964) (noting codification of cases); *id.*, at 486, n. 6 (same). The doctrine was devised to identify instances in which it may be presumed from distribution of an article in commerce that the distributor intended the article to be used to infringe another's patent, and so may justly be held liable for that infringement. "One who makes and sells articles which are only adapted to be used in a patented combination will be presumed to intend the natural consequences of his acts; he will be presumed to intend that they shall be used in the combination of the patent." *New York Scaffolding Co. v. Whitney*, 224 F. 452, 459 (CA8 1915); see also *James Heekin Co. v. Baker*, 138 F. 63, 66 (CA8 1905); *Canda v. Michigan Malleable Iron Co.*, 124 F. 486, 489 (CA6 1903); *Thomson-*

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Houston Electric Co. v. Ohio Brass Co., 80 F. 712, 720–721 (CA6 1897); *Red Jacket Mfg. Co. v. Davis*, 82 F. 432, 439 (CA7 1897); *Holly v. Vergennes Machine Co.*, 4 F. 74, 82 (CC Vt. 1880); *Renwick v. Pond*, 20 F. Cas. 536, 541 (No. 11,702) (CC SDNY 1872).

In sum, where an article is “good for nothing else” but infringement, *Canda v. Michigan Malleable Iron Co.*, *supra*, at 489, there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe, see *Henry v. A. B. Dick Co.*, 224 U. S. 1, 48 (1912), overruled on other grounds, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U. S. 502 (1917). Conversely, the doctrine absolves the equivocal conduct of selling an item with substantial lawful as well as unlawful uses, and limits liability to instances of more acute fault than the mere understanding that some of one’s products will be misused. It leaves breathing room for innovation and a vigorous commerce. See *Sony Corp. v. Universal City Studios*, *supra*, at 442; *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U. S. 176, 221 (1980); *Henry v. A. B. Dick Co.*, *supra*, at 48.

The parties and many of the *amici* in this case think the key to resolving it is the *Sony* rule and, in particular, what it means for a product to be “capable of commercially significant noninfringing uses.” *Sony Corp. v. Universal City Studios*, *supra*, at 442. MGM advances the argument that granting summary judgment to Grokster and StreamCast as to their current activities gave too much weight to the value of innovative technology, and too little to the copyrights infringed by users of their software, given that 90% of works available on one of the networks was shown to be copyrighted. Assuming the remaining 10% to be its noninfringing use, MGM says this should not qualify as “substantial,” and the Court should quantify *Sony* to the extent of holding that a product used “princi-

pally” for infringement does not qualify. See Brief for Motion Picture Studio and Recording Company Petitioners 31. As mentioned before, Grokster and StreamCast reply by citing evidence that their software can be used to reproduce public domain works, and they point to copyright holders who actually encourage copying. Even if infringement is the principal practice with their software today, they argue, the noninfringing uses are significant and will grow.

We agree with MGM that the Court of Appeals misapplied *Sony*, which it read as limiting secondary liability quite beyond the circumstances to which the case applied. *Sony* barred secondary liability based on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use, which the distributor knows is in fact used for infringement. The Ninth Circuit has read *Sony*’s limitation to mean that whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable for third parties’ infringing use of it; it read the rule as being this broad, even when an actual purpose to cause infringing use is shown by evidence independent of design and distribution of the product, unless the distributors had “specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information.” 380 F. 3d, at 1162 (internal quotation marks and alterations omitted). Because the Circuit found the StreamCast and Grokster software capable of substantial lawful use, it concluded on the basis of its reading of *Sony* that neither company could be held liable, since there was no showing that their software, being without any central server, afforded them knowledge of specific unlawful uses.

This view of *Sony*, however, was error, converting the case from one about liability resting on imputed intent to one about liability on any theory. Because *Sony* did not

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displace other theories of secondary liability, and because we find below that it was error to grant summary judgment to the companies on MGM's inducement claim, we do not revisit *Sony* further, as MGM requests, to add a more quantified description of the point of balance between protection and commerce when liability rests solely on distribution with knowledge that unlawful use will occur. It is enough to note that the Ninth Circuit's judgment rested on an erroneous understanding of *Sony* and to leave further consideration of the *Sony* rule for a day when that may be required.

C

Sony's rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. But nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law.¹⁰ *Sony Corp. v. Universal City Studios*, 464 U. S., at 439 ("If vicarious liability is to be imposed on Sony in this case, it must rest on the fact that it has sold equipment with constructive knowledge" of the potential for infringement). Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony's* staple-article rule will not preclude liability.

The classic case of direct evidence of unlawful purpose occurs when one induces commission of infringement by another, or "entic[es] or persuad[es] another" to infringe, Black's Law Dictionary 790 (8th ed. 2004), as by advertising. Thus at common law a copyright or patent defendant

¹⁰Nor does the Patent Act's exemption from liability for those who distribute a staple article of commerce, 35 U. S. C. §271(c), extend to those who induce patent infringement, §271(b).

who “not only expected but invoked [infringing use] by advertisement” was liable for infringement “on principles recognized in every part of the law.” *Kalem Co. v. Harper Brothers*, 222 U. S., at 62–63 (copyright infringement). See also *Henry v. A. B. Dick Co.*, 224 U. S., at 48–49 (contributory liability for patent infringement may be found where a good’s “most conspicuous use is one which will cooperate in an infringement when sale to such user is invoked by advertisement” of the infringing use); *Thomson-Houston Electric Co. v. Kelsey Electric R. Specialty Co.*, 75 F. 1005, 1007–1008 (CA2 1896) (relying on advertisements and displays to find defendant’s “willingness . . . to aid other persons in any attempts which they may be disposed to make towards [patent] infringement”); *Rumford Chemical Works v. Hecker*, 20 F. Cas. 1342, 1346 (No. 12,133) (CC N. J. 1876) (demonstrations of infringing activity along with “avowals of the [infringing] purpose and use for which it was made” supported liability for patent infringement).

The rule on inducement of infringement as developed in the early cases is no different today.¹¹ Evidence of “active steps . . . taken to encourage direct infringement,” *Oak Industries, Inc. v. Zenith Electronics Corp.*, 697 F. Supp. 988, 992 (ND Ill. 1988), such as advertising an infringing use or instructing how to engage in an infringing use, show an affirmative intent that the product be used to infringe, and a showing that infringement was encouraged overcomes the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use, see, e.g., *Water Technologies Corp. v. Calco, Ltd.*, 850 F. 2d 660, 668 (CA Fed. 1988) (liability for inducement where one “actively and knowingly aid[s] and abet[s] another’s direct infringement” (emphasis omitted)); *Fromberg, Inc. v. Thornhill*, 315 F. 2d 407, 412–413 (CA5

¹¹Inducement has been codified in patent law. *Ibid.*

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1963) (demonstrations by sales staff of infringing uses supported liability for inducement); *Haworth Inc. v. Herman Miller Inc.*, 37 USPQ 2d 1080, 1090 (WD Mich. 1994) (evidence that defendant “demonstrate[d] and recommend[ed] infringing configurations” of its product could support inducement liability); *Sims v. Mack Trucks, Inc.*, 459 F. Supp. 1198, 1215 (ED Pa. 1978) (finding inducement where the use “depicted by the defendant in its promotional film and brochures infringes the . . . patent”), overruled on other grounds, 608 F. 2d 87 (CA3 1979). Cf. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 37 (5th ed. 1984) (“There is a definite tendency to impose greater responsibility upon a defendant whose conduct was intended to do harm, or was morally wrong”).

For the same reasons that *Sony* took the staple-article doctrine of patent law as a model for its copyright safe-harbor rule, the inducement rule, too, is a sensible one for copyright. We adopt it here, holding that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties. We are, of course, mindful of the need to keep from trenching on regular commerce or discouraging the development of technologies with lawful and unlawful potential. Accordingly, just as *Sony* did not find intentional inducement despite the knowledge of the VCR manufacturer that its device could be used to infringe, 464 U. S., at 439, n. 19, mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability. Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to

compromise legitimate commerce or discourage innovation having a lawful promise.

III

A

The only apparent question about treating MGM's evidence as sufficient to withstand summary judgment under the theory of inducement goes to the need on MGM's part to adduce evidence that StreamCast and Grokster communicated an inducing message to their software users. The classic instance of inducement is by advertisement or solicitation that broadcasts a message designed to stimulate others to commit violations. MGM claims that such a message is shown here. It is undisputed that StreamCast beamed onto the computer screens of users of Napster-compatible programs ads urging the adoption of its OpenNap program, which was designed, as its name implied, to invite the custom of patrons of Napster, then under attack in the courts for facilitating massive infringement. Those who accepted StreamCast's OpenNap program were offered software to perform the same services, which a factfinder could conclude would readily have been understood in the Napster market as the ability to download copyrighted music files. Grokster distributed an electronic newsletter containing links to articles promoting its software's ability to access popular copyrighted music. And anyone whose Napster or free file-sharing searches turned up a link to Grokster would have understood Grokster to be offering the same file-sharing ability as Napster, and to the same people who probably used Napster for infringing downloads; that would also have been the understanding of anyone offered Grokster's suggestively named Swaptor software, its version of OpenNap. And both companies communicated a clear message by responding affirmatively to requests for help in locating and playing copyrighted materials.

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In StreamCast's case, of course, the evidence just described was supplemented by other unequivocal indications of unlawful purpose in the internal communications and advertising designs aimed at Napster users ("When the lights went off at Napster . . . where did the users go?" App. 836 (ellipsis in original)). Whether the messages were communicated is not to the point on this record. The function of the message in the theory of inducement is to prove by a defendant's own statements that his unlawful purpose disqualifies him from claiming protection (and incidentally to point to actual violators likely to be found among those who hear or read the message). See *supra*, at 17–19. Proving that a message was sent out, then, is the preeminent but not exclusive way of showing that active steps were taken with the purpose of bringing about infringing acts, and of showing that infringing acts took place by using the device distributed. Here, the summary judgment record is replete with other evidence that Grokster and StreamCast, unlike the manufacturer and distributor in *Sony*, acted with a purpose to cause copyright violations by use of software suitable for illegal use. See *supra*, at 6–9.

Three features of this evidence of intent are particularly notable. First, each company showed itself to be aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users. StreamCast's internal documents made constant reference to Napster, it initially distributed its Morpheus software through an OpenNap program compatible with Napster, it advertised its OpenNap program to Napster users, and its Morpheus software functions as Napster did except that it could be used to distribute more kinds of files, including copyrighted movies and software programs. Grokster's name is apparently derived from Napster, it too initially offered an OpenNap program, its software's function is likewise comparable to Napster's, and it attempted to

divert queries for Napster onto its own Web site. Grokster and StreamCast's efforts to supply services to former Napster users, deprived of a mechanism to copy and distribute what were overwhelmingly infringing files, indicate a principal, if not exclusive, intent on the part of each to bring about infringement.

Second, this evidence of unlawful objective is given added significance by MGM's showing that neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software. While the Ninth Circuit treated the defendants' failure to develop such tools as irrelevant because they lacked an independent duty to monitor their users' activity, we think this evidence underscores Grokster's and StreamCast's intentional facilitation of their users' infringement.¹²

Third, there is a further complement to the direct evidence of unlawful objective. It is useful to recall that StreamCast and Grokster make money by selling advertising space, by directing ads to the screens of computers employing their software. As the record shows, the more the software is used, the more ads are sent out and the greater the advertising revenue becomes. Since the extent of the software's use determines the gain to the distributors, the commercial sense of their enterprise turns on high-volume use, which the record shows is infringing.¹³

¹²Of course, in the absence of other evidence of intent, a court would be unable to find contributory infringement liability merely based on a failure to take affirmative steps to prevent infringement, if the device otherwise was capable of substantial noninfringing uses. Such a holding would tread too close to the *Sony* safe harbor.

¹³Grokster and StreamCast contend that any theory of liability based on their conduct is not properly before this Court because the rulings in the trial and appellate courts dealt only with the present versions of their software, not "past acts . . . that allegedly encouraged infringement or assisted . . . known acts of infringement." Brief for Respondents 14; see also *id.*, at 34. This contention misapprehends the basis

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This evidence alone would not justify an inference of unlawful intent, but viewed in the context of the entire record its import is clear.

The unlawful objective is unmistakable.

B

In addition to intent to bring about infringement and distribution of a device suitable for infringing use, the inducement theory of course requires evidence of actual infringement by recipients of the device, the software in this case. As the account of the facts indicates, there is evidence of infringement on a gigantic scale, and there is no serious issue of the adequacy of MGM's showing on this point in order to survive the companies' summary judgment requests. Although an exact calculation of infringing use, as a basis for a claim of damages, is subject to dispute, there is no question that the summary judgment evidence is at least adequate to entitle MGM to go forward with claims for damages and equitable relief.

* * *

In sum, this case is significantly different from *Sony* and reliance on that case to rule in favor of StreamCast and Grokster was error. *Sony* dealt with a claim of liability based solely on distributing a product with alternative lawful and unlawful uses, with knowledge that some users would follow the unlawful course. The case struck a bal-

for their potential liability. It is not only that encouraging a particular consumer to infringe a copyright can give rise to secondary liability for the infringement that results. Inducement liability goes beyond that, and the distribution of a product can itself give rise to liability where evidence shows that the distributor intended and encouraged the product to be used to infringe. In such a case, the culpable act is not merely the encouragement of infringement but also the distribution of the tool intended for infringing use. See *Kalem Co. v. Harper Brothers*, 222 U. S. 55, 62–63 (1911); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F. 2d 829, 846 (CA11 1990); *A & M Records, Inc. v. Abdallah*, 948 F. Supp. 1449, 1456 (CD Cal. 1996).

ance between the interests of protection and innovation by holding that the product's capability of substantial lawful employment should bar the imputation of fault and consequent secondary liability for the unlawful acts of others.

MGM's evidence in this case most obviously addresses a different basis of liability for distributing a product open to alternative uses. Here, evidence of the distributors' words and deeds going beyond distribution as such shows a purpose to cause and profit from third-party acts of copyright infringement. If liability for inducing infringement is ultimately found, it will not be on the basis of presuming or imputing fault, but from inferring a patently illegal objective from statements and actions showing what that objective was.

There is substantial evidence in MGM's favor on all elements of inducement, and summary judgment in favor of Grokster and StreamCast was error. On remand, reconsideration of MGM's motion for summary judgment will be in order.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

GINSBURG, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 04–480

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,
PETITIONERS *v.* GROKSTER, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 27, 2005]

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE and
JUSTICE KENNEDY join, concurring.

I concur in the Court’s decision, which vacates in full the judgment of the Court of Appeals for the Ninth Circuit, *ante*, at 24, and write separately to clarify why I conclude that the Court of Appeals misperceived, and hence misapplied, our holding in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984). There is here at least a “genuine issue as to [a] material fact,” Fed. Rule Civ. Proc. 56(c), on the liability of Grokster or StreamCast, not only for actively inducing copyright infringement, but also or alternatively, based on the distribution of their software products, for contributory copyright infringement. On neither score was summary judgment for Grokster and StreamCast warranted.

At bottom, however labeled, the question in this case is whether Grokster and StreamCast are liable for the direct infringing acts of others. Liability under our jurisprudence may be predicated on actively encouraging (or inducing) infringement through specific acts (as the Court’s opinion develops) or on distributing a product distributees use to infringe copyrights, if the product is not capable of “substantial” or “commercially significant” noninfringing uses. *Sony*, 464 U. S., at 442; see also 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §12.04[A][2] (2005). While

the two categories overlap, they capture different culpable behavior. Long coexisting, both are now codified in patent law. Compare 35 U.S.C. §271(b) (active inducement liability), with §271(c) (contributory liability for distribution of a product not “suitable for substantial noninfringing use”).

In *Sony*, 464 U.S. 417, the Court considered Sony’s liability for selling the Betamax video cassette recorder. It did so enlightened by a full trial record. Drawing an analogy to the staple article of commerce doctrine from patent law, the *Sony* Court observed that the “sale of an article . . . adapted to [a patent] infringing use” does not suffice “to make the seller a contributory infringer” if the article “is also adapted to other and lawful uses.” *Id.*, at 441 (quoting *Henry v. A. B. Dick Co.*, 224 U.S. 1, 48 (1912), overruled on other grounds, *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517 (1917)).

“The staple article of commerce doctrine” applied to copyright, the Court stated, “must strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” *Sony*, 464 U.S., at 442. “Accordingly,” the Court held, “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses.” *Ibid.* Thus, to resolve the *Sony* case, the Court explained, it had to determine “whether the Betamax is capable of commercially significant noninfringing uses.” *Ibid.*

To answer that question, the Court considered whether “a significant number of [potential uses of the Betamax were] noninfringing.” *Ibid.* The Court homed in on one potential use—private, noncommercial time-shifting of

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television programs in the home (*i.e.*, recording a broadcast TV program for later personal viewing). Time-shifting was noninfringing, the Court concluded, because in some cases trial testimony showed it was authorized by the copyright holder, *id.*, at 443–447, and in others it qualified as legitimate fair use, *id.*, at 447–455. Most purchasers used the Betamax principally to engage in time-shifting, *id.*, at 421, 423, a use that “plainly satisfy[d]” the Court’s standard, *id.*, at 442. Thus, there was no need in *Sony* to “give precise content to the question of how much [actual or potential] use is commercially significant.” *Ibid.*¹ Further development was left for later days

¹JUSTICE BREYER finds in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984), a “clear” rule permitting contributory liability for copyright infringement based on distribution of a product only when the product “will be used *almost exclusively* to infringe copyrights.” *Post*, at 9–10. But cf. *Sony*, 464 U. S., at 442 (recognizing “copyright holder’s legitimate demand for effective—not merely symbolic—protection”). *Sony*, as I read it, contains no clear, near-exclusivity test. Nor have Courts of Appeals unanimously recognized JUSTICE BREYER’s clear rule. Compare *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004, 1021 (CA9 2001) (“[E]vidence of actual knowledge of specific acts of infringement is required to hold a computer system operator liable for contributory copyright infringement.”), with *In re Aimster Copyright Litigation*, 334 F. 3d 643, 649–650 (CA7 2003) (“[W]hen a supplier is offering a product or service that has noninfringing as well as infringing uses, some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement. . . . But the balancing of costs and benefits is necessary only in a case in which substantial noninfringing uses, present or prospective, are demonstrated.”). See also *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F. 3d 693, 707 (CA2 1998) (“The Supreme Court applied [the *Sony*] test to prevent copyright holders from leveraging the copyrights in their original work to control distribution of . . . products that might be used incidentally for infringement, but that had substantial noninfringing uses. . . . The same rationale applies here [to products] that have substantial, predominant and noninfringing uses as tools for research and citation.”). All Members of the Court agree, moreover, that “the Court of Appeals misapplied *Sony*,” at least to the extent it read that decision to limit “secondary liability” to a hardly-ever cate-

and cases.

The Ninth Circuit went astray, I will endeavor to explain, when that court granted summary judgment to Grokster and StreamCast on the charge of contributory liability based on distribution of their software products. Relying on its earlier opinion in *A&M Records, Inc. v. Napster, Inc.*, 239 F. 3d 1004 (CA9 2001), the Court of Appeals held that “if substantial noninfringing use was shown, the copyright owner would be required to show that the defendant had reasonable knowledge of specific infringing files.” 380 F. 3d 1154, 1161 (CA9 2004). “A careful examination of the record,” the court concluded, “indicates that there is no genuine issue of material fact as to noninfringing use.” *Ibid.* The appeals court pointed to the band Wilco, which made one of its albums available for free downloading, to other recording artists who may have authorized free distribution of their music through the Internet, and to public domain literary works and films available through Grokster’s and StreamCast’s software. *Ibid.* Although it acknowledged MGM’s assertion that “the vast majority of the software use is for copyright infringement,” the court concluded that Grokster’s and StreamCast’s proffered evidence met *Sony*’s requirement that “a product need only be *capable* of substantial noninfringing uses.” 380 F. 3d, at 1162.²

This case differs markedly from *Sony*. Cf. Peters, Brace Memorial Lecture: Copyright Enters the Public Domain, 51 J. Copyright Soc. 701, 724 (2004) (“The *Grokster* panel’s reading of *Sony* is the broadest that any court has given it

gory, “quite beyond the circumstances to which the case applied.” *Ante*, at 16.

²Grokster and StreamCast, in the Court of Appeals’ view, would be entitled to summary judgment unless MGM could show that that the software companies had knowledge of specific acts of infringement and failed to act on that knowledge—a standard the court held MGM could not meet. 380 F. 3d, at 1162–1163.

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...”). Here, there has been no finding of any fair use and little beyond anecdotal evidence of noninfringing uses. In finding the Grokster and StreamCast software products capable of substantial noninfringing uses, the District Court and the Court of Appeals appear to have relied largely on declarations submitted by the defendants. These declarations include assertions (some of them hearsay) that a number of copyright owners authorize distribution of their works on the Internet and that some public domain material is available through peer-to-peer networks including those accessed through Grokster’s and StreamCast’s software. 380 F. 3d, at 1161; 259 F. Supp. 2d 1029, 1035–1036 (CD Cal. 2003); App. 125–171.

The District Court declared it “undisputed that there are substantial noninfringing uses for Defendants’ software,” thus obviating the need for further proceedings. 259 F. Supp. 2d, at 1035. This conclusion appears to rest almost entirely on the collection of declarations submitted by Grokster and StreamCast. *Ibid.* Review of these declarations reveals mostly anecdotal evidence, sometimes obtained second-hand, of authorized copyrighted works or public domain works available online and shared through peer-to-peer networks, and general statements about the benefits of peer-to-peer technology. See, e.g., Decl. of Janis Ian ¶13, App. 128 (“P2P technologies offer musicians an alternative channel for promotion and distribution.”); Decl. of Gregory Newby ¶12, *id.*, at 136 (“Numerous authorized and public domain Project Gutenberg eBooks are made available on Morpheus, Kazaa, Gnutella, Grokster, and similar software products.”); Decl. of Aram Sinnreich ¶6, *id.*, at 151 (“file sharing seems to have a net positive impact on music sales”); Decl. of John Buser ¶8, *id.*, at 166 (“I estimate that Acoustica generates sales of between \$1,000 and \$10,000 per month as a result of the distribution of its trialware software through the Gnutella and FastTrack Networks.”); Decl. of Patricia D. Hoekman ¶¶3–

4, *id.*, at 169–170 (search on Morpheus for “President Bush speeches” found several video recordings, searches for “Declaration of Independence” and “Bible” found various documents and declarant was able to download a copy of the Declaration); Decl. of Sean L. Mayers ¶11, *id.*, at 67 (“Existing open, decentralized peer-to-peer file-sharing networks . . . offer content owners distinct business advantages over alternate online distribution technologies.”). Compare Decl. of Brewster Kahle ¶20, *id.*, at 142 (“Those who download the Prelinger films . . . are entitled to redistribute those files, and the Archive welcomes their redistribution by the Morpheus-Grokster-KaZaa community of users.”), with Deposition of Brewster Kahle, *id.*, at 396–403 (Sept. 18, 2002) (testifying that he has no knowledge of any person downloading a Prelinger film using Morpheus, Grokster, or KaZaA). Compare also Decl. of Richard Prelinger ¶17, *id.*, at 147 (“[W]e welcome further redistribution of the Prelinger films . . . by individuals using peer-to-peer software products like Morpheus, KaZaA and Grokster.”), with Deposition of Richard Prelinger, *id.*, at 410–411 (Oct. 1, 2002) (“Q. What is your understanding of Grokster? A. I have no understanding of Grokster. . . . Q. Do you know whether any user of the Grokster software has made available to share any Prelinger film? A. No.”). See also Deposition of Aram Sinnreich, *id.*, at 390 (Sept. 25, 2002) (testimony about the band Wilco based on “[t]he press and industry news groups and scuttlebutt.”). These declarations do not support summary judgment in the face of evidence, proffered by MGM, of overwhelming use of Grokster’s and StreamCast’s software for infringement.³

³JUSTICE BREYER finds support for summary judgment in this motley collection of declarations and in a survey conducted by an expert retained by MGM. *Post*, at 4–8. That survey identified 75% of the files available through Grokster as copyrighted works owned or controlled by the plaintiffs, and 15% of the files as works likely copyrighted. App.

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Even if the absolute number of noninfringing files copied using the Grokster and StreamCast software is large, it does not follow that the products are therefore put to substantial noninfringing uses and are thus immune from liability. The number of noninfringing copies may be reflective of, and dwarfed by, the huge total volume of files shared. Further, the District Court and the Court of Appeals did not sharply distinguish between uses of Grokster's and StreamCast's software products (which this case is about) and uses of peer-to-peer technology generally (which this case is not about).

In sum, when the record in this case was developed, there was evidence that Grokster's and StreamCast's products were, and had been for some time, overwhelmingly used to infringe, *ante*, at 4–6; App. 434–439, 476–481, and that this infringement was the overwhelming source of revenue from the products, *ante*, at 8–9; 259 F. Supp. 2d, at 1043–1044. Fairly appraised, the evidence was insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over

439. As to the remaining 10% of the files, “there was not enough information to form reasonable conclusions either as to what those files even consisted of, and/or whether they were infringing or non-infringing.” App. 479. Even assuming, as JUSTICE BREYER does, that the *Sony* Court would have absolved Sony of contributory liability solely on the basis of the use of the Betamax for authorized time-shifting, *post*, at 3–4, summary judgment is not inevitably appropriate here. *Sony* stressed that the plaintiffs there owned “well below 10%” of copyrighted television programming, 464 U. S., at 443, and found, based on trial testimony from representatives of the four major sports leagues and other individuals authorized to consent to home-recording of their copyrighted broadcasts, that a similar percentage of program copying was authorized, *id.*, at 424. Here, the plaintiffs allegedly control copyrights for 70% or 75% of the material exchanged through the Grokster and StreamCast software, 380 F. 3d, at 1158; App. 439, and the District Court does not appear to have relied on comparable testimony about authorized copying from copyright holders.

time. On this record, the District Court should not have ruled dispositively on the contributory infringement charge by granting summary judgment to Grokster and StreamCast.⁴

If, on remand, the case is not resolved on summary judgment in favor of MGM based on Grokster and StreamCast actively inducing infringement, the Court of Appeals, I would emphasize, should reconsider, on a fuller record, its interpretation of *Sony's* product distribution holding.

⁴The District Court's conclusion that "[p]laintiffs do not dispute that Defendants' software is being used, and could be used, for substantial noninfringing purposes," 259 F. Supp. 2d 1029, 1036 (CD Cal. 2003); accord 380 F. 3d, at 1161, is, to say the least, dubious. In the courts below and in this Court, MGM has continuously disputed any such conclusion. Brief for Motion Picture Studio and Recording Company Petitioners 30–38; Brief for MGM Plaintiffs-Appellants in No. 03–55894, etc. (CA9), p. 41; App. 356–357, 361–365.

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SUPREME COURT OF THE UNITED STATES

No. 04–480

METRO-GOLDWYN-MAYER STUDIOS INC., ET AL.,
PETITIONERS *v.* GROKSTER, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[June 27, 2005]

JUSTICE BREYER, with whom JUSTICE STEVENS and
JUSTICE O’CONNOR join, concurring.

I agree with the Court that the distributor of a dual-use technology may be liable for the infringing activities of third parties where he or she actively seeks to advance the infringement. *Ante*, at 1. I further agree that, in light of our holding today, we need not now “revisit” *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417 (1984). *Ante*, at 17. Other Members of the Court, however, take up the *Sony* question: whether Grokster’s product is “capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.” *Ante*, at 1 (GINSBURG, J., concurring) (quoting *Sony, supra*, at 442). And they answer that question by stating that the Court of Appeals was wrong when it granted summary judgment on the issue in Grokster’s favor. *Ante*, at 4. I write to explain why I disagree with them on this matter.

I

The Court’s opinion in *Sony* and the record evidence (as described and analyzed in the many briefs before us) together convince me that the Court of Appeals’ conclusion has adequate legal support.

A

I begin with *Sony*’s standard. In *Sony*, the Court con-

sidered the potential copyright liability of a company that did not itself illegally copy protected material, but rather sold a machine—a Video Cassette Recorder (VCR)—that could be used to do so. A buyer could use that machine for *noninfringing* purposes, such as recording for later viewing (sometimes called “time-shifting,” *Sony*, 464 U. S., at 421) uncopyrighted television programs or copyrighted programs with a copyright holder’s permission. The buyer could use the machine for infringing purposes as well, such as building libraries of taped copyrighted programs. Or, the buyer might use the machine to record copyrighted programs under circumstances in which the legal status of the act of recording was uncertain (*i.e.*, where the copying may, or may not, have constituted a “fair use,” *id.*, at 425–426). Sony knew many customers would use its VCRs to engage in unauthorized copying and “library-building.” *Id.*, at 458–459 (Blackmun, J., dissenting). But that fact, said the Court, was insufficient to make Sony itself an infringer. And the Court ultimately held that Sony was not liable for its customers’ acts of infringement.

In reaching this conclusion, the Court recognized the need for the law, in fixing *secondary* copyright liability, to “strike a balance between a copyright holder’s legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” *Id.*, at 442. It pointed to patent law’s “staple article of commerce” doctrine, *ibid.*, under which a distributor of a product is not liable for patent infringement by its customers unless that product is “unsuited for any commercial noninfringing use.” *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U. S. 176, 198 (1980). The Court wrote that the sale of copying equipment, “like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. *Indeed, it need merely be capa-*

BREYER, J., concurring

ble of substantial noninfringing uses.” *Sony*, 464 U. S., at 442 (emphasis added). The Court ultimately characterized the legal “question” in the particular case as “whether [Sony’s VCR] is *capable of commercially significant noninfringing uses*” (while declining to give “precise content” to these terms). *Ibid.* (emphasis added).

It then applied this standard. The Court had before it a survey (commissioned by the District Court and then prepared by the respondents) showing that roughly 9% of all VCR recordings were of the type—namely, religious, educational, and sports programming—owned by producers and distributors testifying on Sony’s behalf who did not object to time-shifting. See Brief for Respondent Universal Studios et al. O. T. 1983, No. 81–1687, pp. 52–53; see also *Sony*, *supra*, at 424 (7.3% of all Sony VCR use is to record sports programs; representatives of the sports leagues do not object). A much higher percentage of VCR *users* had at one point taped an authorized program, in addition to taping unauthorized programs. And the plaintiffs—not a large class of content providers as in this case—owned only a small percentage of the total available *unauthorized* programming. See *ante*, at 6–7, and n. 3 (GINSBURG, J., concurring). But of all the taping actually done by Sony’s customers, only around 9% was of the sort the Court referred to as authorized.

The Court found that the magnitude of authorized programming was “significant,” and it also noted the “significant potential for future authorized copying.” 464 U. S., at 444. The Court supported this conclusion by referencing the trial testimony of professional sports league officials and a religious broadcasting representative. *Id.*, at 444, and n. 24. It also discussed (1) a Los Angeles educational station affiliated with the Public Broadcasting Service that made many of its programs available for home taping, and (2) Mr. Rogers’ Neighborhood, a widely watched children’s program. *Id.*, at 445.

On the basis of this testimony and other similar evidence, the Court determined that producers of this kind had authorized duplication of their copyrighted programs “in significant enough numbers to create a *substantial* market for a noninfringing use of the” VCR. *Id.*, at 447, n. 28 (emphasis added).

The Court, in using the key word “substantial,” indicated that these circumstances alone constituted a sufficient basis for rejecting the imposition of secondary liability. See *id.*, at 456 (“Sony demonstrated a significant likelihood that *substantial* numbers of copyright holders” would not object to time-shifting (emphasis added)). Nonetheless, the Court buttressed its conclusion by finding separately that, in any event, *unauthorized* time-shifting often constituted not infringement, but “fair use.” *Id.*, at 447–456.

B

When measured against *Sony*’s underlying evidence and analysis, the evidence now before us shows that Grokster passes *Sony*’s test—that is, whether the company’s product is capable of substantial or commercially significant noninfringing uses. *Id.*, at 442. For one thing, petitioners’ (hereinafter MGM) own expert declared that 75% of current files available on Grokster are infringing and 15% are “likely infringing.” See App. 436–439, ¶¶6–17 (Decl. of Dr. Ingram Olkin); cf. *ante*, at 4 (opinion of the Court). That leaves some number of files near 10% that apparently are noninfringing, a figure very similar to the 9% or so of authorized time-shifting uses of the VCR that the Court faced in *Sony*.

As in *Sony*, witnesses here explained the nature of the noninfringing files on Grokster’s network without detailed quantification. Those files include:

—Authorized copies of music by artists such as Wilco,

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Janis Ian, Pearl Jam, Dave Matthews, John Mayer, and others. See App. at 152–153, ¶¶9–13 (Decl. of Aram Sinnreich) (Wilco’s “lesson has already been adopted by artists still signed to their major labels”); *id.*, at 170, ¶¶5–7 (Decl. of Patricia D. Hoekman) (locating “numerous audio recordings” that were authorized for swapping); *id.*, at 74, ¶10 (Decl. of Daniel B. Rung) (describing Grokster’s partnership with a company that hosts music from thousands of independent artists)

—Free electronic books and other works from various online publishers, including Project Gutenberg. See *id.*, at 136, ¶12 (Decl. of Gregory B. Newby) (“Numerous authorized and public domain Project Gutenberg eBooks are made available” on Grokster. Project Gutenberg “welcomes this widespread sharing . . . using these software products[,] since they assist us in meeting our objectives”); *id.*, at 159–160, ¶32 (Decl. of Sinnreich)

—Public domain and authorized software, such as WinZip 8.1. *Id.*, at 170, ¶8 (Decl. of Hoekman); *id.*, at 165, ¶¶4–7 (Decl. of John Busher)

—Licensed music videos and television and movie segments distributed via digital video packaging with the permission of the copyright holder. *Id.*, at 70, ¶24 (Decl. of Sean L. Mayers)

The nature of these and other lawfully swapped files is such that it is reasonable to infer quantities of current lawful use roughly approximate to those at issue in *Sony*. At least, MGM has offered no evidence sufficient to survive summary judgment that could plausibly demonstrate a significant quantitative difference. See *ante*, at 4 (opinion of the Court); see also Brief for Motion Picture Studio and Recording Company Petitioners i (referring to “at

least 90% of the total use of the services”); but see *ante*, at 6–7, n. 3 (GINSBURG, J., concurring). To be sure, in quantitative terms these uses account for only a small percentage of the total number of uses of Grokster’s product. But the same was true in *Sony*, which characterized the relatively limited authorized copying market as “substantial.” (The Court made clear as well in *Sony* that the amount of material then presently available for lawful copying—if not actually copied—was significant, see 464 U. S., at 444, and the same is certainly true in this case.)

Importantly, *Sony* also used the word “capable,” asking whether the product is “capable of” substantial noninfringing uses. Its language and analysis suggest that a figure like 10%, if fixed for all time, might well prove insufficient, but that such a figure serves as an adequate foundation where there is a reasonable prospect of expanded legitimate uses over time. See *ibid.* (noting a “significant potential for future authorized copying”). And its language also indicates the appropriateness of looking to potential future uses of the product to determine its “capability.”

Here the record reveals a significant future market for noninfringing uses of Grokster-type peer-to-peer software. Such software permits the exchange of *any* sort of digital file—whether that file does, or does not, contain copyrighted material. As more and more uncopyrighted information is stored in swappable form, it seems a likely inference that lawful peer-to-peer sharing will become increasingly prevalent. See, e.g., App. 142, ¶20 (Decl. of Brewster Kahle) (“The [Internet Archive] welcomes [the] redistribution [of authorized films] by the Morpheus-Grokster-KaZaa community of users”); *id.*, at 166, ¶8 (Decl. of Busher) (sales figures of \$1,000 to \$10,000 per month through peer-to-peer networks “will increase in the future as Acoustica’s trialware is more widely distributed through these networks”); *id.*, at 156–164, ¶¶21–40 (Decl. of Sinnreich).

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And that is just what is happening. Such legitimate noninfringing uses are coming to include the swapping of: *research information* (the initial purpose of many peer-to-peer networks); *public domain films* (e.g., those owned by the Prelinger Archive); *historical recordings and digital educational materials* (e.g., those stored on the Internet Archive); *digital photos* (OurPictures, for example, is starting a P2P photo-swapping service); “*shareware*” and “*freeware*” (e.g., Linux and certain Windows software); *secure licensed music and movie files* (Intent MediaWorks, for example, protects licensed content sent across P2P networks); *news broadcasts past and present* (the BBC Creative Archive lets users “rip, mix and share the BBC”); *user-created audio and video files* (including “podcasts” that may be distributed through P2P software); and *all manner of free “open content” works collected by Creative Commons* (one can search for Creative Commons material on StreamCast). See Brief for Distributed Computing Industry Association as *Amicus Curiae* 15–26; Merges, A New Dynamism in the Public Domain, 71 U. Chi. L. Rev. 183 (2004). I can find nothing in the record that suggests that this course of events will *not* continue to flow naturally as a consequence of the character of the software taken together with the foreseeable development of the Internet and of information technology. Cf. *ante*, at 1–2 (opinion of the Court) (discussing the significant benefits of peer-to-peer technology).

There may be other now-unforeseen noninfringing uses that develop for peer-to-peer software, just as the home-video rental industry (unmentioned in *Sony*) developed for the VCR. But the foreseeable development of such uses, when taken together with an estimated 10% noninfringing material, is sufficient to meet *Sony*’s standard. And while *Sony* considered the record following a trial, there are no facts asserted by MGM in its summary judgment filings that lead me to believe the outcome after a trial here could

be any different. The lower courts reached the same conclusion.

Of course, Grokster itself may not want to develop these other noninfringing uses. But *Sony's* standard seeks to protect not the Groksters of this world (which in any event may well be liable under today's holding), but the development of technology more generally. And Grokster's desires in this respect are beside the point.

II

The real question here, I believe, is not whether the record evidence satisfies *Sony*. As I have interpreted the standard set forth in that case, it does. And of the Courts of Appeals that have considered the matter, only one has proposed interpreting *Sony* more strictly than I would do—in a case where the product might have failed under *any* standard. *In re Aimster Copyright Litigation*, 334 F. 3d 643, 653 (CA7 2003) (defendant “failed to show that its service is *ever* used for any purpose other than to infringe” copyrights (emphasis added)); see *Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F. 3d 693, 706–707 (CA2 1998) (court did not *require* that noninfringing uses be “predominant,” it merely found that they *were* predominant, and therefore provided no analysis of *Sony's* boundaries); but see *ante*, at 3 n. 1 (GINSBURG, J., concurring); see also *A&M Records v. Napster, Inc.*, 239 F. 3d 1004, 1020 (CA9 2001) (discussing *Sony*); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F. 2d 829, 842–847 (CA11 1990) (same); *Vault Corp. v. Quaid Software, Ltd.*, 847 F. 2d 255, 262 (CA5 1988) (same); cf. *Dynacore Holdings Corp. v. U. S. Philips Corp.*, 363 F. 3d 1263, 1275 (CA Fed. 2004) (same); see also *Doe v. GTE Corp.*, 347 F. 3d 655, 661 (CA7 2003) (“A person may be liable as a contributory infringer if the product or service it sells has no (or only slight) legal use”).

Instead, the real question is whether we should modify

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the *Sony* standard, as MGM requests, or interpret *Sony* more strictly, as I believe JUSTICE GINSBURG's approach would do in practice. Compare *ante*, at 4–8 (concurring) (insufficient evidence in this case of both present lawful uses and of a reasonable prospect that substantial noninfringing uses would develop over time), with *Sony*, 464 U. S., at 442–447 (basing conclusion as to the likely existence of a substantial market for authorized copying upon general declarations, some survey data, and common sense).

As I have said, *Sony* itself sought to “strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce.” *Id.*, at 442. Thus, to determine whether modification, or a strict interpretation, of *Sony* is needed, I would ask whether MGM has shown that *Sony* incorrectly balanced copyright and new-technology interests. In particular: (1) Has *Sony* (as I interpret it) worked to protect new technology? (2) If so, would modification or strict interpretation significantly weaken that protection? (3) If so, would new or necessary copyright-related benefits outweigh any such weakening?

A

The first question is the easiest to answer. *Sony*'s rule, as I interpret it, has provided entrepreneurs with needed assurance that they will be shielded from copyright liability as they bring valuable new technologies to market.

Sony's rule is clear. That clarity allows those who develop new products that are capable of substantial noninfringing uses to know, *ex ante*, that distribution of their product will not yield massive monetary liability. At the same time, it helps deter them from distributing products that have no other real function than—or that are specifically intended for—copyright infringement, deterrence

that the Court's holding today reinforces (by adding a weapon to the copyright holder's legal arsenal).

Sony's rule is strongly technology protecting. The rule deliberately makes it difficult for courts to find secondary liability where new technology is at issue. It establishes that the law will not impose copyright liability upon the distributors of dual-use technologies (who do not themselves engage in unauthorized copying) unless the product in question will be used *almost exclusively* to infringe copyrights (or unless they actively induce infringements as we today describe). *Sony* thereby recognizes that the copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently. Thus *Sony's* rule shelters VCRs, typewriters, tape recorders, photocopiers, computers, cassette players, compact disc burners, digital video recorders, MP3 players, Internet search engines, and peer-to-peer software. But *Sony's* rule does not shelter descramblers, even if one could *theoretically* use a descrambler in a noninfringing way. 464 U. S., at 441–442; Compare *Cable/Home Communication Corp.*, *supra*, at 837–850 (developer liable for advertising television signal descrambler), with *Vault Corp.*, *supra*, at 262 (primary use infringing but a substantial noninfringing use).

Sony's rule is forward looking. It does not confine its scope to a static snapshot of a product's current uses (thereby threatening technologies that have undeveloped future markets). Rather, as the VCR example makes clear, a product's market can evolve dramatically over time. And *Sony*—by referring to a *capacity* for substantial noninfringing uses—recognizes that fact. *Sony's* word “capable” refers to a plausible, not simply a theoretical, likelihood that such uses will come to pass, and that fact anchors *Sony* in practical reality. Cf. *Aimster*, *supra*, at 651.

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Sony's rule is mindful of the limitations facing judges where matters of technology are concerned. Judges have no specialized technical ability to answer questions about present or future technological feasibility or commercial viability where technology professionals, engineers, and venture capitalists themselves may radically disagree and where answers may differ depending upon whether one focuses upon the time of product development or the time of distribution. Consider, for example, the question whether devices can be added to Grokster's software that will filter out infringing files. MGM tells us this is easy enough to do, as do several *amici* that produce and sell the filtering technology. See, e.g., Brief for Motion Picture Studio Petitioners 11; Brief for Audible Magic Corp. et al. as *Amicus Curiae* 3–10. Grokster says it is not at all easy to do, and not an efficient solution in any event, and several apparently disinterested computer science professors agree. See Brief for Respondents 31; Brief for Computer Science Professors as *Amicus Curiae* 6–10, 14–18. Which account should a judge credit? *Sony* says that the judge will not necessarily have to decide.

Given the nature of the *Sony* rule, it is not surprising that in the last 20 years, there have been relatively few contributory infringement suits—based on a product distribution theory—brought against technology providers (a small handful of federal appellate court cases and perhaps fewer than two dozen District Court cases in the last 20 years). I have found nothing in the briefs or the record that shows that *Sony* has failed to achieve its innovation-protecting objective.

B

The second, more difficult, question is whether a modified *Sony* rule (or a strict interpretation) would significantly weaken the law's ability to protect new technology. JUSTICE GINSBURG's approach would require defendants

to produce considerably more concrete evidence—more than was presented here—to earn *Sony's* shelter. That heavier evidentiary demand, and especially the more dramatic (case-by-case balancing) modifications that MGM and the Government seek, would, I believe, undercut the protection that *Sony* now offers.

To require defendants to provide, for example, detailed evidence—say business plans, profitability estimates, projected technological modifications, and so forth—would doubtless make life easier for copyrightholder plaintiffs. But it would simultaneously increase the legal uncertainty that surrounds the creation or development of a new technology capable of being put to infringing uses. Inventors and entrepreneurs (in the garage, the dorm room, the corporate lab, or the boardroom) would have to fear (and in many cases endure) costly and extensive trials when they create, produce, or distribute the sort of information technology that can be used for copyright infringement. They would often be left guessing as to how a court, upon later review of the product and its uses, would decide when necessarily rough estimates amounted to sufficient evidence. They would have no way to predict how courts would weigh the respective values of infringing and noninfringing uses; determine the efficiency and advisability of technological changes; or assess a product's potential future markets. The price of a wrong guess—even if it involves a good-faith effort to assess technical and commercial viability—could be large statutory damages (not less than \$750 and up to \$30,000 *per infringed work*). 17 U. S. C. §504(c)(1). The additional risk and uncertainty would mean a consequent additional chill of technological development.

C

The third question—whether a positive copyright impact would outweigh any technology-related loss—I find the

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most difficult of the three. I do not doubt that a more intrusive *Sony* test would generally provide greater revenue security for copyright holders. But it is harder to conclude that the gains on the copyright swings would exceed the losses on the technology roundabouts.

For one thing, the law disfavors equating the two different kinds of gain and loss; rather, it leans in favor of protecting technology. As *Sony* itself makes clear, the producer of a technology which *permits* unlawful copying does not himself *engage* in unlawful copying—a fact that makes the attachment of copyright liability to the creation, production, or distribution of the technology an exceptional thing. See 464 U. S., at 431 (courts “must be circumspect” in construing the copyright laws to preclude distribution of new technologies). Moreover, *Sony* has been the law for some time. And that fact imposes a serious burden upon copyright holders like MGM to show a need for change in the current rules of the game, including a more strict interpretation of the test. See, e.g., Brief for Motion Picture Studio Petitioners 31 (*Sony* should not protect products when the “primary or principal” use is infringing).

In any event, the evidence now available does not, in my view, make out a sufficiently strong case for change. To say this is not to doubt the basic need to protect copyrighted material from infringement. The Constitution itself stresses the vital role that copyright plays in advancing the “useful Arts.” Art. I, §8, cl. 8. No one disputes that “reward to the author or artist serves to induce release to the public of the products of his creative genius.” *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 158 (1948). And deliberate unlawful copying is no less an unlawful taking of property than garden-variety theft. See, e.g., 18 U. S. C. §2319 (criminal copyright infringement); §1961(1)(B) (copyright infringement can be a predicate act under the Racketeer Influenced and Corrupt

Organizations Act); §1956(c)(7)(D) (money laundering includes the receipt of proceeds from copyright infringement). But these highly general principles cannot by themselves tell us how to balance the interests at issue in *Sony* or whether *Sony*'s standard needs modification. And at certain key points, information is lacking.

Will an unmodified *Sony* lead to a significant diminution in the amount or quality of creative work produced? Since copyright's basic objective is creation and its revenue objectives but a means to that end, this is the underlying copyright question. See *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151, 156 (1975) ("Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts"). And its answer is far from clear.

Unauthorized copying likely diminishes industry revenue, though it is not clear by how much. Compare S. Liebowitz, Will MP3 Downloads Annihilate the Record Industry? The Evidence So Far, p. 2 (June 2003), <http://www.utdallas.edu/~liebowit/intprop/records.pdf> (all Internet materials as visited June 24, 2005, and available in Clerk of Court's case file) (file sharing has caused a decline in music sales), and Press Release, Informa Media Group Report (citing Music on the Internet (5th ed. 2004)) (estimating total lost sales to the music industry in the range of \$2 billion annually), at <http://www.informatm.com>, with F. Oberholzer & K. Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis, p. 24 (Mar. 2004), www.unc.edu/~cigar/papers/FileSharing_March2004.pdf (academic study concluding that "file sharing has no statistically significant effect on purchases of the average album"), and McGuire, Study: File-Sharing No Threat to Music Sales (Mar. 29, 2004), <http://www.washingtonpost.com/ac2/wp-dyn/A34300-2004>

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Mar29?language=printer (discussing mixed evidence).

The extent to which related production has actually and resultingly declined remains uncertain, though there is good reason to believe that the decline, if any, is not substantial. See, *e.g.*, M. Madden, Pew Internet & American Life Project, Artists, Musicians, and the Internet, p. 21, http://www.pewinternet.org/pdfs/PIP_Artists.Musicians_Report.pdf (nearly 70% of musicians believe that file sharing is a minor threat or no threat at all to creative industries); Benkler, Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production, 114 Yale L. J. 273, 351–352 (2004) (“Much of the actual flow of revenue to artists—from performances and other sources—is stable even assuming a complete displacement of the CD market by peer-to-peer distribution [I]t would be silly to think that music, a cultural form without which no human society has existed, will cease to be in our world [because of illegal file swapping]”).

More importantly, copyright holders at least potentially have other tools available to reduce piracy and to abate whatever threat it poses to creative production. As today’s opinion makes clear, a copyright holder may proceed against a technology provider where a provable specific intent to infringe (of the kind the Court describes) is present. *Ante*, at 24 (opinion of the Court). Services like Grokster may well be liable under an inducement theory.

In addition, a copyright holder has always had the legal authority to bring a traditional infringement suit against one who wrongfully copies. Indeed, since September 2003, the Recording Industry Association of America (RIAA) has filed “thousands of suits against people for sharing copyrighted material.” Walker, New Movement Hits Universities: Get Legal Music, Washington Post, Mar. 17, 2005, p. E1. These suits have provided copyright holders with damages; have served as a teaching tool, making clear that much file sharing, if done without permission, is

unlawful; and apparently have had a real and significant deterrent effect. See, *e.g.*, L. Rainie, M. Madden, D. Hess, & G. Mudd, Pew Internet Project and comScore Media Metrix Data Memo: The state of music downloading and file-sharing online, pp. 2, 4, 6, 10 (Apr. 2004), www.pewinternet.org/pdfs/PIP_Filesharing_April_04.pdf (number of people downloading files fell from a peak of roughly 35 million to roughly 23 million in the year following the first suits; 38% of current downloaders report downloading fewer files because of the suits); M. Madden & L. Rainie, Pew Internet Project Data Memo: Music and video downloading moves beyond P2P, p. 7 (March 2005), www.pewinternet.org/pdfs/PIP_Filesharing_March05.pdf (number of downloaders has “inched up” but “continues to rest well below the peak level”); Groennings, Note, Costs and Benefits of the Recording Industry’s Litigation Against Individuals, 20 Berkeley Technology L. J. 571 (2005); but see Evangelista, Downloading Music and Movie Files is as Popular as Ever, San Francisco Chronicle, Mar. 28, 2005, p. E1 (referring to the continuing “tide of rampant copyright infringement,” while noting that the RIAA says it believes the “campaign of lawsuits and public education has at least contained the problem”).

Further, copyright holders may develop new technological devices that will help curb unlawful infringement. Some new technology, called “digital ‘watermarking’” and “digital fingerprint[ing],” can encode within the file information about the author and the copyright scope and date, which “fingerprints” can help to expose infringers. RIAA Reveals Method to Madness, Wired News, Aug. 28, 2003, <http://www.wired.com/news/digiwood/0,1412,60222,00.html>; Besek, Anti-Circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts, 27 Colum. J. L. & Arts 385, 391, 451 (2004). Other technology can, through encryption, potentially restrict users’ ability to make a digital copy. See J. Borland,

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Tripping the Rippers, *C/net News.com* (Sept. 28, 2001), http://news.com.com/Tripping+the+rippers/2009=1023_3=273619.html; but see Brief for Bridgemar Services Ltd. as *Amicus Curiae* 5–8 (arguing that peer-to-peer service providers can more easily block unlawful swapping).

At the same time, advances in technology have discouraged unlawful copying by making *lawful* copying (e.g., downloading music with the copyright holder's permission) cheaper and easier to achieve. Several services now sell music for less than \$1 per song. (Walmart.com, for example, charges \$0.88 each). Consequently, many consumers initially attracted to the convenience and flexibility of services like Grokster are now migrating to lawful paid services (services with copying permission) where they can enjoy at little cost even greater convenience and flexibility without engaging in unlawful swapping. See Wu, *When Code Isn't Law*, 89 Va. L. Rev. 679, 731–735 (2003) (noting the prevalence of technological problems on unpaid swapping sites); K. Dean, *P2P Tilts Toward Legitimacy*, *wired.com*, *Wired News* (Nov. 24, 2004), <http://www.wired.com/news/digiwood/0,1412,65836,00.html>; M. Madden & L. Rainie, *March 2005 Data Memo*, *supra*, at 6–7 (percentage of current downloaders who have used paid services rose from 24% to 43% in a year; number using free services fell from 58% to 41%).

Thus, lawful music downloading services—those that charge the customer for downloading music and pay royalties to the copyright holder—have continued to grow and to produce substantial revenue. See Brief for Internet Law Faculty as *Amici Curiae* 5–20; Bruno, *Digital Entertainment: Piracy Fight Shows Encouraging Signs* (Mar. 5, 2005), available at LEXIS, News Library, Billboard File (in 2004, consumers worldwide purchased more than 10 times the number of digital tracks purchased in 2003; global digital music market of \$330 million in 2004 ex-

pected to double in 2005); Press Release, Informa Media Report, *supra* (global digital revenues will likely exceed \$3 billion in 2010); Ashton, [International Federation of the Phonographic Industry] Predicts Downloads Will Hit the Mainstream, *Music Week*, Jan. 29, 2005, p. 6 (legal music sites and portable MP3 players “are helping transform the digital music market” into “an everyday consumer experience”). And more advanced types of *non*-music-oriented P2P networks have also started to develop, drawing in part on the lessons of Grokster.

Finally, as *Sony* recognized, the legislative option remains available. Courts are less well suited than Congress to the task of “accommodat[ing] fully the varied permutations of competing interests that are inevitably implicated by such new technology.” *Sony*, 464 U. S., at 431; see, e.g., Audio Home Recording Act of 1992, 106 Stat. 4237 (adding 17 U. S. C., ch. 10); Protecting Innovation and Art While Preventing Piracy: Hearing Before the Senate Comm. on the Judiciary, 108th Cong., 2d Sess. (July 22, 2004).

I do not know whether these developments and similar alternatives will prove sufficient, but I am reasonably certain that, given their existence, a strong demonstrated need for modifying *Sony* (or for interpreting *Sony*’s standard more strictly) has not yet been shown. That fact, along with the added risks that modification (or strict interpretation) would impose upon technological innovation, leads me to the conclusion that we should maintain *Sony*, reading its standard as I have read it. As so read, it requires affirmance of the Ninth Circuit’s determination of the relevant aspects of the *Sony* question.

* * *

For these reasons, I disagree with JUSTICE GINSBURG, but I agree with the Court and join its opinion.

No. 01-618

IN THE
Supreme Court of the United States

ERIC ELDRED, ET AL.,

Petitioners,

v.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL,

Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

**BRIEF OF JACK M. BALKIN, YOCHAI BENKLER,
BURT NEUBORNE, ROBERT POST, AND JED
RUBENFELD AS *AMICI CURIAE* IN SUPPORT OF
THE PETITIONERS**

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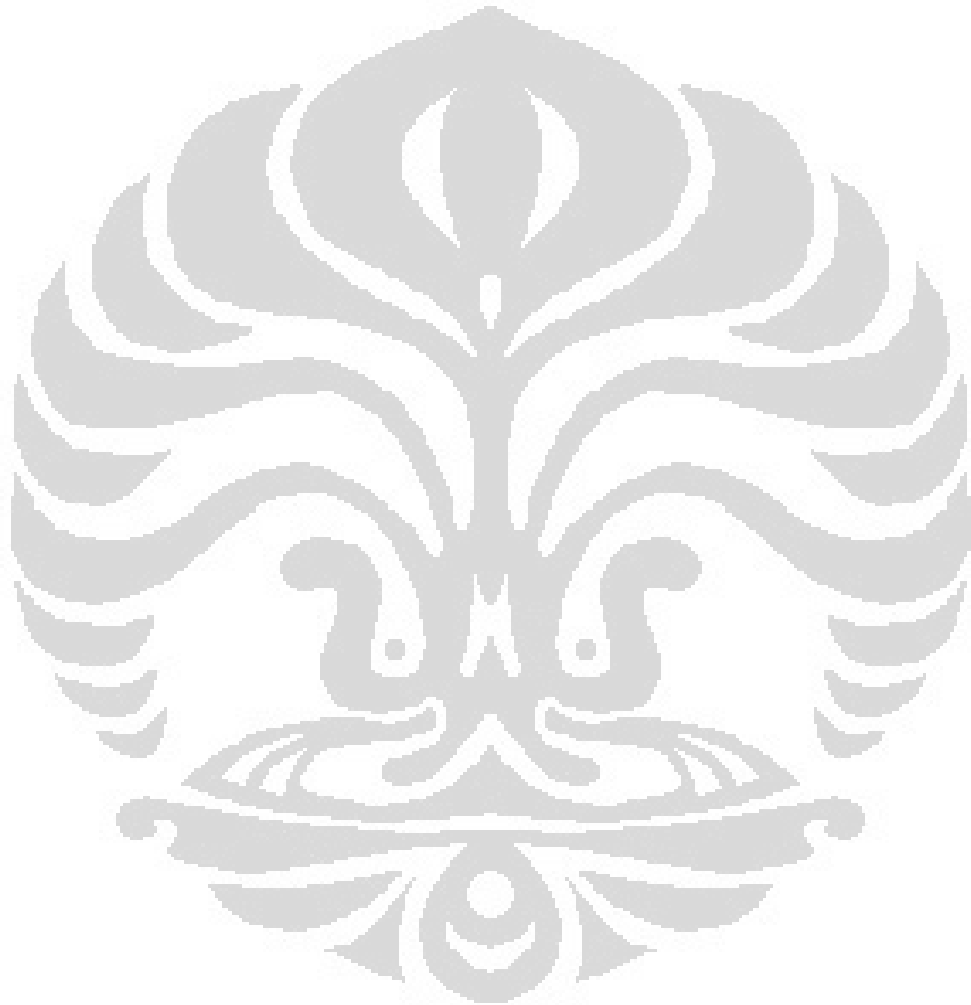


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STATEMENT OF INTEREST

With the written consent of the parties, reflected in letters on file with the Clerk, the undersigned submit this brief as *amici curiae*, pursuant to Rule 37 of the Rules of this Court.

Amici are teachers and students of constitutional law and the First Amendment who are concerned with its application to copyright. They are Jack M. Balkin, Knight Professor of Constitutional Law and the First Amendment, Yale Law School; Yochai Benkler, Professor of Law, New York University School of Law; Burt Neuborne, John Norton Pomeroy Professor of Law, New York University School of Law; Robert Post, Alexander F. and May T. Morrison Professor of Law, Boalt Hall School of Law at the University of California, Berkeley, and Jed Rubenfeld, Robert R. Slaughter Professor of Law, Yale Law School. *Amici* submit this brief *pro se*, representing no institution, group, or association.¹ Their sole purpose is to urge the Court to clarify that Congress's exercise of its power under Article I, Section 8, cl. 8 ("the Exclusive Rights Clause") is subject to the limits on congressional power imposed by the First Amendment.

Amici believe that copyright legislation, like all other congressional legislation, is subject to First Amendment review by the courts. While copyright legislation will ordinarily meet the requirements of the First Amendment because the policies underlying the Exclusive Rights Clause carry significant constitutional weight (especially when ameliorative doctrines such as the idea/expression dichotomy and the fair use doctrine ease

¹ Printing and filing costs were paid by the Information Law Institute at New York University School of Law.

the tension between copyright and the First Amendment), that fact cannot justify the creation of a new categorical exception that immunizes copyright legislation from all First Amendment review. Where, as here, Congress, responding to the arguments of powerful copyright owners, acts to expand copyright protection dramatically at the expense of speech in the otherwise unregulated public domain, Congress's handiwork must be subject to traditional First Amendment scrutiny.

SUMMARY OF ARGUMENT

The Court of Appeals for the District of Columbia appears to have taken the extraordinary step of categorically immunizing copyright legislation from First Amendment review. “[C]opyrights,” the appeals court held, “are categorically immune from challenges under the First Amendment.” *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001). “[W]e reject [plaintiffs’] first amendment objection to the CTEA *because the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others.*” *Id.* at 376. (emphasis added)

This is indefensible doctrine. Copyright law is not aimed at conduct that incidentally affects speech. It is explicitly designed to regulate the marketplace in expression. Its purpose is to suppress disfavored expression—deemed derivative or imitative—in order to enhance other expression—deemed original and creative. Although a judgment to protect originality at the expense of derivative expression may be justifiable, there is no doubt that such a judgment blocks the dissemination of much valuable speech. *See, e.g., Estate of Martin Luther King Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211 (1999) (preventing CBS from using in a documentary its own footage of the “I Have A Dream” speech, in deference to King’s copyright in

the speech). Thus, although a speaker's use of copyrighted expression may constitutionally be regulated by appropriate copyright legislation, a speaker's desire to publish such expression clearly raises cognizable First Amendment issues.

The Court of Appeals advanced its unorthodox doctrine in order to insulate the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 301-304), from First Amendment review. The court held that the constitutionality of copyright legislation, including a dramatic and retroactive extension of its temporal scope, was immune from judicial scrutiny under the First Amendment. This holding is unprecedented. It effectively creates a category of unprotected speech that is wholly defined by Congress free of judicial review.

The category of unprotected speech created by the Court of Appeals differs from other categories of unprotected speech, like obscenity or fighting words. Legislation attempting to regulate obscenity or fighting words is always subject to judicial review to determine whether the relevant constitutional standards have been upheld. But the Court of Appeals would prohibit analogous review of copyright legislation, because it holds that speakers do not possess any First Amendment interests in publishing copyrighted expression. The Court of Appeals even refused to consider the First Amendment implications of the retroactive application of the CTEA—a provision unlikely to survive a minimal requirement that it be rationally related, much less narrowly tailored, to the constitutional mandate of copyright legislation to "suppl[y] the economic incentive to create and disseminate ideas." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985).

Copyright legislation cannot be said to be exempt from First Amendment review merely because it is enacted pursuant to the specific authorization of the Exclusive Rights Clause. All congressional legislation is enacted pursuant to constitutional authorizations of power, and yet all such legislation must meet First Amendment standards. It is not surprising, therefore, that the reasoning of the Court of Appeals flatly contradicts this Court's ruling in *Harper & Row*. In *Harper & Row*, the Court expressly referred to fair use and the idea/expression dichotomy as "First Amendment protections . . . embodied in the Copyright Act[.]" 471 U.S. at 560. These doctrines could not be "First Amendment protections" if individuals had no "cognizable first amendment right to exploit the copyrighted works of others."

The reasoning of the Court of Appeals is unsustainable even if it is narrowly interpreted to mean that the only limitations on copyright legislation imposed by the First Amendment are the idea/expression dichotomy and the fair use doctrine. To hold that the idea/expression dichotomy and the fair use doctrine are constitutionally mandated is to concede the necessity of First Amendment review to determine if a copyright statute has adequately met constitutional standards.

Because copyright law imposes selective prohibitions on communication, often at the expense of significant public discussion, it should be subject to heightened First Amendment scrutiny. This was the approach recently taken by the Court of Appeals for the Second Circuit in *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001), which upheld Section 1201(a)(2) of the Copyright Act only after carefully subjecting that provision to heightened First Amendment

scrutiny, *id.* at 454-55, applying the standard of review established by this Court in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) (“*Turner I*”).

At this stage of the proceedings, however, the Court need not consider whether the CTEA satisfies heightened First Amendment scrutiny. The sole issue necessarily before the Court is the correctness of the refusal of the Court of Appeals to subject the CTEA to any First Amendment review. *Amici* respectfully suggest, therefore, that the Court vacate the decision below and remand to permit the Court of Appeals to review the CTEA under the heightened First Amendment scrutiny appropriate for laws specifically aimed at selectively regulating expression. The justifications advanced by Congress to support the CTEA are so very weak that they are unlikely to survive even moderately elevated scrutiny.

ARGUMENT

I. The Decision Below Creates a New and Unusually Expansive Categorical Immunity from Judicial Review for Copyright Legislation

The court below appears to have taken the unusual step of substantially immunizing an entire area of congressional legislation from First Amendment review. “[C]opyrights,” the Court of Appeals held, “are categorically immune from challenges under the First Amendment.” *Eldred*, 239 F.3d at 375. The court dismissed petitioners’ First Amendment challenge to the CTEA on the grounds that “*the plaintiffs lack any cognizable first amendment right to exploit the copyrighted works of others.*” *Id.* at 376. (emphasis added)

If the Court of Appeals meant what it said, then it has single-handedly created an entirely new category of unprotected speech. By holding that copyright statutes are immune from First Amendment review, it has effectively ceded to Congress the authority to enact whatever copyright legislation it chooses. The only possible justification for this remarkable holding is that copyrighted expression is, like obscenity or fighting words, categorically without First Amendment protection. But this conclusion is implausible, to say the least.

Copyrighted expression frequently lies at the core of protected speech. To pick a simple example, it would plainly be protected speech to publish a new edition of *Uncle Tom's Cabin*, a work that was once copyrighted but is now in the public domain. There is nothing intrinsic about the words of the novel that, like obscenity, deprives them of First Amendment protection. A speaker's First Amendment interest does not suddenly vanish merely because she chooses to express herself in words that happen to be protected by copyright. Alice Randall, for example, who is the author of a book entitled *The Wind Done Gone*, had an obvious First Amendment interest in using elements of *Gone With the Wind* to retell the novel from the perspective of a slave, even though *Gone With the Wind* was still under copyright. See *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).

Recognizing that Alice Randall has a First Amendment interest in publishing *The Wind Done Gone* does not imply that the First Amendment gives her license to ignore the requirements of a valid copyright statute. At issue in this case, however, is not whether, despite countervailing First Amendment interests, copyright law can constitutionally regulate expression, but rather whether

Congress is utterly unrestrained by the First Amendment when it enacts copyright legislation.

The implausibility of the Court of Appeals's conclusion can be seen by imagining a civil rights group seeking to publish an annotated version of *Uncle Tom's Cabin* in 1963 in celebration of the centennial of the Emancipation Proclamation. The publication of such a book would manifestly lie at the very core of speech properly protected by the First Amendment. Because the annotated book would constitute neither a fair use nor solely the appropriation of an "idea," its publication in 1963 would be permissible only because the original copyright of *Uncle Tom's Cabin* had expired in the late 19th century. Yet had the Reconstruction Congress shared the judgment of the 105th Congress and retroactively extended the term of copyright to life of the author plus 70 years, *Uncle Tom's Cabin* would still have been under copyright in 1963. The Court of Appeals would have us believe that in such hypothetical circumstances the civil rights group would have had *no cognizable First Amendment interests* in publishing the annotated edition.

The theory of the Court of Appeals implies that the boundaries of constitutionally protected speech expand or shrink as Congress decides the length and breadth of copyright protection. This implication is surely constitutionally backwards. First Amendment rights restrain congressional enactments, not the reverse.

The theory of the court below is so implausible that it is tempting to assume that the court could not possibly have meant what it said. But its words were explicit, and, more importantly, the Court of Appeals utterly refused to evaluate the CTEA in light of relevant First Amendment standards. The circuit court's express formulation places

expression that uses copyrighted materials in a shrinking group of categorically unprotected speech—like obscenity and fighting words. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). The modern Supreme Court has, however, recognized that categorical exceptions to the First Amendment often substitute labels for analysis, and that they therefore risk diluting the judiciary’s constitutional duty to subject restrictions of free expression to exacting scrutiny. Compare, e.g., *Beauharnais v. Illinois*, 343 U.S. 250 (1952), with *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation); *Valentine v. Chrestensen*, 316 U.S. 52 (1942), with *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (commercial speech). Indeed, this Court has recently declined to create a new categorical exception to the First Amendment for electronic images depicting offensive sexual behavior by children. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (April 16, 2002).

Most importantly, this Court has refused to permit states to regulate even the shrinking group of categorical exclusions to First Amendment protection without subjecting such regulations to appropriate constitutional scrutiny. This is because the definition of categorically unprotected speech is for courts to decide on the basis of their understanding of relevant constitutional standards. Thus legislation regulating obscenity is subject to judicial review to determine whether legislative definitions accord with constitutional requirements. See *Miller v. California*, 413 U.S. 15, 23-24 (1973) (“We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited.”); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); See *Ashcroft v. Free Speech Coalition*, *supra*. Similarly, the categorical exception for “fighting words” does not accord automatic

immunity to laws purporting to regulate them; courts must still determine if a statute only regulates that which may properly be regulated. See *R.A.V.*, 505 U.S. at 385-6.

The theory adopted by the Court of Appeals, however, proposes a category of unprotected speech that is not defined by this Court, but by Congress. The court below held both that there are no cognizable First Amendment rights to publish expression that has been copyrighted, and that the scope and provisions of copyright statutes are exempt from First Amendment review. This goes far beyond any First Amendment decision ever adopted by this Court. The Court of Appeals may well have been concerned to construct a theory that would prevent every copyright infringement suit from turning into a constitutional case. But the court constructed a doctrine that is plainly overreaching, for the doctrine prohibits not merely constitutional challenges to the application of otherwise valid copyright statutes, but also to the constitutionality of copyright statutes themselves.

The very point of the reasoning of the Court of Appeals was to preclude First Amendment challenges to the constitutionality of the CTEA. The court stated that “[t]he works to which the CTEA applies, and in which plaintiffs claim a first amendment interest, are by definition under copyright; that puts the works on the latter half of the ‘idea/expression dichotomy’ and makes them subject to fair use. This obviates further inquiry under the First Amendment.” *Eldred*, 239 F.3d at 376. (Emphasis added.) The works are “by definition” under copyright, however, only because Congress chose to define them so. And the First Amendment inquiry “obviated” is the inquiry into whether or not that congressional definition was itself justifiable in terms of the First Amendment.

The Court of Appeals might have been tempted to accord to copyright legislation an extraordinary exemption from First Amendment review because such legislation is authorized by a special empowering clause of Article I. But this argument proves too much, because *every* congressional statute must be enacted pursuant to a constitutional grant of power. Nor can it be that congressional legislation requires less scrutiny under the Bill of Rights when it derives from a narrowly specified power, rather than a broad power. Congress cannot abrogate the fifth and sixth amendment rights of those accused of piracy on the high seas, simply because the Constitution specifically authorizes Congress to punish piracy in Article I, Section 8, cl. 10.

The Exclusive Rights Clause is one of the few empowering clauses that this Court has unanimously held for over 100 years expressly to include substantial constraints on how it can be used. See *Trade-Mark Cases*, 100 U.S. 82, 94 (1879); *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966) (the clause “is both a grant of power and a limitation”); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989); *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349-51(1991). The existence of these constraints, however, does not justify immunizing copyright legislation from First Amendment scrutiny. This Court has, for example, interpreted the Bankruptcy Clause, Article I, Section 8. cl. 4, expressly to constrain Congress by requiring it to enact bankruptcy laws that are nationally uniform. See *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457 (1982). No one would argue that because the power to enact bankruptcy laws is explicitly circumscribed, such laws are immune from judicial scrutiny to determine whether, for example, they take property without compensation. Similarly, the fact that the Constitution particularly

circumscribes the power of Congress to grant what was at the time of its framing understood as a monopoly² is no reason to grant Congress special immunity when it regulates expression under this particular power.

II. The Categorical Exclusion Proposed by the Court of Appeals is Based on a Misconstruction of *Harper & Row*

The Court of Appeals based its unusual exception to First Amendment law on a misreading of this Court's precedent in *Harper & Row*. In particular, the Court of Appeals interpreted this Court as holding that copyrighted speech was without First Amendment protection when it stated that "[C]opyright's idea/expression dichotomy strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556 (internal quotation marks omitted).

In *Harper & Row*, the Nation Magazine asked the Court to create a special First Amendment exception to copyright law for news reporting that used copyrighted materials. The Court refused, concluding, "we see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright." *Harper & Row*, 471 U.S. at 560.³ There was no need, the

² See Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 54-56 (1994).

³ Elsewhere the Court characterized the argument it rejected in these terms: "the fact that the words the author has chosen to clothe his narrative may of themselves be 'newsworthy' is not an independent justification for unauthorized copying of the author's expression prior to publication." *Harper & Row*, 471 U.S. at 557.

Court held, to create such a *special* First Amendment exception to the scope of copyright law “[i]n view of the First Amendment protections already embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use. . . .” *Id.*

The actual holding of *Harper & Row*, therefore, was exactly the inverse of the interpretation adopted by the Court of Appeals. This Court did not hold that users have no “cognizable First Amendment right to exploit the copyrighted works of others.” Quite to the contrary, it characterized specific components of copyright law, like the fair use doctrine, as “First Amendment protections.”⁴ Fair use could not function as a “First Amendment protection” unless someone who could claim its benefit had a cognizable First Amendment interest in publishing otherwise copyrighted expression.

Far from implying that copyright legislation is immune from First Amendment review, therefore, *Harper & Row* actually holds that copyright legislation must be subject to constitutional review to determine if it maintains a proper balance between freedom of speech and the promotion of expression. At a minimum, it is clear that the doctrines expressly identified by this Court—fair use and the idea/expression dichotomy—cannot be repealed or

⁴ *Cf. Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582-83 (1994) (evaluating eligibility of a potentially infringing work to be treated as a parody and a fair use by quoting with approval the statement that “First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”) (quoting *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 280 (SDNY 1992) (Leval, J.)).

substantially weakened without passing First Amendment scrutiny.

Perhaps, however, the Court of Appeals merely meant to hold that the CTEA did not raise a First Amendment question because it modified neither the fair use doctrine nor the idea/expression dichotomy. On this interpretation, the Court of Appeals implicitly held that fair use and the idea/expression dichotomy *exhaust* the First Amendment protections embodied in copyright law, so that the First Amendment would have no relevance to any other provision in a copyright statute that altered the boundary between the public domain and copyrighted speech.

It is implausible to assume, however, that the First Amendment would touch copyright only at the points of fair use and the idea/expression dichotomy. Compare the First Amendment burden of the following two hypothetical statutes. First, imagine that the Third Congress had retroactively extended the term of copyright protection to a thousand years, thereby prohibiting unauthorized annotations of core documents from the Federalist Papers to *Uncle Tom's Cabin*. Second, imagine a contrasting statute that eliminates the fair use doctrine as to news reports, but that shortens the duration of copyright in such reports to 24 hours. There is no reason why the latter statute should be subject to First Amendment review, while the former should receive no First Amendment scrutiny at all.

Copyright legislation is subject to First Amendment review so as to ensure that public discourse is not unduly damaged by such legislation. Modifications of the idea/expression dichotomy and the fair use doctrine do not exhaust the damage that copyright legislation can inflict on public discourse. This Court's mention in *Harper & Row*

of fair use and the idea/expression dichotomy was thus not intended to be exhaustive, but merely to list the two copyright doctrines that were relevant to First Amendment issues in that case. As the Court of Appeals for the Eleventh Circuit in *SunTrust Bank* recently put it, “the balance between the First Amendment and copyright is preserved, *in part*, by the idea/expression dichotomy and the doctrine of fair use.” 268 F3d at 1263 (emphasis added). Fair use and the idea/expression dichotomy merely ensure that “courts *often* need not entertain related First Amendment arguments in a copyright case.” *Id.* at 1265 (emphasis added).

The recognition in *SunTrust Bank* that the idea/expression dichotomy and fair use doctrine are significant, but not exclusive, elements of the balance between copyright and the First Amendment, is plainly correct. The idea/expression dichotomy cannot provide comprehensive protection to public discourse, because the First Amendment safeguards specific modes of expression, not merely abstract ideas. As this Court stated in *Cohen v. California*, 403 U.S. 15 (1971) “we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.” *Id.*, at, 26. Requiring a critic of the Walt Disney Company to write a scholarly article or an editorial rather than publish a cartoon of Darth Vader sporting Mickey Mouse ears is no different than requiring Paul Cohen to write “I object to the draft.” The idea/expression dichotomy cannot, then, play the definitive role that the court below attributed to it. It is an important mechanism to avoid conflict with the First Amendment, but only when the infringing expression is not an integral part of the speaker’s message.

Although the fair use doctrine likewise provides important mitigation of the First Amendment burdens imposed by the Copyright Act, it too fails to provide comprehensive First Amendment protection. The doctrine does preserve some freedom of expression for users, but it ultimately remains bounded by the government's interest in providing owners with incentives. The First Amendment, however, may require that this interest be weighed against the relevant costs to freedom of expression in ways that the doctrine of fair use does not admit. A new annotated edition of *Gone With the Wind*, for example, can play an important role in political discourse even though the edition may utilize too much of the original to enjoy the protection of fair use. If Congress extended the copyright period for *Gone With the Wind* to such an extended length of time that the copyright could no longer be said to contribute to the incentives for the novel's creation, surely a First Amendment question would be raised about the suppression of the publication of even such a "derivative" book.

It follows that statutory provisions establishing the temporal reach of copyright must be subject to judicial review to determine whether such provisions meet relevant First Amendment standards. Neither the idea/expression dichotomy nor the doctrine of fair use necessarily render copyright legislation compatible with the constitutional requirements of freedom of expression.

III. Legislation That Substantially Expands Copyright Should Be Subject to Heightened First Amendment Scrutiny

The Copyright Act is a statute that regulates speech. It tells some people that they cannot print or publicly present certain words or images. It is not a law aimed at

general conduct that has incidental effects on expression—like a trespass statute or an anti-littering ordinance. It is a law aimed *solely* at expression. It is not a time, place, and manner regulation intended to effectuate non-speech-related purposes.⁵ Its entire purpose and effect is to regulate the production of information, culture, and knowledge. It selectively prohibits printing, publishing, and public expressive performance or display. To paraphrase this Court, if the regulation of printing, publishing, or public performance of materials one deems interesting or evocative is not regulation of pure speech, it is hard to imagine what would be. *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). Such regulation requires elevated scrutiny.

Copyright legislation has traditionally been justified in relation to the First Amendment as providing “the engine of free expression.” *Harper & Row*, 471 U.S. at 558. This Court has in the past considered legislation with analogous justifications. The cable “must-carry” rules, for example, were justified as facilitating the availability of information “from diverse and antagonistic sources.” *Turner I*, 512 U.S. at 663-64; *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 192 (1997) (“*Turner II*”). But just as in *Turner* the Court found it necessary to review congressional legislation to ensure that it indeed advanced its goal of facilitating diverse discourse, so too must courts review copyright legislation to assure that it also actually functions

⁵ “[I]n the context of intellectual property, [the] ‘no adequate alternative avenues’ test does not sufficiently accommodate the public’s interest in free expression. Intellectual property, unlike real estate, includes the words, images, and sounds that we use to communicate. . . . Restrictions on the words or images that may be used by a speaker, therefore, are quite different than restrictions on the time, place, or manner of speech.” *Cardtoons, L.C. v. Major League Baseball Players Ass’n.*, 95 F.3d 959, 971 (10th Cir. 1996) (citations omitted).

as an engine of free expression rather than as a vehicle of censorship.

We agree, of course, that ordinary copyright litigation should not be transformed into a First Amendment battlefield. The central lesson of *Harper & Row* is that the First Amendment should not normally be understood as constraining the application of generally valid rules in run-of-the-mill copyright cases. There is an important distinction, however, between using the First Amendment to review the constitutionality of copyright legislation, and using the First Amendment to second-guess the application of otherwise valid copyright laws. When *Congress* enacts legislation that imposes burdens on speech, even for the purpose of promoting benign ends, courts must review the legislation to ascertain its constitutionality. But when *courts* enforce the terms of otherwise valid copyright statutes, they can be presumed to incorporate relevant First Amendment considerations into their application of the legislation. See *SunTrust Bank*, 268 F.3d at 1265. (“As we turn to the analysis required in this case, we must remain cognizant of the First Amendment protections interwoven into copyright law.”) For this reason, no special additional First Amendment review is necessary in ordinary cases involving the application of otherwise valid copyright law.

Fundamental modification of copyright legislation, by contrast, does require judicial scrutiny. Elevated First Amendment review is especially necessary when Congress acts to modify those components of copyright law that serve to avoid conflict with the First Amendment—components like the idea/expression dichotomy, the fair use doctrine, or the eventual availability of works in the public domain. Fundamental modifications of these components are not frequent. As Senator Hatch recognized in

introducing the predecessor bill that eventually evolved into the CTEA, “it is a rare occasion when we address the fundamental aspects of copyright protection.” 141 Cong. Rec. S3390 (March 2, 1995). But the Senator well recognized that the extension he proposed would introduce precisely such a fundamental change. *Id.*

When Congress acts to alter the basic balance between copyright legislation and the First Amendment, this Court should at a minimum apply the same level of review that it applies to other laws that directly regulate speech in the name of improving the flow of information in society. The “must-carry” rules for the cable industry are an apt analogy. See *Turner I*. Applying *Turner*, congressional efforts to modify the major components of copyright law must at the very least actually serve the government’s interest in supplying “the economic incentive to create and disseminate ideas,” *Harper & Row*, 471 U.S. at 558, and they must do so in a manner that is no more restrictive than necessary. *Turner I*, 512 U.S. at 662.

It should be stressed that heightened judicial scrutiny is even more important in the context of copyright legislation than it was in the context of *Turner* and the other media regulation cases in which the *Turner* test has been applied.⁶ Judicial review is especially significant when the political process is systematically deformed, so that it is unlikely to weigh all the interests affected by legislation. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938), John Hart Ely, *Democracy and Distrust* (1980). Copyright legislation exemplifies the potential for such structural distortion.

⁶ See, e.g., *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

In the context of ordinary media legislation, both the parties burdened and the parties benefited are usually well represented in the political process. For example, both the cable carriers who suffered the burden of the must-carry rules at issue in the *Turner* litigation, and the broadcasters who benefited from those rules, fully participated in the political process that produced the relevant regulations. Copyright legislation, by contrast, is not typically enacted with the benefit of such full and representative political participation. The *benefits* of copyright legislation accrue to the current owners of copyrights, who accordingly have every incentive to advance their present and palpable interests. But the *burdens* of copyright legislation are usually imposed upon diffuse members of the public, and most especially upon those who are not yet born or who are too young to articulate their interest in a copyright law that would more effectively protect their freedom of expression by shortening the duration of the copyright period. Opposition to copyright legislation is thus not fully representative.

The CTEA is a quintessential example of the kind of rent-seeking statute one would expect to result from this structural distortion. Retroactive extension of copyright in particular provides an immediate windfall for the owners of aging copyright inventories. Unsurprisingly, therefore, the Chief Executive Officer of Disney was described as being quite explicit about the importance of the CTEA to his company when he visited the Majority Leader of the Senate a week before the latter co-sponsored the bill. See Alan K. Ota, *Disney in Washington: The Mouse That Roars*, *Congressional Quarterly* (August 8, 1998), 2167. Copyright owners were heavily represented in committee hearings in both houses, counterbalanced only by a rare academic voice. See 144 Cong. Rec. S11672-73 (Oct. 7, 1998); H. R. Rep. No. 105-452 at 5 (1998). The bill itself

was enacted in a single day—discharged by the Committee on the Judiciary, passed by the Senate by Unanimous Consent, considered by the House under suspension of the rules and agreed to by voice vote, all on October 7, 1998.

Although the benefits of copyright extensions to discrete industries are palpable and concrete, the costs of such extensions to future users are diffuse and intangible. Alice Randall, author of *Wind Done Gone*, was but a child when the term of protection for *Gone With the Wind* was first extended, long before she could imagine that the extension would allow a district court to ban her book fifty-two years after Margaret Mitchell's death. See *SunTrust Bank v. Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (N.D.Ga. 2001), *reversed*, 268 F.3d 1257 (11th Cir. 2001). Her case is far from unique. Most potential users of copyrighted works rarely appreciate that their speech will be curtailed in a generation or more by a presently enacted statutory expansion of the Copyright Act. Predictably, therefore, opposition to the CTEA was confined to a smattering of academics and librarians, whose job it is to consider remote and diffuse consequences of legislation.

Copyright legislation typically produces such systematic structural distortions of the political process, and these distortions will always skew copyright legislation towards ever-increasing protection, with only occasional exemptions where specific harms are directly borne by cohesive interest groups such as broadcasters, cable operators, or software producers. Because copyright legislation restricts the fundamental right to communicate, elevated judicial scrutiny is required to ensure a proper balance between the state's interest in promoting copyrighted expression and the public's interest in freedom of expression.

In the procedural context of this case, the Court need not decide the precise level of applicable scrutiny to apply to the CTEA. In *Turner II*, this Court seemed to embrace the proposition that intermediate scrutiny was required in the context of a congressional statute seeking to further expression by differentially burdening the speech rights of distinct parties. *Harper & Row* describes copyright law in exactly these terms. While copyright law serves as “the engine of free expression” “[b]y establishing a marketable right to the use of one’s expression,” *Harper & Row*, 471 U.S. at 558, it also burdens speech in ways that must be mitigated by “First Amendment protections already embodied in the Copyright Act.” *Id.* at 560.

Although *Turner II* suggests that a form of intermediate scrutiny should be applied to the CTEA, this Court need not now decide the precise level of scrutiny applicable to the different settings that might arise in the context of copyright legislation. The level of review appropriate to this case might best be left in the first instance to the Court of Appeals. All that is necessary at this stage in the litigation is to hold that copyright legislation should not be categorically immune from First Amendment review, and should be subject to some degree of elevated scrutiny.

IV. The Categorical Exclusion is Necessary to the Holding Below, as the CTEA is Unlikely to Survive Any Degree of Close Scrutiny

Were this Court to remand to the Court of Appeals with instructions to apply some form of elevated scrutiny to the CTEA, the statute would in our judgment be highly unlikely to survive. The statute was upheld by the Court of Appeals only because it utterly refused to apply any First Amendment review at all.

The CTEA extends the term of copyright from life of the author plus fifty years, to life of the author plus seventy years, or, where the copyright is initially vested in a corporation, from seventy five to ninety five years. *See* Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998). It does so not only prospectively, but retrospectively as well. *See Id.* § 102 (b) & (d).

Had the Court of Appeals subjected the CTEA, in particular its retrospective application, to elevated First Amendment review, it is highly unlikely that important aspects of the statute would have been upheld. The justification for the Act is substantially weaker than that of other statutes which have been held unconstitutional, or which, though upheld, were understood to have presented hard cases.⁷ The CTEA was enacted pursuant to Article I, Section 8, cl. 8 of the Constitution. Its constitutionally mandated goal is therefore to “suppl[y] the economic

⁷ This Court, for example, subjected the must-carry rules to substantially more searching scrutiny than the court below applied to the CTEA, even though the *prima facie* (and, as it turns out, ultimate) economic justification for the must carry rules was substantially more sound than the economic rationale of the retroactive extension of copyright. *See Turner II*, 520 U.S. at 197-224. Another example is provided by a different panel of the Court of Appeals for the D.C. Circuit, which recently struck down the vertical and horizontal ownership rules imposed by the Federal Communications Commission on cable operators. Those rules—though held insufficiently justified—were based on a substantially more plausible economic rationale than any justification that could be offered in support of the CTEA. *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir.) *cert. denied sub nom. Consumer Fed’n of Am. v. FCC*, 122 S.Ct. 644 (2001) (FCC argued, for example, that a minimum of four national cable operators was necessary to give unaffiliated programmers sufficient access to cable outlets for their programming without market distortion, whereas the Court of Appeals held that the Commission had not established that a national duopoly would not have sufficed).

incentive to create and disseminate ideas.” *Harper & Row*, 471 U.S. at 558. The Senate Report on the predecessor bill indeed suggested that authors “are able to bargain for the present value of the projected income from commercial exploitation of the work over the course of the entire copyright term. The additional value of a longer term will, therefore, be reflected in the money received by the author for the transfer of his or her copyright, leading again to increased incentives to create.” S. Rep. No 104-315 at 12 (1996).

It is not at all clear, however, that the CTEA’s *prospective* extension of the copyright terms, much less its retroactive extension, can be justified in terms of the creation of economic incentives. The discounted present value of any revenue stream to be captured eight decades or more in the future is virtually non-existent. See Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 323-29 (1970); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 17 J. L. STUD. 325, 361-62 (1988). We can calculate, for example, how much an author might presently expect to receive in return for one million dollars of royalties 85 years hence, or what the current value of these million dollars would be to investors invited to finance a movie. Using a conservative (relative to media investment risk) business discount rate of 10-12%, the present value of these expected one million dollars is only between \$303 and \$66, barely enough to cover the cost of a modest lunch for prospective investors. Imagine the responses a movie producer would get from the investors gathered at this lunch were he to promise them that they will indeed reap these riches eighty or ninety years hence.

If the CTEA’s *prospective* extension of copyright terms is hard to justify in terms of the creation of economic incentives, the CTEA’s *retrospective* application of this

extension creates no economic incentives at all. A retroactive extension of copyright term applies by definition to works that have already been created and copyrighted. Absolutely no incentive is necessary to ensure the creation of *these* works, because they have already been created. Incentives existing prior to the CTEA were evidently sufficient to bring them into being. See Landes & Posner, *supra*, at 362; Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1194-95 (1970). And yet, as the history of the CTEA makes clear, it is precisely retroactive application that introduces the greatest distortion of the political process, for it is the risk-free immediate windfall on aging inventories that was the greatest payoff for lobbying in support of the CTEA's term extension.

Perhaps cognizant of the woeful inadequacy of the incentives-based justification for the CTEA, legislative history suggests three additional justifications for the CTEA, discussed extensively in the Senate Report from 1995 and restated perfunctorily in the House Report from 1998. The three reasons are: First, harmonization with Europe; second, increasing life span and a supposed resultant need to adjust the term to assure a royalty stream during the lifetime of both the author and at least one additional generation; and third, the preservation of existing works.

This Court need not actually review these justifications at this time, but need only remand to the lower court to consider them. It is the role of the courts below to scrutinize these alternative justifications and to judge their sufficiency. It is clear, however, that the government will find it difficult, if not impossible, to

justify the CTEA in its entirety in the face of appropriately heightened scrutiny.

“Harmonization” with nations that protect speech less than does the United States is not a legitimate government interest. The Government could not impose prior restraints on hate speech, citing as its important interest the fact that it had signed a treaty obligation to do so. A mere policy preference for harmonizing with the longer protection periods available in Europe is accordingly an inadequate justification for extending copyright terms in ways that unduly damage public discourse. That Europe’s nations have chosen a different balance between freedom of speech and social policy is not a legitimate reason for restricting American freedom of speech. Moreover, there is no evidence in the legislative record to support the rather surprising claim that American competitiveness depends on revenue streams from 75-year-old materials, or that the Government could not have persuaded the European Union to treat American companies no worse than it treats its own companies. Plainly, the industry lobbies responsible for term extension are much more interested in using the harmonization argument to tax American consumers for an additional twenty years than they are, for example, in receiving national treatment in Europe. Here again the CTEA bespeaks more of a Congress beholden to industry lobbying than of reasoned balance between the promotion of copyrighted expression and freedom of speech.

The argument about the need to adjust the law to account for longer life spans fares no better. It is simply a romanticized version of the incentive argument. Neither teen pop stars nor octogenarian composers are likely to be affected by the prospect of great grandchildren living on the revenue flow from their royalties eighty or a hundred and twenty years hence, any more than would the investors

gathered at the movie producer's lunch be likely to be impressed by revenue streams many decades removed. Indeed, lengthening life span already increases the average length of protection because the term of a copyright is pegged to the life of the author, thereby allowing owners to save more over the term of a copyright so as to support their offspring after the copyright expires.

The argument about *preserving* existing works, rather than providing incentives for the creation of new works, is no more convincing than the first two justifications proffered. There is no evidence that the preservation of existing works presents an actual problem. The ease with which we can access old books from Plato to Kant, Shakespeare to Dickens, suggests that there is little that needs to be done for books. Neither is there a dearth of recordings of Mozart's music. Perhaps there is some special problem for film or rare musical recordings. If so, Congress can address the problem by a variety of less restrictive means aimed to help actual restorers. These could range from tax benefits or targeted subsidies, to misappropriation-type rules that prevent slavish copying of restored works by competitors. Any of these options would be substantially less restrictive than an across-the-board retroactive extension of all copyrights, which would not only afford statutory protection to preserved versions of old works, but would also prohibit all new works that are in any way "derivative" from these old works. *Turner II*, 520 U.S. at 253-56 (O'Connor, J. dissenting) (describing competition regulation and subsidy as less restrictive alternatives to the "must carry" legislation in question there).

Perhaps there are other, good reasons to support the CTEA's retroactive extension. It is unnecessary, however, for this Court to prejudge the weight and sufficiency of

hypothetical reasons, because the court below never properly considered them. It is not this Court's practice "to create hypothetical nonobvious explanations in order to justify laws that impose significant restrictions upon speech." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 760 (1996).

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the Court reverse the judgment below and remand for reconsideration in light of an appropriate First Amendment standard of review.

Respectfully submitted,

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US00596041A

United States Patent [19] Hartman et al.

[11] Patent Number: **5,960,411**
[45] Date of Patent: **Sep. 28, 1999**

- [54] **METHOD AND SYSTEM FOR PLACING A PURCHASE ORDER VIA A COMMUNICATIONS NETWORK**
- [75] Inventors: **Peri Hartman; Jeffrey P. Bezos; Shel Kaphan; Joel Spiegel**, all of Seattle, Wash.
- [73] Assignee: **Amazon.com, Inc.**, Seattle, Wash.
- [21] Appl. No.: **08/928,951**
- [22] Filed: **Sep. 12, 1997**
- [51] Int. Cl.⁶ **G06F 17/60**
- [52] U.S. Cl. **705/26; 705/27; 345/962**
- [58] Field of Search **705/26, 27; 380/24, 380/25; 235/2, 375, 378, 381; 395/188.01; 345/962**

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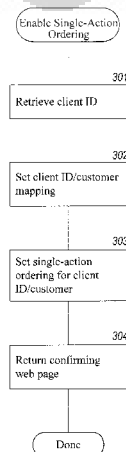
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Primary Examiner—James P. Trammell
Assistant Examiner—Demetra R. Smith
Attorney, Agent, or Firm—Perkins Coie LLP

[57] ABSTRACT

A method and system for placing an order to purchase an item via the Internet. The order is placed by a purchaser at a client system and received by a server system. The server system receives purchaser information including identification of the purchaser, payment information, and shipment information from the client system. The server system then assigns a client identifier to the client system and associates the assigned client identifier with the received purchaser information. The server system sends to the client system the assigned client identifier and an HTML document identifying the item and including an order button. The client system receives and stores the assigned client identifier and receives and displays the HTML document. In response to the selection of the order button, the client system sends to the server system a request to purchase the identified item. The server system receives the request and combines the purchaser information associated with the client identifier of the client system to generate an order to purchase the item in accordance with the billing and shipment information whereby the purchaser effects the ordering of the product by selection of the order button.

26 Claims, 11 Drawing Sheets



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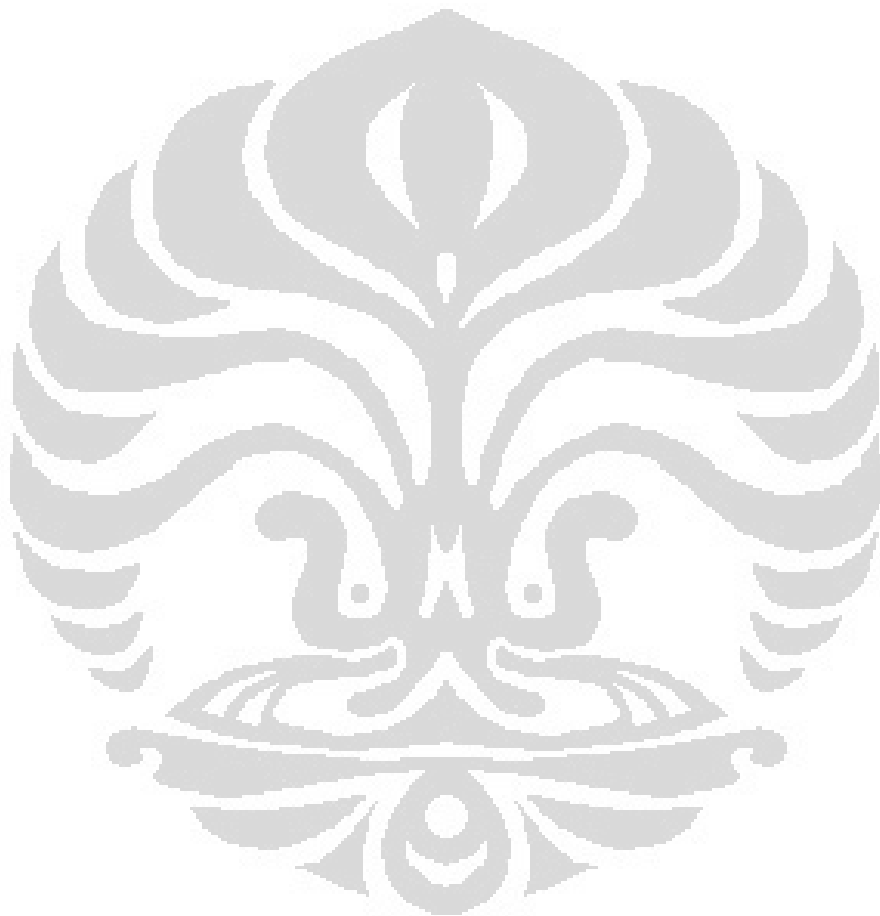
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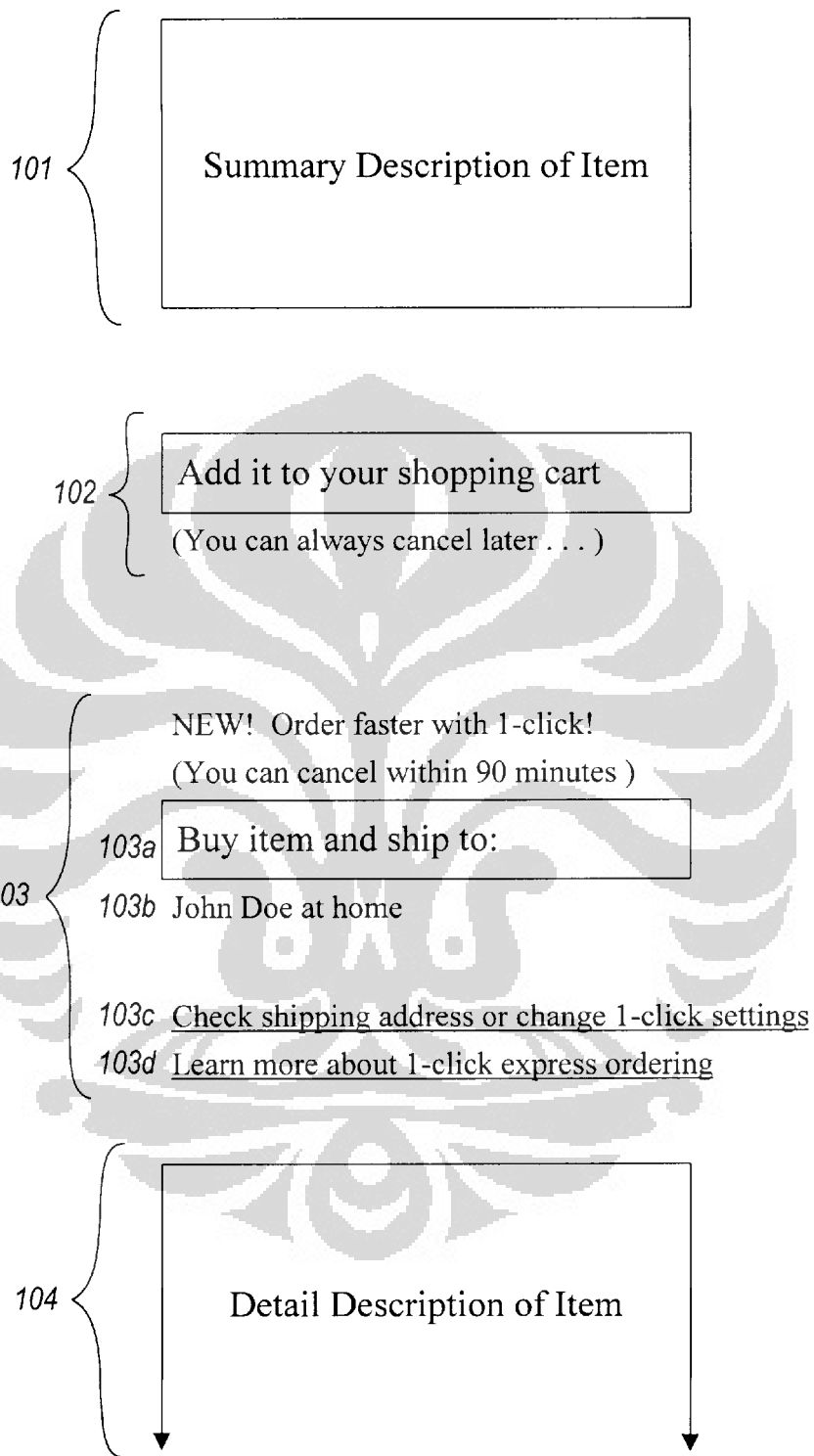


Fig. 1A

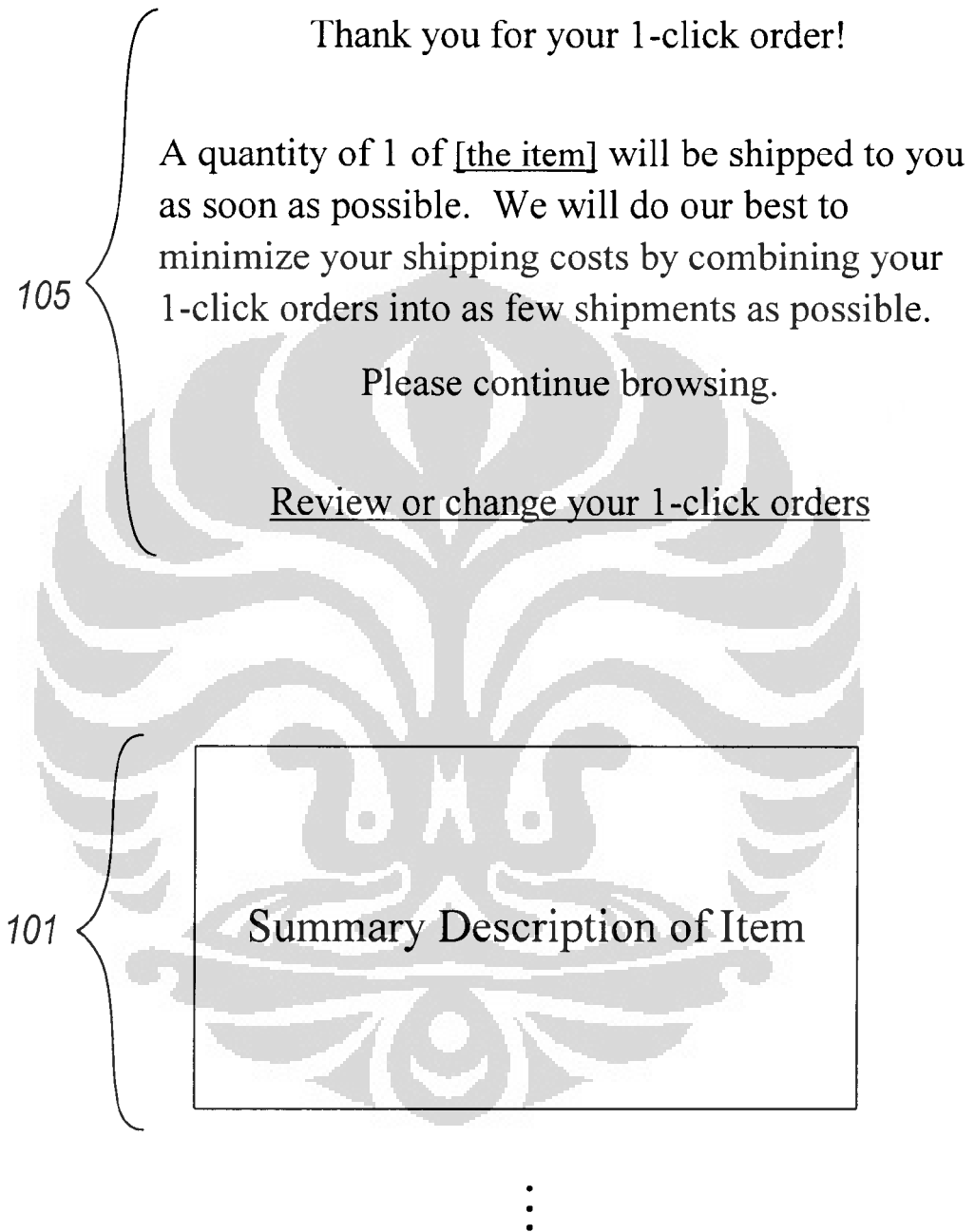


Fig. 1B

Summary of 1-Click Express Orders

Press this button if you Changed Quantities of any item below. If you don't press it, your changes won't "stick." You can set the quantity to 0 (zero) to cancel an item.

The 1-click orders below (available in 3 or fewer days) will be shipped together.

106 {

Order # 098337

1	Item 1	\$10.00
1	Item 2	\$15.00
	Total	\$25.00

The 1-click orders below (available in one week or more) will be shipped together.

107 {

Order # 098336

1	Item 3	\$20.00
1	Item 4	\$ 6.00
	Total	\$26.00

108 {

Ship to: John Doe at home

Shipment Method: Standard Domestic Shipping

Payment Method: **** _**** _***1_2345

Continue Shopping

1-Click Express shipping policies

Fig. 1C

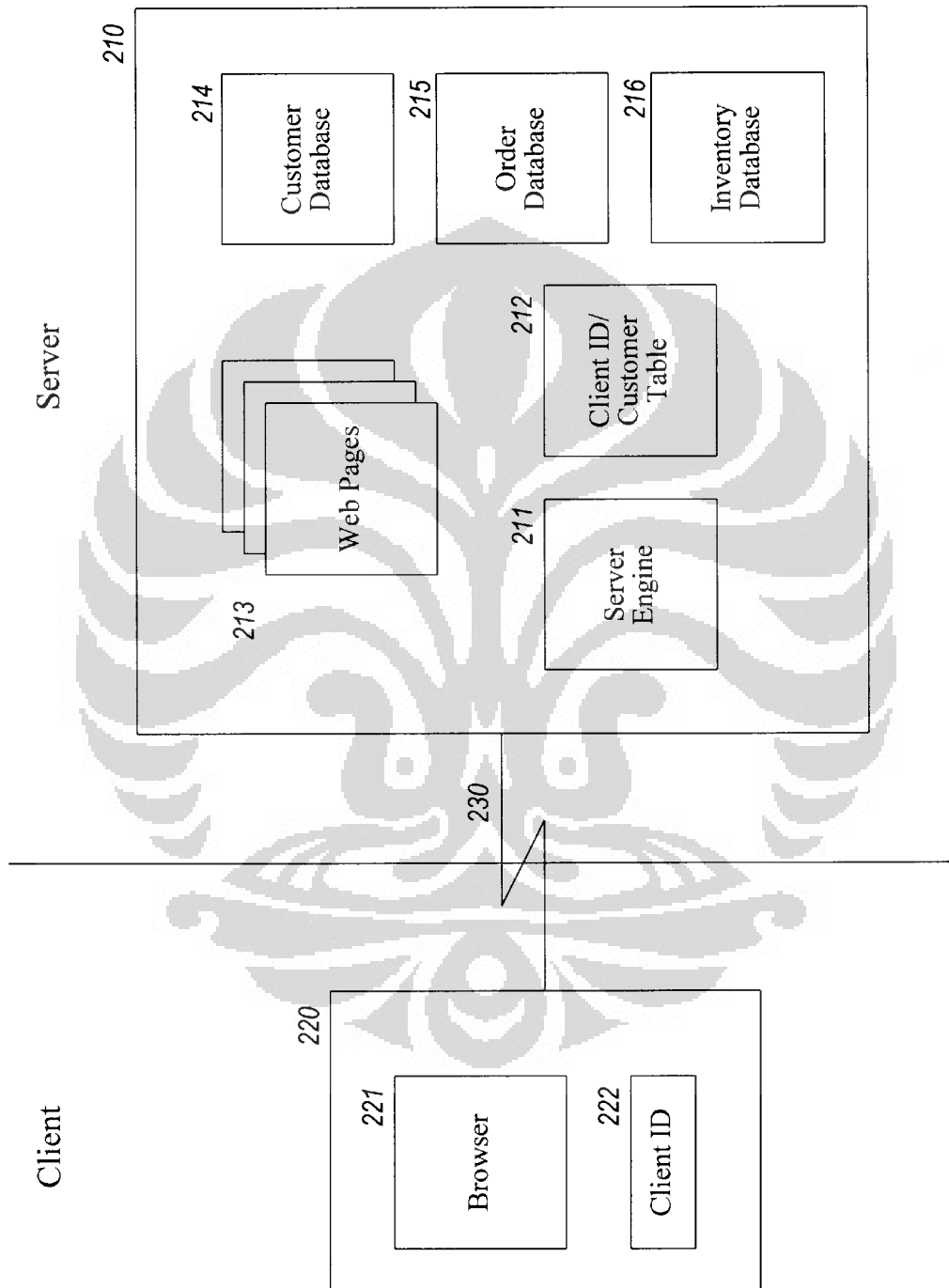


Fig. 2

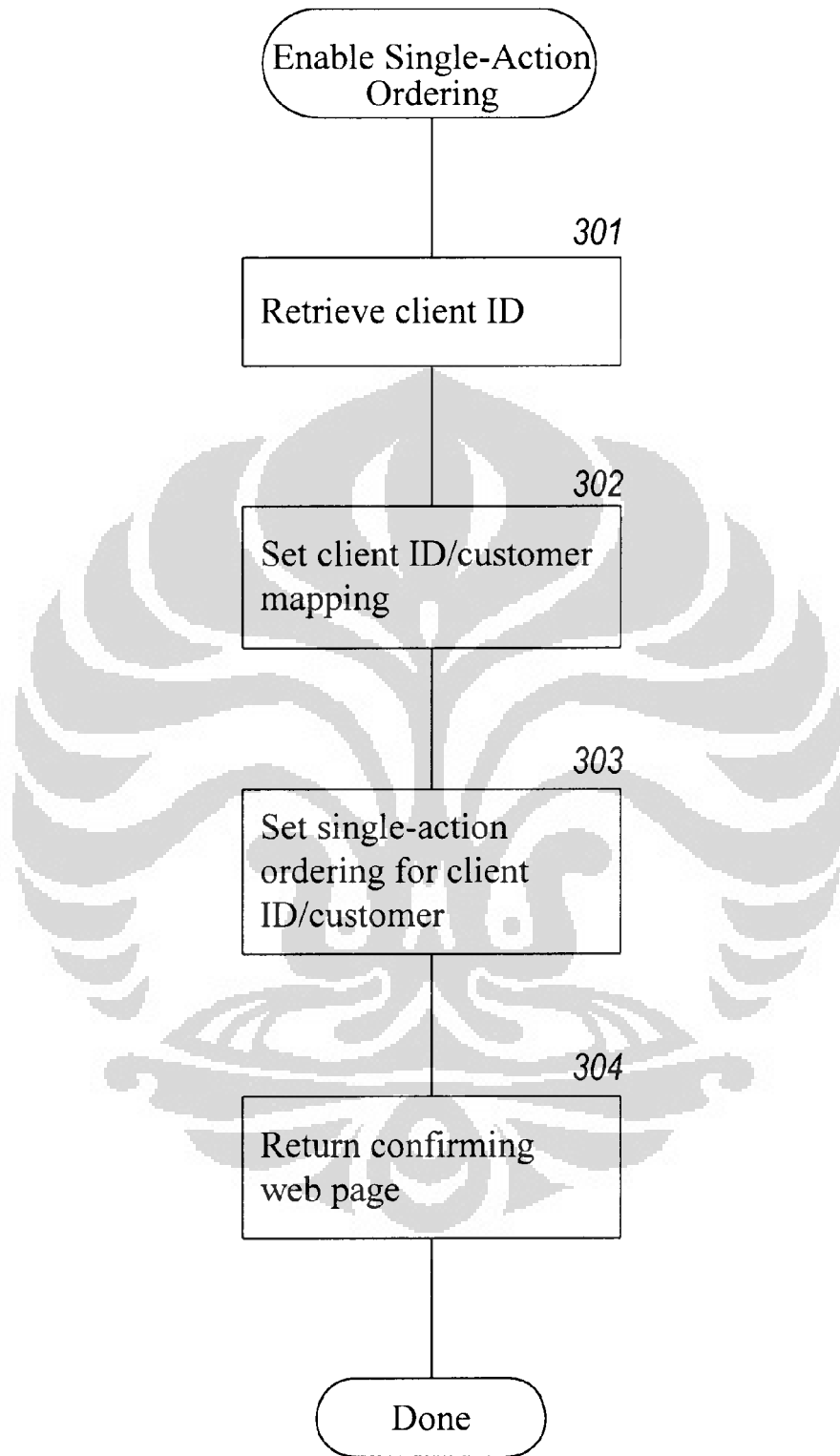


Fig. 3

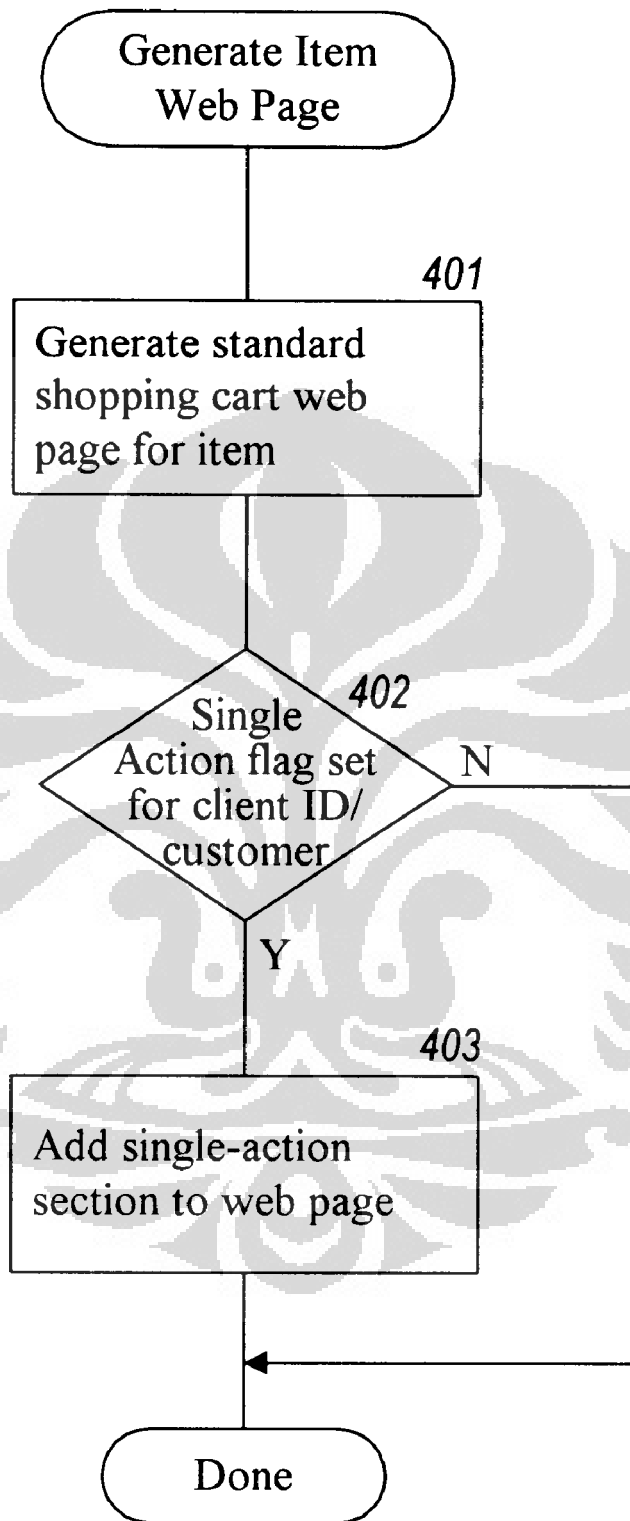


Fig. 4

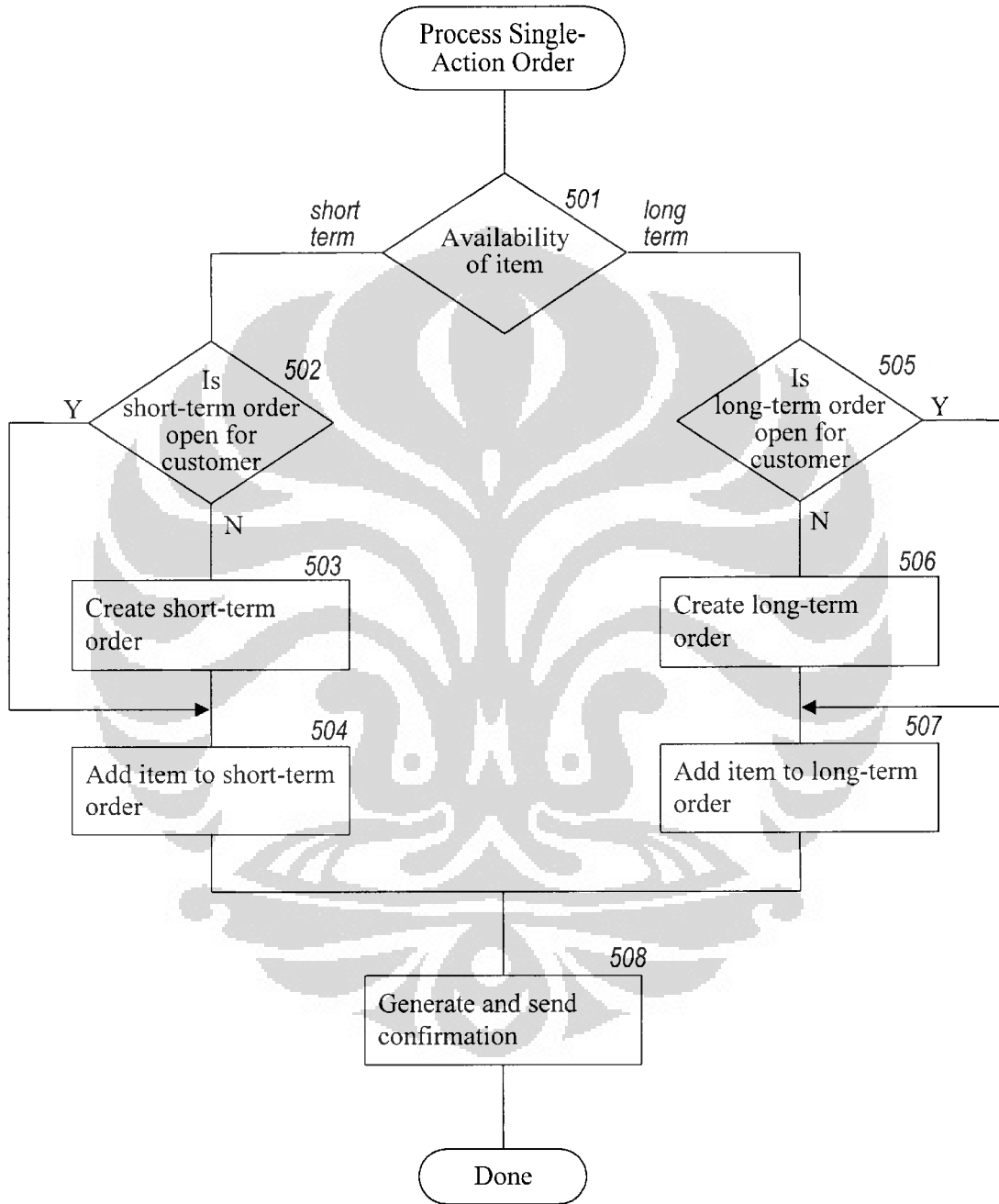


Fig. 5

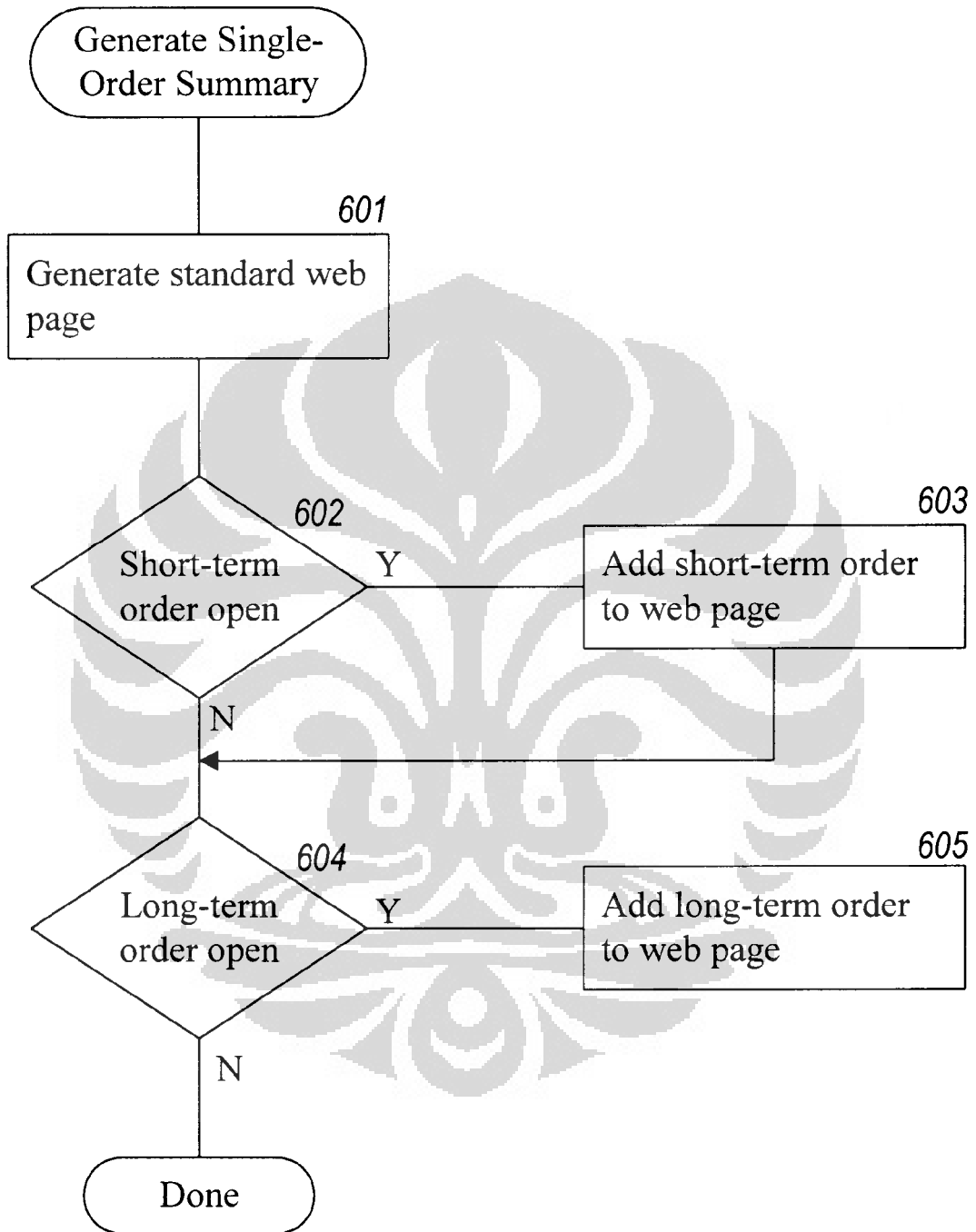


Fig. 6

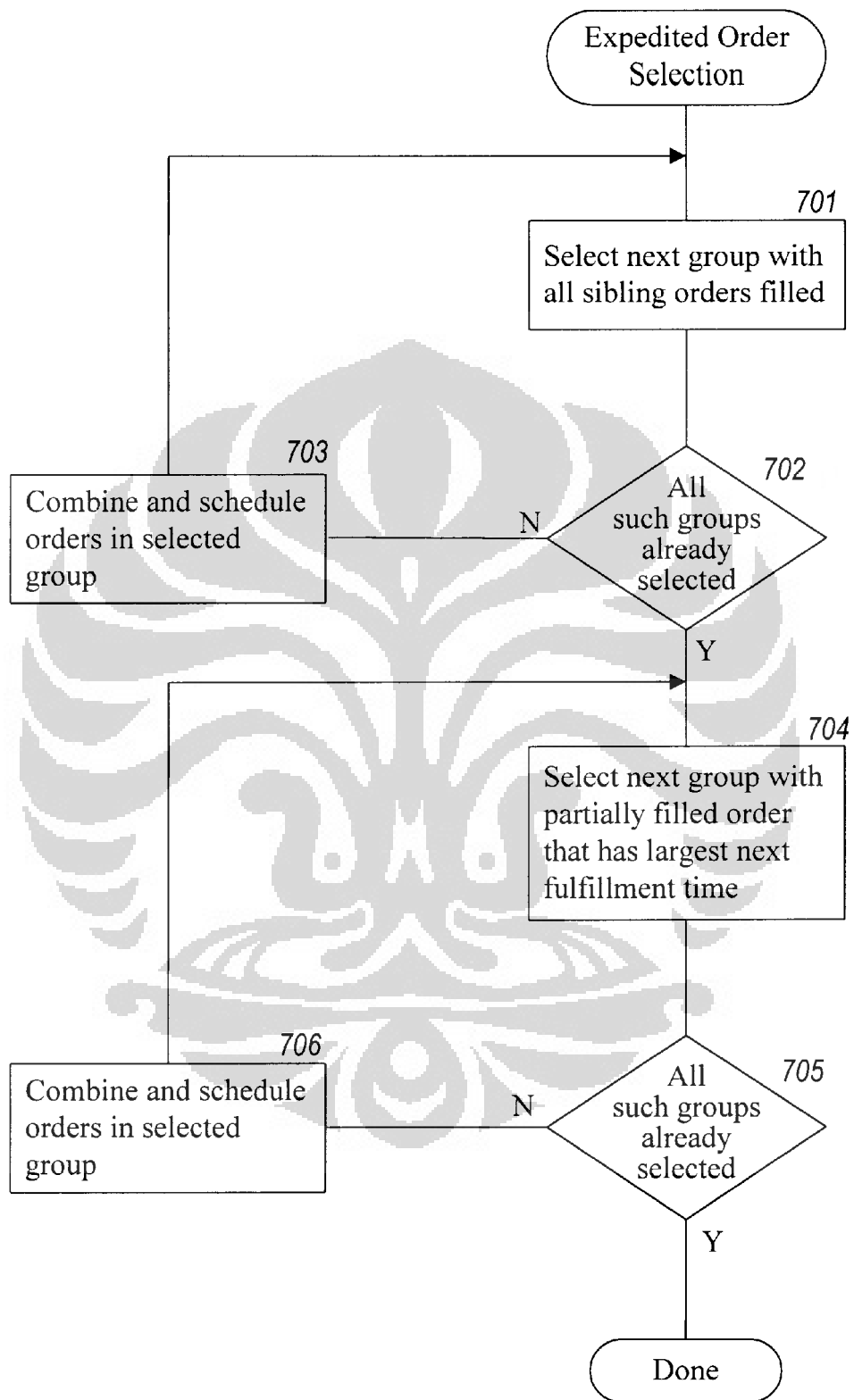


Fig. 7

START

- A: Customer Name & Address
- B: Customer Financial Info
- C: Customer Employment Info
- D: Customer Education Info
- .
- .
- .

Fig. 8A

A: First Name :

M.I. :

Last Name :

Street :

City :

State : Zip :

Next

Previous

- B: Customer Financial Info
- C: Customer Employment Info
- D: Customer Education Info
- .
- .
- .

Fig. 8B

A: Customer Name & Address

B: Net Worth:

Annual Income:

Spouse's Annual Income:

Other Income:

C: Customer Employment Info

D: Customer Education Info

·
·
·

Fig. 8C

METHOD AND SYSTEM FOR PLACING A PURCHASE ORDER VIA A COMMUNICATIONS NETWORK

TECHNICAL FIELD

The present invention relates to a computer method and system for placing an order and, more particularly, to a method and system for ordering items over the Internet.

BACKGROUND OF THE INVENTION

The Internet comprises a vast number of computers and computer networks that are interconnected through communication links. The interconnected computers exchange information using various services, such as electronic mail, Gopher, and the World Wide Web ("WWW"). The WWW service allows a server computer system (i.e., Web server or Web site) to send graphical Web pages of information to a remote client computer system. The remote client computer system can then display the Web pages. Each resource (e.g., computer or Web page) of the WWW is uniquely identifiable by a Uniform Resource Locator ("URL"). To view a specific Web page, a client computer system specifies the URL for that Web page in a request (e.g., a HyperText Transfer Protocol ("HTTP") request). The request is forwarded to the Web server that supports that Web page. When that Web server receives the request, it sends that Web page to the client computer system. When the client computer system receives that Web page, it typically displays the Web page using a browser. A browser is a special-purpose application program that effects the requesting of Web pages and the displaying of Web pages.

Currently, Web pages are typically defined using HyperText Markup Language ("HTML"). HTML provides a standard set of tags that define how a Web page is to be displayed. When a user indicates to the browser to display a Web page, the browser sends a request to the server computer system to transfer to the client computer system an HTML document that defines the Web page. When the requested HTML document is received by the client computer system, the browser displays the Web page as defined by the HTML document. The HTML document contains various tags that control the displaying of text, graphics, controls, and other features. The HTML document may contain URLs of other Web pages available on that server computer system or other server computer systems.

The World Wide Web is especially conducive to conducting electronic commerce. Many Web servers have been developed through which vendors can advertise and sell product. The products can include items (e.g., music) that are delivered electronically to the purchaser over the Internet and items (e.g., books) that are delivered through conventional distribution channels (e.g., a common carrier). A server computer system may provide an electronic version of a catalog that lists the items that are available. A user, who is a potential purchaser, may browse through the catalog using a browser and select various items that are to be purchased. When the user has completed selecting the items to be purchased, the server computer system then prompts the user for information to complete the ordering of the items. This purchaser-specific order information may include the purchaser's name, the purchaser's credit card number, and a shipping address for the order. The server computer system then typically confirms the order by sending a confirming Web page to the client computer system and schedules shipment of the items.

Since the purchaser-specific order information contains sensitive information (e.g., a credit card number), both

vendors and purchasers want to ensure the security of such information. Security is a concern because information transmitted over the Internet may pass through various intermediate computer systems on its way to its final destination. The information could be intercepted by an unscrupulous person at an intermediate system. To help ensure the security of the sensitive information, various encryption techniques are used when transmitting such information through a client computer system and a server computer system. Even though such encrypted information can be intercepted, because the information is encrypted, it is generally useless to the interceptor. Nevertheless, there is always a possibility that such sensitive information may be successfully decrypted by the interceptor. Therefore, it would be desirable to minimize the sensitive information transmitted when placing an order.

The selection of the various items from the electronic catalogs is generally based on the "shopping cart" model. When the purchaser selects an item from the electronic catalog, the server computer system metaphorically adds that item to a shopping cart. When the purchaser is done selecting items, then all the items in the shopping cart are "checked out" (i.e., ordered) when the purchaser provides billing and shipment information. In some models, when a purchaser selects any one item, then that item is "checked out" by automatically prompting the user for the billing and shipment information. Although the shopping cart model is very flexible and intuitive, it has a downside in that it requires many interactions by the purchaser. For example, the purchaser selects the various items from the electronic catalog, and then indicates that the selection is complete. The purchaser is then presented with an order Web page that prompts the purchaser for the purchaser-specific order information to complete the order. That Web page may be prefilled with information that was provided by the purchaser when placing another order. The information is then validated by the server computer system, and the order is completed. Such an ordering model can be problematic for a couple of reasons. If a purchaser is ordering only one item, then the overhead of confirming the various steps of the ordering process and waiting for, viewing, and updating the purchaser-specific order information can be much more than the overhead of selecting the item itself. This overhead makes the purchase of a single item cumbersome. Also, with such an ordering model, each time an order is placed sensitive information is transmitted over the Internet. Each time the sensitive information is transmitted over the Internet, it is susceptible to being intercepted and decrypted.

SUMMARY OF THE INVENTION

An embodiment of the present invention provides a method and system for ordering an item from a client system. The client system is provided with an identifier that identifies a customer. The client system displays information that identifies the item and displays an indication of an action (e.g., a single action such as clicking a mouse button) that a purchaser is to perform to order the identified item. In response to the indicated action being performed, the client system sends to a server system the provided identifier and a request to order the identified item. The server system uses the identifier to identify additional information needed to generate an order for the item and then generates the order.

The server system receives and stores the additional information for customers using various computer systems so that the server system can generate such orders. The server system stores the received additional information in association with an identifier of the customer and provides

the identifier to the client system. When requested by the client system, the server system provides information describing the item to the requesting client system. When the server system receives a request from a client system, the server system combines the additional information stored in association with the identifier included in the request to effect the ordering of the item.

BRIEF DESCRIPTION OF THE DRAWINGS

FIGS. 1A–1C illustrate single-action ordering in one embodiment of the present invention.

FIG. 2 is a block diagram illustrating an embodiment of the present invention.

FIG. 3 is a flow diagram of a routine that enables single-action ordering for a customer.

FIG. 4 is a flow diagram of a routine to generate a Web page in which single-action ordering is enabled.

FIG. 5 is a flow diagram of a routine which processes a single-action order.

FIG. 6 is a flow diagram of a routine for generating a single-action order summary Web page.

FIG. 7 is a flow diagram of a routine that implements an expedited order selection algorithm.

FIGS. 8A–8C illustrate a hierarchical data entry mechanism in one embodiment.

DETAILED DESCRIPTION OF THE INVENTION

The present invention provides a method and system for single-action ordering of items in a client/server environment. The single-action ordering system of the present invention reduces the number of purchaser interactions needed to place an order and reduces the amount of sensitive information that is transmitted between a client system and a server system. In one embodiment, the server system assigns a unique client identifier to each client system. The server system also stores purchaser-specific order information for various potential purchasers. The purchaser-specific order information may have been collected from a previous order placed by the purchaser. The server system maps each client identifier to a purchaser that may use that client system to place an order. The server system may map the client identifiers to the purchaser who last placed an order using that client system. When a purchaser wants to place an order, the purchaser uses a client system to send the request for information describing the item to be ordered along with its client identifier. The server system determines whether the client identifier for that client system is mapped to a purchaser. If so mapped, the server system determines whether single-action ordering is enabled for that purchaser at that client system. If enabled, the server system sends the requested information (e.g., via a Web page) to the client computer system along with an indication of the single action to perform to place the order for the item. When single-action ordering is enabled, the purchaser need only perform a single action (e.g., click a mouse button) to order the item. When the purchaser performs that single action, the client system notifies the server system. The server system then completes the order by adding the purchaser-specific order information for the purchaser that is mapped to that client identifier to the item order information (e.g., product identifier and quantity). Thus, once the description of an item is displayed, the purchaser need only take a single action to place the order to purchase that item. Also, since the client identifier identifies purchaser-specific order infor-

mation already stored at the server system, there is no need for such sensitive information to be transmitted via the Internet or other communications medium.

FIGS. 1A–1C illustrate single-action ordering in one embodiment of the present invention. FIG. 1A illustrates the display of a Web page describing an item that may be ordered. This example Web page was sent from the server system to the client system when the purchaser requested to review detailed information about the item. This example Web page contains a summary description section 101, a shopping cart section 102, a single-action ordering section 103, and a detailed description section 104. One skilled in the art would appreciate that these various sections can be omitted or rearranged or adapted in various ways. In general, the purchaser need only be aware of the item or items to be ordered by the single action and of the single action needed to place the order. The summary description and the detailed description sections provide information that identifies and describes the item(s) that may be ordered. The shopping cart section provides the conventional capability to add the described item to a shopping cart. The server system adds the summary description, the detailed description, and the shopping cart sections to each Web page for an item that may be ordered. The server system, however, only adds the single-action ordering section when single-action ordering is enabled for that purchaser at that client system. (One skilled in the art would appreciate that a single Web page on the server system may contain all these sections but the single-action ordering section can be selectively included or excluded before sending the Web page to the client system.) This example single-action ordering section allows the purchaser to specify with a single click of a mouse button to order the described item. Once the purchaser clicks the mouse button, the item is ordered, unless the purchaser then takes some action to modify the order. The single-action ordering section contains a single-action ordering button 103a, purchaser identification subsection 103b, and single-action ordering information subsections 103c and 103d. The purchaser information subsection displays enough information so that the purchaser can verify that the server system correctly recognizes the purchaser. To reduce the chances of sensitive information being intercepted, the server system sends only enough information so that the purchaser is confident that the server system correctly identified the purchaser but yet not enough information to be useful to an unscrupulous interceptor. The additional information subsections allow the purchaser to obtain various settings or obtain more information related to the single-action ordering. If the purchaser wants to verify the shipping address, the purchaser can select the “check shipping address” label. In response to this selection, the server system may require the purchaser to perform a “login” so that the identity of the purchaser can be verified before the shipping information is viewed or modified. The server system then sends a Web page to the client system for display and possible modification of the shipping address. In this way, the transmitting of the sensitive shipping address can be avoided unless requested by the verified purchaser.

When the purchaser selects the single-action ordering button, the client system sends a message to the server system requesting that the displayed item be ordered. After the server system processes the message, the server system provides to the client system a new Web page that confirms receipt of the single-action order. FIG. 1B illustrates the display of a Web page confirming a single-action order. The confirming Web page contains essentially the same information as the Web page describing the item (i.e., FIG. 1A)

except that an order confirmation section **105** is displayed at the top of the Web page. The order confirmation section confirms that the order has been placed and provides an opportunity for the purchaser to review and change the single-action order. Alternatively, the confirming Web page can be identical to the Web page describing the item (i.e., FIG. 1A), except that the single-action ordering button is replaced with a message confirming the order.

If a single-action ordering is not currently enabled for the client system but could be enabled, then the server system can generate a Web page like FIG. 1A, except that the single-action ordering button **103a** is replaced by a single-action ordering enable button. Such a replacement button could contain text instructing the purchaser to click on the button to enable single-action ordering. When the purchaser clicks on that button, the server system would send the Web page of FIG. 1A to be displayed. Single-action ordering can be enabled whenever the server system has stored sufficient purchaser-specific order information for that client system to complete a single-action order. If the server system does not have sufficient information, then when the purchaser selects the single-action ordering button, the server system can provide a Web page to collect the additional information that is needed. The server system may require the purchaser to "login" so that the identity of the purchaser can be verified before the single-action ordering is enabled.

To help minimize shipping costs and purchaser confusion, the server system may combine various single-action orders into a multiple-item order. For example, if a purchaser orders one item using the single-action ordering and five minutes later orders another item using the single-action ordering, then those orders may be cost effectively combined into a single order for shipping. The server system combines the single-action orders when their expected ship dates are similar. For example, if one item is immediately available and the other item will be available in one day, then the two single-action orders may be cost-effectively combined. However, if the other item will not be available for two weeks, then the two single-item orders would not be combined. FIG. 1C illustrates the display of a Web page representing four single-action orders that have been combined into two separate multiple-item orders based on the availability of the items. The order information **106** indicates that item **1** and item **2**, which will be available in three or fewer days, have been combined into one order. The order information **107** indicates that items **3** and **4**, which will not be available within one week, are combined into a separate order. In one embodiment, the server system may combine single-action orders that are placed within a certain time period (e.g., 90 minutes). Also, the server system may combine or divide orders when the orders are scheduled for shipment based on the then current availability of the items ordered. This delayed modification of the orders is referred to as "expedited order selection" and is described below in detail.

FIG. 2 is a block diagram illustrating an embodiment of the present invention. This embodiment supports the single-action ordering over the Internet using the World Wide Web. The server system **210** includes a server engine **211**, a client identifier/customer table **212**, various Web pages **213**, a customer database **214**, an order database **215**, and an inventory database **216**. The server engine receives HTTP requests to access Web pages identified by URLs and provides the Web pages to the various client systems. Such an HTTP request may indicate that the purchaser has performed the single action to effect single-action ordering. The customer database contains customer information for vari-

ous purchasers or potential purchasers. The customer information includes purchaser-specific order information such as the name of the customer, billing information, and shipping information. The order database **215** contains an entry for each order that has not yet been shipped to a purchaser. The inventory database **216** contains a description of the various items that may be ordered. The client identifier/customer table **212** contains a mapping from each client identifier, which is a globally unique identifier that uniquely identifies a client system, to the customer last associated with that client system. The client system **220** contains a browser and its assigned client identifier. The client identifier is stored in a file, referred to as a "cookie." In one embodiment, the server system assigns and sends the client identifier to the client system once when the client system first interacts with the server system. From then on, the client system includes its client identifier with all messages sent to the server system so that the server system can identify the source of the message. The server and client systems interact by exchanging information via communications link **230**, which may include transmission over the Internet.

One skilled in the art would appreciate that the single-action ordering techniques can be used in various environments other than the Internet. For example, single-action ordering can also be in an electronic mail environment in which an item is described in an electronic mail message along with an indication of the single action that is to be performed to effect the ordering of the item. Also, various communication channels may be used such as local area network, wide area network, or point-to-point dial up connection. Also, a server system may comprise any combination of hardware or software that can generate orders in response to the single action being performed. A client system may comprise any combination of hardware or software that can interact with the server system. These systems may include television-based systems or various other consumer products through which orders may be placed.

FIG. 3 is a flow diagram of a routine that enables single-action ordering for a customer. To enable single-action ordering, a server system needs to have information about the customer that is equivalent to the purchaser-specific order information. The server system can obtain this information in various ways. First, the server system could ask the customer if they would like to have single-action ordering enabled. If so, then the server system could prompt the customer using a Web page for the purchaser-specific order information. Second, the server system could also save the purchaser-specific order information collected when an order is placed conventionally. The server system could, either automatically or with the customer's assent, enable single-action ordering. In step **301**, the server system retrieves the client identifier that was sent by the client system. In step **302**, the server system updates the client identifier/customer table to indicate that the generated client identifier has been associated with that customer. In step **303**, the server system sets a flag indicating that single-action ordering is enabled for that client identifier and that customer combination. That flag may be stored in the client identifier/customer table. In step **304**, the server system supplies a confirming Web page to the client system. The next time a purchaser attempts to order an item, the client system will supply its client identifier to the server system. If single-action ordering is enabled for that purchaser, the server system will assume that the purchaser is the customer associated with that client identifier in the client identifier/customer table. Thus, a purchaser may not want to allow the

server system to enable single-action ordering if there is a possibility that someone else may use that same client system.

FIG. 4 is a flow diagram of a routine to generate a Web page in which single-action ordering is enabled. When single-action ordering is enabled, the server system generates a Web page describing an item as is conventionally done and then adds a single-action ordering section. In one embodiment, the server system adds partial purchaser-specific order information to the section. This information may include the customer's name, a shipping address moniker selected by the purchaser (e.g., "at home"), and the last five digits of a credit card number or a nickname selected by the purchaser. Such partial information should be the minimum information sufficient to indicate to the purchaser whether or not the server system is using the correct purchaser-specific order information. In step 401, the server system generates a standard shopping cart-type Web page for the item. In step 402, if the single-action ordering flag has been set for the client identifier and customer combination, then the server system continues at step 403, else the server system completes. In step 403, the server system adds the single-action section to the Web page and completes.

FIG. 5 is a flow diagram of a routine which processes a single-action order. When a purchaser performs the single action needed to place an order, the client system notifies the server system. The server system then combines the purchaser-specific order information for the customer associated with the client system with the item order information to complete the order. The single-action order may also be combined with other single-action orders and possibly with other conventionally placed orders to reduce shipping costs. In one embodiment, single-action orders can be combined if they are placed within a certain time period of each other (e.g., 90 minutes). This routine illustrates the combining of the single-action orders into a short-term order (e.g., available to be shipped in less than a week) and a long-term order (e.g., available to be shipped in more than a week). One skilled in the art would appreciate that the single-action orders can be combined in various ways based on other factors, such as size of shipment and intermediate-term availability. In step 501, if the item is expected to be shipped in the short term, then the server system continues at step 502, else the server system continues at step 505. In step 502, if a short-term order has already been opened for the purchaser, then the server system continues at step 504, else the server system continues at step 503. In step 503, the server system creates a short-term order for the purchaser. In step 504, the server system adds the item to the short-term order and continues at step 508. In step 505, if a long-term order has already been opened for the purchaser, then the server system continues at step 507, else the server system continues at step 506. In step 506, the server system creates a long-term order for the purchaser. In step 507, the server system adds the item to the long-term order. In step 508, the server system generates and sends the confirmation and completes.

FIG. 6 is a flow diagram of a routine for generating a single-action order summary Web page. This Web page (e.g., FIG. 1C) gives the user the opportunity to view and modify the short-term and long-term single-action orders. In step 601, the server system adds the standard single-action order information to the Web page. In step 602, if a short-term order is open, then the server system adds the short-term order to the Web page in step 603. In step 604, if a long-term order is open, then the server system adds the long-term order information to the Web page in step 605 and completes.

FIG. 7 is a flow diagram of a routine that implements an expedited order selection algorithm. The goal of the expedited order selection algorithm is to minimize the number of orders sent to each destination so that shipping costs are reduced. A destination may be a specific shipping address plus a specific purchaser's billing details. Orders that are sent to the same destination are known as "sibling orders." The algorithm has two stages. In the first stage, the algorithm schedules for shipment the orders for destinations for which all the sibling orders are filled. An order is filled when all its items are currently in inventory (i.e., available) and can be shipped. For each group of sibling orders, the algorithm combines those sibling orders into a single combined order so that only one order is currently scheduled for shipment to each destination. In the second stage, the algorithm combines and schedules groups of sibling orders for which some of the sibling orders are not filled or partially filled. The algorithm may split each partially filled sibling order into a filled sibling order and a completely unfilled sibling order. The algorithm then combines all the filled sibling orders into a single combined order and schedules the combined order for shipment. If any group has only one sibling order and that order is partially filled, then the algorithm in one embodiment does not split that order to avoid making an extra shipment to that destination.

During the second stage, the algorithm may select and schedule groups of sibling orders in a sequence that is based on the next fulfillment time for an item in the group. The next fulfillment time for a group of sibling orders is the minimum expected fulfillment time of the items in that group of sibling orders. For example, if a group of sibling orders has seven items that are not yet fulfilled and their expected fulfillment times range from 3 days to 14 days, then the next fulfillment time for that group is 3 days. The algorithm first schedules those groups of sibling orders with the largest next fulfillment time. For example, if 6 groups have next fulfillment times of 3, 5, 7, 10, 11, and 14 days, respectively, then the algorithm first selects and schedules the sibling orders in the group with the next fulfillment time of 14 days, followed by the group with the next fulfillment time of 11 days, and so on. By delaying the scheduling of groups with short next fulfillment times, the algorithm increases the chances of additional items becoming available (because of the shortness of the next fulfillment time) and thus combined with the scheduled order.

Steps 701–703 represent the first stage of the expedited order selection algorithm, and steps 704–706 represent the second stage of the expedited selection order algorithm. In steps 701–703, the algorithm loops selecting groups in which all sibling orders are filled and combining the orders. In step 701, the algorithm selects the next group with all sibling orders that are filled. In step 703, if all such groups have already been selected, then the algorithm continues with the second stage in step 704, else the algorithm continues at step 703. In step 703, the algorithm combines and schedules the orders in the selected group and loops to step 701. In step 704, the algorithm selects the next group of sibling orders that has the largest next fulfillment time. In step 705, if all such groups have already been selected, then the algorithm is done, else the algorithm continues at step 706. In step 706, the algorithm combines and schedules the orders in the selected group and loops to step 704. When the expedited order selection algorithm is being performed, new orders and new inventory may be received. Whenever such new orders and new inventory is received, then the algorithm restarts to schedule and combine the new orders as appropriate.

Although the algorithm has been described as having two stages, it could be implemented in an incremental fashion where the assessment of the first and second stages are redone after each order is scheduled. One skilled in the art would recognize that there are other possible combinations of these stages which still express the same essential algorithm.

FIGS. 8A–8C illustrate a hierarchical data entry mechanism in one embodiment. When collecting information from a user, a Web page typically consists of a long series of data entry fields that may not all fit onto the display at the same time. Thus, a user needs to scroll through the Web page to enter the information. When the data entry fields do not fit onto the display at the same time, it is difficult for the user to get an overall understanding of the type and organization of the data to be entered. The hierarchical data entry mechanism allows a user to understand the overall organization of the data to be entered even though the all data entry fields would not fit onto the display at the same time. FIG. 8A illustrates an outline format of a sample form to be filled in. The sample form contains various sections identified by letters A, B, C, and D. When the user selects the start button, then section A expands to include the data entry fields for the customer name and address. FIG. 8B illustrates the expansion of section A. Since only section A has been expanded, the user can view the data entry fields of section A and summary information of the other sections at the same time. The user then enters data in the various data entry fields that are displayed. Upon completion, the user selects either the next or previous buttons. The next button causes section A to be collapsed and section B to be expanded so that financial information may be entered. FIG. 8C illustrates the expansion of section B. If the previous button is selected, then section A would collapse and be displayed as shown in FIG. 8A. This collapsing and expanding is repeated for each section. At any time during the data entry, if an error is detected, then a Web page is generated with the error message in close proximity (e.g., on the line below) to the data entry field that contains the error. This Web page is then displayed by the client system to inform the user of the error. In addition, each of the data “entry” fields may not be editable until the user clicks on the data entry field or selects an edit button associated with the data entry field. In this way, the user is prevented from inadvertently changing the contents of an edit field. When the user clicks on a data entry field, a new Web page is presented to the user that allows for the editing of the data associated with the field. When editing is complete, the edited data is displayed in the data “entry” field. Because the fields of the form are thus not directly editable, neither “named-submit” buttons nor Java are needed. Also, the form is more compact because the various data entry options (e.g., radio button) are displayed only on the new Web page when the field is to be edited.

Although the present invention has been described in terms of various embodiments, it is not intended that the invention be limited to these embodiments. Modification within the spirit of the invention will be apparent to those skilled in the art. For example, the server system can map a client identifier to multiple customers who have recently used the client system. The server system can then allow the user to identify themselves by selecting one of the mappings based preferably on a display of partial purchaser-specific order information. Also, various different single actions can be used to effect the placement of an order. For example, a voice command may be spoken by the purchaser, a key may be depressed by the purchaser, a button on a television remote control device may be depressed by the purchaser, or

selection using any pointing device may be effected by the purchaser. Although a single action may be preceded by multiple physical movements of the purchaser (e.g., moving a mouse so that a mouse pointer is over a button), the single action generally refers to a single event received by a client system that indicates to place the order. Finally, the purchaser can be alternately identified by a unique customer identifier that is provided by the customer when the customer initiates access to the server system and sent to the server system with each message. This customer identifier could be also stored persistently on the client system so that the purchaser does not need to re-enter their customer identifier each time access is initiated. The scope of the present invention is defined by the claims that follow.

We claim:

1. A method of placing an order for an item comprising:
 - under control of a client system,
 - displaying information identifying the item; and
 - in response to only a single action being performed,
 - sending a request to order the item along with an identifier of a purchaser of the item to a server system;
- under control of a single-action ordering component of the server system,
- receiving the request;
- retrieving additional information previously stored for the purchaser identified by the identifier in the received request; and
- generating an order to purchase the requested item for the purchaser identified by the identifier in the received request using the retrieved additional information; and
- fulfilling the generated order to complete purchase of the item
- whereby the item is ordered without using a shopping cart ordering model.
2. The method of claim 1 wherein the displaying of information includes displaying information indicating the single action.
3. The method of claim 1 wherein the single action is clicking a button.
4. The method of claim 1 wherein the single action is speaking of a sound.
5. The method of claim 1 wherein a user of the client system does not need to explicitly identify themselves when placing an order.
6. A client system for ordering an item comprising:
 - an identifier that identifies a customer;
 - a display component for displaying information identifying the item;
- a single-action ordering component that in response to performance of only a single action, sends a request to a server system to order the identified item, the request including the identifier so that the server system can locate additional information needed to complete the order and so that the server system can fulfill the generated order to complete purchase of the item; and
- a shopping cart ordering component that in response to performance of an add-to-shopping-cart action, sends a request to the server system to add the item to a shopping cart.
7. The client system of claim 6 wherein the display component is a browser.
8. The client system of claim 6 wherein the predefined action is the clicking of a mouse button.
9. A server system for generating an order comprising:
 - a shopping cart ordering component; and

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- a single-action ordering component including:
 a data storage medium storing information for a plurality of users;
 a receiving component for receiving requests to order an item, a request including an indication of one of the plurality of users, the request being sent in response to only a single action being performed; and
 an order placement component that retrieves from the data storage medium information for the indicated user and that uses the retrieved information to place an order for the indicated user for the item; and
 an order fulfillment component that completes a purchase of the item in accordance with the order placed by the single-action ordering component.
- 10.** The server system of claim **9** wherein the request is sent by a client system in response to a single action being performed.
- 11.** A method for ordering an item using a client system, the method comprising:
 displaying information identifying the item and displaying an indication of a single action that is to be performed to order the identified item; and
 in response to only the indicated single action being performed, sending to a server system a request to order the identified item
 whereby the item is ordered independently of a shopping cart model and the order is fulfilled to complete a purchase of the item.
- 12.** The method of claim **11** wherein the server system uses an identifier sent along with the request to identify additional information needed to generate an order for the item.
- 13.** The method of claim **12** wherein the identifier identifies the client system and the server system provides the identifier to the client system.

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- 14.** The method of claim **11** wherein the client system and server system communicate via the Internet.
- 15.** The method of claim **11** wherein the displaying includes displaying an HTML document provided by the server system.
- 16.** The method of claim **11** including sending from the server system to the client system a confirmation that the order was generated.
- 17.** The method of claim **11** wherein the single action is clicking a mouse button when a cursor is positioned over a predefined area of the displayed information.
- 18.** The method of claim **11** wherein the single action is a sound generated by a user.
- 19.** The method of claim **11** wherein the single action is selection using a television remote control.
- 20.** The method of claim **11** wherein the single action is depressing of a key on a key pad.
- 21.** The method of claim **11** wherein the single action is selecting using a pointing device.
- 22.** The method of claim **11** wherein the single action is selection of a displayed indication.
- 23.** The method of claim **11** wherein the displaying includes displaying partial information supplied by the server system as to the identity of a user of the client system.
- 24.** The method of claim **11** wherein the displaying includes displaying partial shipping information supplied by the server system.
- 25.** The method of claim **11** wherein the displaying includes displaying partial payment information supplied by the server system.
- 26.** The method of claim **11** wherein the displaying includes displaying a moniker identifying a shipping address for the customer.

* * * * *

No. 01-

IN T LIE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioner,

v.

JOHN D. ASHCROFT, In his official capacity
as Attorney General,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the D.C. Circuit err in holding that Congress has the power under the Copyright Clause to extend retrospectively the term of existing copyrights?

Is a law that extends the term of existing and future copyrights “categorically immune from challenge[] under the First Amendment”?

May a circuit court consider arguments raised by *amici*, different from arguments raised by a party, on a claim properly raised by a party?



**PARTIES TO THE PROCEEDINGS AND
CORPORATE DISCLOSURE STATEMENT**

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit were petitioners Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviestore, Inc., Dover Publications, Inc., and Copyright's Commons, and Janet Reno in her official capacity as Attorney General of the United States and her successor, John D. Ashcroft. None of these parties is either publicly held or affiliated with an entity that is so held. The Eagle Forum Education and Legal Defense Fund, L. Ray Patterson, Laura N. Gasaway, and Edward Walterscheid, as well as the Sherwood Anderson Literary Estate Trust, Sherwood Anderson Foundation, the American Society of Composers, Authors, and Publishers, AmSong, Inc., the Association of American Publishers, Inc., Broadcast Music, Inc., the Motion Picture Association of America, the National Music Publishers' Association, Inc., the Recording Industry Association of America, Inc., and the Songwriters Guild of America appeared as *amici curiae* in the Court of Appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Eric Eldred, Eldritch Press, Higginson Book Company, Jill A. Crandall, Tri-Horn International, Luck's Music Library, Inc., Edwin F. Kalmus & Co., Inc., American Film Heritage Association, Moviestart, Inc., Dover Publications, Inc., and Copyright's Commons respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App. 1a) is reported at 239 F.3d 372. The order denying the petition for rehearing and for rehearing en banc (App. 24a) is reported at 255 F.3d 849. The memorandum opinion of the district court (App. 34a) is reported at 74 F. Supp. 2d 1.

JURISDICTION

The judgment of the United States Court of Appeals was issued on February 16, 2001, and the petition for rehearing and for rehearing *en banc* was denied on July 13, 2001. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Patent and Copyright Clause confers upon 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.

U.S. Const., art. I, § 8, cl. 8.

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." *Id.*, amend. I.

The pertinent provisions of the Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998)

(codified at 17 U.S.C. § 304), and the other copyright laws cited in this petition are reprinted in the appendix. App. 40a - 67a.

STATEMENT OF THE CASE

This case is about the limits on Congress' Copyright Clause power. The Constitution gives Congress the power to "promote the Progress of Science" by granting "exclusive Right[s]" "to Authors" for "limited Times." U.S. Const., art. I, cl. 8. In establishing this power, the Framers intended that copyright terms be, as Justice Story described them, "short," and that after that "short interval," creative works would fall into the public domain "without restraint." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 502, at 402 (R. Rotunda & J. Nowak eds., 1987).

Congress has now found a clever way to evade this simple constitutional command. By repeatedly extending the terms of existing copyrights—as it has eleven times in the past forty years¹—Congress has adopted a practice that defeats the Framers' plan by creating in practice an unlimited term. These extensions were initially brief (one or two years). In 1976, the extension was nineteen years. Pub. L. No. 94-553, §304, 90 Stat. 2572. In the statute at issue in this case, the Sonny Bono Copyright Term Extension Act ("CTEA"), Pub. L. No. 105-298,

¹ See Pub. L. No. 87-668, 76 Stat. 555 (1962); Pub. L. No. 89-142, 79 Stat. 581 (1965); Pub. L. No. 90-141, 81 Stat. 464 (1967); Pub. L. No. 90-416, 82 Stat. 397 (1968); Pub. L. No. 91-147, 83 Stat. 360 (1969); Pub. L. No. 91-555, 84 Stat. 1441 (1970); Pub. L. No. 92-170, 85 Stat. 490 (1971); Pub. L. No. 92-566, 86 Stat. 1181 (1972); Pub. L. No. 93-573, Title I, § 104, 88 Stat. 1873 (1974); Pub. L. No. 94-553, § 304, 90 Stat. 2572 (1976); Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998). This pattern is radically different from the history of copyright during the Republic's first 150 years. In the first hundred years of copyright, Congress extended the term of copyrights once. Act of February 2, 1831, §§ 1-2, 4 Stat. 36. In the next fifty years, Congress again extended the terms only once. Act of March 4, 1909, § 4, 35 Stat. 1075, 1076. While these earlier extensions also applied to existing copyrights, the first extension in 1831 cannot be attributed to the Framers (no Framers sat in Congress in 1831), and two extensions in 150 years cannot be held to be a constitutionalized practice.

112 Stat. 2827 Congress has extended the term of existing and future copyrights by twenty years. *Id.* § 102(b).

Because of the CTEA, works originally authored in 1923 that would have fallen into the public domain in 1998 could now remain under copyright until 2019—a term of 95 years. And because of the CTEA, future copyrights will now extend for the life of the author plus 70 years (which for an author who produced in the pattern of Irving Berlin would mean a term of 140 years), or in the case of works for hire, 95 years. These terms contrast against the Framers’ initial term of just 14 years, renewable once only if the author survived. Act of May 31, 1790, § 1, 1 Stat. 124.

Petitioners are various individuals and businesses that rely upon the public domain for their livelihood. Some, such as the lead plaintiff Eric Eldred, build free Internet libraries based upon public domain works; others, such as Dover Press, publish public domain works in high-quality commercial editions. All depend upon a rich public domain to support their work, and many make their work freely available to others.

In January 1999, petitioners filed a facial challenge to the CTEA, arguing (a) that its retrospective aspect (extending the terms of existing, or “subsisting,” copyrights by twenty years) exceeded Congress’ power under the Copyright Clause, violated the First Amendment, and violated the public trust doctrine, and (b) that its prospective aspect (extending the terms of future copyrights by twenty years) violated the First Amendment. The United States moved for judgment on the pleadings, and petitioners cross-moved for summary judgment. The District Court upheld the statute and dismissed the case. App. 34a. Petitioners appealed the rulings on its Copyright Clause and First Amendment claims.

The Court of Appeals, over the dissent of Judge Sentelle, affirmed the District Court’s judgment. App. 1a. The court first rejected petitioners’ First Amendment argument. While the court held that petitioners had standing to raise a First Amendment challenge to both the prospective and retrospective aspects of the

CTEA, App. 4a, the court held the substance of petitioners' claim barred by circuit precedent and this Court's decision in *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985). App. 5a-7a. According to the circuit court, *Harper & Row* established that there is no "first amendment right to exploit the copyrighted works of others." App. 8a. By challenging a statute that extends the term of subsisting copyrights, petitioners, the court held, were "by definition" asserting a "first amendment right to exploit the copyrighted works of others." *Id.* Petitioners' claim was therefore indistinguishable from the defendant's claim in *Harper & Row*. App. 5a-8a. The circuit court thus transformed the narrow holding of *Harper & Row* into a general rule that "copyrights are categorically immune from challenges under the First Amendment." App. 6a. (interpreting D.C. Circuit authority). (The court did not explain how its reasoning would apply to petitioners' First Amendment challenge to future copyrights, which, because applying to works that have not yet been created, "by definition" cannot be the assertion of a "first amendment right to exploit the copyrighted works of others.")

The court also rejected petitioners' Copyright Clause claims. First, the court rejected petitioners' argument that extending the term of subsisting copyrights would violate the "originality" requirement of the Copyright Clause, which limits copyright to works that are "original." *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991). Though the court acknowledged that extending a copyright to a work that had fallen into the public domain would violate the "originality" requirement, App. 8a, it held that extending the terms of subsisting copyrights would not. App. 8a-9a.

Second, the court rejected petitioners' argument that the "limited Times" condition should be read in light of the Copyright Clause's grant of power—"To promote the Progress of Science." So understood, retrospective extensions would not be "limited" in a constitutional sense. To bar retrospective extensions as unlimited in a constitutional sense. App. 10a. Instead, the court held that the grant of power "To promote the Progress of Science" does not restrict the scope of Congress'

power *at all*. The circuit court therefore interpreted the “limited Times” condition independently of the requirement that Congress “promote the Progress of Science,” and held that an extension (or multiple extensions) of a “limited” term was permissible so long as the extension itself was limited. App. 10a-14a.

Finally, in rejecting petitioners’ Copyright Clause claim, the court refused to consider an argument of *Amicus* Eagle Forum that the “promote [] Progress” requirement is an independent constraint on Congress’ power. The court held instead that it should not reach *Amicus*’s argument because petitioners had not expressly adopted it in their brief. App. 11a.² In response to Judge Sentelle’s two dissents, however, the court stated that, had it reached the argument of *Amicus*, it would have rejected that argument. App. 11a, App. 25a. That argument has therefore not been waived in this Court. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (“[i]t suffices for our purposes that the court below passed on the issue presented”).

Judge Sentelle dissented from the panel’s decision with respect to the Copyright Clause claims. App. 16a. Following this Court’s approach in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), Judge Sentelle reasoned that a court must find the “outer limits” to a power granted Congress. To find this “outer limit,” Judge Sentelle asked whether “the rationale offered in support of [the extension of power] has any stopping point.” App. 16a (Sentelle, J., dissenting). In this case, the answer was “no.” The government had argued that any extension would be constitutional so long as it was “limited.” App. 18a. That

² Petitioners expressly endorsed the argument of *Amicus* at oral argument before the D.C. Circuit. Tr. of Oral Arg. 17-18; App. 29a. In light of circuit authority, petitioners did not believe it was necessary to view the “grant of power” as an independent “substantive” constraint on Congress’ Copyright authority. App. 11a. Petitioners continue to agree with Eagle Forum that the CTEA is unconstitutional under either the narrow rule that petitioners have advanced, or under the broader argument endorsed by Eagle Forum.

“rationale,” Judge Sentelle reasoned, led to an “unlimited view of the copyright power”—just the same sort of “unlimited view” that this Court had “rejected with reference to the Commerce Clause in *Lopez*.” App. 17a.

Instead, Judge Sentelle maintained that the proper limit to Congress’ power is found by “returning to the language of the clause itself”—in particular, its “grant of power.” Interpreting that language, Judge Sentelle wrote:

[I]t is impossible that the Framers of the Constitution contemplated permanent protection, either directly obtained or attained through the guise of progressive extension of existing copyrights. . . . Extending existing copyrights is not promoting useful arts, nor is it securing exclusivity for a limited time.

App. 18a-19a.³ Thus, Judge Sentelle concluded, a law that purports to extend the term of a subsisting copyright is beyond Congress’ Copyright Clause power. App. 19a.

Petitioners filed for rehearing and rehearing *en banc*. The panel declined rehearing, and the D.C. Circuit denied rehearing *en banc*. App. 24a. Judge Sentelle, joined by Judge Tatel, dissented from the denial of rehearing *en banc*. Judge Sentelle argued that *en banc* review was merited both because the rule of the panel “effectively eliminates any role for *amicus curiae* in the practice of this circuit,” App. 28a (Sentelle, J., dissenting), and, “more importantly,” because “the Court’s construction of the Copyright Clause . . . renders Congress’ power under Art. I, § 8, cl. 8, limitless despite express limitations in the terms of that clause.” App. 31a. As Judge Sentelle wrote,

³ See also Jane C. Ginsburg, *Copyright Legislation for the “Digital Millennium,”* 23 Colum.-VLA J.L. & Arts 137, 171 (1999) (extending term of existing works “cannot enhance the quantum of creativity from the past, but it can compromise the creativity of the future, by delaying for twenty years the time at which subsequent authors may freely build on these works.”); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 329 n.192 (1970) (arguing that an “additional incentive to produce is irrelevant”).

Once a work is published . . . extending the copyright term does absolutely nothing to induce further creative activity by the author—and how could it? The work is already published [and a] simple finding by Congress to the contrary is not sufficient to demonstrate that the exercise of that power is “necessary and proper.”

Id.

REASONS FOR GRANTING THE WRIT

As this Court has made increasingly clear, Congress’ power is constrained by both express and implied limitations in the Constitution’s grants of power. These constraints can inhere “in the very language” of the grant itself. *United States v. Lopez*, 514 U.S. 549, 553 (1995) (commerce clause); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (“the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power”). They can be found in the express terms conditioning particular grants of constitutional power. *Railway Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457 (1982) (uniformity requirement in bankruptcy clause). Or they can flow from “presupposition[s]” that the Constitution “confirms.” *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) (11th Amendment).

The power at issue in this case is also and likewise constrained. Congress’ power to grant “exclusive right[s],” incident to the power “To promote the Progress of Science,” is expressly limited by the text of the Copyright and Patent Clause. It is expressly limited by the First Amendment. And it is impliedly limited to works that are “original.” *Feist Publ’ns v. Rural Tel. Sen. Co.*, 499 U.S. 340, 345 (1991).

These limitations were established by the Framers to assure a rich public domain, and to avoid the temptation to corruption that state-backed monopolies (as the Framers understood copyrights to be⁴) inevitably invite. They thus effected a regime that requires

⁴ See 1 THE REPUBLIC OF LETTERS 512, 566 (James Morton Smith ed., 1995). Jefferson was strongly opposed to the Constitution’s grant of power to

that monopolies over speech only be granted as a *quid pro quo* for producing something new—as this Court described it, for producing something that “add[s] to the sum of useful knowledge.” *Graham v John Deere Co.*, 383 U.S. 1, 6 (1966). See also *Brenner v. Manson*, 383 U.S. 519, 534 (1966) (describing “[t]he basic *quid pro quo* contemplated by the Constitution”). See generally Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1162-63 (2000) (describing “*quid pro quo* principle”).

The question in this case is whether this same power to grant monopolies as a *quid pro quo* for creating original works can also be used to grant monopolies to “something already in existence,” *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)—*quid pro nihilo*. The court below held that it can, finding that extensions of subsisting terms were constitutional so long as each extension is limited. App. 9a-11a.

This holding nullifies the Framers’ plan. By abstracting the term “limited Times” from the full text of the Copyright Clause, the circuit court has rendered meaningless the Framers’ plain and express intent to restrict the duration of monopolies over speech. Under the authority of this case, Congress can now continue the

Congress to create monopolies. As he wrote to Madison, “It is better . . . to abolish . . . Monopolies, in all cases, than to do it in any The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.” 13 THE PAPERS OF THOMAS JEFFERSON 442-43 (Julian P. Boyd ed., 1956). Madison’s response concedes the general fear. “With regard to Monopolies they are justly classed among the greatest nuisances in Government. But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?” *Id.* at 21. See also Paul J. Heald and Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1150, 1160-62 (2000) (describing the suspect nature of a grant of power to secure monopolies).

practice of extending the term of subsisting copyrights without limit. It can thus achieve a perpetual copyright term “on the installment plan.” Statement of Professor Peter Jaszi, *The Copyright Term Extension Act of 1995: Hearings on S.483 Before the Senate Judiciary Comm.*, 104th Cong. (1995), available at 1995 WL 10524355, at *6.

The “installment plan” was not the Framers’ plan, and this Court should grant review to reverse this holding—both because of the significance of the issues at stake, especially as it they affect the emergence of the Internet, and because of the conflicts in the lower courts that this case evinces about the nature of Congress’ Copyright Power.

Because of the CTEA, an extraordinary range of creative invention will be blocked from falling into the public domain until at least 2019—or longer if Congress extends the copyright term again. Thus, just at the time that the Internet is enabling a much broader range of individuals to draw upon and develop this creative work “without restraint,” Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 502, at 402, extensions of copyright law are closing off this medium to a broad swath of our common culture.⁵

⁵ The significance of the CTEA is only multiplied by the other changes that Congress has made to copyright law. Because protection is automatic, and there is no longer any requirement of renewal, *see* Pub. L. 102-307, title I, § 102(a) & (d), 106 Stat. 264, 266 (repealing renewal requirement), an extraordinary range of creative work now falls into a regulatory black hole—unusable because the “owners” of this property are unknown or unknowable, and because the law criminalizes the use of such material without the copyright owner’s permission. *See* No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678 (“NET Act”), amending 17 U.S.C. § 506(a). These changes dramatically affect the work of artists, researchers, and archivists, as well as commercial entities that draw upon and reuse aspects of our culture. Rather than the rich public domain the Framers envisioned, upon which any may draw “without restraint,” the effect of these changes is to create a mine field of regulations, extending copyright more broadly than at any time in our history. *See also* Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 Stan. L. Rev. 1, 13-20 (2001) (describing how the

This Court should also grant review to resolve the confusion among the circuits both about the scope of Congress' Copyright Clause and about the interaction between Congress' copyright power and the First Amendment. The decision below conflicts with the Fifth Circuit's interpretation of Congress' copyright power, and reveals tensions with other circuits about the same power. The decision also conflicts with the Eleventh Circuit's approach to resolving alleged conflicts between the Copyright Clause and the First Amendment. This case provides the Court with an opportunity to resolve both dimensions of this confusion in authority.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS ABOUT THE LIMITS ON CONGRESS' POWER UNDER THE COPYRIGHT AND PATENT CLAUSE.

The Copyright and Patent Clause 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.

U.S. Const., art. I, § 8, cl. 8.

As this Court has held, the Copyright Clause is “both a grant of power and a limitation.” *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (“a grant of power and certain limitations upon the exercise of that power”). The “grant of power,” as Judge Sentelle described it in dissent below, is the power “[t]o promote the progress of science and useful arts.” App. 16a (Sentelle, J., dissenting). The means for exercising that power are those specified in the “by” clause—through “exclusive Right[s]” to “Authors” for their “Writings” for “limited Times.”

The issue in this case is whether this “grant of power” also constrains Congress' Copyright Clause power—as this Court has

expansion of copyright law should alter the “definitional balance” with the First Amendment).

held, for example, of Section 5 of the Fourteenth Amendment. *Kimel v. Florida Bd. of Regents*, 528 U.S. at 81 (“the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power”). Petitioners have argued that, at a minimum, the “promote [] Progress” requirement should inform the interpretation of the balance of the Clause, including the “limited Times” condition. *Cf. Wheaton v. Peters*, 33 U.S. (8 Peters) 591, 661 (1834) (Copyright Clause to be interpreted “with the words and sentences with which it stands connected”). So understood, a term is “limited” if it can reasonably be said to “promote the Progress of Science.” Retrospective terms, which grant protection for work already in existence, could not in this sense be “limited.”

Amicus Eagle Forum advanced a more expansive claim—that the “grant of power” should itself limit Congress’ copyright authority, independent of the limitations expressed in the “by” clause. Under this reading, even if a copyright term were properly “limited,” it must also be shown to “promote[] Progress.”

The Court of Appeals rejected both arguments. Considering itself bound by its own circuit precedent, *Schnapper v. Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981), the court rejected the argument that “the introductory language of the Copyright Clause constitutes a limit on congressional power.” App. 10a. The D.C. Circuit thereby “erase[d],” as Judge Sentelle wrote in dissent to the denial of rehearing *en banc*, “half of the Copyright Clause—indeed, that half which defines the very power bestowed.” App. 33a.

The Court of Appeals’ holding contradicts this Court’s authority, conflicts with the rule of the Fifth Circuit, and is in tension with the approach of at least four other circuits.

A. The Decision Below Conflicts With Authority Of This Court

As petitioners have argued, this Court has expressly held that the Patent and Copyright Clause is “both a grant of power and a limitation.” *Graham*, 383 U.S. at 5. The “limitation” referenced

in *Graham*, however, is not just the express limitation within the “by” clause—that terms are to be “limited,” or that copyrights are to be granted to “Authors” for their “Writings.” Instead, this Court has recognized important substantive limitations on Congress’ Copyright Clause power that can *only* be understood to flow from the “promote the Progress of Science” requirement. The holding by the court below that “the introductory language” imposed no “limit” on Congress’ Copyright Clause power contradicts this authority.

1. In *Graham* this Court explained that it would be beyond Congress’ constitutional power to grant a patent to a work in the public domain. As the Court wrote, “Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.” 383 U.S. at 6. The court below indicated the same principle would limit Congress’ power, “*mutatis mutandis*,” with respect to copyrights. App. 9a. *Accord Bonito Boats*, 489 U.S. at 146; *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823 (10th Cir. 1993).⁶

In both cases, however, the only possible source of such a restriction is the “promote the Progress of Science” requirement itself. There is no “public domain clause” in the Constitution. Works in the public domain clearly have “Authors”; they certainly include “Writings”; and Congress could plainly authorize such public domain copyrights for a “limited time.” Absent the requirement that Congress “promote the Progress of Science,” there would be no Copyright Clause reason to restrict Congress’ power over the public domain. Yet this Court has clearly and repeatedly indicated that such a power is beyond Congress’ Patent and Copyright Clause power. *See, e.g.*,

⁶ The court below so indicated, even though the government informed the court during oral argument that Congress has purported to remove copyrighted works from the public domain. *See* Tr. of Oral Arg. 37-38, referring to the Uruguay Round Agreements Act, Pub. L. No. 103-465, § 514 (codified at 17 U.S.C. §§ 104A, 109(a)).

Graham, 383 U.S. at 6; *Bonito Boats*, 489 U.S. at 146. That conclusion is flatly inconsistent with the holding below.⁷

Likewise with the requirement of “originality”: As this Court has held, the only “Writings” that Congress may authorize for copyright protection are those that are “original.” *Feist Publ’ns*, 499 U.S. at 345. “Originality” is a constitutional requirement—the “*sine qua non* of copyright. . . .” *Id.* As the *Trade-Mark Cases* held, the patents and copyrights clause power cannot extend to “something already in existence,” 100 U.S. at 94 (1879), only something new.

But the Patent and Copyright Clause does not mention the term “original,” and there is no doubt that under a literal reading of the term “Writings,” “Writings” could include original as well as non-original works. If there is a constitutional limitation on the scope of the “Writings” to which Congress may extend copyright, then this limitation must derive from the “promote the Progress of Science” requirement. There is no other textual source for this restriction on Congress’ otherwise plenary power. This conclusion again, however, flatly contradicts the conclusion of the Court of Appeals below.

These two lines of authority compel the conclusion that the “promote the Progress of Science” requirement constrains Congress’ power under the Copyright Clause. Whether it constrains Congress’ power by narrowing the scope of the terms within the “by” clause, including the “limited Times” condition, or, as *Amicus* Eagle Forum argued, by independently constraining Congress’ copyright authority, the conclusion of the court below to the contrary is clearly wrong. The D.C. Circuit’s opinion has rendered the “To promote the Progress of Science” requirement of the Copyright Clause mere “surplusage.” *Lopez*, 514 U.S. at 589 (Thomas, J., concurring). The Framers and this Court clearly intended that it be much more.

⁷ The Court of Appeals recognized the tension between the circuit authority, *Schnapper v. Foley*, 667 F.2d 102 (D.C. Cir. 1981), and this Court’s opinion in *Graham*. See Tr. of Oral Argument 29-31.

B. The Decision Below Conflicts With The Rule Of The Fifth Circuit And With Authority From Other Circuits

The decision below also contradicts the rule of the Fifth Circuit, and is in tension with the approach of at least four other circuits.

In *Mitchell Brothers Film Group v. Cinema Adult Theater*, 604 F.2d 852 (5th Cir. 1979), the Fifth Circuit addressed the question whether Congress could constitutionally grant copyrights to obscene works. Cinema Adult Theater argued that obscene works did not “promote the progress of Science and useful Arts,” and were therefore not authorized under Congress’ power “to promote the Progress of Science.” *Id.* at 860.

The Fifth Circuit rejected Cinema Adult Theater’s argument—but not because it believed Congress free of any constraint from the “promote[] Progress” requirement. To the contrary, the Court expressly acknowledged that while the “words of the copyright clause” do not require that *individual* copyrights be shown to “promote science or useful arts,” they plainly do “require that *Congress* shall promote those ends.” *Id.* at 859 (emphasis added) (citations omitted). And while the Court recognized that Congress has broad discretion in selecting the means that it believes may promote progress, the Fifth Circuit clearly recognized that “Congress’ power under this Clause is *limited to action that promotes the useful arts.*” *Id.* at 860 (emphasis added).

The Seventh Circuit has embraced the same rule. In interpreting the scope of a claimed patent monopoly, then-Judge Stevens wrote for the Seventh Circuit,

The source and purpose of the statutory monopoly must be kept in mind. “An author’s ‘Writing’ or an inventor’s ‘Discovery’ can, in the constitutional sense, only extend to that which is his own. It may not be broadened to include matters within the public domain. *The congressional power to grant monopolies for ‘Writings and Discoveries’ is likewise*

limited to that which accomplishes the stated purpose of promoting 'the Progress of Science and useful Arts.'”

Frantz Mfg. Co. v. Phenix Mfg. Co., 457 F.2d 314, 327 n.48 (7th Cir. 1972) (emphasis added)(quoting *Lee v. Runge*, 404 U.S. 887, 890 (1971) (Douglas, J., dissenting from denial of certiorari)). The Seventh Circuit also followed a similar principle in a subsequent case interpreting the scope of joint authorship under the Copyright Act. That question should be resolved, the court held, by “focus[ing] on how well the test promotes the primary objective of the Act. This objective is not to reward an author for her labors, but ‘to promote the Progress of Science and useful Arts.’” *Erickson v. Trinity Theatre*, 13 F.3d 1061, 1069 (7th Cir. 1994). See also *J.L. Mott Iron Works v. Clow*, 82 F. 316, 320 (7th Cir. 1897) (“Under the constitution, the power lodged with congress is not unlimited, but is restricted to the promotion of the progress of science and useful arts.”).

The Ninth Circuit has followed the same method to narrow the scope of joint authorship. In *Aalmuhammed v. Lee*, 202 F.3d 1227, 1235 (9th Cir. 1999), the court indicated that “[t]he Constitution establishes the social policy that our construction of the statutory term ‘authors’ carries out. The Founding Fathers gave Congress the power to give authors copyrights in order ‘to promote the progress of Science and useful arts.’”

The Second Circuit, too, has followed this method to guide the interpretation of the scope of “fair use.” “Fair use” is a limitation on the scope of copyright. The Second Circuit has interpreted this limitation in light of constitutional purpose: “to serve [the] purpose [‘to promote the Progress of Science’], ‘courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder’s interest in a maximum financial return to the greater public interest in the development of art, science, and industry.’” *Rosemont Enter. Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966)(citing *Berlin v. E.C. Pubs.*, 329 F.2d 541, 544 (2d Cir. 1964) (Kaufman, J.)).

Finally, the Eleventh Circuit has applied a similar method to interpret the scope of Section 201(c) of the Copyright Act, governing contributions to collective works. It is in light of “fundamental principles,” the court wrote, that the words of the Copyright Act are to be interpreted. *Greenberg v. Nat’l Geographic Soc’y*, 244 F.3d 1267, 1271 (11th Cir. 2001) (“In all cases involving copyright law, we understand that any interpretation and application of the statutory law must be consistent with the copyright clause of the United States Constitution . . . That clause is a limitation, as well as a grant, of the copyright power.”) (citing Heald and Sherry, *supra*, 2000 U. Ill. L. Rev. 1119 (arguing the grant of power in the Copyright Clause constitutes a limit on Congress’ copyright power, and concluding that retrospective extensions of copyright violate the Copyright Clause)).

The rule of the Fifth Circuit, and the approach of the Second, Seventh, Ninth, and Eleventh, is flatly inconsistent with the D.C. Circuit’s conclusion that “the introductory language of the Copyright Clause constitutes [no] limit on congressional power.” App. 10a. The conclusion of the Fifth Circuit is also inconsistent with the apparent rule of the Eighth Circuit. In a case that predates *Feist*, the Eighth Circuit held:

[A]lthough the promotion of artistic and scientific creativity and the benefits flowing therefrom to the public are purposes of the Copyright Clause, *those purposes do not limit Congress’s power to legislate in the field of copyright.*

Hutchinson Tel. Co. v. Fronteer Directory Co., 770 F.2d 128, 130 (8th Cir. 1985) (emphasis added).

This conflict will have significance far beyond the narrow issues of this case. Whether Congress is constrained by the plain language of the Copyright Clause will determine the scope of Congress’ power to pass legislation to protect databases, or further to withdraw work from the public domain. Relying upon the view that the Constitution does not constrain it, some in Congress are presently pushing to expand the monopoly protections copyright law grants, without concern for whether

these expansions truly “promote [] Progress.” *See, e.g.*, The Collections of Information Antipiracy Act, H.R. 354, 106th Cong., 1st Sess. (1999) (extending copyright-like protection to facts within databases, *Feist* notwithstanding); Yochai Benkler, *Constitutional Bounds of Database Protection*, 15 Berkeley L. & Tech. J. 535, 575-87 (2000). Thus, waiting to clarify this conflict will only increase the costs of resolving it later.

By ignoring the “grant of power” and the purposes expressed in that grant, Congress has found a way to evade the Framers’ clear intent. The D.C. Circuit has ratified that evasion. And Congress will now continue to act in reliance upon this ratification.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT IN THE CIRCUITS ABOUT THE RELATIONSHIP BETWEEN CONGRESS’ COPYRIGHT POWER AND THE RESTRICTIONS OF THE FIRST AMENDMENT.

Petitioners have raised a First Amendment challenge to both the retrospective and prospective aspects of the CTEA. They argue that both aspects are content neutral regulations of speech and the press, and therefore subject to intermediate scrutiny. Under intermediate scrutiny, petitioners submit, neither the retrospective nor the prospective extension of the copyright term “advances important governmental interests” without burdening “substantially more speech than necessary.” *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 189 (1997). *See also Bartnicki v. Vopper*, 121 S. Ct. 1753, 1760-61 (2001); *United States v. O’Brien*, 391 U.S. 367, 382 (1968).

The D.C. Circuit, however, refused to apply ordinary First Amendment analysis to the CTEA, holding instead that *Harper & Row* in effect established a special First Amendment “immunity” for copyright legislation. App 5a-8a. Under the D.C. Circuit’s rule, there can be no First Amendment challenge to a copyright statute, as any challenge to a copyright statute is simply a demand for access to particular copyrighted works. Such a demand, the circuit court held, was rejected in *Harper &*

Row. Thus it follows, the court concluded, that “copyrights are categorically immune from challenges under the First Amendment.” App. 6a.

The D.C. Circuit’s application of *Harper & Row* is clearly mistaken. It is also in direct conflict with the approach of the Eleventh Circuit. And, more importantly, it evinces a confusion that *Harper & Row* has engendered about whether the First Amendment imposes any constraint on Congress in its enactment of legislation under the Copyright Clause.⁸ This conflict is another reason this Court should grant review in this case.

A. The D.C. Circuit Has Mistakenly Expanded The Reach Of This Court’s Decision In *Harper & Row*

In *Harper & Row*, this Court was asked to craft a public figure exception in the enforcement of a copyright. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 555-56 (1985). Harper & Row had an exclusive right to President Gerald Ford’s autobiography. The Nation Magazine “scooped” part of that work without the copyright owner’s consent. In defending against the enforcement of the copyright, The Nation argued that because the matter was of such public importance, First Amendment interests should trump Harper & Row’s copyright interests. The Nation would therefore be excused from liability for trespassing on Harper & Row’s right. The Nation did not argue that the copyright was invalid, or that copyright law could not extend to works such as this. It simply demanded that the First Amendment give it the right to trespass on the copyright owner’s property.

This Court rejected The Nation’s argument. As the Court explained, copyright functions as an “engine of free expression,” *id.* at 558, by creating an incentive to produce speech that

⁸ Professor Netanel attributes this confusion both to a misreading of the scope of *Harper & Row* and to a failure of courts to account for changes in First Amendment doctrine that would affect the interaction between the Copyright Clause and the First Amendment. *See* Netanel, *supra*, at 7-12.

otherwise would not be produced. If a work lost its copyright protection simply because it became important, that would destroy much of the speech-inducing effect that copyright law produces. Thus, so long as copyright law regulates expression rather than ideas, *Harper & Row* holds that there is no First Amendment right to trespass on an otherwise legitimate copyright. *Id.* at 558-59. Private owners of intellectual property protected by copyright are able to exercise their rights free of the restrictions of the First Amendment, just as private owners of real property are generally able to exercise their rights free of the restrictions of the First Amendment. *Cf. Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (no first amendment right to trespass on real property).

The overwhelming majority of courts applying the *Harper & Row* rule have done so in the same factual context: In these cases, *Harper & Row* is relied upon to deflect a purported First Amendment right of access to otherwise legitimately copyrighted material.⁹

⁹ See, e.g., *Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1115-16 (9th Cir. 2000) (infringement case rejects First Amendment defense) (citing *Harper*); *Religious Tech. Ctr. v. Henson*, 1999 U.S. App. Lexis 11828, at *3 (9th Cir. 1999) (in “copyright infringement action” court relies upon *Harper* to hold “the Copyright Act already embrace[s] First Amendment concerns”); *Cable/Home Comm. Co. v. Network Prod., Inc.*, 902 F.2d 829, 850 (11th Cir. 1990) (rejecting “First Amendment affirmative defense regarding . . . copyright . . . violations,” court held “first amendment is not a license to trammel on legally recognized rights in intellectual property”) (citing *Harper*) (citations omitted); *New Era Publ’ns v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) (in injunction action to stop publication of allegedly infringing work, court rejects First Amendment defense: “Our observation that the fair use doctrine encompasses all claims of first amendment in the copyright field . . . never has been repudiated.”) (citing *Harper*); *United Video v. FCC*, 890 F.2d 1173, 1190-91 (D.C. Cir. 1989) (court rejects petitioners’ demand for access to copyrighted works “paid for and authorized under the compulsory licensing scheme” of the Copyright Act, holding “cases in which a first amendment defense is raised to a copyright claim do not utilize [intermediate scrutiny]”) (citing *Harper*); *Los Angeles Times v. Free Republic*, 2000 U.S. Dist. Lexis 5669, at *78 (C.D. Ca. 2000) (rejecting defendant’s First Amendment defense to copyright infringement,

The court below has now expanded this unexceptional holding to cover any First Amendment challenge within the domain of copyright—not just to the enforcement of a particular copyright, but also to a challenge of the statutes under which copyrights are established. Because there is no First Amendment right to trespass, the court below has held that there can be no First Amendment right to challenge the legal rule under which the property rights are set.

court held “courts have generally interpreted this discussion in *Harper & Row* to mean that First Amendment considerations are subsumed within the fair use analysis”); *Wojnarowicz v. American Family Ass’n*, 745 F. Supp. 130, 146-47 (S.D.N.Y. 1990) (in infringement action, court rejects First Amendment defense) (citing *Harper*); *Consumers Union of United States v. New Regina Corp.*, 664 F. Supp. 753, 761 n.10 (S.D. N.Y. 1987) (in infringement action, court rejects First Amendment defense) (citing *Harper*). Other courts have reached the same conclusion without applying *Harper* directly. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (in infringement action, “First Amendment concerns in copyright are allayed by the presence of the fair use doctrine”); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 74-75 (2d Cir. 1999) (rejecting First Amendment defense to injunction enforcing copyright); *Twin Peaks Prod., Inc. v. Publ’ns Int’l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993) (in an infringement action, court concludes “the fair use doctrine encompasses all claims of first amendment in the copyright field”); *Fisher v. Dees*, 794 F.2d 432, 434 n.2 (9th Cir. 1986) (rejecting First Amendment defense for parodists); *Roy Export Co. v. CBS*, 672 F.2d 1095, 1099-1100 (2d Cir. 1982) (in infringement action, court concludes “no Circuit that has considered the question . . . has ever held that the First Amendment provides a privilege in the copyright field distinct from the accommodation embodied in the “fair use” doctrine); *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir. 1979) (in infringement action, “first amendment is not a license to trammel on legally recognized rights in intellectual property”); *Wainwright Sec. Inc. v. Wall Street Transcript Co.*, 558 F.2d 91, 95 (2d Cir. 1977) (in infringement action, court rejects First Amendment defense); *Georgia Television Co. v. TV News Clips of Atlanta*, 718 F. Supp 939, 947 (N.D. Ga. 1989) (in infringement action, court holds “conflicts between interests protected by the first amendment and copyright laws thus far have been resolved by application of the fair use doctrine”) (citations omitted); *Walt Disney Co. v. Powell*, 698 F. Supp. 10, 12 (D.D.C. 1988), *vacated in part*, 897 F.2d 565 (D.C. Cir. 1990) (First Amendment “gives no right to steal another’s statutorily protected intellectual property”).

That conclusion cannot follow—as the D.C. Circuit’s own authority in the context of abortion protester cases shows.¹⁰ In those cases, the D.C. Circuit has rightfully held that there “is no general First Amendment right to trespass.” *NOW v. Operation Rescue*, 37 F.3d 646, 655 (D.C. Cir. 1994). But the absence of a “First Amendment right to trespass” cannot mean that an abortion protester cannot challenge the law or injunction establishing the property right that is allegedly trespassed upon. State action *establishing* property rights is fully subject to First Amendment scrutiny, even if private action *exercising* these state established rights is subject to a narrower First Amendment rule. The D.C. Circuit’s conclusion to the contrary is simply mistaken. *Cf. Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 737 (1996) (in reversing the D.C. Circuit’s finding of no state action, this Court held that, though editorial decisions by cable system operators are not themselves state action, a statute giving operators such discretion is fully subject to First Amendment review).

¹⁰ That it does not follow can also be seen in the source of the *Harper & Row* rule itself. As many have noted, this Court in *Harper & Row* drew its “definitional balance” from the work of noted copyright scholar Melville Nimmer. *See e.g.*, Netanel, *supra*, at 11-12. Nimmer had first proposed this “balance” between the First Amendment and copyright in an important article published in 1970. Melville B. Nimmer, *Does Copyright Abridge The First Amendment Guarantees of Free Speech And Press?*, 17 UCLA L. REV. 1180 (1970). In that article, Nimmer argued that so long as copyright protected expression only, there should ordinarily be no First Amendment claim that could be raised against the assertion of a copyright. *See id.* at 1197-99.

But in the very same article, Nimmer goes on to address the First Amendment interests affected by a retrospective extension of copyright. He concluded, as petitioners have argued, that such an extension would violate the First Amendment. *Id.* at 1194-95. His “definitional balance” therefore cannot be read to preclude this conclusion.

B. The Opinion Below Conflicts With The Rule Of The Eleventh Circuit.

The decision below, refusing to apply ordinary First Amendment analysis to a statute modifying the Copyright Act, is in direct conflict with the Eleventh Circuit.

In *CBS Broadcasting Inc. v. EchoStar Communications Corp.*, No. 00-15378, 2001 WL 1081599 (11th Cir. Sept. 17, 2001), the Court of Appeals for the Eleventh Circuit upheld a provision of the Satellite Home Viewer Act, 17 U.S.C. § 119, and Satellite Home Viewer Improvement Act of 1999 (“Improvement Act”), Pub. L. No. 106-133, § 1001 *et seq.*, 113 Stat. 1537, 515 (West Supp. 2001), against a First Amendment challenge. The Improvement Act gave satellite carriers the right to a compulsory license for network programming delivered to private homes in “unserved households.” *Id.* at *1. Defendant EchoStar challenged the statutory scheme, arguing that the distinction the statute drew was content based, and unjustified under the First Amendment.

The Eleventh Circuit rejected EchoStar’s First Amendment claim. Unlike the D.C. Circuit, however, the Eleventh Circuit reached this conclusion by applying ordinary First Amendment analysis to the challenged statute. The court treated the Improvement Act as a content neutral regulation of speech. *Id.* at *14. It thus proceeded to apply intermediate scrutiny to that content neutral copyright regulation, concluding that the restrictions served important governmental interests unrelated to the suppression of speech, and that those restrictions on “First Amendment freedoms [were] no greater than is essential to the furtherance of” those interests. *Id.* at *14-16.

Although defendant EchoStar was defending against a copyright infringement action brought by CBS and others, *id.* at *1, and although the Eleventh Circuit, like the D.C. Circuit, treated *Harper & Row* as setting the framework for its analysis, *id.* at *13, unlike the D.C. Circuit, the Eleventh Circuit did not treat *Harper & Row* as exhausting First Amendment analysis of the Improvement Act. Instead, the Eleventh Circuit expressly

weighed the defendant's First Amendment interest according to ordinary First Amendment analysis. Intermediate scrutiny *of the statute* was appropriate, the court held, even though *Harper & Row* had rejected a First Amendment right to trespass *on particular copyrights*. *Id.* at *15.

Petitioners asked both courts below to apply the same test to the CTEA. Both courts refused. But under the reasoning of the Eleventh Circuit, petitioners would have been entitled to intermediate scrutiny. Indeed, petitioners' claim for intermediate scrutiny would have been stronger analysis than the defendant's in *EchoStar*. Unlike that defendant, petitioners do not claim a right to use otherwise legitimately copyrighted material; petitioners instead argue that the material at issue cannot legitimately be copyrighted. We challenge a statute that purports to create copyrights in a manner that is inconsistent with the First Amendment. But unlike the Court of Appeals for the Eleventh Circuit, neither the District Court nor the D.C. Circuit applied intermediate review of the CTEA. Instead, both courts treated *Harper & Row* as exhausting First Amendment analysis of a copyright statute.

This Court should grant review in this case to resolve this conflict. If *Harper & Row* indeed establishes the rule that copyright law is "immune from challenges under the First Amendment," then that rule is not being followed in at least the Eleventh Circuit, as *EchoStar* demonstrates, nor possibly within the Second Circuit. *See Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 327-29 (S.D.N.Y. 2000) (applying intermediate scrutiny to Digital Millennium Copyright Act) (appeal pending). If, instead, *Harper & Row* simply establishes that the exercise of a copyright by a copyright holder is not subject to intermediate First Amendment scrutiny, then the decision below will short-circuit ordinary First Amendment review of copyright legislation in a range of related cases. As this confusion follows from *Harper & Row* itself, this Court should grant review to clarify the scope of the principle announced in *Harper & Row*.

Petitioners submit that outside the context of a First Amendment challenge to the assertion of an otherwise legitimate

copyright (*i.e.*, a First Amendment right to trespass), ordinary First Amendment analysis should apply. There is no textual reason to exempt copyright law from ordinary First Amendment analysis. Nor is there any history to suggest that the Framers imagined copyright law to be exempt from First Amendment review. To the contrary, at least some expected that the First Amendment would be a check against unrestrained copyright power.¹¹ If a *sui generis* trademark law gets ordinary First Amendment review, *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987), and regulations of the treasury governing currency get ordinary First Amendment review, *Regan v. Time, Inc.*, 468 U.S. 641 (1984), then petitioners submit that copyright law is also constrained by the ordinary rules of the First Amendment.¹²

¹¹ As a delegate to the Pennsylvania ratifying convention argued, in support of a First Amendment,

Tho[ugh] it is not declared that Congress have a power to destroy the liberty of the press; yet, in effect, they will have it They have a power to secure to authors the right of their writings. Under this, they may license the press, no doubt; and under licensing the press, they may suppress it.

² THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA 454 (Merrill Jensen ed., 1976).

¹² For a catalogue of contexts in which the First Amendment has been held to constrain private rights, see Netanel, *supra*, at n.12 (including private rights of privacy, protection against intentional infliction of emotional distress, libel, trademark, tortious interference with business relations, right of publicity, and trade secret protection).

CONCLUSION

For the forgoing reasons, petitioners submit that this Court should grant review in this case to reverse the holding of the D.C. Circuit with respect to Congress' power to grant copyrights retrospectively under the Copyright Clause. Petitioners would also ask this Court to remand the case to the District Court to apply intermediate scrutiny under the First Amendment to both the retrospective and prospective aspects of the CTEA.¹³

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¹³ This case also presents a question for review about whether a Court of Appeals must ignore an argument made by an *Amicus* for a claim properly raised simply because a party has not expressly adopted that argument in its brief. In the court below, *Amicus* Eagle Forum argued that the “promote the Progress of Science” clause was an independent constraint on Congress’ Copyright Clause power. While petitioners expressly embraced that argument at oral argument, App. 29a (Sentelle, J., dissenting), the D.C. Circuit held that *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring), required that it could not consider the argument of *Amicus*. This conclusion is wrong as an application of *Ashwander*, but this Court need not resolve this error. Because there is no doubt that petitioners have raised and properly preserved the claim that the extension of copyright terms is beyond Congress’ Copyright Clause power, App. 31a (Sentelle, J., dissenting), and because the court below nonetheless considered and rejected the argument of *Amicus*, App. 11a-12a, 25a, there is technically no need for the Court to review this question in this appeal. Nonetheless, petitioners raise the question, and would defend the *Amicus*’s right, to give this Court the opportunity to clarify the role of *amici* in argument.

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