WHY THOMAS JEFFERSON WOULD LOVE NAPSTER

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The issue of copyright was one of the most lively subjects of debate among our Founding Fathers. The values that copyright reflects echo with the very principles of the American Revolution and Constitutional Convention.

In the American copyright system since 1791 has reflected American republican values. While it granted a limited, temporary monopoly to a specific publisher, American copyright grew to embody four democratic safeguards:

- A guarantee that all works would enter the public domain once the copyright term expired.
- A collection of purposes that consumers could consider "fair use," such as limited copying for education or research.
- The principle that after the "first sale" of a copyrighted item, the buyer could do whatever he or she wants with the item, save distribute unauthorized copies for profit.
- The concept that copyright protects specific expression of ideas, but not ideas themselves.

Copyright, when well balanced, encourages the production and distribution of the raw material of democracy. But after more than 200 years of legal evolution and technological revolution, American copyright no longer offers strong democratic safeguards. It is out of balance. And our founders — especially Thomas Jefferson — would not be pleased.

Copyright was created as a policy that balanced the interests of authors, publishers, and readers. It was not intended to be a restrictive right. But it has evolved over recent decades into one part of a matrix of commercial legal protections now unfortunately called "intellectual property."

Copyright is a "deal" that the American people made with the writers and publishers of books. Authors and publishers get a limited monopoly for a short period of time, and the public gets access to those protected works and free use of the facts, data, and ideas within them.

Without a legal guarantee that they would profit from their labors and creations, the framers feared too few would embark on creative endeavors. If there were no copyright laws, unscrupulous publishers would simply copy popular works and sell them at a low price, paying no royalties to the author.

But just as importantly, the framers and later jurists concluded that creativity depends on the use, criticism, supplementation, and consideration of previous works. Therefore, they argued, authors should enjoy this monopoly just long enough to provide an incentive to create more, but the work should live afterward in the "public domain," as common property of the reading public.

This principle of copyright as an incentive to create has been challenged in recent decades by the idea of copyright as a "property right." Therefore, many recent statutes, treaties, and copyright cases have seemed to favor the interests of established authors and producers over those of readers, researchers, and future creators. These trends run counter to the original purpose of American copyright.

James Madison, who introduced the copyright and patent clause to the Constitution, argued in The Federalist papers that copyright was one of those few acts of government in which the "public good fully coincides with the claims of individuals." Madison did not engage in "property talk" about copyright. Instead, Madison argued for copyright in terms of "progress," "learning" and other such classic republican virtues as literacy and an informed citizenry.

Thomas Jefferson — author, architect, slave owner, land owner — had no misgivings about protecting private property. Yet he expressed some

George Washington believed copyright would enrich political culture by encouraging creativity and promoting enlightened public discourse. But recent changes to copyright law have debased his vision.

serious doubts about the wisdom of copyright. These concerns were based on Jefferson's suspicion of concentrations of power and artificial monopolies.

While in Paris in 1788, Jefferson wrote to Madison that he rejoiced at the news that nine states had ratified the new Constitution. "It is a good canvass," Jefferson wrote of Madison's work, "on which some strokes only want retouching." Primarily, Jefferson wanted a Bill of Rights attached to the document. But he also desired an explicit prohibition against monopolies, including those limited and granted by the Constitution: patents and copyright.

While Jefferson acknowledged that a limited copyright could potentially encourage creativity, it had not been demonstrated.

The following summer, as Congress was debating the Bill of Rights, Jefferson again wrote to Madison from Paris. This time Jefferson proposed specific language for an amendment that would have allowed copyrights and patents, despite his doubts, but forbidden any other type of commercial monopoly. "For instance," Jefferson wrote, "the following alterations and additions would have pleased me: Article 9. Monopolies may be allowed to persons for their own productions in literature, and their own inventions in the arts, for a term not exceeding _____ years, but for no longer term, and no other purpose."

Justice Louis Brandeis wrote in 1918: "The general rule of law is, that noblest of human productions—knowledge, truths, and ideas—become, after voluntary communication to others, free as the air to common use."

Significantly, the founders did not argue for copyrights or patents as "property." Jefferson even explicitly dismissed a property model for copyright, and maintained his skepticism about the costs and benefits of copyright for many years.

Fearing that copyright might eventually expand to encompass idea protection, not just expression protection, Jefferson wrote, "If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispose himself of it."

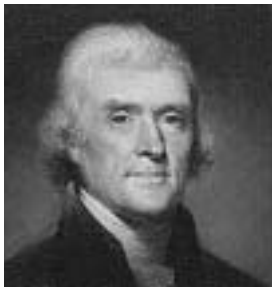
James Madison introduced the copyright and patent clause to the Constitution. He didn't view copyright as a property issue, but as a way to ensure an informed citizenry.

Jefferson then declared the flaw in the notion of copyright as property. Unlike tangible property, ideas and expressions are not susceptible to natural scarcity. As Jefferson wrote of copyright, "Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me."

Therefore, Jefferson feared, the monopolists could use their state-granted power to strengthen their control over the flow of ideas and the use of expressions. Monopolies have the power to enrich themselves by evading the limitations of the competitive marketplace. Prices need not fall when demand slackens, and demand need not slacken if the monopoly makes itself essential to the economy (like electrical power or computer operating systems).

Justice Louis Brandeis wrote in a dissenting opinion in 1918, "The general rule of law is, that noblest of human productions—knowledge, truths ascertained, conceptions and ideas — become, after voluntary communication to others, free as the air to common use." Both Jefferson and Brandeis dissented from the conventional wisdom of their times, but nevertheless influenced the philosophy of copyright. So in the early republic and the first century of American legal history, copyright was a Madisonian compromise, a necessary evil, a limited, artificial monopoly, not to be granted or expanded lightly.

In the 1990s the Clinton administration championed efforts to undermine the democratic safeguards that used to be built into the copyright system. In addition to signing a 20-year term extension and pushing for *sui generis* database



Thomas Jefferson, himself an author and inventor, was suspicious of the information monopolies copyright laws could create. He feared monopolists could use their state-granted power to strengthen their control over the flow of ideas.

protection law, the administration and Congress acted on behalf of global media companies by enacting the most egregious example of recent copyright recklessness: the Digital Millennium Copyright Act of 1998.

The 1998 Digital Millennium Copyright Act, signed into law by President Clinton upends more than 200 years of democratic copyright law. By forbidding the "cracking" of electronic gates that protect works, it puts the power to regulate copying in the hands of engineers and the companies that employ them. This law has one major provision that upends more than 200 years of democratic copyright law. It forbids the "cracking" of electronic gates that protect works — even those portions of works that might be in the public domain or subject to fair use. It puts the power to regulate copying in the hands of engineers and the companies that employ them.

Because the DMCA allows content providers to regulate access and use they can set all the terms of use. And much like the database protection proposal, the de facto duration of protection under the DMCA is potentially infinite. While copyright law in 2001 protects any work created today for life of the author plus 70 years or 95 years in the case of corporate "works for hire," electronic gates do not expire. This allows producers to "recapture" works already or about to fall in the public domain. This also violates the Constitutional mandate that Congress copyright laws that protect "for limited times." The DMCA works over and above copyright law.

Most dangerously, producers could exercise editorial control over the uses of their materials. They could extract contractual promises that the use would not parody or criticize the work in exchange for access. Many web sites already do this. Just as dangerously, the DMCA allows producers to contractually bind users from reusing facts or ideas contained in the work.

For most of American history, copyright has not only reflected democratic principles. It fueled the engines of democracy by rewarding the efforts of both producers and consumers of information and cultural products.

Now, as we prepare to celebrate American independence for the 215th time, copyright is tilted to favor the powerful at the expense of the people. But with the popularity of Napster and such unregulatable networks as Gnutella, public is once again engaged in discussions of copyright and its role in culture and democracy. Jefferson might not have been happy with the recent trajectory of the law. But he would have gotten a kick out of Napster.

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The above poster, created by ModernHumorist.com, parodies the music industry's assault on Napster.