

*Participants in the policy conversations prompted by the advent of digital and Internet technologies have done so amidst a rare opportunity to revisit and question some of the founding principles of United States information policies. The following manifesto encapsulates some of the key conclusions of the scholars who have participated in these conversations. I speak here as both a witness to, and a participant in 25 years of close attention to copyright and information policy by scholars of rhetoric, composition, and communication.*

*Some involved in these conversations have described the years that have unfolded since the first wave of scholarship on copyright as “The Copyright,” but this framing harms those debates in two ways. First, it structures the conversation as a “fight” — as a matter to be resolved through conflict, and further, as parallel to (if not overtly within) the adversarial quarters of the United States legal system. Second, “copyright” does not do enough to challenge the “right” at the core of the copyright — a term which is not neutral and resolves questions even before they have been asked. Framing questions of ownership as “rights” rather than “responsibilities” (which might include conceptions of stewardship and care for that which is copied) positions material that derives economic value as always already belonging to rightsholders, rather than participating in a rolling negotiation among composers, distributors, and the broader public. For these reasons, this manifesto adopts and recommends “copyleft” as a preferred term, with an acknowledgment that this term rightly implies that at least some of the issues in this conflict align along the left/right framing of political conflicts within the United States but also insisting that the left/right embedded in copyleft and copyright does not map exactly onto national politics.*

John Logie, December 2018

## **A COPYLEFT MANIFESTO**

### **1. Intellectual Property isn't.**

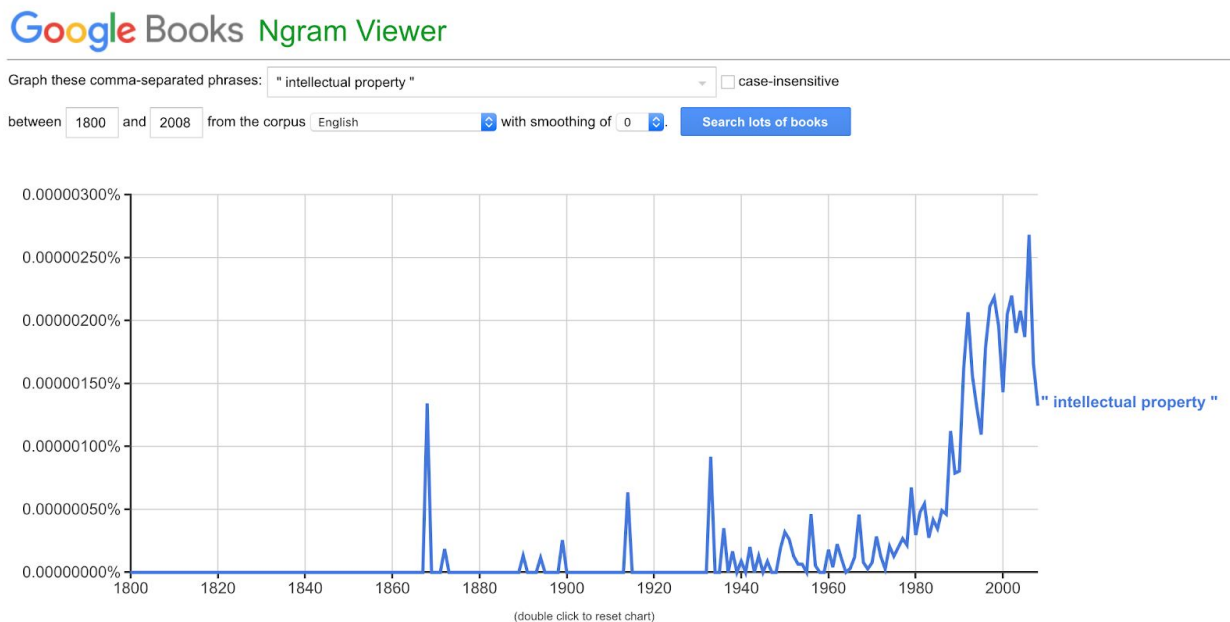
The recently departed John Perry Barlow began his foundational 1994 essay, “[The Economy of Ideas](#)” by quoting [Thomas Jefferson's 1813 letter to Isaac McPherson](#):

*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. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property.*

Jefferson here seems focused on the question of inventions which might be subject to patent law, but the argument holds when extended to creative works. The “propertization” of that which is — at root — intangible is inherently problematic. Real (as in “real estate”) property questions are resolvable by means of surveys, measuring implements, and fences. In the case of real property, the baseline exercise of one’s property rights is the exclusion of others from that property . . . *in physical terms*. Placing the adjective “intellectual” before the noun “property” encourages us to enter an analogical space (a book or a painting is like an estate) shot through with potential moments of disconnection and confusion. Jefferson resisted the real property analogy because he understood the tension between using tangible property as the legal framework to address the intangible products of human creativity.

## 2. “Intellectual property” is a relatively new concept.

A quick review of Google’s Ngram estimator of word occurrence reveals striking trends with respect to the incidence of the term “intellectual property” relative to the key legal concepts that are now understood to fall under its umbrella: copyright, patent, trademark, and trade secrets.



First, for most of United States history, people have not been speaking of “intellectual property” *at all*. While copyright and patent laws clearly date back to the legislative efforts of the first Congress in 1790, it was more than 140 years before the umbrella term “intellectual property” was the subject of any sustained conversation. Second, since the 1980s, “intellectual property” has become an increasingly popular term. Indeed, up until Ngram’s 2008 cutoff, invocations of “intellectual property” and “copyright” were increasingly common in books, while discussions of patent, trademark, and trade secrets were all declining.

## Google Books Ngram Viewer

Graph these comma-separated phrases: "intellectual property "," copyright "," patent "," trademark "," trade secret "  case-insensitive

between 1780 and 2008 from the corpus English with smoothing of 3 Search lots of books



That “intellectual property” is now roughly as common as “copyright” in book-length arguments is a tribute to the efforts of the World Intellectual Property Organization (WIPO), an arm of the United Nations. The [1967 U.N. Convention establishing WIPO](#) features a preamble that states that the signatories are “Desiring . . . to encourage creative activity, to promote the protection of intellectual property throughout the world.” But a review of this convention shows that it is all stick and no carrot, in direct contravention of the [United States Constitution’s clause](#) ceding to Congress (as a proxy for the people) the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” The whole of WIPO’s agenda, by contrast, is directed at “protection” rather than “encouragement” and offers almost no consideration of questions of public access (even eventual access) or use of protected materials.

### 3. “Moral rights” are at odds with the founding principles of United States copyright law.

When the United States [signed on to the Berne Convention](#), (an international agreement regarding copyright first established among European countries in 1886 and joined a century later by the United States in 1989), it made claims that it would only pursue a “minimalist approach to compliance,” but as a practical matter, this was the point at which the concept of “moral rights” found legal purchase within United States copyright law. Within Berne, an “author’s” rights to “paternity” (note the sexism embedded in the language) and “integrity” are established with the following language:

the author shall have the right to claim authorship of the work and to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation.

As a practical matter, this language is what enabled Pierre Hugo — great-great-grandson of Victor Hugo (born 1802, deceased 1885) — to head into the French courts *in 2007* to object to a sequel to *Les Misérables* written by François Cérésa, claiming the Hugo family’s ongoing right to object to, and thus control, the *Les Misérables* characters from Victor Hugo’s 1862 novel. Pierre Hugo’s case against Cérésa ultimately failed (after a costly journey through the courts), but it was heard and considered. Such an outcome would (or should) be less likely in a United States context because the United States’ foundational rationale for copyright law stems from a [Constitutional clause](#) that specifies that Congress (as a proxy for the people) shall have the power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” The clear import of this phrasing is that the public benefit of “progress” is the basis for the limited monopolies granted to authors and inventors — and not a baseline concern with potential rights of authors and inventors that might supersede the public’s benefit.

#### **4. Notice, renewal, and registration requirements worked, and these requirements should be brought back (even at the cost of leaving the Berne Convention).**

Additionally, when the United States [signed on to Berne](#), this move supposedly “harmonized” international copyrights by eliminating notice and registration requirements and attaching copyright to anything “fixed in a tangible medium of expression”. Later court decisions made clear that digital works were jolly well “fixed” enough for the purposes of Berne, so **practically everything is copyrighted now**. In a landscape transformed by the speed and reach of the Internet, notice and registration requirements would provide a helpful guide to whether, for example, a meme is understood by its makers to be owned and protected or freely circulable. Instead, [we drift through cyclical periods of uncertainty with respect to what can be used and how](#). A system that prompted makers of worth with significant economic value to flag their work as protected — and to create a searchable record of their having done so — would restore balance to our copyright laws.

#### **5. The Library of Congress is failing in one of its most basic responsibilities — making the copyright status of existing works knowable and available.**

For many years, the best available guide to whether a given work might be in the public domain or not was a now-outdated chart prepared by Lolly Gasaway. At present, this task falls to widely dispersed resources like [Columbia University Libraries’ Copyright Advisory Office](#). But clearly, educating people as to the current copyright status of a given work is a **baseline** responsibility of the United States Registrar of Copyrights, which is responsible for [this shabby effort](#). To this day, the Copyright Office only has searchable records from 1978 forward. For older works, the Copyright Office recommends that [those wishing to research the copyright status of a given work visit The Library of Congress between 8:30am and 5pm Monday through Friday](#), or, failing that, pay an open-ended hourly fee for a search conducted by the office itself. In a section of the Copyright Office’s website on “copyright modernization,” the office explains that it is now hard at work on a “virtual card catalog” that painstakingly reproduces a subset of the actual physical

cards from the old card catalog system, dating from *only* 1955 to 1977. This might be a worthy effort if — and only if — these cards consistently offered clarity with respect to the copyright date and status of existing works. They do not. The absence of a comprehensive, searchable digital database that clarifies the copyright status of all works in the Library of Congress is a travesty and gives away the degree to which copyright is attendant to the needs of publishers at the expense of the needs of consumers.

## **6. “Life Plus” terms are a violation of the original intention behind United States copyright law.**

In 1976, in the midst of a massive overhaul of United States Copyright law, [Congress made an egregious mistake, shifting the term of copyright from fixed terms to a “life plus” term](#) (then life of the author plus 50 years, since extended to life plus 70 years). This move, which was presented as a step toward “harmonizing” with European laws, effectively privileged arguments for “moral rights.” Fixed terms ensure that copyright laws are directed toward public benefits. “Life plus” standards are, by contrast, grounded in the notion that composers of texts ought to be protected from ever witnessing their work being adapted and used by others. “Life plus” standards are also routinely presented by their advocates as protecting heirs — who are positioned as the best possible stewards of their ancestors’ work — but the truth is that most valuable copyrights are sold off and heirs are no longer part of the equation.

## **7. United States Copyright was, initially, “An Act for the Encouragement of Learning”**

The first United States Congress passed the first United States copyright law in 1790. Its title reads: “[An Act for the Encouragement of Learning](#)” — a title sure to puzzle 21st-century educators who have had to navigate the byzantine pathways attendant to the use of copyrighted materials in classrooms in the wake of the [Basic Books vs. Kinko’s](#) decision. Copyright is experienced on college campuses as a hurdle. It is the hitch in the production of coursepacks. It is the reason why journal articles are found within proprietary silos. It is the reason why, when permissions are not secured — even in cases where images are arguably fair use — images are routinely cut from journal articles.

It is common for students to express surprise that [existing law specifies that “multiple copies for classroom use” ought to be understood as fair use](#). And if those coursepacks — with copyright fees attached — have generated *any* income for any of the readers of this manifesto, please [e-mail me](#), so that you can be included in the new open-access spreadsheet: [Scholars Who Have Actually Received Royalties for Material Included In Coursepacks](#). I pledge to update this regularly every time I receive notice that a colleague has actually been compensated (*and please, please send notice if this has happened*). If the learning isn’t going to be encouraged, might we at least encourage the composing?

## 8. The Public Domain has been cheated of content for two decades.

The ugly truth of the [Sonny Bono Copyright Term Extension Act](#), effective January 1, 1999, is that it was more about extending copyright terms for extant works than it was about maximizing incentives that would prompt people to make more works (i.e. promoting the progress of useful arts). The almost 20 years since copyright term extension have not prompted a dramatic spike in compensation for the makers of copyrighted works. As [TyAnna Herrington rightly argued in Kairos in 1998](#):

The Constitution provides creators with **limited** exclusive rights; the limitation is included to establish the existence of a public domain in information. Under current law, [presently under attack in the Senate](#), copyrighted material reverts to the public domain 50 years after the death of the creator, which ensures that the public has access to created knowledge as a basis upon which to build new knowledge. This process, in turn, ensures the continued development and progress of societal knowledge.

Herrington's argument warned against the erosion of the public domain that was, shortly thereafter, achieved via the Bono Act, with retroactive copyright terms effectively "freezing" the annual advancement of works to public domain status, and 1922 becoming a functional breaking point between works that are sure to be public domain and works that might have some form of continuing copyright protection.

## 9. When considering information policies, the answer to the question *cui bono?* (who benefits?) often delivers unsatisfying answers.

The ultimate test of a copyright law within a United States context is whether the law is, on balance, maximizing public benefit. Or at least, that is [what the Constitution suggests it should be](#). The naive hope of most consumers (and especially of those who self-identify as fans) is that their purchases offer some measure of direct support to the people who made the works that the consumers value. Perhaps the most visible example of composers who have concluded that the math is not adding up are [musicians](#), who have a long history of [speaking out](#) against the ethically bankrupt accounting practices of the major music labels and streaming services. Streaming services have offered a reasonably affordable means of "renting" music for 21st-Century listeners, but for most musicians, hitting the road is the surest way to ensure meaningful compensation for their various talents. And, of course, this is not always comfortable or even possible for some musicians. As for the major labels, [their self-reported numbers speak pretty clearly](#), the balance sheets remain skewed in their favor. And musicians continue [passing the hat](#) to take care of each other.

## 10. Fair Use has been systematically eroded by rights holders.

Two words: [Dancing baby](#).

OK, some more words.

The fact that a 29-second clip of a baby and an older sibling dancing and acting crazy while the barely discernible music of Prince plays in the background could trigger a 10+ year legal wrangle that reached the United States Supreme Court before the parties settled ([finally, in June of 2018](#)) is emblematic of a broken copyright system. United Music Publishing Group, on behalf of Prince, sent a Digital Millennium Copyright Act “notice and takedown” seeking removal of what — in a saner legal landscape — would be quickly and clearly recognized as fair use. *Even if* Stephanie Lenz were benefitting commercially from circulating this particular clip on YouTube, this is a transformative work, taking a small portion of an existing commercial work and *adding* new expressions and new meanings to that work in a way that could only conceivably benefit the rightsholders. Further, Lenz’s video is in no way a competitor or substitute for [“Let’s Go Crazy” in its full form](#) (*especially* not without that final guitar solo). A legal landscape in which we become aware that this trivial video is the basis for a decade of legal wrangling that leaves us all as potential litigants is copyright law’s next parody of [Jarndyce v. Jarndyce](#).

### **11. Copyright makes it harder than you might expect to give something away.**

One of the most depressing conversations I have ever had as a scholar was at the March 1995 meeting of the Conference on College Composition and Communication’s Intellectual Property Caucus meeting. Because the conference was being held in close proximity to the scholarly home of noted copyright expert [Peter Jaszi](#), the Caucus invited Jaszi and his frequent collaborator, Martha Woodmansee, as guest speakers, hot on the heels of their 1994 publication of [The Construction of Authorship: Textual Appropriation in Law and Literature](#). As we met, the Caucus members zeroed in on a question that mattered mightily to them as members of a scholarly community that routinely exchanged syllabi, textual materials, assignments, and other works with one another (all now effectively copyrighted according the Berne’s “fixity” requirement). That question was: *how do we give something away?* Or, more formally, *how do we “gift” a work directly to the public domain?* Jaszi’s answer was memorable and befuddling. He patiently and repeatedly explained that in order to direct a work to the public domain, the copyright holder would need to first assert copyright *and then issue a license which effectively allowed usage parallel to the usage parameters associated with public domain works*. Jaszi’s counterintuitive answer pointed up the need for general assistance with licenses that would help lay people both “unbundle” copyrights and opt out of the one-size-fits-all copyright regime ushered in by Berne. This need was eventually met by [Creative Commons, founded in 2001](#). But the first wave of Creative Commons licenses did not fully address the specific goal of delivering a given work directly to the public. Creative Commons eventually addressed the specific need the Caucus members raised by developing the [CC0 Public Domain Dedication](#), in a process that started in 2007. But Jaszi’s point remains as true as it was in 1995. You can’t

“just give” something to the public domain. [You have to travel \*through\* copyright in order to opt out of copyright.](#)

*The United States’ founders developed a copyright law that was unusual — in an international context — because it identified public benefit as its foundation. This list repeatedly illustrates the ways United States copyright laws have drifted away from public benefit and toward protecting the rights of owners (without imposing much in the way of responsibilities). This should prompt educators — especially teachers of composition and communication — to align more aggressively with the Copyleft approach to intellectual creations: to reclaim copyright as a means to promote learning, to move materials more promptly into the public domain, and to recommit to policies that prioritize public access over ownership.*

*We need to rebalance copyright law in order to once again maximize the public’s centrality. This project is not peripheral to the work of educators. Indeed, it is arguably foundational to all of our work.*