## ARTICLES

# THE RITE OF COPYRIGHT: THE COMPARATIVE PROCEDURAL EMPHASIS OF AMERICAN COPYRIGHT LAW

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ABSTRACT

Copyright regimes across the world share a common history and a basic modern international framework. This foundational similarity provides a unique opportunity for a comparative study of the subtler distinctions among copyright regimes. Using examples from the United States, Germany, France, Sweden, and Japan, this essay argues that American copyright law is heavily influenced by an emphasis on procedure and is much less attentive to underlying substantive rights. This essay compares and contrasts the methods by which various copyright regimes address "sweat of the brow" works, author moral rights, the generality of statutory provisions, and recent legislation on digital media. From these comparisons, American copyright laws seem to provide sophisticated procedural mechanisms for the copyright stakeholders as well as in copyright adjudications. For example, American courts determine whether a work is copyrightable using a largely procedural inquiry. However, such procedural means are often more burdensome than helpful in directly addressing the underlying substantive issues, like robust protection for authors' moral rights. This essay therefore highlights the theme that American copyright law places a greater emphasis on procedure than its international counterparts. More broadly, this emphasis reflects America's overarching process-centric legal values. After all, copyright laws are part of America's widely-recognized proceduralistic legal system.

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## I. INTRODUCTION

It was a cold September morning in A.D. 561. Two warring Irish clans were about to face off near modern-day Sligo County,[1] where its favorite son W.B. Yeats would be born thirteen centuries later.[2] Saint Columba was rebelling against King Diarmait for a supposedly unfair edict.[3] The ensuing Battle of Cúl Dreimhne was massive and bloody, and claimed over three thousand lives.[4] This is the first known copyright dispute in history.

Around this time, Christianity was spreading throughout Ireland.[5] Saint Columba, a tireless scribe who reportedly handwrote over three hundred books in his lifetime, had occasioned upon a holy psalms manuscript in a church and proceeded to transcribe a copy.[6] The original manuscript's owner claimed ownership to Saint Columba's copy as well and appealed to King Diarmait, who announced the first copyright ruling in history: "To every cow its calf and to every book its copy."[7] Saint Columba, the copyright infringer, then rebelled at the Battle of Cúl Dreimhne.[8]

### *A. Common Roots of Copyright around the World*

This stunning early development aside, modern day copyright law progressed through two major stages. The first copyright revolution was publisher-centric and a result of the invention of the printing press.[9] This revolution is linguistically tied to the word *copy*right, which implicates acts relating to copying.[10] Prior to the printing press, copying a text was laborious, expensive, and time-

[1] *See Columba*, A DICTIONARY OF CHRISTIAN BIOGRAPHY, LITERATURE, SECTS AND DOCTRINES (William Smith & Henry Wace eds., 1877) [hereinafter DICTIONARY OF CHRISTIAN BIOGRAPHY, *Columba*].

[2] *See* Fionnuala McHugh, *Sligo, Ireland: On the Trail of W. B. Yeats*, TELEGRAPH (June 13, 2015), http://www.telegraph.co.uk/travel/destinations/europe/ireland/11534508/ Sligo-Ireland-On-the-trail-of-W.-B.-Yeats.html.

[3] *See* DICTIONARY OF CHRISTIAN BIOGRAPHY, *Columba*, *supra* note 1.

[4] *See* Ruth Suehle, *The Story of St. Columba: A Modern Copyright Battle in Sixth Century Ireland*, OPENSOURCE (June 9, 2011), https://opensource.com/law/11/6/story-st-columba-modern-copyright-battle-sixth-century-ireland.

[5] *See* DICTIONARY OF CHRISTIAN BIOGRAPHY, *Columba*, *supra* note 1.

[6] *See* Suehle, *supra* note 4.

[7] JOE MCGOWAN, SLIGO FOLK TALES 20 (2015).

[8] *See* Suehle, *supra* note 4.

[9] *See* Hal R. Varian, *Copying and Copyright*, 19 J. ECON. PERSPS. 121, 122 (2005).

[10] *See* Jane C. Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC'Y U.S.A. 113, 116, 119 (2002/2003).

consuming.[11] Therefore, restricting control to the original text was a sufficient means to control the copying of the text as well.[12] With the printing press, however, mass production of information became readily available.[13] In response, many governmental and religious authorities wanted control over what was printed.[14] Thus, some of the first copyright laws were edicts that either sanctioned or prohibited the printing of specific texts.[15] For example, in 1486, the Duke of Venice sanctioned the printing of a book on the history of Venice through an exclusive grant.[16] Conversely, in 1501 "Pope Alexander VI issued a bull . . . against the unlicensed printing of books," and in 1559, Pope Paul IV issued a list of prohibited books that could not be printed, entitled the *Index Expurgatorius*.[17] Renaissance copyright was therefore a means of state censorship.[18]

However, in order to balance censorship with the promotion of a publishing industry, governments began providing broader monopolistic copyright privileges as a systematic form of printing-approval.[19] Instead of sanctioning or prohibiting individual works, states began to grant exclusive privileges to individual printers (and later, to printing guilds), to whom they trusted to print without subverting state power.[20] Such a system was established in order to support and develop a publishing industry to the state's liking.[21]

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[11] *See Printing Press and Its "Impact" on Literacy,* UBC BLOG (Oct. 30, 2010), https://blogs.ubc.ca/etec540sept10/2010/10/30/printing-press-and-its-impact-on-literacy/.

[12] *See* Varian, *supra* note 9, at 122.

[13] *See, e.g.*, Jeremiah E. Dittmar, *Information Technology and Economic Change: The Impact of the Printing Press*, 126 Q. J. ECONS. 1133, 1161 & n.48 (2011) (providing an example of how the printing press was used to shape a mass movement); *see also Printing Press*, *supra* note 11 ("When the printing press was invented there was a shift from the laborious manuscript making to the codex print allowing many copies of written work[s] to be quickly created, in turn providing greater access to information for all . . . .").

[14] *See* Zack Kertcher & Ainat N. Margalit, *Challenges to Authority, Burdens of Legitimization: The Printing Press and the Internet*, 8 YALE J. L. & TECH. 1, 8 (2005/2006).

[15] *See* RONAN DEAZLEY, ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH-CENTURY BRITAIN (1695–1775), at 221 (2004) ("[C]ensorship and ownership of the published press moved, seemingly conspiratorially, hand in hand.").

[16] *See* Jeremy Phillips, *The English Patent as a Reward for Invention: The Importation of an Idea*, 3 J. LEGAL HIST. 71, 78 n.22 (1982).

[17] ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 14 (1983).

[18] *See* DEAZLEY, *supra* note 15, at 221.

[19] *See* POOL, *supra* note 17, at 15.

[20] *See* A.J.K. Robinson, *The Evolution of Copyright, 1476-1776*, 22 CAMBRIAN L. REV. 55, 56, 57–58 (1991).

[21] *See generally* Ronald V. Bettig, *Critical Perspectives on the History and Philosophy of Copyright*, 9 CRITICAL STUD. MASS COMM. 131, 138 (1992) ("By extending grants and privileges . . . the city government was attempting to encourage the importation of new industrial techniques and stimulate the growth of local industry and commerce. . . . Such privileges were also granted to selected entrepreneurs in exchange for political loyalty and as

The first copyright revolution thereby developed privileges that became state-backed monopolies on printing, with the resulting copyright belonging to the publishers.

Moreover, this copyright revolution was not Eurocentric. Even though Pi Sheng beat Johannes Gutenberg to inventing the movable type printing press by almost four hundred years,[22] the Song Emperor in 1068 issued an order banning the printing of the "Nine Books," which were written in the preceding dynasty in order to curb subversion of dynastic power[23]—much like the European authorities would do five centuries later.[24] And like the Europeans, the Song authorities eventually required all publishers to seek a state-granted license before any book could be printed.[25]

This tremendous monopolist power granted to copyright privilege holders became its own undoing as copyright law entered its second revolution. By the late seventeenth century, the printer guilds in England had become so powerful and its monopoly grew so large that all legally printed books had to register with one consolidated guild—the Stationers' Company.[26] With monopoly came inevitable abuse. The Stationers' Company eventually upset many famous and powerful authors over its course of business by printing against author wishes or without appropriate contractual compensation.[27] John Locke and John Milton had both personally petitioned Parliament for redress against the Stationers' Company.[28] Along

a way to support infant industries. Conveniently, they served to control who printed and what was printed.").

[22] *See* Tsien Tsuen-Hsuin, *Paper and Printing*, *in* 5 SCIENCE AND CIVILIZATION IN CHINA 201, 203 (Joseph Needham ed., 1985).

[23] *See* FAN ZHANG & DENNIS XIE, CHINESE COPYRIGHT PROTECTION HAS STORIED HISTORY, STRONG FUTURE 1, www.sourcetrix.com/docs/Whitepaper-China_Intellectual_Property.pdf (last visited Dec. 15, 2016); *see also* Katie Lula, *Neither Here nor There but Fair: Finding an International Copyright Legal System between East and West, Past and Present*, 8 ASIAN-PACIFIC L. & POL'Y J. 96, 109–10 (2006) ("While the West initially disguised its censorship policies in copyright, . . . China had no scruples about using copyright primarily for censorship.").

[24] *See* POOL, *supra* note 17, at 14.

[25] *See* Ibou Thior, *Intellectual Property Rights Protection in China*, 2 J. WASH. INST. CHINA STUD. 33, 37 (2007) ("When a publisher, Mr. Cheng of Meishan, Sichuan, printed the book 'Stories of the East Capital', 'the copyright [p]age' mentioned 'Printed by Cheng of Meishan, who applied protection from the superior, any reproduction is prohibited.'").

[26] *See* CYPRIAN BLAGDEN, THE STATIONERS' COMPANY: A HISTORY, 1403-1959, at 146 (1960) ("On June 14th an Ordinance for the Regulating of Printing was passed. All books were to be officially licensed and entered in the register; no book belonging to the English Stock was to be printed without the [Stationers'] Company's consent; powers of search and seizure were provided. The [g]overnment and the Stationers were . . . in partnership . . . .").

[27] *See, e.g.*, *id.* at 101.

[28] *See* Mark Rose, *The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne*, 12 TUL. J. TECH. & INTELL. PROP. 123, 133, 136

with these grievances, the printer guild's tremendous (monopoly-created) influence alarmed Parliament, who finally refused to renew its monopolist privilege in 1695.[29] In its place, after fifteen years of political struggle,[30] the now-famous Statute of Anne was passed in 1710, which granted *authors* of books the exclusive right to print and copy their works for fourteen years.[31]

The Statute of Anne became the model legislation for all modern copyright law because it was truly revolutionary in three respects. First, this was the first form of copyright via legislation, rather than licensing.[32] Although copyright was still a state-sanctioned monopoly, it was available for all those who qualified and not just those who catered to the state's interests.[33] Copyright thus became public law instead of private law.[34] Second, this legislation was author-centric.[35] The copyright belonged to the creator of the work and not its publisher.[36] In fact, the statute specifically states that it was enacted as a response to the abuse of the prior system:

> Printers, Booksellers, and other Persons have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future . . . .[37]

Conceptually, this was an all-important legal innovation. Copyright was now an extension of traditional property: a literary work—to be printed and copied—was considered the author's intellectual property ("IP") and was tied to the author's creativity, morals, thinking, and natural rights. Third, and most importantly, the statute pivoted the fundamental purpose behind copyright from

(2009).

[29] *See* DEAZLEY, *supra* note 15, at 1; *see also* Rose, *supra* note 28, at 137 ("Open hostility to the great booksellers' monopolies provided one impetus for resistance to the continuation of licensing. The danger of having a partisan licenser in control of the press was also becoming evident.").

[30] *See* Robinson, *supra* note 20, at 66–67, 68.

[31] *See* Statute of Anne, 8 Ann., c. 19 (1710) (Eng.); Robinson, *supra* note 20, at 68.

[32] *See* Rose, *supra* note 28, at 138–39.

[33] *See* Craig W. Dallon, *The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest,* 44 SANTA CLARA L. REV. 365, 407–08 (2004).

[34] *See id.* at 407, 409.

[35] *See id.* at 407, 408.

[36] *See id*. at 407.

[37] Statute of Anne, 8 Ann., c. 19 (1710) (Eng.).

censorship to utilitarianism.[38] The statute states that it was enacted "for the [e]ncouragement of [l]earned [m]en to [c]ompose and [w]rite useful [b]ooks."[39] Under the Statute of Anne, copyrights were granted as an incentive to produce intellectual creations.[40] This is a fundamental shift from the prior purpose of a state check against subversive publishing. This innovative copyright revolution therefore developed a system that incentivized authors to produce works that would be protected by legislation. All future copyright regimes would be built on these foundations.[41]

However, these foundations are not without some degree of internal conflict. For example, the United States was one of the first nations to absorb the revolutionary ideas embodied in the Statute of Anne.[42] Nevertheless, the Americans firmly emphasized a utilitarian-driven copyright purpose, by prefacing the copyright clause in their new Constitution with: "To promote the [p]rogress of [s]cience and useful [a]rts . . . ."[43] This is one of only two clauses in the entire Constitution to state a purpose.[44] Conversely, post-revolution France emphasized a different aspect of the Statute of Anne by focusing on copyright protection of the authors' rights.[45] The National Assembly endorsed an author-centric focus by declaring that a copyright is part of a citizen's natural rights, and by calling France's first copyright statute the "declaration of the *rights* of genius."[46] These differing emphases of the Statute of Anne continued for all subsequent copyright legislations. For example, modern American copyright law remains much more utilitarian in purpose than European copyright law, which provides far more rights-of-authors protections.[47] Inspired by such fundamentally revolutionary but sometimes conflicting purposes, it should perhaps not be surprising that specific facets of copyright legislations in many countries aim to protect that country's vital interests, with similarities and dissimilarities resonating with contemporary economics.[48]

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[38] *See* Dallon, *supra* note 33, at 402.

[39] Statute of Anne, 8 Ann., c. 19.

[40] *See* Dallon, *supra* note 33, at 409.

[41] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 8.

[42] *See* Dallon, *supra* note 33, at 409.

[43] U.S. CONST. art. I, § 8, cl. 8.

[44] The other is the Second Amendment. *See* U.S. CONST. amend. II.

[45] *See* Carla Hesse, *Economic Upheavals in Publishing*, *in* REVOLUTION IN PRINT: THE PRESS IN FRANCE 1775-1800, at 69, 70, 80–81 (Robert Darnton & Daniel Roche eds., 1989).

[46] *Id.* at 80 (emphasis added).

[47] *See infra* Part III.

[48] *See* Gerard V. Curtin, Jr., *The Basics of ASICs: Protection for Semiconductor Mask*

In the United States, for example, it may initially be surprising for a casual browser of the U.S. Copyright Act to read that semiconductor chip designs are copyrightable.[49] However, this surprise is likely more about the categorization than the protection's existence; from a social utility perspective, it is not that surprising that the U.S. government wishes to provide some form of IP protection for its semiconductor industry. After all, the U.S. is the undisputed world leader in the semiconductor industry,[50] which accounts for as much as $350 billion in sales per year.[51] Japan and the EU have similar copyright protections for semiconductors[52] presumably due to the economic importance of the industry to their respective countries as well.[53] However, these protections developed later than the American Semiconductor Protection Act ("SCPA"), and are perhaps responses to or mimics of the American SCPA[54] because of the American semiconductor industry's global leadership.[55] As a counterexample, the Swedish Copyright Act was among the last of the holdout industrialized countries to still not grant semiconductor design protection.[56] To this day, the Swedish

*Works in Japan and the United States*, 15 B.C. INT'L & COMP. L. REV. 113, 120–21 (1992).

[49] *See* 17 U.S.C. §§ 901–914 (2012).

[50] *See* Press Release, Semiconductor Indus. Ass'n, Global Semiconductor Sales Increase in April; Steady Growth Projected for Next Three Years (June 2, 2015), http://www.semiconductors.org/news/2015/06/02/global_sales_report_2015/global_semiconductor_sales_increase_in_april_steady_growth_projected_for_next_three_years.

[51] *See id.*

[52] *Compare, e.g.*, Council Directive 87/54/EEC, arts. 2, 3, 1986 O.J. (L 24) (describing the European community's directives and protections for semiconductor products), *with infra* Part IV(A) (describing the United States' protections for semiconductor products); *see also* Curtin, *supra* note 48, at 126 (discussing Japanese protections and similarities to United States protections for semiconductor products).

[53] PRICEWATERHOUSECOOPERS EU SERVS. EESV, EUR. COMM'N, COMPARISON OF EUROPEAN AND NON-EUROPEAN REGIONAL CLUSTERS IN KETS: THE CASE OF SEMICONDUCTORS 20 (2013), http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=2623 ("Over the last decade, the semiconductor industry and its natural downstream ICT industries created more than [seven hundred thousand] additional jobs in Europe . . . ."); *see also* INT'L TRADE ADMIN., 2016 TOP MARKETS REPORT: SEMICONDUCTORS AND SEMICONDUCTOR MANUFACTURING EQUIPMENT: JAPAN 1 (2016), http://trade.gov/topmarkets/pdf/Semiconductors_Japan.pdf ("Japan has the third largest electronics manufacturing industry in the world and is home to two of the top [ten] semiconductor buying companies . . . .").

[54] The American SCPA legislation was developed in 1984, whereas major European and Japanese counterparts developed in 1985 and 1987. *See* Council Directive 87/54/EEC, *supra* note 52, art. 11; Curtin, *supra* note 48, at 114 & n.11.

[55] *See* INT'L TRADE ADMIN., *supra* note 53, at 2; Press Release, *supra* note 50.

[56] *See* 1 ch. 10 § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK (Svensk författningssamling [SFS] 1994:190) (Swed.) (showing that Sweden's Copyright Act, enacted in 1960, contains a 1994 provision that explicitly excludes semiconductors from the Swedish Copyright Act's purview, stating that semiconductors are protected by a different statutory provision).

Copyright Act states: "Copyright does not subsist in layout designs in semiconductor products. Special provisions apply to the rights in such designs."[57] And it was not until 2009 that the Swedish Semiconductor Topography Act was in its mature form, almost two decades behind its European neighbors.[58] This reluctance to make semiconductors subject to IP may be due to Sweden's generally liberal attitudes toward open-source electronic innovation,[59] as exemplified by IP-rejecting companies like Spotify.[60] Therefore, Sweden's legislative behavior with respect to semiconductor designs, despite its contrast to American and European counterparts, is nevertheless consistent with a pursuit of copyright policy aligned with essential economic values.

Another prominent and easily understandable example is fashion. The French copyright laws explicitly include, in the general categories of copyrightable subject matter, "creations of the seasonal industries of dress and articles of fashion[, including i]ndustries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, . . . shoes, gloves, [and] leather goods . . . ."[61] This statutorily emphatic protection should not be much of a surprise: French fashion is widely heralded as iconic, is responsible for €75 billion of exports each year, and employs over four hundred thousand French workers.[62] Like American semiconductors to America's economy, French fashion is vital to France's economy. As a counterexample, the United States takes the opposite approach to fashion. Fashion designs that "set[] forth the shape, style, cut, and dimensions for converting fabric into a finished dress or other clothing garment"

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[57] *Id.*

[58] *See* LAG OM SKYDD FÖR KRETSMÖNSTER FÖR HALVLEDARPRODUKTER (Svensk författningssamling [SFS] 1992:1685) (Swed.); *supra* note 54 and accompanying text.

[59] *See, e.g.*, *Mission*, OPEN SOURCE SWED., http://www.opensourcesweden.se/mission (last visited Nov. 1, 2016) ("Open Source Sweden is an industry association that supports the interests of Swedish Open Source companies. . . . Our mission is to stimulate a healthy market for [s]oftware through the development, provision, and support of products and services based on Open Source Software and Open Standards."); *see also* Magnus Bergquist et al., *Justifying the Value of Open Source*, 2012 EUR. CONF. ON INFO. SYS. PROC. (describing the legitimacy and usefulness of free and open source software ("FOSS")).

[60] *See, e.g.*, Gunnar Kreitz & Fredrik Niemelä, *Spotify—Large Scale, Low Latency, P2P Music-on-Demand Streaming*, 2010 IEEE TENTH INT'L CONF. ON PEER-TO-PEER COMPUTING (P2P) PROC.

[61] CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] [INTELLECTUAL PROPERTY CODE] art. L112-2 (Fr.).

[62] *See Industrie de la mode habillement statistiques: France* [*Fashion Apparel Industry Statistics: France*], FASHION UNITED, https://fashionunited.be/fr/industrie-de-la-mode-habillement-statistiques-france (last visited Nov. 1, 2016).

are plainly not copyrightable.[63] One reason for this contrasting style may be due to the presence of a lenient "open fashion" attitude within the United States.[64] Some scholars believe that in the United States, a "regime of low IP protection, by permitting extensive and free copying, enables emerging [fashion] trends to develop and diffuse rapidly, and, as a result . . . die rapidly[] . . . in a process of quick design turnover."[65] This tolerant American attitude is perhaps a result of a reputation that, until recently, American fashion had been considered "low-end," and New York fashion was perceived as only "focusing exclusively on production and relying on Paris for design inspiration."[66] Again, this legislative behavior mirrors the industry-specific needs for copyright, which in turn, unsurprisingly follows economic interests.

This pursuit in structuring copyright laws to protect differing economic interests, as well as the aforementioned conflicting emphases of the different foundations of the Statute of Anne, almost disrupted the international normalization of copyright. As the world began to globalize soon after the Statute of Anne, so did most of the copyright regimes around the world. By 1886, the now-widespread Berne Convention had begun to adopt international minimum standards for copyright laws.[67] All of the modern copyright regimes still adopt the basic rationales of the Statute of Anne: exclusive author control for a period of years in order to incentivize creative production and to safeguard the author's rights.[68] Specifically, all copyright regimes under the Berne Convention provide three minimum protections. First, copyright protection must be granted to works "in the literary, scientific and artistic domain[s] . . . ."[69] Second, the protection must include the right to reproduce, broadcast, communicate to the public, perform in public, make adaptations, and translate.[70] Third, the copyright

[63] 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08(H)(1), (H)(3)(a) (Matthew Bender rev. ed. 2016).

[64] *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1734 (2006).

[65] *Id.* at 1733.

[66] Norma M. Rantisi, *The Ascendance of New York Fashion*, 28 INT'L J. URB. & REGIONAL RES. 86, 86 (2004).

[67] *See* Peter Burger, *The Berne Convention: Its History and Its Key Role in the Future*, 3 J.L. & TECH. 1, 15–16 (1988).

[68] *See id.* at 6, 16.

[69] *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Nov. 2, 2016) [hereinafter *Summary of the Berne Convention*]; *see* Burger, *supra* note 67, at 18.

[70] *See* Burger, *supra* note 67, at 15–16, 24–25, 28, 32–36, 43–47; *Summary of the Berne*

duration must be at least the author's life plus fifty years.[71]

Disappointingly, the United States refused to sign onto the Berne Convention for almost one hundred years.[72] This lack of U.S. participation created "a source of controversy and irritation" for what would have otherwise been an example of "one of the earliest and . . . most successful ventures into world law."[73] The underlying reason, as one may have surmised, was economic self-interest.[74] The United States in the late eighteenth century, nineteenth century, and early twentieth century was a net importer of copyrighted materials;[75] as the U.S. came to export more copyrighted works in the twentieth century—first with Hollywood films in the 1930s and later with software in the 1970s—it realized it was losing as much as $63 billion per year to copyright piracy abroad.[76] This economic self-interest thereby shifted the legislative posture from wariness of protecting foreign copyrights to urging for strong bilateral protections of copyrighted works across the globe.[77] Today, 169 countries around the world are parties to the Berne Convention, including the U.S.[78] Most of these countries' modern copyright laws have very similar structures that adopt the three Berne minimums.[79] Almost all copyright acts begin with categories of copyrightable subject matter,[80] followed by a list of author rights,[81] and then describe these protections' durations.[82] All in all, copyright law seems to have evolved along the same historic arc in the Western world (if not the entire world), and certainly seems to have reached the same point today in terms of basic structural

*Convention*, *supra* note 69.

[71] *See* Burger, *supra* note 67, at 30–31; *Summary of the Berne Convention*, *supra* note 69.

[72] *See* Orrin G. Hatch, *Better Late Than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 171–72 (1989).

[73] Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499, 499 (1967).

[74] *See* Hatch, *supra* note 72, at 171.

[75] *See id.* at 172–73.

[76] *See id.* at 179–80.

[77] *See id*. at 180.

[78] *See WIPO-Administered Treaties: Berne Union*, WORLD INTELL. PROP. ORG., http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&search_what=B&bo_id=7 (last visited Nov. 2, 2016).

[79] *See, e.g.*, *Summary of the Berne Convention*, *supra* note 69.

[80] *See, e.g.*, 17 U.S.C. § 102 (2012); Nihon no chosakukenhō [Copyright Law of Japan], Law No. 48 of 1970, as amended up to No. 35 of 2014, art. 10; 1 ch. 1 § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK (Svensk författningssamling [SFS] 1994:190) (Swed.).

[81] *See, e.g.*, 17 U.S.C. § 106; Copyright Law of Japan, art. 17; 1 ch. 2 § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK (SFS 1973:363) (Swed.).

[82] *See, e.g.*, 17 U.S.C. § 302; Copyright Law of Japan, art. 51; 4 ch. 43 § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK (SFS 1995:1273) (Swed.).

features.

### *B. Comparative Study of Copyright*

This common foundation on which modern copyright laws arose makes for a unique and interesting opportunity for a study of comparative law. There are few, if any, existential clashes among copyright regimes because of copyright's aforementioned shared traditions and basic structures (despite the minor wrinkles along the way). What is different among copyright regimes lies in the nuances. The types of works that are copyrightable (beyond literature, science, and art) vary from country to country, as do the duration of the copyright and the author's rights.[83] More legally advanced features like infringement determinations or registration requirements also offer country-specific differences.[84] Focusing on such nicer variables that still rest on the same basic underpinnings[85] makes for a more controlled study; there will not be discussed any fundamentally anti-copyright cultures and influences that make legal comparisons inapposite. To be clear, there may still be existential copyright law questions in terms of practical enforcement; the obvious examples include why and how rigorously copyright is enforced in certain jurisdictions,[86] and how copyright enforcement interacts with ever-advancing digital technologies.[87] However, on a theoretical level, copyright's basic structure exists firmly throughout the world due to its shared history.[88] The (theoretical) comparative questions encountered are more nuanced and therefore more probing for this discussion. For example, why does France give an extra thirty years of copyright protection to authors who died as members of the French Armed Services?[89] Or why does the United States offer copyright owners a five-year window thirty-five years after a copyright license to claw back any

[83] *See, e.g.*, WORLD INTELLECTUAL PROP. ORG., 2005 UNDERSTANDING COPYRIGHT AND RELATED RIGHTS 6, 7–11, 12–13, http://www.wipo.int/edocs/pubdocs/en/intproperty/909/wipo_pub_909.pdf.

[84] *See, e.g.*, *id*. at 14–15.

[85] *See, e.g.*, *Summary of the Berne Convention*, *supra* note 69.

[86] *See, e.g.*, Bingchun Meng, China's Copyright Policy in the Era of Globalization: A Chance to Restore the Public's Interest 92–93, 96 (Aug. 2006) (unpublished Ph.D. thesis, Pennsylvania State University), https://etda.libraries.psu.ed/catalog/7200 ("[W]ith the escalating exogenous pressure for China to step up enforcement and an increasing number of domestic copyright disputes, administrative regulation has been greatly expanded.").

[87] *See* Benjamin J. Robertson, *Copyright*, *in* THE JOHNS HOPKINS GUIDE TO DIGITAL MEDIA 92–93 (Marie-Laure Ryan et al. eds., 2014).

[88] *See Summary of the Berne Convention*, *supra* note 69; *supra* Part I(A).

[89] *See* C.P.I. [INTELLECTUAL PROPERTY CODE] art. L123-10 (Fr.).

grants of that copyright?[90]

This essay seeks to illuminate these nice copyright differences and similarities—beyond basic statutory structures—through a comparative study of copyright laws in the United States, Germany, France, Sweden, and Japan. I will argue via specific statutory examples that American copyright law places a greater emphasis on procedure than its international counterparts. The contrapositive is that many of the subtle eccentricities in American copyright law are reflections of the comparative American legal obsession with procedure.

This essay's perspective is novel for copyright literature because past works have only compared distinct features within copyright regimes. For example, Professor Jane Ginsburg studied different copyright regimes' definition of authorship, as well as moral rights protections for authors.[91] Obviously, such in-depth insights are useful for a broad comparative study; Part III(C) of this essay in fact discusses various countries' notions of authorship.[92] However, such insights do not provide a structural thesis for *why* copyright regimes are *consistently* different across multiple features. In another example, Professor Daniel Gervais studied different copyright regimes' notions of originality;[93] again, Part II(A) of this essay discusses this important facet of copyright laws.[94] However, there is again no broader explanation and application for why such differences would permeate consistently across multiple copyright features. In fact, most of the literature on comparative copyright articulates descriptive differences among singular features within copyright regimes, such as comparisons of various regimes' rules on joint works,[95] fair use,[96] publicity,[97] orphan works,[98] and Internet

[90] *See* 17 U.S.C. § 203(a)(3) (2012).

[91] *See generally* Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1063–64 (2003) ("Much of copyright law in the United States and abroad makes sense only if one recognizes the centrality of the author, the human creator of the work. Because copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-uses can (straightfacedly) assert. This makes it all the more important to attempt to discern just what authorship means in today's copyright systems. This [a]rticle endeavors to explore the concept of authorship in both common law and civil law jurisdictions.").

[92] *See infra* Part III(C).

[93] *See generally* Daniel J. Gervais, Feist *Goes Global: A Comparative Analysis of the Notion of Originality in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 949, 951 (2002) ("[In this article,] we will compare the *Feist* standard of originality with the standard now applied in a number of civil law countries, and demonstrate that there is a global emerging standard that narrows the gap between civil and common law-based copyright systems.").

[94] *See infra* Part II(A).

[95] *See, e.g.*, Thomas Margoni & Mark Perry, *Ownership in Complex Authorship: A*

copyright laws.[99] In contrast, this essay provides a thematic and explanatory thesis that the American copyright regime is emphatically procedural rather than substantive, which is an applicable arc across multiple features of our copyright regime. The remainder of this essay will explicate the applications of this thesis across multiple statutory provisions, which makes for a uniquely encompassing perspective for the comparative copyright literature.

Despite the bulk of the literature being constricted to very specific copyright features, there have been two broad surveys of comparative copyright law. First, Jane Ginsburg provided an overview of a comparative study of French versus U.S. copyright laws,[100] and second, Professor Dennis Karjala provided an overview of a comparative study of Japanese versus U.S. copyright laws.[101] Neither of these surveys articulated any holistic themes that account for overarching copyright distinctions, though, especially not as the copyright laws pertain to broader legal traditions. This essay thereby provides the additionally novel perspective that the broader legal tradition of American proceduralism can be powerfully explanatory for unique U.S. copyright eccentricities.

From legal education[102] to litigation practices[103] to popular

*Comparative Study of Joint Works in Copyright Law*, 34 EUR. INTELL. PROP. REV. 22, 22 (2012).

[96] *See, e.g.*, Martin Senftleben, *Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law*, *in* METHODS AND PERSPECTIVES IN INTELLECTUAL PROPERTY 30 (Graeme B. Dinwoodie ed., 2013).

[97] *See, e.g.*, Bryce Clayton Newell, *Freedom of Panorama: A Comparative Look at International Restrictions on Public Photography*, 44 CREIGHTON L. REV. 405, 405–06, 407–09 (2011).

[98] *See, e.g.*, Marcella Favale et al., *Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation* 1 (Intellectual Prop. Office, CREATe Working Paper No. 2013/7, 2013), https://zenodo.org/record/8377/files/CREATe-Working-Paper-2013-07.pdf.

[99] *See, e.g.*, Jeremy de Beer & Christopher D. Clemmer, *Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries?*, 49 JURIMETRICS J. 375, 376 (2009); Nicola Lucchi, *Intellectual Property Rights in Digital Media: A Comparative Analysis of Legal Protection, Technological Measures, and New Business Models under EU and U.S. Law*, 53 BUFF. L. REV. 1111, 1115 (2005); Guy Pessach, *An International-Comparative Perspective on Peer-to-Peer File-Sharing and Third Party Liability in Copyright Law: Framing the Past, Present, and Next Generations' Questions*, 40 VAND. J. TRANSNAT'L L. 87, 89 (2007).

[100] *See* Jane C. Ginsburg, *French Copyright Law: A Comparative Overview*, 36 J. COPYRIGHT SOC'Y U.S.A. 269, 275 (1989).

[101] *See* Dennis S. Karjala & Keiji Sugiyama, *Fundamental Concepts in Japanese and American Copyright Law*, 36 AM. J. COMP. L. 613, 613 (1988).

[102] *See* Mirjan R. Damaška, *A Continental Lawyer in an American Law School: Trials and Tribulations of Adjustment*, 116 U. PA. L. REV. 1363, 1377 (1968) ("[A]n American book on civil procedure will contain no comparable discussion of sources, jurisdiction and competence, or standing, no discussion of evidence, and so forth.").

beliefs,[104] it is a well-reported phenomenon that the American legal system values procedural justice above substantive fairness. Some scholars have argued that when litigants are evaluating the overall fairness of the legal system in the U.S., their perceptions of procedural dignity are so important that the actual outcome may be irrelevant.[105] Other scholars have gone as far as to state that the core of "The Cult of the Common Law" lies in the assertion of "the superiority of Anglo-American legal procedure . . . ."[106] Conversely, in continental Europe, procedural justice is seen as a means to strengthen the tools available for the relevant actors, such as judges, to ultimately obtain substantive fairness.[107] Professor Tom Tyler explains that the American emphasis on procedure is deeply rooted, noting that "different types of people within American culture define the meaning of procedural justice in a similar way. This suggests that definitions of the meaning of [procedural] justice . . . may be part of the cultural beliefs shared by members of our society."[108] An ethnographic study that attempts to explain this American cultural obsession argues:

> As . . . working-class Americans use the legal system and talk to family and friends who have used it, they discover that it does not always protect the rights which it asserts. They find it to be, like other institutions in modern society, imperfect and *reflective of underlying power relationships*. These people recognize that their problems are not taken as seriously as those of powerful, rich people, but this is hardly a source of surprise. That their rights are recognized at all is, in fact, positive. The courts are evaluated against expectations of society in general, and there is a clear recognition of the stratified and unequal nature of economic and power relationships. In some ways, the court is less unequal than many other aspects of society. For those who

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[103] *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 18 (1986) ("The American machinery of justice . . . continues to be more deeply permeated by features embodied in the coordinate ideal than are judicial administrations of any other industrial state in the West.").

[104] *See, e.g.*, Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 284 n.35 (2002).

[105] *See* E. Allan Lind & P. Christopher Earley, *Procedural Justice and Culture*, 27 INT'L J. PSYCHOL. 227, 235 (1992).

[106] John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 551 (1995).

[107] *See* Chase, *supra* note 104, at 297 n.113.

[108] Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y REV. 103, 132 (1988).

> learn to use it, there are occasional moments of success. This does not mean that the courts are solving the problems citizens bring to them, but that *they provide enough to make it worth trying again*.[109]

From this explanation, American courts are perceived as just another institution within society that generally reflects broader socioeconomic dynamics.[110] This institution's operative worth is measured by how often it does deviate from the expected power dynamics, which in turn is gauged through proxies such as access and procedures for those who wish to engage with this institution.[111] Other scholars have proposed an alternative psychological explanation, which argues that when authorities provide individuals with fair procedures, the individuals feel a "sense of obligation" to the authorities, and are therefore more likely to cooperate and perceive the authorities as possessing legitimacy.[112] In all of these explanations, procedural justice provides a certain enhancing perception of the legal system to American society.[113] All of these perceptions and explanations ultimately contribute to the fact that the American legal system places inordinate value on procedure.

In this essay, I will focus on this American, procedure-centered legal approach to contrast some of the subtle differences among international copyright regimes. Specifically, I argue that American copyright law places a greater emphasis on procedure than its international counterparts. I explore this argument using three axes that delineate the subtle similarities and differences among copyright regimes that are attributable to this emphasis: the value of effort versus accomplishment in different copyright regimes, the value of authors' moral rights, and the generality of copyright statutory structures.[114] By comparing examples from the United States and other countries' copyright acts along these axes, I will analyze why American copyright law is structured in its current form and how that reflects our process-centric legal values. In many ways, these axes perhaps *are* the legal process values that contribute to our procedure-centric legal regime.

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[109] Sally Engle Merry, *Concepts of Law and Justice among Working-Class Americans: Ideology as Culture*, 9 LEGAL STUD. F. 59, 65 (1985) (emphasis added).

[110] *See id.*

[111] *See id.*

[112] *See* Mike Hough et al., *Procedural Justice, Trust, and Institutional Legitimacy*, 4 POLICING 203, 204 (2010).

[113] *See* Tyler, *supra* note 108, at 103–04.

[114] *See infra* Parts II, III, IV.

Along the first axis, in Part II of this essay, I show that European and Japanese copyright statutes are more willing to protect work-products that require intense effort, whereas the American Copyright Act values novelty and creativity.[115] This Part begins my comparative discussions at the roots of what deserves a copyright. For example, American copyright case law requires at least a modicum of creativity before a work-product can be copyrighted.[116] Conversely, following the Nordic Catalogue Rule, European and Japanese copyright statutes protect non-creative, brute-force cataloging and database compilations of facts (and other non-copyrightable elements) that require immense effort and presumably would not have been created but for the copyright incentive.[117] The American case law that distinguishes between copyrightable "creativity" and non-copyrightable "sweat of the brow" work showcases the fact that U.S. courts inquire into the process of the author's creation to adjudicate this all-important threshold question.[118] This reflects the broader social value in which Americans tend to emphasize the process to accomplish a legal goal, such as reaching the copyright threshold, whereas other countries tend to value effort alone. At a policy level, I argue that such an American emphasis in fact lessens the utilitarian-incentive purpose behind the copyright regime.

Along the second axis, in Part III of this essay, I show that while the American Copyright Act is conscientious of an author's natural and moral rights, European copyright statutes are even more encompassing.[119] For example, American copyright laws provide authors with rights to prevent derivatives of a work without the original creator's permission.[120] American copyright laws also provide the seemingly odd protection that a copyright's sale can be reclaimed by the original owner after thirty-five years, to perhaps ensure that authors of surprisingly-successful works are protected from an initially naïve contract.[121] On the other hand, European

[115] *See infra* Part II.

[116] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991) (citing Trade-Mark Cases, 100 U.S. 82, 94 (1879)); *infra* Part II(A).

[117] *See, e.g.*, Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BUNDESGESETZBLATT, TEIL I [BGBL I], as amended up to Act of Apr. 4, 2016, § 2, art. 4 (Ger.); Nihon no chosakukenhō [Copyright Law of Japan], Law No. 48 of 1970, as amended up to No. 35 of 2014, art. 12bis.

[118] *See Feist Publ'ns*, 499 U.S. at 358.

[119] *See infra* Part III(A).

[120] *See, e.g.*, Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983); Anderson v. Stallone, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at *24 (C.D. Cal. Apr. 25, 1989).

[121] 17 U.S.C. § 203(a)(3) (2012).

and Japanese copyright statutes have specific sections entitled: "Moral Rights."[122] They also contain statutory features like preventing the degradation or defamation of an author's work, even after a sale, in order to protect a copyright creator's moral rights.[123] These differences reflect the larger distinction about authors' rights between the United States and other countries. The American author protection is largely procedural, as authors are given contractual and negotiation-based procedures to protect their works, whereas European author protection is largely an inherent notion tied to the author's being, and hence is much more substantive in scope. This again reflects the broader legal value in which Americans tend to emphasize the process over the substantive protection of the authors' rights.

Along the third axis, in Part IV of this essay, I show that the United States copyright statute as well as the European and Japanese copyright statutes face similar tensions between using a more specific, unique (or *sui generis*) language to describe advancing technologies versus attempting to maintain a connection to generalist property legal notions.[124] For example, to articulate copyrightable subject matters, the American Copyright Act enunciates broad categories but also includes specific "sub-acts" within the general U.S. Copyright Act to expound certain non-obvious categories.[125] Specifically, the U.S. Copyright Act includes *sui generis* sub-acts for protection of architectural features in buildings, semiconductor chip designs, and boat hull designs.[126] The U.S. Copyright Act also provides for specialist royalty judges to calculate copyright damages,[127] whereas France defers damages calculations to generalist courts like in any other property or contract dispute.[128] Finally, the United States maintains a registration system for securing full rights under copyright that many other countries do not.[129] All of these examples reflect the

[122] *See, e.g.*, UrhG [Copyright Act], Sept. 9, 1965, BGBL I, as amended up to Act of Apr. 4, 2016, § 4, arts. 12–14 (Ger.); Nihon no chosakukenhō [Copyright Law of Japan], Law No. 48 of 1970, as amended up to No. 35 of 2014, arts. 17–20.

[123] *See, e.g.*, UrhG [Copyright Act], § 4, art. 14 (Ger.); Copyright Law of Japan, arts. 19, 20.

[124] *See infra* Part IV.

[125] *See, e.g.*, 17 U.S.C. §§ 102, 901–14, 1001–10, 1101.

[126] *See id.* §§ 102, 901, 1301.

[127] *See id.* § 801.

[128] *See* C.P.I. [INTELLECTUAL PROPERTY CODE] arts. L321-1 to L321-13 (Fr.).

[129] *Compare, e.g.*, U.S. COPYRIGHT OFFICE, 2012 COPYRIGHT BASICS 7, www.copyright.gov/circs/circ01.pdf [hereinafter COPYRIGHT BASICS] ("[C]opyright registration is a legal formality intended to make a public record of the basic facts of a particular copyright. . . . Even though registration is not a requirement for protection, the copyright law provides several

statutory complexities in a legal system attempting to accommodate intricate technologies involved in modern IP. By treating copyright protection slightly less similarly to general, traditional property notions, American lawmakers are indicating that they are more comfortable with a complex copyright statutory structure, dense with subject-specific technicalities. These intricacies, including unique procedures and adjudication mechanisms for various specific scenarios, again reflect the broader social value in which Americans tend to cherish (rather than be daunted by) procedures in the copyright statutory structure.

Finally, in Part V of this essay, I conclude by showing that these comparative themes will continue into the future based on the current contrasting trends in American and European approaches to managing digital copyright issues.[130] This Part discusses the American proceduralization of copyright into the digital millennium. For example, to counteract Internet piracy, the United States has statutorily created enforcement procedures in connection with Internet service providers ("ISPs"), through a series of steps involving warnings and Internet speed slowdowns, in order to deter individual piracy.[131] American digital copyright case law has also articulated procedural checks against anti-circumvention tools that could be used to facilitate digital piracy.[132] Conversely, some European countries have balked at such steps because they deem unfettered access to the Internet a fundamental and inviolable individual freedom.[133] Instead of assessing how reasonable and effective such steps are at stopping digital piracy, many European countries do not wish to consider any proposal that impinges on free Internet access.[134] Therefore, as we march further into the digital

inducements or advantages to encourage copyright owners to make registration."), *with* Barbara Kuchar, *Austria, in* INTELLECTUAL PROPERTY LAW IN THE EUROPEAN COMMUNITY: A COUNTRY-BY-COUNTRY REVIEW 41, 49 (Angus Phang et al. eds., 2004) [hereinafter INTELLECTUAL PROPERTY LAW] ("It is not necessary or [even] possible to register copyright in Austria.").

[130] *See infra* Part V.

[131] *See* David Kravets, *ISPs Now Monitoring for Copyright Infringement*, WIRED (Feb. 25, 2013), http://www.wired.com/2013/02/copyright-scofflaws-beware.

[132] *See, e.g.*, RealNetworks, Inc. v. Streambox, Inc., No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at *17–18 (W.D. Wash. Jan. 18, 2000).

[133] *See* Silke Wünsch, *Internet Access Declared a Basic Right in Germany*, DW (Jan. 27, 2013), http://www.dw.com/en/internet-access-declared-a-basic-right-in-germany/a-16553916; Yana Breindl & François Briatte, Digital Network Repertoires and the Contentious Politics of Digital Copyright in France and the European Union, Presented at the Internet, Politics, Policy 2010: An Impact Assessment Conference 24 (Sept. 16, 2010), http://hal.univ-grenoble-alpes.fr/hal-00845640/document.

[134] *See* Konrad Lischka, *Wrangling over Copyright Protection Treaty: Germany Speaks out*

millennium, the American love for procedure will continue to provide stark examples for the study of comparative copyright. With advancing technology, the American procedures for determining Internet provider interactions with users or anti-circumvention techniques will provide finer and finer guidelines. In contrast, in other copyright systems, the search for and adherence to substantive values rather than equitable procedures will drive the application of their copyright laws.

As this summary suggests, I use the terms "procedure" and "process" broadly. Process or procedure could take on any and all of the following three meanings in this essay. One definition is the plain-meaning conceptual notion of how a solution is arrived at; that is, the process to get to a solution. For example, to determine whether a work is copyrightable, American courts focus on how that author's thought process produced the work in question.[135] A second definition refers to the various legal or administrative procedures used in copyright systems. For example, American copyright tribunals have complex procedures as part of its legal process, and U.S. ISPs use systematic, administrative procedures to warn their users of copyright infringements.[136] The third definition derives from procedural protections of other legal remedies. For example, the U.S. provides clawback rights for copyright licenses after thirty-five years, which is to ensure procedural fairness in licensing negotiations after the perhaps unfair or uninformed initial negotiation.[137] While there is certainly no single, taut definition of "process" or "procedure" for the thesis that the American copyright regime is process-centric, this fact only serves to highlight the argument that American copyright does not emphasize substantive copyright values or rights; this contrapositive may be the sharper and tauter perspective for examining and understanding my central argument.

Before delving into these specific discussions, I would like to briefly return to the Battle of Cúl Dreimhne. The story of Saint Columba is surprisingly rich if it is examined along some of these

*against Global Internet Ban for Pirates*, SPIEGEL ONLINE (Mar. 3, 2010), http://www.spiegel.de/international/europe/wrangling-over-copyright-protection-treaty-germany-speaks-out-against-global-internet-ban-for-pirates-a-681498.html.

[135] *See* Dennis S. Karjala & Keiji Sugiyama, *Fundamental Concepts in Japanese and American Copyright Law*, 36 AM. J. COMP. L. 613, 620 (1988).

[136] *See* 17 U.S.C. § 803(b) (2012); Nate Anderson, *Major ISPs Agree to "Six Strikes" Copyright Enforcement Plan,* ARS TECHNICA (July 7, 2011), http://arstechnica.com/tech-policy/2011/07/major-isps-agree-to-six-strikes-copyright-enforcement-plan.

[137] *See* 17 U.S.C. § 203(a)(3).

modern perspectives. Under the lens of the natural rights of authors, it is noteworthy that medieval scribes often impressed on each manuscript their own style of calligraphy and iconography, rich in artistic detail and execution.[138] Therefore, perhaps Saint Columba's dispute was not merely about the copying of the biblical text, but is rather more fractious with respect to authorial moral rights and derivative works rights associated with the entirety of the artistic details likely contained in the copied holy manuscript. Additionally, under the lens of generalist versus specialized copyright laws, it is noteworthy that King Diarmait enunciated his ruling using the words: "To every cow its calf and to every book its copy."[139] In citing the cow-calf analogy, the king invoked the concept of increase from traditional property. Therefore, the first copyright ruling in history has hints of translating generalist property notions into the realm of intellectual property. Finally, under the lens of economic importance, it is noteworthy that early Christian holy manuscripts and other relics were extremely valuable for the local parishes, especially for attracting revenue from pilgrims.[140] Therefore, three thousand men may have died in the name of religion or copyright,[141] but the economic impact of the disputed holy manuscript was likely not trivial either. Admittedly, unlike examining statutory text, these deductions about a historic event are speculative. Nevertheless, this essay's analytical axes for comparing copyright regimes can provide sharp insights about the similarities and differences among legal and social values from jurisdictions old and new, far and wide.

## II. COPYRIGHT LAWS' DIFFERENCES REGARDING VALUE OF EFFORT

Leading up to the 2010 Vancouver Winter Olympics, the Canadian team motto: "Own the Podium" garnered vociferous backlash because it was deemed "un-Canadian."[142] To critics, trying

[138] *See, e.g.*, LEILA AVRIN, SCRIBES, SCRIPT AND BOOKS: THE BOOK ARTS FROM ANTIQUITY TO THE RENAISSANCE 136 (1991) (discussing descriptions of artistic scribes' treatment of psalms texts similar to what Saint Columba may have purportedly copied).

[139] MCGOWAN, *supra* note 7, at 20.

[140] *See* Neil Asher Silberman, *Power, Politics and the Past: The Social Construction of Antiquity in the Holy Land*, *in* THE ARCHAEOLOGY OF SOCIETY IN THE HOLY LAND 11 (Thomas E. Levy ed., 1995) ("Th[e] international market in relics was encouraged by church officials, for it became an important source of revenue for the monastic and religious establishments in the Holy Land. And the inherent value of these relics and the frequent conflicting claims to possession of identical relics led to an ever greater emphasis on the objects themselves.").

[141] *See* Suehle, *supra* note 4.

[142] *See* Randy Starkman, *Own the Podium Lived Up to Billing*, TORONTO STAR (Feb. 16,

your best was the greater Canadian virtue than winning, which was deemed more of an American obsession.[143] Many sociology studies seem to indirectly insinuate that Americans really do value results more than effort.[144] For example, Americans are thought to be less generous with social welfare than Europeans in part because they believe "the poor remain poor only because they refuse to put in th[e] effort."[145] Thus, Americans tend to believe effort always begets results, and hence tend not to wholly value effort in of itself.

The copyright laws may be a surprising place to find hints of this effort-apathy attitude. As a threshold matter in many copyright disputes, the question is often what deserves a copyright.[146] Although obtaining a copyright generally has less stringent novelty requirements than obtaining a patent, there are still minimal thresholds;[147] no country grants a copyright for verbatim copying.[148] However, interestingly, American copyright laws tend to value less effort-based work-products and require more creativity before meeting the requisite threshold.[149] Furthermore, such an attitude towards "results-over-effort" is actuated via a procedure-centric approach in the American copyright regime.[150] This Part will discuss the procedures used in American copyright statutes and case law for determining whether a work has met the threshold requirements for a copyright and the contexts such procedures

2011), http://www.thestar.com/sports/olympics/2011/02/16/own_the_podium_lived_up_to_billing.html.

[143] *See* Ian Chadband, *Winter Olympics 2010: Red-Faced Canadians Not Amused as America Rules the Podium*, TELEGRAPH (Feb. 22, 2010), http://www.telegraph.co.uk/sport/othersports/winter-olympics/7294354/Winter-Olympics-2010-red-faced-Canadians-not-amused-as-America-rule-the-podium.html.

[144] *See, e.g.*, Alberto Alesina et al., Harvard Inst. of Econ. Research, *Why Doesn't the United States Have a European-Style Welfare State?*, BROOKINGS PANEL ON ECON. ACTIVITY, no. 2, 2001, at 187, 237, 238, http://scholar.harvard.edu/files/glaeser/files/why_doesnt_the_u.s._have_a_european-style_welfare_state.pdf.

[145] *Id.* at 237.

[146] *See, e.g.,* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 342 (1991); Baker v. Selden, 101 U.S. 99, 107 (1880); West Publ'g Co. v. Mead Data Ctr., Inc., 799 F.2d 1219, 1228 (8th Cir. 1986).

[147] *See Trademark, Patent, or Copyright?*, U.S. PAT. & TRADEMARK OFF., http://www.uspto.gov/trademarks-getting-started/trademark-basics/trademark-patent-or-copyright (last updated June 9, 2016); *see also Feist Publ'ns,* 499 U.S. at 363 ("As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity.").

[148] *See, e.g.*, Paul Goldstein, *Infringement of Copyright in Computer Programs*, 47 U. PITT. L. REV. 1119, 1127 (1986).

[149] *See Feist Publ'ns*, 499 U.S. at 364.

[150] *See id.* at 363–64 (explaining that American copyright law prioritizes the process behind the creation by emphasizing rewarding the originality of a work instead of the effort that was put forth in creating the work).

produce that come to devalue effort-alone creations.

### *A. American Copyright Eligibility: Creativity Regardless of Usefulness*

To be protected under U.S. copyright laws, a work needs to display at least a "modicum of creativity."[151] In the seminal case *Feist Publications v. Rural Telephone Service*, the U.S. Supreme Court explained that compiling facts in a non-creative manner, such as an alphabetical listing of telephone numbers in a phone book, is insufficient for a copyright under this standard.[152] This ruling originates from the principle that facts and ideas are not copyrightable,[153] which means a compilation or derivation of these non-copyrightable subject matters is also not copyrightable unless there is some minimal creativity.[154] Admittedly, the Court made this threshold very low both linguistically (by asking only for a "modicum" of creativity) and by negative examples (which explain that the arrangements just cannot be merely "mechanical" or "routine").[155] Despite this, the Court made clear its position when it announced that even when a party "expend[s] sufficient effort to make . . . [a work] useful, but [there is] insufficient creativity to make it original[,]" the work will not be eligible for a copyright.[156]

It is particularly illuminating that the *Feist* Court determined what constituted a "modicum" of creativity via reference to procedures.[157] According to the Court, mere "mechanical" or "routine" rearrangements of non-copyrightable matters do not meet this threshold.[158] As a contrapositive to this enunciation, the *Feist* Court refused to accede that the substantive usefulness of the work is sufficient to overcome this threshold bar.[159] This procedure-centric approach to determining copyright eligibility has a surprisingly beneficial quality to some. For example, Professor

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[151] *Id*. at 346 (citing Trade-Mark Cases, 100 U.S. 82, 94 (1879)) ("[O]riginality requires independent creation plus a modicum of creativity.").

[152] *See Feist Publ'ns*, 499 U.S. at 363–64.

[153] *See* 17 U.S.C. § 102(b) (2012); *see also* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 556 (1985) (citing 17 U.S.C. § 102(b)) ("No author may copyright his ideas or the facts he narrates."); Baker v. Selden, 101 U.S. 99, 102 (1879) (providing examples of types of works that qualify for copyright status, and those that do not).

[154] *See Feist Publ'ns*, 499 U.S. at 348 (citing NIMMER & NIMMER, *supra* note 63, § 2.11(D)).

[155] *See Feist Publ'ns,* 499 U.S. at 362.

[156] *Id*. at 362–63.

[157] *See id*. at 363–64.

[158] *See id*. at 362.

[159] *See id*. at 363–64.

Russ VerSteeg argues that by using a procedural impediment to ensure sufficient creativity, instead of statutorily requiring an objective standard of creativity, the American regime ensures that copyright eligibility is not perceived as requiring some "exalted level of towering genius . . . ."[160] Thus, with the policy objective of setting a fairly low creativity bar in mind, the American copyright regime focuses on the procedures of creativity to ensure an accessible yet judiciable framework.[161] However, this lack of appreciation for effort-based productions has garnered significant criticism among IP scholars.

The most compelling counterargument to this American stance against copyrighting "sweat of the brow" work is from a utilitarian perspective. Professor Ian Ayres argues that what is obvious may not necessarily be inevitable.[162] That is, even if an effort-intensive work-product lacks creativity and originality, it will not be produced without appropriate incentives because of the effort required.[163] Therefore, if such a work-product is desirable and socially useful, it ought to be incentivized through granting copyright protection.[164] Another persuasive counterargument is from an equity perspective. Professor Wendy Gordon argues that authors of works should always be given a reward for their efforts as a matter of restitutionary justice.[165] A third broader counterargument is from an efficiency perspective. Since *Feist*, many compilation and database authors have turned to trade secret doctrines and contracting in order to protect their non-copyrightable works.[166] Instead of making the compiled materials publicly available under copyright, which provides greater social access to the underlying information, the creators have resorted to secrecy and licensing as means of recovering the effort investment.[167] Such individualized contracting dramatically increases overall social transaction costs, precisely via means that IP laws like copyright are meant reduce.[168]

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[160] *See* Russ VerSteeg, *Sparks in the Tinderbox:* Feist*, "Creativity," and the Legislative History of the 1976 Copyright Act*, 56 U. PITT. L. REV. 549, 566–67 (1995).

[161] *See id.* at 564, 566–67.

[162] *See, e.g.*, Jimmy J. Zhuang, *Copyright: Better Fitting Genes*, 97 J. PAT. & TRADEMARK OFF. SOC'Y 442, 468 (2015).

[163] *See* VerSteeg, *supra* note 160, at 586–87.

[164] *See id.* at 586–88.

[165] *See* Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 166–67 (1992).

[166] *See* ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 447 (6th ed. 2012).

[167] *See id.*

[168] *See* Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works*

As discussed in the next section, these issues that seem undoubtedly tied to an American devaluation of effort-alone are resolved very differently in European copyright regimes.

### *B. The Nordic Catalog Rule and Appreciation of "Sweat of the Brow" Works*

The famous Nordic Catalog Rule originated as a copyright provision in Scandinavian countries for the protection of electronic compilations and databases.[169] These laws protect "sweat of the brow" work-products that systematically catalog unoriginal or uncreative materials into a useful database, but that nevertheless require intensive efforts.[170] The copyright protections offered are certainly less robust than traditional copyrights: the copyright owner cannot exclude others *a priori*, the copyright owner only owns a right to compulsory licenses, and the copyright duration is only for ten years.[171] Yet, providing copyrights to such compilation and cataloging efforts prevents outright copying and thereby reduces the free-rider problem, perhaps ensuring that the obvious would actually become inevitable.[172]

Protection for such catalogs is not a *sui generis* device for the copyright regimes that provide it.[173] Rather, such protection for "sweat of the brow" work-products is often integral to the respective copyright statutes. For example, in the German Copyright Act, Article 4 explicitly protects database works; this protection is provided prominently within the statutory structure, as it is placed almost immediately after Article 2, which lists generally copyrightable subject matters.[174] The Japanese Copyright Act follows a similar structure: Article 12 explicitly protects database works and is structurally preceded almost immediately by Article 10, which lists general copyrightable subject matters.[175] Not to be

*of Information*, 90 COLUM. L. REV. 1865, 1921–22, 1929 (1990).

[169] *See* Zhuang, *supra* note 162, at 468.

[170] *See id.*

[171] *See* Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after* Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 372 & n.161 (1992). "For a specific statute protecting such databases, see [t]he Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases . . . ." Zhuang, *supra* note 162, at 468 n.151; *see* Council Directive 96/9/EC, 1996 O.J. (L 77).

[172] *See* Zhuang, *supra* note 162, at 468.

[173] *See id.*

[174] *See* UrhG [Copyright Act], Sept. 9, 1965, BGBL I, as amended up to Act of Apr. 4, 2016, § 2, arts. 2, 4 (Ger.).

[175] *See* Nihon no chosakukenhō [Copyright Law of Japan], Law No. 48 of 1970, as amended up to No. 35 of 2014, arts. 10, 12, 12bis.

outdone, the French Intellectual Property Code places database protection in the article immediately after the article listing general copyright subject matters.[176] To underline the integral nature of database protection within these statutes, I would point out that the textual separation between generally copyrightable subject matter, like books, and protections for databases is literally four to five lines of text (and *not* several pages, like certain American statutory "articles").[177] Conversely, the American Copyright Act codifies the *Feist* holding by prominently stating, at its beginning in 17 U.S.C. § 101, that a copyrightable "compilation" must be "arranged in such a way that the resulting work as a whole constitutes an *original* work of authorship."[178] Therefore, the contrast in attitudes toward copyrighting catalogs cannot be any sharper in both the statutory protections themselves and the structural drafting styles.

It is equally illuminating to contrast these countries' attitudes and emphases towards protecting databases. For example, the French Intellectual Property Code provides that "authors of anthologies or collections of miscellaneous works or data, such as databases, which, *by reason of the selection or the arrangement of their contents*, constitute intellectual creations."[179] This statutory structure and language demonstrates that the means and procedures of creation are merely descriptors ("which, by reason of the selection . . .") for the substantive work-product.[180] Instead, the statute is emphatically protective of the author and the underlying substantive intellectual creation directly.[181] Thus, there is much less emphasis in using process to determine eligibility under these sweat-of-brow legislations. While the broad EU directive to protect databases via copyright included statutory review procedures, these procedures were not for determining eligibility, but to ensure that there is fair competition among database makers.[182] Thus, international copyright regimes focus significantly less on procedures than their American counterpart when determining the

[176] *See* C.P.I. [INTELLECTUAL PROPERTY CODE] arts. L112-2, L112-3 (Fr.).

[177] *Compare* 17 U.S.C. §§ 102, 103 (2012), *with* C.P.I. arts. L112-2, L112-3 (Fr.); *and* UrhG [Copyright Act], § 2, arts. 2, 4 (Ger.); *and* Copyright Law of Japan, arts. 10, 12, 12bis.

[178] 17 U.S.C. § 101 (emphasis added).

[179] C.P.I. art. L112-3 (Fr.) (emphasis added).

[180] *Id.*

[181] *See Under French Law: Authors' Rights and Their Work: Protecting Creation and Cultural Diversity,* SACD, http://www.sacd.fr/Authors-rights-and-their-work.2163.0.html (last visited Nov. 7, 2016).

[182] *See* U.S. Copyright Office*, Report on the Legal Protection for Databases: Excerpts of the Executive Summary, August 1997*, 24 BULL. AM. SOC'Y INFO. SCI. 25, 26 (1998), http://onlinelibrary.wiley.com/doi/10.1002/bult.82/epdf.

threshold question of copyright eligibility.

However, the Nordic Catalog Rule is not without its critics. For example, attorney Stephen Maurer worries that protecting "sweat of the brow" work will constrain access to the underlying facts contained within the databases, as well as hinder efforts to improve and reformat the databases.[183] Nevertheless, the emphasis by European and Japanese copyright regimes to protect these databases perhaps reflects a greater cultural sensitivity to the value of effort for its own sake. The next section describes another instance of this cultural contrast.

### *C. Translation Rights*

As copyrighted works disseminate around the world, there is an increasing need for translation across languages among global audiences.[184] For this aspect of copyright protection, various regimes take differing approaches. In the United States, 17 U.S.C. § 106 explains that the copyright author has exclusive rights "to prepare *derivative works* based upon the copyrighted work[,]"[185] which is defined to include a translation of a copyrighted work.[186] The Japanese Copyright Act follows the same rule, and explicitly states: "The author shall have the exclusive rights to translate . . . or otherwise adapt his work."[187] Surprisingly, the Swedish Copyright Act also states that "copyright shall include the exclusive right to control the work . . . be it in the original or an altered form, in translation or adaptation . . . ."[188] Conversely, in Germany: "Translations and other adaptations of a work which are the adapter's own intellectual creations are protected as independent works without prejudice to the copyright in the adapted work."[189] France affords a similar protection for translators of copyrighted works: "The authors of translations, adaptations, transformations or

[183] *See* Stephen M. Maurer et al., *Europe's Database Experiment*, SCIENCE, Oct. 26, 2001, at 789, 790.

[184] *See* Aaron Lee, *Increase in Translation Requests Puts Pressure on Localisers*, DEVELOP (Apr. 17, 2013), http://www.develop-online.net/news/increase-in-translation-requests-puts-pressure-on-localisers/0114586.

[185] 17 U.S.C. § 106(2) (2012) (emphasis added).

[186] *See id.* § 101.

[187] Nihon no chosakukenhō [Copyright Law of Japan], Law No. 48 of 1970, as amended up to No. 35 of 2014, art. 27.

[188] 1 ch. 2 § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK (Svensk författningssamling [SFS] 1973:363) (Swed.).

[189] UrhG [Copyright Act], Sept. 9, 1965, BGBL I, as amended up to Act of Apr. 4, 2016, § 2, art. 3 (Ger.).

arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work."[190] Therefore, translations of copyrighted works are not permitted in the U.S., Japan, and Sweden, whereas they are independently copyrightable in France and Germany.

From the perspective of novelty or creativity, a translation is likely to fall on the non-copyrightable side of the *Feist* rule. Most translations apply mechanical or routine rules of language rather than engender their own original content.[191] However, some scholars have argued that the act of translation is so infused with creativity and discretion that it is no less original than the act of writing itself.[192] Despite the immense range of the nature and types of translation (that would influence which of these two views is more correct), no copyright regime differentiates particular translation mechanisms or contexts.[193] This serves as an important counterargument that process-centric perspectives cannot explain all the differences among copyright regimes. The attitude toward the copyright-worthiness of translations may simply reflect the view that translations are useful and require "sweat of the brow" effort, but lack independent originality. Whether a country's copyright laws provide the protection for translation in order to incentivize such works may therefore broadly reflect that country's attitude towards effort versus creativity, without implicating procedural emphases toward determining the value of that effort or creativity. The U.S., as well as Japan and Sweden, do not afford translators a copyright for their "sweat of the brow" work, even though Japan and Sweden offer database copyrights.[194] This thus shows that various countries may lie along an effort-appreciation spectrum. The American copyright regime seems to value originality and creativity above all else, Japan and Sweden may appreciate effort without originality more, and Germany and France seem to appreciate effort-alone the most.[195]

This Part provided a non-exclusive explanation for America's

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[190] C.P.I. [INTELLECTUAL PROPERTY CODE] art. L112-3 (Fr.).

[191] *See, e.g.*, Martin Kay, *The Proper Place of Men and Machines in Language Translation*, 12 MACHINE TRANSLATION 3, 3 (1997).

[192] *See* LAWRENCE VENUTI, THE TRANSLATOR'S INVISIBILITY: A HISTORY OF TRANSLATION 238 (2d ed. 2008) ("'Like the act of poetry itself,' [translator Will Stone] asserted, 'translation is essentially an intuitive private act of empathy, and despite the energies of theorists seems to nudge any analytical conclusion towards complacency.'").

[193] *See, e.g.*, *supra* notes 184–90 and accompanying text.

[194] *See supra* notes 166–67, 172, 181–89 and accompanying text.

[195] *See* discussion *supra* Parts II(B), II(C).

choice in significantly stressing originality and creativity over effort in the form of the unique American legal emphasis on procedure. Using this perspective, one reading of the *Feist* holding is plainly procedural: any work that is produced from merely "mechanical" or "routine" effort is insufficient for obtaining a copyright;[196] rather, an American copyright has to undergo a process that entails a "modicum of creativity."[197] The creativity or originality requirement is simply an examination of the *process* by which an intellectual property was engendered; the Court is asking if that process is creative enough.[198] Conversely, a substantive examination would focus on the work-product engendered, and ask questions about its usefulness, its inevitability without an incentive like copyright protection, and its consideration value to the creator for his or her efforts.[199] That the U.S. copyright regime doesn't protect "sweat of the brow" work-products despite their usefulness or non-inevitability may therefore partly be a result of this broader de-emphasis on substantive fairness in American legal values. Creativity and originality can be distilled into a purely procedural examination, which American courts love. Therefore, by asking how effort-appreciative a country's copyright laws are, the broader legal values surrounding procedural versus substantive justice that contribute to a copyright statute's specific features may begin to appear.

## III. VARIATIONS IN AUTHOR RIGHTS

Copyright has always had strong ties to the moral rights of authors. John Locke is often cited for the first articulation of this personhood notion.[200] According to Locke, the labor of one's body and the work of one's hands are extensions of the property one owns in his own person.[201] Scholars have often extended this analogy to the fruits of intellectual production, which like any other labor, would be an extension of the author's person.[202] Georg Wilhelm Friedrich Hegel further elaborated this notion and argued: "[T]he person becomes a real self only by engaging in a property

[196] *See, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362–63 (1991).
[197] *See id.* at 346, 362 (citing Trade-Mark Cases, 100 U.S. 82, 94 (1879)).
[198] *See Feist Publ'ns,* 499 U.S. at 362.
[199] *See, e.g.*, *id.* at 363.
[200] *See, e.g.*, Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 965 (1982).
[201] *See id.*
[202] *See* MERGES ET AL., *supra* note 166, at 2–3.

relationship with something external."[203] From this personhood perspective, scholars have argued that the ability to possess property and fruits of labor, like an intellectual production, belongs among the moral rights of an individual creator.[204] As was discussed in Part I, the legislative history of the Statute of Anne is filled with rancor and discontent about the publishers' abuse of authors,[205] which further cemented the central importance of author moral rights in copyright regimes.

In this Part, in section A, I will describe some of the shared values in different copyright regimes that all similarly respect author rights. In section B, I will describe some of the unique U.S. author rights and highlight the procedural nature of these protections. In section C, I will contrast these with other author rights available abroad to demonstrate the variations in the value of author moral rights among copyright regimes.

### *A. Copyright Duration and Derivative Works Rights*

Perhaps one of the most obvious features of copyright statutes that respects an author's personhood is the duration of a copyright. Every major copyright jurisdiction in the world has a duration that is the life of the author plus a specified number of years.[206] Why should a young author be rewarded with a longer monopoly than an old author? Patents do not make such distinctions. And the Statute of Anne surely did not make such a distinction, but instead granted all authors fourteen years of copyright protection from the date of production.[207] Thus, the only plausible explanation is that there is some notion that a copyright is tied to the author's personhood and existence, and therefore, the duration of a copyright should be concomitant with the author's life.[208] However, even within this framework of attaching an author's personhood to copyright protection, a jurisdiction can still fall short in the details based on its differing levels of respect for authors. For example, the United States is generally regarded as providing weak protection for moral

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[203] *Id.* at 7.

[204] *See, e.g.*, Radin, *supra* note 200, at 978.

[205] *See supra* notes 26–36 and accompanying text.

[206] *See Foreign Copyright Laws: Tree-View Chart on Foreign Copyright Law*, COPYRIGHTDATA, http://chart.copyrightdata.com/ch08A.php#top (last visited Dec. 10, 2016).

[207] *See* Statute of Anne, 8 Ann., c. 19 (1710) (Eng.).

[208] *See* Jenny L. Dixon, *The Copyright Term Extension Act: Is Life Plus Seventy Too Much?*, 18 HASTINGS COMM. & ENT. L.J. 945, 956 n.66, 957 (1996) ("Moral rights also raise issues regarding the appropriate duration of protection.").

rights of authors,[209] as will be discussed in sections B and C. Therefore, it should not be surprising that "American treatment of anonymous and pseudonymous works by foreign authors may still fall short of the [Berne] Convention standard . . . [and c]ertain pre-1978 works by foreign authors may still receive less than life plus fifty years of protection . . . ."[210] Respect for the moral rights of authors is thereby directly reflected in the copyright protection itself, by referencing the author's life as the benchmark for the duration of the monopoly. Though different regimes may differ in degree, this strong notion of the author's personhood is, at its core, similarly protected throughout the Berne Convention.[211]

Another more direct and specific feature of copyright statutes that respects an author's moral rights is the derivative works protection.[212] Every major copyright jurisdiction in the world provides an author the exclusive right to prepare derivatives or adaptations of a copyrighted work.[213] From a moral rights perspective, this protection allows the author to maintain his or her "integrity interests" in ensuring that his or her work is not a "substantial distortion" of his or her original creation.[214] This again reflects the notion that a copyright is tied to the author's personhood and therefore needs to be defended against unauthorized alterations or intrusions. However, as with copyright duration, even within this prevalent framework of ensuring authors' personhood integrity in derivative works, jurisdictions may vary in their levels of protection. For example, in the United States, case law makes this protection very narrow. In the widely cited case of *Anderson v. Stallone*, the court held that an alleged disallowed third-party derivative work must be "substantially similar" to the claimed original work to infringe statutory copyright protection.[215] On the other hand, another court held in *Gracen v. Bradford*

[209] *See, e.g.*, Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795, 798 (2001).

[210] J.H. Reichman, *An Evaluation of the Copyright Extension Act of 1995: The Duration of Copyright and the Limits of Cultural Policy*, 14 CARDOZO ARTS & ENT. L.J. 625, 630 (1996).

[211] *See id.* at 627–28, 631.

[212] *See, e.g.*, Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 39–40 (1985).

[213] *See, e.g.*, 17 U.S.C. § 103(b) (2012); C.P.I. [INTELLECTUAL PROPERTY CODE] art. L112-3 (Fr.); 1 ch. 2 § LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK (Svensk författningssamling [SFS] 1973:363) (Swed.).

[214] *See* Kwall, *supra* note 212, at 40–41.

[215] Anderson v. Stallone, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at *32 (C.D. Cal. Apr. 26, 1989) (citing Sid & Marty Krofft TV Prods. v. McDonald's Corp., 562 F.2d 1157, 1162–63 (9th Cir. 1977)).

*Exchange* that a derivative work produced by the original copyright owner needs to be "substantially different from the underlying work to be copyrightable."[216] Therefore, an American author seeking to vindicate his or her exclusive right to generate a derivative work needs to seek protection within this very narrow *Stallone-Gracen* judicial framework: his or her authorized derivative work must be substantially different enough from his or her original, but others' unauthorized derivative works must be substantially similar enough to his or her original. By contrast, derivative works rights are much broader in France and Germany. In France, leading case law suggests that a derivative work is any work that "borrows the elements that generated copyright protection in the primary work . . . ."[217] In Germany, leading case law suggests that a derivative work is any that still maintains the "fundamental character of the primary work."[218] A deep respect for the personhood rights of authors is thereby also reflected in the derivative works protections. It is noteworthy that despite these differences in degree, most jurisdictions provide similar kinds of protection with respect to copyright duration and derivative works: every system bases its protection on the substantive wish to honor the author's personhood, largely free from procedural complexities. However, even with this shared core, we begin to see that different jurisdictions have significant variance in valuing other aspects of an author's moral rights. The next section discusses in-depth some of the more distinctive moral rights available in non-U.S. jurisdictions, with a focus on protections against distorting a copyrighted work (i.e., the basis for derivative works protection).

### *B. Moral Rights of Copyright Owners*

The moral rights of authors, in its current form and understanding, can be concisely described as "the author's personal, artistic interest in the work," so as to ensure its integrity, to prevent its distortion or mutilation, and which ultimately is to prevent the destruction of the author's reputation.[219] American courts have historically been frank in their attitudes toward moral rights in copyright, stating: "In the present state of our law the very

[216] Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983).

[217] Daniel Gervais, *The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs*, 15 VAND. J. ENT. & TECH. L. 785, 825 (2013).

[218] *Id.* at 829, 830.

[219] Ginsburg, *supra* note 100, at 275.

existence of [such a] right is not clear . . . ."[220] Even with the enactment of the Visual Artists Rights Act in 1990 to explicitly grant such moral rights for copyright owners, the statute narrowly limits that protection for "[o]nly the author of a work of visual art . . . ."[221] The Visual Artists Rights Act allows eligible copyright owners to prevent misattribution of their work, destruction of works of "recognized stature," and mutilation of a work that would be prejudicial to their reputations.[222] As for non-visual works of art, the "first sale" doctrine effectively stops all author moral rights at the moment of sale, so that the purchaser may alter, mutilate, or destroy the work of art without any authorial consent.[223] This level of protection is much narrower than what is offered in other countries.

France is often regarded as the paradigmatic example of far-reaching authorial moral rights.[224] Under the French copyright system, author moral rights include the following four elements: a right of the author to decide to publish or not publish; a right of the author to withdraw or modify a published work; a right of the author to correct an attribution of a work or disclaim a misattribution of a work; and a right of the author to prevent alteration, mutilation, or excessive criticism of the work.[225] What is most unique about these moral rights is that they are inalienable to the author, to the extent that the author cannot even voluntarily contract them away.[226] Germany adopted a similar inalienable trait for its author moral rights.[227] In fact, these moral rights are deemed such an important part of copyright law that they are considered "superior to any pecuniary interest" that an author has in his or her copyright.[228] To the French and Germans, the "author has . . . made a gift of his creative genius to the world; in return, he has a right—a moral right—to expect that society respect his

[220] Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 579 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949).

[221] 17 U.S.C. § 106A(b) (2012).

[222] *See id.* § 106A(a)(2), (3)(B).

[223] *See* Benjamin S. Hayes, Note, *Integrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 OHIO ST. L.J. 1013, 1022 (2000) ("The *droit de suite* is unlikely to find a place in American law, however, because it directly conflicts with the 'first sale' doctrine, a well-settled feature of the Copyright Act.").

[224] *See* Dominique Giocanti, *Moral Rights: Authors' Protection and Business Needs*, 10 J. INT'L L. & ECON. 627, 627 n.1 (1975).

[225] *See* Ginsburg, *supra* note 100, at 275–77.

[226] *See id.* at 276.

[227] *See* Russell J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S.A. 1, 4 n.28 (1980).

[228] *Id.* at 4.

creative genius."[229] Specifically, the French copyright law ensures that the moral rights "remain[] vested in the artist even after the object itself has been transferred."[230] Such a characteristic would thwart any first sale doctrine obstacles that the American copyright system poses.[231] Moreover, the moral rights are not separately transferable or assignable, and last for perpetuity.[232] The perpetual and inalienable nature of moral rights would have precluded the absurd scenario in which two American art investors cut up Picasso's *Trois Femmes* into one-inch squares to sell individually as "original Picassos."[233] Perpetuity also ensures that a work of art remains in the form its creator had envisioned regardless of the creator's lifespan or ownership over the work.[234] This is a dramatic emphasis of the intellectual natural rights of an author in ensuring that his or her labors engender a perpetual property notion.[235] Therefore, by celebrating the personhood of the author as the primary virtue, moral rights of authors in France and Germany are extremely powerful and inclusive, and upend the primarily utilitarian notion of copyright that the American regime cherishes.

Beside these broad moral rights of authors, European copyright regimes also accommodate individual authors based on their personal characteristics. In France, the duration of a copyright is extended an extra thirty years for any author who died in the service of France.[236] In Germany, reproduction and/or distribution of a copyrighted work for persons with disabilities for any non-commercial purpose (and not just educational or research purposes)[237] is considered fair use.[238] These more specific examples again demonstrate the greater European emphasis on the personhood of the author. Although not far-reaching like moral rights, these specific provisions focus on the author's individual characteristics as another means to celebrate the personhood of the author.

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[229] *Id.* at 12.

[230] *Id.*

[231] *See* Hayes, *supra* note 223, at 1022.

[232] *See* Ginsburg, *supra* note 100, at 276.

[233] *See* Jon Ippolito, *Trusting Amateurs with Our Future*, THOUGHT MESH (Dec. 21, 2011), http://thoughtmesh.net/publish/printable.php?id=402.

[234] *See* Ginsburg, *supra* note 100, at 276–77.

[235] *See id.*

[236] C.P.I. [INTELLECTUAL PROPERTY CODE] art. L123-10 (Fr.).

[237] *E.g.*, 17 U.S.C. § 107 (2012) (explaining that only educational or research uses of copyrighted works are considered fair use).

[238] UrhG [Copyright Act], Sept. 9, 1965, BGBL I, as amended up to Act of Apr. 4, 2016, § 6, art. 45a (Ger.).

This large discrepancy in the availability of author moral rights between the United States and Europe has many possible explanations, but most of them center on an American emphasis of procedure. The most widely cited explanation begins with the observation that common law has historically not recognized the right of an individual's personality.[239] That is, common law notions of protection for personal reputation or honor—more broadly encompassed under the term personality—are rather limited; besides narrow cases for defamation, personality is rarely protected as a right in and of itself, and property ownership is hardly ever discussed as a Hegelian extension of a right to self-worth.[240] Thus, Professor Justin Hughes proposes that one reason there is a lack of judicial recognition for author moral rights in the United States[241] is because authors' moral rights are difficult to enforce procedurally in courts: without a national consensus on what constitutes the right of personality, the only principle in which courts can use to enforce author rights is through estoppel, which provides "patchwork" protection at best and lacks procedural consistency overall.[242] This explanation essentially argues that having moral rights devalues procedure because available judicial remedies would be too inconsistently applied without a historically coherent jurisprudence on the right of personality.[243] This procedural inconsistency concern was ironically and unintentionally captured by the fact that the committee tasked with ensuring American compliance with Berne moral rights was literally called the "Ad Hoc Working Group."[244] On the other hand, Russ VerSteeg argues that author moral rights do not exist in the United States because the U.S. legal system values contractual freedom, and any impediments to this freedom that impose costs beyond merely ensuring procedural propriety is considered too paternalistic.[245] This complementary explanation thereby argues that impositions on authors' rights to contract away their copyright is usually too burdensome to justify; the cost is far

[239] *See* Edward J. Damich, *The Right of Personality: A Common-Law Basis for the Protection of the Moral Rights of Authors*, 23 GA. L. REV. 1, 4 (1988).

[240] *See id.* at 28–29, 28 n.135, 32–33.

[241] *See, e.g.*, Shostakovich v. Twentieth Century-Fox Film Corp., 80 N.Y.S.2d 575, 577 (Sup. Ct. 1948), *aff'd*, 87 N.Y.S.2d 430 (App. Div. 1949).

[242] *See* Justin Hughes, *Fixing Copyright: American Moral Rights and Fixing the Dastar "Gap,"* 2007 UTAH L. REV. 659, 712–13.

[243] *See id.* at 708–09, 712.

[244] *See* Damich, *supra* note 239, at 3–4.

[245] *See* Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 WASH. L. REV. 827, 849 (1992).

greater than what is needed to ensure procedural propriety.[246] A final, more provocative explanation is put forth by Professor Tom Bell. Assuming that institutions enforcing author moral rights are procedurally constrained by pre-existing precepts of law,[247] Bell argues that a society's copyright regime and its welfare regime are administratively and procedurally remarkably interconnected.[248] That is, author moral rights can be seen as a form of author welfare, so that societies with otherwise procedurally and administratively stronger social welfare regimes will undoubtedly also provide stronger author moral rights in their copyright regimes.[249] Most empirical studies show that the United States provides significantly lower social welfare and perceives such programs much more negatively than European states.[250] Therefore, given Tom Bell's theory, it is not surprising that in parallel to the relatively poor American social welfare regime, author moral rights are not as robust in the United States either. Although it is unclear which of these explanations truly accounts for the discrepancy in author moral rights in the United States versus Europe, it should be apparent from the discussion thus far that the United States Copyright Act lacks many author-specific protections. However, in their place, American copyright laws have unique, process-centric protections to ensure the equity of contracts for author rights.

### *C. Copyright Recapture*

Under the U.S. Copyright Act, an author of a work who has previously licensed or sold a copyright can recapture that copyright (and revoke any licensing grants or contracts) after thirty-five years of the original grant.[251] In a comparative study of notions of authorship, Jane Ginsburg argues that this concept of copyright recapture is the American analog to European author moral

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[246] *See id.* at 848–49.

[247] *See, e.g.*, Randy E. Barnett, *Of Chicken and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 HARV. J.L. & PUB. POL'Y 611, 628–29 (1989).

[248] *See* Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 236 (2003).

[249] *See id.* at 236, 240.

[250] *See, e.g.*, Clem Brooks, *Framing Theory, Welfare Attitudes, and the United States Case*, *in* CONTESTED WELFARE STATES: WELFARE ATTITUDES IN EUROPE AND BEYOND 210 (Stefan Svallfors ed., 2012) (showing figures that indicate that the United States' perceptions of welfare provisions for the jobless, in healthcare, and for old age protections would be the most negative if the U.S. were considered part of the EU).

[251] *See* 17 U.S.C. § 203(a)(3) (2012).

rights.[252] She first suggests: "Because copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert."[253] Then, she explains that these include the "moral rights" of a work's "attribution and integrity . . . as well as the U.S. termination or recapture right entitling the author to terminate contracts of transfer of rights under copyright and to recapture those rights [from the public] to license them anew."[254] This argument postulates a powerful analogy: the personhood notions of copyright are centrally concerned about ensuring that an artistic creation is demarcated from the rest of society, so that the public cannot intrude upon the author's creation.[255] To protect against public intrusion into an author's persona, the European systems provide inalienable moral rights to the author.[256] Conversely, the American system provides a contractual remedy to revoke any previous public access.[257]

The original rationale behind the copyright recapture doctrine is "[t]o protect authors of older works from having to 'live' with a bad deal they entered into when they had little negotiating skill or leverage . . . ."[258] However, the Ginsburg thesis is equally compelling and more broadly applicable because it offers a uniquely American counterpoint to author moral rights and personhood considerations.[259] Regardless of the reason for the initial copyright sale, if an author is subsequently discontent about changes to the copyrighted work—whether it is because the work has undergone alteration, mutilation, and misattribution, or because the work has increased substantially in value—the recapture provision provides the author an opportunity to re-contract for better terms and protections.[260] For example, if the author wants the four elements of the French moral rights system after realizing the importance of

[252] *See* Ginsburg, *supra* note 91, at 1068 n.16.

[253] *Id.* at 1068 (alteration in original).

[254] *Id.* at 1068 n.16.

[255] *See, e.g.*, Mass. Museum of Contemporary Art Found., Inc. v. Buchel, 593 F.3d 38, 49 (1st Cir. 2010).

[256] *See, e.g.*, Cort v. St. Paul Fire & Marine Ins. Cos., 311 F.3d 979, 985 (9th Cir. 2002).

[257] *See* 17 U.S.C. § 203(b) (2012).

[258] Lloyd J. Jassin, *Copyright Termination: How Authors (and Their Heirs) Can Recapture Their Pre-1978 Copyrights*, COPYLAW, http://www.copylaw.com/new_articles/copyterm.html (last visited Nov. 10, 2016).

[259] *See* Ginsburg, *supra* note 91, at 1063–64.

[260] *See generally* H.R. REP. No. 94–1476, at 124 (1976) ("[S]ection 203 . . . [is] a provision safeguarding authors against unremunerative transfers . . . [and a] provision . . . [that] is needed because of the unequal bargaining position of authors, resulting in part from the impossibility of determining a work's value until it has been exploited.").

ensuring his or her work's integrity, he or she may re-contract to insist upon those rights in his or her subsequent copyright license.[261] Moreover, the recapture doctrine permits the widow, surviving children, or the author's estate to recapture the copyright interest as well.[262] Thus, the recapture provision permits the owner of the copyright interests to recalibrate the valuation process in response to changing life circumstances of the author, much like veterans or disabled authors get special considerations based on their personal characteristics in European regimes. Therefore, the recapture provision is a uniquely American solution to protect an author's personhood values. By providing an opportunity to re-contract, the American regime provides a broadly applicable antidote for an author to rectify whatever harms that may have befallen his or her beloved copyrighted work after thirty-five years.

This uniquely American approach to protecting an author's personhood values again reflects the American emphasis on procedure, albeit with an ironic twist. While the putative justification is to provide the copyright owner with a recapture opportunity for an initially unfavorable contract,[263] the subsequent question becomes: why did the copyright owner form a bad contract in the first place? If the copyright regime offered strong moral rights to authors, there would not be a need for the author to resort to recapture to ensure that his or her copyright is not inappropriately used—initially or after thirty-five years.[264] One answer is that Americans value the freedom to contract, and thus want authors to be able to agree to bad contracts without paternalistic oversight.[265] However, the presence of the recapture provision clearly shows that the U.S. copyright regime still prefers some oversight against unfavorable copyright contracts.[266] A more-encompassing, alternative explanation may lie in the nuances of the congressional intent in enacting the recapture provision. Attorney Marc Stein explains that the recapture provision "allow[s] an author

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[261] *See id.*

[262] *See* 17 U.S.C. § 203(a)(2).

[263] *See* Jassin, *supra* note 258.

[264] *See generally* Gilliam v. ABC, Inc., 538 F.2d 14, 24 (2d Cir. 1976) ("American copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors.").

[265] *See* VerSteeg, *supra* note 245, at 849.

[266] *See generally* H.R. REP. No. 94–1476, at 124 ("Section 203 reflects a practical compromise that . . . further[s] the objectives of the copyright law while recognizing the problems and legitimate needs of all interests involved.").

a second chance to *negotiate* the sale of the fruits of his intellectual labor."[267] Thus, it may not necessarily be for the *contents* of the contract itself, but rather the opportunity to *re-negotiate*, for which this provision serves its major importance.[268] Because the copyright licensing environment can be "a complex system of procedures and institutions that can be . . . unwelcoming to the uninitiated and underresourced,"[269] the American copyright regime wishes to provide another process to ensure that an initially byzantine process can be rectified. The irony is further layered by the fact that the "process of [copyright] termination [and recapture] is [itself] convoluted and the requirements are potentially confusing . . . ."[270] Such a convoluted process to protect an earlier convoluted process crystallizes the epitome of American proceduralism: rather than providing underlying substantive author moral rights, like European copyright regimes do, America's process-centric regime offers eccentricities like the recapture process as remedies to an unfair or complicated process upstream. Thus, the variation in the value of author rights is another example in which different international copyright regimes reflect their broader legal values, like American proceduralism.

## IV. SIMILARITIES AND DIFFERENCES IN THE GENERALISM OF LAWS

The discipline of intellectual property strives to still be a study of traditional property, in large part because of the insights and centuries of rich case law analogies that the study of property provides.[271] More generalizable notions of traditional tangible property applied to IP make concepts easier to understand—that is why King Diarmait used the cow-calf analogy that he did. However, because of the nature of IP, especially with ever-advancing technical complexities in fields like patents, there has always been a struggle

[267] Marc R. Stein, *Termination of Transfers and Licenses Under the New Copyright Act: Thorny Problems for the Copyright Bar*, 24 UCLA L. REV. 1141, 1147 n.29 (1977) (emphasis added).

[268] *See generally* H.R. REP. No. 94–1476, at 127 ("Section 203 would not prevent the parties to a transfer or license from voluntarily agreeing at any time to terminate an existing grant and negotiating a new one . . . .").

[269] Sean Pager, *Making Copyright Work for Creative Upstarts*, 22 GEO. MASON L. REV. 1021, 1026 (2015).

[270] Sean McGilvray, *Judicial Kryptonite?: Superman and the Consideration of Moral Rights in American Copyright*, 32 HASTINGS COMM. & ENT. L.J. 319, 324 (2010).

[271] *See* Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1034–35 (2005) ("[S]cholars increasingly turn to the legal and economic literature of tangible property law to justify—or to modify—the rules of intellectual property.").

to maintain these generalist legal concepts with an ever-increasing specialist approach to understanding IP-specific issues.[272] For example, how does one apply traditional property notions to things like genetic code? This tension between generalist IP laws that conform to traditional notions of property and specialist IP laws that accommodate unique features of IP is an excellent perspective from which to compare various copyright regimes. More specifically, this Part of the essay asks how generalist or specialist a country's copyright laws are. Countries with similarities in dealing with this tension have procedurally similar approaches to resolving this issue.

### *A. Common Tension: Usage of* Sui Generis *Categories*

One striking feature from browsing through the American Copyright Act is that it incorporates many seemingly unrelated sub-acts within it. For example, Title 17 of the United States Code contains three especially peculiar individual sub-acts granting copyrights to very non-traditional subject matters: the Semiconductor Chip Protection Act of 1984 ("SCPA"),[273] the Architectural Works Copyright Protection Act of 1990 ("AWCPA"),[274] and the Vessel Hull Design Protection Act of 1998 ("VHDPA").[275] For such novel subject matters, like the rest of the world, the U.S. takes a *sui generis* approach in its basic statutory structuring.

The SCPA serves as an illuminating example. The SCPA provides a ten-year copyright for "mask works," which are the instructions for circuit designs contained within semiconductor chips.[276] What is unique about the legal approach taken is that U.S.C. Title 17 specifically provides a *sui generis* category for the protection of semiconductor designs, rather than simply appending "mask works" onto its list of generally copyrightable subject matter in § 102.[277] That is, semiconductor chip designs are protected as a

[272] *See* Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1607 (2010).

[273] Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 98 Stat. 3347 (1984) (codified at 17 U.S.C. §§ 901–914 (2012)).

[274] Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5133 (1990) (codified at 17 U.S.C. § 120).

[275] Vessel Hull Design Protection Act of 1998, Pub. L. No. 105-304, 112 Stat. 2905 (1998) (codified at 17 U.S.C. §§ 1301–1332).

[276] *See* Zhuang, *supra* note 162, at 466.

[277] *Compare* 17 U.S.C. § 102(a)(1)–(8), *with id.* §§ 901–914 (providing both the list of generally copyrightable subject matter and the specific *sui generis* codification of the SCPA,

separate category, with different rights, duration, and scope, than other traditional copyrights within the Copyright Act. Yet, the SCPA is codified within and becomes a part of the general copyright statute. Such a structure resulted from a deliberate congressional choice after vigorous debate.[278]

Other countries all follow a similar statutory structure. At the urging of the United States, Japan took the exact same *sui generis* approach as was used with the SCPA.[279] Furthermore, the European Union issued a council directive for the legal protection of topographies of semiconductors in 1987, which is similar to the SCPA.[280] Member states then incorporated this *sui generis* directive into their general copyright statutes; for instance, Article L622-1 of the general French Intellectual Property Code incorporates the protection for semiconductor topographies.[281] This common statutory structure therefore suggests that there is much similarity among international copyright regimes when faced with new technologies.

When a technically challenging and unique form of IP asset like semiconductor mask works arises, it seems like all countries follow a similar two-step legislative procedure. The first response is to create a *sui generis* category of protection.[282] Subsequently, this *sui generis* category gets incorporated within the traditional and generalist framework of copyright protection.[283] Neither step is intuitively obvious. Semiconductor designs could have been protected under a judicial interpretation that extended the definition of "design copyrights."[284] And even if it were not, the newly created *sui generis* category could have remained a thoroughly independent act, instead of being incorporated into the traditional copyright regime.[285] That many copyright regimes take

which is not part of the first list).

[278] *See, e.g.*, MICHAEL D. SCOTT, 1 SCOTT ON INFORMATION TECHNOLOGY LAW § 5.06 (3d ed. 2007 & Supp. 2016).

[279] *See* Curtin, *supra* note 48, at 114 ("The Japanese Act closely follows the SCPA, and several commentators believe it was passed as a result of strong urging by the U.S. [g]overnment. Like the SCPA, the Japanese Act created a new form of intellectual property to cover semiconductors, distinct from patent or copyright.").

[280] *See* Council Directive 87/54/EEC, *supra* note 52.

[281] C.P.I. [INTELLECTUAL PROPERTY CODE] art. L622-1 (Fr.).

[282] *See, e.g.*, Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, 98 Stat. 3347 (1984) (codified at 17 U.S.C. §§ 901–914 (2012)); Council Directive 87/54/EEC, *supra* note 52.

[283] *See, e.g.*, 17 U.S.C. §§ 901–914; C.P.I. art. L622-1 (Fr.).

[284] *See* 17 U.S.C. §§ 1301–1332; Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 AM. BUS. L.J. 27, 46–47 (2011).

[285] For example, the Lanham Act protection for trademarks, which came in 1946, was neither incorporated into the pre-existing general patent regime in Title 35 nor incorporated

the approach of enacting a *sui generis* category to subsequently codify it within a generalist copyright framework suggests a common tension across all IP jurisprudence, which in turn creates common procedural solutions. With cutting-edge and disruptively innovative technologies, legislatures have become concerned that existing IP regimes are inadequately protecting the new asset values.[286] However, faced with the choice of modifying existing IP regimes or creating new ones, lawmakers feel some sympathy for the generalist notion that IP regimes ought not be unduly complex,[287] which may be part of the larger concept that people ought to be able to (somewhat) understand the law.[288] Therefore, this generalist-specialist tension seems to be common across many copyright regimes, as illustrated by the similar two-step legislative evolutions with which copyright regimes have reacted to and incorporated novel technologies. In this respect, the United States is not procedurally unique. However, even though this common tension runs deep, the next two sections will show that this generalist-specialist tension is in fact a spectrum, along which lies many specific features of copyright statutes that still highlight some unique American traits.

### *B. Copyright Royalty Judges*

The previous section suggested that the American copyright regime faces the same generalist-specialist tension in its basic statutory structure as other regimes, best seen through *sui generis* categories of novel copyrightable subject matters. Beyond this basic structural similarity, however, there are many specific features of different copyright statutes that vary along a generalist-specialist spectrum.[289] As examples to demonstrate this variance, this section discusses royalty judges and the next section discusses the

into the pre-existing general copyright regime in Title 17. Instead, it became its own statutory regime as codified in Title 15. *See* 15 U.S.C. § 1051.

[286] *See* Michael L. Doane, *Trips and International Intellectual Property Protection in an Age of Advancing Technology*, 9 AM. U.J. INT'L L. & POL'Y 465, 469 (1994).

[287] *See* Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 30 (1996) ("The Register of Copyrights has a tradition of extreme caution in taking policy roles. For most of its history, the Copyright Office has played the role of go-between, translator and emissary between [the specialist] copyright industries and [generalist] Congress.").

[288] *See, e.g.*, Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 164 (2004).

[289] *See, e.g.*, *infra* Part IV(B), (C).

copyright registration system.

From a utilitarian perspective, the major modern mechanism to monetize copyrights is via royalties, which is consideration for the copyright owner to license his or her IP for another to use.[290] However, there are scenarios in which licensing for individual transactions are extremely inefficient. In the paradigmatic example, radio stations playing copyrighted songs often require spontaneity in song selection (in response to song requests, for instance).[291] Such airplay would be very difficult if each song played had to be pre-licensed; requiring such pre-clearance would also reduce the royalty revenues for the copyright owner because it would chill the willingness to use the copyrighted song out of fear of infringement.[292] Thus, compulsory licensing was developed to standardize a royalty rate at which all songs can be played on the public airwaves; radio stations pay these pre-set fees, but do not require pre-clearance to use the copyrighted material.[293] How these pre-set compulsory licensing fees are determined in different copyright regimes is very interesting.

In the U.S., royalty rates for compulsory copyright licenses are decided by specialist judges.[294] Section 801 of U.S.C. Title 17 provides that the "Librarian of Congress shall appoint [three] full-time Copyright Royalty Judges,"[295] who shall "make determinations and adjustments of reasonable terms and rates of royalty payments" for compulsory licenses.[296] This effectively establishes a specialist administrative board with immense power to determine royalty rates in many settings,[297] often to the boisterous dismay of those impacted.[298] Again, this solution is not intuitively preordained. A

[290] *See Royalty,* BLACK'S LAW DICTIONARY (10th ed. 2014).

[291] *See, e.g.*, *How We Pay Royalties: U.S. Radio Royalties*, BROADCAST MUSIC, INC., http://www.bmi.com/creators/royalty/us_radio_royalties (last visited Nov. 10, 2016).

[292] *See* Amanda Reid, *The Power of Music: Applying First Amendment Scrutiny to Copyright Regulation of Internet Radio*, 20 TEX. INTELL. PROP. L.J. 233, 273–74 (2012).

[293] *See* 17 U.S.C. § 115 (2012).

[294] *See id.* §§ 801(a)–(b)(1).

[295] *Id.* § 801(a).

[296] *Id.* § 801(b)(1). Specific categories of compulsory copyright licensing, such as radio airplay of a song, are set by the Copyright Royalty Judges. *See, e.g.*, Frederick F. Greenman, Jr. & Alvin Deutsch, *The Copyright Royalty Tribunal and the Statutory Mechanical Royalty: History and Prospect*, 1 CARDOZO ARTS & ENT. L.J. 1, 2 (1982).

[297] *See, e.g.*, *In re* Digital Performance Right in Sound Recordings and Ephemeral Recordings, Final Determination of Rates and Terms, 72 Fed. Reg. 24,084 (May 1, 2007) (codified at 37 C.F.R. pt. 380 (2016)).

[298] *See, e.g.*, Jacqui Cheng, *NPR Fights Back, Seeks Rehearing on Internet Radio Royalty Increases*, ARS TECHNICA (Mar. 21, 2007), http://www.arstechnica.com/tech-policy/2007/03/npr-fights-back-seeks-rehearing-on-internet-radio-royalty-increases.

more generalist approach could have tasked the courts of general jurisdiction to resolve royalty disputes, much like a damages determination in a contract dispute.[299] However, the legislative history of the Copyright Royalty Board shows that Congress deemed such specialist judges necessary, because in front of an otherwise generalist court, "the representatives of the new technologies have shown consistent tactical superiority over their more established opponents among the copyright owners."[300] Therefore, due to ever-advancing technologies, copyright again requires a more specialist treatment than generalist property adjudications.

This preference for royalty specialists is present only in some foreign copyright regimes. Austria, Germany, and Switzerland have had copyright royalty tribunals with a similar rate-setting function since the 1970s.[301] In contrast, France has a slightly more generalist approach.[302] Quasi-public corporations called "Royalty Collection and Distribution Societies" are used "for the collection and distribution of authors' royalties and . . . established in the form of civil law companies."[303] These societies, membered by copyright owners, then implement rules for royalty collection that are ultimately approved by the "Minister of Culture."[304] Thus, in the French system, copyright royalties are set by corporations created by copyright owners, who are then subject to government review. In even sharper contrast, Japanese royalty setting is a purely generalist legislative function; the compulsory license fees are set by the legislature in the copyright statutes directly.[305] From these differences, the variance in the identity of the royalty rate-setter thus reflects the larger generalist-specialist spectrum of copyright laws.

The American copyright regime favors royalty specialists[306] to a point where one scholar has exclaimed (hyperbolically) that Copyright Royalty Judges' "purposes and [the] language establishing the Tribunal do[es] not match *any* foreign statutory

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299 *See, e.g.*, Greenman & Deutsch, *supra* note 296, at 4.

300 *Id.*

301 *See* Walter Dillenz, *The Copyright Royalty Tribunals in Austria, the Federal Republic of Germany and Switzerland*, 34 J. COPYRIGHT SOC'Y U.S.A. 193, 198–200 (1987).

302 *See, e.g.*, C.P.I. [INTELLECTUAL PROPERTY CODE] art. L321-1 (Fr.).

303 *Id.*

304 *Id.* art. L321-3.

305 *See* E. Fulton Brylawski, *The Copyright Royalty Tribunal*, 24 UCLA L. REV. 1265, 1265 n.4 (1977).

306 *See* 17 U.S.C. § 801(a) (2012).

provisions."[307] France and Japan, to differing degrees, prefer more generalist approaches to copyright law's royalty features.[308] This comparative trend is somewhat surprising. Overall, Americans tend to be more disdainful of administrative regulators than Europeans.[309] Furthermore, administrative bureaucrats have played large roles in modernizing the Japanese economy since World War II and are generally regarded as highly efficient.[310] It is therefore somewhat puzzling that the American copyright regime places such an essential feature—monetization—in the hands of specialist judges and administrators.

One possible explanation could be that American lawmakers are more comfortable with a complex copyright revenue regulatory structure, including unique procedures and adjudication means, because of the broader legal atmosphere that Americans tend to cherish (rather than be daunted by) procedure.[311] In support of this explanation, when web-streaming revenue disputes were first litigated at the Copyright Royalty Board in the early 2000s, instead of determining substantively what fair revenues ought to be for this new medium, "Congress instead convinced itself that the . . . system's procedural problems were the cause of webcaster dissatisfaction[;] . . . rejecting . . . any substantive critique of the royalty rate standard or the [Board's] decision[s] . . . ."[312] Much like author moral rights, web-streamers' complaints for the lack of a substantive standard were to be remedied with more procedure.[313] Historical practice also supports this view. The first ever meeting of the first ever hearing at the Copyright Royalty Tribunal was called to "discuss hearing procedures."[314] Therefore, although American proceduralism may not have influentially contributed to the establishment of specialist Copyright Royalty Judges, the judges' presence in the American copyright regime—and not in certain

[307] Brylawski, *supra* note 305, at 1266 (emphasis added).

[308] *See, e.g.*, C.P.I. [INTELLECTUAL PROPERTY CODE] art. L321-1 (Fr.); Brylawski, *supra* note 305, at 1265 n.4.

[309] *See, e.g.*, CHARLES T. GOODSELL, THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC 3 (4th ed. 2004).

[310] *See* T. J. Pempel, *Bureaucracy in Japan*, 25 PS: POL. SCI. & POLS., no. 1, Mar. 1992, at 19, 20–21.

[311] *See, e.g.*, Paul Musser, *The Internet Radio Equality Act: A Needed Substantive Cure for Webcasting Royalty Standards and Congressional Bargaining Chip*, 8 LOY. L. & TECH. ANN. 1, 17 (2009).

[312] *Id.*

[313] *See id.* at 18.

[314] Bernard Korman & I. Fred Koenigsberg, *The First Proceeding Before the Copyright Royalty Tribunal: ASCAP and the Public Broadcasters*, 1 COMM. & L. 15, 28 (1979).

others—is another indication that American proceduralism is a powerful explanatory factor for subtle differences among comparative copyright.

### *C. Copyright Registration Requirements*

As the saying goes, "possession is nine-tenths of the law."[315] This quip refers to a traditional property notion of ownership;[316] the negative implication is that if you possess a property, you do not need to perform any other act to be deemed its "owner." To analogize copyright to generalist forms of property, one key question is what more does the copyright-owner have to do to claim legal ownership beyond "possession"—which presumably entails merely conjuring up an intellectual idea and remembering (or possessing) it in one's mind. In American copyright law, the minima for copyright ownership (beyond "possessing" an idea) are that the idea needs a "modicum of creativity" and "fix[ation] in a tangible medium."[317] Beyond these, any additional requirements would stray the concept of copyright further away from the generalist notions of traditional property and more into the realm of specialist law. One commonly encountered additional requirement is registration.

Although the American copyright regime does not formally require registration, the need for registration is relatively important compared to other systems.[318] As a threshold matter, the U.S. Copyright Office explicitly states that "[c]opyright is secured automatically when the work is created" and "[n]o publication or registration or other action in the Copyright Office is required to secure copyright."[319] From this, copyright seems like any other form of tangible property. However, the Copyright Office also specifically points out three important advantages for registering a copyright. First, "[b]efore an infringement suit may be filed in [federal] court,

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[315] Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1380–81 (2013).

[316] *See, e.g.*, John Duncan, Uti Possidetis*: Is Possession Really Nine-Tenths of the Law? The Acquisition of Territory by the United States: Why, How, and Should We?*, 38 MCGEORGE L. REV. 513, 515 (2007) (reciting the history of the United States' property acquisitions, whereby military, economic, and territorial expansion served as the rationale for seizure and possession as ownership).

[317] Zhuang, *supra* note 162, at 449; *see* Feist Publ'ns, Inc., v. Rural Tel. Serv. Co., 499 U.S. 340, 362 (1991); H.R. REP. No. 94–1476, at 52 (1976).

[318] *See* WORLD INTELLECTUAL PROP. ORG., WIPO SUMMARY OF THE RESPONSES TO THE QUESTIONNAIRE FOR SURVEY ON COPYRIGHT REGISTRATION AND DEPOSIT SYSTEMS 5, http://www.wipo.int/export/sites/www/copyright/en/registration/pdf/registration_summary_responses.pdf (last visited Dec. 20, 2016) [hereinafter WIPO SUMMARY].

[319] COPYRIGHT BASICS, *supra* note 129, at 3.

registration is necessary for works of U.S. origin."[320] Second, "[r]egistration allows the owner of the copyright to record the registration with the U.S. Customs Service for protection against the importation of infringing copies."[321] And third, registration of a copyright provides statutory damages and attorney fees against infringers.[322] Therefore, the American copyright regime makes registration an essential additional requirement for copyright ownership.

Conversely, other countries' copyright regimes do not place such an emphasis on registration. In fact, Germany and Sweden have no mechanisms by which to even register a copyright.[323] And although copyright registration is available in Japan, the registration only provides the benefit that "the registered date will be taken as the date of creation of the work" unless there is contrary evidence.[324] The French copyright registration mechanism provides similar benefits as Japan's.[325] From these comparisons, it appears that an American copyright has more registration requirements, at least functionally, than its international counterparts. By extension, this suggests that the American copyright regime is further afield from the generalist notion of property ownership because it requires more acts in order to establish full ownership.

The procedural requirement of registration prior to a copyright owner seeking statutory damages and attorney fees in an infringement action[326] is stealthily outcome determinative.[327] This again demonstrates the importance of procedure in American copyright. Professor John Tehranian elaborates that "[i]n other countries, full legal vindication of one's exclusive rights does not require the added procedure of registration . . . ."[328] The reason this

[320] *Id.* at 7.

[321] *Id.*

[322] *See id.*

[323] *See* Bengt Eliasson & Helena Östblom, *Sweden, in* INTELLECTUAL PROPERTY LAW, *supra* note 129, at 380 ("It is not possible to register copyright in Sweden."); WIPO SUMMARY, *supra* note 318 ("In Austria and Germany, only . . . works that have been published as anonymous or pseudonymous works can be recorded. The only purpose of this voluntary registration is to apply the duration of copyright protection to anonymous and pseudonymous works.").

[324] WORLD INTELLECTUAL PROP. ORG., JAPAN'S RESPONSE TO WIPO QUESTIONNAIRE FOR SURVEY ON COPYRIGHT REGISTRATION AND DEPOSIT SYSTEMS 2, http://www.wipo.int/export/sites/www/copyright/en/registration/replies/pdf/japan.pdf (last visited Dec. 20, 2016).

[325] *See, e.g.*, C.P.I. [INTELLECTUAL PROPERTY CODE] art. L511-6 (Fr.).

[326] *See* COPYRIGHT BASICS, *supra* note 129, at 7.

[327] *See id.*

[328] John Tehranian, *The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy*, 24 BERKELEY TECH. L.J. 1399, 1409 (2009).

procedural feature of copyright registration is so important is because unless the artist is well-endowed or his or her work is already famous, the cost of bringing an infringement action likely dwarfs any non-statutory damages that can be obtained even in a court victory.[329] Therefore, the ex ante expectation behavior of an unsophisticated, unregistered copyright owner is to not bring suit altogether, even in the face of blatant infringement.[330] Such a procedural hurdle is problematic because "while Berne may not ban a copyright registration system that serves a procedural end, its language appears to render any copyright registration system that affects substantive rights, including significant remedies, suspect."[331] Therefore, the copyright registration requirement serves as another example of American proceduralism indirectly obstructing important substantive goals.

The past two sections have shown that certain aspects of the American copyright laws—royalty rate-setting and registration requirements—are more specialist in nature than their international counterparts. This generalist-specialist tension is a part of the larger trend in IP laws, which strived from the very beginning (à la King Diarmait) to expound upon traditional property concepts while still adapting to ever-changing technological landscapes.[332] It is noteworthy that all copyright regimes struggle with this tension and are along a generalist-specialist spectrum.[333] There are no per se copyright registration requirements and no specialized copyright courts for dispute resolution in any major copyright jurisdiction,[334] and yet America takes a subtly less generalist approach to copyright laws in some of its features, perhaps due to the broader American legal atmosphere of being more comfortable with a complex statutory structure dense with subject-specific technicalities. Whether providing procedures to adjudicate specialist issues like compulsory licensing revenues or requiring procedures to register copyrights, this American proceduralism makes for distinctly different consequences and outcomes for copyright owners.

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[329] *See id.* at 1411.

[330] *See id.* at 1412.

[331] *Id.* at 1439.

[332] *See, e.g.*, Litman, *supra* note 287, at 30 ("The Register of Copyrights has a tradition of extreme caution in taking policy roles. For most of its history, the Copyright Office has played the role of go-between, translator and emissary between [the specialist] copyright industries and [generalist] Congress."); Pager, *supra* note 269, at 1025–26.

[333] *See, e.g.*, Balganesh, *supra* note 272, at 1607.

[334] *See, e.g.*, COPYRIGHT BASICS, *supra* note 129, at 3.

Two additional, possibly overlapping explanations can also account for America's choice in this generalist-specialist spectrum that reflects broader legal values. First, American law does not feel daunted by the optics of complexity.[335] While European lawmakers use a variety of methods to increase public accessibility and understanding of the law, for instance by making mobile apps and cartoons,[336] American jurisprudence has no such official practice.[337] Therefore, perhaps American lawmakers feel more comfortable using a more specialist approach to copyright law because they are not attempting (as much as their European counterparts) to make the copyright laws accessible to the general public. This explanation complements the theory that American lawmakers are more comfortable providing or requiring complex procedures in the copyright process. Second, American copyright law derives from the common law tradition, which is precedent-based.[338] This may mean that as cases with unique facts grow in a niche area, the precedents grow further and further astray from their roots in generalist law.[339] Thus, the common law legal structure might inherently make American copyright law more specialist because technology pushes the factual distinctions quickly along lines of copyright precedents. Therefore, by asking how generalist or specialist a country's copyright laws are, these larger social and legal values that contribute to a copyright statute's place on the generalist-specialist spectrum may begin to surface.

## V. ONTO THE DIGITAL ERA

As the heavily procedure-oriented American copyright statutes enter the digital millennium, there is tremendous potential for their expansion. With the advent of digital media in the past two decades, new questions arise regarding how to best address digital copyright infringement.[340] In the United States, the exact methods

[335] *See* Musser, *supra* note 311, at 17.

[336] *See, e.g.*, *EU Laws Made Easy: New Interactive App Explains How Majority of Legislation Gets Created*, EUROPEAN PARLIAMENT NEWS (May 17, 2013), http://www.europarl.europa.eu/news/en/news-room/20130508STO08098/EU-laws-made-easy-new-app-explains-how-majority-of-legislation-gets-created.

[337] *See, e.g.*, Pager, *supra* note 269, at 1025.

[338] *See* Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 S. CT. ECON. REV. 21, 38 (2007); Damich, *supra* note 239, at 47–48.

[339] *See, e.g.*, Deborah Kemp, *Copyright on Steroids: In Search of an End to Overprotection*, 41 MCGEORGE L. REV. 795, 806 n.53 (2010).

[340] *See, e.g.*, Michael Walker, Jr., *A Better Public Performance Analysis for Digital Music Locker Storage*, 87 ST. JOHN'S L. REV. 629, 653 (2013).

for implementing digital copyright protection evolved slowly, although along a path that mirrors European development.[341] In this final Part, I will compare and contrast various copyright regimes' responses to digital copyright violations and highlight the dynamics of a digital copyright future.

Legislatively, the Digital Millennium Copyright Act ("DMCA") of 1998 planted many seeds of sophisticated procedures to prevent digital piracy.[342] For example, one specific provision addressed online service providers, who had to adopt technical measures to identify and protect copyrighted works, create standards to let copyright owners identify and protect their work, and designate an agent to receive notification of claimed infringement; by setting up such procedures, these service providers are not liable for contributory copyright infringement.[343] Initially, these complex mandatory procedures seemed worrisome to ISPs, especially as the first wave of digital copyright lawsuits targeted file-sharing networks.[344] Hundreds of such lawsuits were filed between 1999 and 2003.[345] However, these requirements were soon relegated to the background as the lawsuits against individual users dwarfed the lawsuits against file-sharing networks. Between 2003 and 2008, over thirty thousand individual users were sued; many of these were equivalent to strike suits, where the sued individuals routinely paid $3,000 in settlement for the violation when faced with a statutory penalty that could have reached as high as $150,000 per illegally-obtained copyrighted file.[346] When senators and various public interest groups cried extortion over this plethora and the conclusory nature of these suits, the third and current phase of digital copyright protection began.[347] Between 2009 and 2013, via agreements among content-providers and ISPs, all of the major ISPs began to monitor their subscribers' activities.[348] For every copyright infringement, the ISP issues an alert to the

[341] *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 198 (2003) (citing Eldred v. Reno, 239 F.3d 373, 379 (D.C. Cir. 2001)); Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 319–20 (2013).

[342] *See, e.g.*, Universal City Studios v. Corley, 273 F.3d 429, 435 (2d Cir. 2001) (citing 17 U.S.C. § 1201 (2012)).

[343] *See* 17 U.S.C. § 512(a), (c)(2), (c)(3).

[344] *See RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUND. (Sept. 30, 2008), https://www.eff.org/wp/riaa-v-people-five-years-later [hereinafter *RIAA v. The People*].

[345] *See id.*

[346] *See* David Kravets, *supra* note 131; *RIAA v. The People*, *supra* note 344.

[347] *See RIAA v. The People*, *supra* note 344.

[348] *See* Victor Luckerson, *Coming Soon: A Softer Approach to Online Piracy*, TIME (June 26, 2012), http://business.time.com/2012/06/26/coming-soon-a-softer-approach-to-online-piracy/.

subscriber.[349] With each additional copyright-infringing digital activity, the ISP displays increasingly severe alerts and warnings, which triggers a decrease in the subscriber's Internet speed that ultimately results in the termination of the subscriber's Internet service.[350] Usually, this procedure requires between three to five offenses before the ISP takes the more drastic actions, such as slowing down Internet speed.[351] In parallel, much case law developed that impelled major online service providers to carefully follow take-down procedures for copyrighted contents within their digital possession.[352] This mechanism of provider-aided digital copyright protection is the epitome of proceduralization. Through DMCA provisions, case law, and agreements among various stakeholders, digital copyright protection in the United States evolved to engender very specific procedures to efficiently protect copyrights while not prosecuting in a draconian fashion.[353] This outcome may not have been inevitable with a regime less focused on procedure.

In Europe, there is currently a splinter among the nations in how to address the digital copyright revolution. France, Ireland, and the United Kingdom have adopted a plan similar to the American regime.[354] Digital copyright infringers face a graduated response of warnings from ISPs, which ultimately leads to terminating Internet service for repeat offenders.[355] Moreover, online providers are required to ensure that there is a notice-and-take-down procedure for infringing works within their control.[356] However, Germany, Sweden, and Spain have rejected such plans.[357] In these countries, the right to access the Internet is considered a fundamental human right.[358] Therefore, there is a vociferous antagonism against these

[349] *See id.*

[350] *See, e.g.*, Kravets, *supra* note 131.

[351] *See id.*

[352] *See, e.g.*, Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 27 (2d Cir. 2012) (citing 17 U.S.C. § 512 (2012)).

[353] *See* Kravets, *supra* note 131.

[354] *See* Breindl & Briatte, *supra* note 133, at 5.

[355] *See id.* at 4.

[356] *See, e.g.*, Digital Economy Act, (2010) § 3 (Eng.).

[357] *See* Breindl & Briatte, *supra* note 133, at 5.

[358] *See* Claudine Beaumont, *Swedish Government Pledges Super-Fast Broadband for All*, TELEGRAPH (Nov. 4, 2009), http://www.telegraph.co.uk/technology/broadband/6500162/Swedish-government-pledges-super-fast-broadband-for-all.html (describing how Internet access is a fundamental right in Sweden); David Rothkopf, *Is Unrestricted Internet Access a Modern Human Right?*, FOREIGN POL'Y (Feb. 2, 2015), http://foreignpolicy.com/2015/02/02/unrestricted-internet-access-human-rights-technology-constitution/ (describing how Internet access is a fundamental right in Spain); Wünsch, *supra* note 133 (describing how Internet

graduated responses. Germany's Justice Minister pointedly argued: "The German government will not accept any international treaty that includes blocking Internet access [and] . . . banning Internet usage is a fundamentally wrong path to take—even in the battle against copyright infringement."[359] This strong belief in unfettered access to the Internet, even at the cost of copyright infringement, may reflect broader balancing of values. In Germany, for example, the European Pirate Party, whose main political platform advocates for freer access to digital content and advocates against Digital Rights Management ("DRM") and anti-circumvention technologies, has won seats in four state parliaments in 2012.[360] To such European countries, the procedure with which digital copyright is enforced—even if perfectly reasonable—is an irrelevant consideration if it violates certain substantive values, such as access to Internet, which they deem much more socially valuable than copyright enforcement.

As we march further into the digital millennium, the American love for procedure will continue to provide stark examples for the study of comparative copyright. With advancing technology, the American procedures for determining whether a provider has met the anti-circumvention, anti-trafficking, or safe harbor provisions of the DMCA will generate finer and finer guidelines. For example, when Internet speeds were relatively slow after the enactment of the DMCA, the main method to vend digital content was from a central server.[361] Thus, the oft-cited first major DMCA case of *RealNetworks v. Streambox* held that it is considered anti-circumvention to deceive the central server with a false authentication request.[362] However, by 2009, when broadband Internet was commonplace, most digital contents were vended as a live stream in which the contents existed only temporarily on a local user's hard drive.[363] Thus, the case of *RealNetworks v. DVD Copy Control Association*[364] held that it is considered anti-circumvention

access is a fundamental right in Germany).

[359] Lischka, *supra* note 134.

[360] *See* Rebecca Wexler, *The Private Life of DRM: Lessons on Privacy from the Copyright Enforcement Debates*, 17 Yale J.L. & Tech. 368, 369 (2015).

[361] *See, e.g.*, Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. 297, 310 (2003).

[362] RealNetworks, Inc. v. Streambox, Inc., No. C99-2070P, 2000 U.S. Dist. LEXIS 1889, at *11 (W.D. Wash. Jan. 18, 2000) ("Streambox VCR is able to convince the RealServer into thinking that the VCR is, in fact, a RealPlayer.").

[363] *See* WebWise Team, *What is Streaming?*, BBC (Oct. 10, 2012), http://www.bbc.co.uk /webwise/guides/about-streaming.

[364] RealNetworks, Inc. v. DVD Copy Control Ass'n, 641 F. Supp. 2d 913 (N.D. Cal. 2009).

to save the local temporary copy of a streamed digital file and subsequently read directly from that copy, rather than from the original stream that had authentication requirements.[365] This evolution of what it means to violate anti-circumvention shows that procedure follows the relevant technology. The American copyright system will continue to develop equitable standards in evaluating digital copyrights because American copyright emphasizes such procedures. By contrast, copyright systems like those in Germany postulate along fundamental principles. For instance, the European Pirate Party does not believe in anti-circumvention technologies, regardless of their procedural definition, because such technologies are thought to violate free access to information and are invasions of digital privacy.[366] Therefore, comparatively, the American copyright system is constantly in search of equitable procedures with which to apply its copyright laws, and is not examining fundamental substantive values.

[365] *See id.* at 933 ("RealDVD does [no authentication measures] when it reads back DVD content from its hard drive. The process of authentication with the DVD drive, and subsequent content decryption, is thereby circumvented by the RealDVD products.").

[366] *See* Wexler, *supra* note 360, at 369–70.