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# Toward a Public Trust Doctrine in Copyright Law

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# TOWARD A PUBLIC TRUST DOCTRINE IN COPYRIGHT LAW

Haochen Sun\*

## ABSTRACT

As a full-fledged legal tool in property and environmental law, the public trust doctrine has played an important role in deterring inappropriate exploitation of natural resources and improving protection of the environment. In this article, I explore the possibility of introducing the public trust doctrine into copyright law and explain why we need to expand the use of the public trust doctrine from natural resources to knowledge and information as informational resources. By and large, I demonstrate that compared with the Copyright Clause and the First Amendment, the public trust doctrine, if introduced into copyright law, can create more effective and powerful institutional mandates to invalidate the socially unsound expansion of copyright protection, such as the recent extension of copyright terms.

Moreover, I propose that we can tap into the public trust doctrine to generate a set of new legal techniques aimed at enriching copyright adjudication and policy-making discourse. To this end, I argue that we should use the doctrine to promote the ethical values of guardianship, responsibility, and community. Embedded in these values, the doctrine, as I will show, aims to promote and protect the public's collective rights in knowledge and information held in public trust for all citizens. Moreover, the doctrine paves a new way to enforce both the government's political responsibilities and the copyright holders' social responsibilities regarding public access to and use of knowledge and information. Besides, I show how courts could apply the public trust doctrine to create alternative approaches to weigh the constitutionality of the recent twenty-year extension of copyright terms and to lay out a new decision for the Google Book Search Project case.

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# TOWARD A PUBLIC TRUST DOCTRINE IN COPYRIGHT LAW

Haochen Sun

Each time you write something and you send it out into the world and it becomes public, obviously everybody is free to do with it what he pleases, and this is as it should be....

**Hannah Arendt**<sup>1</sup>

If his works deliver signs, they have to be deciphered without his assistance. If he participates in this deciphering, he speaks. Thus the product of labor is not inalienable possession, and it can be usurped by the Other.

**Emmanuel Levinas**<sup>2</sup>

## INTRODUCTION

We are facing an unprecedented environmental crisis. Deforestation has been quickly eating away trees; global warming has been vastly melting away polar ice; and water pollution has been ghastly depriving of human lives. At the forefront of our fight against the environmental crisis, the public trust doctrine has played an important role in deterring inappropriate exploitation of natural resources by government actors and private investors. By reclaiming the public's collective interest in certain essential natural resources, it has reinvigorated the environmental movement<sup>3</sup> through championing the human values of "guardianship, responsibility, and community"<sup>4</sup> in our public space or natural ecosystems.

Meanwhile, we are facing an unprecedented environmental crisis in our cultural ecosystem.<sup>5</sup> Technological measures have been increasingly used to lock up

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<sup>1</sup> Remarks to the American Society of Christian Ethics, 1973 (cited in Margaret Canovan, *Introduction*, in HANNAH ARENDT, *THE HUMAN CONDITION* xx (2<sup>nd</sup> Ed. 1998)).

<sup>2</sup> EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* 176 (1969).

<sup>3</sup> See Erin Ryan, *Public Trust & Distrust: Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 479-80 (2001) ("Environmental activists widely hailed the emergence of the new public trust as the legal tool that would finally empower them against powerful private and government interests they believed imperiled natural resources nationwide"); David Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988).

<sup>4</sup> Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998).

<sup>5</sup> For explanations of the idea of the cultural ecosystem, see text accompanying infra notes 65-75. The use of the "environment metaphor" in this article draws on the idea of cultural environmentalism pioneered by James Boyle. See James Boyle, *A Politics of Intellectual Property: Environmentalism for the Net?*, 47 DUKE L. J. 87 (1997); *Cultural Environmentalism and Beyond*, 70 LAW & CONTEMP. PROBS. 5 (2007); *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 230-249(2008).

information; copyright terms have been retroactively extended to pull more works back into proprietary control; and databases have been given stronger legal protection in order to fence off public access. Heavily skewed by the copyright-based conglomerates,<sup>6</sup> the recent broad expansion of copyright protection, to a large extent, foreshadows the coming of a massive private enclosure of digital information.<sup>7</sup> Amid this rampant enclosure movement, at stake is our cultural ecosystem which has been disrupted by the unprecedented expansion of copyright protection, bringing with it “unpredictable, ugly, dangerous, and possibly irreparable consequences.”<sup>8</sup>

What can we do in order to deal with this crisis? In this article, I propose that we can tap into the public trust doctrine to generate a set of new legal techniques aimed at enriching copyright adjudication and policy-making discourse. To this end, I argue that we should use the doctrine to promote the ethical values of guardianship, responsibility, and community in the intangible public space, the sphere of essential importance to human development and communicative actions. Embedded in these values, the doctrine, as I will show, aims to promote and protect the public’s *collective rights* in knowledge and information held in public trust for all citizens (the informational resources in our cultural ecosystem). To this end, the doctrine paves a new way to enforce both the government’s *political responsibilities* and the copyright holders’ *social responsibilities* regarding public access to and use of informational resources in our cultural ecosystem. Hence, the public trust doctrine in copyright law functions to sustain and enhance the synergies between the major stakeholders in our cultural ecosystem, namely the members of the public, copyright holders, the government and courts, in order to promote a healthy public environment for individual and social development. In doing so, the doctrine enhances the *substantive values* of the public interest in free flow of knowledge and information on the one hand, and promotes the *procedural values* of democratizing the making of copyright policies and laws through engaging more public participation on the other hand.

By and large, the public trust doctrine, as I will show, has the potential to address a major problem that looms large in the recent discourse on copyright and public domain. While it is unquestionably important to discuss the nature of the public

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<sup>6</sup> For discussion about this undemocratic problems in copyright legislative process, see the text accompanying *infra* notes 154-161.

<sup>7</sup> See e.g. James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROB. 33 (2003); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM: WHO OWNS THE KNOWLEDGE ECONOMY? (2003); DAVID BOLLIER, SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH (2002); CHRISTOPHER MAY, AGLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS: THE NEW ENCLOSURES? (2000).

<sup>8</sup> James Boyle, *Environmentalism for the Net*, *supra* note 5, at 109.

domain,<sup>9</sup> it actually becomes more important to think about how we can come up with effective legal techniques to sustain and enhance the public domain. Indeed, many commentators and public interest activists are very enthusiastic and hopeful about the invocation of the Copyright Clause<sup>10</sup> or the First Amendment to counter and invalidate overly strong protection of copyright.<sup>11</sup> Yet *Eldred v. Ashcroft*<sup>12</sup> dealt as a direct blow to these approaches. The Supreme Court adamantly denied the claim that either the Copyright Clause or the First Amendment was a bar to the recent twenty-year expansion of copyright terms.<sup>13</sup>

Against this backdrop, I will demonstrate that the public trust doctrine, if introduced into copyright law, can become an effective alternative tool to invalidate the socially unsound expansion of copyright protection, such as the recent extension of copyright terms. It further functions to revitalize the waning public interest-oriented tradition in copyright adjudication<sup>14</sup> and policy-making.<sup>15</sup> From this perspective, the public trust doctrine does go beyond the reach of the Copyright Clause and the First Amendment. But it by no means follows that the

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<sup>9</sup> See e.g., Collected Papers on the Public Domain published in 2003 Law and Contemporary Problems (James Boyle ed.); Julie E. Cohen, *Copyright, Commodification, and Culture: Locating the Public Domain*, in THE FUTURE OF THE PUBLIC DOMAIN: IDENTIFYING THE COMMONS IN INFORMATION LAW 121 (Lucie Guibault & P. Bernt Hugenholtz eds., 2006); Pamela Samuelson, *Enriching Discourse on Public Domain*, 55 DUKE L. J. 783 (2006); Tyler T. Ochoa, *Origins and Meanings of the Public Domain*, 28 U. DAYTON L. REV. 215 (2003); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990); David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS. 147 (1981).

<sup>10</sup> Article I, Section 8, Clause 8 grants Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

<sup>11</sup> See e.g., Robert Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187, 2239 (2000) (“The point remains the same: in an age of increasing ‘statutorification’ in intellectual property law, the system needs a counterweight where the legislative process is skewed. The [Copyright] Clause of the constitution, long dormant, seems the best candidate.”); NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* (2008) (proposing that copyright law should be subject to the First Amendment scrutiny).

<sup>12</sup> 537 U.S. 186 (2003).

<sup>13</sup> For a comprehensive critique of *Eldred’s* major arguments, see Haochen Sun, *Overcoming the Achilles Heel of Copyright Law*, 5 NW. J. TECH. & INTELL. PROP. 265, 320-22, 327-28 (2007).

<sup>14</sup> *Feist Publ’n, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 349-50 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.”) (citations omitted). Similar conclusions can be found in other cases. See *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932); *U.S. v. Paramount Pictures*, 334 U.S. 131, 158 (1948); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Computer Assocs. Int’l v. Altai, Inc.*, 982 F.2d 693, 711 (2d Cir. 1992); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994).

<sup>15</sup> See H.R. REP. NO. 2222, 60th Cong., 2d Sess., 7 (1909) (“The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings...”).

doctrine would totally supplant them. Instead, the doctrine, as I will show, acts to buttress their embedded mandates by channeling a whole new set of concrete legal techniques into copyright adjudication and policy-making. Put differently, those legal techniques afforded by the public trust doctrine would effectively prompt courts to fulfill their judicial responsibilities to champion the cause of the Copyright Clause and the First Amendment, and further to avoid rendering *Eldred*-type decisions. Moreover, the use of the public trust doctrine as proposed in this Article would create new ways to increase the public awareness of the importance of protecting free flow of knowledge and information, and to mobilize more members of the public to actively engage in policy discourse regarding how the ownership of knowledge and information should be allocated.<sup>16</sup> This is because the doctrine has the very potential to show the general public their stake in our cultural ecosystem as it did in the past to mobilize the environmental movement by increasing the public awareness of each human being's stake in the environmental protection of our natural ecosystem.<sup>17</sup> In this sense, the public trust doctrine would further buttress the mandates embedded in the First Amendment and the Copyright Clause by engaging more citizens to participate directly or indirectly in the making of copyright policies or laws.

On the other hand, the bundle of the conventional doctrines embedded in copyright law per se is seen as the effective legal tools to prevent stronger copyright protection from stifling free flow of knowledge and information for social creativity and innovation. Put differently, it is submitted that copyright law itself contains adequate safeguard measures to protect and promote the public interest in free flow of knowledge and information. The fair use doctrine, for example, gives the public at large the privilege to use works without the relevant author's permission and paying royalties.<sup>18</sup> Therefore, the doctrine is hailed as a legal tool that defines "the contours of the private and public domains of human expression and in so doing, directly impact our capability for human flourishing."<sup>19</sup> Yet the recent unprecedented expansion of copyright protection may have jeopardized the positive role played by the fair use doctrine in promoting free flow of knowledge and information. Congress has adopted a series of laws, such as the Millennium Digital Copyright Act, which may have unduly undercut the public's conventional privileges of using knowledge and information under the fair use doctrine.<sup>20</sup> Moreover, many courts have interpreted the fair use doctrine based on the individualistic vision of property rights and thereby turned a blind eye to the larger

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<sup>16</sup> For the discussion on the importance of engaging more public participation in shaping and reshaping intellectual property laws, see Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008).

<sup>17</sup> See e.g., David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVIRONMENTAL LAW JOURNAL 711, 732-33 ("The Public Trust Doctrine is a forerunner of the movement to guarantee certain environmental rights as fundamental human rights.").

<sup>18</sup> See 17 U.S.C. § 107 (2006).

<sup>19</sup> Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes? Evidence From the Fair Use Case Law*, 31 COLUM. J. L. & ARTS 517, 522 (2008).

<sup>20</sup> See the text accompanying *infra* notes 76154-78, 93-95161.

public interest in free flow of knowledge and information.<sup>21</sup> The combination of the legislative and judicial expansions of copyright protection, therefore, has made the fair use doctrine “an exceedingly feeble, inconsistent check on copyright holders’ proprietary control.”<sup>22</sup>

Against this backdrop, the public trust doctrine will provide us with a vantage point to rethink the nature and scope of many conventional copyright doctrines designed to ensure the freedom of knowledge and information for both individual and social development. On the one hand, the doctrine, as I will argue, would lead us to broaden our vision of the public interest in knowledge and information by regarding fair use of works as the public’s *collective rights*. On the other hand, I will further argue that the public trust doctrine would lead us to rethink the *social responsibilities* that should be imposed upon copyright holders. From this perspective, the fair use doctrine imposes upon copyright holders a set of social responsibilities that require them to engage themselves in promoting the larger project of improving the cultural ecosystem of our public space. Through seeing fair use as the public’s collective rights and copyright holders’ social responsibilities, the use of the public trust doctrine in copyright law would offer a creative and dynamic interpretation of the nature and scope of the fair use doctrine, and further immensely help copyright law to deliver its promise to serve as the “engine of free expression.”<sup>23</sup>

The initial Part of this Article reconsiders the social foundation of the public trust doctrine. It argues that the doctrine plays an important role in sustaining and improving the dynamics of our public space, which is essential to human development and flourishing. Drawing on the social foundation of the doctrine, Part II discusses how and why the doctrine should be introduced into copyright law. By combining the conclusions drawn in the preceding two Parts, Part III further delves into the legal foundation of the public trust doctrine. It explains in detail how the set of new legal techniques afforded by the doctrine are founded on the combination of the three agendas aimed at defending the public’s collective rights, enforcing the government’s political responsibilities, and requiring copyright holders to fulfill their social responsibilities respectively. The fourth Part seeks to apply the doctrine to overturn *Eldred* and to lay out a new decision for the Google Book Search Project case.

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<sup>21</sup> See the text accompanying *infra* notes 89-90, 127-143. See also, NETANEL, *supra* note 11, at 62-66 (discussing the Blackstonian property-centered view of fair use that has been widely used by courts); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 545 (2004) (explaining why wide use of the notion of transformative use in fair use cases can in turn cause serious free speech problems).

<sup>22</sup> NETANEL, *supra* note 11, at 63.

<sup>23</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 589 (1985) (Brennan, J., dissenting).

## I. REDISCOVERING THE SOCIAL FOUNDATION OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine has a long and venerable history. Generally speaking, it stemmed from Roman law concepts of public property, which prescribed that the air, the rivers, the sea and the seashore were incapable of private ownership. Rather, they were dedicated to the use of the public.<sup>24</sup> With the rise and development of free trade in Europe, the idea of the public trust was invoked by those against king's and feudal lords' manipulative control of certain natural resources essential to the commercial manufacture and trade of products in the marketplace. Thereby, the Roman law idea of the public trust gradually took root in many common law and civil law jurisdictions in Europe.<sup>25</sup>

American law adopted the modern version of the public trust doctrine after its debut in *Illinois Central Railroad v. Illinois*,<sup>26</sup> a decision rendered by the Supreme Court in 1892. In *Illinois Central*, the Court invalidated Illinois state government's privatization of the navigable waters of Lake Michigan and land underneath them. Because these resources were regarded as being "held in trust for the people of [Illinois]," the public "may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."<sup>27</sup> Therefore, the Court ruled that the government could not grant any private parties a proprietary control over those resources, which would in turn exclude the public at large from having free and unimpeded access to and use of them.

With the rise of modern environmental movement in the early 1960s, Joseph Sax revitalized the public trust doctrine by imbuing it with new substantive and procedural underpinnings. He argued that in terms of the substantive value, the public trust doctrine should not restrict itself to its conventional role in protecting the right of navigation, commerce and fishing. Rather, the doctrine could further act as a powerful legal tool for people to protect their right to sustainable protection of the environment.<sup>28</sup> With regard to the procedural value, he put

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<sup>24</sup> THE INSTITUTES OF JUSTINIAN bk. 2, tit. 1, pts. 1-6, at 65 (J. Thomas trans. 1975) ("By the law of nature these things are common to mankind – the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings which are not, like the sea, subject only to the law of nations.").

<sup>25</sup> For example, in England, the public trust doctrine was recodified in the Magna Carta and forced upon King John in 1225 after his defeat at the battle of Runnymede. The treaty stipulated that neither he nor any future king could grant private hunting and fishing rights to favored earls and dukes, thereby cutting off the commons from people who relied upon them for their livelihood. By the eleventh century a French law had been decreed which said that "the public highways and byways, running water and springs, meadows and pastures, forests, heaths and rocks are not to be held by Lords; nor are they to be maintained in any other ways than that their people may always be able to use them." See MARC BLOCH ET AL, FRENCH RURAL HISTORY 183 (1966).

<sup>26</sup> 146 U.S. 387 (1892).

<sup>27</sup> *Id.* at 452.

<sup>28</sup> See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 478-89 (1970).

forward a proposal that the public trust doctrine empowers courts to act on citizens' behalf to override unreasonable privatization of natural resources carried out by government.<sup>29</sup> This is because the democratic process of governing use of natural resources is vulnerable to lobbying efforts made by the relevant interest groups. From this perspective, Sax proposed that in order to deliver its substantive and procedural promises, the modern public trust doctrine must be imbued with three interrelated standards of review: (1) "contain[ing] some concept of a legal right in the general public;" (2) "be[ing] enforceable against the government;" and (3) "be[ing] capable of an interpretation consistent with contemporary concerns for environmental quality."<sup>30</sup> With the surge of the environmental movement, Sax's theory of the public trust doctrine has provided a legal cause of action for public interest activists and citizens at large to prevent or stop environmental harm caused to certain natural resources. Despite criticisms,<sup>31</sup> the doctrine per se has been at the forefront of state common law developments aimed at protecting natural resources as public property. Meanwhile, the legal status of the doctrine has been formally recognized in many state constitutions and environmental laws.<sup>32</sup>

Drawing on the lessons gleaned from a rich array of judicial opinions and scholarly discussions, I will explore in this Part the social foundation of the public trust doctrine, which would lay the ground for introducing the doctrine into copyright law. I will argue that we can re-conceptualize the role of the public trust doctrine beyond the conventional wisdoms by considering its social foundation from the perspective of the philosophical theory of the public space.

### **A. Public Space as the Foundation of Human Development**

By and large, having a private space is of essential importance for every human being to achieve self-development and flourishing. The private space that belongs exclusively to a particular person draws up the boundaries of the sphere, such as walls, fences, doors and so on. In this way, it affords the bounded sphere in which we are left free to choose the ways of satisfying our own desires and inclinations without undesirable interventions from others. Thus, in our own private spaces we remain free to design the contents of private life of being as individuals, including enjoying happiness and peace, and even living through loneliness or sorrow. From this perspective, the institution of private property is designed to protect personal freedom within the boundaries of the private space.

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<sup>29</sup> *Id.* at 491-565

<sup>30</sup> *Id.* at 474.

<sup>31</sup> See e.g. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986).

<sup>32</sup> For example, the Pennsylvania State Constitution provides that "public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefits of all the people." PA. CONST. art I. §27. See Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006); Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169 (1997).

Hegel, albeit seen as the inspirational figure for the modern communitarianism, insightfully observed that the premise of legal protection of private property in human society lies in the fact “[t]he person must give himself an external *sphere of freedom* in order to have being as Idea.”<sup>33</sup>

Yet having the private space is not necessarily the only condition on which human beings achieve self-development and flourishing. The trajectory of the human development and flourishing, in fact, constantly entails the direct or indirect influence from others, be they known or unknown human beings. For example, our being able to speak a language as one of the basic human capabilities is acquired through numerous encounters and interactions with others. Although parents surely play an important role in nurturing our linguistic capabilities in the family setting, we sustain and enhance them through speaking with and listening to people we meet on various occasions. Furthermore, our exposure to the general cultural environment improves our linguistic capabilities, because it provides us with the multitude of key ingredients of communal norms which govern the ways in which people speak. They primarily include customs, traditions, and so on, and are by nature collectively shaped by the people who live in the same community. Therefore, the role of “others” in human development, be it direct or indirect, shows that human action and speech, as Hannah Arendt observed, are “never possible in isolation” and “need the surrounding presence of others”.<sup>34</sup>

In addition to the “human” other, we also need non-human objects as the “other” for our development and flourishing. Things like houses, beds, clothes and so on, form the exclusive external spheres that are essential to our life in the private space. Meanwhile, there are non-human objects which constitute the indispensable “other” outside the boundaries of the private spaces. On the one hand, we can find our presence, be it constant or sporadic, in the non-human “other” which is not made by men. We go boating in the river, hiking in the mountain, and picnicking in the forest. In our eyes, these things, the non-man-made “other”, form the natural environment to which we belong.<sup>35</sup> On the other hand, we can find our presence in the “other” which is made collectively by our fellow human beings. We speak loudly in the town square, drive fast on the highway, and play happily in the park. These venues, the man-made “other”, form the social environment in which we are nurtured. Regardless of being man-made or not, all these thing-hood others create the environment that lies outside the boundaries of our private spaces.<sup>36</sup>

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<sup>33</sup> G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 41 (trans. H. B. Nisbet, 1991).

<sup>34</sup> HANNAH ARENDT, *THE HUMAN CONDITION* 188 (2<sup>nd</sup> Ed. 1998). Arendt also points out that “action and speech are surrounded by and in contact with the web of the acts and words of other men.”

<sup>35</sup> JAMES SALZMAN & BARTON H. THOMPSON, *ENVIRONMENTAL LAW AND POLICY* 3 (2007) (“The stillness of a remote forest lake or the imposing crags of a mountain peak provide for many both a sense of connection to a larger world and a sense of inner wonder.”).

<sup>36</sup> Mead uses the language process as an example to demonstrate that the self “arises in the process of social experience and activity, that is, develops in the given individual as a result of his

The otherness of human development,<sup>37</sup> as discussed above, makes it impossible for any of us to live only within the closed boundaries of our won private spaces. Rather, because the “other” always physically exists outside of the private space, one’s coming to the “other” requires him to situate himself in the place where he and the “other” can meet each other, though the distance between them is not sure (sometimes face to face, sometimes not). Such arena is the public place where only open boundaries exit.

The openness of the public place which accommodates “me” and “others” has two core attributes: publicity and commonality. On the one hand, the public space is the open arena where “everything that appears in public can be seen and heard by everybody and has the widest possible publicity.”<sup>38</sup> On the other hand, the public space is the open arena where people have things together in common and these things ought not to be held in exclusive possession by any single person.<sup>39</sup> Therefore, the public space affords people the sphere in which they can meet and act together to achieve social or political goals and to further set up norms that govern human interactions in the society as a whole.

## **B. Public Space and the Public Trust Doctrine**

As shown at the outset of the preceding section, the thrust of the public trust doctrine is to keep certain natural resources held in trust for the general public as a whole. These resources are regarded as “inherent public property”<sup>40</sup> and every

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relations to that process as a whole and to the other individuals.” GEORGE HERBERT MEAD, *MIND, SELF, & SOCIETY* 135 (1967).

<sup>37</sup> The phenomenologist account of human development offers the most profound discussion about the relationship between the self and the other. *See e.g.*, G. W. F. HEGEL, *PHENOMENOLOGY OF SPIRIT* § 178 (A. V. Miller trans. 1977) (“Self-consciousness exists in and for itself when, and by the fact that, it so exists for another; that is, it exists only in being acknowledged.”); EMMANUEL LEVINAS, *TOTALITY AND INFINITY: AN ESSAY ON EXTERIORITY* 193 (Alphonso Lingis trans. 1969) (“It is the face; its revelation is speech. The relation with the Other alone introduces a dimension of transcendence, and leads us to the a relation totally different from experience in the sensible sense of the term, relative and egoist.”). The idea of men as social beings further lends a strong support to the phenomenologist account of human development. *See* ARISTOTLE, *THE NICOMACHEAN ETHICS* 14 (Penguin, 2004) (“By self-sufficient we mean not what is sufficient for oneself alone living a solitary life, but something that includes parents, wife and children, friends and fellow-citizens in general; for man is by nature a social being.”); ARISTOTLE, *POLITICS* 10 (Oxford 1998); Karl Marx, *Economic Philosophic Manuscripts of 1844*, in 66 *THE MARX-ENGELS READER* 85 (Robert V. Tucker ed. 1978) (“[T]he human essence of nature first exists only for social man; for only here does nature exist for him as a bond with man—as his existence for the other and the other’s existence for him—as the life-element of the human world.”); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 216 (1976) (“[L]ike everything else the self is defined by the totality of its relations with other beings and, particularly, with other selves.”).

<sup>38</sup> ARENDT, *supra note* 34, at 50. A similar notion of the publicity is offered by Iris Young. *See* IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 168-170 (2000).

<sup>39</sup> ARENDT, *supra note* 34, at 52.

<sup>40</sup> *See* Carol Rose, *The Comedy of the Commons: Commerce, Custom and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

member of the public has free and unimpeded access and use of them. The public ownership vested in the general public makes the boundaries of the public trust resources constantly open to everyone on equal terms. Therefore, the public trust doctrine is by nature designed to maintain the public openness of the protected resources to every member of the public, and to prevent them from being privatized and equipped with closed boundaries by any potential private parties. As I will show below, there are, however, a variety of manipulative activities performed by either government or private parties, which result in the degrading of the openness of the public space. In this context, the public trust doctrine plays an important role in countering those manipulations and thereby protecting the openness of the public space that is of essential importance for human development and flourishing as shown in the preceding section.

### **1. Against the Ecological Manipulation**

First and foremost, the public trust doctrine has been evoked as a powerful legal tool for combating the manipulative activities that cause the ecological deteriorating of the natural environment. It has been long recognized that the natural environment is formed by interconnected ecosystems as the networks of biota that mutually support one other. Each part of the natural environment is interdependent and can not be reduced into disparate bits and pieces.<sup>41</sup> The deterioration of the environment, by and large, results from human activities that make undesirable alterations to the integrity of the environment. They are routinely performed by people in order to exploit a particular part of natural resources without paying any sufficient heed to the negative impacts on the environment in its entirety.

Against this backdrop, the public trust doctrine functions to protect and preserve the natural environment by providing safeguards against the “destabilizing changes”<sup>42</sup> to natural resources as the public space for the general public. In doing so, it requires every member of the public to follow the “land ethic” that is based upon the notion that “[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.”<sup>43</sup> The doctrine, therefore, holds that “conservation of resources is intrinsically good and necessary for the continuation of society.”<sup>44</sup> By ruling out any unreasonable alterations to public trust natural resources, the doctrine recognizes and embraces the intrinsic values of maintaining the openness of the

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<sup>41</sup> See e.g., Judy L. Meyer, *The Dance of Nature: New Concepts in Ecology*, 69 CHI.-KENT L. REV. 875, 883 (1994) (“Our history ... has taught us that activities in one part of the landscape greatly influence other parts.”).

<sup>42</sup> Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L.REV. 185, 188 (1980) (“The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title. The function of the public trust as a legal doctrine is to protect such public expectations against destabilizing changes, just as we protect conventional private property from such changes.”).

<sup>43</sup> ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 224-25 (1968).

<sup>44</sup> *W.J.F. Realty Corp. v. State*, 672 N.Y.S.2d 1007, 1012 (1998).

natural environment. From this perspective, the California Supreme Court, for example, placed much emphasis on the practice of conservation through keeping the tidelands open for all:

There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as *open space*, and as *environments* which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.<sup>45</sup>

Generally speaking, the manipulative activities that have been invalidated by the public trust doctrine fall into two categories. First, the doctrine has been invoked to flight unreasonable diversion of natural resources. For example, the California Supreme Court forbade the water department in Los Angeles to unreasonably divert water from the rivers feeding Mono Lake on the ground that the vast diverting of water had severely caused degrading of the lake's scenic beauty and ecological values.<sup>46</sup> Given that the lake waters are held in public trust for all the citizens in California, the state as the trustee of the water resources was deemed to have failed to “preven[t] any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.”<sup>47</sup>

On the other hand, the doctrine has been invoked to regulate or prohibit activities that cause pollution to natural resources. For example, acting as the trustee of the natural resources concerned, the State of Idaho required a company to make a million-dollar restoration effort to remove oil sheen leaked in Idaho's St. Joe River.<sup>48</sup> Moreover, courts have also used the doctrine to help the government or people to recover damages they sustained due to the pollution of public trust natural resources.<sup>49</sup>

## **2. Against the Economic Manipulation**

The rhetoric of the tragedy of the commons teaches that privatization is a panacea for overuse or depletion of natural resources for the public.<sup>50</sup> Moreover, given the

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<sup>45</sup> *Marks v. Whitney*, 6 Cal. 3d 251, 259-60 (1971) (emphases added).

<sup>46</sup> *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 424-25 (Cal.,1983) (“As a result of these diversions, the level of the lake has dropped; the surface area has diminished by one-third; one of the two principal islands in the lake has become a peninsula, exposing the gull rookery there to coyotes and other predators and causing the gulls to abandon the former island. The ultimate effect of continued diversions is a matter of intense dispute, but there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled.”).

<sup>47</sup> *Id.* at 445.

<sup>48</sup> See ZYGMUNT J.B. PLATER ET AL, ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1067 (2004).

<sup>49</sup> See e.g., *In re Complaint of Steuart Transp. Co.*, 495 F. Supp. 38 (1980).

<sup>50</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE (1968). Aristotle may be the first person to come up with this idea. For example, he pointed that “[they devote a very small fraction of time to the consideration of any public object, most of it to the prosecution of their own

heightened difficulty in reaching agreement due to the increased transaction costs when the number of parties increases, the theory of collective action further adds the rhetorical basis for making privatization as a means to the ends of optimal use of natural resources.<sup>51</sup> The economic justification for privatizing natural resources, therefore, centers on the need to allocate exclusive control over resources to those who can make optimal use and management. It further highlights the role of free market in bringing about maximization of wealth for personal and social development.<sup>52</sup>

Yet privatization through the invisible hand of mere privatization and free market begs the question why certain natural resources, such as the Mississippi River and the Central Park in the New York City, ought to be held in public trust and are not susceptible of private ownership. The rationale against expansive privatization of natural resources, by and large, stems from the fact the free market, albeit its liberty-promoting function, breeds coercions by creating monopolization of resources. In the modern society, it is inevitable for every person to get involved in the trade that takes places in the marketplace. While every person has the equal status as a trading participant in the marketplace, the type or amount of resources held in their control in fact differs from one another. Therefore, the bargaining power they have for negotiating deals in the marketplace always varies from person to person. Due to the unequal distribution of bargaining power, some people with stronger bargaining power can coerce others into following their commands, should the latter need anything from the former.<sup>53</sup> Although the latter may turn around to seek another party to trade, the inequality of distribution of bargaining powers would still lead them to negotiate with those with stronger bargaining power, resulting in their being subjected to coercion again.

From the bargaining-power perspective, an expansive privatization of natural resources would bring out the problem that the private owner may exert coercion on members of the public. On the one hand, by relying on the right to exclude, a private owner may prevent the public from exercising their public trust rights, such as walking across the private beach for fishing, bathing or swimming in the sea, and walking along privately-owned lake shore to relax.<sup>54</sup> Under this circumstance, the private ownership of public trust resources is the shield against

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objects. Meanwhile each fancies that no harm will come to his neglect, that it is the business of somebody else to look after this or that for him; and so, by the same notion being entertained by all separately, the common cause imperceptibly decays.” ARISTOTLE, POLITICS 1261b (1885).

<sup>51</sup> See generally MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 125-28 (1971) (arguing that large-group organization is ineffective where the benefits are collective because of free riding).

<sup>52</sup> See eg., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 32-34 (6<sup>th</sup> ed. 2003); Harold Demsetz, *Towards a Theory of Property Rights*, 57 AMERICAN ECONOMIC REVIEW 347 (1967).

<sup>53</sup> See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLITICAL SCIENCE QUARTERLY 470 (1923).

<sup>54</sup> *Town of Orange v Resnick*, 94 Conn 573, 578; 109 A 864 (1920) (listing as public rights “fishing, boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge and . . . passing and repassing”).

the public's access to or use of the resources. It signals that unauthorized use of the resources concerned would result in legal penalties, should the owner assert his rights before courts. For fear of the potential legal penalties, many members of the public may opt out of exercising their public trust rights. Against this backdrop, the private owner simply coerces the public by using their bargain power to exclude. The public trust doctrine has been invoked by the court to stop the use of coercive power in this kind of case. For example, the New Jersey Supreme Court ruled that the public are legally to have unimpeded access to and make reasonable use of the privately-owned dry sand beaches to use the foreshore areas for recreational purposes like bathing and swimming.<sup>55</sup>

On the other hand, if certain natural sources indispensable to the life of the public fall into proprietary control, property owners may charge access and use fees that most members of the public can not afford. Therefore, privatization of certain natural resources would lead to monopolistic control and abuses. Recognizing the grave harm that may be caused by monopolization of certain natural resources, courts repeatedly used the public trust doctrine to prevent navigable waters and the lands underneath them from being held under proprietary control. These resources inherently have the public trust status, because they are indispensable for commercial activities through navigation to take place.<sup>56</sup> The exclusive control over the navigable waters as the "highways of commerce,"<sup>57</sup> would result in monopolistic price that is prohibitively high for regular navigation activities, causing an unreasonable increase in social cost of commerce. Therefore, the public trust doctrine aimed at keeping navigable waters open for all commercial activities, as the court concluded, "is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment."<sup>58</sup>

### **3. Against the Cultural Manipulation**

Thirdly, the public trust doctrine invalidates the state action in allocating certain natural resources that would bring about cultural manipulation in the public space. Human interactions in the public space are of essential importance for human development. Keeping the public space equally open for all ensures that people are free to enter into the public space to interact and socialize with others. By providing the venue for human interactions, the public trust doctrine fosters a culture of participation through enriching human socialization and promoting democratic governance.

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<sup>55</sup> See e.g. *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984).

<sup>56</sup> *Rose*, *supra note* 40, at 754.

<sup>57</sup> *Packer v. Bird*, 137 U.S. 661, 667 (1891); *Shively v. Bowlby*, 152 U.S. 1, 49(1894) ("[T]he navigable waters and the soils under them ... shall be and remain public highways....").

<sup>58</sup> *Illinois Central*, 146 U.S. at 436 (1892). See also, *Gibbons v. Ogden*, 22 U.S. 1 (1824) (invalidated exclusive privilege to navigate New York waters with steam vessels).

To enrich human socialization, the public trust doctrine mandates that certain natural resources should be maintained open for the public to use for the recreational purpose. These recreational uses permitted and protected by the doctrine include bathing, swimming, walking and so on.<sup>59</sup> A person's participation in these recreational activities in the public space opens the door for him to mingle himself with others and to exchange his own thoughts and ideas with them. Moreover, it allows him to relax and improve his physical and mental well-beings by taking part in those recreational activities with the company of the known or unknown people in the public space. Being together with others in this setting may help him to walk out of the potential shadow of isolation and loneliness, and to have more fun in exercising and playing. By keeping certain natural resources open for recreational use by the public, the doctrine per se plays the role of encouraging people to enter into the public space, and thereby further promotes the culture of participation through facilitating active socialization among people in the public space. Any private activities that hinder active socialization in the public space, therefore, would amount to cultural manipulation. For example, if any private parties prevent members of the public from accessing the seashore areas to bathe and swim, they would be deemed to have caused public nuisance.<sup>60</sup>

On the other hand, effective democratic governance necessarily entails citizens' active participation in public discourse on a wide range of social issues. To this end, the citizens at large must have the freedom to take part in "uninhibited, robust, and wide-open"<sup>61</sup> debate in the public space. From this perspective, the public space ought to be kept open for everyone to express their views, to make suggestions, to exchange information, and to raise doubts. The openness of the public space, in essence, allows people to perform speech activities in order to participate in democratic governance. For example, streets and parks are important venues for people make their speech activities effective in the public space. Any interventions that dilute the openness of streets and parks as public spaces, would result in suppressing free speech and thereby amount to cultural manipulation of the public's initiative to participating in democratic governance. Hence courts have invoked the public trust doctrine to make sure that streets and parks as the public fora for free speech activities are open to all. For example, in *Hague v. Committee for Indus. Organization*, the Supreme Court famously stated that "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used

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<sup>59</sup> For the role of public property in facilitating socialization, see Rose, *supra note* 40, at 777-781.

<sup>60</sup> Judge Best thought that "the interruption of free access to the sea is a public nuisance.... The principle of exclusive appropriation must not be carried beyond things capable of improvement by the industry of man. If it be extended so far as to touch the right of walking over these barren sands, it will take from the people what is essential to their welfare, whilst it will give to individuals only the hateful privilege of vexing their neighbours." *Blundell v. Catterall*, 5 B. & Ald. 268, 275 (K.B.1821), cited in *Matthews v. Bay Head Improvement Association*, 95 N.J. 306 (1984).

<sup>61</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”<sup>62</sup>

## II. RESHAPING THE PUBLIC TRUST DOCTRINE AS AN LEGAL TOOL IN COPYRIGHT LAW

In the preceding Part, I delved into the social foundation of the public trust doctrine by exploring how and why it plays an important role in deterring ecological, economic, and cultural manipulations so as to maintain the openness of a robust public space. The social foundation of the doctrine, as I will discuss in this Part, lays the bedrock justification for introducing the doctrine into copyright law. On the one hand, I will first show that the role of copyright law in governing the openness the (intangible) public space through allocating the ownership of knowledge and information would necessitate expanding the use of the public trust doctrine from natural resources to knowledge and information as informational resources. On the other hand, I will also show that the current modes of copyright protection have bred ecological, economic and cultural manipulations, and the public trust doctrine, if introduced into copyright law, would play a pivotal role in countering these manipulations and thereby further maintain and enhance the openness of the (intangible) public space. By and large, I will seek to shed new light on why the public trust doctrine should be introduced into copyright law and will demonstrate that the court in *Eldred v. Reno* entirely erred in ruling that the public trust doctrine should not be extended to copyright law.<sup>63</sup>

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<sup>62</sup> 307 U.S. 496, 515 (1939). See also, *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (“No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora.”).

<sup>63</sup> *Eldred v. Reno*, 74 F. Supp. 2d 1, 3-4 (D.D.C. 1999) (“Insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine.”). For discussion about the relationship the public trust doctrine and copyright law, see Maureen Ryan, *Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World*, 79 OR. L. REV. 647 (2000); Margaret Chon, *Postmodern "Progress": Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97, 102-03 (1993). The core problem of these two articles is that they do not provide convincing reasons for the expansion of the doctrine. Nor do they propose any new legal techniques derived from the practice of the doctrine for courts to deal with hard copyright cases. See also, Keith Aoki, *Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. OF GLOBAL LEGAL STUD. 11, 37-42 (1998) (proposing that the doctrine should be applied to knowledge and information but should not be introduced in copyright law).

### **A. (Intangible) Public Space and Copyright Law**

As shown in the preceding Part, there are certain natural resources that form the crucial elements of a dynamic and robust public space. Given that these natural resources exist in tangible form, they constitute the tangible public space where people engage themselves physically in the interactions with the other human beings and non-human objects. While the public space can be comprised of tangible resources, it can also be formed by resources that exist in intangible form. These resources are primarily knowledge and information and they constitute what I call the intangible public space.

In the intangible public space, people use knowledge and information as the public resources to communicate with one another. Based upon the knowledge and information they obtain, people talk and write not only about their personal matters but also the larger economic, cultural, political issues. In this way, people exchange their understandings of these issues and try to figure out how they should deal with them. In addition to talking and writing, people also use knowledge and information in other forms of communicative actions,<sup>64</sup> such as painting, dancing and so on. These actions performed by the movements of human body largely reveal people's inner feelings to the outer world. The performers of these actions use knowledge and information to dictate and organize the movements of their human bodies to reveal their inner feelings to the audiences in the outer world. Given that the performing of all communicative actions is done in a public setting, it necessarily involves people's public use of their reason.<sup>65</sup> To use one's reason publicly, one first selects the knowledge and information available in the intangible public space, and then uses it for the purpose of communicating with one another about their own inner world of reasoning.

By and large, copyright law plays an important role in regulating the flow of knowledge and information in the public space. This is because it functions to regulate communicative actions and the ways in which people can legally make public use of their reason. By enacting copyright law, the state accords exclusive ownership on expressions of communicative actions, which include literature, art, film, artistic, audio/visual performances, television broadcasts and so on. Meanwhile, it further furnishes legal penalties against infringements of the exclusive rights over copyrighted expressions. Therefore, it is inevitable that any

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<sup>64</sup> For Habermas, communicative action plays an essential role in shaping human beings and human society in the following three ways. "Under the functional aspect of *mutual understanding*, communication action serves to transmit and renew cultural knowledge; under the aspect of *coordinating action*, it serves social integration and the establishment of solidarity; finally, under the aspect of *socialization*, communicative action serves the formation of personal identities." JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (II) 137 (Thomas McCarthy tran. 1984)

<sup>65</sup> For the idea of public use of reason, see JÜRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY 27 (T. Burger trans. 1989).

knowledge and information in expressive form, may be subject to copyright protection.

Given that private ownership inherently carries the power to exclude, copyright law inevitably acts as a filter that determines the extent to which knowledge and information would remain free of proprietary control in the intangible public space.<sup>66</sup> The access to and use of knowledge and information, therefore, is no longer open and free for the general public in many cases. If one wants to use knowledge and information available in copyrighted expressions, he or she first needs to obtain permission from the relevant copyright owner. Therefore, it necessarily follows that only those who can obtain permission, for example through paying royalties, are allowed to do that. By operating copyright protection, the state, therefore, inevitably makes a series of decisions regarding the availability of knowledge and information that remains open and free in the public space for people to use. From this perspective, copyright law by nature functions to determine the degree of the openness of the intangible public space. Akin to its role in acting as a check on the state's power in allocating certain natural resources, the public trust doctrine could be applied by courts to examine whether the state has exercised its power of allocating informational resources in an appropriate and reasonable way. Generally speaking, the public trust doctrine in copyright law is embodied with the following two basic principles and how they could be used will be discussed in Part III.

First of all, the public trust doctrine in copyright law mandates that knowledge and information ought to be held in trust for the general public as informational resources. Knowledge and information, as shown above, is an essential resource that empowers people to engage themselves in any communicative actions in the intangible public space. Accordingly, knowledge and information as informational resources, akin to certain natural resources such as navigable waters, seashores and so on, are essential to keeping the public space open for all the people. For example, Jefferson emphatically stated that “Nature clearly wants ideas to be free! ... Like air, ideas are incapable of being locked up and hoarded.”<sup>67</sup> Similarly, Justice Brandeis's famous opinion in *International News Service v. Associated Press* contains a classic defense of the public ownership nature of knowledge and information: “The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—

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<sup>66</sup> NETANEL, *supra* note 11, at 118 (“Copyright is speech regulation. ... [C]opyright is heavily involved in allocating speech entitlements among various speakers and categories of speech.”); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535, 1569 (2005) (“Copyright regulates expressive activity. It controls the extent to which creators can build upon existing works in order to make commentary, collage, and other types of iterative creativity. Copyright also influences the availability and cost of expressive works that can be experienced by readers and other consumers of creativity.”).

<sup>67</sup> Letter to Isaac McPherson (Aug. 13, 1813) in THOMAS JEFFERSON, WRITINGS 1291 (1984).

become, after voluntary communication to others, free as the air to common use.”<sup>68</sup>

On the other hand, the public trust doctrine requires that the government’s action in allocating the ownership of informational resources through the initiative of copyright law shall be made only for the protection and promotion of the public interest. By and large, the government is deemed the trustee of informational resources flowing in the intangible public space, and therefore is politically responsible for guaranteeing to “leav[e] no room for a statutory monopoly over information and ideas.”<sup>69</sup> It is invalid for the government to grant copyright over informational resources purely for benefiting any private parties. In fact, the for-the-public-interest requirement fully comports with James Madison’s opinion that copyright is an instance in which “public good fully coincides ... with the claims of individuals.”<sup>70</sup> Moreover, it has been recognized by the courts which proclaimed that copyrights “are limited in nature and must ultimately serve the public good.”<sup>71</sup>

## **B. The Public Trust Doctrine and Copyright Law**

In the discussion that follows, I will demonstrate that there are ecological, economic and cultural manipulations caused either by the government who has the political power to decide the level of copyright protection, or by the private parties who act as copyright holders having proprietary control over relevant information resources. The presence of these manipulative activities and the lack of the effective measures to counter them in the current structure of copyright protection further make it necessary to introduce the public trust doctrine in copyright law.

### **1. The Ecological Manipulation**

Akin to the human existence in the natural ecosystem, there is a cultural ecosystem in which people perform communicative actions based upon public use of their reason. This is because our public use of reason entails a combination of two interconnected processes. On the one hand, we need to *internalize* knowledge

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<sup>68</sup> 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). *See also*, Carol M. Rose, *Romans, Roads, and Romantic Creators: Traditions of Public Property in the Information Age*, 66 LAW & CONTEMP. PROBS. 89 (2003) (arguing that information should be seen as nonexclusive public property under Roman law doctrines).

<sup>69</sup> *Harper & Row*, 471 U.S. at 582 (Brennan, J., dissenting).

<sup>70</sup> ALEXANDER HAMILTON, JAMES MADISON & JOHN JAY, THE FEDERALIST 241 (1826).

<sup>71</sup> *Fogerty v. Fantasy*, 510 U.S. 517, 526 (1994); *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 17, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved.”). For more cases stating this opinion, see *supra note* 14. *See also*, Kenneth Crews, *The Law of Fair Use and the Illusion of Fair Use Guidelines*, 62 OHIO ST. L.J. 599, 607 (2001) (“The framers of the U.S. Constitution clearly intended that the law of copyright... would be tailored to serve the advancement of knowledge.”).

and information into our inner minds to trigger the thinking and reasoning abilities. To be sure, once we enter into the public space, we lead us to the world of our observing and interacting with others in the public space as well. The process of observation and interaction generates the necessary knowledge and information for us to think and reason about matters in the intangible public space. On the other hand, we also need to externalize the knowledge and information resulting from our thinking and reasoning power to sustain and enhance our activities of observing and interacting with others in the public space. Every moment when we speak, write, or act with other body movements, we all impart to others the knowledge and information for them to perceive what we think and reason about. The process of writing, for example, clearly entails the combination of these two processes. Authors write based upon the knowledge and information acquired through their experiencing of the environment in which they live. In particular, they write by drawing on the materials written by others.<sup>72</sup> Moreover, authors always spend time in writing for the purpose of communicating their thoughts from inner minds to the external world of people. From this perspective, writing is also a process of revealing and displaying authors' inner minds to their audiences.<sup>73</sup>

Therefore, the need for us to keep internalizing and externalizing knowledge and information makes our communicative actions and public use of reason inextricably intertwined with those of others'. In this sense, our intangible public space is by nature an ecosystem in which each of us performs communicative actions through the cultural exchange of the knowledge and information that flows in the intangible public space. We cannot divide our cultural ecosystem into separated bits and pieces. This would in turn result in blocking either our internalizing or externalizing of knowledge and information when we perform communicative actions. Akin to the natural ecosystem,<sup>74</sup> keeping the integrity of our cultural ecosystem therefore has the intrinsic value for each member of the public. Thus, the ethos of conservation that goes against what Joseph Sax called "destabilizing changes" to natural resources applies to<sup>75</sup> to informational resources in our cultural ecosystem.

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<sup>72</sup> See e.g., Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1177-98 (2007). Widely recognized as the judge who decided the first fair use case, Justice Story straightforwardly commented that "in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." *Emerson v. Davies*, 8 F. Cas. 615, 619 (CCD Mass. 1845).

<sup>73</sup> For example, Habermas portrays novelists' writing activities as the process of "allow[ing] anyone to enter into the literary action" and this results in "the innermost core of the private...oriented to an audience (*Publickum*)."<sup>74</sup> See HABERMAS, *supra* note 65, at 49-50.

<sup>74</sup> See text accompanying *supra* notes 41-45 .

<sup>75</sup> See Sax, *supra* note 42.

It seems that the recent unprecedented expansion of copyright has made a significantly negative effect on free flow of knowledge and information by causing serious “destabilizing changes” to our cultural ecosystem. These developments in copyright protection, as shown below, significantly tighten up proprietary control over informational resources, making it hard for the public to use them in order to internalize knowledge and information to perform communicative actions.

In 1998, Congress adopted the Copyright Term Extension Act (CTEA) to give another twenty-year extension of copyright terms, prospectively and retroactively. However, the retroactive extension of copyright terms in particular, has pulled the works that are already or about to be out of copyright protection back into the proprietary control.<sup>76</sup> If the extension had not been made, these contents traditionally recognized as public property,<sup>77</sup> would have remained free for the public to use. They can be seen as quasi ideas and facts not subject to any form of copyright protection. Moreover, the Millennium Digital Copyright Act (DMCA) prohibits circumvention of technological measures that are employed by copyright holders to lock up works in digital form, and further bars manufacture and distribution of devices capable of circumventing technological measures. DMCA accords paracopyright<sup>78</sup> to right holders in that it would allow them to legally lock up any information with technological measures they deploy. Also, right holders are entitled to control access to their works, making it harder or even impossible for the public to make fair use of works under many circumstances. This is because the public can make fair use only when they have free and unimpeded access to works in the first hand, given that fair use presupposes that the public at large does not need to obtain permission from, and pay royalties to, any copyright holders concerned.

## 2. The Economic Manipulation

Generally speaking, copyright law confers upon creators the market power to reap what they sow in the production and dissemination of their works. Therefore, at the heart of copyright law, lies its promise to protect economic rights as the most direct and important means of ensuring the monetary returns to creators.<sup>79</sup> Yet

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<sup>76</sup> Under the retroactive extension, works copyrighted in 1923 and timely renewed will not enter the public domain until 2018, assuming no further extension.

<sup>77</sup> See e.g., *Merriam v. Holloway Pub. Co.*, 43 F. 450, 451 (1890) (“When a man takes out a copyright, for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property . . .”); *Merriam v. Famous Shoe & Clothing Co.*, 47 F. 411, 413 (1891) (“[A]s the copyright on that edition has expired, it has now become public property. Any one may reprint that edition of the work . . .”).

<sup>78</sup> NETANEL, *supra note* 11, at 66-70; Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1096-1110 (2003).

<sup>79</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (“The economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors.”); *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff’d*, 60 F.3d 913 (2d Cir.

this model of protection, if not checked by the strong limitations on economic rights, may result in unbridled exploitation of those who seek for the license to use the works controlled by copyright holders.

On the one hand, while the public has the privilege to make fair use of works with no need to obtain permission from pay royalties to right holders, they may still end up paying right holders to get the unnecessary licenses. Under many circumstances, users are not sure whether their uses of works can be deemed fair by law, because the limitations on copyright such as the fair use doctrine are usually too vague and indeterminate for them to rely on to make such a decision.<sup>80</sup> They then become afraid of being sued and a series of grave troubles they may get themselves plunged into, such as a large amount of time and energy needed to respond to the litigation and the potential damages and attorney fees they may need to cover. Faced with this kind of *hidden coercion* that may be exerted by the copyright holder, many individuals or entities may simply refrain from making fair uses of works,<sup>81</sup> and many educational institutions in particular have already adopted overly restrictive fair use policies.<sup>82</sup>

On the other hand, the public at large is also faced with the *tangible coercion* that may be exerted by the right holder against them. First, many copyright holders have routinely exaggerated the scope of their economic rights as a way to prevent the public from making fair use. For example, the cautionary notice—“No part of this book can be reproduced without the permission of the publisher”—can be easily found in almost every book published, be it copyrighted or not. Publishers also routinely require users in this way: you may quote no more than *X* number of words, lines, or paragraphs from the book.<sup>83</sup> Yet it seems that all the publishers

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1994), *quoted in Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003). (“[C]opyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.... The profit motive is the engine that ensures the progress of science.”); *Harper & Row*, 471 U.S. at 558 (“By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.”).

<sup>80</sup> Sun, *supra* note 13, at 283-91; James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887-95 (2007).

<sup>81</sup> Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 545 (2004) (“Even a successful fair use defense is expensive, and the risk of such a lawsuit deters publishers from investing in potentially infringing works...”).

<sup>82</sup> William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1694 (1988) (“[A]s almost any college teacher can attest, the information presently being given faculty by university counsel regarding how much copyrighted material they may reproduce for classroom use is distinctly unhelpful.”); William W. Fisher & William McGeeveran, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Materials in the Digital Age* 85-87 (2006) (listing the “[u]nduly [c]autious [g]atekeepers” of fair use in university settings); Robert A. Gorman, *Copyright Conflicts on the University Campus*, 47 J. COPYRIGHT SOC’Y U.S.A. 297, 313 n.36 (2000) (describing NYU’s adoption of restrictive fair use guidelines after a lawsuit over copying course materials).

<sup>83</sup> See STEPHEN FISHMAN, *THE COPYRIGHT HANDBOOK: HOW TO PROTECT & USE WRITTEN WORKS* 11/8 (8th ed. 2005) (“[A]lthough there is no legally established word limit for fair use, many

accustomed to using exaggerations of that kind have totally turned a blind eye to the fair use doctrine that sets up no special limit on the amount users can copy and in fact allows the public to reproduce portions of or even the entire copy of the work.<sup>84</sup> Moreover, copyright holders may leverage their economic rights to impose prohibitively high licensing fees for users. Such practice is still legal because they charge fee simply in accordance with the business practices they uses.

The following story epitomizes both the hidden and tangible coercions that copyright holders especially those big media corporations can exert on the public. Jon Else, a documentary filmmaker, spent almost nine years in raising funds and producing a non-commercial documentary. Yet Fox News insisted on charging a licensing fee of \$10,000 for him to use “a 4.5-second, out-of-focus, no-sound background shot” in that documentary. Else was advised that his use of that shot might be fair use, but he might plunge himself into the trouble of litigation if Fox News decides to sue him. Because the licensing fee was prohibitively high for him, he had to cut that shot off from his documentary.<sup>85</sup> Jon Else’s story is not an isolated case. Rather, many other documentary filmmakers and researchers and students in educational institutions alike are faced with the same situation.<sup>86</sup>

### **3. The Cultural Manipulation**

By furnishing the protection of economic rights, modern copyright law functions to relieve creators from their financial reliance on the individual or state patronage which may unduly influence the ways in which they express their own ideas and opinions. With the securing of their economic independence, creators are supposed to produce and disseminate works reflective of their own thoughts, making contribution to the cultural diversity of our society. Yet it is inevitable that protecting economic rights as the core of copyright law inculcates people with the notion that literal and artistic creation always involves monetary returns, and the more works one creates or controls, the more economic benefits one can reap. From this perspective, copyright law condones or even encourages that mentality of maximizing economic benefits in producing and disseminating works of authorship. Against this backdrop, for many corporate entities in particular, maximizing economic benefits becomes the sole motivation of engaging in or organizing literary and artistic creations.

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publishers act as if there were one and require their authors to obtain permission to quote more [than] a specified number of words (ranging from 100 to 1,000 words.”).

<sup>84</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that verbatim copying for time-shifting purpose is fair use ); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (holding that extensive copying for the purpose of making parody is fair use).

<sup>85</sup> See NETANEL, *supra* note 11, at 15-17.

<sup>86</sup> See e.g., PATRICIA AUFDERHEIDE & PETER JASZI, *UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS* (2005); Fisher & McGeeveran, *supra* note 82.

Yet the ethics of maximizing economic benefits promoted by the current modes of copyright protection may have caused serious problem of cultural manipulations. In many circumstances, copying works is crucial for members of the general public to participate in the cultural life in a society.<sup>87</sup> Activities of this kind are generally seen as conducive to cultural development and social well-being. For example, researchers and educators routinely need to copy reasonable portions of works in order to do research and carry out teaching activities. Music sampling greatly helps musicians to compose new music. Yet copyright holders especially those big companies wield strong power to stop members of the public from copying their works and thereby hamper their cultural participation. As long as copyright holders deem it necessary to act for the purpose of maximizing their economic benefits, they would simply send relevant members of the public cease-and-desist letters or sue them without regard to whether copying may be beneficial to the society at large. Faced with the threat of that kind, many members of the public would simply stop copying works and further give up their activities in cultural participation. Even if they opt not to stop, they may be ordered by courts to pay the potential damages, the amount of which is usually prohibitively high.

In fact, courts have actually rendered a large number of cases that have the effect of condoning or even promoting those legal actions that filed by copyright holders purely out of their maximization-of-economic-benefits impulses. For instance, it has become trendy for courts to see transformative use of a work as presumptively fair use.<sup>88</sup> Yet many courts have taken it for granted that nontransformative use of a work may amount to an infringement of copyright. Against this backdrop, courts repeatedly ruled that nontransformative use, including plain old photocopying even in scientific or educational settings, is presumptively not fair use.<sup>89</sup>

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<sup>87</sup> See e.g., Tushnet, *supra* note 81, at 562-81; Olumfunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* 248-99 (1998).

<sup>88</sup> For transformative use, courts asks “whether the new work merely ‘supersede[s] the objects’ of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message...” See *Campbell*, 510 U.S. at 579. The Court in *Campbell v. Acuff-Rose Music* further explained that though a “transformative use is not absolutely necessary for a finding of fair use, . . . the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.” *Campbell*, 510 U.S. at 579. See also, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1271-74 (11th Cir. 2001); *Mattel Inc. v. Walking Mountain Prod.*, 353 F.3d 792, 806, 801-02 (9th Cir. 2003); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 818 (9th Cir. 2003).

<sup>89</sup> See e.g., *L.A. Times v. Free Republic*, 2000 U.S. Dist. LEXIS 5669 at 75 (C.D. Cal. 2000) (“Conversely, the amount and substantiality of the copying and the lack of any significant transformation of the articles weigh heavily in favor of plaintiffs....”); *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (holding that a use merely for the same as the original work “moves the balance of the calibration on the first factor against” user of the work and “seriously weakens a claimed fair use”); *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 923 (2d Cir. 1994) (“Rather than making some contribution of new intellectual value and thereby fostering the advancement of the arts and sciences, an untransformed copy is likely to be used simply for the

Moreover, courts even ruled that any sampling from a sound recording, presumably even a single note, infringes the copyright in the sampled recording.<sup>90</sup>

#### **4. Internal and External Safeguards**

As shown above, there are ecological, economic and cultural manipulations lurking in the current mode of copyright protection. Given the limit of space, I pointed out only some of the major manipulative activities. Yet copyright law, as I will demonstrate in the discussion that follows, contains neither the necessary internal nor external safeguards that are strong enough to effectively deter those manipulations. This further makes it necessary and urgent to introduce the public trust doctrine into copyright adjudication and policy-making.

##### **a. Internal Safeguards**

Copyright law itself contains the internal safeguards aimed at preventing absolute protection of private ownership. By and large, they carve out the limitations on exclusive rights vested in creators. For example, the idea/expression dichotomy dictates that it is the expression of ideas rather than ideas that is the subject matter of copyright protection.<sup>91</sup> Moreover, copyright law is supposed to provide legal protection in limited duration. Besides, the fair use doctrine allows the public in general to use reasonable portions of works for purposes such as “criticism, comment, news reporting, teaching, scholarship, or research.”<sup>92</sup> While these internal safeguards do provide the necessary breathing room for the public to use the knowledge and information contained in copyrighted works, they are in fact not strong enough to curb the potential ecological, economic, and cultural manipulations.

First, these internal safeguards do not set up any institutional limits on the government’s power to privatize knowledge and information in the public space. By and large, they act as the tool kit for the court to adjudicate the copyright

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same intrinsic purpose as the original, thereby providing limited justification for a finding of fair use.”); *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data*, 166 F.3d 65, 69, 72 (2d Cir. 1999) (finding that absence of transformative use in a case involving translation of news items weighed heavily against fair use); *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1389 (6th Cir. 1996). Moreover, courts repeatedly held that nontransformative uses should be presumed to cause market harm. This makes it unlikely for them to rule that nontransformative uses are not infringing. *See, e.g. Dr. Seuss Enters. v. Penguin Books USA*, 109 F.3d 1394, 1403 (9<sup>th</sup> Cir. 1997) (“Because, on the facts presented, [defendant’s] use of *The Cat in the Hat* original was nontransformative, and admittedly commercial, we conclude that market substitution is at least more certain, and market harm may be more readily inferred.”); *Oasis Publ’g Co. v. West Publ’g Co.*, 924 F. Supp. 918, 929 (1996) (presuming the existence of because of nontransformative use); Laura G. Lape, *Transforming Fair Use: The Productive Use Factor in Fair Use Doctrine*, 58 ALB. L.REV. 677, 716-17 (1995).

<sup>90</sup> *See e.g., Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005).

<sup>91</sup> 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea.”); *Baker v. Selden*, 101 U.S. 99, 103 (1879); *Mazer v. Stein*, 347 U.S. 201, 217 (1954).

<sup>92</sup> 17 U.S.C. § 107.

disputes between private parties and to decide whether allegations against infringements of copyrights should be upheld. On the other hand, these safeguards are basically incorporated into copyright law by the legislature and used as the tool kit to prevent protection of copyrights from being absolute. The legislative body is by nature the drafter or codifier of these safeguards. Inevitably, absent in these safeguards is the external institutional check on the legislative power to examine the validity of the government's decisions regarding the allocation of informational resources. As shown in the discussion that follows, both the CTEA and the DMCA were in fact adopted by the government without taking into account their potential in seriously jeopardizing the role of these internal safeguards in promoting free flow of information and knowledge.

Secondly, the recent unprecedented expansion of copyright protection, in fact, was accompanied by the agendas aimed at significantly weakening the power of those internal safeguards as the limitations on copyrights. For example, the CTEA simply relaxed the mandate that the terms of copyright protection shall be strictly limited. It opened the door for the potential extensions of copyright term as long as the legislature sees fit.<sup>93</sup> Moreover, the DMCA's rigid anti-circumvention protection effectively renders the idea/expression dichotomy meaningless in the digital age.<sup>94</sup> The DMCA confers up copyright holders a de facto right to restrict access to their works, making it much harder for the public make fair use of works in a meaningful way. Fair use presupposes that the public at large first have free access to works and then make decisions regarding whether they need to make fair uses.<sup>95</sup> Yet free access to works is no longer available for users because technological measures deployed by copyright holders simply fence off them from getting access to works and the DMCA furnishes penalties against circumvention of those "digital fences". Hence, the waning of the internal safeguards furnishes larger room for copyright holders to maneuver so as to have their manipulative activities organized to their advantage. It also further demonstrates that these internal safeguards themselves lack the necessary institutional check on the governmental power, which leaves the door widely open for the government to bypass the principles embedded in those safeguards as they see fit.

Thirdly, the internal safeguards' inability to curb the manipulative activities committed by copyright holders is further exacerbated by their inherent indeterminacies.<sup>96</sup> For example, copyright law simply states that the idea/expression dichotomy is a baseline principle for copyright protection. Yet it

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<sup>93</sup> See text accompanying *supra* notes 76-77.

<sup>94</sup> See text accompanying *supra* note 78.

<sup>95</sup> Jane Ginsburg, *Copyright Legislation for the "Digital Millennium,"* 23 COLUM.-VLA J.L. & ARTS 137, 140 (1999) (observing that "it may be fair use to make nonprofit research photocopies of pages from a lawfully acquired book; it is not fair use to steal the book in order to make the photocopies.").

<sup>96</sup> For a comprehensive discussion about the indeterminacy problems inherent in copyright law, see Sun, *supra* note 13, at 303-311; Gibson, *supra* note 80 at 887-906.

never ascertains and in fact it is exceedingly difficult to make sure what could be seen as non-copyrightable “ideas” or otherwise as copyrightable “expressions”.<sup>97</sup> Accordingly, Judge Hand once lamented that “[n]obody has ever been able to fix [the] boundary [between idea and expression], and nobody ever can.”<sup>98</sup> Moreover, the fair use doctrine, too, is actually fraught with a host of uncertainties. The legislative history shows that Congress did not intend to shape the doctrine as “bright-line rules”<sup>99</sup> for courts. Worse still, in the real world of practice, the courts have developed inconsistent, and even conflicting, approaches to apply the doctrine.<sup>100</sup> For example, with respect to whether the use of works is for commercial purpose or not, the Supreme Court in *Sony*<sup>101</sup> and *Harper & Row*<sup>102</sup> held that any commercial use of works ought to be regarded as “presumptively unfair.” Yet it ruled in *Campbell* to the contrary that commercial or noncommercial character of a work “is not conclusive,” and this factor shall be “weighed along with others in fair use decisions.”<sup>103</sup> Against this backdrop, the multitude of indeterminacy problems inherent in those internal safeguards definitely leaves a sizable gap within which the government or copyright holders may maneuver to perform those manipulative activities. For example, as shown above, media corporations and publishers routinely set up unreasonable requirements for the public to obey, such as the specific number of words and lines they can quote.<sup>104</sup> Worse still, the relevant members of the public are not able to “fire back”, because they and even their lawyers are not sure whether their use of works could be deemed fair by the court. Against this backdrop, the risk-averse public would choose not to challenge copyright holders before courts.

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<sup>97</sup> Sun, *supra* note 13, at 307 (“Yet charting the boundaries between idea and expression is no easy work in many cases. On the one hand, while the idea/expression dichotomy is hailed as a universal standard for setting the threshold of copyright protection, no efforts as to what elements of works would fall into the two baskets of “idea” and “expression” respectively, have ever been done in any national and international copyright law.”).

<sup>98</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>99</sup> See *Sony*, 464 U.S. at 448 n.31 (1984) (noting that Congress had “eschewed a rigid, bright-line approach to fair use”); *Sony*’s opinion in this respect has been consistently endorsed by the Supreme Court’s decisions pertaining to fair use. See, e.g., *Harper & Row*, 471 U.S. at 588; *Campbell*, 510 U.S. at 577 (pointing out that “[t]he task [of section 107] is not to be simplified with bright-line rules . . . .”). See also MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.05[A] (13-159) (arguing that nothing in section 107 provides “a rule that may automatically be applied in deciding whether any particular use is ‘fair’”).

<sup>100</sup> *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661 (2 Cir. 1939) (“the issue of fair use, which alone is decided, is the most troublesome in the whole law of copyright”).

<sup>101</sup> *Sony*, 464 U.S. at 451 (“[E]very commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright . . . .”).

<sup>102</sup> *Harper & Row*, 471 U.S. at 540 (“The fact that the publication was commercial as opposed to nonprofit is a separate factor tending to weigh against a finding of fair use.”).

<sup>103</sup> *Campbell*, 510 U.S. at 584 (contended that “hard evidentiary presumption”<sup>147</sup> of this type “would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . .”) See also *Sony*, 464 U.S. at 492 (Brennan, J., dissenting) (drawing the same conclusion).

<sup>104</sup> See *supra* note 83.

## **b. External Safeguards**

It is widely recognized that the Copyright Clause or the First Amendment set up a check on the governmental power in granting proprietary control over informational resources and thereby they together act as the external safeguards against manipulative activities. Yet both of them can only target the state action regarding allocation of informational resources. According to the state action doctrine, they cannot directly constrain that private action that may cause a host of manipulative problems as shown in the preceding section.<sup>105</sup> While the government may abuse its power, copyright holders, as demonstrated in the preceding section, still commit a series of manipulative activities which cannot be effectively and adequately deterred by the internal safeguards embedded in copyright law. Therefore, the external safeguard would simply turn a blind eye to the manipulative activities committed by copyright holders as private actors.

Even though the Copyright Clause or the First Amendment can play its role as the check on government power, they actually do not play a sufficiently strong role in examining whether or not the government exercises its power in a manner conducive to the promotion and protection of public interest. For the Copyright Clause, it seems that it carries no *active* institutional check on the state action in allocating informational resources. For instance, the Supreme Court has stated that the Copyright Clause does not empower the judiciary to scrutinize whether any state action in expanding copyright is valid under the Clause. “[The Court] is not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.”<sup>106</sup> Without competent institutional check on the state power to allocate informational resources, the Copyright Clause has instead become the ground on which the legislature can enact law to strengthen copyright protection, which in effect chiefly caters to the private interest of copyright holders and thereby brings about marginal or no benefits for the public interest in learning and knowledge sharing.<sup>107</sup>

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<sup>105</sup> See e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (“Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 *HOFSTRA L. REV.* 1379, 1387(2006) (“[T]he Constitution does not purport to determine how one person is to treat another. So far as the Constitution is concerned, one individual may steal the possessions of another, assault another person, even commit murder, and it is not a violation of the Constitution.”).

<sup>106</sup> *Eldred*, 537 U.S. at 208. The majority also concluded that “it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.” *Id.* at 212. See also, *Sony*, 464 U.S., at 429 (“[I]t is Congress that has been assigned the task of defining the scope of [rights] that should be granted to authors or to inventors in order to give the public appropriate access to their work product.”).

<sup>107</sup> See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 *GEO. L.J.* 1771 (2006) (“[E]ven if an *Eldred II* were filed tomorrow, we would still be unlikely to see the Supreme Court writing a manifesto about the nature of the [Copyright] Clause as a limitation [on government’s power in allocation of information resources].”).

Regarding the First Amendment, both free speech right and property right are largely regarded as fundamental rights enjoyed by citizens.<sup>108</sup> This renders it impossible for the free speech right to gain the necessary primacy over property rights which surely include copyright.<sup>109</sup> Therefore, it follows that in allocating information resources through enacting copyright law, the government may not presumptively give primacy to free speech values over the need to protect copyright. Moreover, courts have ruled that copyright can actually trump free speech right in certain cases. For example, in treating copyrighted works as the embodiment of creators' speeches, *Eldred* held that the free speech principle "bears less heavily when speakers assert the right to make other people's speeches."<sup>110</sup> On the other hand, there has been a widely-accepted assumption that the internal safeguards such as the idea/expression dichotomy and the fair use doctrine, function as the safety valves that make copyright law presumptively compatible with the free speech values. From this perspective, it follows that copyright law can generally pass the First Amendment muster.

### III. REIMAGINING THE LEGAL FOUNDATION OF THE PUBLIC TRUST DOCTRINE IN COPYRIGHT LAW

In the preceding two Parts, I discussed the social justification for introducing the public trust doctrine into copyright law. I argued that akin to the justification that makes the doctrine fully-fledged in both environmental and property laws, we can draw on the doctrine to promote and protect our intangible public space against the backdrop that the recent copyright laws enacted by the state have produced an enormous negative impact on the vibrancy of our cultural ecosystem. In particular, I considered the potential role of the public trust doctrine in filling up the gap left by the internal and external safeguards to counter the ecological, economic, and cultural manipulations lurking in our cultural ecosystem.

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<sup>108</sup> Carol M. Rose, *Property As the Keystone Right?*, 71 NOTRE DAME L. REV. 329 (1996); Cass R. Sunstein, *On Property and Constitutionalism*, CARDOZO L. REV. (1992). But see Laura S. Underkuffler, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033 (1996).

<sup>109</sup> The conflicting judicial opinions regarding shopping mall cases clearly demonstrate this point. In some cases, courts ruled against private owners of shopping malls and ordered opening of malls for free speech activities. See e.g. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *N.J. Coalition Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326, 333 (N.J. 1994). Yet, courts also have ruled to the contrary on the basis that "property [does] lose its private character [even though] the public is generally invited to use it for designated purposes." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 571 (1972). See also, *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Ins. Co.*, 512 Pa. 23 (Pa. 1986); *Stranahan v. Fred Meyer, Inc.*, 331 Ore. 38 (Or. 2000).

<sup>110</sup> *Eldred*, 537 U.S. at 221 ("The First Amendment securely protects the freedom to make-or decline to make-one's own speech; it bears less heavily when speakers assert the right to make other people's speeches.").

The conventional wisdom about copyright law, as demonstrated in the preceding Part, harbors the complacency that either the internal or external safeguards can effectively ward off a variety of manipulative activities in the area of copyright protection. I pointed out that there is in effect no room for the complacency of that kind. In the Part that follows, I will consider the legal foundation of the public trust doctrine in copyright law and how courts can use the doctrine as a legal tool to invite a set of new legal techniques so as to counter the manipulative activities committed by the state or private actors to our cultural ecosystem. Moreover, the set of legal techniques embodied in the doctrine, as I will explain, is composed of three concrete elements: (1) defending the public's *collective rights* in public trust informational resources; (2) effectuating the government's *political responsibilities* through courts' exercise of the judicial review power; and (3) enforcing the copyright holder's *social responsibilities* through the courts' broadly looking at the need of public interests. As I will show, these legal techniques can largely be borrowed from the judicial practices of the public trust doctrine in protecting certain essential natural resources that form our public space.

## **A. Defending the Public's Collective Rights**

### **1. Collective Rights in Public Trust Natural Resources**

When invoking the public trust doctrine, courts repeatedly emphasize that the doctrine by nature aims to protect the public's rights to get access to or use of the public trust resources, and every member of the public shall enjoy such rights on equal terms. In *Illinois Central*, the Supreme Court emphatically made the rights-based statement as follows:

[The title to submerged lands] is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.<sup>111</sup>

Based upon the conventional rights of navigation, commerce and fishing enunciated in *Illinois Central*, many state courts have expanded the scope of public rights to cover recreational uses. For example, the Connecticut Supreme Court first expressly recognized that the public trust rights protect a variety of recreational activities including "boating, hunting, bathing, taking shellfish, gathering seaweed, cutting sedge, and ... passing and repassing" in the public trust resources.<sup>112</sup> Generally speaking, there has been a solid recognition of the right of recreational use in many states, such as California,<sup>113</sup> New Jersey,<sup>114</sup>

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<sup>111</sup> *Illinois Central*, 146 U.S. at 452.

<sup>112</sup> *Town of Orange v Resnick*, 94 Conn 573, 578 (1920).

<sup>113</sup> *Marks v. Whitney*, 6 Cal. 3d 251(1971); *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983).

Washington,<sup>115</sup> Michigan,<sup>116</sup> etc.<sup>117</sup> Meanwhile, given the paramount importance of ecosystem preservation, the public trust doctrine has been widely used to protect the public right to environmental protection.<sup>118</sup>

The rights protected by the public trust doctrine are by nature collectively held by persons as members of the public. In this sense, they are not individual rights, but rather collective rights. This is primarily because people acquire and enjoy the bundle of public trust rights based upon their social membership in the public space. Under the public trust doctrine, it is recognized that every member of the public shares a stake in the public trust resources which form the tangible public space. Therefore, the realization of the collective rights is indispensable for cultivating human beings as social members and enhancing their interests in the communal development.<sup>119</sup> By contrast, individual rights that protect private property, personal privacy and so on, are bestowed upon persons primarily for the purpose of promoting individual worth and dignity as human beings.<sup>120</sup> The realization of individual rights is deemed to have intrinsic values to self-actualization and self-development.

Judging from the multitude of public trust doctrine cases, the collective rights protected by the doctrine have two salient attributes. First, they are *not divisible* in terms of how individuals can share the protected resources. Every member of the public, from the letters and spirits of law, is equally entitled to have access to, and make use of, the public trust resources which ranges from navigable waters,

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<sup>114</sup> *Matthews v. Bay Head Imp. Ass'n*, 95 N.J. 306, 323 (1984); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40 (2005).

<sup>115</sup> *Orion Corp. v. State*, 109 Wn.2d 621 (1987).

<sup>116</sup> *Glass v. Goeckel*, 473 Mich. 667 (2005).

<sup>117</sup> Yet the Massachusetts and Maine Supreme Court refused to extend the public trust doctrine to recreational uses and strictly limited it to navigational and fishing purposes. See *Bell v. Town of Wells*, 510 A.2d 509 (1986); *Opinion of the Justices*, 365 Mass. 681 (1974).

<sup>118</sup> California is generally seen as the first state to recognize the public's right to environmental protection under the public trust doctrine. See *Marks v. Whitney*, 6 Cal. 3d 251(1971); *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983). All most all commentators maintain that the public has the right to environmental protection under the public trust doctrine. See e.g., Sax, *supra* note 42; Klass, *supra* note 32; Bernard S. Cohen, *The Constitution, the Public Trust Doctrine, and the Environment*, 1970 UTAH L. REV. 388 (supporting that the right to healthy environment stems from the interaction of the public trust doctrine with the Ninth Amendment); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, *supra* note 17.

<sup>119</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 208 (1986) (arguing that collective rights protect "interests of individuals as members of a group in a public good and the [collective] right is a right to that public good because it serves their interest as members of the group"). See also, Leslie Green, *Two Views of Collective Rights*, 4 CAN. J. L. & JURISPRUDENCE 315 (1991) (explaining why collective rights should be viewed as rights to collective interests).

<sup>120</sup> For Kant, the protection of individual rights is based upon the premise that every human being has autonomy and self-worth, and should be treated as an end rather than means. Thus, it reflects the categorical imperative laid out by Kant: "all rational beings stand under the law that each of them is to treat himself and all others never merely as means but always at the same time as ends in themselves." IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 41 (1997).

submerged lands, to public squares and parks. People have equal entitlements in this regard because they share collective interests in those resources. Collective interests, in this context, are indistinguishable and unassignable shares of those resources enjoyed by the people as members of the public. Put differently, the public trust resources are by nature taken as an integral whole for members of the public rather than divisible and discrete parts available to be used by any particular persons.<sup>121</sup>

On the other hand, the collective rights protected by the public trust doctrine are *not alienable* in any circumstances. In *Illinois Central*, the Supreme Court enunciated a general rule governing allocation of public trust resources by mandating that “control of the State for the purposes of the [public] trust can never be lost.” Therefore, under this general rule, the government as the trustee of natural resources shall never revoke the public’s collective rights and further trade them away with the transferring of the public trust resources to private parties. Moreover, the Supreme Court also laid down two exceptions to the general rule of inalienability by prescribing that government can transfer the public trust resources to private parties only if (1) they “are used in promoting the interests of the public”; or (2) the transfer is made “without any substantial impairment of the public interest.”<sup>122</sup> Therefore, these two exceptions show that the collective rights in the public trust resources are not alienable even in the circumstances where the government transfers the ownership of a resource to a private party. In other words, given the inalienability of the collective rights, the public can still exercise their rights in the privately owned public trust resources.

## **2. Collective Rights in Public Trust Informational Resources**

The conventional mode of copyright protection, to a large extent, remains silent on the legal status of the general public (users of copyrighted materials) in our cultural ecosystem. While copyright law is replete with explicit itemizations of the bundle of economic rights enjoyed by creators, it does not, as a routine, expressly itemizes the bundle of rights that ought to be conferred upon members of the public for them to assert collective interests in knowledge and information. Not surprisingly, the conventional mode of copyright protection has given rise to a widely-held mentality that sees securing adequate protection of economic rights enjoyed by creators as the priority of copyright law.<sup>123</sup>

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<sup>121</sup> In *Arnold v. Mundy*, Chief Justice Kirkpatrick of New Jersey Supreme Court concluded that all navigable rivers in which the tide ebbs and flows and the coasts of the sea, including the water and land under the water, are “common to all the citizens, and that each [citizen] has a right to use them according to his necessities, subject only to the laws which regulate that use ....” 6 N.J.L. 1, 93 (1821). In a recent water resource case, the Hawaii Supreme Court boldly affirmed that “the public trust doctrine applies to all water resources, unlimited by any surface-ground distinction.” *In re Water Use Permit Applications*, 94 Hawai’i 97, 135 (2000).

<sup>122</sup> *Illinois Central*, 146 U.S. at 452-53.

<sup>123</sup> *Harper & Row* epitomizes the mentality that the core of copyright law is to protect authors’ economic rights. In this case, the Supreme Court held that that the defendant’s quotation of 300 words from the unpublished 200,000-word manuscript of former President Gerald R. Ford could

### **a. The Scope of the Collective Rights for the Public**

The introduction of the public trust doctrine into copyright law would first help us to counter the copyright holder-centered mentality, and further help us to think about and ascertain the scope of rights that ought to be enjoyed by the general public. For this purpose, I propose that akin to their public rights in certain natural resources, the public shall be accorded with the following three general categories of collective rights over public trust informational resources.

- **The Right to Environmental Protection.** The public has the right to have our cultural ecosystem environmentally well-protected.<sup>124</sup> Any activities that cause serious environmental pollution in our cultural ecosystem would violate this right enjoyed by the public.

- **The Right to Cultural Participation.** The public has the right to fully participate in the cultural life by freely expressing their opinions and engaging in research and creativity activities.<sup>125</sup> The enjoyment of this right shall not be unduly hampered by the government and private parties through tightening up proprietary control over knowledge and information.

- **The Right to Benefit from Technological Development.** The public has the right to enjoy the benefits from technological advances in communicating knowledge and information. This right guarantees that technological advances of that type could be encouraged and protected, and further requires that state should ensure that the public has adequate access to these technologies.<sup>126</sup>

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not constitute fair use, even though the quotations related to a historical event of undoubted significance for the public interest (the resignation and pardon of President Richard M. Nixon). *Harper & Row*, 471 U.S. at 557.

<sup>124</sup> In addition to the support from the public trust doctrine, this right can further find its grounding in Principle 1 of the *Stockholm Declaration* which states that “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”

<sup>125</sup> Similarly, this right can find a strong grounding in human rights law. For example, The Universal Declaration of Human Rights places much emphasis on the requirement that states should allow citizens to enjoy full latitude in “freely [participating] in the cultural life of the community.” UDHR, art. 27.1. In this sense, cultural participation is the very realm of life that is free of unreasonable state surveillance, interference, and coercion. Moreover, under the International Covenant on Economic, Social and Cultural Rights, states shall adopt various measures to “achieve the full realization of [the] right [to cultural participation].” The measures include “those necessary for the conservation, the development and the diffusion of science and culture.” Moreover, states shall “respect the freedom indispensable for scientific research and creative activity.” See, CESCR, arts. 15.2-15.3.

<sup>126</sup> This right is derived from the public right in navigable waters for navigation and commerce. The public trust doctrine protects this right because it aims to ensure the public at large can benefit from the openness of navigable waters for navigation and commerce. As the convenience afforded by science and technology has become an indispensable part of human life, the right “to share in scientific advancement and its benefits” has been enshrined in human rights treaties as well. See, UDHR, art. 27.1; CESCR, art. 15.1 (b).

### **b. The Nature of the Collective Rights for the Public**

Apart from ascertaining the scope of the public's rights in informational resources, the public trust doctrine would further help us to rethink the *nature* of rights that ought to be enjoyed by the public, and to generate new legal techniques to protect the public's rights. As a result, the use of the public trust of doctrine would lead to a better-balanced approach to address many thorny issues that may arise in the process of copyright adjudication or policy-making.

Similar to their rights over certain natural resources, the public's rights over informational resources are collectively held by the public at large, given that every individual has a social membership in the cultural ecosystem of the intangible public space. Moreover, the public's collective rights are by nature indivisible and inalienable. The indivisibility requirement entails that each public member's interest in informational resources is equally counted and inextricably intertwined with one another. The prevention of one member of the public from exercising his public rights would result in harming both his as well as other fellow members' interests in access to and use of informational resources. On the other hand, the inalienability requirement generally mandates that the government cannot trade away their rights over informational resources when it grants creators with copyright in the informational resources concerned. Therefore, the combination of the indivisibility and inalienability requirements prompts both the government and the courts to vigilantly examine the impact of proprietary control over informational resources on the realization of the public's collective rights.

For the government, the public trust doctrine would mandate that it shall not grant new exclusive rights or expand the existing exclusive rights for creators under the circumstances that such decisions would purely give them greater economic benefits while providing no or marginal benefits to the public at large. Therefore, the government must take positive measures to fully examine and scrutinize the impact of any proposed expansion of copyright protection on the public interest in access to and use of informational resources.

Being indivisible and inalienable, the public's collective rights protected by the doctrine further require the courts to adopt a broad-based approach fully sympathetic to the social values of public access to and use of informational resources. To this end, courts need to go beyond the conventional wisdom which teaches that the limitations on copyright are tailor-made to protecting relevant users' individual interest in informational resources. Put differently, the conventional wisdom sees the limitations on copyright as only functioning to protect the rights individually enjoyed by users of informational resources. The fair use doctrine, for example, is conventionally recognized as the "affirmative defense" available for a user to defeat a particular infringement claim alleged against him or her.<sup>127</sup> Courts following this approach routinely examine only

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<sup>127</sup> *Harper & Row*, 471 U.S. at 561; *Campbell*, 510 U.S. at 580; *Eldred*, 537 U.S. at 219.

whether the interest of an individual user involved in the dispute should be protected by the fair use doctrine. Rather, they rarely consider the extent to which that individual party's interest has any correlation with the interests of the public at large. For example, in *Harper & Row*, the Supreme Court held that that The Nation's quotation of 300 words from the unpublished 200,000-word manuscript of former President Gerald Ford could not constitute fair use, even though the quotations related to a historical event of undoubted significance for the public interest. In rendering such a decision, the Court did not examine the quotations per se would produce any public benefits, say promoting democracy through protecting the free flow of information and freedom of expression. Instead, the Court seemed to focus on the impact of the unauthorized use on the market value of the copyrighted work.<sup>128</sup> In particular, it concluded that “[i]t is fundamentally at odds with the scheme of copyright to accord lesser rights in those works that are of greatest importance to the public. Such a notion ignores the major premise of copyright and injures author and public alike. ‘[To] propose that fair use be imposed whenever the ‘social value [of dissemination] . . . outweighs any detriment to the artist,’ would be to propose depriving copyright owners of their right in the property precisely when they encounter those users who could afford to pay for it.’”<sup>129</sup>

By hailing the “market value” factor as the “undoubtedly the single most important element of fair use,”<sup>130</sup> *Harper & Row* and its progenies<sup>131</sup> foreclosed fair use by only weighing the individual interest/right in accessing and using works against the copyright holder's economic interest. This led *Harper & Row* to ignore the fact that The Nation's quoting 300 words of the Ford manuscript was in effect vital to lending authenticity and understanding to its news reporting of the historical event of the resignation and pardon of former President Richard Nixon. To keep the public informed of the details of that historical event undoubtedly

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<sup>128</sup> *Harper & Row*, 471 U.S. at 566-69.

<sup>129</sup> *Harper & Row*, 471 U.S. at 559 (citing Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1615 (1982)).

<sup>130</sup> *Harper & Row*, 471 U.S. at 566.

<sup>131</sup> See e.g., *Texaco*, 60 F.3d at 930-31 (“It is not unsound to conclude that the right to seek payment for a particular use tends to become legally cognizable under the fourth fair use factor when the means for paying for such a use is made easier... . An unauthorized use should be considered ‘less fair’ when there is a ready market or means to pay for the use.”); *Castle Rock Entertainment v. Carol Publ'g Group*, 150 F.3d 132 (2nd Cir. 1998). See also, NETANEL, *supra* note 11, at 64-65 (“Since *Harper & Row*, the Blackstonian property-centered view of fair use has steadily gained ground. Courts have repeatedly invoked the bare possibility licensing in potential markets for the copyright holder's work to deny fair use and have insisted that while evidence of market harm generally dooms a fair use claim, the absence of such evidence in no way guarantees that the use will be deemed fair.”); Carol M. Silberberg, *Preserving Educational Fair Use in the Twenty-First Century*, 74 U.S.C. L. REV. 617, 618 (2001)(expressing concern that courts will give too much emphasis to licensing as a solution to market failure in educational settings); Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 to Avoid the 'Fared Use' Fallacy*, 2007 UTAH L. REV. 619.

“furthered the public interest”<sup>132</sup> in “a broad dissemination of principles, ideas, and factual information [that] is crucial to the robust public debate and informed citizenry....”<sup>133</sup> In fact, the opinions rendered by *Harper & Row* and its progenies share the same “market value” mentality with *Lucas v. South Carolina Coastal Council*, in which the Supreme Court invalidated regulatory taking of landowner’s property on the ground that it caused “deprivation of all economically viable use” of the property.<sup>134</sup> Yet such a justification based purely on examining the “market value” factor or the economic injury to the property owner was simply made without carefully scrutinizing the fact that the regulatory taking in question carried stronger public interest in preserving the natural ecosystem in the beachfront areas.<sup>135</sup>

As I pointed out in my early work, the *Harper & Row*-type judicial practice which is based upon the notion that seeing fair use as an individual right, “would give rise to the problem that [the public’s] rights are automatically ‘ranked’ lower than copyrights” and “courts actually water down the importance of protecting public interest.”<sup>136</sup> When dealing with those fair use cases, courts in fact barely took the larger public interest into their account. This would lead to the serious consequences that “[t]he progress of arts and sciences and the robust public debate essential to an enlightened citizenry are ill served by this constricted reading of the fair use doctrine.”<sup>137</sup>

By contrast, the judicial practice of the public trust doctrine consistently shows that courts have given priority to the considering of the values of the public interest. Thus, it follows that courts should examine broadly the impact of a single state or private action on the public interest at large. For example, the Hawaii Supreme Court concluded that “any balancing between public and private

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<sup>132</sup> *Harper & Row*, 471 U.S. at 590 (Brennan, J., dissenting).

<sup>133</sup> *Harper & Row*, 471 U.S. at 582 (Brennan, J., dissenting).

<sup>134</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). In this case, David H. Lucas purchased in 1986 two residential lots on the Isle of Palms in Charleston County, South Carolina. However, South Carolina enacted the Beachfront Management Act (1990) which resulted in barring Lucas from erecting any permanent habitable structures on his two parcels. Thus, the central question the Court dealt with in *Lucas* was ecologically based shoreline regulations which prohibit further development constitute a taking of the landowner’s property.

<sup>135</sup> The recent taking jurisprudence shows that the Supreme Court has parted with the so-called categorical rule in deciding regulatory taking is valid or not. See *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002). For a detailed discussion about these issues, see Laura Underkuffler, *Tahoe’s Requiem: The Death of the Scalia View of Property and Justice*, 21 *Constitutional Commentary* 727 (2004).

<sup>136</sup> Sun, *supra note* 13, at 321. This sort of automatic watering-down of public’s rights could be further found in an opinion made in *Eldred*: “The First Amendment securely protects the freedom to make-or decline to make-one’s own speech; it bears less heavily when speakers assert the right to make other people’s speeches.” *Eldred*, 537 U.S. at 221.

<sup>137</sup> *Harper & Row*, 471 U.S. at 579 (Brennan, J., dissenting).

purposes [shall] begin with a presumption in favor of public use, access, and enjoyment.”<sup>138</sup>

To promote and protect the three categories of collective rights enjoyed by the general public, courts therefore need to alter their interpretive methodologies and judicial techniques for adjudicating copyright cases, in particular for those fair use cases. The public trust doctrine would require that when adjudicating copyright cases, courts need to bear in mind that the public’s rights are by nature collective rights rather than individual rights. This would require courts not to interpret the fair use doctrine restrictively. Accordingly, sufficient consideration of the public interest shall be made in the process of rendering judicial decisions. Rather than fixing their focus on individual interest, courts shall look broadly to the spectrum of public interests and their ramifications for public access and use of informational resources.<sup>139</sup> For example, when interpreting the nature of fair dealing exception which is similar to the fair use doctrine in U.S., the Canadian Supreme Court in fact largely used the ethos of the public trust doctrine as described above to promote the collective rights in informational resources enjoyed by the public:

The fair dealing exception, like other exceptions in the Copyright Act, is a *user’s right*. In order to maintain the proper balance between the rights of a copyright owner and users’ interests, it *must not be interpreted restrictively*.... “Research” must be given a *large and liberal interpretation* in order to ensure that users’ rights are not unduly constrained.... “Dealing” connotes not individual acts, but a *practice or system*. This comports with the purpose of the fair dealing exception, which is to ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works. Persons or

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<sup>138</sup> *In re Water Use Permit Applications*, 94 Hawai’i 97, 142(2000); *In re Waiola O Molokai, Inc.* 103 Hawai’i 401, 432 (2004) (reaffirming this argument made in the former case). See Carol Necole Brown, *Drinking from a Deep Well: The Public Trust Doctrine and Western Water Law*, 34 FLA. ST. U. L. REV. 1, 4 (2006) (“Public rights are just as essential to a healthy and functioning democratic society as are private rights, and strengthening the public trust doctrine ensures that public resources are not turned over to private owners, essentially consolidating usufructuary interests in important waters in the hands of a few and to the exclusion of the public.”).

<sup>139</sup> See e.g., Pamela Samuelson, *Unbundling Fair Uses* at 25, available at <http://ssrn.com/abstract=1323834> (“Courts should give greater weight to the public’s interest in access to the information the defendant’s use would make available. Particularly in cases involving free speech and free expression values, courts can and should give more consideration to the public interest in access to the defendants’ expression.”); BURRELL&ALLISON COLEMAN, COPYRIGHT EXCEPTIONS: THE DIGITAL IMPACT 279-80 (2005) (proposing that the limitations on copyright shall be seen as users’ rights and they “can be objected that different users’ rights are justified by very different societal interests”); Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 331 (2006) (arguing that “[i]ntellectual property is about social relations and should serve human values”); Jack Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 50 (2004) (“To make intellectual property consistent with the idea of free speech as democratic culture, there must be a robust and ever expanding public domain with generous fair use rights. Intellectual property also must not be permitted to create chokepoints or bottlenecks in the spread of knowledge and the distribution of culture.”).

institutions relying on the ... fair dealing exception need only prove that their own dealings with copyrighted works were for the purpose of research or private study and were fair. They may do this either by showing that their own practices and policies were research-based and fair, or by showing that *all individual* dealings with the materials were in fact research-based and fair.<sup>140</sup>

On the other hand, the public trust doctrine could also be used to counter the general rule regarding the burden of proof that has been used by courts in dealing with fair use cases. Court's treating fair use as users' individual rights and consequently the affirmative defense for them has, as shown above, led courts to routinely place on the defendant the burden of proof to demonstrate his act is in line with the fair use doctrine.<sup>141</sup> The shifting of burden of proof, as it stands, simply presumes that fair use is in fact "the right to hire a lawyer to defend [one's] right to create,"<sup>142</sup> unduly making it more costly and complicated for members of the public to defend their rights.<sup>143</sup> Worse still, it also takes for granted that copyright as an individual right should be given greater weight than the collective rights enjoyed by the public.

By contrast, the ethos of the public trust doctrine, if applied to the fair use cases, would require courts to shift the burden of proof to the plaintiff, namely the copy holders especially those big entertainment and publishing companies.<sup>144</sup> Through

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<sup>140</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 1 S.C.R. 399 (2004) (emphases added), available at <http://www.canlii.org/en/ca/scc/doc/2004/2004scc13/2004scc13.html>. A less liberal or ambitious interpretation of the fair use doctrine, though showing strong sympathy for the need to protecting the public interest, has been made by some U.S. courts. See *Time, Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968) (holding in favor of fair use in part because "[t]here is a public interest in having the fullest information available on the murder of President Kennedy."); *Suntrust*, 268 F.3d at 1283 (pointing out that if copyright holders had the right to prevent others from making parody of their works, that would have made "a policy that would extend intellectual property protection into the precincts of censorship"); *Blanch v. Koons*, 467 F.3d 244, 254 (2d Cir. 2006) (noting that "the public exhibition of art is widely and [it has] value that benefits the broader public interest").

<sup>141</sup> See e.g., *Campbell*, 510 U.S. at 580 ("Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets. "); *Texaco*, 60 F.3d at 918 ("Fair use serves as an affirmative defense to a claim of copyright infringement, and thus the party claiming that its secondary use of the original copyrighted work constitutes a fair use typically carries the burden of proof as to all issues in the dispute."); *Fair Use of Copyrighted Works*, H.R. Rep. No. 102-836, 102d Cong., 2d Sess. 3 n.3 (1992) (concluding that the burden "is always on the party asserting the defense, regardless of the type of relief sought by the copyright owner...").

<sup>142</sup> LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* 187 (2005).

<sup>143</sup> To borrow words from Lessig, defending fair use as individual rights "costs too much, it delivers too slowly, and what it delivers often has little connection the justice underlying the claim. The legal system may be tolerable for the very rich. For everyone else, it is an embarrassment to a tradition that prides itself on the rule of law." See LESSIG, *supra* note 142., at 187.

<sup>144</sup> Pamela Samuelson also points out that in fair use cases the burden of proof shall in general be placed on the copyright holders:

Given the important role that fair use plays in mediating tensions between copyright law and the First Amendment and other constitutional values, it would be appropriate for the burden of showing unfairness to be on the copyright owner. When deciding whether to

shifting the burden of proof, courts would show that their following the ethos of the public trust doctrine requires them to give appropriate primacy to the rights collectively enjoyed by the public and to the promotion and protection of public interest. In this sense, it is the possibility that collective rights enjoyed by the public could potentially gain primacy over the individual right in copyrighted works that provides the ground of shifting the burden of proof to the copyright holders. Moreover, the shifting of the burden of proof in this regard would further open the door for courts to engage in a more expansive scrutiny of the subtleties and nuances of the public interest that could be promoted, should the plaintiff's copying of works is to be upheld as fair use. Besides, it would encourage members of the public to assert their rights more actively and spontaneously rather than simply succumb to copyright holders' demands for licensing fees. This is because the shift of the burden of proof would significantly reduce their costs to participate in litigations and make it quicker to settle disputes so that their activities would not be unduly hampered by the exceedingly complex, lengthy and costly litigation process.

## **B. Effectuating the Government's Political Responsibilities**

### **1. Political Responsibilities Regarding Public Trust Natural Resources**

Under the public trust doctrine, the government has the trustee power to regulate or dispose of natural resources. Meanwhile, the government is required by the doctrine to fulfill its political responsibility to promote and protect the public's collective rights over certain natural resources. For example, it has been repeatedly emphasized that the government has "the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people."<sup>145</sup>

To ensure that the government would fulfill its political responsibilities, the public trust doctrine confers upon courts the judicial review power to consider the validity of government's *state action* in allocating the protected resources. According to the judicial practice, courts examine whether or not the government's allocation of public trust resources is made for the purpose of promoting public interests. For example, with respect to navigable waters and the land underneath them, the Supreme Court in *Illinois Central* stated that "The

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challenge a use as infringement, rights holders often anticipate that fair use will be at issue in the case, and they are typically in a better position than defendants to offer proof on key issues pertinent to fair use, such as the likelihood of harm to the market. See Pamela Samuelson, *Unbundling Fair Uses* at 70, available at <http://ssrn.com/abstract=1323834>. I am grateful to Ng-Loy Wee Loon for directing me to Pamela Samuelson's latest thought about the rule of the burden of proof in the fair use cases after she read an earlier draft of this article.

<sup>145</sup> *In re Complaint of Steuart Transp. Co.*, 495 F. Supp. 38, 40 (1980). *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 441 (Cal., 1983) ("[T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.").

control of the State for the purposes of the trust can never be lost, except [that resources] are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”<sup>146</sup> Accordingly, if the results of state action cannot live up to the standard of review enunciated in *Illinois Central*, courts would invalidate the government’s decisions regarding allocation of public trust resources, and would denounce its “abdication”<sup>147</sup> of the political responsibility to protect the public’s collective rights.

The judicial oversight of the state action regarding its allocation of public trust resources, in effect, empowers the court to overturn the decisions made by the government as the representative of the public at large. Anti-majoritarian as it is, the public trust doctrine as the basis of the judicial review power is legitimized by its role in remedying “the tyranny of the minority” problem that may arise in the democratic decision-making process. The conundrum inherent in the modern democracy, as Carl Schmitt observed, is that political institutions as the venue for deliberating public good may have been transformed into the institutions for powerful interest groups to negotiate and bargain for commercial deals of power distribution. Those powerful interest groups, routinely formed by large business organizations, are the “minority” parties in the society when compared to the public as the “majority” whose collective interest are supposed to be of central importance in democratic governance. Yet these “minority” groups are able to drastically reduce the inclusive deliberation in the legislative and administrative process to the business meeting concerning the distribution of interests among them. Because they wield an unparalleled wealth of resources, these “minority” groups are extremely active in penetrating the structure of democratic deliberation by controlling some or most of the representatives of the public, such as senators, governors, etc. When these representatives become their “loudspeakers” in the political decision-making process, the democratic deliberation would degenerate into “an empty formality” and “superfluous decoration”<sup>148</sup> for the public interest at large. Their conduct, in Carl Schmitt’s opinion, is no longer “concerned with discovering what is rationally correct, but with calculating particular interests and the chances of winning and with carrying these through according the one’s own interests.”<sup>149</sup>

The state action regarding allocation of natural resource is indeed very vulnerable to the “tyranny of the minority” problem as discussed above. Given that public trust resources have enormous market value, any proprietary control of them would surely generate windfall profits for any private parties. Not surprisingly,

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<sup>146</sup> *Illinois Central*, 146 U.S. at 453.

<sup>147</sup> *Id.* (“Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.”).

<sup>148</sup> CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 6 (E. Kennedy trans. 1988).

<sup>149</sup> *Id.* at 5-6. Therefore, the politics of the deliberation degenerates into regular business meeting in which “social or economic power-groups caculat[e] their mutual interests and opportunities for power, and they actually agree compromises and coalitions on this basis.”

this gives rise to the rent-seeking activities<sup>150</sup> that may be aggressively pursued by the private parties with strong economic clout.<sup>151</sup> Through bribing or lobbying governmental officials in power, these parties take possession of a public trust resource. On the other hand, the public at large is always diffuse and unorganized. It is relatively hard to get them organized as a concerted voice to take part in the government's decision-making process associated with the allocation of public trust resources. Too often, the public at large is simply unable to wage struggle to counter the powerful rent-seeking activities performed by large corporations.

Based upon the public trust doctrine, the exercise of the judicial review power by courts plays an important role in preventing or altering the state action of allocating natural resources which has been skewed by rent-seeking activities. As Sax insightfully observed, the public trust doctrine "is a technique by which courts may mend perceived imperfections in the legislative and administrative process."<sup>152</sup> To do so, the doctrine empowers the courts to "promote equality of political power for [the] disorganized and diffused [public as the] majority" whose interest is easily jeopardized by the "self-interested and powerful minorities [who] often have undue influence on" governmental resource management.<sup>153</sup> Therefore, courts derive and legitimize the judicial review power from the need to protect the public's collective rights against the tyranny of the minority that may occur in the process of government's allocating of public trust informational resources.

## **2. Political Responsibilities Regarding Public Trust Informational Resources**

With respect to copyright protection, the law-making process regarding the allocation of informational resources does suffer from the "tyranny of the minority" problem intensified by the rent-seeking activities as well. Legislative bodies, by and large, have been heavily lobbied and persistently controlled by the major copyright-based industries, which primarily include entertainment corporations, publishers, and collective management organizations.<sup>154</sup>

In the digital age, informational resources increasingly have higher market value. To a large extent, they are the lifeblood of any knowledge-based economies. Akin to the situation in natural resources, the increased value in having ownership of informational resources has been driving more and more corporations in the copyright-based industry to persuade the legislature into adopting laws that provide stronger copyright protection. Against this backdrop, the relevant

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<sup>150</sup> Rent-seeking is the expenditure of resources in an effort to capture these supra-normal returns. Lobbying for special legislative privileges is a classic example. See JAMES M. BUCHANAN ET AL., TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (1980).

<sup>151</sup> The rent seeking problem in natural resources management, see Ragnar Torvik, *Natural Resources, Rent Seeking and Welfare*, 67 JOURNAL OF DEVELOPMENT ECONOMICS 455 (2002).

<sup>152</sup> Sax, *supra note* 42, at 509.

<sup>153</sup> *Id.* at 560.

<sup>154</sup> See general Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J. L. & ARTS. 61, 65-67 (2002); JESSICA LITMAN, DIGITAL COPYRIGHT 22-76 (2001).

industries first negotiate the deals to protect their interests and then forge a coalition to bring them to fruition in Congress. They hire experts to draft legislative proposals aimed at amending law to beef up copyright protection. They further send lobbying representatives to present eloquently to members of Congress how useful and reasonable their proposals are. The prevailing presence of the copyright-based industry in the legislature process has persistently led to increased protection of copyright, making them have stronger power to tighten up the flow of informational resources. The scope of the exclusive rights that control access to and use of information contained in works of authorship has been increasingly enlarged. At the same time, however, the legislature has kept narrowing down the limitations on those exclusive rights which give room for the public to use information contained in works.<sup>155</sup>

The legislative expansion of copyright protection, however, has been made without much consideration of its social costs to public access to and use of informational resources. In many cases, the legislative proposals submitted by the representatives from the relevant copyright-based industries were overwhelmingly adopted by Congress without much close scrutiny over their impact on public interests. “Much legislation advances the agendas of private interest groups....Congress in effect agreed that if the industry representatives would invest the time and energy to develop a bill that all of them endorsed, Congress would refrain from exercising independent judgment on the substance of the legislation.”<sup>156</sup> In this one-sided process, legislators were preoccupied with the rhetoric that the stronger copyright protection would necessarily give copyright holders stronger economic incentive to produce and disseminate works, resulting in increased amount and availability of works for the public. Such rhetoric, however, has only been touted by the industry representatives. Legislators routinely shy away from interrogating whether stronger protection would bring about either stronger economic incentive to produce works or substantial benefits for the public. Therefore, it is not surprisingly that legislative expansions of copyright “often consist of outright congressional rubber-stamping of industry-drafted legislative and committee reports.”<sup>157</sup>

The expanding of exclusive rights as well as the narrowing of copyright limitations, without a doubt, has an enormous impact on the public’s access to and use of informational resources. Yet the public at large has failed to have their concerns voiced in the law-making process and to further have them seriously scrutinized by legislators. This is primarily because the public, akin to their

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<sup>155</sup> See text accompanying *supra* notes 93-95 .

<sup>156</sup> Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 314 (1989) (footnotes omitted); Jessica Litman , *Copyright, Comprise and Legislative History*, 72 CORNELL L. REV. 857, 860-61 (1987) (“Indeed, the statute’s legislative history is troubling because it reveals that most of the statutory language was not drafted by members of Congress or their staffs at all. Instead, the language evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines.”).

<sup>157</sup> NETANEL, *supra* note 11, at 184.

circumstances in the government's decision-making process regarding allocation of natural resources, is too diffuse and unorganized to launch backlash against excessive expansion of copyright protection. Also, as laymen of copyright law, the majority of the public are prone to take it granted that copyright expansion does not have much to do with them. Too often, the public at large is unfortunately not aware of the ramifications of copyright expansions for their interests even after the relevant law is adopted.<sup>158</sup>

Among numerous amendments to copyright law, the Copyright Term Extension Act epitomizes the fact that the law-making process has been one-sidedly dominated and skewed by the copyright-based industries.<sup>159</sup> Throughout its legislative history, the Congressional hearings were persistently dominated by pro-copyright testimonies. As a result, the CTEA was adopted on the basis of these testimonies.<sup>160</sup> Indeed, it became evident that the "tyranny of the minority" problem that exists in the government's allocation of natural resource, has plagued the copyright lawmaking as well. Against this backdrop, courts can and should act as the guardian for the public to question whether government has fulfilled its political responsibilities regarding allocation of informational resources.<sup>161</sup> To this end, they can rely on the public trust doctrine to urge the government to engage in open and rational process of democratic deliberation, when they proceed to allocate informational resources through enacting copyright laws.

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<sup>158</sup> NETANEL, *supra* note 11, at 184 ("In contrast to well-heeled interest groups, the public consists of a large number of discrete individuals, each with a small, highly diffuse stake in the regulation at issue. As a result, the general public faces serious organizational obstacles to countering industry lobbying, and when industries lobby for speech entitlements, the underrepresented public interest in free speech is likely to be shortchanged.").

<sup>159</sup> See LESSIG, *supra* note 142, at 218 (noting that more than two-thirds of the original sponsors of CTEA in the House and Senate received contributions from Disney and that "Disney is estimated to have contributed more than \$800,000 to reelection campaigns in the 1998 cycle"); Christina N. Gifford, *The Sonny Bono Copyright Term Extension Act*, 30 U. MEM. L. REV. 363, 385-86 (2000) ("In fact, ten of the thirteen sponsors of the bill in the House received contributions from Disney, and eight of the twelve sponsors in the Senate were given money by Disney's political action committee. Disney also made a \$ 20,000 donation to the National Republican Senatorial Committee two weeks after Senate Majority Leader Trent Lott signed the bill. Other notable lobbyists included the Gershwin family, whose copyright on George Gershwin's 'Rhapsody in Blue' was due to expire in 1999, and other acclaimed artists like Bob Dylan and Quincy Jones.").

<sup>160</sup> See Dennis S. Karjala, *Judicial Review of Copyright Term Extension Legislation*, 36 LOY. L.A. L. REV. 199, 206-222 (2002).

<sup>161</sup> See Merges, *supra* note 11, at 2239 (arguing that "in an age of increasing 'statutorification' in intellectual property law, the system needs a counterweight where the legislative process is skewed."); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 362 (2004) ("Although intellectual property rights can be dispensed in both unfair and economically harmful ways, recognizing a constitutional norm against successful rent-seeking would require rolling back much of what government has done in the twentieth century and would simply place an additional hurdle - judicial approval - in the way of making federal economic policy.").

To excise the judicial review power, courts could examine the substantive and procedural aspects of the state action in allocating of informational resources. For the substantive value, they could rely on the standard of review used by *Illinois Central* to determine whether the government has fulfilled its political responsibilities. To this end, courts need to consider whether the government's granting of stronger proprietary control over informational resources would benefit the public or cause substantive harm to the public interest.<sup>162</sup> Moreover, the doctrine shifts the burden of proof to the government, requiring it to demonstrate the strong public-interest purpose in granting stronger copyright protection. At this juncture, the shift of the burden of proof compels the government to disclose the potentially hidden details concerning how and why informational resources in question have been privatized or afforded with stronger proprietary protection.

Second, in terms of the procedural issues, courts could examine whether the adoption of copyright laws has adequately taken into account the interests of major stakeholders through open and fair procedures.<sup>163</sup> To this end, the court could consider whether decisions are made with a great deal of public notice so as to keep the public reasonably informed and give them sufficient time to get prepared and organized to respond and counteract. In particular, the doctrine further requires that the legislative body must take accommodative measures to have the representatives of the public closely involved in the law-making process. For example, legislative body may invite civil society organizations such as Public Knowledge, Electronic Frontier Foundation, etc, to present their concerns for the impact of any proposed new laws on the public interest in access to information. Therefore, courts can strike down the law enacted without close participation by the representatives of the public, or order the legislature to revise the law by actively having those representatives adequately engaged in the legislative process.

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<sup>162</sup> Robert Merges has a similar position regarding the role of the judiciary in protecting public interest by arguing that “[t]he Supreme Court may have to step in at some point to regulate rent seeking in its boldest form,” though he does not make his point from the perspective of the public trust doctrine. See Merges, *supra* note 11, at 2191, 2238-39 (“A copyright term incapable of serving as an incentive at any plausible discount rate; a private patent bill tucked into an unrelated piece of legislation granting a long extension for no justifiable reason: in these and similar cases, an inquiry into the legislative process seems a relevant consideration. In a close case, that inquiry should tip the balance. A court could then invalidate the statute, returning the issue to Congress.”)

<sup>163</sup> See KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986) (empirical research shows that lobbying is most effective when the interest group's goals are narrow and the legislation involves issues of “low-visibility” from the general public's perspective).

## C. Enforcing the Copyright Holders' Social Responsibilities

### 1. The Property Holders' Social Responsibilities

Apart from acting as the check on state action, the public trust doctrine also constrains *private action* under the circumstances in which the public needs must be accommodated in the privately controlled resources. On the one hand, courts have invoked the doctrine to order opening of private property to accommodate public access and use. In this circumstance, courts routinely ascertain that public access to or use of the relevant private property is the condition on which the public can meaningfully exercise their collective rights over trust resources. In courts' opinion, without taking any accommodative measures for the public, property owners would seriously impinge on, if not effectively eliminate, the collective rights of the public. For example, the New Jersey Supreme Court acknowledged that "[e]xercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless."<sup>164</sup> Hence, the Court ruled that the public must be afforded with both access to and use of privately-owned upland beach (dry sand areas) as reasonably necessary for them to exercise their public trust right to bathe or swim in the foreshore areas.

On the other hand, under the public trust doctrine, the private parties who obtained ownership of public trust resources from the government are required to accommodate public access to and use of those resources in their proprietary control. Under this circumstance, the private ownership conferred by the government is seen as a bifurcated title. On the one hand, the party has acquired private ownership over the resource concerned. This title of ownership, under the common law, is recognized as *jus privatum*. Yet the title is subject to the public's collective rights over the resources concerned. On the other hand, the common law regards the public's collective rights over public trust resources as *jus publicum* protected by the state.<sup>165</sup> The bifurcated title over the privatized public trust resources shows that while the government can alienate public trust resources on appropriate occasions, it must not give up and abdicate the responsibilities to protect public interests in those resources. Despite the government's alienation of public trust resources, the public therefore can still exercise their rights over those privately controlled resources obtained from

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<sup>164</sup> *Matthews v. Bay Head Imp. Ass'n*, 95 N.J. 306, 323 (1984). Moreover, in an earlier case the court also stated that "A modern court must take the view that the public trust doctrine dictates that the beach and the ocean waters must be open to all on equal terms and without preference." *Neptune City v. Avon-by-the-Sea*, 61 N.J. 296, 309 (1972).

<sup>165</sup> See e.g. *Shively v. Bowlby*, 152 US 1,11 (1894) (holding that "the title, *jus privatum*, in [tidelands] ... belongs to the king, as the sovereign; and the dominion thereof, *jus publicum*, is vested in him, as the representative of the nation and for the public benefit"); *Appleby v. City of New York*, 271 U.S. 364 (1926) (ruling that the ownership of submerged lands carrying both the *jus publicum* and the *jus privatum*); *Glass v. Goeckel*, 473 Mich. 667, 680 (2005) ("*Jus publicum* refers to public rights in navigable waters and the land covered by those waters; *jus privatum*, in contrast, refers to private property rights held subject to the public trust.").

government's privatization schemes.<sup>166</sup> For example, regarding the littoral rights granted by the government, courts repeatedly held that "although the state retains the authority to convey lakefront property to private parties, it necessarily conveys such property *subject to the public trust*."<sup>167</sup>

By requiring the public accommodation in private property, the public trust doctrine, in fact, imposed upon property owners both negative and positive social responsibilities. For the negative responsibility, the doctrine requires that private property owners not to use their property in a manner harmful to the public for them to exercise their collective rights under the public trust doctrine. In fact, the imposition of negative responsibilities reflects a long-recognized principle that "all property ... is held under the implied obligation that the owner's use of it shall not be injurious to the community"<sup>168</sup> and other individuals.<sup>169</sup> For instance, in *Orion Corp. v. State*, Orion Corporation, the owner of 5,600 acres of Padilla Bay tidelands in Washington attempted to dredge and fill Padilla Bay to create a residential community. Yet the court held that Orion's purchase of the tidelands was subject to the public trust and must accommodate the public need, given that the state could not give up *jus publicum* interest for all the citizens. Hence, Orion Corporation has the responsibility not to carrying out dredging and filling of the tidelands at issue that "would substantially impair the public rights of navigation and fishing, as well as incidental rights and purposes [for boating, swimming, water skiing]."<sup>170</sup> Similarly, filling of tidal waters was also invalidated by *Palazzolo v. State*<sup>171</sup> based on the public trust doctrine. Moreover, courts have also held that private owners have the responsibility not to erect fences on their properties, which would prevent the public from exercising the right to walk on the lake shores below the ordinary high water mark<sup>172</sup> or to navigate in the lake waters.<sup>173</sup>

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<sup>166</sup> See e.g. *Caminiti v. Boyle*, 107 Wn.2d 662, 669 (1987) ("The state can no more convey or give away this *jus publicum* interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.'") (citing *Illinois Central*); *Glass v. Goeckel*, 473 Mich. at 679 ("At common law, our courts articulated a distinction between *jus privatum* and *jus publicum* to capture this principle: the alienation of littoral property to private parties leaves intact public rights in the lake and its submerged land.").

<sup>167</sup> *Glass v. Goeckel*, 473 Mich. at 679.

<sup>168</sup> *Mugler v. Kansas*, 123 U.S. 623, 665 (1897).

<sup>169</sup> For example, Justice Brandeis contended that "the right of the owner to use his land is not absolute. He may not so use it as to create a public nuisance; and uses, once harmless, may, owing to changed conditions, seriously threaten the public welfare." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (Brandeis, J., dissenting) (1922).

<sup>170</sup> *Orion Corp. v. State*, 109 Wn.2d 621,638-42 (1987). In an earlier case, the court required littoral property owners to remove fills that prevented submergence of their shoreline and thus impeded their neighbors' access to the adjoining lake. *Wilbour v. Gallagher*, 77 Wn.2d 306 (1969).

<sup>171</sup> Not Reported in A.2d, 2005 WL 1645974, 7, (R.I.Super.,2005).

<sup>172</sup> See e.g. *Glass v. Goeckel*, 473 Mich. at 699.

<sup>173</sup> See e.g. *Lincoln v. Davis*, 53 Mich. 375, 390 (1884) ("[T]here can be no doubt of the right of the state to forbid any erections within such parts of the water as are strictly navigable, and to regulate the distance beyond which no private erections can be maintained.").

With respect to the positive responsibility, private property owners are required by the public trust doctrine to take on certain set of tasks to facilitate the public's exercising of their collective rights. For instance, given that access to and use of dry sand areas are indispensable for the public to make recreational use of the foreshore areas, the New Jersey Supreme Court ordered that private property rights was required to afford the public not only "reasonable access to the foreshore" but also "a suitable area for recreation on the dry sand."<sup>174</sup>

## 2. The Copyright Holders' Social Responsibilities

Given that the core of the conventional copyright law is the protection of creators' economic rights, the law per se is largely silent on whether copyright holders have social responsibilities. The designing of copyright law, therefore, inculcates a popular mentality in copyright holders that armed with the bundle of economic rights protected by copyright law, they nevertheless do not have any social responsibilities after the publication of their works. Hence they reason that they have fulfilled their social responsibilities through publishing their works and thereby informing the public of their intellectual creations. It then naturally follows that as long as they finish the acting of publishing, they do not have any further social responsibilities whatsoever regarding the protection of their copyrights. For them, copyright simply denotes the Blackstonian notion of property, in which the owner enjoys "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."<sup>175</sup>

Moreover, *Eldred v. Ashcroft* lends a strong support for the Blackstonian notion of property that divorces exclusive rights enjoyed by copyright holders from the social responsibilities that they should have. In *Eldred*, the Supreme Court acknowledged that social responsibilities are imposed upon right holders as a *quid pro quo* for vesting them with patent rights.<sup>176</sup> Yet, it rejected that the same conclusion could be applied to copyright. In doing so, the Court based its denial on the distinction between the protections afforded to copyright and patent:

We note [that] patents and copyrights do not entail the same exchange, and that our references to a *quid pro quo* typically appear in the patent context . . . . [C]opyright gives the holder no monopoly on any knowledge. A reader of an author's writing may make full use of any fact or idea she acquires from her reading. The grant of a patent, on the other hand, does prevent full use by others of the inventor's knowledge.<sup>177</sup>

Without carefully reconsidering the nature of copyright and recent legislative overhaul that may change the landscape of copyright protection, the Court's

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<sup>174</sup> *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 185 N.J. 40, 55 (2005) (citing *Matthews*).

<sup>175</sup> BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 393 (1882).

<sup>176</sup> *Eldred*, 537 U.S. at 216 (holding that the disclosure requirement for patentees should be seen as "the price paid for the exclusivity secured").

<sup>177</sup> *Eldred*, *id.* at 216-17.

ruling against the requirement of social responsibilities is dubious. With the recent expansion of copyright protection, it is not necessarily true that the protection afforded to copyright holders, according to the letters of copyright law, does not enable them to monopolize any knowledge. For example, it was bluntly pointed out in *Sega Enters. Ltd. v. Accolade* that “the fact that computer programs are distributed for public use in object code form often precludes public access to the *ideas* and *functional* concepts contained in those programs, and thus confers on the copyright owner a *de facto* monopoly over those ideas and functional concepts.”<sup>178</sup> Moreover, the Court failed to bear in mind that retroactive extension of copyright terms and legal protection of technological measures<sup>179</sup> and non-original databases<sup>180</sup> actually confer monopoly over ideas upon right holders.

The use of the public trust doctrine would provide us with a vantage point to think about why social responsibilities should be imposed upon copyright owners, and further how the social responsibilities could be enforced by copyright law. The core idea for courts is to think about the relationship between the copyright owners and the public at large. First and foremost, borrowing from the techniques of the public trust doctrine, courts could consider the imposition of social responsibilities on copyright holders based upon the fact that they need to provide public accommodation in order to promote and protect the public’s collective rights.<sup>181</sup> On the one hand, despite the right to exclude vested in copyright holders, the public access to and use of the works concerned may constitute the condition on which members of the public can exercise their collective rights in a meaningful way. As Rebecca Tushnet has convincingly demonstrated, “copying is of value to audiences who have access through copying to otherwise unavailable speech. It also enhances copiers’ ability to express themselves; to persuade others; and to participate in cultural, religious, and political institutions.”<sup>182</sup> Therefore, courts must examine whether the public at large, if their copying of works is not allowed, can still exercise their rights protected by the public trust doctrine in a meaningful way.

On the other hand, given that copyright law now affords quasi legal protection over ideas and facts through the law of anti-circumvention regulations, courts may rely on the public trust doctrine to consider the imposition of social responsibilities upon right holders concerned in order to facilitate the public’s

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<sup>178</sup> *Sega Enters. Ltd. v. Accolade*, 977 F.2d 1510, 1527 (9th Cir. 1992) (emphasis added).

<sup>179</sup> See text accompany *supra* notes 76-78.

<sup>180</sup> For example, the *sui generis* model adopted in E.U. is intended to protect the non-original database that contain “qualitatively and/or quantitatively a substantial investment” against unauthorized “extraction and/or re-utilization of the whole or of a substantial part of” the contents of that databases. See Directive 96/9/EC of the European Parliament of and of the Council of 11 March 1996 on the Legal Protection of Databases, Art.7.1. The *sui generis* model makes it possible that the maker of databases in fact has the proprietary control over facts and ideas.

<sup>181</sup> For discussion on the equality and reciprocity as the basis of imposing social responsibilities, see Sun, *supra* note 13, at 322-326.

<sup>182</sup> Tushnet, *supra* note 81, at 562.

exercising of rights over those ideas and facts under their control. Unquestionably, ideas and facts are not subject to proprietary control and copyright protection. Rather, they remain in the public space freely available for the public to use. If the government affords quasi copyright protection over certain elements of ideas and facts through anti-circumvention regulations or any other forms of copyright protection, courts may hold that the relevant copyright owners shall have the responsibility to accommodate the exercise of public trust rights over the ideas and facts concerned.

By and large, to consider copyright holders' social responsibilities would provide us with a new insight into thinking about the nature of copyright in general and the copyright limitations like the fair use doctrine in particular. The use of the public trust doctrine in this regard broadens our vision of the nature of copyright through postulating that "social responsibility is the very *quid pro quo* for granting a bundle of exclusive rights to [copyright holders]."<sup>183</sup> In this sense, we do not see the function of copyright law as merely granting economic rights to creators or securing adequate copyright protection for them. Rather, copyright law also plays an essential role in making it effective that creators with copyright protection would contribute to the promoting of the public interest in improving accumulation and dissemination of knowledge and information and further in enhancing social creativity and innovation in the economic and cultural development of our human society. Moreover, with the use of the public trust doctrine, we do not simply see the fair use doctrine as merely carving out limitations on copyrights vested in creators. Rather, the fair use doctrine should be seen as a useful tool to impose social responsibilities upon copyright holders and to further enforce the social responsibility of that type. From this perspective, the fair use doctrine makes it legally effective that copyright holders would exercise their rights in a manner conducive to the promotion and protection of the public's collective rights over informational resources. As I argued in my earlier work, the fair use doctrine, if seen from the perspective of social responsibilities, actually becomes one of the institutional arrangements aimed at sustaining and enhancing the reciprocal relationship between copyright holders (creators) and the general public (users):

According to the principle of reciprocity, as long as users act in a manner respectful of copyright, creators should and must be required to do something positive to the promotion and protection of users' rights. In this sense, the grant of copyright to creators therefore intrinsically entails the social responsibilities imposed upon them. Put differently, users can thereby forcefully petition creators to exercise their rights in a manner conducive to the pursuit of public good. From this perspective, copyright holders are required to come to terms with the socially beneficial use of their works by the public at large. Under

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<sup>183</sup> Sun, *supra note* 13, at 328.

certain circumstances, they are further required to facilitate such kind of use of copyrighted works.<sup>184</sup>

Yet it does not necessarily follow that courts should invoke the public trust doctrine in adjudicating every case to examine whether copyright holders have social responsibilities to take measures aimed at accommodating the public. This mode of adjudication may cause many conventional copyright doctrines dysfunctional in dealing with private law suits. Instead, with respect to the copyright holders' responsibilities, courts should use the public trust doctrine merely as a last resort. Only in the circumstances where courts face hard cases and find it very difficult to make a decision even after using all of conventional doctrinal tools can they start to invoke the public trust doctrine. In this context, courts can draw on the public trust doctrine to consider whether the copyright holder have social responsibilities to the public. If so, courts can then rule that the copyright holder owe responsibilities to the defendant given that he or she is presumptively to be a member of the public. In this scenario, the dispute could be resolved on the basis of courts' reasoning of the extent to which social responsibilities should be imposed on copyright holders.

#### **IV. REENGINEERING THE PUBLIC TRUST DOCTRINE THROUGH PRACTICE AND APPLICATIONS**

Based on preceding discussion about the theories and concrete techniques of the public trust doctrine, I will consider how the doctrine could be applied to create new alternative ways to deal with the copyright cases which are core to the healthy development of our cultural ecosystem.

##### **A. Overturning *Eldred***

In *Eldred v. Ashcroft*, the Supreme Court upheld the constitutionality of the recent twenty-year extension of copyright terms. On the one hand, the Court held that the extension was rationally made within the ambit of Congress' legislative power, because the past term extensions were unanimously deemed valid and Congress demonstrated legitimate policy judgments for the latest term extension, such as the need to keep up with the term extension in European Union, to provide economic incentive to produce and disseminate new works and so on.<sup>185</sup> Therefore, it ruled that the enactment of the CTEA did not violate Copyright Clause. On the other hand, the Court held that the CTEA does not violate the First Amendment, because it did not change the contours of the idea/expression

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<sup>184</sup> Sun, *supra note* 13, at 324. The idea of reciprocity in copyright law was discussed by Lord Ellenborough in a very early copyright case, though not in an explicit way. He thought that "[w]hile I shall think myself bound to secure in every man the enjoyment of his copyright, one must not put manacles on science." Therefore, he proposed that "a man may fairly adopt part of the work of another; he may so make use of another's labors for the promotion of science, and the benefit of the public." *Cary v. Kearsley*, 4 Esp. 168, 170-171 (1803).

<sup>185</sup> *Eldred*, 537 U.S. at 199-208.

dichotomy and the fair use doctrine as the so-called “built-in First Amendment accommodations” in copyright law.<sup>186</sup>

The use of the public trust doctrine, however, would render a judicial opinion that runs direct counter to *Eldred* and invalidates the enactment of the CTEA. Given that the CTEA’s extension of copyright terms would necessarily grant proprietary control over public trust informational resources (without the extension, they would have remained in public trust), the Supreme Court can rely on the public trust doctrine to exercise its judicial review power to consider whether the CTEA is valid or not.

Following the doctrine, the Court first needs to examine whether the *substantive* public values have been infused into the CTEA. To this end, the Court could examine whether the term extension promotes public interest or whether it does not cause any substantial impairment of the public interest. As show in Part III, this is the threshold inquiry required by *Illinois Central* and many other public trust doctrine cases.<sup>187</sup> First, judging from the CTEA’s legislative purpose, the Court could conclude that its extension of copyright terms was adopted for purely benefiting the copyright holders, especially those big entertainment companies.<sup>188</sup> As the Senate Report and the majority of testimonies delivered at the Congressional hearings show, it is evident that the major purpose of the CTEA was to provide increased economic benefits to copyright holders.<sup>189</sup> Moreover, the Court could further consider whether the CTEA would substantively impair the public interest. At this juncture, the Court could find that the CTEA would hardly provide most of creators more incentive to produce and disseminate more works for the public, because it is dubious that their decision-making process would take into account the extra twenty-year protection as a motivation for acting in that way. Instead, the Court could find that the CTEA may cause grave social harms. For example, many economists have estimated that the CTEA

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<sup>186</sup> *Id.* at 218-221.

<sup>187</sup> See texts accompanying *supra* note 122.

<sup>188</sup> See *e.g.*, LESSIG, *supra* note 142, at 218.

<sup>189</sup> The Report stated the legislative purpose as follows:

The purpose of the bill is to ensure adequate copyright protection for American works in foreign nations and the continued economic benefits of a healthy surplus balance of trade in the exploitation of copyrighted works. The bill accomplishes these goals by extending the current U.S. copyright term for an additional 20 years. Such an extension will provide significant trade benefits by substantially harmonizing U.S. copyright law to that of the European Union while ensuring fair compensation for American creators who deserve to benefit fully from the exploitation of their works. Moreover, by stimulating the creation of new works and providing enhanced economic incentives to preserve existing works, such an extension will enhance the long-term volume, vitality and accessibility of the public domain.

Senate Report 104-315, [http://thomas.loc.gov/cgi-bin/cpquery/R?cp104:FLD010:@1\(sr315\)](http://thomas.loc.gov/cgi-bin/cpquery/R?cp104:FLD010:@1(sr315)). For the summary of testimonies, see *Karjala*, *supra* note 160, at 206-222.

would give rise up to monopoly control of information and thereby increase “the social cost of monopoly.”<sup>190</sup>

On the other hand, the Court needs to further consider whether the CTEA was adopted in line with the *procedural* requirements under the public trust doctrine. To this end, it needs to make sure that the CTEA’s legislative process adequately involved stakeholders or representatives for the public and Congress further seriously considered their opinions. The legislative history, however, clearly shows that Congress actually failed to do so. This is because testimonies delivered before Congress were predominantly from the copyright-based industry or the pro-copyright camp, and the enactment of the CTEA was in fact based entirely upon their opinions.<sup>191</sup>

## **B. Google Book Search Project**

By and large, the Google Book Search Project “create[s] a comprehensive, searchable, virtual card catalog of all books.”<sup>192</sup> It helps people to find new books and locate the particular information they need in the relevant books. Also, it makes available to the public the books that are not protected by copyright yet are on longer in print (publishers have no economic interest to circulate them). Google, however, was sued for copyright violation due to the fact the project basically involves unauthorized verbatim copying of copyrighted works. It seems highly uncertain whether the project itself could constitute fair use of works. This is largely because it would be exceedingly hard for the court to decide whether the project may affect copyright holders’ marketing of similar digital library services, and whether Google’s online indexing of books can be counted as transformative use of works.<sup>193</sup> Faced with the risk of losing in court and the severe negative impact of nearly endless litigation process that may affect its project, Google reached a private settlement with the plaintiff.<sup>194</sup>

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<sup>190</sup> See e.g., Brief of George A. Akerlof et al. as Amici Curiae in Support of Petitioners at 10-12, *Eldred v. Ashcroft*, No. 01-618.

<sup>191</sup> See *Karjala*, *supra* note 160, at 206-222. After reviewing the CTEA’s legislative history, Karjala concluded that “A number of witnesses before Congress stated, in essence, that an extended term meant stronger copyright protection and that stronger protection would operate as an incentive to the creation of new works. No witnesses attempted to rebut the argument that the present value of the extended term to a current author is nil. No one testified that any particular author had decided against undertaking the creation of a new work that he would have undertaken had the prospective term been life plus seventy years instead of the pre-CTEA life-plus-50-year term.” *Id.* at 221.

<sup>192</sup> *Google Books Library Project*, available at <http://books.google.com/googlebooks/library.html>.

<sup>193</sup> See e.g., Diane Leenheer Zimmerman, *Can Our Culture Be Saved? The Future of Digital Archiving*, 91 *Minn. L. Rev.* 989, 1018-25 (2007). For the opinion holding that the Google project can not pass the fair use scrutiny, see Siva Vaidhyanathan, *The Googlization of Everything and the Future of Copyright*, 40 *U.C. DAVIS L.REV.* 1207, 1221-25 (2007) (explaining why the Google project can not be seen as fair use); Elisabeth Hanratty, *Google Library: Beyond Fair Use?*, 2005 *DUKE L. & TECH. REV.* 10, ¶3 (“Without a significant change in interpretation of the law, it is unlikely that Google will be able to successfully claim its actions constitute fair use...”);

<sup>194</sup> The settlement documents are available at <http://books.google.com/booksrightsholders/agreement-contents.html>.

Generally speaking, the use of the public trust doctrine can work as a reasonable alternative to save the Google project which is hailed as almost an equivalent to invention of the printing press.<sup>195</sup> Apart from being a check on governmental power, the doctrine, as I demonstrated in the preceding Part, also sets up restrictions on private action performed by copyright holders. To do so, it imposes social responsibilities on them. As mentioned above, it is very difficult for the court to decide whether the Google project is fair use or not. Against this backdrop, the court could use the public trust doctrine as a last resort to consider whether copyright holders have the responsibilities to accommodate public access to and use of their works through the Google project.

On the one hand, copyright holders may have the responsibility to accommodate the public to exercise their collective right to cultural participation and right to benefit from technological advances. Through the digital technologies advanced by Google, the public at large is enabled to obtain “basic bibliographic information” about the works and the “search term” they want to locate or pinpoint in the works as well. These are basically the informational resources held in public trust and are not subject to copyright protection. Having access to and use of them are of essential importance for the public to enjoy their rights. For example, the project promotes the right to cultural participation by greatly facilitating researchers and teachers to locate the information they need. It also promotes the right to benefit from technological advances by making it easily for the public to locate those informational resources by digital technology. Yet verbatim copying done by Google is necessary to help them enjoy these rights in a meaningful way. Without it, the public at large cannot use this sort of digital technology to locate the informational resources they need. Meanwhile, the court should also note that Google project has taken an adequate level of restraint measures in order to prevent or minimize the potential harm to the copyright holders. For example, it only shows a few snippets to the public, displays copyright notice, and provides links that directs the public to the venues where works are available to be purchased.

On the other hand, copyright holders may the responsibility to accommodate the public to exercise their collective right to environmental protection in our cultural ecosystem. Digital technology opens up a myriad of unprecedented opportunities to archive all of works by digitizing them. It facilitates and enhances environmental protection in our cultural ecosystem because it would greatly reduce the cost for the public to use works and enormously enriches the diversity

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<sup>195</sup> Mark Gregory, *Google's Books Online under Fire*, <http://news.bbc.co.uk/1/hi/business4576827.stm/> (“The head of Oxford University's library service said the [Google] project could turn out to almost as important as the invention of the printing press.”); *Google Book Search*, [http://en.wikipedia.org/wiki/Google\\_Book\\_Search](http://en.wikipedia.org/wiki/Google_Book_Search) (pointing out that “librarians hail the initiative for its potential to offer unprecedented access to what may become the largest online corpus of human knowledge”).

of works that could be made available to the public.<sup>196</sup> From this perspective, copyright holders are required to get involved in the digital technology-based protection of our cultural ecosystem and ought to fulfill this responsibility by allowing digital archiving that is being carried out by the agent, such as Google. Yet, given that Google is a for-profit organization, the court may require it to donate a reasonable portion of its revenues earned from the project to the non-for-profit public interest organizations, or to reasonably compensate copyright holders as a reward for their involvement in the project.

### CONCLUSION

By and large, the public trust doctrine resonates strongly with Justice Holmes' view that law is "the felt necessities of the time."<sup>197</sup> As many courts and leading commentators have observed, the doctrine is by nature "to be molded and extended to meet changing conditions and needs of the public it was created to benefit."<sup>198</sup> In this Article, I have demonstrated that because there are ecological, economic and cultural manipulations that have arisen amid wide use of new technologies in the digital age, we do need to expand the use of the public trust doctrine from natural resources to knowledge and information flowing in our intangible public space. The use of the public trust doctrine, as I have shown, would function to counter those manipulations that have posed a severe threat to our cultural ecosystem, in which all of us have a stake as social members of the public space. Through curbing those manipulations, the doctrine would defend the public's collective rights and enforce both the government's political responsibilities and the copyright holder's social responsibilities.

Yet the expansion of the public trust doctrine into copyright law would give rise to the concern that it might afford too much power to the judiciary and thereby might unduly disrupt the check-and-balance structure in our democratic system. Indeed, this is a legitimate concern.<sup>199</sup> But when we take a closer look at the

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<sup>196</sup> See e.g., Zimmerman, *supra* note 193, at 993-97.

<sup>197</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

<sup>198</sup> *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309 (1972). See e.g., *Marks*, 6 Cal.3d at 259 ("The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another."); *Orion*, 109 Wash. 2d at 640-41 ("The trust's relationship to navigable waters and shorelands resulted not from a limitation, but rather from a recognition of where the public need lay."); *In re Water Use Permit Applications*, 94 Hawai'i 97, 135 (2000) ("The public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances."); Sax, *supra* note 28, at 556-57; Carol Rose, *supra* note 40, at 722; Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U. C. DAVIS. L. REV. 269, 315 (1980).

<sup>199</sup> For critique of the role of the modern public trust doctrine in the constitutional system, see James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989); Lazarus, *supra* note 31. For general arguments against judicial review, see e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS*

building blocks of the doctrine, it is easy to find that courts use the doctrine for the public interest and their exercising of the judicial review power actually stems from the necessity of defending the public's collective rights.<sup>200</sup> In the context of copyright law, the past decade has witnessed an unprecedented expansion of copyright protection spawned by the legislature. Yet the one-sided legislative process which has been dominated chiefly by the copyright-based industry also gives rise to the concern that such mode of expanding copyright protection is in fact socially unsound and has seriously disrupted the check-and-balance structure in making copyright law aimed at accommodating various social needs through democratic discourse and procedure-channeling. The use of the public trust doctrine, by and large, would function to defend the public's collective rights and to correct the undemocratic problem in making copyright through empowering the court to act as a check on the power of the legislative branch. In this sense, the doctrine has the potential of restoring the check-and-balance structure in making copyright law as a social institution that mediates and reconciles the competing interests in privately owing and publicly using informational resources in the digital age.

It is true that nothing can be perfect. Any institutional design, to a larger and lesser degree, carries defects. The public trust doctrine and the court's role in defending the public interest are no exceptions. This is a fact that we have to come to terms with. Yet the court has indeed played an indispensable role in taking the initiative in breaking suppressive barriers to justice and freedom in dark time of crisis.<sup>201</sup> A court in England invalidated the monopoly in trade granted by Queen Elizabeth I dating far back to late sixteenth century.<sup>202</sup> In the new millennium, it was again the Supreme Court who liberated homosexuals from the homophobia inherent in anti-sodomy laws,<sup>203</sup> and resoundingly denounced the deprivation of Guantánamo detainees' constitutional right to challenge their detention in American courts.<sup>204</sup> These crises have the resonance with Rousseau's caveat: "Nothing is more dangerous than the influence of private interests on public affairs, and abuse of the laws by the Government is a lesser evil than the corruption of the Lawgiver...."<sup>205</sup> Indeed, all these crises, together with the

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(1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* (2008).

<sup>200</sup> For a similar argument for empowering the court to promote environmental protection for the general public, see e.g., William D. Araiza, *Democracy, Distrust and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine and the Search for a Substantive Environmental Value*, 45 UCLA LAW REV. 385 (1997).

<sup>201</sup> For general positions in favor of judicial review based on unique status of courts in our constitutional system, see e.g., RONALD DWORIN, *FREEDOM'S LAW* (1996); Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006); Richard H. Fallon, Jr., *The Core of an Uneasy Case For Judicial Review*, 121 HARV. L. REV. 1693 (2008).

<sup>202</sup> *Darcy v. Allein*, 77 Eng. Rep. 1260, (K.B. 1602).

<sup>203</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>204</sup> *Boumediene v. Bush*, 553 U.S. \_\_\_\_ (2008).

<sup>205</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT' AND OTHER LATER POLITICAL WRITINGS* 91(1997).

environmental crisis in our natural and cultural ecosystems, clearly reveal the high stakes of the potential manipulative power wielded by interest groups and legislatures. From this perspective, it is high time for courts to use the public trust doctrine as a doctrinal tool to actively respond to the unprecedented environmental crisis in our cultural ecosystem.