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**Citation:** Goold, P. (2012). The Evolution of Normative Legal Scholarship: The Case of Copyright Discourse. *European Journal of Legal Studies*, 5(2), pp. 23-29.

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# **The Evolution of Normative Legal Scholarship: The Case of Copyright**

## **Discourse**

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## **I. Introduction**

“Legal scholarship generally consists of normative statements about the way that government decisions should be made. These statements can be understood as prescriptions addressed to the relevant decision maker: most frequently a judge, but also a legislator or administrator.”<sup>1</sup>

- Edward Rubin

“By and large, neither judges nor any other bureaucratic decision makers are listening to academic advice that they are not already prepared to believe.”<sup>2</sup>

- Pierre Schlag

Often the function of legal scholarship is to provide normative advice about the law. It is unlike the natural or social sciences, which aim to describe how the world is. Instead, legal scholars aim to show how the world ought to be. They endeavour to demonstrate what the optimal law on a given issue is. These suggestions are directed towards the legal decision makers (e.g. judges and legislators) in the hope that good law will be created. This is the rationale presented in the first opening quote from Edward Rubin.

But there is a problem with that role. That problem is summed up in the quote from Pierre Schlag. Arguably lawmakers do not consider the advice of legal scholars when it does not suit them. Pierre Schlag argues that this presents an ‘unravelling’ or ‘decomposing’ of the function of the legal scholar as normative advice giver. This belief is a serious challenge to legal scholars. If normative legal advice is routinely ignored, then does it have any justifiable place in modern legal discourse? Alternatively, is normative legal scholarship a relic from a past time, merely clinging to life within today’s higher education system? This essay asks whether Schlag is correct and whether the normative advice-giving role of scholars is decomposing. It answers this question through the case study of copyright discourse.

Copyright law demonstrates features of Schlag’s belief. One can argue that often lawmakers are not concerned with the writings of copyright scholars. However, on closer

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<sup>1</sup>Edward L. Rubin, ‘On Beyond Truth: A Theory for Evaluating Legal Scholarship’ [1982] 80 Cal L Rev 889-963, 900.

<sup>2</sup>Pierre Schlag, ‘Pre-Figuration and Evaluation’, [1992] 80 Cal L Rev 965-977, 972.

observation, one can see an evolution in normative copyright scholarship. As lawmakers increasingly ignore the views of copyright academics, scholars have changed the target audience for whom they write normative advice. Rather than aim normative advice directly to lawmakers, scholars now frequently write advice for the general public to read; they aim to persuade the public about what the law should accomplish. Once that is performed, the public can express their disapproval at undesirable copyright law through the democratic process. Scholars engage the public in this way by turning away from traditional forms of legal scholarship and instead distributing their ideas through social media and publicly oriented books. As a result, these scholars are shaping the way society and law makers view copyright despite an atmosphere that is arguably unresponsive to traditional academic opinion. In the arena of copyright therefore, Schlag's fears appear misguided; the function of the scholar is not dead. In this regard, copyright may be an atypical area of scholarship. Copyright perhaps concerns highly particularized issues of concern only to a specific group in society. Nevertheless, this case study may still provide an important message to those scholars working in other areas: if public engagement in legal discourse is possible, it can provide an efficacious tool for ensuring the ultimate creation of good law.

This paper shall begin by recapping the fundamental theory of copyright law. It will then go on in part III to highlight the academic views surrounding that theory. Part IV will demonstrate how and why those views are often ignored. Part V shall however demonstrate the growing impact of the public will on copyright policy, and part IV will show how copyright academics are successfully fuelling that public voice with their normative legal advice. The paper concludes by discussing some of the significance and limitations of this insight.

## **II. Copyright Fundamentals**

Copyright law provides authors with the exclusive right to copy their literary and artistic works (e.g. books, music, film etc.).<sup>3</sup> The reason for doing so, particularly in the Anglo-American tradition, is a matter of economics and is known as the Incentive Theory of Copyright.<sup>4</sup>

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<sup>3</sup> See e.g. Berne Convention for Protecting Literary and Artistic Works art. 9, Sept. 9, 1886 as amended on Sept. 28 1979, §9.

<sup>4</sup> William Landes & Richard Posner, *The Economic Structure of Intellectual Property Law* (1<sup>st</sup> edn, Harvard University Press, 2003) 37-70; See also Reto M. Hilty, 'Rationales for the Legal and Protection of Intangible Goods and Cultural Heritage' [2009] IIC 883-911.

Artistic works have high fixed costs. This means that substantial resources (typically time and money) must be used to create the first copy of the work. But they also have low marginal costs. Once the first copy is in existence, it is cheap and simple to make further copies. This stems from the fact that these works are public goods.<sup>5</sup> They are non-rival, meaning that one person's consumption does not affect the ability of others to consume the good. They are also non-excludable, meaning that possession by one person does not prevent others from possessing the same good at the same time.

This leads to a particular market failure.<sup>6</sup> If there were no copyright, an author would spend significant resources creating the first copy of a work. For example, an author would spend time creating a book, in which time he still would have to expend money on food and shelter to maintain his existence. If he publishes the book, it could then be quickly and easily copied. Now there would be two versions in the market: the original and the copy. The copyist could then sell the book to a third party. Price competition between the two works would ensue. This is a competition that the copyist would be likely to win. The copyist would have no fixed costs to recover; he could therefore sell the work cheaper than the original author. The consumer would buy the copied version, and not the original author's, and as a result the original author would not recover his fixed cost investment. He therefore would lose money. If this scenario was routine, it would arguably be unlikely that he or any other author would invest their time creating new works in the future, despite the fact that doing so would be positive for social welfare.

Copyright aims to alleviate this market failure. By providing exclusivity in the market place, the copyright allows the author to raise prices above marginal cost without encouraging price competition. This supra-competitive pricing allows him to recover his costs. He (and other authors) therefore has an incentive to produce new works.

### **III. Academic Unease**

However, despite this positive economic theory, copyright has numerous costs. Firstly, the supra-competitive pricing is poor for social welfare. The existence of consumers who are

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<sup>5</sup> *ibid* 14.

<sup>6</sup> See Wendy Gordon, 'Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors' [1982] 82 Colum L Rev 1600-1657.

willing to pay a price above marginal cost, but not prepared to pay the supra-competitive price, means unfulfilled demand. This leads to deadweight loss and allocative inefficiency.<sup>7</sup> In addition, there are significant enforcement costs to the copyright.<sup>8</sup> Finally, copyright has potential non-economic costs. Particularly it has the potential to harm freedom of expression because it limits citizens' ability to duplicate informational works.<sup>9</sup>

And it is also known that alternatives exist to ensure the production of new artistic works.<sup>10</sup> Even without the profit incentive, many authors would still create a certain number of new works. This is due to artists' general enjoyment from producing art and literature. Alternatively, the author could rely on his market lead-time. Copying successfully often requires a certain amount of time. In which time, the author has market exclusivity and can charge supra-competitive prices. During this time, no enforcement costs are incurred by the state. The government may also choose to actively encourage work production in other forms. Government bodies may provide subsidies to artists to produce works on commission. Or money could be awarded through prizes, allocated for works that are the most objectively impressive, or popular. Finally, there are also private contractual arrangements that could work. The author could contract with various actors prior to creating the work. They would provide him with money and he would use that to create the work. A modern equivalent of this is online crowd-sourcing. Whereby Internet users pool money and allocate it to artists with original artistic ideas.

So far, however, this discussion is confined to theory. Theoretical benefits exist to copyright, but equally theoretical disadvantages exist, as do theoretical alternatives. There is little empirical evidence to suggest in reality whether the copyright is necessary.<sup>11</sup> And as a result of this lack of knowledge, scholars have often demonstrated uncertainty about whether copyright is indeed desirable. This tradition of academic uncertainty can be traced back at

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<sup>7</sup> Landes & Posner (n 4) 71-84.

<sup>8</sup> *ibid.*

<sup>9</sup> See generally Robert C. Denicola, 'Copyright and Free Speech: Constitutional Limitations on the Protection of Expression' [1979] 67 Cal L Rev 283-316; Melville B. Nimmer, 'Does Copyright Abridge the First Amendment Guarantees of Freedom of Speech and Press' [1969] 17 U.C.L.A. L Rev 1180-1204; L.Ray Patterson, 'Free Speech, Copyright and Fair Use' [1987] 40 Vand L Rev 1-66.

<sup>10</sup> See e.g. Stephen Breyer, 'An Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs' [1970] 84 Harv L Rev 281-351; Lior Zemer, 'Rethinking Copyright Alternatives' [2006] 14 Int. J Law Info Tech 137-145; Arnold Plant, 'The Economic Aspects of Copyright in Books', [1934] 1 *Economica* 167-195; Landes & Posner (n 4) 37-70.

<sup>11</sup> Ivan P.L. Ping, 'Copyright: A Plea for Empirical Research' [2006] 3 *Review of Research on Copyright Issues* 3-13.

least to Arnold Plant in 1934<sup>12</sup> but has had much more modern iteration. Hurt and Schuman concluded that the “traditional assumption that copyright enhances the general welfare is at least subject to attack on theoretical grounds”<sup>13</sup>; Steven Breyer (now US Supreme Court Justice Breyer) came to an “ambivalent position on the question of whether copyright protection – considered as a whole – is justified”<sup>14</sup>; and more recently Richard Watt concluded that “some copyright piracy is highly likely to be socially efficient.”<sup>15</sup> The purpose of demonstrating this is not to suggest that all copyright academics wholly disagree with the necessity of copyright. Rather it is to show that a large number of academics are uncertain on this question, and because of the paucity of understanding, they do not wish to see copyright unjustifiably extended.

#### **IV. Academics Ignored**

Such academic perturbations are however often met with sanguine responses from lawmakers. Despite well documented theoretical deficits surrounding copyright, the law has expanded drastically throughout history. The first copyright statute, passed in Great Britain in 1709, allowed the authors of books the right to copy their work for a maximum of 28 years.<sup>16</sup> Today’s copyright looks very different. US copyright, for example, lasts for the life span of the author plus an additional seventy years.<sup>17</sup> The right attaches to almost all forms of creative work<sup>18</sup> demonstrating a “spark” or “minimal degree” of originality.<sup>19</sup> And finally, the law no longer merely provides an exclusive right to make copies, but also confers exclusive rights to make adaptations, to perform the work publicly, to display the work publicly, and to distribute the work.<sup>20</sup>

Given the academic inability to prove copyright’s necessity, why has it expanded so greatly? One answer is that private lobbying has successfully driven the legislative agenda.

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<sup>12</sup> Plant (n 10).

<sup>13</sup> Robert M. Hurt & Robert M. Schuman, ‘The Economic Rationale of Copyright’ [1966] 56 *The American Economic Review* 421-432, 432.

<sup>14</sup> Breyer, (n 10) 322.

<sup>15</sup> Richard Watt, *Copyright and Economic Theory: Friends or Foes* (1<sup>st</sup> edn, Edward Elgar, 2000) 201.

<sup>16</sup> An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies during the Times therein mentioned, 1709.

<sup>17</sup> 17 U.S.C. §302.

<sup>18</sup> 17 U.S.C. §102 (Copyright subsists in literary works (including computer programs), musical and accompanying works, dramatic and accompanying works, pantomimes, choreographic works, pictorial works, graphic works, sculptural works, motion pictures and other audio-visual works, sound recordings, and architectural works).

<sup>19</sup> *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340, 365 (1991).

<sup>20</sup> 17 U.S.C. §106.

Historically, the impact of vested interests is familiar within copyright. The first copyright statute was fuelled by the bequests of the Stationers' Company, a collection of private booksellers.<sup>21</sup> And today this aspect of copyright is still well understood. The following passage from William Patry, former Copyright Counsel to the U.S. House of Representatives, is illustrative:

“Copyright interest groups hold fundraisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or sold-out concerts, and draft legislation they expect Congress to pass without any changes. In the 104th Congress, they are drafting the committee reports and haggling among themselves about what needs to be in the report. In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as their legislation and their committee report. With the 104th Congress we have, I believe, reached a point where legislative history must be ignored because not even the hands of congressional staff have touched committee reports.”<sup>22</sup>

Two modern anecdotes seem to add weight to the claim that academic views will often be overlooked when countered by the interests of lobbyists. Firstly, consider the Copyright Term Extension Act (CTEA).<sup>23</sup> This piece of US legislation was enacted in 1998. Prior to this date, the copyright term lasted the life of the author plus an additional fifty years. The CTEA extended that to life plus seventy years. The influence of lobbying was relatively clear. The Walt Disney Company's copyright over the lucrative Mickey Mouse character was due to expire in 2003. As Robert Merges relays, this company then went on a mission to prevent the character from falling into the public domain.<sup>24</sup> Merges is not alone in describing how Disney's concerns were at the root of the copyright extension. Other notable academics have

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<sup>21</sup> See e.g. Ronan Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1665-1775)* (1<sup>st</sup> edn, Hart Publishing, 2004) 31-51; Adrian Johns, *Piracy: The Intellectual Property Wars From Gutenberg to Gates* (1<sup>st</sup> edn, University of Chicago Press, 2010) 17-40; Mark Rose, *Authors and Owners: The Invention of Copyright* (1<sup>st</sup> edn, Harvard University Press, 1993) 31-48.

<sup>22</sup> William F. Patry, 'Copyright and the Legislative Process: A Personal Perspective' [1996] 14 *Cardozo Arts & Ent* 139-152, 141; See also Reto M. Hilty, 'The Expansion of Copyright Law and its Social Justification' in Christopher Heath and Kung-Chung Liu, *Copyright Law and the Information Society in Asia* (1<sup>st</sup> edn, Hart Publishing, 2007) 1-31.

<sup>23</sup> Public Law 105 - 298 - An Act To Amend The Provisions Of Title 17, United States Code, With Respect To The Duration Of Copyright, And For Other Purposes.

<sup>24</sup> See e.g. Center for Responsive Politics, 'No Lights, No Camera, Lots of Action: Behind the Scenes of Hollywood's Washington Agenda' (Oct. 11, 1998) in Robert Merges, 'One Hundred Years of Solicitude: Intellectual Property Law 1900-2000' [2000] 88 *Cal L Rev*, 2187-2241, 2235, FN 218 ("Walt Disney was a company with a mission. With its copyright for Mickey Mouse up in 2003, Disney wanted to keep the character and the royalties for as long as it could. The company pushed for a law in the 105th Congress that would grant a 20-year extension on all copyrighted works. *Congressional Quarterly* reported that Disney CEO Michael Eisner made the entertainment giant's position known at an informal June 9 meeting with Senate Majority Leader Trent Lott (R-Miss). A week later, Lott signed on as a co-sponsor to copyright extension legislation-and the very day Walt Disney's political action committee made a \$1,000 contribution to Lott's campaign committee. On June 25, Disney made another donation-\$20,000 in soft money to the National Republican Senatorial Committee.").

made similar statements.<sup>25</sup> Even those inclined to support copyright expansion have noted the hand of private lobbying in this legislation.<sup>26</sup>

The law was passed and subsequently challenged on constitutionality grounds in the Supreme Court.<sup>27</sup> During the trial, seventeen famous economists, including 5 Nobel Prize winners, presented an amicus curiae brief to the court. In the brief the economists explained how the extension of copyright protection “made little economic sense”.<sup>28</sup> They argued that any beneficial impact on author’s incentive to create new works was insignificantly small.<sup>29</sup> At the same time they acknowledged that increasing the length of copyright protection has negative effects for economic welfare – due to longer monopoly pricing and enforcement costs. Despite these arguments, the court upheld the law. It dismissed the academic claims in a fashion that many have found unsatisfactory.<sup>30</sup> It appeared that lobbying beat the views of academia and that neither the court nor legislators were prepared to listen to a view that they did not already support.<sup>31</sup>

A similar process is occurring today with the proposed Anti-Counterfeiting Trade Agreement (ACTA).<sup>32</sup> This is a multilateral agreement between the USA and many other nations. The final text for which has been drafted<sup>33</sup> and has been signed by most parties.<sup>34</sup>

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<sup>25</sup> See e.g. Chris Sprigman, ‘The Mouse That Ate the Public Domain: Disney, the Copyright Term Extension Act, and Eldred v. Ashcroft’, (*Findlaw*, 5 March 2002) <[http://writ.news.findlaw.com/commentary/20020305\\_sprigman.html](http://writ.news.findlaw.com/commentary/20020305_sprigman.html)> accessed 30 May 2012.

<sup>26</sup> See e.g. Richard Posner, ‘The Constitutionality of the Term Extension Act: Economics, Politics, Law and Judicial Technique in Eldred v. Ashcroft’ [2003] 55 Sup Ct. Rev. 143-162; Richard Epstein, ‘The Dubious Constitutionality of the Copyright Term Extension Act’ [2002] 36 Loy L.A. L Rev 123-158.

<sup>27</sup> Eldred v. Ashcroft, 537 U.S. 186 (2003).

<sup>28</sup> Liebowitz and Margolis, ‘Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects’ [2005] 18 Harv J L & Tech 435-457, 437.

<sup>29</sup> *ibid* 438.

<sup>30</sup> Epstein (n 26); Michael Jones, ‘Eldred v. Ashcroft: The Constitutionality of the Copyright Term Extension Act’ [2004] 19 Berkeley Tech LJ 85-106; Arlen W. Langvard, ‘Unwise of Unconstitutional? The Copyright Term Extension Act, the Eldred Decision, and the Freezing of Public Domain for Private Benefit’ [2004] 5 Minn Intel Prop Rev 193-292; Thomas R. Lee, ‘Eldred v. Ashcroft and the (Hypothetical) Copyright Term Extension Act of 2020’ [2003] 12 Tex Intel Prop LJ 1-22; Sue Ann Mota, ‘For Limited Times: The Supreme Court Finds the Copyright Term Extension Act as Constitutional in Eldred v. Ashcroft, But When Does it End?’ [2005] BC Intel Prop & Tech F 110501-110502; Posner (n 26); Joy Rillera, ‘Eldred v. Ashcroft: Challenging the Constitutionality of the Copyright Term Extension Act’ [2003] 5 Vand J Ent L & Prac 23-26.

<sup>31</sup> Equally, one US Supreme Court judges have notably denounced the value of legal scholarship. Chief Justice Roberts has recently made the following comment: “Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18<sup>th</sup> Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”, see Richard Brust, ‘The High Bench vs. The Ivory Tower’ (*ABA Journal*, 1 Feb. 2012). [http://www.abajournal.com/magazine/article/the\\_high\\_bench\\_vs\\_the\\_ivory\\_tower/](http://www.abajournal.com/magazine/article/the_high_bench_vs_the_ivory_tower/) accessed 14 July 2012

<sup>32</sup> The Anti-Counterfeiting Trade agreement (ACTA), Final Proposed Text, Nov. 15th, 2010, <[http://www.ustr.gov/webfm\\_send/2379](http://www.ustr.gov/webfm_send/2379)> accessed 30 May 2012.

<sup>33</sup> *ibid*.

This law will further expand the protection for copyright by strengthening the enforcement power of the right holders.<sup>35</sup> Not only is it the strongest international law on the civil and criminal enforcement of copyright, it requires many nations to implement novel anti-piracy aids such as border measures (i.e. searching at ports for counterfeit or pirated goods) and technological protection measures (i.e. digital technologies designed to restrict copying). The proposed law was received badly by many legal scholars. Over 90 law professors gathered in June 2010 at the Washington College of Law to discuss the matter.<sup>36</sup> They concluded that the law “threatens numerous public interests”<sup>37</sup> including freedom of speech and privacy on the Internet. Later, more than 75 legal professors sent a letter to President Barack Obama suggesting the law is harmful and should be substantially altered.<sup>38</sup> This has been echoed in the EU where 182 academics signed a letter to the EU commission criticizing the law in equally forceful terms<sup>39</sup>. However, these letters did not fundamentally alter the direction of the law.<sup>40</sup>

This ignorance of academic views is grist to the mill for Pierre Schlag. These anecdotes suggest a certain futility of academic normative advice. But, there is a countervailing force yet to discuss.

## **V. Popularization of Copyright**

Today, copyright is a matter of general public interest and debate. And a number of recent incidents suggest that the public voice is becoming increasingly important in dictating legal policy.

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<sup>34</sup> See generally, Michael Blakeney & Louise Blakeney, ‘Stealth Legislation? Negotiating the Anti-Counterfeiting Trade Agreement (ACTA)’ [2010] 16(4) Int TLR 87-95; Margot Kaminski, ‘On the Origin and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)’ [2009] 34 Yale J Int’l L 247-256.

<sup>35</sup> ACTA (n 32) Ch. 2.

<sup>36</sup> American University Washington College of Law, International Experts Find that Pending Anti-Counterfeiting Trade Agreement Threatens Public Interests (23 June 2010), <<http://www.wcl.american.edu/pijip/go/acta-communiqué>> accessed 30 May 2012.

<sup>37</sup> *ibid.*

<sup>38</sup> Letter from 75 law professors to President Barack Obama (28 Oct 2010), available at <<http://www.wcl.american.edu/pijip/go/blog-post/academic-sign-on-letter-to-obama-on-acta>> accessed 30 May 2012.

<sup>39</sup> Opinion of European Academics on Anti-Counterfeiting Trade Agreement (3rd Dec 2010), [http://www.iri.uni-hannover.de/tl\\_files/pdf/ACTA\\_opinion\\_200111\\_2.pdf](http://www.iri.uni-hannover.de/tl_files/pdf/ACTA_opinion_200111_2.pdf); For latest signatories see Institut für Rechtsinformatik, <<http://www.iri.uni-hannover.de/subscriber.html>> accessed 30 May 2012.

<sup>40</sup> The EU Commission responded but pushed ahead with the law, see EU Commission Comments on Opinion of European Academics on Anti-Counterfeiting Trade Agreement, (27 April, 2011), <[http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc\\_147853.pdf](http://trade.ec.europa.eu/doclib/docs/2011/april/tradoc_147853.pdf)> accessed 30 May 2012.

Continuing with the theme of ACTA, while academic opinion did not greatly influence the issue, public engagement did. During the early part of 2012 numerous wide-scale public demonstrations against the treaty occurred in Europe.<sup>41</sup> Since then, the Commission has asked the Court of Justice of the European Union to decide on whether ACTA is in line with fundamental human rights.<sup>42</sup> Neelie Kroes, the Digital Agenda Commissioner has suggested strongly that this was a response to the public protests. According to Kroes, the commission has “recently seen how many thousands of people are willing to protest against rules which they see as constraining the openness and innovation of the Internet” and she acknowledged this as “strong new political voice.”<sup>43</sup>

The same story could be made surrounding the Stop Online Piracy Act and the Protect IP Act (SOPA/PIPA).<sup>44</sup> These were two bills laid before the US Congress in early 2012. Like ACTA each aimed to increase the enforcement powers of IP holders. Despite initial momentum, the bills lost support after widespread dissatisfaction from the public as well as some of the world’s most popular websites e.g. Wikipedia.org.<sup>45</sup>

These examples conform to a more general trend. It is far more common today to see the public engage in copyright issues. In the last decade a number of organizations have founded in order to facilitate this. Of primary importance is the Free Culture Movement. This refers to an ideological perspective advocating that copyright be less restrictive and allow the general public more freedom to use copyrighted works. This ideology translates itself into a number of real world activist groups. Students for Free Culture, for example, is an international organization, consisting of many different university chapters upholding the free culture ideals.<sup>46</sup> And the Free Culture Forum<sup>47</sup> is a coalition of various actors who produce

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<sup>41</sup> See e.g. Dave Lee, “ACTA Protests: Thousands take to the streets across Europe” (*BBC News*, 11 Feb. 2012) <<http://www.bbc.co.uk/news/technology-16999497>> accessed 30 May 2012.

<sup>42</sup> EU Commission Press Release, EU Commission Officially Referred ACTA to ECJ (11 May 2012) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=799>> accessed 30 May 2012.

<sup>43</sup> Neelie Kroes, ‘The European Public on the Net, Berlin (4 May 2012) <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/326&format=HTML&aged=0&language=EN&guiLanguage=en>> (last visited 30 May, 2012); See also John Clancy, EU Trade Spokesman (note 42) (“The Court’s opinion is vital to respond to the wide-ranging concerns voiced by people across Europe on whether ACTA harms our fundamental rights in any way.”).

<sup>44</sup> H.R. 3261, 112th Cong. (2012); S. 968, 112 Cong. (2012).

<sup>45</sup> See e.g. Jonathan Weisman, ‘In Fight Over Piracy Bills, New Economy Rises Against Old’ (*NY Times*, 18 Jan 2012) <<http://www.nytimes.com/2012/01/19/technology/web-protests-piracy-bill-and-2-key-senators-change-course.html?pagewanted=all>> accessed 30 May 2012.

<sup>46</sup> Students for Free Culture, <<http://freeculture.org/>> accessed 30 May 2012.

<sup>47</sup> The Free Culture Forum, <<http://fcforum.net/>> accessed 30 May 2012.

white papers on copyright issues such as the “Charter for Innovation, Creativity, and Access to Knowledge”.<sup>48</sup>

Beyond that there are also licencing organizations such as Creative Commons.<sup>49</sup> This is an international non-profit organization that aims to facilitate the licensing of copyrighted material. When a good is licensed under traditional copyright law, the copyright holder maintains all the rights over the work. The copyright holder is still the only person who can copy, adapt, perform or display, and distribute the work.<sup>50</sup> Creative Commons licensing is different. It allows the author to retain “some” rights.<sup>51</sup> For example, the copyright holder may allow users to create adaptations to his work. Or he may allow users to copy the work freely for certain purposes. Which rights the author retains depends on which license he uses.<sup>52</sup>

A final point could also be made about copyright advocacy groups, such as the Electronic Frontier Foundation (EFF). The EFF is a non-profit organization that advocates the rights of users in the digital world. It describes itself as “the first line of defense”<sup>53</sup> when user freedoms come under attack. In pursuing these goals, the EFF funds a number of court cases<sup>54</sup> and the production of whitepapers on copyright issues.<sup>55</sup> In doing so, it has had a number of successes in changing the direction of the law.<sup>56</sup>

## **VI. Academic Response: New Target Audiences and New Distribution Methods**

There is therefore a public engagement in copyright issues. What is even more interesting is the relationship between this public audience and copyright academics. In a world where traditional academic opinion often falls on deaf ears, frequently copyright academics write directly for this public audience. And, although the nature of this relationship is undoubtedly

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<sup>48</sup> The Free Culture Form, ‘Charter for Innovation, Creativity, and Access to Knowledge’ <[http://fcforum.net/charter\\_extended](http://fcforum.net/charter_extended)> accessed 30 May 2012.

<sup>49</sup> Creative Commons, <<http://creativecommons.org/>> accessed 30 May 2012.

<sup>50</sup> This is the case unless the rights are expressly transferred, e.g. under 17 USCS Sect. 106A(e) in the US context.

<sup>51</sup> Creative Commons, ‘About’ <<http://creativecommons.org/about>> accessed 30 May 2012.

<sup>52</sup> Creative Commons, ‘Licenses’ <<http://creativecommons.org/licenses/>> (last visited 30 May 2012).

<sup>53</sup> Electronic Frontier Foundation, ‘About’ <<http://www.eff.org/about>> (last visited 30 May 2012).

<sup>54</sup> Electronic Frontier Foundation, ‘Cases’ <<http://www.eff.org/cases>> (last visited 30 May 2012).

<sup>55</sup> Electronic Frontier Foundation, ‘Whitepapers’ <<http://www.eff.org/wp>> (last visited 31 May 2012).

<sup>56</sup> Electronic Frontier Foundation, ‘Victories’ <<http://www.eff.org/victories>> (last visited 31 May 2012).

complex, one can advance the hypothesis that the work of these academics is one causal factor in generating public discussion.

The clearest example is that of Lawrence Lessig. Lessig is a professor of law at Harvard. In addition, he is the founder of Creative Commons, a former board member of the EFF, and arguably the figurehead of the Free Culture Movement. And, particularly in relation to the latter movement, it is interesting to note how Lessig has helped to develop this public engagement.<sup>57</sup> As a legal academic and professor at Harvard, one would expect to see a long list of lengthy, footnote laden articles (perhaps fairly describable as esoteric and arcane) published in traditional legal journals and law reviews. These articles would make normative statements about the correct shape of the law. The target audience would be legislators and judges. This would be consistent with Rubin's view of legal scholarship. That is what one would expect but not what one will find. Although some such works still exist,<sup>58</sup> Lessig has conveyed his most influential legal thoughts by writing books designed for the general public to read.

Some of Lessig's most prominent works on copyright law are: *Code*,<sup>59</sup> *The Future of Ideas*,<sup>60</sup> *Free Culture*,<sup>61</sup> and *Remix*.<sup>62</sup> Most of his books are free for download under creative commons licenses as eBooks. Alternatively, they can be found in paper back at most book retailers. The central message of all these books is that copyright law is too restrictive and has negative effects on the creation and spread of creative works in society.<sup>63</sup> And much of the Free Culture Movement is founded directly upon these ideas.<sup>64</sup> The movement employs the Lessig-coined phrase "Free Culture" as its central theme and uses much of Lessig's

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<sup>57</sup>Lawrence Lessig, Harvard Law Faculty Directory,

<<http://www.law.harvard.edu/faculty/directory/index.html?id=888&show=bibliography>> accessed 31 May 2012

<sup>58</sup> See e.g. Lawrence Lessig, 'What Everybody Knows and What Too Few Accept' [2009] 123 Harv LR 104. Lawrence Lessig, 'In Support of Network Neutrality' [2007] 3 ISJLP 185.

<sup>59</sup> Lawrence Lessig, *Code: And Other Laws of Cyberspace* (1<sup>st</sup> edn, Basic Books, 2000).

<sup>60</sup> Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (1<sup>st</sup> edn, Random House, 2003).

<sup>61</sup> Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (1<sup>st</sup> edn, Penguin Books, 2005).

<sup>62</sup> Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (1<sup>st</sup> edn, Penguin Book, 2008).

<sup>63</sup> See e.g. Lessig (n 61) 28 ("There has never been a time in history when more of our 'culture' was as 'owned' as it is now. And yet there has never been a time when the concentration of power to control the uses of culture has been as unquestionably accepted as it is now").

<sup>64</sup>See e.g. Richard Poynder, 'Interview with Lawrence Lessig' <<http://poynder.blogspot.com/2006/04/interview-with-lawrence-lessig.html>> (describing Lessig as the "de facto leader" of the Free Culture Movement) accessed 30 May 2012; Siva Vaidhyanathan, 'The Anarchist in the Coffee House: A Brief Consideration of Local Culture, The Free Culture Movement, and Prospects for a Global Public Sphere' [2007] 70 Law & Contemp Probs 205.

terminology and arguments. In doing so, these publications have given shape to the entire copyright discourse in the digital age.

Lessig's scholarly strategy has not stopped at writing books. He has adopted other innovative ways of distributing his advice. His use of television and film is one such example. Lessig appeared and discussed his ideas in popular television shows such as *The West Wing*,<sup>65</sup> *The Colbert Report*,<sup>66</sup> *The Daily Show*<sup>67</sup> and in popular documentaries such as *RiP: A Remix Manifesto*.<sup>68</sup> In addition Lessig employs a private blog, a twitter feed, and a wiki (a website that allows the creation and editing of any number of interlinked web pages via a web browser using some simple tools) to distribute his ideas. He is also a frequent blogger on various other sites, such as the influential news-blog *The Huffington Post*.<sup>69</sup>

When one looks at Lessig's work, one sees a legal scholar that has had a strong impact on how society views copyright policy. But rather than speak to lawmakers, who seem unlikely to listen, he has addressed his advice to the public generally. And Lessig is not alone in this process. While he is perhaps the clearest example, numerous other copyright scholars have also changed their target audience and distribution methods. In the footsteps of Lessig, well-established academics have with increasing frequency produced copyright literature for the general masses. This essay mentioned William Patry above. In addition to writing one of the leading copyright treatises, Patry has produced two popular book entitled *Moral Panics and the Copyright Wars*<sup>70</sup> and *How to Fix Copyright*.<sup>71</sup> In the former Patry discusses how copyright expansionists have resorted to metaphors that demonize copyright infringers just as is often the case with moral panics. And in the latter, Patry discusses the interplay between copyright law and technology. Neil Netanel, professor of law at UCLA law school, published *Copyright's Paradox*.<sup>72</sup> This work details the complicated relationship between copyright law and free speech. Adrian Johns, professor of History at the University of Chicago has produced *Piracy: The Intellectual Property Wars from Gutenberg to Gates*.<sup>73</sup> This is an historical

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<sup>65</sup> 'The West Wing: The Wake-Up Call' (NBC television broadcasts, 9 Feb 2005).

<sup>66</sup> 'The Colbert Report' (Comedy Central television broadcast 8 Jan. 2009).

<sup>67</sup> 'The Daily Show' (Comedy Central television broadcast 13 Dec. 2011).

<sup>68</sup> Brett Gaylor, 'RIP: Remix Manifesto!' (2008).

<sup>69</sup> The Huffington Post, 'Blog Entries by Lawrence Lessig, ' <<http://www.huffingtonpost.com/lawrence-lessig>> accessed 30 May 2012.

<sup>70</sup> William F. Patry, *Moral Panics and the Copyright Wars* (1<sup>st</sup> edn, Oxford University Press, 2009).

<sup>71</sup> William F. Patry, *How to Fix Copyright* (1<sup>st</sup> edn, Oxford University Press, 2011).

<sup>72</sup> Neil Netanel, *Copyright's Paradox* (1<sup>st</sup> edn, Oxford University Press USA, 2010).

<sup>73</sup> Johns (n 21).

account of the term copyright “piracy.” And there are many more examples of these books.<sup>74</sup> It would take too much time to detail them all here. Needless to say, these books are relatively cheap<sup>75</sup> and they are distributed to the public in the same manner that other public books are. They can be found online at Amazon.com or a local bookstore. Many are even downloadable as e-books to facilitate the new generation of technology savvy digital-book readers such as the Kindle. In addition, these professors also employ the use of social media. This often comes in the form of blogs, some of which are individually run<sup>76</sup> while others chose to contribute to collaborative blogs such as the *Huffington Post*;<sup>77</sup> many use Twitter as well.<sup>78</sup> By doing so, these scholars distribute their normative legal suggestions directly to the general public, rather than to judges and legislators; they then rely on the public to demand that good laws be created in the routine democratic fashion, as has happened in the ACTA and SOPA/PIPA controversies.

The author of this essay has in the past had the opportunity to speak with some of these scholars and ask them their opinions on this idea. Lawrence Lessig particularly agreed that by writing books designed for the public he could maximize his impact on society purely by reaching more people.<sup>79</sup> Whereas law review articles would be read by a small number of people made up of mostly other law professors, as well as some judges and legislators, books such as *Free Culture* and *Remix* are read by a far greater number of people. This maximizes

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<sup>74</sup> See e.g. Joanna Demers, *Steal This Music: How Intellectual Property Law Affects Musical Creativity* (1<sup>st</sup> edn, University of Georgia Press, 2006); Patricia Aufderheide & Peter Jaszi, *Reclaiming Fair Use: How To Put Balance Back In Copyright* (1<sup>st</sup> edn, University of Chicago Press, 2011); Michele Boldrin, *Against Intellectual Monopoly* (1<sup>st</sup> edn, Cambridge University Press, 2008); James Boyle, *The Public Domain: Enclosing The Commons Of The Mind* (1<sup>st</sup> edn, Yale University Press, 2010); John Palfry, *Born Digital: Understanding The First Generation Of Digital Natives* (1<sup>st</sup> edn, Basic Books, 2010); Paul K. Saint-Amore, *Modernism And Copyright* (1<sup>st</sup> edn, Oxford University Press, 2011); John Tehranian, *Infringement Nation: Copyright 2.0 And You* (1<sup>st</sup> edn, Oxford University Press USA, 2011); Siva Vaidhyanathan, *Copyrights And Copywrongs: The Rise Of Intellectual Property And How It Threatens Creativity* (1<sup>st</sup> edn, New York University Press, 2001); Jonathan Zittrain, *The Future Of The Internet: And How To Stop It* (1<sup>st</sup> edn, Penguin Books, 2008).

<sup>75</sup> See e.g. Boyle (n 74), Amazon.com Price \$11.23 <[http://www.amazon.com/The-Public-Domain-Enclosing-Commons/dp/0300158343/ref=tmm\\_pap\\_title\\_0](http://www.amazon.com/The-Public-Domain-Enclosing-Commons/dp/0300158343/ref=tmm_pap_title_0)> accessed 30 May 2012; Patry (n 70), Amazon. Com Price \$11.98 < [http://www.amazon.com/Moral-Panics-Copyright-William-Patry/dp/B0062GK700/ref=sr\\_1\\_1?s=books&ie=UTF8&qid=1338648930&sr=1-1](http://www.amazon.com/Moral-Panics-Copyright-William-Patry/dp/B0062GK700/ref=sr_1_1?s=books&ie=UTF8&qid=1338648930&sr=1-1)> accessed 30 May 2012.

<sup>76</sup> See e.g. James Boyle, ‘The Public Domain: Enclosing the Commons of the Mind’ <<http://www.thepublicdomain.org/blog/>> accessed 30 May 2012; William Patry, ‘The Patry Copyright Blog’ <<http://williampatry.blogspot.com/>> accessed 30 May 2012; Jonathan Zittrain, ‘The Future of the Internet and How to Stop It’ <<http://futureoftheinternet.org/blog/>> accessed 31 May 2012.

<sup>77</sup> See e.g. The Huffington Post, ‘Blog Entries by Pamela Samuelson’ <<http://www.huffingtonpost.com/pamela-samuelson>> accessed 30 May, 2012; The Huffington Post, ‘Blog Entries by Edward Lee, The Huffington Post’ <<http://www.huffingtonpost.com/edward-lee>> accessed 30 May 2012; The Huffington Post, ‘Blog Entries of Yochai Benkler’, <<http://www.huffingtonpost.com/yochai-benkler>> accessed 30 May 2012.

<sup>78</sup> See e.g. Michael Boldrin, MichaleBoldrin@michaleboldrin <<http://twitter.com/#!/micheleboldrin>> accessed May 30 2012; James Boyle, JamesBoyle@thepublicdomain <<http://twitter.com/#!/thepublicdomain>> accessed 30 May 2012; Jonathan Zittraine, Jonathan@Zittrain, <<http://twitter.com/#!/zittrain>> accessed 30 May 2012.

<sup>79</sup> Telephone Interview with Lawrence Lessig, Professor of Law, Harvard Law School, (8 July 2011).

the dispersion and the impact of the normative advice. The same idea was endorsed by Michael Geist who, when asked about the impact of his traditional academic articles compared to his well known blog on ACTA,<sup>80</sup> felt that the latter had a much greater impact on how law would develop.<sup>81</sup>

## **VII. Conclusion**

This paper has discussed solely normative legal scholarship. It is true that there are perhaps other aspects of legal scholarship, such as doctrinal study, which may not be as well suited to popularization. Nevertheless, the example of copyright is significant for any scholar wishing to retain an impact on the fundamental policy objects of the law. On the most important questions in copyright, private interests often override traditional academic opinion. This supports Schlag's 'unraveling' theory. But in response to this, copyright scholarship has evolved. Scholars frequently choose to address their normative advice, not to lawmakers, but to the general public. This public, as seen in the examples of the ACTA and SOPA/PIPA, is capable of influencing law making where arguably traditional academics are not.

This case study of copyright provides a message to academics working in other areas of law. The message is indeed tentative currently and in need of thorough empirical study. Nevertheless, some anecdotal evidence suggests that when academic opinion appears to be routinely ignored, then trying to engage the public is a strategic move towards ensuring the creation of good laws. Therefore, let academics discover knowledge about what is good law, give that knowledge to the public and allow people to make the normative decisions that lawmakers should follow.

Will all legal subjects equally benefit from such popularization in the same way that copyright has? It is difficult to say from this early vantage point. But one could easily envision the polemic issues found in constitutional law, public international law, and criminal law (amongst others) equally engaging the public's imagination. And arguably law professors working in these areas are granted job security via tenure in order to encourage academic risk taking. Notably, Pierre Schlag has elsewhere called for tenured legal professors to take more

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<sup>80</sup> Michael Geist, 'Michael Geist Blog' <<http://www.michaelgeist.ca/>> accessed 31 May 2012.

<sup>81</sup> Interview with Michael Geist, Professor of Law at University of Ottawa, (Berkeley, California, USA, 21 April 2012).

risks and to reinvigorate legal scholarship.<sup>82</sup> Talking to the public may be part of that new future. In doing so, scholars will retain their positions as normative advice givers and this aspect of scholarship will remain justifiable.

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<sup>82</sup> Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)' [2009] 97 Geo L J 803-835.