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Of Monks, Medieval Scribes, and Middlemen

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OF MONKS, MEDIEVAL SCRIBES, AND MIDDLEMEN

*Peter K. Yu**

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"[F]or all I know, the monks had a fit when Gutenberg made his press."

— Justice Stephen Breyer¹

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1. Transcript of Oral Argument at 11, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005) (04-480) [hereinafter *Grokster* Transcript].

INTRODUCTION

Today's copyright debate has generally focused on the "digital dilemma" created by the Internet and new media technologies.² Threats created by emerging communications technologies, however, are not new. Throughout history, there have been remarkable similarities between the threats created by new technologies and those posed by older ones. Indeed, one could compare the social impact of the Internet to that of the printing press.³ As Marshall McLuhan observed in the early 1960s, "[w]e are today as far into the electric age as the Elizabethans had advanced into the typographical and mechanical age. And we are experiencing the same confusions and indecisions which they had felt when living simultaneously in two contrasted forms of society and experience."⁴

One of the latest technologies to disrupt the copyright market is peer-to-peer file-sharing technology. The legality of the distribution of this technology was challenged before the United States Supreme Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*⁵ During the oral argument, Justice Stephen Breyer questioned whether the petitioners' counsel would apply the test proposed for the new technology to some once-new technologies, such as the photocopying machine, the videocassette recorder, the iPod, and the printing press. When the counsel quickly responded in the affirmative in each case, Justice Breyer could not help but quip, "[F]or all I know, the monks had a fit when Gutenberg made his press."⁶

While the Justice's timely observation unsurprisingly earned laughter from the audience, it also provoked us to rethink the nature, newness, and ramifications of the challenge confronting the entertainment industry today. Many legal scholars have described copyright as a response to the emergence

2. COMM. ON INTELLECTUAL PROP. RIGHTS AND THE EMERGING INFO. INFRASTRUCTURE, NAT'L RESEARCH COUNCIL, *THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE* (2000) [hereinafter *DIGITAL DILEMMA*]; see also Peter K. Yu, *The Copyright Divide*, 25 *CARDOZO L. REV.* 331, 375-76 (2003) (discussing how digital technologies have greatly reduced the cost and speed of reproduction while substantially increasing the quality of the reproduced work and how they have created direct competition between digitally reproduced products and their originals).

3. For interesting papers exploring the parallels and divergences between the printing press and the Internet, see RAND, *New Paradigms and Parallels: The Printing Press and the Internet*, <http://www.rand.org/multi/parallels/> (last visited Feb. 16, 2006).

4. MARSHALL MCLUHAN, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* 1 (1962).

5. 125 S. Ct. 2764 (2005).

6. *Grokster* Transcript, *supra* note 1, at 11.

of the printing press. However, very few have examined the press's impact on a group of contemporary middlemen—the medieval scribes.⁷ This Introductory Essay, therefore, undertakes this inquiry and explores the impact of the then-new technology on the now-obsolete scribal industry. It begins by tracing the emergence of medieval scribes and the printing press and concludes with observations on the appropriate policy responses to the challenge created by the Internet and new communications technologies.

I. THE EMERGENCE OF MEDIEVAL SCRIBES

Before the invention of the printing press, books were generally copied by hand, and presses and other machines were rarely used.⁸ The history of book copying usually begins with medieval monks and their monasteries.⁹

7. See, e.g., Paul GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 31 (rev. ed. 2003) (“The printing press irrevocably altered the balance of moral and economic claims to works of authorship. It also presented copyright law’s central question.”); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 9 (1993) (noting that the “historical emergence [of copyright] is related to printing technology”); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, *LAW & CONTEMP. PROBS.*, Winter/Spring 2003, at 33, 42 (discussing a continuum, in which “one end sits a monk painstakingly transcribing Aristotle’s *Poetics*[, i]n the middle lies the Gutenberg printing press . . . [and a]t the far end lies the Internet and the online version of the human genome”); Thomas F. Cotter, *Gutenberg’s Legacy: Copyright, Censorship, and Religious Pluralism*, 91 *CAL. L. REV.* 323, 325 (2003) (noting that “[an] effect of the invention of printing was the development of copyright law”); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 *U. CHI. L. REV.* 263, 324 (2002) (observing that “[j]ust as Gutenberg’s printing press threatened the dominance of scribes, peer-to-peer networking and MP3s clearly threaten the recording industry”); Brander Matthews, *The Evolution of Copyright*, 5 *POL. SCI. Q.* 583, 586 (1890) (noting that “it was only after the invention of printing that an author had an awakened sense of the injury done him in depriving him of the profit of vending his own writings”).

8. As Leila Avrin noted:

The contemporary private-press book is almost always composed (typeset) by hand, printed by hand (often on homemade paper), and usually bound by hand, but a press and other machines are used along the way. . . . Metal types invented by Gutenberg about 1450 and the wooden handpress were the first steps in the process of mechanization of the book’s manufacture.

LEILA AVRIN, *SCRIBES, SCRIPT AND BOOKS: THE BOOK ARTS FROM ANTIQUITY TO THE RENAISSANCE* 327 (1991); see also LUCIEN FEBVRE & HENRI-JEAN MARTIN, *THE COMING OF THE BOOK: THE IMPACT OF PRINTING 1450-1800*, at 260 (David Gerard trans., Verso 1984) (noting that “the introduction of printing was . . . a stage on the road to our present society of mass consumption and of standardisation”).

9. This starting point is perhaps due to the nostalgic fascination today’s audience has with monks, their chants, and their lifestyle. See, e.g., Nat Ives, *Poverty, Chastity, Marketability*, *N.Y. TIMES*, Aug. 25, 2003, at C1 (discussing commercials and advertisements

However, professional scribes existed as early as the Mesopotamian Empire, in which writing extended beyond a small group of priests.¹⁰ During the Roman era, there were not only scribes, but also an active book trade.¹¹ Although commentators generally trace copyright back to the English Statute of Anne,¹² the printing patents in the Venetian Republic,¹³ or the resolution of the dispute before the legendary King Diarmid in sixth-century Ireland,¹⁴ there

featuring monks as pitchmen); Richard Harrington, *Chants of a Lifetime*, WASH. POST, July 20, 1994, at B7 (reporting that the “Chant” album, performed by the cloistered Benedictine monks of Santo Domingo de Silos in northern Spain, “has sold more than 2 million copies in the United States [in a few months] since its release” and that the album “opened at No. 1 on the Billboard classical chart and . . . went to No. 3 on the pop charts”); Elise Soukup, *Monks: Capturing the Sound of Silence*, NEWSWEEK, Jan. 23, 2006, at 10 (reporting about the rave review of a new three-hour documentary *Into Great Silence*, which features everyday activities of the monks of the Carthusian Order in the French Alps).

10. AVRIN, *supra* note 8, at 75 (noting that writing was not limited to a small group of priests despite a complex writing system and limited literacy).

11. For a discussion of literary creations and the commercial book trade during the Roman era, see generally GEO. HAVEN PUTNAM, *AUTHORS AND THEIR PUBLIC IN ANCIENT TIMES* 163-281 (3d ed., 1908) [hereinafter PUTNAM, *AUTHORS AND THEIR PUBLIC*].

12. 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, 8 Anne, c. 19 (1709) (Eng.).

13. See, e.g., BRUCE W. BUGBEE, *GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW* 43 (1967); JOHN FEATHER, *PUBLISHING, PIRACY AND POLITICS: AN HISTORICAL STUDY OF COPYRIGHT IN BRITAIN* 10 (1994); Peter K. Yu, *Currents and Crosscurrents in the International Intellectual Property Regime*, 38 LOY. L.A. L. REV. 323, 331 (2004).

14. As one commentator retold the story of Saint Columba, the Apostle of Caledonia (521-597):

The story is that Columba while visiting his ancient master Finnian made a hurried and clandestine copy of the abbot’s *Psalter*. Finnian claimed from Columba the copy he had made, contending that a copy made without permission ought to belong to the owner of the original. The monk refused to give up the transcript and the question was referred to King Diarmid in the castle at Tara. The King gave his judgment[,] “. . . to every cow belongeth her little cow (or calf),—and in the same way, to every book belongeth its copy. . . .” Columba, however, refused to abide by the decision and called the clans of his friends and relatives together and took by force what he failed to obtain by stealth.

Salathiel C. Masterson, Comment, *Copyright: History and Development*, 28 CAL. L. REV. 620, 624 (1940) (footnote omitted). For a more lengthy treatment of this legendary story, see 1 GEO. HAVEN PUTNAM, *BOOKS AND THEIR MAKERS DURING THE MIDDLE AGES* 46-48 (1896) [hereinafter PUTNAM, *BOOKS AND THEIR MAKERS*]. But see AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 42 (1899) (stating that the dispute “has been voted unworthy of belief”); CHRISTOPHER MAY & SUSAN K. SELL, *INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY* 49 (2006) (noting that claims that the dispute was “the first relatively formal copyright dispute . . . are exaggerated, but nevertheless the case has some totemic resonance”); Linda J. Lacey, *Of Bread and Roses and Copyrights*,

is sufficient evidence to suggest that rewards for authorship might have existed in Rome, even though “a general law of copyright” did not exist.¹⁵ As Christopher May and Susan Sell noted:

The Roman publishing industry, or more accurately the organized production of multiple copied scribal texts, emerged and expanded in the first century B.C., originally in Alexandria, then moving to Rome in the fifty years before A.D. 100. As had happened previously in Greece, authors were frequently supported by patrons and did not directly receive money from the “publication” of their works. A new model of authorship slowly emerged, however, with a direct link between author and the sale of specific works, and before long, a rudimentary concept of literary property was developed.¹⁶

While the early Roman publishers existed for “the service of literature and of the State, and not the securing of profits,”¹⁷ some historical evidence has suggested that “Cicero was in the habit of securing remuneration from the sale of his published works, and that this remuneration was proportioned to the extent of the sales, and must therefore have been in the shape either of a royalty or of a share of the net profits.”¹⁸ His decision to continue with Atticus as his publisher further suggests the existence of “other publishers

1989 DUKE L.J. 1532, 1541 (pointing out that commentators have agreed that the story about the dispute “is just a pleasant myth”).

15. Russ VerSteege, *The Roman Law Roots of Copyright*, 59 MD. L. REV. 522, 523 (2000). According to Professor VerSteege, the Romans “did develop the legal principles of property, contract, and liability that have shaped many of the essential building blocks of American copyright law today.” *Id.* at 523-24. For an examination of the Roman law roots of copyright, see generally *id.*

16. MAY & SELL, *supra* note 14, at 47-48; see also PUTNAM, AUTHORS AND THEIR PUBLIC, *supra* note 11, at 140 (noting that “[i]t is probable that in Alexandria not only the publishers but also the authors secured returns from the profits of book-production”); Masterson, *supra* note 14, at 622 (noting that “a system of compensation to authors certainly came into practice” in Rome).

17. As George Putnam noted:

In Rome, as in Athens, the men who first interested themselves in publishing undertakings, or at least in the publishing of higher class literature, were men who combined with literary tastes the control of sufficient means to pay the preparation of the editions. Their aim was the service of literature and of the State, and not the securing of profits, and, as a fact, these earlier publishing enterprises must usually have resulted in a deficiency.

PUTNAM, AUTHORS AND THEIR PUBLIC, *supra* note 11, at 181.

18. *Id.* at 188; see also Masterson, *supra* note 14, at 622 (maintaining that “Cicero apparently had a direct business interest in the sale of his books, that is, his publishing arrangements were on a royalty basis” and that “there is evidence that his works and the right to their continued publication were bought from Atticus by the bookseller Dorus” after his death).

whose facilities were worth consideration in comparison with those of Atticus.”¹⁹

In the fourth century, however, the book trade in Rome began to collapse. As George Putnam stated in his classic book on ancient authorship, this collapse could be partly attributed to the decision of Emperor Constantine to move the Empire’s capital to Byzantium, the revival of the use of Greek (as a substitute for Latin), and, most important of all, the growing power and influence of the Church.²⁰ As the Church grew in size and power, “the reading of the works of ‘pagan’ writers was discouraged, and the manuscripts themselves were first neglected, and later suffered to fall into decay.”²¹ Meanwhile, “[s]cholars gave their scholarship and trained copyists their clerical skill to the service of the Church,” and Christian scribes focused their efforts primarily on the transcription of scriptures and the copying of prayers and hymns.²² As a result, even when the Church did not prohibit the study of non-ecclesiastical literature, “[t]he writers of Greece and Rome were, for Christian believers, . . . frivolous and time-wasting, . . . [and] Christian duties [in such a short medieval life often] left no free hours for Homer or Virgil, Plato or Epictetus.”²³ As the Roman Empire declined, *Pax Romana* began to disappear, and the constant fighting between the Romans and foreign invaders had made roads in Europe unsafe for book traders to travel,²⁴ thus greatly reducing access to knowledge.

In the early Middle Ages, the Church played a very important role in protecting ancient works,²⁵ and monks were heavily involved in the

19. PUTNAM, *AUTHORS AND THEIR PUBLIC*, *supra* note 11, at 188; *see also id.* at 193 (stating that “it seems evident from the references made by Roman authors to the arrangements for the sale of their books, that other publishing concerns already existed in Rome, although no other names have been preserved”).

20. *See id.* at 273-81 (discussing the decline of the commercial book trade in Rome).

21. *Id.* at 274-75.

22. *Id.* at 275.

23. *Id.*

24. As George Putnam explained:

The State had to fight almost continuously for its existence, and the fighting was not infrequently near at home, the city itself being from time to time menaced. The “peace of the Empire” existed no longer. It was not a time for the development of literature, and literature, excepting a small body of doctrinal and controversial publications of the Church, practically disappeared.

Id. at 277.

25. *See AVRIN*, *supra* note 8, at 205 (observing that “[f]rom the time of the breakup of the Roman Empire, it was the Church in general, and the monastery in particular, that was responsible for the preservation and transmission of literary traditions”); MARC DROGIN, *ANATHEMA!: MEDIEVAL SCRIBES AND THE HISTORY OF BOOK CURSES I* (1983) (observing that “[f]or more than 1,000 years, the Christian Church, despite its excesses and incapacities, was

“reproduction and preservation of the literature that had been inherited from earlier writers,—writers whose works had been accepted as classics.”²⁶ The Rule of St. Benedict, for example, “contained a specific instruction that a certain number of hours in each day were to be devoted to labour in the *scriptorium*. The monks who were not yet competent to work as scribes were to be instructed by the others.”²⁷

Notwithstanding the Church’s active participation, the production of knowledge remained parochial. The copying of books was also slow, tedious, and very time-consuming; it took years for a scribe to complete “a particularly fine manuscript with colored initials and miniature art work.”²⁸ When Bishop Leofric took over the Exeter Cathedral in 1050, he found only five books in its library. Despite immediately establishing a scriptorium of skilled workers, his crew managed to produce only sixty-six books in the twenty-two years before the bishop’s death in 1072.²⁹ Likewise, although the Library of Cambridge University had a remarkable collection of 122 books in 1424, it “labored for a half-century to increase the number to 330.”³⁰

To make the copying task even more difficult, the working conditions in monasteries were “far-from-productive.”³¹ For instance, “[t]he weather might be uncomfortable, the light poor . . . , and the text difficult to read or tedious to contemplate.”³² In addition, monks had to “concentrate on material they [might] not have been interested in—or even understood,” and they often feared that they would make an error or would not be able to complete a given work within the specified time.³³ Under these conditions, it is, therefore, no

a source—often the only source—of safety, serenity and culture in an often self-destructive world”).

26. 1 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 16; *see also id.* at 10 (noting that, in the early Middle Ages, “the responsibility for the preservation of the old-time literature and for keeping alive some continuity of intellectual life, rested solely with the monasteries, and the work of multiplying of distributing such books as had survived was carried on by the monks, and by them only”); AVRIN, *supra* note 8, at 205 (noting that “[a]lthough reading and writing existed to some degree outside the monastery, it was within its walls that most manuscripts were written, bound, and illuminated, at least until the thirteenth century”).

27. 1 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 12; *see also id.* at 317 (noting that “[t]he fragments of classic literature which had survived the destruction of the Western Empire, had . . . owed their preservation chiefly to the Benedictine monasteries”).

28. DROGIN, *supra* note 25, at 15.

29. *Id.*

30. *Id.* at 37.

31. *Id.* at 10.

32. *Id.* at 12.

33. *Id.* at 21. In fact, making an error in the copying process was tantamount to committing a sin, because “an error made and uncorrected would be copied again and again as others borrowed the book.” *Id.* at 12-14; *see also* JAMES WESTFALL THOMPSON, *THE MEDIEVAL*

surprise that monks sometimes jotted remarks about their frustration and relief in the margins, or the colophons, of their manuscripts. Examples of these remarks included “Thin ink, bad vellum, difficult text,” “Thank God, it will soon be dark,” and “Now I’ve written the whole thing: for Christ’s sake give me a drink.”³⁴

While the copying process was painful, monks continued to labor for at least two reasons. First, copying helped increase the knowledge base.³⁵ In the early Middle Ages, obtaining knowledge from books was not easy, and it often entailed “weeks or months of negotiation with a distant house for its loan; the putting-up of a sizable pledge for its security; [and] the wait for its arrival.”³⁶ Even after the manuscript was secured, it required several people and many months of labor to copy, proofread, decorate, and bind the book. Indeed, because of the limited access, “[a]ny book, even badly produced and riddled with errors, might well be the only one on that subject that anyone in the community had ever seen.”³⁷

Second, the act of copying would benefit their soul. “From almost the beginning of monastic history, regardless of the educational value of books, their copying was considered manual labor and promoted as a way of involving the person in hard work for the benefit of his soul in the hereafter.”³⁸ Because the monks focused on the process, rather than the contents, it was not uncommon to find them writing over materials on the same parchment or copying “useless texts in illegible scripts.”³⁹ After all, the goal of such writing assignments was not to produce or preserve knowledge, but rather to keep their hands and minds busy and away from sins or idle thoughts.⁴⁰

By the twelfth century, towns emerged, and communities grew in size and wealth. As a result of the spread of literacy, the demand for books increased dramatically, and a large number of new texts appeared.

LIBRARY 602 (1939) (noting that “[t]he scribe was expected to copy exactly what he saw before him, even when it was clearly wrong, unless he first obtained the sanction of the abbot, for his work was to be later revised”).

34. AVRIN, *supra* note 8, at 224.

35. 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 61 (noting that King Louis IX of France “took the ground that it was better to transcribe books than to purchase the originals, because in this way the mass of books available for the community was increased”).

36. DROGIN, *supra* note 25, at 6.

37. *Id.*

38. *Id.* at 9; *see also* 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at ix (noting that “the incentive to literary labour was no longer the laurel crown of the circus, the favours of a patron, or the *honoraria* of the publishers, but the glory of God and the service of the Church”).

39. THOMPSON, *supra* note 33, at 592.

40. *Id.* (noting that one of the two motives for the copying of books was “to serve as busywork for hands and minds otherwise idle”).

“[M]onastic libraries [soon] found it more and more difficult to keep their collections up to date, and they began employing secular scribes and illuminators to collaborate in book production.”⁴¹ Meanwhile, schools became independent from cathedrals, to which they were originally attached, and guilds of lecturers and students gathered to form universities.⁴² With the changing lifestyle and the emergence of new educational institutions,

[i]t became more and more common for people to want to own books themselves, whether students seeking textbooks or noble women desiring to own beautifully illuminated Psalters. By 1200 there is quite good evidence of secular workshops writing and decorating manuscripts for sale to the laity. By 1250 there were certainly bookshops in the big university and commercial towns, arranging the writing out of new manuscripts and trading in second-hand copies. By 1300 it must have been exceptional for a monastery to make its own manuscripts: usually, monks bought their books from shops like anyone else, although this is not quite true of the Carthusians or of some religious communities in the Netherlands.⁴³

As universities began to rely on scribes to produce and reproduce texts, supervision by the university faculty became necessary.⁴⁴ Ordinances, therefore, were developed “to regulate the work of the copyists, to lay down the minimum requirements of formal presentation and substantial correctness, and to prescribe the selling price of duly certified copies.”⁴⁵ A notable example of these regulations was the ordinance of Bologna University of

41. CHRISTOPHER DE HAMEL, *SCRIBES AND ILLUMINATORS* 5 (1992); see AVRIN, *supra* note 8, at 227 (noting that “[a]lthough monastic manuscript production continued after the twelfth century, the growth of the cathedral schools and then the universities created a need for many more texts than ever before”); DROGIN, *supra* note 25, at 5 (noting that “[i]n the latter part of the Middle Ages much of [writing] was turned over to paid professionals, part of the sizable population of self-employed scribes who catered to businesses, private collectors, and the enormous demands for texts during the rise of the universities”).

42. AVRIN, *supra* note 8, at 210; see also *id.* (noting that “[l]earning passed from the religious domain to the secular, and at times the brightest monks were sent to the universities to study”). Some of the earlier ones included the universities in Paris and Bologna.

43. DE HAMEL, *supra* note 41, at 5.

44. See E. PH. GOLDSCHMIDT, *MEDIEVAL TEXTS AND THEIR FIRST APPEARANCE IN PRINT* 102 (1943) (noting that “standard text-books such as the *Corpus Juris*, which were in constant demand[,]. . . were multiplied under the supervision of the faculty itself”); THOMPSON, *supra* note 33, at 638 (noting that “[u]niversity authorities rigidly supervised and controlled [the stationers] and periodically inspected their stock”).

45. GOLDSCHMIDT, *supra* note 44, at 102; see also Masterson, *supra* note 14, at 624 (noting that “[u]niversity regulations were made governing the price (which was more often than not a rental price), the number of lines to a page, and the material to be used”). But see ELIZABETH L. EISENSTEIN, *THE PRINTING REVOLUTION IN EARLY MODERN EUROPE* 11 (2d ed. 2005) (noting that “[c]aution is needed when extending university regulations designed to control copyists to the actual practices of university stationers—let alone to bookdealers serving nonuniversity clientele”).

1259, which provided what commentators have considered to be the earliest regulations of sales, loans, and production of books used by the university.⁴⁶ Similar regulations were also enacted by the University of Paris in 1275 and by Alphonso X of Castile in Spain sometime between 1252 and 1285.⁴⁷ Although England had similar regulations concerning the stationers, “[t]he English book trade . . . developed not around the universities, as on the Continent, but in London, where the stationers formed a guild as early as 1403.”⁴⁸ This guild was known famously as the Stationers’ Company, and it lasted until shortly before the enactment of the English Statute of Anne.⁴⁹

As the book trade grew in volume, the number of scribes increased dramatically, and a scribal industry began to emerge as a profession. Despite their growth, medieval scribes continued to be treated as mere laborers, rather than content creators or knowledge producers. Worse still, they “received little pay for [their] work”;⁵⁰ “[t]he average scribe in the later Middle Ages [for example] . . . had to work three to seven days for the sum earned in one day by a common foot-soldier slogging through Scotland in King Edward’s army.”⁵¹ Nevertheless, the book trade continued to flourish in major European cities, and the number of scribes and illuminators increased substantially as a result. “By the late thirteenth century in Paris (a century later in England), ateliers of scribes and illuminators were known by the name of their master artists,”⁵² and “[t]he names of scribes, illuminators, parchment-makers and binders . . . [can be found] in tax records, though few names can be linked with surviving books.”⁵³

II. THE GUTENBERG CHALLENGE

By the mid-fifteenth century, a revolutionary reproduction technology—the printing press—emerged. Although commentators have disputed the historical origin of the printing press and the role of Johannes

46. THOMPSON, *supra* note 33, at 638.

47. *See id.* at 639 (discussing the regulations concerning the stationers in France and Spain).

48. *Id.* at 643.

49. Statute of Anne, *supra* note 12. For discussion of the Stationers’ Company in England, see generally BIRRELL, *supra* note 14, at 71-90; CYPRIAN BLAGDEN, *THE STATIONERS’ COMPANY: A HISTORY, 1403-1959* (1960); LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 28-77 (1968).

50. DROGIN, *supra* note 25, at 30.

51. *Id.*

52. AVRIN, *supra* note 8, at 228.

53. ROWAN WATSON, *ILLUMINATED MANUSCRIPTS AND THEIR MAKERS* 9 (2003).

Gutenberg in inventing the new technology,⁵⁴ no one denies that the printing press revolutionized the reproduction process,⁵⁵ just as digital technologies revolutionized the analog reproduction process in the mid-1980s.

Shortly after the invention, the technology of the printing press was spread quickly throughout Europe. “[B]y the 1490s each of the major states had one important publishing centre and some had several.”⁵⁶ The initial demand for printed books came from universities, the clergy, monasteries and convents, the Civil Service, the feudal nobility (and their ladies), lawyers and physicians, and schoolboys and their teachers.⁵⁷ There was also “a wide market for prayer-books, missals, almanacs, calendars, prognostications, broadsides, and other printed matter.”⁵⁸ In fact, the demand and supply for printed materials varied considerably from one geographical region to another. As George Putnam recounted:

[W]e find Aldus in Venice devoting his presses almost exclusively to classical literature and in the classics, so largely to Greek; . . . in Basel and Nuremberg the early printers are producing the works of the Church Fathers, in Paris the first Estienne (in the face of the fierce opposition of the theologians) is multiplying editions of the Scriptures, and in London, Caxton and his immediate successors, disregarding both the literature of the old world and the writings of the Church, are presenting to the English public a long series of romances and *fabliaux*. . . . Some of these earlier publishers were willing simply to produce the books for which the people about them were asking, while others, with a higher ambition and a larger feeling of responsibility, proposed themselves to educate a book-reading and book-buying public, and thus to create the demand for the higher literature which their presses were prepared to supply.⁵⁹

54. See 1 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 348-402 (discussing the invention of printing and the work of the first printers in Holland and Germany). For a biography of Johannes Gutenberg, see generally JOHN MAN, *THE GUTENBERG REVOLUTION: THE STORY OF A GENIUS AND AN INVENTION THAT CHANGED THE WORLD* (2002).

55. See EISENSTEIN, *supra* note 45, at 334 (noting that “[f]ive hundred years of printing have given rise to an ever-expanding knowledge industry that is unlike anything that was sustained by hand copying over the course of millennia”); 1 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at ix-x (noting that “the invention of printing, which in revolutionising the methods of distributing intellectual productions, exercised such a complex and far-reaching influence on the thought and on the history of mankind”). For a comprehensive discussion of the revolutionary impact of the printing press, see generally EISENSTEIN, *supra* note 45. *But see* ADRIAN JOHNS, *THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING* 638 (1998) (noting that “the implications of communications technologies will . . . be wide ranging and significant, but they are unlikely to be monolithic or hegemonic”).

56. EISENSTEIN, *supra* note 45, at 336.

57. GOLDSCHMIDT, *supra* note 44, at 14-15.

58. *Id.* at 15.

59. 1 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at xi.

Notwithstanding the growing demand for printed books, the scribal industry continued to prosper for decades—long enough for the existing scribes to make a living while enabling young apprentices to learn a new trade.⁶⁰ Some scribes also made successful transition to become printers,⁶¹ while others found new jobs as type designers.⁶² Although illuminators, like scribes, were affected by the new printing press,⁶³ many of them remained hired until at least the eighteenth century, for decorating deeds, royal letters patent, copies of the oaths, and other official documents.⁶⁴

Moreover, printed books and handwritten manuscripts coexisted for many decades beyond the invention of the printing press.⁶⁵ It was, indeed, not uncommon to find *incunabula*,⁶⁶ or “transitional ‘hybrid’ products[,]” that

60. See EISENSTEIN, *supra* note 45, at 339 (noting that “[w]riting letters, producing autograph manuscripts, keeping ledgers, and numerous other practices that entail pen work not only coexisted and persisted with the output of printers” and that “the employment of copyists continued for centuries until typewriters came into play”); MAN, *supra* note 54, at 217 (“Scribal practices endured, their products in demand for another twenty years. And printed book prices, as with any new technology, did not at once undercut manuscripts.”); 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 87 (stating that “[t]owards the end of the fifteenth century, and for some years after the beginning of the work of the German printers, the production of manuscripts in Germany continued actively in the monastery of S. Peter at Erfurt, and in the monasteries of S. Ulrich and Afra in Augsburg”); THOMPSON, *supra* note 33, at 644 (noting that a “staff of copyists [in a bookshop in Florence] turned out numerous manuscripts in Latin, Greek, and Hebrew” even after printing was invented and that the bookshop “received book orders from Germany, Hungary, France, Spain, and England”). Although Vespasiano da Bisticci, mentioned in the last citation, closed his bookshop later, many manuscript bookdealers, in particular the *cartolai* of Renaissance Italy, “accommodated themselves fairly easily” to the new environment. EISENSTEIN, *supra* note 45, at 320.

61. See EISENSTEIN, *supra* note 45, at 319 (noting that “[t]he scribe who became a printer did not undergo a gradual change but experienced a veritable metamorphosis”).

62. See AVRIN, *supra* note 8, at 195 (observing that “[w]hen printing began in the 1450s, printers looked to the handwriting of the scribes in the area for models on which to base typography, and they often employed scribes as type designers”).

63. See EISENSTEIN, *supra* note 45, at 26 (noting that “[t]he use of typography for texts led to that of xylography for illustration, sealing the fate of the illuminator along with that of the scribe”).

64. See WATSON, *supra* note 53, at 126-27 (“From Cambridge and Oxford colleges to the Guilds of the City of London, illuminators were employed to decorate important deeds. Other official documents, from royal letters patent in England to copies of the oaths taken by Venetian doges and councillors, continued to be illuminated up to the eighteenth century.”).

65. See 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 243 (noting that “[t]he trade of the Italian dealers in manuscripts was not brought to an immediate close by the introduction of printing”).

66. The term *incunabula* is generally used to refer to books printed with moveable type prior to 1501. Thanks to Susan Scafidi for providing this term.

were printed on a press but illuminated by hand.⁶⁷ In addition, unlike today's computer technology, it took "a long time . . . before the work of the printing-press came to be sufficiently understood to bring to a stop the labours of the scribes in manifolding manuscripts for sale and for exchange," just like in other cases of new technologies.⁶⁸

While printed books were state-of-the-art, manuscripts remained as popular as before, at least initially. Many older medieval scholars, like those who were reluctant to find information online in the early days of the Internet, continued to "prefer[] the manuscript form for their books, and found it difficult to divest themselves of the impression that the less costly printed volumes were suited only for the requirements of the vulgar herd."⁶⁹ Indeed, many "noblemen and wealthy scholars who had inherited, or who had themselves brought together, collections of famous works in manuscript, were for some time, not unnaturally, unwilling to believe that ordinary people could, by means of the new invention, with a comparatively trifling expenditure secure perfect and beautiful copies of the same works."⁷⁰

Finally, in the early days of printing, fully printed works were very expensive, and manuscripts remained an affordable alternative for the public.⁷¹ In 1483, for example, the cost of hiring a scribe to reproduce Ficino's translation of Plato's *Dialogues* was a third of what the Ripoli Press charged for setting up and printing the work.⁷² Because a newly printed Gutenberg Bible "cost roughly the equivalent of more than a dozen well-fed cattle or the title to a house in town," few in the late fifteenth century could ever hope to own a copy,⁷³ not to mention the abundant supply of cheap monastic labor that

67. See EISENSTEIN, *supra* note 45, at 320 (discussing the existence of "deluxe, hand-illuminated [printed] volumes . . . as transitional 'hybrid' products").

68. I PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 87.

69. *Id.* at 243; see also *id.* at 414 (noting that "it was . . . the case that for a number of years after the invention of printing, a considerable proportion of the wealthier collectors of literature continued to give their preference to manuscripts as being more aristocratic and exclusive").

70. *Id.* at 342.

71. See DROGIN, *supra* note 25, at 30 ("At the end of the 15th century, even the advent of printing did little to reduce a book's price. It was more of a saving to buy parchment or paper, inks, etc., and copy a book than to purchase even a second-hand printed copy.").

72. EISENSTEIN, *supra* note 45, at 15 ("In 1483, the Ripoli Press charged three florins per quintero for setting up and printing Ficino's translation of Plato's *Dialogues*. A scribe might have charged one florin per quintero for duplicating the same work.").

73. DROGIN, *supra* note 25, at 31; see also MAN, *supra* note 54, at 143 (noting that "[o]rdinary people . . . did not have Bibles and would never be able to afford one, whether copied by scribes or printed").

made unnecessary the additional expenses for reproducing ecclesiastical works through the printing press.⁷⁴

Although the press was generally well-received in Europe, some criticized and resisted the new technology, while others, in particular those outside Europe, were reluctant to embrace it.⁷⁵ In Europe, for example, Johannes Trithemius, the Abbot of Sponheim, “not only exhorted his monks to copy books [through his *De laude scriptorum*], but also explained why ‘monks should not stop copying because of the invention of printing.’”⁷⁶ Some scribes also put up opposition efforts—a notable example being the failed 1474 attempt by the Genoa scribes “to petition the Senate for the expulsion of the printers.”⁷⁷ Notwithstanding these resistance and occasional opposition efforts, legal responses to the printing press did not emerge until decades after the invention of the new technology.

74. See 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 87 (noting that the persistent use of scribes “was very largely . . . the result of the fact that in the monasteries was always available a large amount of labour, and that the use of this labour for the preparation of sacred books had come to form part of the religious routine of the institution”).

75. Unlike the European states, the Ottoman Empire strongly resisted the introduction of the printing press. SUSAN SCAFIDI, WHO OWNS CULTURE: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW 33 (2005). As Bernard Lewis, a leading Middle Eastern historian, has noted:

Printing had been known in Turkey since the fifteenth century. Gutenberg’s work in Europe was duly recorded in the Turkish annals, and presses were introduced to the Ottoman realms at an early date, with the authorization of the sultan, but only by minority communities. The first were the Jews, followed later by the Greeks and Armenians. They were allowed to print in their own languages and scripts but were strictly forbidden to print in the Arabic script. The argument put forward at the time was that this, being the script in which the Qur’ān was written, was sacred, and therefore printing it would be a kind of desecration. Another possible factor was the vested interest of the guild of calligraphers.

BERNARD LEWIS, WHAT WENT WRONG: WESTERN IMPACT AND MIDDLE EASTERN RESPONSE 142 (2002).

76. EISENSTEIN, *supra* note 45, at 11. Notwithstanding the criticism, the Abbott seemed to be more “concerned with the reform of his order” than with the challenge created by the printing press. Jan-Dirk Müller, *The Body of the Book: The Media Transition from Manuscript to Print*, in THE BOOK HISTORY READER 143, 146 (David Finkelstein & Alistair McCleery eds., 2002).

77. 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 413. “The application was . . . disregarded; the new art met at once with a cordial reception, and from the beginning secured the active support of the government.” *Id.*

III. THE INTRODUCTION OF PROTO-COPYRIGHT

The earliest legal response to the printing press appeared in the form of printing patents, or *privilegii*, in the Venetian Republic, the contemporary “capital of printing” in Europe, or perhaps even the world.⁷⁸ “By the end of the 1460s the craft of printing had been introduced in Rome and Venice,”⁷⁹ and 2835 works had been printed in Venice by the end of the century, compared to only 300 in Florence, 298 in Bologna, 629 in Milan, and 925 in Rome.⁸⁰

In 1469, the Republic, for the first time, granted a printing patent, or a privilege, to the German printer Johann von Speyer.⁸¹ This privilege sowed the seed for the institution of modern copyright by creating in him “an exclusive right to print books in all Venetian territories for the next five years.”⁸² Although the privilege was the first one preserved in the actual records in Venice, the Republic might have previously granted other similar patents, as evidenced by the statement in Speyer’s patent that “it was ‘usual’ to grant such monopolies.”⁸³ Nevertheless, the German printer’s privilege did not last long. He died the year after he received the grant, and, upon his death, the Venetian authorities refused to transfer the grant to his heirs, thus paving the way for the development of the Venetian printing industry.⁸⁴

78. Christopher May, *The Venetian Moment: New Technologies, Legal Innovation and the Institutional Origins of Intellectual Property*, 20 *PROMETHEUS* 159, 169 (2002); see also 1 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 409-10 (discussing Venice’s advantageous position for becoming a literary and publishing center); 2 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 405 (noting that Venice “was the chief publishing centre of the world”).

79. See Paul A. David, *Intellectual Property Institutions and the Panda’s Thumb: Patents, Copyrights, and Trade Secrets in Economic Theory and History*, in *GLOBAL DIMENSIONS OF INTELLECTUAL PROPERTY RIGHTS IN SCIENCE AND TECHNOLOGY* 19, 51 (Mitchel B. Wallerstein, et al. eds., 1993).

80. See 1 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 327.

81. FEATHER, *supra* note 13, at 10-11. As Professor Feather noted, “Speyer was the first printer in the city, and it was in everyone’s interest to protect his position.” *Id.* at 10.

82. *Id.* at 11. *But see* Frank D. Prager, *A History of Intellectual Property from 1545 to 1787*, 26 *J. PAT. & TRADEMARK OFF. SOC’Y* 711, 718 (1944) (noting that it remains “contested whether he was recognized as first importer of the whole art of typography, or as inventor of improvements”).

83. Prager, *supra* note 82, at 715.

84. MAY & SELL, *supra* note 14, at 56; see 2 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 344-45 (“[Johann von Speyer] died shortly after securing this monopoly. It was not continued to his heirs, and Jenson, Nicolas of Frankfort, and their associates were left free to push their printing operations as they saw fit.”).

In the first decade and a half of printing, the Venetian Republic granted privileges to only printers, but not authors. However, the Cabinet set a precedent by granting a privilege to Marc' Antonio Sabellico on September 1, 1486, for publishing his history of Venice.⁸⁵ This privilege "allowed him 'to choose which printer would publish his book, and any other printer who published it would be fined 500 ducats.'"⁸⁶ This grant was particularly significant, because it ushered in a new era of copyright protection, or at least proto-copyright protection.

A few years later, in 1493, "the Venetian Cabinet set a [further] precedent by giving Daniele Barbaro a ten-year exclusive grant to publish a book [*Castigationes Plinii*] by his late brother Ermolao."⁸⁷ As the number of privileges increased rapidly, the Senate eventually restricted its grant of privileges to "new and previously unprinted works," partly to prevent hoarding of available titles and partly to reduce the claims and counterclaims for protection by printers and publishers.⁸⁸ In 1544, the Council of Ten in Venice finally introduced a decree to "prohibit the printing of any work unless written permission from the author or his immediate heirs had been submitted to the Commissioners of the University of Padua."⁸⁹ Commentators have suggested that this decree marked "the earliest formal provision for the protection of copyright" in history.⁹⁰

There were at least two reasons why printers and stationers were granted the exclusive rights to publish. First, the decrees were instituted as "protection against outside interference with their strictly defined domains of business."⁹¹ Although the first printing patent was granted to a foreign printer

85. See BUGBEE, *supra* note 13, at 44 (describing Sabellico's privilege as "the first known copyright in Venice and Italy").

86. MAY & SELL, *supra* note 14, at 68.

87. *Id.* at 69.

88. *Id.* "Under the law of [August 1,] 1517, privileges were thereafter to require a two-thirds vote in the Senate and were to be issued only for works which were new or which had not before been printed." 2 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 360. As George Putnam noted:

Among its advocates were many of the printer-publishers, who were willing to lose their property rights in existing copyrights for the sake of getting rid of the evils that had arisen from the accumulation of overlapping privileges, or of privileges which had been secured not for direct use but for obstruction and for sale, and of privileges which on various grounds had not been obtained in good faith.

Id.

89. MAY & SELL, *supra* note 14, at 69; see also BUGBEE, *supra* note 13, at 46; David, *supra* note 79, at 52.

90. MAY & SELL, *supra* note 14, at 69.

91. BIRRELL, *supra* note 14, at 49.

who imported the technology, the privileges were soon used to protect local printers against outside competition.⁹²

Second, by the mid-sixteenth century, the Church and the Crown had used these privileges as part of their control mechanism to suppress heretical thoughts. Although the Church initially welcomed printers and supported the earlier typographers, they soon “began to realise the extent of their blunder,” especially when the printers of Wittenberg began to distribute pamphlets of Luther and Melancthon and when the presses of Geneva and Zurich started disseminating writings of Calvin and Zwingli.⁹³ As Augustine Birrell noted in one of his famous *Seven Lectures on the Law and History of Copyright in Books*, the Church, at that time, was “frightened . . . at the New Learning, and at the independence and lawlessness of mind and enthusiasm that accompanied the New Learning.”⁹⁴ It is, therefore, no surprise that by the mid-sixteenth century three Commissioners of Heresy were associated with the Council of Ten in Venice, and a subsequent Council decree of 1548-1549 organized into a guild all of the printers and booksellers in the city-state.⁹⁵ As

92. See BUGBEE, *supra* note 13, at 22 (suggesting that “it is possible that [Johann von Speyer’s] grant constituted an importation franchise”); 2 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 347 (noting that, while most of the privileges in Italy “were concerned with the protection of the individual producer against competition within the Venetian State,” some privileges were designed to protect “Venetian printing and publishing as a whole against the competition of foreign rivals”).

93. 2 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 217; *see also id.* (noting that “[i]t is difficult to conceive of the accomplishment of the Reformation without the aid of the printing-press, and it is probably, in fact, not too much to say that, without the printing-press, the work done by the Reformers could not have been brought about at all”). See generally EISENSTEIN, *supra* note 45, at 164-208, for a discussion of the impact of the printing press on the Reformation.

94. MAY & SELL, *supra* note 14, at 69; *see also* ROSE, *supra* note 7, at 11 (noting that “in the middle years of the century, a guild of printers and booksellers was organized as an instrument for government surveillance of the press”). Nevertheless, as the late Ray Patterson pointed out in the case of English censorship regulations:

[C]opyright was not created because of censorship, nor would the absence of censorship have prevented its creation, but censorship did aid private persons, publishers and printers, in developing copyright in their own interest with no interference from the courts and little from the government. The early censorship regulations thus serve as a prelude to the development of copyright.

PATTERSON, *supra* note 49, at 21.

95. MAY & SELL, *supra* note 14, at 69 (stating that the subsequent decree was partly enacted to assist the Church with the suppression of heretical works); *see also* BUGBEE, *supra* note 13, at 47 (noting that “[a]side from [the Council decree’s] aim to improve the Venetian printing trade, the only major industry then unorganized, this measure was intended to assist the suppression of heretical literature”). Commentators, nevertheless, lamented how the increasing censorship in Venice has stifled the prosperous book trade there. As George Putnam noted:

While other causes . . . contributed to the extinction of the prestige of the Venetian

it did in the early Middle Ages, the Church also “took the printing press into its own service, and it succeeded, in the course of a generation or two, in training up a school of literary defenders and apologists who . . . were able . . . to hold their own in controversy with the Protestant opponents of Rome.”⁹⁶

While the printing patents were important, they were far from the copyright we have today. As Professor Birrell pointed out, “[p]rinting by itself was not the mother of author’s copyright,”⁹⁷ and the modern concept of copyright would not emerge until the eighteenth century.⁹⁸ The lack of a modern notion of copyright can be attributed to several reasons. First, there were still plenty of existing books for the printers to reproduce, and the stationers did not need to generate incentives for the creation of new works. As Bruce Bugbee noted in his discussion of the printing patents in the Venetian Republic, “The monopolies in their unalloyed form usually embodied an exclusive license to print or sell an entire class of books for a specified term. The question of rights of authorship was disregarded, generally the authors were long since dead.”⁹⁹ Indeed, “[w]hen . . . , after 1470 or so, the printers got to work to supply the demand in the universities, they found that the big text-books most in request and most easily saleable were not those of recent composition but the reputed standard works of the thirteenth and fourteenth centuries.”¹⁰⁰

Press, and to the very great decline in its business, the chief responsibility for such decline must rest with the Church for its persistent hostility to the smallest measure of freedom of the Press, and for its insistence upon restrictive measures of censorship which were absolutely incompatible with publishing activity and with literary production.

2 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 384.

96. 2 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 217-18.

97. BIRRELL, *supra* note 14, at 49.

98. See, e.g., Carla Hesse, *Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777-1793*, 30 REPRESENTATIONS 109 (1990); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455; Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author,'* 17 EIGHTEENTH-CENTURY STUD. 425 (1984). For an excellent collection of essays examining the concept of authorship, see generally THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE (Martha Woodmansee & Peter Jaszi eds., 1994).

99. BUGBEE, *supra* note 13, at 44; accord 2 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 407 (noting that “[f]rom the time of the invention of printing, about 1450, to the end of the fifteenth century, the works of living authors played practically no part in the German book-trade, and the question of commercial results for their writers did not call for consideration”). *But see id.* at 214 (noting that “there is record . . . of the publication before the close of the fifteenth century and early in the sixteenth, chiefly in Paris, of occasional volumes of original writings”).

100. GOLDSCHMIDT, *supra* note 44, at 23; see FEBVRE & MARTIN, *supra* note 8, at 249

Second, authors of the late fifteenth century were usually supported by wealthy patrons, like the monarchy, the nobility, and the Church.¹⁰¹ Copyright, therefore, was not necessary, as the patronage system provided the authors with the needed incentives to engage in the creative process.

Third, “printing presses were licensed and in the hands of a Guild,”¹⁰² and most authors could only “sell [their manuscripts] out . . . or to persuade the Crown to give [them] a grant of letters patent for a term of years.”¹⁰³ In England, for example, authors “were not eligible to hold copyright,” because they were not members of the Stationers’ Company.¹⁰⁴ Nevertheless, as the late Ray Patterson pointed out, “[t]he relationship between authors and the stationers [in England] existed on a much more complex and sophisticated level over too long a period of time . . . [and] there [were] recorded occasions of the grant of copyright to the author for his own works.”¹⁰⁵

Finally, although a concept of individual authorship might have existed in the Middle Ages,¹⁰⁶ that concept was very different from the proprietary notion of authorship we have today or the one that existed in Rome during the Classical period. As Ernst Goldschmidt pointed out, “[t]o the medieval

(noting that “the immediate effect of printing was merely to further increase the circulation of those works which had already enjoyed success in manuscript”); David, *supra* note 79, at 51 (noting that “[t]he question of rights of authorship was largely disregarded because much of the demand was for extant works (such as the Bible) that were in the public domain and whose authors, even when identified, were long since dead”).

101. See Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 733-34 (2005) (discussing the aristocratic patronage model used to support the creation of musical compositions); see also VerSteeg, *supra* note 15, at 530-31 (noting that ancient authors “were funded by wealthy patrons or worked on municipal projects funded by governments” and therefore “had no need to seek a financial reward through making multiple copies of their works”).

102. BIRRELL, *supra* note 14, at 74.

103. *Id.*

104. PATTERSON, *supra* note 49, at 5. Cf. MARTHA WOODMANSEE, *THE AUTHOR, ART, AND THE MARKET: REREADING THE HISTORY OF AESTHETICS* 45 (1994) (“The only legal institution available to publishers in eighteenth-century Germany was the privilege. . . . [It] had as its intent not the recognition of the rights of authors, but the protection of printers.”).

105. PATTERSON, *supra* note 49, at 65; see also ROSE, *supra* note 7, at 10 (noting that “[m]ost privileges were issued to printers, but some were issued to authors and others to translators or editors”).

106. As Mary Carruthers explained, “[i]n considering medieval views of textual authority, one needs always to keep in mind that *auctores* were, first of all, texts, not people.” MARY J. CARRUTHERS, *THE BOOK OF MEMORY: A STUDY OF MEMORY IN MEDIEVAL CULTURE* 190 (1990). But see A.J. MINNIS, *MEDIEVAL THEORY OF AUTHORSHIP: SCHOLASTIC LITERARY ATTITUDES IN THE LATER MIDDLE AGES* (1984) (discussing the growing attention on the human qualities of the *auctor* in the late middle ages and the shift of focus from the divine *auctor* to the human *auctor*).

scholar the question: Who wrote this book? would not necessarily or even primarily mean: Who composed this book? It might convey that the inquiry was for the identity of the scribe not of the author."¹⁰⁷ The question meant literally who *wrote* this book.

To be certain, highly-prized manuscripts "were carefully guarded as valuable property by the monastery itself [However, t]he property was the particular manuscript and not the form of ideas it contained."¹⁰⁸ In fact, regulations prohibited manuscript dealers from "refus[ing] to loan a copy for hire to a member of the university even though the purpose of the member was the producing of copies."¹⁰⁹ The existence of a large number of scribes copying books every day¹¹⁰ and the fact that the majority of the reading public continued to memorize texts by heart¹¹¹ also had made it difficult for a new property right in literary works to emerge.

IV. FOUR LESSONS ON INTERMEDIARIES

Although the emergence of the printing press did not directly result in the creation of modern copyright, it planted the seed for an exclusive right to publish. It also illustrated how new legal rights, or privileges, were created as a response to the emergence of new reproduction technologies.¹¹² Indeed, the encounter with the printing press of the Church, the medieval scribes, and the Venetian printers provides some interesting insights into our current policy responses to the "digital dilemma" created by the Internet and new communications technologies.¹¹³

107. GOLDSCHMIDT, *supra* note 44, at 97.

108. Masterson, *supra* note 14, at 624; *see also* BUGBEE, *supra* note 13, at 13 (stating that "[p]ermission to transcribe a well-authenticated manuscript could be granted or withheld by its owner, but this was not true copyright in the modern sense" (footnote omitted)).

109. Masterson, *supra* note 14, at 624-25. It is, therefore, no surprise that one commentator suggested that "some of the regulations of the universities were of such a character as to destroy the author's rights in an original work." *Id.* at 624.

110. As Professor Birrell observed, "[w]ith ten thousand copyists at work in Paris and New Orleans [sic] alone, 'si l'on en croit Villaret,' the exclusive rights of living writers, if such rights existed, must have been infringed by the busy pens of the transcribers." BIRRELL, *supra* note 14, at 48.

111. *Cf.* PUTNAM, AUTHORS AND THEIR PUBLIC, *supra* note 11, at 107 (suggesting "[the] exceptional development of the power of memory [among the Greeks] . . . may properly be credited with some influence upon the slowness of the growth among the ancients of any idea of property in an intellectual production").

112. *See* MAY & SELL, *supra* note 14, at 70 (noting that, "[i]n Venice, the invention of something akin to modern intellectual property was in part a response to a new revolutionary information technology").

113. *See* DIGITAL DILEMMA, *supra* note 2.

A. Lesson One

As history has shown, printing patents were not instituted to protect an obsolete industry. Rather, they were granted to protect those who were quick to adapt and invest in the new technology. Just like the dot-com crash at the turn of this century, some printers in the late fifteenth century were unsuccessful in making the change and lost a considerable amount of capital.¹¹⁴ While Peter Schoeffer, a former scribe, took up printing and founded a printing industry, Vespasiano da Bisticci, “the most noteworthy of all manuscript bookdealers,” closed his bookshop.¹¹⁵ Even the monks had to make a transition; the “Brothers of common life” (*clerici de vita communi*), for example, were among those who “ma[d]e very prompt and intelligent utilisation of the new invention of printing . . . [and they successfully established] the earlier printing offices . . . in Germany and in the Low Countries.”¹¹⁶

One may wonder why most scribes did not seek legal protection to fight against extinction, but chose adaptation instead. There were several plausible reasons. First, as explained above, the scribes did not go out of extinction quickly. Indeed, the sale of manuscripts continued to flourish for at least a generation or two, and scribal publications continued to exist until at least the seventeenth century.¹¹⁷ The pace of change, therefore, was much slower, and

114. MAY & SELL, *supra* note 14, at 57 (noting that “the extensive Venetian publishing industry [in the late fifteenth and early sixteenth centuries] oscillated between boom and bust”). Indeed, as Elizabeth Eisenstein observed, “[t]he cluster of printing houses in Venice is reminiscent of what happened to ‘Silicon Valley’—not least because so many ‘startups’ (like recent ‘dot-coms’) rapidly went bankrupt and closed down.” EISENSTEIN, *supra* note 45, at 337.

115. EISENSTEIN, *supra* note 45, at 319-20; *see also* 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 341 (noting that Vespasiano da Bisticci “was the largest dealer in manuscripts of his time”). It is, nevertheless, important to note that he died in 1498, when printing was still in its early days. *Id.* at 342.

116. 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 90; *see also id.* at 88 (describing the “Brothers of common life”).

117. *See, e.g.*, MAY & SELL, *supra* note 14, at 88 (noting that “during the seventeenth century the (relatively) large-scale scribal copying of manuscripts remained another way for authors to ‘publish’ their work”); HAROLD LOVE, SCRIBAL PUBLICATION IN SEVENTEENTH-CENTURY ENGLAND (1993) (discussing the existence of various forms of scribal publications in seventeenth-century England, including verse miscellanies, parliamentary compilations, and consort music for viols); Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 931 n.135 (2005) (noting that “[m]usic publishers faced competition from ‘scribal’ publishers—human copyists—well into the nineteenth century”).

the transitional period was far longer than what the entertainment industry is currently experiencing.¹¹⁸

Second, the high prices of printed books might have segmented the market, to the point that there was only minimal competition between handwritten manuscripts and printed books, at least before the price of the printed books fell below that of handwritten manuscripts. Indeed, “[t]he earlier books issued from the presses were planned to meet the requirements of th[e] higher class collectors, whose taste had been formed from beautiful manuscripts.”¹¹⁹ Around the 1490s, however, “a demand had arisen for cheap books for popular reading,” and the second generation of printers took advantage of this opportunity by reducing the quality of printing and, therefore, book prices to meet the needs of the growing market.¹²⁰ Although manuscripts became a high-priced collector’s item, as a result of the deterioration of the quality of their competitors, their markets were displaced by printed books, and the scribal industry declined as a result.

Third, while the printing technology was no doubt revolutionary, the fifteenth-century contemporaries, in retrospect, might not have seen the threat created by this new technology. As Professor Birrell observed, many of them saw the new technology as “nothing more than a clever labour-saving device for multiplying copies more quickly and cheaply than by hand”¹²¹—something similar to the use of dictation or tracing paper perhaps.¹²² The inability to foresee the revolutionary impact of the printing press also helped explain why the Church had initially welcomed printers and their technology, only to regret it later on.

Finally, even if the scribes had considered the printing press a fatal threat, as mere laborers they were unlikely to have the needed political power to challenge the printers and the stationers. The lack of political power was particularly important in an environment when legal protection was granted

118. Cf. Yu, *P2P and the Future of Private Copying*, *supra* note 101, at 746 (noting that “[c]omputers, digital technology, and file-sharing networks are disrupting the existing distribution model, threatening to permanently eliminate hundreds of thousands of jobs”).

119. 1 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 414.

120. *See id.*

121. BIRRELL, *supra* note 14, at 48. Cf. Masterson, *supra* note 14, at 625 (reminding readers that “the practice of the new art of printing was not a change in kind but only a change in degree”).

122. 1 PUTNAM, *BOOKS AND THEIR MAKERS*, *supra* note 14, at 66 (noting that “[i]n the later Middle Ages, . . . there is evidence of writing at dictation, and this practice began to obtain more generally as the results of the work of the scribes came to have commercial value”); MAY & SELL, *supra* note 14, at 56 (discussing the use of tracing paper to generate multiple copies from a single illustration).

primarily through petitions for privileges.¹²³ A case in point was the failed attempt by Genoa scribes to drive out competition from the printers.¹²⁴ Their petition to the Senate to expel the new players and their emerging trade was quickly denied, and the new technology was met with “a cordial reception” from the Senate and the “active support of the government.”¹²⁵

B. Lesson Two

There are many different intermediaries in the production or distribution chain, and these intermediaries come and go as a result of technological innovation. For example, as John Feather pointed out:

The chain of book dissemination in its simplest forms is as follows:

Authors → Publisher → Bookseller → Reader.

In practice, however, it was far more complicated. Between author and publisher there may have been a patron, editor, or reader, exercising great influence. Between publisher and bookseller there were the printer and binder, and the manufacturers and suppliers of their materials, as well as many different levels of bookseller from the wholesaler to street trader. Between bookseller and reader there were other intermediaries, such as the reviewer or librarian. By the eighteenth century, the chain of book supply had become highly complex.¹²⁶

Moreover, the importance of intermediaries changes over time. For instance, printers, with their unique access to limited technical facilities, were very important in the fifteenth and sixteenth centuries.¹²⁷ In the late sixteenth century, however, they “started to lose influence to copy-holding booksellers.”¹²⁸ By the seventeenth century, they became “merely the agent[s] of the publisher[s],” who had since become “the central figure[s] in the book trade” by virtue of their ability to select, organize, and finance the

123. “Before the period of general legislation, the practice had . . . been arrived at by securing, first from the College, and later from the Senate, privileges, taking the shape either of monopolies or of copyrights, while for the *imprimatur* or authority to print, application was made to the Council of Ten.” 2 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 358.

124. 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 413.

125. *Id.*

126. John Feather, *The Commerce of Letters: The Study of the Eighteenth-Century Book Trade*, 17 EIGHTEENTH-CENTURY STUD. 405, 406-07 (1984) (footnotes omitted); *see also* 1 PUTNAM, BOOKS AND THEIR MAKERS, *supra* note 14, at 201 (noting that “[t]he ‘book-trade’ was held to include all the dealers and artisans who were concerned with the production and distribution of manuscripts; that is, the copyists and their employers, the binders, the illuminators, the sellers of parchment, and, later, the manufacturers of paper”).

127. Feather, *supra* note 126, at 409.

128. MAY & SELL, *supra* note 14, at 90.

manufacture of books.¹²⁹ As intermediaries continue to emerge, adapt, and disappear in the dynamic business environment, the need to protect a particular group, or groups, of middlemen from obsolescence has become highly suspect.

Consider, for example, the challenges created by digital intermediaries today. Through online distribution and peer-to-peer technologies, consumers can now freely transmit information without the intervention of a third party. Although many intermediaries have become redundant as a result, some have managed to survive. In fact, the scarcity of time¹³⁰ and the substantial investment needed for a content producer to create a new distribution service have rendered some of these surviving intermediaries even more important than before. Meanwhile, other intermediaries have quickly adapted to the new technological environment, regaining footholds in the market while taking advantage of new revenue-generating opportunities. In response to the changing lifestyle, new players and technologies also have emerged to provide value-added services that assist customers in navigating, contextualizing, filtering, decoding, customizing, and authenticating information.¹³¹

129. Feather, *supra* note 126, at 409.

130. See J.M. Balkin, *Media Filters, the V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1148 (1996) (“All communications media produce too much information. So in that sense, all media have a problem of scarcity. But the scarcity is not a scarcity of bandwidth. It is a scarcity of audience.”); Monroe E. Price, *The Newness of New Technology*, 22 CARDOZO L. REV. 1885, 1911 (2001) (noting that “[i]nformation overproduction creates a problem not merely of unwanted offensiveness greeting an Internet user, but also of unwanted irrelevance”).

131. As Stefaan Verhulst wrote:

The abundance of content has led to a call for and the creation of new types of mediation and hence new intermediaries that can:

- search and navigate in the wealth of information for the right match of information needed;
- warn or even filter and block information that is unwanted or considered harmful;
- contextualize or give information about information through so-called metadata;
- integrate and decode different streams of information;
- customize the reception and consumption of services and information; and
- verify or authenticate the source, the user, and whether payment has been received.

Stefaan G. Verhulst, *About Scarcities and Intermediaries: The Regulatory Paradigm Shift of Digital Content Reviewed*, in HANDBOOK OF NEW MEDIA: SOCIAL SHAPING AND CONSEQUENCES OF ICTS 432, 443 (Leah A. Lievrouw & Sonia Livingstone eds., 2002); see also Charles Firestone, *Digital Culture and Civil Society: A New Role for Intermediaries?*, INTERMEDIA, Dec. 1994-Jan. 1995, at 26 (discussing the evolving role of intermediaries); Mitra Barun Sarkar et al., *Intermediaries and Cybermediaries: A Continuing Role for Mediating Players in the Electronic Marketplace*, 1 J. COMPUTER-MEDIATED COMM. (1995), <http://jcmc.indiana.edu/vol1/issue3/sarkar.html> (contending that “not only is it likely that widely available information

Notwithstanding the dynamic nature of the transitional process and the continuous interactive cycles of mediation, disintermediation, and reintermediation,¹³² the need for stronger copyright has become a rallying cry for the content industries. For the past three centuries, they have repeatedly complained about how their markets would be destroyed by such new reproduction technologies and distribution practices as the lending libraries, photocopying machines, and digital reproduction technologies.¹³³ In a widely-cited and very memorable quote, the long-time movie industry lobbyist Jack Valenti, for example, testified before Congress that the videocassette recorder was “to the American film producer and the American public as the Boston strangler [was] to the woman home alone.”¹³⁴ However, in each and every time, the technology never arrived as the Boston strangler Valenti described; rather, it came with new revenue and opportunities that eventually transformed the woman.

Although copyright holders are reluctant to admit it, the Internet and new communications technologies could be just another incarnation of this Boston strangler who will transform the woman once again. The competition between the content industries and the digital intermediaries may not be a zero-sum game, as the industries have perceived.¹³⁵ With an appropriate copyright policy, suitable business structures, and effective management tools, the two groups of players may be able to work together to create synergy and to develop mutually-beneficial solutions.¹³⁶ Moreover, as the United States Court of Appeals for the Ninth Circuit has acknowledged in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*:

The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often

infrastructures will reinforce the position of traditional intermediaries, but that networks will also promote the growth of a new generation of intermediaries”).

132. One could even make an argument for a process of creative disintermediation à la Joseph Schumpeter, if the new intermediaries emerge at the same time as the old intermediaries become obsolete. See generally JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 81-86 (Harper Collins 1975) (describing the process of creative destruction).

133. See DIGITAL DILEMMA, *supra* note 2, at 78-79.

134. *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4784, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong.* (1982) (statement of Jack Valenti, former president of the MPAA).

135. Thanks to Michael Carroll for highlighting this point.

136. See generally Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can Learn from Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569 (2002) (advocating the nonzero-sum resolution of intellectual property disputes).

provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player.¹³⁷

C. Lesson Three

Societal attitudes toward copying depend largely on the society's need for access to information and knowledge. In the Classical period, there is sufficient evidence to suggest that rewards for authorship might have existed in Rome and that there was a strong aversion to literary theft among the Greek and Roman authors.¹³⁸ The attitudes toward copying, however, changed in the Middle Ages. Since the tenth century, "[t]he tendency of writers . . . ha[d] been to devote their energies to commentaries on the ancient works, and to analyses and interpretations of these rather than to original production."¹³⁹ Instead of creating rewards to facilitate an emerging book trade, the preservation and dissemination of knowledge became very important—to the point that copying was considered socially acceptable, or even necessary. As one commentator explained:

This fine art of taking another man's ideas and claiming them as one's own is an example of the different attitude that existed in the Middle Ages as compared not only with today, but with the Classical period that preceded it. Medieval writers felt that all the literature that existed in their time was a fund of man's knowledge, rather than belonging to its individual authors. A writer would borrow from a past work without care or concern in crediting its author—even if he knew who it was—and would then, often, not consider it important to sign his own work. Thus the difficulty modern scholars have in establishing who wrote what. In the Roman era such a concept would have been inconceivable. In the legal terminology of the Empire, the heinous crime of man-stealing was known as *plagium* *Plagium*, of course, became *plagiare* in French, and thus, in English, *plagiarism*, and did not again become a crime until after the Middle Ages had passed.¹⁴⁰

137. 380 F.3d 1154, 1167 (9th Cir. 2004), *vacated and remanded*, 125 S. Ct. 2764 (2005).

138. See discussion *supra* notes 15-19 and accompanying text.

139. PUTNAM, *AUTHORS AND THEIR PUBLIC*, *supra* note 11, at 36.

140. DROGIN, *supra* note 25, at 18-19 (footnote omitted); see also BUGBEE, *supra* note 13, at 13 (noting that "the first-century (A.D.) Roman epigrammatist Martial . . . is credited with the first use of the term *plagium*, which had previously denoted kidnapping or man-stealing, to include literary piracy, and from this originated the word 'plagiarize'"); PUTNAM, *AUTHORS AND THEIR PUBLIC*, *supra* note 11, at 202-03 (discussing the application of the term *plagium* to literary theft in the Roman era). One can even trace the concept of plagiarism back to the Greeks. See *id.* at 68 (noting that the Greek authors "began at an early date . . . to raise questions with each other on the score of plagiarisms, and to be jealous of retaining undisturbed the full literary prestige to which they might be entitled").

In fact, as medieval scholars have pointed out, “no studious monk abroad failed to carry his own *enchiridion* (notebook) in which to jot down as much as he could of interest from every new book he found in his travels and which he could not afford to purchase.”¹⁴¹ In addition, “many volumes in the medieval libraries were composite miscellanea comprising quaternions written by various scribes and assembled by the librarians. . . . [T]here [also] existed and still exist composite volumes which in origin and essence were nothing but the ‘collectanea’ found in a deceased author’s study and bound up for preservation.”¹⁴²

Today, the Internet and new technologies have created an immense potential for the dissemination of information and knowledge. The arrival of these technologies has enabled us to build digital libraries and archives, to develop Internet-based distance-learning programs, and to promote real-time access of scientists and researchers to sophisticated online computer databases of technical information.¹⁴³ Indeed, the importance of access to information and knowledge was recently underscored by the World Summit on the Information Society¹⁴⁴ and the Access to Knowledge Campaign.¹⁴⁵

In light of this immense potential, one has to wonder whether societal attitudes (and legal policies) toward copying need to be changed again, just as Roman attitudes evolved into those espoused in the Middle Ages. Should society modify its attitudes toward copying based on its heightened ability to disseminate information and knowledge? Should it do so based on its need to preserve information and knowledge (especially in light of the “one-way ratchet” of intellectual property protection)?¹⁴⁶ Or should it do so *only* if it can ensure that individual authors receive their well-deserved rewards for creation?

141. DROGIN, *supra* note 25, at 7.

142. GOLDSCHMIDT, *supra* note 44, at 100.

143. COMM’N ON INTELLECTUAL PROP. RIGHTS, INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS 100 (2003).

144. See World Summit on the Information Society [WSIS], WSIS Declaration of Principles (Dec. 12, 2003), available at http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0004!!PDF-E.pdf; WSIS, WSIS Plan of Action (Dec. 12, 2003), available at http://www.itu.int/dms_pub/itu-s/md/03/wsis/doc/S03-WSIS-DOC-0005!!PDF-E.pdf.

145. Consumer Project on Technology, Access to Knowledge, <http://www.cptech.org/a2k/> (last visited Feb. 15, 2006).

146. Rochelle Cooper Dreyfuss, *TRIPS—Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21, 22 (2004); see LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* (2004); Boyle, *supra* note 7. But see Robert P. Merges, *A New Dynamism in the Public Domain*, 71 U. CHI. L. REV. 183 (2004) (highlighting public actions taken to invigorate the public domain).

Meanwhile, from the standpoint of the authors and the rights holders, are those making unauthorized reproduction or adaptation of copyrighted works the new barbarians? Should the copyright system be modified, as a result, to protect against this barbarian invasion (just like what the Church and its monks did when they copied and preserved the ancient works)?¹⁴⁷ After all, as Adrian Johns pointed out, “unauthorized printing threatened to ‘unauthorize’ authors themselves. Even more important, it threatened the credibility to be attributed to their ideas. Like print itself, piracy . . . had *epistemic* as well as *economic* implications; it affected the structure and content of knowledge.”¹⁴⁸ One, therefore, cannot overlook the impact of unauthorized reproduction and re-creation on the integrity of the works and the stability of meaning in cultural texts, even if we ignore moral rights and the authors’ reputation.¹⁴⁹

D. Lesson Four

The copying practice in Medieval Europe was actually quite similar to the practice in Confucian China, and perhaps in other East Asian civilizations during the contemporary period. William Alford titled his seminal work on intellectual property protection in China with an old Chinese saying, “To steal a book is an elegant offense.”¹⁵⁰ Influenced heavily by Confucianism, the Chinese believed that copying was an important living process through which people acquired understanding to guide their behavior, to improve themselves through self-cultivation, and to transmit knowledge to the posterity.¹⁵¹ Thus,

147. Thanks to Robin Malloy for asking this very interesting question.

148. JOHNS, *supra* note 55, at 33.

149. See generally Justin Hughes, “Recoding” *Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999) (exploring situations in which “the utility derived by passive non-owners from the stability of propertized cultural objects [may be] greater than the utility that would accrue to non-owners who want to recode cultural objects so much that those non-owners need to be freed from existing legal constraints”).

150. WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* (1995).

151. As I described elsewhere:

The Chinese believed that “the essence of human understanding had long since been discerned by those who had gone before and, in particular, by the sage rulers collectively referred to as the Ancients who lived in a distant, idealized ‘golden age.’” Subsequent generations thus have to interact thoroughly with the past in order to acquire this understanding to guide their behavior, to improve through self-cultivation, and to transmit such knowledge to the posterity.

Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U. L. REV. 131, 224 n.459 (2000) (quoting ALFORD, *supra* note 150, at 25).

at a very young age, they were taught to “memorize[] vast sequences of the classics and histories.”¹⁵² By the time they grew up, the sources they memorized became their universal language,¹⁵³ and they were able to “construct[] their own works by extensive cut-and-paste replication of phrases and passages from those sources.”¹⁵⁴

Interestingly, medieval monks were known to have committed similar “elegant offenses”—indeed, with the same motivation as that of the Confucianists.¹⁵⁵ The monks were also taught to memorize texts.¹⁵⁶ As a twelfth-century sermon declares, “Let us consider then how we may become scribes of the Lord. The parchment on which we write for Him is a pure conscience, whereon all our good works are noted by the pen of memory.”¹⁵⁷ In addition, like the contemporary Chinese, medieval scholars valued compilation more than composition. As Ernst Goldschmidt observed:

They valued extant old books more highly than any recent elucubrations and they put the work of the scribe and the copyist above that of the author. The real task of the scholar in their view was not the vain excogitation of novelties but the discovery of great old books, their multiplication and the placing of copies where they would be accessible to future generations of readers. Intellectual pride and vanity, boastfulness of great learning acquired, these were vices rare in the early centuries and bred only in the competitive environment of the universities.¹⁵⁸

152. JOHN KING FAIRBANK & MERLE GOLDMAN, *CHINA: A NEW HISTORY* 101 (1998).

153. See ALFORD, *supra* note 150, at 26 (noting that allusion and reference to the classics and histories constituted “a sophisticated cultural shorthand” that was potentially accessible throughout the Sinicized world); JOSEPH R. LEVENSON, *CONFUCIAN CHINA AND ITS MODERN FATE: A TRILOGY* xvii (1965) (noting that citation to the classics “was the very method of universal speech”).

154. FAIRBANK & GOLDMAN, *supra* note 152, at 101.

155. DROGIN, *supra* note 25, at 6-7 (noting that “[s]ome monks who left their communities on pilgrimage and were given hospitality at a distant monastery are known to have stolen a book they found there; the gaining of knowledge for their own community was more worthy than the crime was sinful” (footnote omitted)).

156. As Mary Carruthers noted:

Medieval culture remained profoundly memorial in nature, despite the increased use and availability of books for reasons other than simple technological convenience. The primary factor in its conservation lies in the identification of memory with the formation of moral virtues. Writing . . . was always thought to be a memory aid, not a substitute for it. Children learned to write as a part of reading/memorizing, inscribing their memories in the act of inscribing their tablets.

CARRUTHERS, *supra* note 106, at 156; see also PUTNAM, *AUTHORS AND THEIR PUBLIC*, *supra* note 11, at 106 (noting that “[t]he [Greek] boys in school were given as their daily task the memorizing of the works of the poets, and what was begun under compulsion appears to have been continued in later life as a pleasure”).

157. CARRUTHERS, *supra* note 106, at 156.

158. GOLDSCHMIDT, *supra* note 44, at 112.

Given the similarities between the Confucian Chinese and medieval Europeans, one has to question, as Professor Alford did, why intellectual property laws took root in Europe but not in East Asia?¹⁵⁹ After all, the Chinese mastered movable-type printing centuries before the advent of the printing press,¹⁶⁰ and books were no less available in China than in Europe. Moreover, if modern copyright existed in our civilization for only a few centuries out of millennia of development, how strong would the justifications for copyright be? Is copyright as self-evident as its proponents have claimed? Would copyright represent universal values? Could it withstand the test of time? And what would be its role in promoting creativity?

CONCLUSION

Although this Essay captures only some of the developments in the wake of the emergence of the printing press, these developments provide important insights into our current debate concerning the challenge created by the Internet and new communications technologies. While history may not tell us which intermediaries will survive, or what new players will emerge, it provokes us to ask important questions about how we could effectively respond to the challenges confronting existing intermediaries. For that reason, the story of the printing press may tell us about more than just the monks, the medieval scribes, and the middlemen, not to mention that monks have remained active in collecting, reproducing, and disseminating information in the digital world today.¹⁶¹

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On April 8-9, 2005, the Intellectual Property & Communications Law Program at Michigan State University College of Law, the James H. and Mary B. Quello Center for Telecommunication Management & Law in the College of Communication Arts & Sciences at Michigan State University, and the

159. ALFORD, *supra* note 150.

160. See PUTNAM, *AUTHORS AND THEIR PUBLIC*, *supra* note 11, at 29 (noting that books printed by movable type printing “were turned out towards the close of the tenth century A.D., or early in the eleventh century, more than three centuries before the presses of Gutenberg began their work in Mayence”).

161. Electronic Scriptorium is a provider of archives conversion and digitization services that works closely with communities of monks and nuns. The website of Electronic Scriptorium is available at <http://www.electronicSCRIPTORIUM.com/>. nextScribe was founded to conduct the research and development needed to advance the objectives of a strategic Internet plan for the Vatican. The website of nextScribe is available at <http://www.nextscribe.org/background.html>. Thanks to Susan Scafidi (and her “esteemed colleague”) for sharing these sites with the Author.

Michigan State Law Review co-organized a two-day conference entitled “W(h)ither the Middleman: The Role and Future of Intermediaries in the Information Age.” To help us understand the role and future of intermediaries in the information age and the many related legal, social, economic, and cultural issues, this conference brought together intellectual property scholars, communications policy experts, economists, political scientists, information specialists, and policymakers. This symposium issue collects some of the papers presented at the conference, the Second Annual Lecture in Intellectual Property and Communications Law presented by Professor Lawrence Lessig, as well as others that are relevant to the conference topic. I hope you will enjoy them.

