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Wrestling with the 1909 Copyright Act in Theory and Practices

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I. Introduction:

For the last two years, I have been working on current projects that have both involved an entangled relationship with the 1909 Copyright Act. One is a theoretical piece (co-authored with W. Ron Gard)[2] and the other is a software tool specifically addressing the intricacies of the 1909 Copyright Act within the context of copyright duration.[3] Both projects have presented great struggles—neither has been easier. In trying to understand the struggle itself, I think I have found another layer to the inquiry—the *why* has revealed perhaps a greater understanding of a nearly impenetrable past. This essay will briefly describe the two projects themselves and the struggles with each of them, and suggest how these struggles are indicative of the act itself, perhaps, and may help us to understand our own relationship to the Act as well as the 1976 Copyright Act.

The struggle with the 1909 Copyright Act did not begin with these two projects. My first foray into the 1909 Copyright Act came when I was writing about Section 303(a) and the transformation of common law copyright under the 1909 Copyright to federal statutory protection under the 1976 Copyright Act (through Section 301).[4] I soon discovered the problem of the dividing line of publication, and how the entire 20th century had struggled to integrate new technologies—that did not necessary have physical copies for sale—into the judge-made categories of general and limited publication. The 1909 Copyright Act itself did not address definitions of publication—its absence created a whole set of cases that sought to address this lack. By the end of the century, the Copyright Office and many others seemed to be fed up with the chaos. And so, the story goes , the dividing line between published and unpublished was no longer workable, giving one more reason to join a Berne-like system where published and unpublished works were protected by the federal system. My early work looked at this transition. This might be seen as the flirting stage—I saw others frustrated by the act, but I had not experienced the small annoyances, the indecision and the emotional complexity from inside. I still found the 1909 Act intriguing. I now see that point in our relationship as the bait. Why, I

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[1] Associate Professor, Tulane University Law School.

[2] Martin Eden's Modernist Anxieties: A Socio-Literary Reading of the Copyright Act(s), co-authored with W. Ron Gard, *Modernism and Copyright*, edited by Paul Saint-Amour, Oxford University Press (forthcoming)

[3] The *Durationator* software is still in the construction and testing phase. It will be available at www.durationator.com (a version is available now). We are looking for partners in testing for the late Spring and throughout the summer. The work is supported by a Tulane Research Enhancement Grant.

[4] Elizabeth Townsend Gard, *Unpublished Work and the Public Domain: The Opening of a New Frontier*, 54 J. Copyright Society of the U.S.A. (Winter 2007), and Elizabeth Townsend Gard, *The Birth of the Unpublished Public Domain and the International Implications*, 24 Cardozo Arts & Ent. L.J. (2006).

wondered, had so many been so unhappy about its published/unpublished problems? Every act has its own quirks—but at least now, under the 1976 Act published and unpublished were united (eventually) under one rubric. Or, so I thought. But the 1909 Copyright Act turns out to be extremely complicated—with its own ways of thinking and differentiating, and its own rationale. It is an early twentieth century document that we still must understand in the 21st century. We (my spouse, my research assistants) tackled the problem of understanding from both the practical and theoretical realm. I came away with two main concepts: the 1909 Act really only describes a way "in" to a system, and we must now contemplate and devise the path out, and circulation, rather than publication (or even fixation later) might have produced better and less frustrating results, but might, even today, help us better sort out the published/unpublished distinctions still haunting our present—that circulation in the end might have been the concept at the heart of the 1909 Act. This essay looks at both the practice and theory side of the 1909 Copyright Act.

II. 1909 in Practice, or the making of the Durationator software

For the last two years, I have been engaged in trying to answer one simple question: when does a pre-1978 work come into the public domain? We have nearly completed a software program that addresses the complexity of that question, but not without battle scars. The research necessary for the Durationator was formidable, sometimes with questions that remain unanswerable. Penetrating the psyche of the 1909 Copyright Act proved, in some ways, the key to unlocking its mysteries. I think that moment came only a few months ago when I was sorting out the category of maps. But before I can tell you that story, I have to tell you this story…[5]

I spent a good deal of my time in the basement of the New Orleans Public Library, trying to find proof of a usable past.[6] I felt like an archeologist, like Indiana Jones, on a quest for the existence of the public domain.[7] The reference librarian on duty writes me an improvised "pass" on a piece of scrap paper, and I descend behind-the-scenes, where everything thirty-minutes the lights turn off, marking the time I have been looking through the Catalog of Copyright Entries, the Copyright Office's official records of registrations and renewals. Currently, these out-of-the-way, dusty records are often the only way to determine which works, written long ago, are now in the public domain or still under copyright.[8] Strange that these records—clearly rarely used—hold part of the illusive key to our public domain. Why is it nearly impossible to find a usable past? This is the story of the struggle in determining the copyright status of any given work—a

[5] A reference, of course, to Dav Pilkey's Super Diaper Baby (2002).

[6] Tulane University's copy of the Catalog of Copyright Entries, the Copyright Office's official government record of registration and renewals, was destroyed as a result of flooding from Katrina. A set of the CCE remained unscathed in the basement of the New Orleans Public Library. Eventually, the NOPL graciously loaned Tulane Law School their entire set of CCE records, to which I am very grateful. Thank you to Lance Query, Kimberley Glorioso, Carla Prichett, and Tony ___ for arranging the loan of this collection, and of course Todd Stamps and his staff that helped us move the large collection.

[7] Scholars have debated just what is included in the public domain.

[8] The records for Class A books are available online from a number of sources, including the Stanford Renewal Database available at http://collections.stanford.edu/copyrightrenewals/bin/page?forward=home (last visited March 19, 2009). Google, with the help of Project Gutenberg, made these records available as an XML file, which we have incorporated into our *Durationator* copyright term software tool. For more, see We also found copies of the registration records for motion pictures—available at the Internet Archive. Everything else—art, musical compositions, movie renewals, commercial prints, maps, photographs, lectures, dramas, sermons, and periodicals—all of these records were not available online—only through a search of the original records.

struggle that physically begins with searching the records in the basement of the NOPL, but quickly turned to the law itself. The struggle to locate the public domain should not be, for the records are merely symptomatic of the illness: the law itself often creates just as much a near impossible question in its own right.

When a work comes into the public domain is a fundamental, foundational question within copyright law. The 10th circuit recently called the movement of a work from copyrighted to the public domain as a bedrock principle of copyright law.[9] U.S. Copyright law(s)—and copyright around the world—are based on the concept of a bargain, where the government gives statutory protection for a limited time in exchange for the work becoming part of the public domain at the expiration of that "limited Times."[10] Once this occurs, the work is now "free as the air to common use."[11] That is, a scholar, artist, filmmaker, or anyone else is free to use as much or in whatever manner they wish to use of the public domain as they see fit—no restrictions, no permissions, no limitations on the amount used (as in fair use). The question becomes—when does this occur? When does any given work come into the public domain? Current copyright has not made that very easy to determine, as the case studies in this paper will demonstrate.

The public domain has been well discussed and theorized by many scholars. Mapping, advocating, and protecting the spaces of the public domain are important in defining, preserving and ensuring the survival of the public domain. This paper argues that we must also actually *locate* the works that have become part of the public domain. The *Durationator* hopes to help in the process of locating in the legal context.

What aspects of the law creates hurdles to a usable past? First, the domestic law itself is very detailed, confusing, complicated, and sometimes contradictory. Second the copyright records needed to determine a fact-specific inquiry are often inaccessible and also incredibly complex in their organization. Third, treaties and implementing legislation has altered the manner in which we approach questions on the copyright status of foreign works, and so require a new thinking-through of how to get to the answer of which foreign works are in the public domain, and in what instances can one rely on the previous public domain status of the work. Fourth, the situations in which potential copyrighted or public domain works are being used—namely placed on the Internet—pose additional choice of law and extraterritorial questions that are not easily answered. Fifth, the law regarding public domain derivative works and underlying original works still under copyright is maddening at best.

The outcome of these questions, however, is not only a paper. The answer to the question—when is any given work in the public domain--has taken years of research, along with dozens of research assistants, has ultimately led to the creation of a software tool we call the *Durationator*.[12] In creating the *Durationator*, a legal information software tool, we sought to

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[9] *Golan v. Gonzales*, 501 F.3d 1179 (10th. Cir. 2007).
[10] U.S. Constititution, I.8.8.
[11] INS dissent. This is an often quoted phrase, and has even been used in titles by IP scholars. See, for example, Benkler, Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain, 74 N.Y.U. Law Review 354 (1999)
[12] Team Durationator has included Matt Miller, Justin Levy, Jeff Pastorek, Benjamin Varadi, Stavros ___, Benjamin Feldman, Eric Arnold, Michael Aisen, Jessica DeNisi, and Wendy We have been generously funded by the Tulane University Research Enhancement Grant.

make more accessible the resources and law necessary for determining the copyright status of any work for use in the U.S. and around the world. The larger paper (the (Im)Possibilities of a Usable Past, currently in draft form) discusses the creation of the *Durationator*, and in particular looks at what legal questions had to be answered in order to create the flowchart behind the code, and in so doing, make the past usable once again.

For this paper, I would like to recount how the idea for the *Durationator* came into being. *Two* unsolicited emails occurred during the Summer of 2007. Someone emailed me to ask if they could set a Vera Brittain poem to music—that is, was an early 20th century poem by a British author in the public domain in the U.S.? This seemed a reasonable question. After all, I had done my doctoral work on Vera Brittain, and I had just written two pieces on unpublished works and copyright duration. I soon realized that the problem was very complicated, and required a good deal of research and analysis, thanks to *Twin Book*, republication in the 1930s and a reissue of the original 1918 in 1995 by the British Imperial War Museum.[13] But I also thought—I don't really want to have to remember all of these complex duration rules, case law and variables, especially notice for each class of work. Wouldn't it be nice to have a software program where one could input specific information about a work and get a detailed working through of the law—a way to put all of my research over the last few years into a usable form. The research behind the *Durationator* turned out to be quite complex, with many twists and turns as we sought to dislodge the many impediments to our quest. The point of the software was—to make this complex research accessible.

The second email came from Matt Miller, a rising 2L at the time, who was in search for a summer research assistant position. I told him of my idea—he had been a computer programmer before law school. He accepted the challenge, in his quiet confident style. He knew it could be done, and so together we set about to create a flowchart as a precursor to creating the software. Two years later, the flowchart and software has grown exponentially. Team Durationator has included dozens students, with about half a dozen taking distinct leadership roles. We found ourselves quickly expanding to the countries of the world—as a necessary step in determining U.S. copyright law, and we also found that the U.S. law itself was far more complex than we first imagined. Now, we have for just the U.S. law, over 163 Nodes (questions), 358 Edges (answers), and the possibility of 20,944 Unique Paths.

We engaged in a number of case studies as well to understand the kinds of questions and answers needed for the software. For example, we looked into the works of Gertrude Berg (1899-1966), an early pioneer in radio and television, who wrote a great deal, and is best known for her character Molly Goldberg, which appeared on the radio, on a number of television series, in films, and on Broadway. She also wrote an autobiography and a cookbook. If a scholar or a documentary filmmaker wanted to use some of her writings—or even use the episodes of the television shows, reenact the radio scripts or borrow from films themselves—how would they determine the copyright status of each work? All of Berg's works were written under the previous act, the 1909 Copyright Act, which was in effect through 1977, when it was replaced by the 1976 Copyright Act. In part, this is what makes the quest for the status of her works so difficult, for it is the combination of how the 1976 Copyright treats works created before 1978 and the 1909 Copyright itself that cause all the problems.

[13] More on this particular issue is discussed in my forthcoming paper, "Towards a Constitutionally Defined Public Domain," which does an in depth analysis of Section 104A. A draft is available from the author.

We found that the Berg quest was complicated—complicated by the structure of the 1909 Act's obsession with categories, complicated by the accessibility of the copyright office records (except in the case of books), and complicated by uncertainty of the practices of the specific industries themselves, which impacted upon the legal status of the work. We also found that our laws on the relationship between the original and derivative work further complicated an already messy situation.

The 1976 Copyright Act dramatically altered how we configure the duration of a copyrighted work, but left in place the scheme of calculation of works created before January 1, 1978—for both published and unpublished work. The 1909 Copyright, as well as the other copyright acts since the first in 1790, had been based on the date of publication of a work, or in some cases upon the registration of unpublished works that qualified for federal protection. The 1976 Copyright, adopting the Berne standard, dramatically shifted the thinking on how duration was calculated. What this means in a practical sense is that one must know the rules under the 1909 Act—quite precise, technical and specific to the kind of work (art, drama, photographs), but also apply more contemporary additions, such as copyright restoration of foreign works (and who counts as a foreign author). Happily, in the case of Berg, the foreign author question was the only one we did not have to answer—but it also showed us the inequities of a system that restored works to one set and not others, although we were not advocating restoration, of course. We saw the same mistakes being made by domestic and foreign authors alike, but with difficult outcomes in the 21st century.

A great part of our focus was trying to understand the classes of work—or categories under the 1909 Act. The 1909 Copyright Act was designed with specific kinds of works in mind—different groups spent a good deal of time lobbying for specific categories, believing this would make it easier to get specific additions and exceptions to newspapers or drama, for example.[14] The early discussion of what came to be the 1909 Act reveal very compartmentalized thinking. For example, the Photographers' Copyright League wants a separate category for photographs, although in 1905, they were still not quite sure *why* they needed a separate category.[15] Newspapers hoped that if they had a separate category, they would be able to have a short protective term, of say, like that in Tasmania, where the term of copyright "varies from forty hours to one hundred and twenty hours as the length of time when this shall be your property." (p. 21) Each industry saw themselves as distinct, with specific problems not related to the others. What developed was a highly differentiated system of categories with slight variations in the formalities required by law. These differences, however, had large consequences. For instance, if one registered a book with maps under the Map category, only the maps, and not the text was protected by copyright. The text came into the public domain upon publication. Each category had its own traps and requirements. We are left with this system now—to determine when a work met the requirements and when its term of protection ends—always the same length of term for each category (to the dismay of the newspaper people). As we got further into the project, our relationship with the categories altered—and we

[14] See the legislative history of the 1909 Act, **Stenographic Report on Conference on Copyright May 31-June 2 1905, volume 1**

began to see the patterns, paths, and requirements to determine the copyright status of a work changed.

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The category of pre-1978 published "books" turns out to be a rather simply inquiry, as long as the work was published in the U.S. and was written by a U.S. author. First, the law is rather straightforward: under the 1909 Act, a book must have had proper notice at the time of publication, and after the first initial term of 28 years, the work must have been renewed at the Copyright Office. Although registration was not mandatory, there was a deposit and manufacturing requirement. Therefore, to determine the copyright status of a book, one need to look to the renewal requirement, and then to notice. If the work had no renewal or notice, one then turned to confirm the work was indeed a general publication. Under the current law, if a pre-1978 book was renewed with proper notice, the term is 95 years from publication. Very simply, then, works published before 1923 are in the public domain. Works published between 1923 and 1963 require investigation into the renewal and notice status of a work. The renewal records for books are available—both at the *Durationator* software site—but also at Stanford Renewal Database and through a xml file at Google.

Books would be a simple case, had it not been for the URAA and the restoration of foreign works as of January 1, 1996. Let's say that one determines that a greeting card sold during 1934 in the UK had no copyright notice on the card itself—one can view the card and find no markings. Until 1996, the status of that greeting card was that it was in the public domain in the U.S. Now, the same greeting card has had its copyright reinstated *automatically*. The Stanford Renewal Database does not take this turn of events into account—it merely presents the renewal records for works published between 1923 and 1950—the dates where renewal was required. And now, with the District Court decision on remand in *Golan*, we may have a further differentiation—between reliance parties before and after restoration, making the analysis—and the software—that much more complicated.

In the case of Berg, we have one example of a book that was registered and renewed, and two books that were not renewed but were in general publication. In 1931, Berg published a collection of radio scripts as a book for sale to the public, *The Rise of the Goldbergs*, which was registered at the Copyright Office, and renewed in its 28th year, bringing the term of protection to a total of 95 years of protection, or through 2026.[16] In contrast, the Stanford Renewal Database does not contain renewal records for Berg's memoir *Molly and Me* (1961) or *The Molly Goldberg Cookbook* (1955).[17] So, with a quick search of in a database and little knowledge about the law, we have found out that anyone is free to use *Molly and Me* in whatever form they want—quoting extensively, republishing, even posting the entire work on the Internet. For a scholar working on Getrude Berg, the fact that her autobiography is in the public domain dramatically alters the potentials for a project. Caren Deming, a film studies scholar,

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[15] *Id at Volume 1, p. 14.*

[16] Gertrude Berg, *The Rise of the Goldbergs (1931), Stanford* Renewal Database, http://collections.stanford.edu/copyrightrenewals/bin/detail?fileID=1376853467X (last visited March 23, 2009). The original registration date was April 18, 1931, and was renewed on November 5, 1958—during the 28th year of the copyright. Under the 1909 Act, years were measured by the actual date—until 1950 where it changed to a calendar year system. [get reference from fishman].

[17] *Molly and Me* (1961) came into the public domain in the U.S. after 1989, and *The Molly Goldberg Jewish Cookbook* (1955) came into the public domain in the US after 1983.

encountered a change in her thinking when she found that one of the main texts she plans to use in her work is in the public domain. She even thought an idea of a one-woman show which, incorporating her scholarship and intertwining it with Berg's autobiography. She started to think of the text without restrictions, and with it the concept of her project began to shift.

Three important lessons are to be learned from this small exercise. First, scholars and others do not tend to think about the legal status of the works they use, until after the project is well underway or even completed. While many know stories of literary executors who refuse to give permission to scholars—scholars who have often put in ten or twenty years on a project, the other side is that if a scholars knows that a work is in the public domain, this might bring a new freedom, new scholarship, a new way of viewing the materials. Second, it is often unpredictable which will be renewed and what will not. Berg's autobiography—her personal story was not renewed, while many others of her works (as we will see) were renewed. It is worth the quick search for every work one is using to determine the copyright status of a work, just in case. Third, once a work is in the public domain, the work continues to have life—a rebirth of sorts. We see this with the Berg cookbook. In 1999, Ivyland Books republished *The Molly Goldberg Jewish Cookbook* presumably *because* it was in the public domain.

Most are aware of the rubric applied to books. For instance, the ALA recently issued a slide ruler based on this simple format. In fact, most digitalization projects—Google Book Project, Project Gutenberg and others—have tended to focus their energies on books because of the ease in determining the copyright status of these works. But, Class A—published books—was the catch-all category for the system. Books were included, of course, but so too was a long list of works—games, greeting cards, poems, pamphlets, letters, and directories, to name a few--that did not fit into other categories. This meant that may works could have been registered under Class A, which might also have been registered under the other classes—a photograph, greeting card, or map, for instance. And so, we had to make sure that we had the user check these records as well as the class-specific records. As we moved through each category, we found the most obvious way of researching the copyright status of a given work did not provide the most direct path. The case of advertisements was our first indication of this, but this also included, most profoundly, motion pictures and then with maps came the epiphany.

The class of Maps turned out to hold all of the problems and joys embodied in the 1909 Act—and determining a path brought us to a new level in understanding that ours was a quest to determine which works had been welcomed into the federal system and how to prove that they were not free from the federal system. We at once had to follow the maze in and out, and we wanted to have the most direct path out, which turned out to be more of a challenge than we thought. Maps had every element and every problem we had encountered the system. If we could make maps work, the *Durationator* would actually give us the answers we desired.

The 1909 Act was based on a nineteenth century concept of what was considered a good—tangible objects that could be reproduced and sold.[18] Magazines, books, newspapers, art work, musical compositions, maps—these are all examples of the kinds of works the 1909

[18] Cite to our article

Copyright was designed to protect.[19] But, even before technology would radically change what needed protection—radio, television, films—the 1909 Act recognized there might be some instances were goods were not sold, but still the works themselves till needed protection by the federal copyright act. What the 1909 Copyright did was create a new category, "Works not Reproduced for Sale".[20] These works would remain unpublished and protected by common law copyright, *unless* the copyright holder registered the works with the Copyright Office under Section 12. With registration, the work then carried the same term of copyright as a published work—an initial term of 28 years with an option of renewal (and automatic renewal as of 1964).

Not all unpublished works were eligible for federal protection. Manuscripts, for instance, could not be registered as an unpublished work, but dramatic plays could. The motivation was works that would be in the stream of commerce in some fashion—other than selling of a physical copy—should be registered under Section 12. For instance, lectures could be registered under this category. But Section 12 also contained hybrid categories—ones where the copyright holder could register the work as an unpublished work or as a published work. This included musical compositions, art, photography, and motion pictures. The Copyright Office had distinct requirements for Section 12 works—no notice and only one copy for deposit, rather than two. Unpublished versions were also cataloged separately as unpublished. And other works could begin their life under Section 12 and then be published, falling under a different category. For example, a dramatic composition could be registered as unpublished, but then a published version could be registered under books, as with the case with Getrude Berg's collection of radio scripts.

The 1909 Act created a number of categories were a copyright holder could register a work, even if it was not published. Section 12 of the 1909 Act provided the ability to register works "not reproduced for sale."[21] Two types of categories are included—those that could be published or unpublished, and those that were only registered if they were unpublished. The implication of Section 12 was profound, at least from the standpoint of our flowchart, and in part, led us to rethink the order of the flowchart. Rethinking the paths meant rethinking the law—its logical and what was necessary to answer our guiding question. We had many versions of the paths, and as we gained knowledge, we started to see patterns and ways of streamlining. We found ourselves trying to get into the mindset of the 1909 Act (reading the six volumes of legislative history at one point from start to finish) and figuring out how to translate the concerns of one century into the next.

As we near the conclusion of the first phase of the project—two years and dozens of research assistants later—I have been thinking about *why* the paths, the records, the investigations are so complex and nearly impossible in some cases. I think I have come to see the 1909 Copyright Act as flawed in a new way. The Act seems to have been a door into a store full of benefits—the "in door" – with intricate requirements—if one entered the "map" door rather than the "book" door, consequences followed, for example—that only the map and not the

[19] Put in 1909 Copyright Act citation of subject matter
[20] 17 U.S.C. §12 (1909 Act)
[21]

text (if there was an accompanying text), for example, would be covered by the copyright. The system was set up with special interests in mind—as the legislative history demonstrates—but with differences only in slight details, rather than substantive differences in terms, for example. The gatekeeper mentality allowed, as many have written, for most works to enter the public domain—being bestowed federal protection brought select works that met the requirements into a special club whose membership often expired after twenty-eight years. The law acted as doorman. The system, however, hadn't contemplated an exit strategy. This becomes clear both in the lack of interest in digitizing the pre-1978 copyright records—something our project has undertaken. It also seems to not have taken into account how complex choices and rules would be difficult to unravel 100 years later. The door "out" – the heart of our project – is often very difficult to find.

III. Theorizing the 1909 Copyright Act

Concurrent with the Durationator copyright software, I embarked on a second project—co-authored with my spouse, W. Ron Gard, which tried to understand the 1909 Act from a socio-literary point of view, primarily using the theory of accumulation by Jean-Joseph Goux. We saw the 1909 Act, in part, as a failure from its beginning, because at the moment of its coming into being, the world was dramatically shifting from a pre-Fordist era to Fordism, and it was this shift that changed our concept of what counts. The problems I had encountered in working with Section 303(a) – namely the question of publication – misplacedly situated the transition into the federal system. We came to see that same misplacement with fixation with the 1976 Copyright Act. We instead saw the term "circulation" more useful, if still a bit elusive. For it was when the works left the creators hands and were exposed to others—in whatever form—that the creators began to feel the need for greater and federal legal protection. The categories under the 1909 Act—those categories that Team Durationator had been in wrestling for two years—failed nearly from the beginning, as the secondary category "works not reproduced for sale" overwhelmed the system.

Our focal point into the inquiry of traditional contours begins with Jack London's *Martin Eden* (1909). Martin's struggles serve as an entry point into the mindset of those behind the 1909 Copyright Act. The novel illustrates the difference the copyright act and society itself placed on unpublished versus published works—a key component to the workings of the 1909 Copyright Act. Upon its enactment, the 1909 Copyright Act was a law that valued manufactured goods, and only peripherally works "not reproduced for sale."[22] We assert that the 1909 Copyright Act reflects a pre-Fordist mindset, and how, like Martin, the 1909 Copyright Act reflects a division and a value system that struggles to come into the Twentieth century. The Act looks back, rather than forward. Both the 1909 Copyright Act and Martin are unable to easily adapt to what constitutes circulation. For both Martin and the 1909 Copyright Act, it is their undoing.

The essay suggests that the failure of the 1909 Copyright Act can be pinpointed to Section 12 --a section added in order to account for "works not reproduced for sale."[23] The failure comes in not being able to adjust easily to the change in what culture began to value—

[22] 1909 Copyright Act, Section 12.

[23]

movies, broadcasting, and television, and other works that had not be envisioned in the pre-Fordist mindset. These works did not fit into the traditional definition of publication, and therefore, did not fit into a scheme which valued circulation of copies to the general public as the determinator of entrance into the federal statutory system. Before the passage of the act, the drafters were confronted with this problem—that some works might need protection even without circulation of published copies, and so included for the first time the concept of a category of "works not for sale" that still would receive federal protection.

Works not for sale was a limited category of works that did not fit into the general scheme of the copyright act, but nevertheless in their unpublished, unpurchasable form, were allowed federal protection. This category was limited to "lecture or similar production or a dramatic, musical, or dramatico-musical composition; … motion-picture photoplay; … a photograph; … a complete motion picture; or … a work of art or a plastic work or drawing."[24] These works could be registered at the Copyright Office, even in their unpublished state—where no reproductions were made for sale. These works could also be registered as published works, but these had different requirements. Section 12 was made for the pre-publication state, where a work might still need federal legal protection. This distinction—works for sale and works not for sale—can help us to understand why the 1909 Copyright Act could be seen to have failed the needs of the 20th century. We further argue that the 1976 Copyright Act may have made exactly the same mistake—focusing on the cultural work itself, rather than the relationship, the circulation of value embedded in the work itself.

The 1909 Copyright Act was designed to address a broad category of works. In fact, the broadening of copyrightable subject matter was something some found alarming—what L. Ray Patterson and Stanley W. Lindberg called the "trivialization of copyright."[25] At the end of their chapter on the development of copyright in the early twentieth century, they write, "One future note: a complete assessment of copyright under the 1909 act requires a consideration of an additional development that is too seldom discussed—the trivalization of copyright."[26] They attribute this trivialization to the extension of copyright protection "to such 'writings' as 'statuettes, bookends, clocks, lamps, door knockers, candlesticks, inkstands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles, and ash trays'. Compare these 'copyrightable works' with newspapers—for which one court in the nineteenth century had actually refused to recognize copyright protection, on the grounds that they did not contribute to learning! That overly narrow ruling led to the 1909 act's designation of newspapers as being copyrightable, but in the process the fundamental intent of copyright was seriously compromised with the simultaneous inclusion of so much extraneous baggage."[27] Patterson and Lindberg saw this as indicative of a shift from a regulatory theory of copyright to a more property-based system.

[24] 1909 Copyright Act, Section 12.
[25] Patterson and Lindberg, The Nature of Copyright: A Law of Users' Rights, 1991, 88. This third major revision of the copyright act had a number of new elements previously not included before, including work for hire, compulsory licensing for musical works, and an explicit right to copy.

[26] Id at 88.
[27] Id at 88.

When placed into the historical moment of the time the 1909 Copyright Act's fixation on the expansion of categories of "thingness" corresponds to the development of the corporation and mass production—a shift in value that would mark the modernist response through a good part of the 20th century. It was thought that the value of publication triggered the limited monopoly. As the century continued, the question of what counted as publication became problematic, as the courts struggled to determine when a radio show, movie, broadcast or television series was "published", as none of these new kinds of works circulated in the same manner as say, a book. There was nothing that the public could actually purchase. The "thingness" being available for sale was the mechanism that triggered protection. The crisis would be felt in many legal cases, including the Martin Luther King, Jr. "I Have a Dream" speech that deemed by two courts—30 years apart—not to be a general publication, because public performance did not count as publication, nor did copies given to the news media for purposes of news reporting. The problem became so acute that the 1976 Copyright Act reflects the impossibility of the system—the published/unpublished distinction for purposes of federal protection was abolished, and in its place, a work obtained federal protection automatically upon creation, as long as the work was fixed in a tangible medium of expression with the minimum degree of creativity and independent creation.

The new definition—fixedness and originality—was supposed to solve the problems of the 1909 Copyright Act. But, strangely, the late-Modernist legislation still could not let go of the "thingness"—the need now to be fixed. The object was still at the center of the system. Being published or being fixed somehow transformed the object into something requiring legal protection. Under the 1976 Copyright Act, nearly everything became worthy of federal protection, creating new problems of overprotection. Why did the 1909 Copyright Act so distinguish between published/unpublished, and why does the 1976 Copyright Act create little distinction? We assert it was a reaction, not only to international pressures to adopt the Berne standards of protection, but to the troubled waters of misplaced confidence in the "thingness" under the 1909 Copyright Act. If one need not make a distinction between an unpublished and published photograph, one assumes they thought, the problems of "what counts" would dissolve. Unfortunately, this did not address the underlying concept of value, circulation and exchange. These were the same problems that plagued the 1909 Copyright Act.

This essay argues that a more persuasive and, indeed, productive understanding of the foundations of copyright can be found by looking to the socio-cultural nature of economic development as it occurred in the United States from the latter portion of the nineteenth century to the present and articulating copyright law as arising discursively within and as part of such a context. Put another way, our essay argues that only by viewing copyright law, and the U.S. copyright acts specifically, as discursive manifestations arising structurally within the historical trajectory of U.S. economics as one culturally manifest can one come to understand the particular nature of the legal protections arising in relation to particular kinds of works at particular points in time.

Our argument is that modern copyright law's origin in a historical moment in which material production so quickly and pervasively developed to transform the cultural environment resulted in a concept grounding of copyright law within those same material structures. This is to say that socio-cultural developments led to an undue primary emphasis being placed on the materially produced object itself, with a concurrent recognition of the placing of the material item into the realm of commerce. Yet, as an historical economic examination demonstrates, this conceptual grounding is historically contingent and, thereby, increasingly trails further and further behind twentieth-century developments wherein the circulation of goods increasingly comes to outstrip the tangible aspects of goods being circulated. These issues continue presently to cloud conceptualizations of copyright law, although, as the *Golan* decision demonstrates, this is not widely recognized. By moving beyond a simple formalistic examination to a reading of them as culturally-specific constructions that homologously evidence in their linguistic operations the formations of value configuratively occurring at the level of social exchange, we can far better understand the current problems.

All of these documents—the 1909 Copyright Act, the 1976 Copyright Act, and even the late-Twentieth century amendments like the DMCA, CTEA, and the URAA, are trying to affix ownership interests in something. Each text grapples with perception of changing notions of copyright, particularly the impact of new technology both on what is copyrightable and how to protect copyrightable works. While technology plays an important driving force in copyright law, what underpins any notion of configuring ownership is the ability to control the thing of value, and value has everything to do with exchange and circulation, not fixation in or publication of things. So, as exchange changes, it introduces all kinds of conceptualizations of routing or rooting the ownership interests. The transformation throughout the Twentieth century of the dynamics of exchange inherently introduced problems into their conceptualizations into these ownership interests that the 1976 Copyright Act tried to address, and yet, the we found ourselves once again in a crisis, as value and concepts of circulation and exchange altered in ways that the 1976 Copyright Act had not be built to address.

Neither the 1909 nor the 1976 Copyright Acts focus on the more fundamental principle, which says value itself is derived from cultural systems of exchange. So, to ignore the dynamic systems of exchange is to mislocate the foundation on which one is constructing a legal regime. We read these texts as embodiments of cultural configurations, with all the dynamics of valuation. These texts are in effect, "DOA" or at least problematic upon their enactment, because they fail to take into account the fundamental foundations that are creating the problems they seek to address.

The incorporation of value into the sequence of traditional contours allows for an embedding of and moving beyond the cultural object itself, and enters a dialogue as to the meaning of the objects relationship within society—what legal protection is necessary for the cultural object to function within a system that at once protects the individual—through an incentive system to create, but was designed for the benefit of the public, both in the creation of

the culture as well as its reuse. We must situate the law within a socio-economic space, and analyze "traditional contours" within the regime of accumulation(s). For it is the cultural, economic and historical coordinates that allow the mapping of "tradition," and allows us to see "contours" that otherwise might not be seen.

IV. Some Thoughts: Understanding and Exiting the Maze of Circulation

Finding a door out—we hope that the *Durationator* helps find the door out—that allows us to use the past. Circulation—we see the concept of "circulation" more helpful than fixation or publication—even if fixation or publication is the triggering factor. How does the law construct what counts for circulation, and how does that alter with within a diachronic cultural socio-literary reading?

How does one exit from a maze? It appears one has to work one's way backwards through the maze again—that is in some ways a good explanation of our current flowchart for the software. Why does the maze look the way it does—why is there a maze at all? We have come to create a different exit maze—to leave the maze requires a different set of questions, a different ordering, so not to unnecessarily wind around.

In some ways, the gatekeeping mechanism of Classes and formalities of the 1909 Act binds the two research papers together. The 1909 Act had its own sense of its regime of accumulation, which was embedded in late-19th century concepts of industrialization. While some at the time (I would argue the dramatists during the legislative hearings) understood that it was circulation—access and availability of the intangible, rather than the thing itself that needed protecting, the mentality of mass produced goods kept the drafters of the 1909 Copyright contemplating anything further afield than "works not reproduced for sale."

But the 1909 Copyright did not see the entrance into the system as "circulation", *or did they*? We are left with the complex system of categories, formalities, requirements for publication that vary from category to category, copyright records, and industry standards, sometimes—all to determine when a work has completed its copyright term. Yet, could it be that "circulation" was really at the heart of the matter—why else would they include a "works not for sale category" and allow unpublished works—works not published or being sold in its thingness—to be included? This addition of allowing unpublished works to be registered makes sometimes very easy to determine when a work comes into the public domain (in the case of movies, which is otherwise nearly impossible). Sometimes, the addition complicates the matter, as in the case of musical compositions and photographs, which could be registered either as published or unpublished works. The definition of general versus limited publication fits into this concept of "circulation," for it is only when works are circulating freely without limitation that a general publication has occurred.

These concurrent projects—a theoretical piece that places emphasis on "circulation" and a software project that tries to sort out the exit into the public domain given the 1909 Copyright Act's formalities—together these projects, I hope, add to the discussion of the legacy and meaning of the 1909 Copyright Act, both in its historical context as well as its current influence on our culture today.