A RHETORICAL ANALYSIS OF COMPETING COPYRIGHT CONCEPTUALIZATIONS, THE DIGITAL MILLENNIUM COPYRIGHT ACT AND CREATIVE COMMONS

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ABSTRACT

This paper explores the question, what do the metaphors used in the discourse about the Digital Millennium Copyright Act and Creative Commons—at the point of their formations—reveal about their conceptualizations of copyright law in the digital age, and what commonalities emerge that could form a middle ground for the two polarized camps to meet? Using critical rhetoric and risk society as a theoretic framework and metaphor criticism as a methodology, this paper uncovers six metaphor clusters used in the discourse surrounding the origins of the DMCA—risk, security, piracy, balance, highway, and frontier—and six in Creative Commons—materiality, construction, balance, freedom, economics, and protection.

Ultimately, my analysis reveals that the discourse of the DMCA, especially as it constructs an ambiguous threat and enemy, fits into Beck’s theory of risk society. Creative Commons, however, avoids all reference to risk, instead focusing on the harmonious aspects of technology to promote their postmodern ideals of collaborative expressions of art. Both conceptualizations rely on the historical notion
of balance in copyright law, but each define what a balanced state is differently, suggesting that the differences may be ideologically irreconcilable. Ultimately, metaphor use in the DMCA suggests that it prioritizes creators, publishers, and distributors, while Creative Commons prioritizes the public.
This thesis would not be possible without all the support of my friends and family, especially my parents, Mark Davis and Ellie Gunn, who always encourage me to do my best. Thanks are also due to my wonderful thesis committee, Dr. Alison Vogelaar and Dr. Mirjana Dedaic, for their excellent suggestions and careful attention to both my ideas and my prose.
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Chapter 1. Introduction

The rise of the digital age has altered the way we live our lives. Take this paper, for example. I type into a word-processing program that renders it not as a physical piece of paper, but as a digital text file. As I compose this, I am listening to digital music files stored on my laptop’s hard drive. I log in to my university’s library database through my wireless Internet connection to pull up a digital image version of a journal article originally published in printed form in 1962. In each of these digital actions, I touch on a part of United States law that needed to be reformulated 15 years ago to reflect the digitalization of our world: copyright law. In digital interactions like this, questions emerge, such as what is the original and what is the copy? Who owns the right to make copies? What rights do I have to this digital text document, to the digital music files on my hard drive, to the digital image file of the journal article I download? Questions like these plagued the United States government in the early 1990s when they started to realize full power of the blossoming digital age. Clearly, copyright needed to be rethought on the federal level to prevent the melee that would arise from local judges’ differing interpretations of how old laws applied to new technologies.

Several proposals for how to rethink copyright law have emerged. In this thesis project, I use rhetorical theory to examine two competing conceptualizations of
copyright law for the digital age: the Digital Millennium Copyright Act and Creative Commons. I begin by providing a historical context of copyright law in general and the two movements in particular. Drawing from the historical relationship between law and rhetoric, I demonstrate the interconnectiveness of the two disciplines to show that rhetorical criticism of legal texts is an important way to understand the meaning of law beyond the legal code. With a critical rhetoric theoretical framework, I approach the DMCA and Creative Commons by an in-depth analysis of metaphor usage in discourse about both topics. Using a metaphoric analysis of tenor and vehicle pairs present throughout foundational documents and popular press articles for each as my methodology, I discover that the discourse surrounding the origins of the DMCA employs risk, security, piracy, balance, highway and frontier metaphors, while that of Creative Commons uses materiality, construction, balance, freedom, economics, and protection metaphors.

Using the theoretical framework of Ulrich Beck’s “risk society,” I argue that the metaphors in the discourse surrounding the DMCA serve to construct an artificial threat from new technology that may result in a means of controlling a fearful populace. Risk discourse also promotes the idea that laws like the DMCA can provide the security needed from the globalized threat of developing technology. The discourse of Creative Commons, however, carefully avoids risk discourses, instead framing
technology as an opportunity to work toward the public good. I evaluate the effectiveness of each strategy, given the proponents’ rhetorical situations.

Next, I examine the similarities and differences in metaphor clusters of the competing conceptualizations. I argue that the materiality and construction clusters employed in the discourse about Creative Commons and the frontier cluster used in the DMCA discourse both work to fix copyright in a vocabulary of physical space. Both also draw from the balance metaphor used throughout history to talk about copyright law, although their differences in tenor and vehicle pairs demonstrates that they have different conceptualizations of what balance is. In terms of differences, the DMCA relies on piracy metaphors to construct the lawlessness of the Internet and its users, while freedom metaphors are prevalent in Creative Commons discourse, meaning it instead draws upon the American ideology of liberty to promote their licensing scheme to the public.

Finally, in light of the analysis throughout, I answer my research question: What do the metaphors used in the discourse about the Digital Millennium Copyright Act and Creative Commons—at the point of their formations—reveal about their conceptualizations of copyright law in the digital age, and what commonalities emerge that could form a middle ground for the two polarized camps to meet?
The History of Copyright

Copyright scholars generally recognize England’s 1710 Statute of Anne as the first regulation regarding reproduction of works, but concerns surrounding ownership originated in the mid-fifteenth century, when Johann Gutenberg’s movable type printing press enabled the efficient mass reproduction of printed works. One such issue was ownership over the right to reproduce the works, what we would now call copyright. Was it the author’s? The printer’s? The bookseller’s? These questions were previously irrelevant; the monks who copied books prior to the development of the printing press were unable to produce mass quantities of an exact replicable material object, so the idea of ownership over the right to reproduce an object was not a central concern. One early form of copyright was the privilege system that was established in Venice and spread throughout Europe in the mid-fifteenth century, although this process was more analogous to a modern-day patent than our notion of copyright (Rose, 1993). Most privileges were granted to printers (although a few went to authors) and covered the rights to use particular typefaces, print particular titles or print in particular languages, and even—at the beginning of the printing boon—the right to print at all. These privileges were for a limited period of time, but the system quickly grew to be a managing nightmare (Rose, 1993). The Venice Senate attempted reforms, but the system simply did not sustain the demands of the printing world.
A parallel system emerged alongside the privilege idea in the mid-sixteenth century in England: a guild system of booksellers and printers under the auspices of the Stationers’ Company. The guild controlled the right to print a title and make any additional copies of that title at a future date. While one specific publisher did not control the title forever, anyone who published the title had to be in the guild (Rose, 1993). The Stationers’ Company was established by the crown, so the guild system also served the dual purpose of enabling a certain amount of censorship. By 1694, however, growing resentment of publishing monopolies and censorship, led by John Locke, caused Parliament to refuse to renew the Stationers’ Licensing Acts (Rose, 1993; Samuels, 2000).

The fifteen years between the expiration of the Stationers’ Licensing Acts and the Statute of Anne brought an important shift in the definition of copyright. While prior concerns about the right to reproduce works had been raised, the primary emphasis was on the booksellers’ and printers’ rights; authorial ownership was not contemplated. One owned the book when one published it; the author maintained no independent ownership over the prose he or she had composed. Daniel Defoe\(^1\) led the charge to change the idea of ownership in regard to printed works. Gradually, printers began to see the reasoning in Defoe’s ideas, particularly when they realized that the

\(^{1}\) According to Rose (1993), Defoe’s motivation was partly due to his imprisonment because the High Church party, who was responsible for jailing him, favored the old system because it enabled them to control what was said in the press.
lack of authorial ownership was discouraging authors from producing new works
(Rose, 1993). In spring 1710, Parliament passed the Statute of Anne, the first copyright
law, that was “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” (Samuels, 2000, p. 12). The Statute gave authors a limited copyright over
their works: for new works, fourteen years, plus an additional fourteen if the author
was still alive at the end of the first fourteen; existing titles were under copyright for
twenty-one years. Additionally, authors had to register their rights and send copies of
their book to every major library in the United Kingdom. Whatever its limitations, the
Statute of Anne represented the world’s first copyright law, and it is important to note
that it was one that specifically gave rights to the authors to maintain a claim of
ownership over their work.

Eighty years later, in 1790, George Washington signed the first U.S. copyright
law into effect. The new law, also “An Act for the encouragement of learning”
(Samuels, 2000, p. 15), owed much to the Statute of Anne; its provisions gave authors
the right to print, publish, and sell their works for up to twenty-eight years, and copies
had to be distributed to the clerk of the local district court and the secretary of state.
Similar to the Statute of Anne, then, the U.S. copyright law placed emphasis on
authorial ownership over materials, and gave creative control to the author of the work rather than the publisher, printer, or bookseller.

The idea of authorial ownership forms the cornerstone of our modern copyright law as well; throughout the twentieth century, the copyright debate has stemmed around who has control and what constitutes fair use (Litman, 2006). As times have changed, Congress has passed modifications to copyright law, including major overhauls in 1831, 1870, 1909, and 1976 in response to changes in the publishing industry. New types of works were given copyright protection in each subsequent revision, and the terms of the copyright length was extended in most of the revisions (Bielefield and Cheeseman, 1999). The rise of the digital era promised to bring drastic changes as well.

**The Digital Millennium Copyright Act**

In 1993, President Bill Clinton formed the Information Infrastructure Task Force, or the IITF, “to articulate and implement the Administration’s vision for the National Information Infrastructure (NII)”—what we today call the Internet and its related technologies (IITF, 1993a). An “Agenda for Action,” released on September 13, included a nine-item task list for the IITF. The seventh item acknowledged that the NII necessitated a reconceptualization of U.S. copyright laws. Under the heading, “Protect intellectual property rights,” it read: “The Administration will investigate how
to strengthen domestic copyright laws and international intellectual property treaties to prevent piracy and to protect the integrity of intellectual property” (IITF 1993b). Secretary of Commerce William Delaney chaired the IITF and formed three executive committees: Telecommunications Policy, Information Policy, and Applications and Technology. The Information Policy Committee had three sub-working groups, one of which was the Working Group on Intellectual Property, chaired by Bruce Lehman, the assistant secretary of commerce and commissioner of patents and trademarks. The Lehman Working Group’s responsibilities were twofold: examining implications of the NII on intellectual property and suggesting changes to law and policy regarding intellectual property, especially copyright law, to cover issues raised by the development of the new NII.

After a public hearing in Arlington, Virginia, on November 18, 1993, where 30 people testified, and an open comment period that garnered an additional 70 statements, the Lehman Working Group issued a preliminary draft of its findings on July 7, 1994. This first report, known as the “Green Paper,” contained the Lehman Working Group’s discussion of the issues raised by the NII and preliminary suggestions for changes in U.S. law to address the issues. Many saw the Green Paper’s

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2 Representatives from 26 government agencies served on the Lehman Working Group; however, Litman (2006, p. 90) says individuals on the Working Group “complained privately…that they were figureheads: all decisions were made and all documents were drafted by the commissioner and his senior staff without any consultation.” Thus, the focus of my analysis of Working Group rhetoric is public comments by Commissioner Lehman.
recommendations as being overly friendly toward entertainment industry interests, and less so to consumers, libraries, and other users. Copyright scholar Jessica Litman (2006) suggests the public hearing was “for the purpose of getting on the record what it was that current market leaders in the information and entertainment industries wanted—and didn’t want,” and the resulting Green Paper’s “suggestions echoed those made by industry representatives in the public hearing” (p. 91).

The Green Paper addressed three main areas of copyright law in which its drafters believed new decisions were needed (Litman, 2006). The first was a definition of reproduction for the digital age. Court cases like *Mai Systems v. Peak Computer* (1993) had led to the legal definition of a reproduction as whenever it is loaded into RAM. These decisions meant that any time a person opened a copyrighted file on a computer without express permission of the copyright owner, that person was violating copyright law. The Green Paper upheld this definition of reproduction. The second area was the definition of transmission. In copyright law, the copyright owner has control over public performances only, while private showings are exempt from the owner’s control. The Green Paper suggested most digital transmissions should be

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4 Copyright scholars generally agree that loading a file into RAM is making a reproduction of it (even if it is just temporary) and thus should be covered by copyright law. In setting that principle in the digital realm, however, the provision enables copyright holders to “actually control the right to read” (Nimmer, 2003, p. 15), something copyright law should not cover, many believe.
considered public performances, even if they were individual-to-individual, ensuring copyright holders had more control over transmissions. The third area was to legally enable copyright owners to develop copy-protection technology (like the digital rights management (DRM) encoded on songs purchased on iTunes today), and make the development or sale of programs or devices designed to circumvent such technology illegal.

The Green Paper was the first substantial document produced by the U.S. government to describe the need for new copyright protection in the digital age. And since it was a preliminary draft of a report, it also provided a document for people to discuss, which they did in a series of September 1994 public hearings in Chicago, Los Angeles, and Washington, D.C. These public hearings allowed people who supported and opposed various elements of the Green Paper to express their views to the Lehman Working Group, who then had to decide what to change for the next version of the report.


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5 For transcripts of these hearings, see http://w2.eff.org/Infrastructure/Govt_docs/ipwg091494_hearing.transcript, http://w2.eff.org/Infrastructure/Govt_docs/ipwg091694_hearing.transcript, http://w2.eff.org/Infrastructure/Govt_docs/ipwg092294_hearing.transcript, and http://w2.eff.org/Infrastructure/Govt_docs/ipwg092394_hearing.transcript.
“Paper.” According to Litman (2006), the difference between the Green Paper and the White Paper was “largely one of style rather than substance” (p. 94). The White Paper, she argues, suggested that its recommendations were “well-settled and uncontroversial implications of the current law” rather than the “desirable amendments” of the Green Paper (p. 94). Lehman thus framed the White Paper as merely “interpreting current law to resolve any ambiguities that might arise in the context of new technology” (Litman, 2006, p. 94-5), rather than the development of a new legal doctrine.

The White Paper formed the backbone of two bills, S. 1284 (sponsored by Senators Orrin Hatch and Patrick Leahy) and H.R. 2441 (introduced by Representatives Carlos Moorhead, Patricia Schroeder, and Howard Coble), both called the NII Copyright Protection Act of 1995. The Lehman Working Group suggestions were the subject of vigorous arguments in Congress before they became the Digital Millennium Copyright Act (DMCA). The DMCA, which had by then become H.R. 2281, did not pass Congress until 1998 because of challenges from Internet users who thought the White Paper’s interpretation of needed laws did not provide the balance that Lehman suggested and instead favored copyright owners at the expense of consumers. Critics employed the new medium to connect with each other, forming groups like the Digital Future Coalition that worked to oppose the Lehman Working Group’s recommendations (Litman, 2006). Libraries and other information and
education organizations waged a public relations campaign about the negative impact the Working Group’s provisions would have on their ability to do their jobs, garnering much popular press coverage of their objections to the White Paper.

Faced with unexpected hurdles in getting his suggestions through the U.S. legislature, Commissioner Lehman tried another tactic: take the recommendations to the World Intellectual Property Organization’s (WIPO) diplomatic conference in Geneva, Switzerland, in 1996. If the United Nations’ intellectual property organization ratified the provisions, Congress would as well, Lehman reasoned. This plan backfired as well; the international intellectual property scholars also viewed Lehman’s provisions as too favorable toward copyright owners, and refused to enact most of the elements (Goldstein, 2003). The legislation returned to the United States, meaning it was up to Congress to determine a solution through legislative processes. The differences between the Lehman Working Group’s White Paper and the final version of the DMCA signed by President Clinton in 1998 are great. At the most basic level, the DMCA’s nearly 30,000 words far eclipse the White Paper’s 9,000.

The most controversial element in the DMCA is its strict anti-circumvention provisions, the idea of which originated with the Green Paper in 1994. These provisions make it legal to add copyright protection to a digital file (like the DRM on iTunes songs) and illegal to crack the copyright protection or sell software to disable it.
In describing these provisions, legal scholar Lawrence Lessig uses an analogy of car theft: it is illegal to steal a car and many car owners install alarm systems, so it makes sense for the law to prohibit disabling alarms or selling tools for the explicit purpose of disabling a car alarm. Anti-circumvention proponents claim that the copyrighted material is owned just like the car is owned, but Lessig (2002) says this is a false analogy:

[T]his story about real property doesn’t map directly onto intellectual property. For as I have described, intellectual property is a balanced form of property protection. I don’t have the right to fair use of your car; I do have the right to fair use of your book. Your right to your car is perpetual; your right to copyright is for a limited term. The law protecting my copyright protects it in a more limited way than the law protecting my car (p. 187).

Goldstein (2003) makes this point as well:

Indeed, the anti-circumvention proposals might more accurately be called anti-copyright law, for they challenged the principle that has been at the center for copyright law from its beginning—that the rule of law is a fairer and more efficient means for protecting literary and artistic works than are physical barriers. The message from copyright owners, of course, was that the rule of law could no longer be relied on to protect the value of their works (p. 175, emphasis in original).

This expansion of copyright provision to an area of the law previously not covered means that the DMCA was more than just an update of existing copyright statutes to protect digital transmissions. Instead, it was a way to reconceptualize copyright. And not everyone liked the new conceptualization.
Academic attention to the Digital Millennium Copyright Act has come mostly from law journals or the historical accounts of the process on which I have based this section. While the DCMA is the subject of numerous press releases, blog posts, and news media reports, few academics have approached the DMCA from a theoretical perspective. Gimm’s (2005) conference presentation article is one of the few touching on the DMCA and the rhetorical arguments surrounding it. In it, he focuses his critical attention on the discourse of the Congressional debate about the DMCA and the metaphor “piracy.” Tying the use of the term to the history of pirates, Gimm says the metaphor at work in the DMCA debates is that piracy is violent thievery. While he fails to demonstrate the power of the metaphor by using Lakoff and Johnson or other rhetoricians for his theoretical basis of metaphor use, Gimm nevertheless makes an important argument about how the use of this metaphor frames how lawmakers approached the text of the DMCA, which I will extend upon in my study.

**Creative Commons**

The call for an alternative to the DMCA began with open source software developers. Open source developers generally code programs in a volunteer, collaborative environment, working without monetary gain to develop programs that others can use and continue to improve upon. The Linux operating system was one of the first major open source projects, but other popular products include the Mozilla
Firefox Internet browser, the Mozilla Thunderbird e-mail client, and the Open Office suite, which has word processing, spreadsheet, database, and presentation capabilities. Massachusetts Institute of Technology professor Richard Stallman is credited with conceptualizing the idea of copyleft, a programmer’s right to distribute their works for others to contribute to but keep within the open source community. Stallman witnessed a growing problem of developers taking an open source software, making improvements to the code, but packaging—and copyrighting—it as their own proprietary product. In doing so, developers made minor modifications to the code, but did not produce the bulk of the intellectual work that goes into programming a complex software, reaping the benefits of others’ work without equitably compensating them (Patterson, 2000). Stallman’s solution, copyleft, dictates that any modifications to the open source code must be documented and released freely back into the open source community for others to use or make additional modifications to; in other words, proprietary software developers could not incorporate any part of an open source software into their code and maintain their proprietary license.

To make copyleft legally binding, Stallman proposed copyrighting the software with an attached distribution licensing agreement that enables others to use and modify the code so long as they return it to the public domain with the distribution requirements intact. “Thus, the code and the freedoms become legally inseparable,”
writes Stallman. “Proprietary software developers use copyright to take away the users’ freedom; we use copyright to guarantee their freedom. That’s why we reverse the name, changing ‘copyright’ into ‘copyleft’” (2002, p. 89). Particularly in the software industry, where cross-platform and cross-program viability is an important facet of programming, existing copyright laws in relation to code put software developers at a disadvantage: “Copyrights sabotage the substantial benefits of standardization,” write Gallaway and Kinnear (2004, p. 470), while acknowledging that proprietary software developers work in the realm of economics, and in software, keeping source code private is seemingly the most important way to assure first-mover advantage.

The widest-used copyleft is the Free Software Foundation’s GNU General Public License. Programmers can apply the GNU GPL to their software before releasing it for others to download and tweak; by including the GNU GPL with the software, the original developer ensures that any modifications made and released to the software will also be accompanied by a release of the altered source code. The Free Software Foundation’s website contains versions of the copyleft license and detailed instructions for how one would apply it to a piece of their own software. The site also contains an extensive “frequently asked questions” section that documents many of the legal subtleties of copyleft. In short, the site is designed around the premise that novice

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6 The GNU GPL is available online at http://www.gnu.org/copyleft/gpl.html.
open source developers can easily apply the copyleft GNU GPL to their code, encouraging the continuation of the open source community and the conceptualization of copyleft.

In 2001, a group of people set out to expand the idea of copyleft beyond open source software to incorporate all works covered by copyright law. The group, which included lawyers, law professors, computer science professors, documentary filmmakers, and entrepreneurs, formed Creative Commons, a nonprofit corporation that soon developed a set of copyright guidelines like the GNU GPL for all types of “creative works” (Creative Commons, “History”). Supported by the Berkman Center for Internet and Society at Harvard Law School and Stanford Law School Center for Internet and Society, as well as monetary contributions from a wide variety of organizations and individuals, Creative Commons presents an alternative to the “All Rights Reserved” copyright standards of the DMCA. The Creative Commons website’s “About” page provides their mission: “We work to offer creators a best-of-both-worlds way to protect their works while encouraging certain uses of them—to declare ‘some rights reserved.’”

A web application\(^7\) guides creators through a set of questions to determine which type of license agreement from the six main areas—Attribution Non-commercial No Derivatives (by-nc-nd), Attribution Non-commercial Share Alike (by-

\(^7\) The web application is available at http://creativecommons.org/license/.
nc-sa), Attribution Non-commercial (by-nc), Attribution No Derivatives (by-nd), Attribution Share Alike (by-sa), or Attribution (by)—is best for their needs. In each licensing scheme, a creator licenses his or her work under the appropriate Creative Commons license, depending on what uses are acceptable to the creator. For example, if I take a photograph and post it on my website under an Attribution Non-commercial Share Alike license, I am giving anyone the rights to make modifications to my photograph—to include it in a collage or retouch it in Photoshop, say—and post it to their site as long as they are not using it for commercial purposes, give attribution to me as the original image creator, and license the derivative work (the collage or retouched image) under a similar license. Other Creative Commons licensing schemes range from Attribution Non-commercial No Derivatives (the ability only to repost your work while giving you credit) to Attribution (the ability to do anything with your work as long as you get credit). The Creative Commons licensing scheme thus works within the existing copyright law boundaries to provide an alternative for creators, legally enabling the “Rip. Mix. Burn.” advertising campaign slogan Apple pushed in 2001. In recent years, music in particular has been a site of the growing success of sampling and mashups—joining songs from multiple artists to form a new song—not possible without excessive legal hoops for work covered by traditional copyright law.
By offering these choices, Creative Commons “aims to build a layer of content, governed by a layer of reasonable copyright law, that others can build upon. Voluntary choice of individuals and creators will make this content available. And that content will in turn enable us to rebuild a public domain,” writes Lawrence Lessig (2004, p. 283) in his book *Free Culture*. Lessig, a professor of law at Stanford University, is one of the main founders of the Creative Commons movement. Lessig is often referred to as the voice of the movement because of his extensive career in the public eye on issues surrounding copyright in cyberspace, including court and Congressional testimony, three books, numerous articles, a popular blog, and legal representation of Eric Eldred in *Eldred v. Ashcroft* in 2003, a pivotal case that challenged the 1998 Sonny Bono Copyright Term Extension Act. As a founder of Creative Commons, Lessig is on their board of directors and often serves as the de facto spokesman for the organization.

Creators licensed more than 1 million content objects using the Creative Commons licensing scheme in the first six months (Lessig, 2004). Since then, its popularity has grown; perhaps the most famous site that uses Creative Commons is the photo site Flickr. Users have the option to add a Creative Commons license to the photographs they upload to their site. This feature made headlines in 2007 when a photo taken at a church-sponsored carwash in Texas ended up on a billboard.
advertisement in Australia for Virgin Mobile; the photographer had licensed the photo under an Attribution Creative Commons license (Cohen, 2007). Many wiki sites are also licensed under Creative Commons (although Wikipedia is licensed under a similar option, the GNU Free Documentation License). Three of Lessig’s books are also licensed under Creative Commons and available for free download on his website, lessig.org.

The majority of academic attention paid to Critical Commons focuses on the goals of the organization rather than the rhetoric surrounding it. Andrew Murray’s book *The Regulation of Cyberspace* and Kembrew McLeod’s *Freedom of Expression* both devote several pages to a discussion of the Creative Commons movement and what it means for intellectual property in the digital age. Many law journals devote articles to the legal implications of the Creative Commons licenses. Coombe & Herman (2004) approach the idea of Creative Commons rhetorically, but through an anthropological framework, investigating the meme of space rather than the rhetoric of the movement itself. Christopher Kelty (2004) also approaches the study of Creative Commons from an anthropological perspective, as he was involved as the “culture” expert in the creation of the licensing scheme. He analyzes the way culture is defined within the Creative Commons movement, coming the closest to analyzing rhetoric surrounding Creative Commons. But few academics in rhetorical studies have
addressed the discourse surrounding the movement, making my approach to the subject novel.

**Rhetorical Studies of the Law**

Rhetorical philosopher Chaim Perelman’s book *Justice, Law, and Argument* discusses Perelman’s view of how justice operates in western society. Perelman is one of the first scholars to suggest that the justice system is based on argumentative principles. Writes Perelman: “Legal reasoning is thus a very elaborated individual case of practical reasoning, which is not a formal demonstration, but an argumentation aiming to persuade and convince those whom it addresses, that such a choice, decision, or attitude is preferable to concurrent choices, decisions, and attitudes” (1980, p. 129).

In establishing legal discourse as inherently argumentative in nature, Perelman demonstrates that it is an important subject for rhetorical attention. While legal texts have been analyzed since Aristotle’s time, establishing that every legal text is inherently persuasive is an important step in developing rhetorical criticism of such texts.

Philip Bobbit’s *Constitutional Fate* (1982) describes the varied ways that the Constitution is used as an argumentative tool in legal proceedings, including as a historical argument, a textual argument, a doctrinal argument, a prudential argument, a structural argument, and an ethical argument. Although the Digital Millennium
Copyright Act is a change to the U.S. Code rather than the Constitution, the claims Bobbit makes about the Constitution as a piece of text used in arguments applied to the U.S. Code as well, since they are closely related. Ideology runs through each of Bobbit’s six types of argument, suggesting that the code of law is a text that holds meaning beyond its legal prescriptions.

James Boyd White’s book *Heracles’ Bow* (1985) was one of the first modern books to argue for a strong link between the study of law and the study of rhetoric. White, in a chapter published in *The University of Chicago Law Review* prior to publication of the book, argues that “law is a branch of rhetoric” and “rhetoric is continuous with law, and like it, has justice as its ultimate subject” (1985, p. 684). Harking back to Gorgias, White argues, law and rhetoric were inseparable, but our modern sensibilities drew them apart. He suggests that they should be thought of as interrelated, especially given the constitutive properties of rhetoric: “The law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends” (1985, p. 691). By looking at law through the rhetorical studies lens, White believes a better understanding of jurisprudence will emerge.

The study of legal texts as elements of discourse gained traction in 1987 with the publishing of Brit Peter Goodrich’s *Legal Discourse*. “While previous studies

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8 For more on constitutive rhetoric, see Charland (1987).
within the philosophy of law have, on occasion, examined the presuppositions of legal analysis and legal practice in the terminology of the philosophy of language, law and language have in general been treated as discrete phenomena—the conjunction ‘and’ has marked a constant separation of distinctive areas of expertise,” Goodrich (1987, p. ix) writes. Drawing elements from Ferdinand de Saussure’s linguistics research and Aristotelian rhetorical theory, Goodrich develops what he calls a “New Rhetoric”—discourse analysis as method—and suggests it should be applied to the law. Using the work of Chaim Perelman as a philosophic backing, Goodrich argues that an interdisciplinary study of law is important in understanding the legal practices of (post)modern society.

Goodrich contributes a chapter to a collected volume published in 1994, The Rhetoric of Law, as does James Boyd White. Many of the chapters in this collection discuss legal language in terms of court proceedings rather than the development of laws themselves\(^9\), the premise that legal discourse can and should be analyzed through a rhetorical lens holds. According to White, “much of the life of the law is the reading of prior texts claimed to be authoritative, listening to arguments about those claims and about the meaning of those texts, and making arguments of both kinds oneself. This is not a scientific process, nor readily describable in scientific terms, but a rhetorical and

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\(^9\) This is representative of many rhetorical studies of legal texts—see, for example, Ferguson (1990) or Levinson (1995), which focus on judicial opinions, or LaRue (1995), which examines constitutional law as narrative.
literary one” (1994, p. 37). Thinking of law as rhetoric, White suggests, enables us to consider the process of creating laws “differently” than the classic legal formalism.

The philosophy of law known as legal formalism claims that discourse plays no constitutive role in the development of laws. The Critical Legal Studies (CLS) movement formed to oppose this philosophical grounding. Roberto Mangabeira Unger’s 1986 book *The Critical Legal Studies Movement* outlines the problems with formalism and objectivism as applied to law, suggesting that a “deviant doctrine”—one in which a person’s status in society is irrelevant in relation to the law—should be adopted. As postmodern critical theorists broke down modernist ideals of foundationalism, CLS theorists attempted to prove the ideals of justice on which the legal system were based were similarly biased. Scholars in CLS often used rhetorical analysis to demonstrate the inadequacies of legal formalism. Communication scholar Marouf Hasian, Jr., describes how CLS employed rhetorical analysis: “This postmodern approach augments traditional legal accounts by focusing on the function of discursive fragments that are created to hide some of the contradictions and power relationships that exist within society” (1994, p. 46). Luciates (1990) also explains: “CLS is not simply a theory of the relationship between law and society that implicitly

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10 Although White does not explicitly tie his work to Mikhail Bakhtin’s theories of polyphony, similarities between the two no doubt exist.
recognizes the rhetorical nature of the legal doctrine, but is rather a politically charged, disciplinary praxis akin to what McKerrow calls a critical rhetoric” (p. 442).

Instead, Luciates suggests a subtly different use of rhetoric in CLS, “a critique that looks *between* rhetoric and ‘the law’ to discover the materialized practices of language-in-action which create the conditions for the collective experience of power, legitimacy, and social change” (1990, p. 447). Hasian, Jr., and Croasmun lament that CLS has turned into “deconstructive nihilism” and call for a return to the purer form of rhetorical scholarship that can bridge the gap between CLS and the “foundational Platonism” (1996, p. 384) that marked the pre-CLS period in legal studies. Paralleling critical theorists’ discovery of the praxis problems with pure postmodern criticism, legal and rhetorical scholars sought a middle ground between the pure, Platonic version of the law and the postmodern deconstructive version. Hasian, Jr., and Croasmun warn against what they perceive as the CLS movement’s disregard for the constitutive power of rhetoric, suggesting that “the power of discourse has both deconstructive and reconstructive dimensions, and rhetoric will have its revenge on those who would ignore either dimension” (1996, p. 393). Ultimately, they suggest that the legal system should be philosophically construed “as a set of pragmatic, symbolic constructs rather than as immutable principles, standards, and regulations” (p. 393). In this way, rhetoric
can demonstrate the power at play in jurisprudence without the abnegation aspect of CLS while also recognizing the constitutive power of rhetoric.

Klinger (1994) tackles the problems with the CLS movement, formalism, positivism, realism, and moralism, suggesting that Kenneth Burke’s theory of dramatism provides a better way to think about legal texts. Jurispudence, Klinger argues, is about human motivations, and dramatism gives critics the tools to examine such enterprises. Formalists place primary importance on agency, positivists on agency and agents, moralists on agent and act, realists with scene, and CLS on purpose. Instead of focusing on narrow elements, a real philosophy of law would incorporate all aspects of Burke’s dramatistic pentad, Klinger says.

In a 1996 journal article, Hasian, Jr., Condit, and Lucaites use the “separate but equal” doctrine to develop a five-pronged rhetorical action of the law: (1) law is bound by public culture, (2) law is polysemic, (3) law is hegemonic, (4) law is vulnerable to social change, and (5) law is usually not fair. Hasian, Jr., Condit, and Lucaites conclude their piece with a call to action: “The responsibility of the full citizenry for the form and substance of the laws must be heightened and highlighted, so that eventually, judgments about our constitutions, even those made by ordinary individuals who are not trained to ‘think like lawyers,’ may be taken as competent contributions to the crafting of that law” (1996, p. 339). Creating such an understanding about what the
law means and how it is conceptualized by the people who do think like lawyers is the purpose of my project; in reaching this understanding, it is my hope that ordinary individuals may then fight for a version of digital copyright law that represents a multitude of interests.

**Critical Rhetorical Theory**

In this analysis, I align with the critical rhetoric (following Raymie McKerrow and Michael McGee) camp within contemporary rhetorical theory instead of the close reading camp (following Michael Leff). While I will direct close attention to individual instances of discursive formations, namely metaphors, I choose as my “text” many fragmented elements of discourse about the DMCA and Creative Commons, and recognize my evaluative position as rhetorical critic within a postmodern, Foucauldian understanding of power and discourse.

In his 1989 journal article, “Critical Rhetoric: Theory and Practice,” McKerrow applies Michel Foucault’s idea of power/knowledge to the field of rhetorical studies, suggesting that the role of critics is to expose the discourses of power. He defines eight principles of critical rhetoric praxis: (1) Critique is “not a method, but a *practice*” (p. 102), and thus has an evaluative component; (2) “The discourse of power is material” (p. 102), and thus has constitutive elements; (3) “Rhetoric constitutes *doxastic* rather than *epistemic* knowledge” (p. 103), and thus is concerned with how symbols exert
power rather than how they are created; (4) “Naming is the central symbolic act of a nominalist rhetoric” (p. 105), meaning first that rhetoric is nominalist and second that the labels attached are of critical importance; (5) “Influence is not causality” (p. 106), and rhetoricians should limit their claims to influence rather than determining cause; (6) “Absence is as important as presence in understanding and evaluating symbolic action” (p. 107); (7) “Fragments contain the potential for polysemic rather than monosemic interpretation” (p. 107), allowing for conflicting meanings to arise from the same text; and (8) “Criticism is a performance” (p. 108), suggesting that the rhetorical critic must necessarily involve him- or herself in the project because of the nature of collecting pieces of text. McKerrow’s call for a focus on a Foucauldian emphasis on power within discourse frames the critical work in the evaluative parts of this project.

Complementary to McKerrow’s critical rhetoric is McGee’s (1990) call for rhetorical criticism that addresses the fragmentation of discourse in postmodern culture. Drawing from Roland Barthes, Jacques Derrida, Michel Foucault, and other critical theorists, McGee argues that rhetorical critics should view rhetorical “texts” as fragments. He writes:

They are simultaneously structures of fragments, finished texts, and fragments themselves to be accounted for in subsequent discourse, either (a) the audience/reader/critic’s explanation of their power and meaning, or (b) the audience/reader/critic’s rationalization for having taken their cue as an excuse for action. … As a fragment in the critic’s text, the speech is only a featured part of an arrangement that includes all facts, events, texts, and stylized

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expressions deemed useful in explaining its influence and exposing its meaning (1990, p. 279).

Taking McGee’s call for action, my rhetorical analysis will collect many fragments of discourse surrounding the DMCA and Creative Commons in order to uncover the discursive conceptualizations of each. McGee suggests that finished discourse is the province of the consumers, not the producers; as a rhetorical critic, I will assume the role of consumer to amass this collection of fragments, recognizing from McKerrow that my interpretation of them may be simply one of many possibilities for meaning.

**Metaphoric Criticism**

Metaphors have been a subject of critical attention for centuries; in rhetorical studies, scholars hold particular interest in their functions. At its most basic, a metaphor is a way of representing something in terms of another. A speaker or writer’s choice of metaphor shapes the way we understand a particular term (the tenor), as we map associations with the other term (the vehicle) to create a new way of thinking about it. Metaphoric criticism as methodology examines the tenor-vehicle pairs to expose the ways the figure functions in each rhetorical usage.

One of the first journal articles ever published on the metaphor as a rhetorical construct, Osborn and Ehninger’s (1962) “The Metaphor in Public Address” suggests metaphors form a “stimulus-response cycle” (p. 226) that works in three steps: error, puzzlement-recoil, and resolution. The authors build upon I.A. Richards’ definition of
the tenor (the subject) and vehicle (the way to reconceptualize it) from his book

*Philosophy of Rhetoric*, a usage that many rhetorical scholars also have adopted.

Osborn and Ehninger suggest a way to evaluate the power of the metaphor: “If one knows the receiver’s tenor of a subject both before and after the occurrence of a metaphor, and the maker’s intention in casting the metaphoric stimulus, one can tell quickly whether the metaphor has performed its intended task” (p. 227-8). That is, evaluating the audience’s knowledge of the tenor before and after the metaphor can determine how effective the metaphor was.

In a later article Osborn (1967) highlights the important properties of one type of metaphor: archetypal metaphors. Osborn says they are common, they are used over many generations without changes in meaning, they often relate to human experience, they are particularly powerful when they relate to human motivation, they are quite persuasive, and they are especially significant in important speeches. Although Osborn limits these properties to archetypal metaphors in this article, rhetorical scholars have applied them to all types of metaphors in the last 50 years.

Indeed, Osborn’s suggestions about archetypal metaphors seem to pre-frame the later ideas of Lakoff and Johnson of how all metaphors operate. In Lakoff and Johnson’s (1980) book *Metaphors We Live By*, the pair argue that metaphors exist for more than just “poetic imagination” and “rhetorical flourish.” Instead, metaphors
structure our thoughts and actions: “Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature” (p. 3). Common types of metaphors they describe include spatialization or orientational metaphors (“happy is up”), ontological metaphors (“inflation is an entity”), and container metaphors (“visual fields are containers”). In each description, Lakoff and Johnson provide examples of the main metaphor at work as well as the entailments that stem from the main metaphor. Entailments are “subcategorization relationships,” according to Lakoff and Johnson (p. 9); for example, “time is a limited resource” is an entailment of the metaphor “time is money.” Lakoff and Johnson define “expressions” as the sayings that support the primary metaphor; for “time is money,” expressions are the use of such words as “spend” or “budget” in relation to time. Lakoff and Johnson’s book serves as the foundation for most rhetorical scholars’ metaphoric criticism.

One such scholar, Robert Ivie (1987), suggests a five-step methodology for doing metaphoric criticism, which I will follow: (1) become familiar with a set of related texts, (2) select representative texts from the bunch, (3) cluster according to entailments of the vehicle, (4) create “concept files” of occurrences of the vehicle, and (5) analyze the concept files for patterns. Carpenter’s (1990) journal article adds an important moral element to metaphoric criticism, suggesting that rhetorical scholars follow Wayne Booth’s call for ethics-based criticism and Raymie McKerrow’s call for
a “pulling together” of many bits of discourse to serve as a text.\footnote{McGee’s “Text, Context, and the Fragmentation of Contemporary Culture,” with similar ideas, would be published three years later.} In his essay, Carpenter uses bits of television, radio, theater, song, and personal correspondence, among others, to trace the metaphor of the American military in the 20th century as making forays into the “frontier” like the glorified explorers of the previous century did in the western United States. The moral/ideological dimension comes in Carpenter’s discussion of this metaphor as being a national tragedy because of its power in structuring our thoughts about war in terms of what he considers to be a false basis.

Bosmajian’s (1992) book Metaphor and Reason in Judicial Opinions focuses its attention on the documents called judicial opinions that judges produce at the end of court trials. Although the text I will be analyzing is not a judicial opinion, Bosmajian is one of the few people who deal explicitly with metaphors in legal texts. He suggests that metaphors and other stylistic tropes are frequent in judicial opinions, and that “the courts have relied heavily on tropes in arguments justifying their decisions,” (p. 12). Referencing Lakoff and Johnson, Kenneth Burke, and others, Bosmajian analyzes the often-cited “marketplace of ideas” phrase in judicial opinions. By framing our world as an open marketplace, Bosmajian argues that ideas become commodities to be bought and sold, which he claims is often problematic. Bosmajian also discusses the “wall of
separation” between church and state, the “chilling effect,” and the “captive audience” metaphors. Bosmajian argues that the power of these metaphors in shaping judicial decisions comes not only through the cases in which they are employed, but also how they are continually referenced in subsequent decisions, making them an important subject of critical attention.

Although not directly related to my topic (and a linguistics-based analysis rather than rhetorical studies-based), Ferrari’s (2007) “Metaphor at work in the analysis of political discourse” demonstrates U.S. President George W. Bush’s use of fear and security metaphors, which are similar to the ones used in my text on copyright law. Ferrari uses Lakoff and Johnson to discuss the conceptual metaphors in President Bush’s post-9/11 discourse on the “preventative” war in Iraq. She touches on how Bush’s metaphoric use contributes to his strategy of fear, including metaphors of the belt (security can be tightened) and struggle (conflict is a struggle).

Finally, Litman’s (2006) book Digital Copyright, from which I draw much of my historical background on the Lehman Working Group, also includes a chapter titled “Choosing Metaphors.” Litman is a legal scholar and not a rhetorician, so her metaphoric analysis, while informative, does not fully delve into the implications of the rhetorical construction of these metaphors. She writes that early metaphors suggested that copyright is “a bargain in which the public granted limited exclusive
rights to authors as a means to advance the public interest” (p. 78), but today the
metaphors is “less about incentives or compensation than it is about control. …
Proponents of enhanced protection changed the story of copyright from a story about
authors and the public collaborating on a bargain to promote the progress of learning,
into a story about Americans trying to protect their property from foreigners trying to
steal it” (p. 80). While Litman’s analysis focuses on the legal implications of these
metaphors, mine focuses on—as Lakoff and Johnson say—our conceptual system, or
how the metaphor use suggests a certain conceptualization of the ideas of copyright
law for the digital age.

Each of these texts frame my theoretical understanding of metaphor use,
providing the methodological framework for my analysis. In the forthcoming chapters,
I will do as Ivie (1987) suggests, assembling a collection of metaphor uses in the bits
of fragmented discourse about the Digital Millennium Copyright Act and Creative
Commons. I will analyze these metaphors to find similar clusters that are used
throughout the discourse, then interpret and evaluate the results to form my
conclusions about each approach’s conceptualizations of copyright in the digital age.

**Conclusion**

This chapter provides an overview of the literature and theory on which I will
be basing my thesis project. In the next chapter, I will provide a deep metaphoric
analysis of the discourse surrounding the Digital Millennium Copyright Act, making some initial conclusions about how they function to construct a conceptualization of the need for digital copyright law. In Chapter 3, I will do the same for Creative Commons. My final chapter will include an extended discussion of the world view that each promote and an analysis of the similarities and differences in metaphor use, as well as a discussion of what the future could hold for these two competing copyright conceptualizations.

I also feel that it is important to note that as the Internet is a global resource, the question of copyright in the digital age is an international one. For the purposes of this paper, I am solely discussing copyright law in the United States, although Creative Commons has been expanded to other countries. Although some of my popular press articles come from international news sources, the coverage is all about U.S. law rather than the law of those particular countries. Other scholars (see, for example, MacQueen, 1997) address the international ramifications of cyberspace copyright.
Chapter 2. Metaphoric Criticism of the Digital Millennium Copyright Act

As I argued in the previous chapter, the origins of the Digital Millennium Copyright Act can be traced to the Working Group on Intellectual Property, chaired by Bruce Lehman, the Clinton Administration assistant secretary of commerce and commissioner of patents and trademarks. In 1993, the Lehman Working Group started analyzing how to adapt copyright law for the digital age, releasing the preliminary Green Paper in 1994 and a final version, the White Paper, in 1995. The White Paper then became two bills, S. 1284 and H.R. 2441, both called the NII Copyright Protection Act of 1995. Although these bills died and the Digital Millennium Copyright Act was not enacted until 1998, I argue that they represent the beginnings of the DMCA and thus the Clinton Administration’s original conceptualization of digital copyright law. These therefore form the basis of my analysis.

Two months after the release of the White Paper, on November 15, 1995, Commissioner Lehman testified to the Subcommittee on Courts and Intellectual Property Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate about the Working Group’s recommendations and how they are addressed in the bills (Lehman, 1995). His statement is adapted from text that first appeared in the “background” section of the

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12 Originally, the government called the Internet the “National Information Infrastructure”; hence the NII in these bill titles.
Green Paper, serving as the justification for the new legal recommendations. The text changed slightly from the Green Paper to the White Paper and again in his statement. Because the statement is the final version of this text, it reflects the ultimate views of the Lehman Working Group. Although many texts on copyright law in the digital age have been generated since this document, this is the first testimony from a government official in the legislature about the topic, making it a foundational document and thus the cornerstone of my analysis. I trace Lehman’s metaphor usage to demonstrate how he and the Working Group rhetorically conceptualize copyright in the digital age. I argue that Lehman metaphorically frames technology as a threat to be feared, while law serves as the security to protect society from that threat, perfectly evoking Beck’s theory of risk discourse. Copyright itself, in Lehman’s speech, is a metaphoric balance between content providers and consumers.

My analysis of the metaphors builds off of Ulrich Beck’s theory of “risk society,” which asserts that in the globalized, post-Cold War, industrial society, we have formed a reflexive modernity that brings with it risks. Risk, according to Beck, is “a systematic way of dealing with hazards and insecurities induced and introduced by modernization itself. Risks, as opposed to other dangers, are consequences which relate to the threatening force of modernization and to its globalization of doubt” (1992, p. 21). Risks bring the challenges of addressing them, and the government often plays
the role of creating these artificial risks for the purposes of controlling the populace. Beck adds: “Questions of the development and employment of technologies (in the realms of nature, society and the personality) are being eclipsed by questions of the political and economic ‘management’ of the risks of actually or potentially utilized technologies” (1992, p. 20). Risk society discourse thus includes the creation of both the threat and the government-based solution to control the risk.

While Lehman’s statement is the cornerstone of my analysis, I believe it is important to address other texts that also deal with the idea of digital copyright law, following McGee and McKerrow’s call for a fragment-based ideological analysis. Thus, I supplement my analysis of Lehman’s testimony by examining the discourse in news coverage of digital copyright laws from 1994 to 1998. To find these texts, I conducted a Lexis-Nexis search of major news outlets with the key words digital, copyright, Bruce, and Lehman. This search returned more than 100 articles; I narrowed my analysis to 43 relevant articles that described the changes to copyright law in the digital age. From these, I found the risk, security, and bargain metaphors also at play, but several new clusters as well, including piracy metaphors, highway metaphors, and frontier metaphors.
Risk Metaphors

Although Lehman acknowledges the positive possibilities for the NII in his speech, his usage of risk metaphors overshadows the potentials for good. His metaphors suggest that technology is a threat to society at large, and specifically to content providers whose works are at risk due to the NII. Lehman also employs delivery and race metaphors that convey a sense of technology being out of control, which contribute to his ultimate fear strategy. Such metaphors reinforce Beck’s notion of the risk society.

In his first use of the risk metaphor, Lehman says, “Creators, publishers, and distributors of works will be wary of the electronic marketplace.” Continuing the thought a few sentences later, he adds, “Creators and other owners of intellectual property rights will not be willing to put their interests at risk” (1995)\(^\text{13}\). Both of these are examples of entailments of the main metaphor of technology as a threat. By claiming that content providers are “at risk” and “wary” of the NII, Lehman cognitively maps feelings of fear onto new technology. As he goes on, the metaphor usage becomes more explicit. At one point, he uses the example of the development of digital audiotape recorders as an analogy for the situation with the NII at that time. The audio recording technology led to an “increased threat of rampant unauthorized use.”

\(^{13}\) Lehman’s testimony is available online at http://www.uspto.gov/go/com/doc/ipnii/nii-hill.html; thus, page numbers are not available for any of the quotes I am using from his statement.
he says, suggesting that the NII presents a similar, widespread danger to content providers.

After establishing the general fear of the technology, Lehman brings in two metaphors that contribute to the risk cluster as entailments. The threat in the first metaphors is general—it is the technology itself that is threatening. Rather than assuming that his readers will complete the entailment that nefarious individuals can exploit those threats, Lehman spells out exactly how and metaphorically links it to previous dissemination methods: “The establishment of high-speed, high-capacity electronic information systems makes it possible for one individual, with a few key strokes, to deliver perfect copies of digitized works to scores of other individuals—or to upload a copy to a bulletin board or other service where thousands of individuals can download it or print unlimited ‘hard’ copies” (1995). This swarm metaphor (evocative of the Cold War rhetoric Beck’s analysis is embedded in) suggests that technology makes it possible for one person to easily disseminate copyright-protected material to a vast audience. By using the delivery metaphor in the same sentence, Lehman draws attention to the necessity of being present in previous copyright violations. A physical connection is no longer necessary to transmit the work, but in using the delivery vehicle, Lehman emphasizes the magnitude of the change by

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14 It is interesting to note here that the word “print” suggests Lehman was more concerned with content elements that could be reproduced in hard copy. The biggest application of the law that emerged from the Working Group, however, has been in the audio and video components, not the printed ones.
framing it in terms of the old way. The technology is thus to be feared because of its possibility for individual actors to disseminate on a large scale.

Another metaphor that entails the risk cluster is the notion that technology and law are in a race. This metaphor builds the suspense and raises the notion that humans are not in control of the situation, something of which we should be afraid. “It is difficult for intellectual property laws to keep pace with technology,” Lehman says. “…technology gets too far ahead of the law” (1995). This metaphor suggests that technology (the tenor) is running (the vehicle) on its own accord, without anything to harness it in. In giving the technology agency (for it is not the developers who are running, it is technology itself), Lehman sidesteps the question of human involvement. Humans have an ethical dimension to their thought process, but technology does not; in removing humans from the equation through this metaphor, Lehman implies that technology may advance without human intervention. This metaphor is a classic example of risk society discourse, in which the technology continues to develop on its own. And if technology is out of control, moving faster than laws can keep up with, we should be fearful of it.

Through the use of threat, delivery, and race metaphors, Lehman positions technology as a vast and frightening force of which our society should be fearful, but few news articles so position technology. One notable exception is a Business Week
article from October 17, 1994. In his lede paragraph, journalist Otis Port quotes Lehman to build a short circuit metaphor: “Unless the creators of information ‘have confidence that their products are not going to be expropriated,’ the wired world could develop a short circuit, says Bruce A. Lehman” (1994, p. 212). A short circuit happens when the incoming and outgoing wires touch prior to where they are supposed to, thus completing the circuit before the electricity reaches its intended destination. In the popular vernacular, however, short circuit is generally understood as any sort of electronics problem that causes massive failure of the system—suggesting, in Port’s use of the short circuit vehicle, that the tenor of technology is unsafe and needs a circuit breaker like copyright law to protect the public from the potential damages caused by a short circuit.

Port’s article goes on to quote the Recording Industry Association of America’s general counsel saying that the “Internet ‘seems uncontrollable’” (Port, 1994, p. 212), metaphorically linking the idea that technology (the tenor) is a wild, non-human being that advances with or without provocation (the vehicle). If humans have no control over the technology, then it is to be feared, for there is no rational, logical way to harness its progress. In the U.S. society that values control and prediction, loss of control is something of which we should be fearful. In Port’s article, it is not the humans using the technology that create the problems, it is the technology itself. Much
of this metaphoric strategy can be tied to the publication in which this article appears; *Business Week*’s readership is more likely to be the content producers who have enjoyed control over content in the pre-digital age, and thus easily swayed by a fear appeal that would remove their control.

Both Lehman and the popular press articles position technology as a vast and frightening force of which our society should be fearful—a risk that should be controlled. Lehman, it is no surprise, has a solution to this problem: the Working Group’s recommendations for changes to law, which can provide security from the threat of technology.

**Security Metaphors**

Law, in Beck’s risk society terms, can control the overpowering threat of mass technological revolution. And indeed, one of the important facets of risk discourses is that they imply the remedy of security within the discourse. Beck writes: “The promise of security grows with the risks and destruction and must be reaffirmed over and over again to an alert and critical public through cosmetic or real interventions in the techno-economic development” (1992, p. 20). Such reaffirmation occurs metaphorically throughout the discourse surrounding digital copyright amendments: Law is protection. This law-as-tenor, protection-as-vehicle metaphor dominates the entirety of Lehman’s statement to the Subcommittee on Courts and Intellectual
Property Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate—he uses some form of the word “protect” (including protected, protection, and unprotected) seventeen times throughout the speech. For every instance of fear brought on by technology, Lehman frames an equal sense of security from that threat found only in the proposed amendments to the law. The content of popular press articles also metaphorically constructs law as providing security from the threat of the Internet.

Lehman’s first use of the protect security metaphor comes directly after the fear metaphor. He writes:

Creators, publishers, and distributors of works will be wary of the electronic marketplace unless the law provides them the tools to protect their property against unauthorized use. Thus, the full potential of the NII will not be realized if the education, information, and entertainment products protected by intellectual property laws are not protected effectively when disseminated via the NII (1995).

Like a deadbolt lock is a tool to protect a family’s home (or property), laws are tools to protect content producers’ property. Existing intellectual property laws, Lehman says, have demonstrated how they secure the products as they have been disseminated in the past. Because of the new threat, however, existing security measures are no longer good enough—new law needs to be developed, extending the protection to cover new threats. This first use of the metaphor is dominant throughout Lehman’s speech, as
most of his references to protection involve securing works. In this usage, the security is exclusively for the producers of the content.

Lehman’s second use of the security metaphor extends the protection to consumers as well. Using the example of audio cassette recorder laws, Lehman says: “Congress responded to the increased threat of rampant unauthorized use with legislation that incorporated both technological and legal measures to protect the interests of both consumers and copyright owners” (1995). Although he does not suggest exactly how the legislation provided such security, the metaphor again pairs nicely with his risk metaphor by providing a concrete example of how the law brings security and expands the scope of the protection to include consumers as well as content producers. Lehman’s audience in this speech is the judicial committee and subcommittee, so it is important for him to frame the metaphor in terms of consumers as well as content providers, as the members of this committee probably identify more as consumers than providers. It is also important to note that in this case, what is being protected is the interests. Lehman relies on his audience to draw the connection between “rampant unauthorized use” and an assault on “interests,” which may be an artificial relationship for some. Not all consumers feel that someone else’s unauthorized use of a copyrighted digital file is a threat to their personal interests.
Lehman’s next expression of the security metaphor is that laws protect *rights*. This metaphoric relationship is stronger because the historical conceptualization of copyright is based on the presupposition that copyright is a right, even from the etymology of the word. Indeed, the U.S. Constitution begins with the Bill of Rights, establishing that law begins with rights. Drawing upon this rich metaphoric history, Lehman says the amendments “will provide the necessary balance of protection of rights” and “would expand the copyright owner’s rights into an arena previously unprotected” (1995). This metaphor thus functions to suggest that the Lehman Working Group’s recommendations uphold the rights of citizens as the framers of the Constitution desired—an important claim in Congressional testimony.

Lehman’s final usage of the security metaphor, with the tenor of law and the vehicle of protect, comes in his last section, wherein he is describing a provision of the Working Group recommendations that makes it illegal to falsify “copyright management information” (the copyright owner and terms of the copyright). Such an amendment, he says, assists the content consumers: “The public should be protected from false information about who created the work, who owns rights in it, and what uses may be authorized by the copyright owner” (1995). In the most direct association of laws as security for consumers in the text, Lehman extends the security metaphor to all players in the copyright debate, suggesting that the law has the ability to provide
that security. This theme continues in the only security-related metaphor in this section that does not involve the word *protect.* “Copyright management information will serve as a kind of license plate for a work on the information superhighway,” he says. In doing so, Lehman metaphorically connects the security that comes from being able to identify cars on the roads to his copyright management suggestions, using an already-established popular term for the Internet. Because citizens and Congress already understand the benefits of license plate laws, this metaphor works well to make his audience map the good feelings about license plate laws (the vehicle) onto the provisions of the new amendment (the tenor).

Throughout the speech, Lehman uses security metaphors to suggest that laws will ensure the safety of content providers and consumers, although he emphasizes the benefits for providers more than consumers. By making explicit reference to how previous laws have provided such security, then offering that the new amendments will extend that protection, Lehman metaphorically constructs the recommendations with the positive connotations of laws in American society.

Lehman’s use of the security metaphors is mirrored in news reports about the changes to copyright laws with the digital age. Most articles include some form of the word, either in a quote or in the expository words of the journalist. In the trade journal *Advertising Age,* Clark (1994) quotes Philip Dodds, executive director of the
Interactive Multimedia Association, as saying, “You have to make sure we have safe and reliable methods to protect intellectual property,” (p. 24). The *Christian Science Monitor* quotes Lehman as saying “We are protecting people against the theft of their intellectual property” (1996, p. 20). *Daily Variety* reports that Senator Edward Kennedy “said the ‘rules of the road’ on the emerging info highway ‘must protect the intellectual property rights’ of creators” (Wharton, 1994b, p. 6).

Other articles continue with the metaphor. “The administration’s goal is to protect against widespread copying of materials,” (Gussow, 1994, p. 9) says the *St. Petersburg Times*. The *Boston Globe* reports that the government approaches digital copyright law “with a hands-off style, allowing copyright holders themselves—and not information superhighway ‘policeman’—to use civil law as protection” (Bruce, 1994, p. 61). The *New York Times* says of the World Intellectual Property Organization (WIPO) treaties: “the international situation was more difficult because countries that were not copyright importers often had little incentive to meet American demands for expanded copyright protection” (Markoff, 1995, p. 18). *Billboard* magazine reports: “The bill protects labels and featured artists from unauthorized digital transmissions of sound recordings and could bring in millions of dollars annually from domestic and foreign licensing” (Holland, 1995a), with a subsequent article adding that law “offers artists and labels protection” (Holland, 1995b). The *New York Times* claims that
previous copyright laws “contain no explicit protection for recorded music or computer software” (Lewis, 1996, p. A1). And Billboard also adds that the WIPO treaties “offer higher worldwide protection” and “should ensure that sound recordings will not only be protected in the digital-delivery age, but will receive the same treatment as other intellectual properties” (Holland, 1996). In each of these metaphor uses, law serves as the tenor and protect serves as the vehicle.

Just as Lehman’s use of the term in his testimony implies that law will provide security from the threat of the digital technology (and pirates), these metaphors imply that the public interests are best served by enacting some form of copyright law. According to these news articles, copyright law is unquestionably protection, and what needs to be protected are intellectual property, people, labels and artists, music, software, and sound recordings. With the exception of the reference to labels (which only comes in a trade press, appealing to the audience for those pieces), all of these elements are part of the public good—creative works made by and for people, the people themselves, or the ideas people have. Working in conjunction with the risk and piracy metaphors, security and protection metaphors suggest that the only way for the new technology to be safe is to enact a form of copyright law that imposes strict guidelines on the fledgling Internet. Such metaphors thus work to map the positive
feeling of security and protection onto the proposed changes to copyright law, and reinforce a sense of order on the risk society.

**Piracy Metaphors**

Describing the illegal transmission of copyrighted material online as “piracy” is not a new use; indeed, the *Oxford English Dictionary*’s second definition of piracy is: “The unauthorized reproduction or use of an invention or work of another, as a book, recording, computer software, intellectual property, etc., esp. as constituting an infringement of patent or copyright; plagiarism; an instance of this.” The originations of this term in English stem from the 17th century, including John Hancock’s 1668 reference to “Some dishonest Booksellers, called Land-Pirats, who make it their practise to steal Impressions of other mens Copies” (OED). Daniel Defoe and Lord Byron also referenced such a use of the term, according to the OED, but it was not until the digital copyright law battles began that the term infused public discourse. It is interesting to note that Lehman does not use the piracy metaphor in his statement, but it is rampant in the news media discourse.

The first few newspaper reports about the issue start to introduce the term piracy, and as the debate intensifies, the word appears more frequently. An article in the *New York Times* on July 7, 1994, the day the Green Paper was released, described the need for changes to copyright law: “Although it would be virtually impossible to
stop individual bootleg copies of material from being transmitted electronically, the goal is to create a legal deterrent to widespread piracy” (Riordan, 1994, p. D1). An article the next day in the Boston Globe continues the trend. “According to the report, copyright protections must be extended to prevent intellectual property of individuals and industries—such as the motion picture, publishing, music and computer software industries—from being stolen or pirated” (Bruce, 1994, p. 61). In an article published in the entertainment industry magazine Daily Variety, the author says that, “Lehman conceded that even with passage of legislation, copyright holders will still face problems with piracy,” and then quotes the Motion Picture Association of America saying that a continued dissemination of movies “requires a secure path, free of hijackers and pirates” (Wharton, 1994a, p. 3).

One Newsweek article even metaphorically aligns hackers with pirates, calling one directory that hackers broke into “a pirate’s treasure trove” (Newsweek, 1994, p. 46). It also includes estimates of how much money is lost to “piracy” each year, discusses a “nationwide piracy ring,” references “thievery,” suggests that “pirating a digital version” takes a significant time investment, and suggests that in Asia, “piracy is not always considered a crime.”

These references continue. In a Daily Variety article titled “Biz backs copyright report; criminal sanctions lobbied for bill on info highway robbery,” the author refers
to violators as “copyright pirates” (Wharton, 1995, p. 3). An article in the *Economist* from July 27, 1996, on digital technology and copyright contains “pirate” or “piracy” a total of 28 times in 3,011 words, making it one of the largest concentrations of piracy metaphor uses in popular press coverage. The *Financial Times* references “cyberspace pirates” (Dunne, 1995, p. 13), the *New York Times* discusses “Internet piracy” (Schiesel, 1996, p. A1), and the *Washington Post* says that the new laws “help prevent piracy of computer software, movies and other recordings produced for global markets” (Barr, 1998, p. A25). Each of these examples connect the tenor of digital copyright violators to the vehicles of pirates.

Pirates. Piracy. Treasure. Thievery. Robbery. Stealing. The journalists paint a picture of unsavory theft from hard-working, law-abiding businesses. The primary definition of piracy in the *Oxford English Dictionary* is, “The action of committing robbery, kidnap, or violence at sea or from the sea without lawful authority, esp. by one vessel against another; an instance of this.” Tales of pirates stretch far back in history to times before the common era with the Sea People in the Mediterranean. Pirates sailed the high seas with no attachment to a country, surviving on often violent thievery of other ships, seeking treasure and fortune with a disregard for fairness and the well-being of others.
By metaphorically aligning copyright infringers with pirates, the popular press maps the mystique and danger of the lawless pirates onto these present-day unnamed “pirates” and provides a frame that guides both behavior and policy. Like Lehman’s threat metaphors, the piracy metaphor works to construct an aura of fear surrounding the technology—but in this case, it is less about the technology and more about the people using it. Interestingly, during the formation of digital copyright laws in the mid-1990s, the focus was generally on the threat of piracy rather than documented cases of piracy.\(^\text{15}\) Law-abiding, ordinary people have something to fear from pirates, whose disregard for morals or laws makes them a significant threat, according to the metaphor, although in both its original use and its contemporary application to digital copyright violations, those who are at risk from such attacks are merchants of the goods, not the public.

Nevertheless, the popular notion of seafaring pirates includes an element of violent harm toward innocent victims who are simply doing their jobs. By suggesting that copyright violators are engaging in piracy, the metaphor maps the innocent victim status to the copyright holder and the violent thievery to the infringers. This metaphor works particularly well because to many, the idea of computer hackers also held a similar mystique—alluring, but ultimately bad. The take-down-the-man rally cry of

\(^{15}\) This would change during the popular press coverage of the Napster legal debate at the turn of the century, when piracy became a central focus of the discourse.
hackers and pirates is really quite similar, but the effects of the robbery at sea often trickled down to innocent victims in a way that makes this metaphor effective in producing fear for the copyright violations. The metaphor ultimately suggests the detrimental effects of this thievery will reach as far as the innocent public.

Although most articles dealing with digital copyright law mention some form of piracy, a few examples deserve a closer look. An article in the January 27, 1995, issue of the *Christian Science Monitor* extended the pirate metaphor to include a historical geographic reference when discussing digital copyright law: “The idea is to make it more difficult for the information superhighway to become the high-tech equivalent of the Spanish Main, where byte-hungry buccaneers log on to bulletin boards to pirate software and other protected information” (Spotts, 1995, p. 9). The Spanish Main references the Spain-owned coastline along the Caribbean Sea, including what is now Florida, Mexico, Central America, and the northern coast of South America. This region of the world was notorious for its piracy in the seventeenth century because of the gold riches coming out of the port cities (and likely especially prevalent in contemporary American popular culture because of Robert Louis Stevenson’s *Treasure Island*). Metaphorically equating the Internet (the tenor) to the Spanish Main (the vehicle) transfers the excitement of vast fortunes awaiting while also carrying with it the dangerous threats of piracy.
Gimm (2005) describes the use of the piracy metaphor in the Congressional debates about the DMCA in 1998, but does not trace its use and reverberation in popular press articles or in the original manifestations of the DMCA in the mid-1990s. Nevertheless, several of his observations are also relevant to my study. Gimm notes the prevalence of international themes when discussing piracy: “In terms of a tangible enemy, piracy is defined exclusively as a foreign threat rather than a domestic one” (2005, p. 16). This foreign element comes up in a one of the news reports as well. In an op-ed penned by Bruce Lehman in *Business Week*, the international reference comes up again, as he suggests “a lax legal regime in one country could provide a haven for pirates who could undermine the market for legitimate ‘goods’ throughout the world” (Lehman, 1998, p. 21). By explicitly connecting the piracy metaphor to global interests, this article paints the enemy pirate as a foreign threat. Not only does piracy threaten in the domestic sphere, but it also could affect the ability of the United States to compete in the global market. While the perpetrators of piracy are not as explicitly constructed as being foreign as in Gimm’s examples, the news article brings in the international element, thereby suggesting that pirates could be housed outside the borders of the United States. The international nature of the threat also evokes the Cold War rhetoric on which Beck’s risk society discourse theory is framed.
One interesting difference between my findings about the piracy metaphors in the early 1990s and Gimm’s findings from the Congressional debates in the late 1990s is in a distinction between legal and illegal copying. Gimm argues that the way legislators used piracy “obliterates the differences between stealing, all forms of copying, and pirating” (2005, p. 15). While most of the piracy metaphors at play in the news articles collapse the difference, I found two examples of this distinction. The first is an opinion piece in the *Globe and Mail*, in which the author writes that “piracy is already illegal” (Knopf, 1996), so the proposed changes in digital copyright law are unnecessary. And a *Newsweek* article from July 18, 1994, seems to suggest a difference between “pirated audiotapes” and “digital copies”: “Unlike photocopies of books or pirated audiotapes, the digital copies are virtually identical in quality to the original” (Kantrowitz, Cohen, & Liu, 1994, p. 54). Such phrasing suggests that the authors make a distinction between illegal copying and copying in general. This point of distinction is lost on all other authors; all copying falls under the piracy metaphor, whether it is illegal or not. Confusingly, however, the *Newsweek* authors fail to continue using this distinction in their piece, adding later that “network piracy is a minor—but growing—problem” and “networks create more opportunities for piracy” (Kantrowitz, Cohen, & Liu, 1994, p. 54). The piracy metaphor has power for stricter
law enthusiasts because it collapses all uses of copying into violent thievery without making a distinction between legal and illegal copying.

The piracy metaphor—widespread in news coverage throughout the beginnings of digital copyright law development—thus frames the Internet as a dangerous place for creative goods, full of people who are looking to violently steal from innocent businesses and the public at large. Some of the references are more detailed metaphorically—referencing geographic areas famous for pirates or framing it as an international problem—but all reinforce the idea that the rise of the Internet brought with it a threat.

**Balance Metaphors**

Litman (2006) claims that the dominant metaphors in modern copyright debate have moved into control rather than the bargain (or a balance) between content producers and the public. Lehman’s speech, however, suggests that the balance metaphor is still in existence, although the majority of metaphoric uses in popular press articles are from people opposing Lehman’s suggestions. Toward the late 1990s, proponents of strict digital copyright laws began reclaiming the balance metaphor.

Law, Lehman says, is a balance. In one paragraph in his speech, Lehman (1995) uses the balance metaphor four times:

Technology has altered the balance of the Copyright Act—in some instances, in favor of copyright owners and in others, in favor of users. The law should be
adapted to accommodate and adapt the law to technological change so that the intended balance is maintained and the Constitutional purpose is served. The Administration believes that, with the amendments proposed in H.R. 2441 and S. 1284, the Copyright Act will provide the necessary balance of protection of rights—and limitations on those rights—to promote the progress of science and the useful arts. Existing copyright law needs the fine-tuning that technological advances necessitate and that those bills provide, in order to maintain the balance of the law.

Balance occurs when two sides are in equilibrium, unmoving, each having equal status. The balance metaphor is prevalent in the entire judiciary system, beginning with the scales of justice icon that is metaphorically used to represent the system. Being in balance is one of the founding principles of American Constitutional law, and to suggest that the law is out of balance implies that changes need to be made to regain that balance. Devices or systems that rely on balance (as Lehman suggests the legal system does) usually cannot function when out of equilibrium. Although his first use suggests that it has thrown the balance off occasionally in favor of both parties, he does not suggest that this evens out; instead, he suggests that the scales of justice are off, although he leaves open the possibility of whether it is the owners or the users that get the better deal. Instead, he sidesteps which is more important, claiming that maintaining the copyright balance, the bargain that has been in place for centuries, is important. Note in this section that Lehman’s balance metaphor also pits owners and users against each other, suggesting that one has to give something up for the other.
The popular press articles also occasionally employ the balance metaphor, although usually in starkly opposing sides. A *Washington Post* article is one example in which the balance metaphor is used for neither side, but instead to explain the narration of copyright law: “Historically, the United States has sought to maintain what is known as the ‘copyright balance’ between the needs to protect rights of those who produce works and needs of those who would use the information to gain access to it” (Schwartz, 1996, p. A1). Save for this reference, however, the balance metaphor is usually strategically employed by one side or another to make claims about the proposed law.

In an article in the *Christian Science Monitor*, Carol Henderson, executive director of the American Library Association’s Washington, D.C., office is quoted as saying: “The series of amendments proposed to the copyright laws are small individually, but put together they could easily tip a careful balance between the legitimate needs of copyright holders and the legitimate needs of the users of copyrighted material” (Spotts, 1995, p. 9). The *New York Times* also quotes a representative of the American Library Association using the metaphor. “‘If we don’t preserve that balance, then only information proprietors will cross the bridge into the 21st century,’ said Adam M. Eisgrau, legislative counsel for the American Library Association” (Lewis, 1996, p. A1). Another *New York Times* article uses the balance
metaphor in expository writing, explaining that opponents say “the new treaties, if adopted, would not be in the spirit of American copyright law, which was intended to balance profit against society’s need for information to advance progress in science, education and the arts” (Caruso, 1996, p. D1). A final New York Times article also claims that opponents say “today’s copyright laws strike a balance between protecting commercial interests and encouraging new creations” (Caruso, 1998, p. D3), but the DMCA will disrupt the balance.

In each of these uses, it is a balance between the copyright holders and the users; the latter two New York Times articles are most explicit about pointing out that the balance is between profit and societal good (ironic, given that neither is a direct quote, unlike the first two). All explain the balance as being historically relevant, suggesting that the balance currently in effect is an American principle, based in the spirit of the law. By implying that their goals are only to maintain such balance, the opponents of the law metaphorically align themselves with the framers of the Constitution, a powerful rhetorical position. And by suggesting that the laws will throw the equation out of balance, the opponents simultaneously paint Lehman and his supporters as being in favor of the commercial interests rather than the public as well as not being in the spirit of the Constitution.
The power inherent in this metaphor use is likely why proponents of the digital copyright laws moved to reclaim it after the original bills had failed and the fight moved to the World Intellectual Property Organization meeting. A *New York Times* article suggests that the WIPO “treaties are aimed at balancing the interests of writers, artists and other creators of copyright material against those of users and distributors of digital information” (Schiesel, 1996, p. A1). *Billboard* magazine quotes Register of Copyright Marybeth Peters as saying the WIPO treaties “will require other countries to adopt a copyright system that comports with the balance already struck in U.S. law” (Holland, 1997). And Lehman employs the balance metaphor again in his *Business Week* op-ed: “Yet there are those who are attempting to use this opportunity to undermine the balance necessary to the functioning of our copyright system” (Lehman, 1998, p. 21).

Through these uses of the balance metaphor, proponents of strict digital copyright law suggest that the existing conditions—the addition of new technologies—represent an imbalance, and it is the laws that are necessary to rectify the problem. For both parties using the balance metaphor, it draws upon the Constitutional history of copyright law to suggest that the position of imbalance is wrong. For the proponents of the law, however, it is important to imply that new technologies have unaligned the balance, and that the proposed law changes will repair the problem.
Highway Metaphors

Video artist Nam June Paik is said to have invented the term “information superhighway” to describe the Internet in a 1974 Rockefeller Center report, but it was Vice President Al Gore who popularized the term in the 1990s. Although Lehman’s only real metaphor related to this is the license plate metaphor discussed in the security section (likely because the “information superhighway” term was not as popular when Lehman testified), the press employed extended metaphors related to it in explaining Internet-related copyright laws to their readers.

Most of the metaphors suggest that failure to act will be detrimental to the progress along the highway. In a bit of a mixed metaphor, one news report says: “A White House panel is warning that copyright problems could derail many of the commercial services expecting to be cruising the information highway” (Newsbytes, 1994). The Daily Variety, which also calls it the “infopike,” writes that the Motion Picture Association of America says that “the info highway will unleash a ‘fabulous cornucopia of information and entertainment. But realization of this promise requires a secure path, free of hijackers and pirates” (Wharton, 1994a, p. 3). The New York Times quotes Lehman: “There won’t be any cars on the highway if we don’t make certain the cars don’t get hijacked at the entrance ramp” (Riordan, 1994, p. D1). Advertising Age writes that “The Clinton administration [is] seeking to remove potential copyright roadblocks on the information superhighway” (Clark, 1994, p. 24).
These metaphors also fall into the risk category—the road will become dangerous if
digital copyright laws are not passed. Such metaphors work particularly well because
the majority of the audience these articles are aimed at have experienced a highway at
some point in their lives. Anything that prevents one from cruising on a highway or
suggests the possibility of a security-threatening hijacking is obviously a danger; if the
law can solve these problems, then it is an important step to ensure that the highway
remains clear and safe.

Countering Lehman and other law proponents’ view, the Boston Globe quotes
Ed Black, general counsel and VP of the Computer and Communications Industry
Association: “If you have too many toll booths and hurdles on the information
superhighway, nobody will be able to move” (Bruce, 1994, p. 61). The Globe and Mail
adds that the new laws “will only add inefficient transaction costs and tolls to an
otherwise ‘free’ system” (Knopf, 1996). Likewise, a Newsweek article suggests that
“Consumers may face new tollbooths on the Information Highway,” adding that
“Patrolling the Infobahn could turn out to be even harder than building it” (Kantrowitz,
Cohen, and Liu, 1994, p. 54). Just as proponents used the threat of obstructed or
insecure roadways to suggest that copyright is needed, opponents of the law employ a
roadway annoyance to shape public perception of the changes to copyright law. Most
citizens are not enamored with the idea of toll booths, which not only require traffic to
slow but also cause a monetary deficit for motorists. Equating the copyright law limitations to tolls maps the ill will most American motorists feel toward the toll system onto the legislation.

A few of the articles, however, use metaphors that directly parallel the concepts they are trying to express, with vehicles that map directly onto the tenors. The *Daily Variety* reports that Senator Edward Kennedy “said the ‘rules of the road’ on the emerging info highway ‘must protect the intellectual property rights’ of creators (Wharton, 1994b, p. 6). “Rules of the road” is an informal term for the laws governing driving, just as copyright law is the rules governing intellectual property transmissions on the web. This metaphor assists readers in understanding what copyright means metaphorically. In other uses, *Business Week* makes an off-hand remark about “pick[ing] up speed on the Information Superhighway” (Yang, 1996, p. 58), referencing the rise in users, and a Reuters wire story suggests that the WIPO treaties “would be the roadmap for copyrights on the information superhighway” (Reuters, 1996). Like maps provide guidance for highway travels, passage of the WIPO treaties would provide a plan for action in copyright law in the United States. These metaphors thus connect the readers to the concepts without a strong suggestion one way or another as to the benefit of the laws.
Frontier Metaphors

In this project, I am following Carpenter’s (1990) (mentioned in Chapter 1) suggestion that critics should create texts out of multitudes of popular press references, and like Carpenter, my texts reveal cultural cooption of the “new frontier” metaphor. Cyberspace, according to the news reports about digital copyright law, is the new frontier, complete with lawlessness, outlaws, bandits, sheriffs, pioneers, and wrangling. Lehman does not use this metaphor, but many of the news media reports do.

The *Boston Globe*, covering the release of the Green Paper in an article on July 8, 1994, opens with the following: “Like the Old Wild West, the developing ‘information superhighway’ is in danger of becoming a lawless land, with outlaw bandits (the land-based equivalent of pirates) stealing property at every opportunity. And the sheriff who says he has come to institute law and order is Commerce Secretary Ronald H. Brown” (Bruce, 1994, p. 61). *Newsweek* quoted lawyer and author Anne Wells Branscome explaining that “electronic pioneers have been ‘carving out their own information domains in much the same way pioneers homesteaded the Western frontiers’” (Kantrowitz, Cohen, & Liu, 1994, p. 54). Another *Newsweek* article suggests that the Internet is “our new frontier, a digital Wild West” (Newsweek, 1994, p. 46). Peter F. Harter, public-policy counsel for Netscape Communications, is quoted as saying, “We’re facing the frontier of the law,” (Yang, 1996, p. 58) in *Business*

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16 Brown was the one who formally released the Green Paper, although he was a figurehead only; the work was headed by Bruce Lehman.
Week. A Reuters wire article describes the debate about digital copyright as “wrangling about who owns what on the Internet” (Reuters, 1996).

The frontier metaphor is a common one for describing the Internet; cyberspace is, after all, a new space. And just as popular tales about the American Wild West suggest, the beginnings of American occupation of the frontier were bumpy, with laws only working in carefully controlled areas and many outlaws running wild. By framing the beginnings of cyberspace in this way, the news media not only captures public interest in the new frontier but also metaphorically aligns players with certain subject positions in the tale—the Clinton administration officials are the sheriffs who will ultimately prevail, bringing a needed law and order to the lawless land. Those individuals who were early adopters of the Internet are pioneers, staking claims on virtual land and setting up norms of society with which others may or may not agree. After all, federal and state law often failed to match the legally dubious truces many pioneers reached with their neighbors.

The historical frontier metaphor even extends into the name of a group that opposed Lehman’s copyright law recommendations: the Electronic Frontier Foundation. A Washington Post article quotes the board chair of the EFF, Esther Dyson, extending yet another frontier metaphor to demonstrate her reticence to the change. “It’s like trying to update laws governing the use of horse-drawn buggies to
apply to automobiles, she suggested. ‘There are probably laws on the books that say how often you should water a horse,’ Dyson said. ‘But you don’t apply those to cars’” (Corcoran, 1995, p. H1). As the life on the new frontier became more established, automobiles replaced horses as the main mode of transportation, but the rules are not exactly the same. Instead, Dyson suggests, the entirety of copyright law should be rethought so laws relevant to horses are not applied to cars—and copyright laws relevant to other forms of transmission are not applied to cyberspace. By connecting these thoughts, Dyson frames the copyright debate for the public in terms of the differences between horses and automobiles—something much more visual and easier to understand than the complexities of United States copyright law.

**Conclusion**

Metaphors structure our thoughts and actions, and Lehman’s speech and the news media articles on digital copyright demonstrate the many metaphors at play in the digital copyright law debates. As I have shown, six main clusters of metaphors emerge throughout the discourse surrounding digital copyright law: risk, security, piracy, balance, highway, and frontier metaphors. In each of these examples, I have demonstrated how the conceptualization of copyright through that metaphor can shape public perception of what law is and its role in the digital realm, especially in contemporary risk society.
A full discussion of the implications of these metaphor uses will be forthcoming in Chapter 4, but a few preliminary remarks are warranted. Because our view of reality can be seen in the structure of our language, our discourse reveals the ideologies operating in our world view. The metaphor uses that Lehman promotes—especially the risk and security ones—suggest that he operates under a risk society ideology, in which technological development is something to be feared, and the government's role is to protect the populace from this threat. The balance, highway, and frontier metaphors serve a strategic purpose to further his claim that the laws are important and his proposals are in line with past conceptualizations of copyright law, while the risk, security, and piracy metaphors speak to Beck’s notion of a constructed ideology of fear. Within the discourse of the origins of the Digital Millennium Copyright Act, technology is a scary development that could harm the public, and needs strict copyright law to protect it. The news media reports began to hint at alternative conceptualizations of copyright law; in the next chapter, I will examine one such movement in great detail: the Creative Commons licensing scheme.
Chapter 3. Metaphoric Criticism of Creative Commons

Creative Commons is a non-profit organization founded to promote copyright alternatives to the Digital Millennium Copyright Act (DMCA). Creative Commons offers creators a set of six different licensing schemes that enable the work being licensed to enter the public domain but with whatever restrictions the creator designates. Founded in 2002 by law professor Lawrence Lessig and others opposed to the stringent requirements of the DMCA, Creative Commons has rapidly grown in popularity, with millions of content objects now licensed using their scheme. Although other licensing schemes are available (Wikipedia, for example, is licensed with the Free Software Foundation’s GNU Free Documentation License), Creative Commons remains one of the most popular, with major players like Google, Yahoo, and Flickr developing search engines that catalog objects within the Creative Commons repository.

Prior to starting Creative Commons, Lessig had established himself as one of the premier scholars in United States cyberspace law. He founded Stanford University Law School’s Center for Internet and Society, has served on the board of directors of

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17 According to a 2002 Creative Commons press release, the original Board of Directors included “law professors Lawrence Lessig, James Boyle, and Michael Carroll, MIT computer science professor Hal Abelson, lawyer-turned-documentary filmmaker-turned-cyberlaw expert Eric Saltzman, and public domain web publisher Eric Eldred. The organization is also advised by a technical advisory board that includes boardmember Hal Abelson, Barbara Fox (Senior Architect, Cryptography and Digital Rights Management, Microsoft WebTV), Don McGovern (Senior Fellow at the Berkman Center for Internet and Society at Harvard Law School), and Eric Miller (Activity Lead for the World Wide Web Consortium’s Semantic Web Initiative).”
numerous cyberlaw-related organizations, has written prolifically for both popular and academic presses, and argued about copyright law in the digital realm at all levels of the court, including the U.S. Supreme Court. Lessig’s four books—*Code and Other Laws of Cyberspace* (2000), *The Future of Ideas* (2001), *Free Culture* (2004), and *Code Version 2.0* (2006)—are all staples in technology, culture, and law courses across the United States. Because Lessig is a well-known figure in Internet law circles, Creative Commons received widespread press and popularity from its initial launch in 2002.

Lessig’s (2004) book *Free Culture* discusses the problems with existing copyright law for the Internet age. Accusing copyright supporters of fear mongering, Lessig argues that the current copyright laws are no longer in the spirit of the founding fathers, and are, in fact, impinging upon the freedoms they supported. In the final five pages of the book, Lessig includes a dense argument for Creative Commons as a solution to the problems he spent the previous 250 pages discussing. These five pages, together with references throughout Lessig’s other works, form the foundational documents I will analyze. Additionally, I will look at how Creative Commons has been received in the popular press. In order to do this, I conducted a Lexis-Nexis search of major news publications with the keywords “Creative Commons,” “Lessig,” and “license,” then analyzed the resulting 32 articles to determine the metaphor uses. The
results included several hundred articles from newspapers all over the world, including the *New York Times*, *Washington Post*, *Boston Globe*, *Christian Science Monitor*, *The Guardian*, *Globe and Mail*, and *The Economist*, and creative industry trade publications like *New Media Age* and *Creative Review*.

While a few metaphors are prevalent throughout the discourse surrounding Creative Commons, the majority of the metaphors are used only one or two times. Those that are repeated, however, are significant: materiality, construction, balance, freedom, economics, and protection metaphors. In this chapter, I will argue that three metaphoric clusters emerge from the expression of physical space. The name Creative Commons itself metaphorically evokes the idea of community-based usage rights of property owned by an individual, as does discussions of the public domain. Additionally, I will evaluate the dominant use of construction metaphors—especially by Lessig—in a number of different contexts using the vehicle of building or rebuilding on several tenors pairs (including the public domain, a movement of people, new laws for new technology, a method of denoting what is marked as Creative Commons, and an organization). Next, I demonstrate how the use of balance metaphors echoes past metaphors about copyright law while suggesting that the current situation is out of balance and thus needs to be rectified by an idea like Creative Commons. Additionally, I argue that freedom functions as a dominant metaphor and
ideograph that positions Creative Commons on an ideologically high ground. Next, I suggest that the discourse employs several vehicles from an economics metaphoric cluster to describe how Creative Commons works to an audience well versed in traditional market economics. Finally, I address metaphors that frame Creative Commons as a form of protection for the rights of ownership.

**Materiality Metaphors**

Throughout the discourse surrounding Creative Commons, two metaphoric clusters emerge that attempt to make sense of copyright in terms of material space. The first is the idea of the commons, a shared public space. The second is the public domain, a concept that runs through all debates over copyright but originates in the idea of shared land.

**The Commons**

The name of the organization itself is a metaphor: Creative Commons. The first time Lessig uses the vehicle of the commons is in the subtitle of his (2001) book *The Future of Ideas: The Fate of the Commons in a Connected World*. One section in the book is devoted to “rebuilding the creative commons”—an idea that later forms the basis of his organization. In naming the organization Creative Commons, Lessig metaphorically ties the organization to the rich history of the term commons.
The idea of a commons as a physical space is deeply entrenched in British history. In the United Kingdom, a commons is a piece of land owned by an individual but that many people have the rights to access and use. This included land in which farmers could graze livestock, for example, or a lake where anyone could fish. Such examples of the commons were often tied to natural resources; while someone did own the piece of land, the resources were available to anyone in the community. In the United States, land such as the Boston Common was modeled after such a system; today, the Common serves as a public park, a modern equivalent of the commons.

The metaphoric use of the commons to refer to non-physical spaces is not new; over time, the idea of the commons has expanded to include any public resource. The “information commons,” for example, is the idea that the world’s knowledge should be combined into a source accessible to anyone in a (usually virtual) library. The idea of the commons has inherently positive associations, including the ideas of community and free resources, for one has access to the commons by mere virtue of being part of a community. The use of the term also evokes a sense of friendship through that idea of community.

By calling his organization “Creative Commons,” Lessig metaphorically links his goals to the idea of shared resources. The works licensed under Creative Commons are then not just the property of individuals, they are also part of the commons—
resources designed for the entire community to use. Like a public park owned by a city but open to anyone to enjoy, works licensed under Creative Commons carry the idea that they are for the community to access and use. Since Creative Commons is designed around the idea of enabling some forms of alteration to the work, this metaphor is particularly apt.

The Public Domain

Closely related to the idea of the commons is the public domain. In current terminology, a work is in the public domain when it has no copyright applied to it. Often, this comes because the copyright term expires. For example, Nathaniel Hawthorne’s *The Scarlet Letter* is now part of the public domain, meaning that anyone can print the text and sell the bound copy or reproduce it on a website. Much of the debate surrounding digital copyright is about works entering the public domain; the length of time a copyright should be extended is a contentious issue. But the public domain is itself a metaphor, originating in the seventeenth century as, according to the *Oxford English Dictionary*, “land belonging to the public; common land.” Like the commons, the public domain is another physical space that is provided for the good of the community at large, and references to it abound in any discussion of copyright. For

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18 See, for example, [http://www.eldritchpress.org/nh/sl.html](http://www.eldritchpress.org/nh/sl.html), where Eldritch Press has reproduced the entirety of Hawthorne’s novel. Eldritch Press owner Eric Eldred was the defendant represented by Lawrence Lessig in the Supreme Court case on copyright extensions that caused Lessig to devote much of his time to developing an alternative to existing digital copyright law. Eldred is also one of the founders of Creative Commons.
Lessig and the Creative Commons supporters, the public domain is beneficial and for the common good, and thus a metaphor that bears repeating; for content owners hoping to continue making a profit on their creative works long after the death of the creator, the public domain is the last thing they want. Thus, it makes sense for Creative Commons to embrace the use of the public domain as a positive metaphor throughout their literature, and it is often cited in popular press coverage of the organization as well, since the debate over Creative Commons almost always centers on enabling works to enter the public domain, which is one of Creative Common’s main criticisms of the DMCA.

Both of these two metaphoric clusters conceptualize Creative Commons and copyright law as in terms of materiality. For an abstract concept like copyright licenses, such metaphors work to make the reality of the effects more concrete, demonstrating their applicability to the real world. Since Creative Commons affects digital works most especially, such metaphors also help to frame the ideas in physical terms.

**Construction Metaphors**

The section in Lessig’s book *Free Culture* that addresses Creative Commons is titled “Rebuilding Free Culture: One Idea,” putting one of his most dominant metaphors front and center in his argument: the construction metaphor. This is not the
first time he used this metaphor, however; in his chapter from *The Freedom of Ideas* (2001), he titles a section “Rebuilding the Creative Commons” in a generic reference to works in the public domain, since the organization had not yet been formed. In four pages of text in his book, Lessig uses some form of the word “build” 15 times, making it one of the more dominant metaphors in the argument for Creative Commons. This metaphor would be more powerful, however, if Lessig were to choose one element that he was building, and decided on whether he was building it or rebuilding it.

The chapter from *Free Culture* contains numerous uses of the build metaphor. Referencing Creative Commons, Lessig says, “Its aim is to build a layer of reasonable copyright on top of the extremes that now reign. It does this by making it easy for people to build upon other people’s work, by making it simple for creators to express the freedom for others to take and build upon their work. … Creative Commons aims to mark a range of content that can easily, and reliably, be built upon” (2004, p. 282, emphasis in original). This metaphor is fairly straightforward, with build as the vehicle, but without a direct specification of the tenor. Engineering teaches us that all layers in a structure—foundations, floors, support beams, walls, and roofs—contribute to the structural integrity of the building; each layer is critically important for the other layers and for the structure in its entirety. The rigid “extremes” of digital copyright law may provide the foundation, but for the creativity to emerge—the architectural beauty—
creators must be able to allow others to use their work. Architects must collaborate with each other on the design of each element of the structure so as not to design a roof that will not fit on top of the walls, for example. Such a collaborative building process is what Lessig is advocating in this metaphor use.

Lessig repeats the idea a few paragraphs later: “Creative Commons thus aims to build a layer of content, governed by a layer of reasonable copyright law, that others can build upon. Voluntary choice of individuals and creators will make this content available. And that content will in turn enable us to rebuild a public domain” (2004, p. 283). This is the first mention of an explicit tenor, exactly what Lessig is intending to build: the public domain. While the first few uses of the metaphor obscure the object of exactly what Creative Commons is building, this metaphor finally provides it. It is also important to note that Lessig shifts to “rebuild” in this use, suggesting that the public domain used to be standing, but is no longer. Since Lessig’s argument is that the original copyright laws used to enable works to enter the public domain, but no longer do, the idea of rebuilding in relation to the public domain is apt. Nevertheless, it is also a bit of a shift in metaphor use, since it is the first time he has referenced the idea of rebuilding something that was already there. This metaphor use may therefore have been more appropriate had Lessig included a metaphoric link to the destruction of the
public domain; although this metaphor appears earlier in the book, it needs to be restated again when Lessig hits the construction metaphor so hard.

Leastig continues, “we are not interested only in talking about a public domain or in getting legislators to help build a public domain. Our aim is to build a movement of consumers and producers of content (‘content conducers,’ as attorney Mia Garlick calls them) who help build the public domain” (2004, pp. 283-4). In this use, Lessig reinforces that the object he is metaphorically building (the tenor) is the public domain, but he switches the vehicle from rebuilding to simply building it. And he also calls for a change in the tenor: not simply building a public domain, but building a movement of people—an idea that seems to diminish the power of the construction metaphor for the public domain. While the idea of building a movement suggests development, it clashes with the construction metaphor Lessig uses with the public domain; interchangeably using each of these metaphors seems to dim the power of both.

He continues to muddle the metaphor in subsequent uses. Lessig calls for new laws for new technology; “Creative Commons give people a way effectively to begin to build those rules,” he writes (2004, p. 284). With this addition, he adds yet another tenor to a list that already includes the public domain and a movement of people. Lessig extends the metaphor when detailing his plans for action.

The next step is partnerships with middleware content providers to help them build into their technologies simple ways for users to mark their content with
Creative Commons freedoms. … These are the first steps to rebuilding a public domain. They are not mere arguments, they are action. Building a public domain is the first step to showing people how important that domain is to creativity and innovation (2004, pp. 285-6).

Thus, Lessig introduces a fourth tenor for the construction metaphor—to build ways to denote Creative Commons content into the technology, a more mechanical use of the term build—before repeating the tenor of the public domain. And again, Lessig returns to the vehicle being simply building a public domain, rather than rebuilding it, as the section title and the first use suggests.

This metaphoric confusion regarding what is being built dilutes what would have otherwise been an extremely powerful metaphor. The metaphoric alignment of building new rules is perhaps the strongest of the bunch; as new technology grows, new rules need to rise up to meet the growth of technology. But since Lessig has already metaphorically aligned the building vehicle with public domain, movement, and technology tenors, the addition of a tenor of rules causes the entire metaphor to lose its power. The problem is compounded that in each of the uses, it is not clear whether the vehicle is supposed to be build or rebuild.

In an interview with British newspaper The Guardian, Lessig added yet another use of the metaphor. “Creative Commons is a response to what we think is badly functioning copyright law, making it extremely hard for people to legally use the power of the network to build on and share creative work. We built a system that
makes it easy for creators to express their desire that others be able to share their work” (Mackintosh, 2004, p. 21). In this use, Lessig echoes the tenor of building upon others’ content as what Creative Commons enables—similar to the Globe and Mail’s use—but then adds a use of tenor that describes how the Creative Commons system was developed. By making Creative Commons also a tangible system that Lessig built, adding another tenor to the already-diluted mix of building vehicles, he metaphorically depletes the power that would otherwise arise from using such a dominant metaphor.

To further confuse the matter, the news article that employs the build metaphor also uses it in a different way. Toronto’s Globe and Mail states about Creative Commons: “What might be one person’s idea of plagiarism or infringement of copyright is another person’s notion of a free exchange of ideas, of building from the old to create something new” (Dixon, 2003, p. R3). Thus, this popular press article ties the construction metaphor to the act of working with the licensed material itself, creating a new work from the one that was licensed under Creative Commons. This metaphor works well to describe the idea behind how works in the public domain with a Creative Commons license would be used—I could add a chapter to a novel that was licensed under a Creative Common Attribution license, for example, thereby building a new work from the foundation of the novel. However, it does not blend well with the
other building metaphors in use by Lessig to describe Creative Commons, instead adding the tenor of an idea to Lessig’s growing uses of the build vehicle.

The construction metaphor has the potential to be powerful because of its relation to the idea of progress, an American ideal. New technologies are often metaphorically conceptualized as progress; and Creative Commons is a response to a need created because of new technologies. Using such metaphors has the potential to help Lessig, but his confusion of tenors and inconsistent vehicles throughout the construction metaphor render it ineffective.

**Balance Metaphors**

In addition to the construction metaphors used in the book section on Creative Commons, Lessig employs the balance metaphor, a metaphor that is prevalent throughout history in the discussion of copyright law. The popular press employs this metaphor often as well, sometimes in reference to what Lessig believes and occasionally simply in reference to the digital copyright debate. As I argued in the previous chapter, the balance metaphor gains its power both from the historical conceptualization of copyright law as a balance as well as the visual imagery of the scales of justice.

To understand the power of this metaphor, I turn to another concept from rhetorical studies. Kenneth Burke discusses an “ultimate” vocabulary of terms that
have almost “mystical” power (1950, p. 189), which Richard Weaver adopted and defined as “terms to which the very highest respect is paid” (1953, p. 212). Weaver called the positive ones that bring people together “god terms” and the negative ones that exclude the other “devil terms” and suggested that by evoking such terms, rhetors can powerfully unite an audience behind their views. The idea of justice is one such god term, making this both a very powerful term and a term over which it is worth fighting. In discussing Creative Commons, then, many employ the balance metaphor to create this sense of importance and righteousness for the organization, even though it operates as a licensing scheme as a way to get around the legal hoops set by the DMCA.

In Free Culture, Lessig employs the balance metaphor in a vague reference to the historical use of balance as a conceptual system for determining copyright law. He writes: “Finally, there are many who mark their content with a Creative Commons license just because they want to express to others the importance of balance in this debate” (Lessig, 2004, p. 285). This metaphor relies on the presupposition that Lessig’s audience will be familiar with the historical conceptualization of copyright as the balance between the creators and the public good. The audience may be familiar with this idea; consider previous examples where Lessig has used the metaphor. In The Future of Ideas, he writes, “intellectual property is a balanced form of property
“protection” (Lessig, 2001, p. 187). *The Guardian* quotes Lessig stressing that Creative Commons helps to “ensure that the balance in this system is maintained” (Thompson, 2003, p. 10). In both of these examples, balance is framed as the guiding principle in the history of intellectual property and copyright law. Creative Commons, in these uses, is simply a way to continue the historical trend of a balanced approach to copyright law.

Other articles more alternatively frame the current digital copyright law as imbalanced. An article in the *Economist* suggests that Lessig “argues for a more reasonable balance, by redefining copyright law closer to the function that it served in the past” (*Economist*, 2004). The *New York Times* writes, “Mr. Lessig contends that excessively long copyright protections and the aggressive tactics of media conglomerates have upset a traditional American balance of intellectual property and creativity” (Sullivan, 2004, p. G5). Both metaphors work well, suggesting that something imbalanced must become balanced again, and positioning Creative Commons as the solution to that imbalance. And both recognize the historical elements of the conceptualization of copyright as a balance.

An article in the *Boston Globe* disregards the perceived historical balance, arguing: “Creative Commons, cofounded and run by Stanford Law professor Lawrence Lessig, aims to find a balance between the extremes of strict regulation and unchecked
exploitation” (Anderman, 2004, C1). In this use of the balance metaphor, its relation to the past conceptualization of copyright law as a balance is ignored, suggesting instead that Creative Commons is what is prompting this drive for a balance. While this works to suggest that Creative Commons is a solution to the problem of imbalance, it neglects the important historical facet of the metaphor. While the balance metaphor is powerful on its own, it draws its most significant strength from the idea that balance is what the founders of copyright law hundreds of years ago sought. In claiming merely that Creative Commons is aiming to find balance without acknowledging that such balance has been the cornerstone of digital copyright law for centuries, the metaphor loses some of its potential strength.

In addition to the idea of a balance, other popular press articles employ the idea of “middle ground.” Like balance, middle ground suggests a compromise between two belief systems. For example, one article states, “Creative Commons was launched in 2001 to search for middle ground in the world of Copyright law” (Toronto Star, 2004, p. D1). An article in the Christian Science Monitor adds, “What’s needed, some observers urge, is a new copyright that recognizes a middle ground between rights and no rights to a work of art” (Lamb, 2005, p. 1). The Oxford English Dictionary defines middle ground as “A (metaphorical) place or position halfway between extremes; an area or position of moderation or possible compromise.” By suggesting that Creative
Commons is looking for that middle ground, the metaphor implies that other digital copyright solutions represent the extremes. This metaphor positions Creative Commons positively as the compromising solution, and reinforces the idea that Creative Commons is the balanced solution to digital copyright law.

**Freedom Metaphors**

From the title of Lessig’s book *Free Culture* to just about every article ever published on Creative Commons, freedom is a dominant metaphor. Freedom not only operates as a metaphor in this case, but also as an “ideograph” (McGee, 1980). Closely related to Burke’s (1950) ultimate terms, McGee’s ideograph is a term that carries the power of a certain ideology, connecting the study of rhetoric with an ideological imperative. Often vague in definition, ideographs are nevertheless powerful terms that unite people of similar mindsets about the importance of the term. McGee suggests that some ideographs for U.S. citizens include liberty, rights, and laws. Carrying the ideological burden of the idea of liberty, freedom works to suggest a desired state of being, conveying a metaphorical sense that such a state is attainable. Particularly in United States law, the term freedom holds metaphorical power that overpowers many other metaphors because of its ties to the ideology inherent in American citizenship.

In *Free Culture* (eponymously a metaphor), Lessig writes that Creative Commons is “making it simple for creators to express the freedom for others to take
and build upon their work” (2004, p. 282). In this metaphoric usage of the freedom vehicle, Lessig suggests that licensing a work under Creative Commons enables freedom. By using this term, Lessig maps the positive (god-term) feelings about freedom onto Creative Commons. To suggest that an organization enables an individual to have freedom metaphorically constructs that organization as the good and anyone who opposes it as the evil. Lessig continues:

A Creative Commons license constitutes a grant of freedom to anyone who accesses the license…Content is marked with the CC mark, which does not mean that copyright is waived, but that certain freedoms are given. These freedoms are beyond the freedoms promised by fair use. … These choices thus establish a range of freedoms beyond the default of copyright law. They also enable freedoms that go beyond traditional fair use. And most importantly, they express these freedoms in a way that subsequent users can use and rely upon without having to hire a lawyer (Lessig, 2004, p. 283, emphasis added).

The frequency of the seven uses of the freedom metaphor in six sentences adds an element of power to Lessig’s metaphoric argument. In this metaphoric use, he clearly positions the “default of copyright law” as being anti-freedom, which gives him leverage to suggest that his framework trumps any law—it is the ultimate American way of life. While it might be argued that those supporting the U.S. law (the DMCA, in this case), rather than those advocating a mere licensing scheme that is more of a creative workaround the law (Creative Commons), are more entitled to the freedom metaphor, Lessig ignores this, instead claiming the metaphor for Creative Commons. Although he acknowledges that “Creative Commons is not the only organization
pursuing such freedoms” (Lessig, 2004, p. 283), these other organizations are ones like the Free Software Foundation’s GNU or the Electronic Frontier Foundation, not the United States law. And in recognizing these organizations as also being under the “freedom” umbrella, Lessig expands the power of the metaphor to related efforts.

This metaphor is a big coup for Lessig and Creative Commons, especially because it is repeated so frequently in news articles. For example, the *New York Times* suggests that creators can “easily designate their work as freely sharable” under Creative Commons (Harmon, 2002, p. C4). The *Boston Globe* writes, “Creative Commons licenses are a way to use the strength of free distribution” (Denison, 2002, p. E2). An article in the *Christian Science Monitor* quotes Berklee College of Music administrator Dave Kusek as saying to use Creative Commons “when you want access to your material to be free” (Armstrong, 2003, p. 11). *New Media Age* suggests that Creative Commons offers “broad digital rights where users feel free to ‘rip, mix, and share’” (Harper, 2005, p. 14). The *Irish Times* writes that “Attaching one of these boilerplate licenses to your work, or linking to it on the web, freed your endeavour from the default copyright restrictions” (O’Brien, 2005, p. 7). *The Guardian* quotes Lessig: “What Creative Commons sets out to do is to make it easier for artists and authors to mark their content with the permission they intend it to carry out and to invite people to sue that work consistent with the freedoms given and the rights
reserved” (Sutherland, 2006, p. 24). The Washington Post even includes a quote from the Motion Picture Association of America attorney Fritz Attaway—normally a staunch supporter of the DMCA—using free in relation to Creative Commons: “I think it’s helpful to educate consumers that there is a place like Creative Commons where one can access intellectual property that has been freely made available to the general public” (Cha, 2005, p. E1).

These are a representative sampling of the usage of the freedom metaphor; just about every article on Creative Commons includes at least one mention of some form of the word free. This metaphor works on multiple levels. At the economic level, works licensed under Creative Commons are available for others to work with at no cost. But there is also the sense of freedom in that the works are not subject to the creator’s regulation; for example, someone would be able to take a song I licensed under Creative Commons and make a remix that I find atrocious, but unless they violate the terms of the license, I cannot do anything; this freedom in creativity is another element that Creative Commons stresses. Creative Commons also frees users from stringent copyright laws that keep them from sharing their work with others, meaning that the liberty-related metaphor is also at work for creators as well as users. In each of these examples, the freedom metaphor brings with it the power of the ideograph to promote a positive view of Creative Commons.
One specific use of the freedom metaphor merits a closer examination. In an article in the *Globe and Mail*, the author suggests that Creative Commons “creates a freer flow of ideas, the argument goes, since so much of the 20th century’s creative output is locked away under copyrights that are legally airtight and untouchable. What might be one person’s idea of plagiarism or infringement of copyright is another person’s notion of a free exchange of ideas, of building from the old to create something new” (Dixon, 2003, p. R3). While this example also contains examples of construction metaphors (discussed earlier) and economic metaphors (to be discussed next), it most clearly metaphorically defines Creative Commons as the solution that leads people to be freed from a “locked” digital copyright law. It is not simply that the users of Creative Commons are enabling freedom. Instead, the example places the freedom in a hierarchy of free-ness—and on such a scale, Creative Commons is “freer.” By simultaneously suggesting that Creative Commons is a particularly valid form of freedom and that laws have hindered freedom, this metaphor reinforces the positive elements of Creative Commons with its ideological power.

In each of these instances, the power of the metaphor comes from the use of freedom as the vehicle. Because freedom is an ideograph central to the American legal system—and one of the founding principles of the nation—it is powerful on both a metaphoric and an ideological level. The incessant repetition of the term freedom in
association with Creative Commons maps that construct upon Creative Commons, making it a powerful metaphor for Lessig to use in his side of the digital copyright debate.

**Economics Metaphors**

Some of the more interesting uses of metaphor clusters in the discussion of Creative Commons are economics metaphors. Although Creative Commons does offer licenses that allow works to be used for commercial purposes, the reasoning behind the scheme is to enable creators to give up their right to make a financial profit from the dissemination of the work for the betterment of society. Nevertheless, the metaphors relating to the financial market occur several times throughout the discourse about Creative Commons.

In the preface of *Free Culture*, Lessig explains his motivation for writing the book: “A free culture, like a free market, is filled with property. It is filled with rules of property and contract that get enforced by the state. But just as a free market is perverted if its property becomes feudal, so too can a free culture be queered by extremism in the property rights that define it” (2004, p. xvi). In metaphorically aligning the tenor of Creative Commons through the vehicle of the market economy, Lessig suggests that the same principles that are featured in economic theory hold true for Creative Commons as well. Property, rules, and rights are all metaphoric
expressions that have meaning within an economic context, and the importance of maintaining a balance between them for the purposes of the greater market good is well known among market economists. And in a free market, the terms of the market are set by those individuals involved in the trading, without oversight by a third party, just as Creative Commons licenses are an agreement between the creator and the user without an intermediate such as an attorney.

By mapping the knowledge of market economics onto Creative Commons through the free market vehicle, Lessig enables those who are not familiar with the idea of a free culture to conceptually understand the need for it and the reasoning behind the movement. Lessig’s audience in this piece—and indeed, for Creative Commons as a whole—is familiar with the basics of market economy; by suggesting that the way they understand the operation of a free market parallels that of the free culture movement, Lessig explains his idea in terms that someone who spends a great amount of time dealing with market and profits can understand. Additionally, the economics metaphors at work hold particular sway for Americans, as market economics discourse dominates much of the popular vernacular, making it a safe metaphor for consumption in the United States.

In the Globe and Mail article mentioned in the previous section, economics metaphors are also employed: “What might be one person’s idea of plagiarism or
infringement of copyright is another person’s notion of a free exchange of ideas, of building from the old to create something new” (Dixon, 2003, p. R3). The idea of an exchange is a basic market term for when items are traded between people; in this case, the vehicle is an exchange of ideas, and a free one at that. By suggesting that the tenor of Creative Commons is an exchange market, the article helps articulate the vehicle’s connection of the free exchange of ideas with a free exchange of capital.

In another example of a popular press article discussing Creative Commons in terms of the financial market, the *Boston Globe* quotes Creative Commons Executive Director Glenn Otis Brown: “‘The message is that you can now be clever about leveraging one right against another,’ Brown said. Exactly how to leverage these rights will be a focus of business strategists. … As Creative Commons’s Brown put it, ‘If you’re clever about how you leverage your rights, you can cash in on openness’” (Denison, 2002, p. E2). The idea of leveraging also has a market meaning and is thus another economic vehicle. To leverage means to borrow money and invest it in another option with the hope that the interest rate will be higher where you invest it than what you are paying for the debt. The idea that rights to a creative work, as the tenor, is something that can be leveraged means that one could potentially get a larger return on the investment by releasing the work into the public domain through a Creative Commons license than one would get from applying traditional digital copyright to it.
So, for example, a band that is relatively unknown may get more exposure from releasing a song under a Creative Commons license for others to post on different sites or download for free, leading to the band becoming popular and the widespread audience now purchasing full-length albums or concert tickets.

The *Boston Globe* article adds, “That kind of intellectual property horse trading is exactly what Creative Commons is hoping to enable” (Denison, 2002, p. E2). Completing the market metaphor with the idea of horse trading furthers the economic metaphor. The vehicle of horse trading originates from the centuries in which horses were a hot commodity to be traded; horse trading is characterized by shrewd bargaining on both sides. This has a slightly negative connotation, meaning that the metaphor does not advance the positive feelings as the other market ones do, but it is nevertheless a suggestion of economic trading, a helpful metaphoric addition to the idea of Creative Commons.

The discourse surrounding Creative Commons thus exhibits several vehicles within the economics metaphor, including free markets, property, rights, rules, contracts, exchange, leveraging, cashing in, and horse trading. Particularly for an American audience, these metaphors offer an effective means of mapping one’s understanding of market economics onto a non-capital-based system.
Protection Metaphors

Although Lessig does not use the protection metaphor when discussing Creative Commons, several of the popular press articles do. In all of the uses, Creative Commons is positioned as the element doing the protection. As I argued in the previous chapter, the protection metaphor is powerful because it appeals to our need to feel secure; unlike with the DMCA metaphors, however, the Creative Commons protection metaphors do not come with an explicit threat, but an implied one.

In one use of the protection vehicle, an article in the *Economist* suggests: “For record labels and movie studios, technology’s latest promise lies in how it can protect their wares online…A non-profit start-up called Creative Commons is taking the inverse approach: using technology to protect the public domain” (Economist, 2002). In this metaphor, the two ideas of protection are placed in antithesis. While the record labels and movie studios are embracing technology as a protection of traditional copyrights, Creative Commons is suggesting that technology will protect the public domain. This is an interesting parallel, because it is the legal language of the licenses and not the technology behind Creative Commons that it is doing the protecting. In other words, for the record labels and movie studios, technology is both a threat and a protection, and the law is a protection, but for Creative Commons, only the second truly applies. Nevertheless, this metaphor suggests that the tenor of the public domain is threatened (echoing the rebuilding metaphors discussed earlier in this chapter) and
insinuates that the threat comes at the hands of the record labels and movie studios using the technology to protect their interests. Even though the direct parallel fails, the metaphor is powerful in suggesting that there is some threat to the public domain, and that Creative Commons offers some security for that threat.

In two other popular press articles, what needs protection is the notion of ownership (the tenor). The Washington Post reports that Creative Commons “has drafted a set of licenses intended to allow people to share their works while still protecting their ownership” (Cha, 2003, p. A1). And trade magazine Creative Review adds that a creative company “will be able to make content such as film clips available for consumers to re-edit or copy and distribute, while protecting itself from certain undesired usage and protecting its ownership” (Williams, 2006, p. 36). These metaphors, with protect as the vehicle, more realistically describe how Creative Commons operates: by enabling creators to safeguard the ownership (the tenor) over their work. The implied threat is that allowing your work to be reused means giving up all rights to the work; Creative Commons protects the idea of ownership while enabling others to do whatever else they desire with your work. Ownership, though, is what many creators loathe to give up; by suggesting that ownership will be secure with Creative Commons, the metaphor maps the feelings of personal security onto a licensing scheme.
While these uses of the protection metaphor are effective in their message about Creative Commons, it is surprising that none of them come from the official sources. Lessig focuses his metaphors heavily on the building and freedom clusters, rather than drawing from other vehicles that could open more doors for him, including the protection cluster. I will expand more upon what this means for the DMCA and Creative Commons in the next chapter.

**Conclusion**

The six types of metaphor—materiality, construction, balance, freedom, economics, and protection—that I have analyzed in this chapter are prevalent throughout the discourse surrounding Creative Commons, but they are by no means the only ones operating. I chose to focus on the six described in this chapter, as they were representative of the ways that Creative Commons is positioned metaphorically as both an opposition to and a rising above the Digital Millennium Copyright Act.

A full discussion of the effects of these metaphors in comparison to those used in the DMCA will be the focus of the next chapter, but a few concluding remarks are important here. First, Lessig seems to employ only a few metaphors—especially the construction and freedom ones—but he uses these clusters in large concentration. Although news articles about Creative Commons also employ these metaphors on occasion, it is Lessig himself who frames these as the important ones in the discussion.
Lessig’s dominant focus on a few key metaphors means that the news discourse instead employs a wide range of metaphors. While the DMCA discourse all generally uses the same metaphors, the discourse about Creative Commons uses many more—but only one or two times—that I have not addressed today. In doing so, the discourse fails to bring a comprehensive finality to specific clusters. By concentrating his own discourse on such a small fraction of metaphors, Lessig enables journalists to create their own metaphors, and the ones they choose are often not in sync with the other discourse about Creative Commons. To better serve his rhetorical purpose, Lessig should have cast a wider net of metaphors to frame the discourse around. Instead, other than a few themes that occur occasionally throughout the discourse, the metaphors occur only once or twice, diluting the power because of a lack of repetition.
Chapter 4. Implications

In analyzing the discourse surrounding the Digital Millennium Copyright Act (DMCA) and Creative Commons in the last two chapters, I have identified several metaphor clusters that appear in each. In the case of the DMCA, I examined Commissioner Bruce Lehman’s statement before Congress at the beginning of the bill and the news reports surrounding Lehman’s proposed legislation. In these, I uncovered risk, security, piracy, balance, and frontier metaphors. For Creative Commons, I looked at founder Lawrence Lessig’s book sections explaining the licensing scheme as well as news reports about it and found materiality, construction, balance, freedom, economics, and protection metaphors. In my discussions of each metaphor cluster, I have offered an evaluation of the effectiveness of that metaphor as a framework for promoting each point of view.

In this chapter, I explore the larger picture of what these metaphor clusters say in relation to each other and the implications of these frameworks. I begin by looking at elements of risk society discourse evidenced in each, arguing that Lehman’s metaphors about digital copyright law fit into the framework, while Lessig’s metaphors about Creative Commons do not and, in fact, may be a resistance to it. I find that Lehman relies on risk discourse to construct the need for his proposed law, whereas Lessig emphasizes the positive aspects of technology to promote a postmodern ideal of
collaborative artistic expression and consumption. Next, I identify points of similarities between the metaphor uses in each, specifically the use of the balance and physicality metaphor clusters. I argue that this similarity suggests that both value the historical precedence of copyright being a balance between the creator and the public, but each has a different definition of what balanced means and that the physicality metaphors work to make the virtual ideas of digital copyright law seem more real by discussing them in material terms.

After explaining the similarities, I describe the differences in metaphors. Namely, I argue that the DCMA relies on piracy metaphors to construct a threat that necessitates government intervention in the form of new copyright laws, while Creative Commons emphasizes the American ideology of freedom and economics discourse that may help an audience of businesspeople understand the need for the licensing scheme. Finally, reflecting upon the work I have done thus far in the project, I discuss the implications of how the DMCA and Creative Commons are functioning ideologically in today’s society. I suggest that fundamental differences in their conceptualization of the role of copyright in the digital age keeps them from ever finding compromise.
Copyright Conceptualization and Risk Society

Beck’s (1990) concept of risk society informs the metaphor clusters—especially those surrounding risk and security in the discourse of the formation of the DMCA. Appeals to risk are not present, however, in the discourse surrounding Creative Commons. This discrepancy suggests that the two conceptualizations of digital copyright law have fundamentally different philosophical groundings in regard to the role of technology in our future. Lehman frames his discussion of the DMCA in terms of the threat of technology that creates an aura of fear, then constructs a solution to the threat in the form of digital copyright law. Lessig instead focuses on the positive elements of the technology, suggesting that Creative Commons offers a utopian solution to the copyright dilemma in the digital age.

Much of Beck’s argument about risk society focuses on the relation between risk and the advances at the levels of nuclear, biological, chemical, and atomic sciences. The danger, he writes, comes from man-made hard science and technology replacing nature. It is the consequences of humankind’s advancements in science and technology that bring about the risk society, for “the risks of the risk society are not a consequence of scientific failure but rather, are an unintended after-effect of techno-scientific achievement” (Ekberg, 2007, p. 348). Although the changes Beck is discussing come from the technology that is overtaking nature, the lessons can be exported to technological change that instead affects that natural way of doing things—
or, in other words, changes the way we naturally conceive of something like copyright law and constructs an artificial fear of the implications of the technological change on social order. As my own philosophical grounding is in social constructivism, I also believe that what we think of as natural in this case is what our society has constructed to be natural—the idea that creators have some right to regulate the display of their work. That is, I believe our conceptualization of what “natural” is in the case of digital copyright law is socially constructed.

Beck also brings social constructivism into his argument. Risks, Beck says, “are particularly open to social definition and construction. Hence the mass media and the scientific and legal professions in charge of defining risks become key social and political positions” (1990, p. 23, emphasis in original). By acknowledging the role social institutions play in determining what is natural, Beck adds elements of postmodern theory into his argument. For at their most basic level, these risks are merely products of social institutions’ definitions of risks. It is reasonable, then, to extend Beck’s discussion of the risk society’s relation to nature beyond a modern definition of “natural” to include a postmodern understanding of what nature is. Such a postmodern understanding suggests that social, political, and media institutions—and those who represent them—frame our definition of risk and nature, and thus the
discourse from these sources is an important clue to their adherence to or rejection of thinking in terms of risk society.

Beck claims that the unanticipated elements of a new technology prove to be powerful in shaping the social understanding of the technology. He writes: “in the risk society the unknown and unintended consequences come to be a dominant force in history and society” (1990, p. 22). Nowhere is this clearer than in responses to the development of the Internet. The communications tool proved to be so useful that the exchange of copyrighted digital materials intensified, a consequence of the development that was not intended. When Lehman describes this technology in risk society metaphors, he echoes Beck’s point that the unintended consequences can come to be powerful discursive resources.

For Lehman, however, risk discourses prove important to his rhetorical situation. Lloyd Bitzer (1968) suggests that the first step in rhetorical criticism is to analyze the situation in which the orator speaks, analyzing the exigences (an “imperfection marked by urgency”), audience, and constraints, to form an appreciation for whether the discourse succeeds in resolving the exigences within the constraints for the audience. In this case, Lehman’s exigence is to convince his audience of senators and representatives that the recommendations in his task force’s White Paper, which they have proposed for resolution in both houses, are necessary and important laws.
Lehman’s clusters of risk and security represent an effective use of metaphors, given his rhetorical situation.

The risk metaphor works to construct an exigence for Congress by borrowing from a popular discourse. If technology is a threat, as Lehman suggests, then it is an issue that demands immediate action and policy to address. It is the responsibility of the legislative branch of the government to pass laws that address such threats, so framing the development of the Internet as a risk to society is an effective way to get legislators to act on a proposed legislation. In particular, Lehman’s choice to frame the new technological threat with metaphors like “delivery” that map the new forms of dissemination onto old ways of thinking about copyright violation helps legislators who may or may not be familiar with the finer points of exactly what this new “national information infrastructure” does understand the new concept in terms of the old. These risk metaphors thus function well for what Lehman is attempting to accomplish.

However, Lehman pushes an ambiguous risk cluster that serves to add elements of the unknown to perpetuate the fear. Technology is a threat, yes, but to whom? Lehman’s rhetoric suggests that the only people technology is threatening to are those content producers. What he fails to point out is that this is a very one-sided threat; save for his example of the individual as the threat, users do not even enter Lehman’s
picture. While this threat metaphor works well, Lehman fails to draw it completely enough to incorporate all parties interested in copyright law. For it is the users who legislators supposedly represent, not the entertainment industries who are the ones really threatened by the Internet.19

The metaphor in the news report—that the “Internet ‘seems uncontrollable’” (Port, 1994, p. 212), according to the Recording Industry Association of America general counsel—is risk society discourse at its finest. Suggesting that technology is wild plays directly into Beck’s terminology, in which risks come from the elements of scientific advancement over which humans have no control. In this use, the threat is to the general population at large, since risk knows no legal borders. This use of risk discourse almost works even better than any of Lehman’s metaphors because it can apply to anyone anywhere anytime, a hallmark of risk society. And, as Beck notes, the power of dissemination through mass media only enhances the risk message.

The real brilliance in the risk metaphor, however, comes when one views it in contrast with the security metaphor Lehman employs when discussing the law. By claiming that law is a protection, Lehman offers a ready-made solution to the fairly ambiguous problem he just established. These two metaphors work exceptionally well

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19 Indeed, hindsight suggests that the largest threat actually came from numerous local judges misunderstanding technology and making a wide range of decisions that may or may not have established a clear precedent; the law served more to clarify exactly how judges should decide court cases than to respond to a threat to content producers or consumers.
in tandem, which is often how Lehman uses them—technology is a threat, but law will protect from the threat, he repeats in different forms.

Indeed, the security metaphor is particularly strong because of its repetition. Over and over, Lehman metaphorically suggests that law provides the security needed to overcome the threat of technology. Lehman also extends the security metaphor to areas not covered in the risk metaphor, however, by suggesting that law protects not only the threatened content producers, but also consumers, rights, and the public. Although this metaphor works well on its own, it would be more effective had Lehman established that these groups were also threatened in his risk metaphor cluster.

One area where these two work particularly well together is in the race metaphor. Having already established that technology is a threat and laws are protection, Lehman metaphorically pits them against each other. Both are on a set course, and technology has taken the lead. But his ultimate conclusion—that protection can overcome threat if it is addressed in a timely manner—both reassures legislators that security is possible while also suggesting that it needs to be done quickly, before the distance between them becomes insurmountable. The race metaphor also introduces the threat of time into Lehman’s risk society discourse, which serves to make the impending threat even more scary.
The threats Beck explicitly discusses in his work—food-based chemicals, air pollution, and water hazards, for example—are often currently managed by United States government agencies whose role it is to provide security from such risks. Lehman’s metaphor use thus works particularly well to extend the security needed for this particular technological threat to an existing framework: U.S. law. Arguing that the risk can be mitigated through adopting the elements of the working group’s White Paper fits well within the bounds of existing security solutions to risks already present from previous techno-scientific advancements.

The news reports that employ the security metaphor all do so to metaphorically suggest that the public interest is best served through enacting digital copyright law. Like Lehman’s uses, these metaphors evoke risk discourse, promoting the idea that risks that come from the advances in technology threaten the general population, but that government regulation of the technology can provide the protection needed to keep society secure from the threat. The significant security metaphor repetition across many news sources reaffirms the presence of risk.

Despite the prevalence of risk society discourse in the discussions of the DMCA, risk is absent in discourses surrounding Creative Commons. Although both systems are solutions to digital copyright law, they frame their conceptualizations very differently. While the DMCA’s early discourse reveals a reliance on a constructed idea
of technology as a threat and law as a security, playing into risk society discourse, Creative Commons sidesteps risk-oriented discourse. It is a smart decision, given their rhetorical situation; Creative Commons’s exigence is to convince the general public that the Internet offers possibilities that are currently locked down by the DMCA and other fear-based, overly strict digital copyright laws.

Lessig and the Creative Commons group see technology as offering the opportunity for individual creators to interact with each other, enabling an artistic collaboration previously made difficult if not impossible. Technology, for Creative Commons, is potential. All of the metaphor clusters that Lessig employs—materiality, construction, balance, freedom, economics, and protection—all are either neutral or positive in connotation. The discourse surrounding Creative Commons is thus upbeat and full of potential. By rejecting the doom inherent in risk society discourse, Lessig rises above the negative aspects of such a discourse strategy to emphasize the positive, non-threatening elements of Creative Commons.

Certainly, the presence of the protection metaphor suggests risk society discourse, since both digital copyright strategies employ it. In its uses within Creative Commons, however, the metaphor advocates that what needs protecting is the public interest, and it needs that protection from greedy content-industry representatives, looking to pad their own capital at the expense of the creators and the general public.
By making the industry the threat—but only implicitly—the discourse about Creative Commons ignores Beck’s notion of risk society, for it is not the technology that is the threat, but corporations. This difference in what the system protects from enables Creative Commons to use the protection metaphor—an important one for their aims—without evoking risk discourses. In not explicitly defining a threat, Lessig and other Creative Commons authors choose to downplay the idea that technology has negative consequences, avoiding risk society discourse, while simultaneously employing a protection metaphor to suggest that their licensing scheme is an appropriate solution to the problem of big business interests taking over what once was a public sphere.

Indeed, in the Creative Commons discourse, technology is not a risk at all. In all of the metaphors Lessig and the news media use to discuss the licensing scheme, technology is framed as opening doors to new creative possibilities. Technology enables the artistic collaborations that Creative Commons then protects. And in one of Lessig’s uses of the construction metaphor, the technology even can have law built into it. Such metaphorical uses promote the idea that technology is a tool for humans to use, not an uncontrolled risk that our society must harness before it causes mass destruction.

Lessig’s approach to the problem of digital copyright law is distinctly postmodern. While Beck’s reflexive modernity recognizes the socially constructed
nature of the threat, his analysis lies firmly within the modern framework of society. The basis of Creative Commons, however, embraces the idea that there is no one way of doing something—that foundations are only foundations to create something new upon. The collaboration and sharing involved in Internet culture—a postmodern expression of artistry—finds legal protection within Creative Commons, something that is not possible within the framework of the DMCA, which is based on a different philosophical understanding of what constitutes art.

The two competing conceptions of what digital copyright law should look like thus have their origins in a different conception of technology itself. The metaphors used throughout the discourse surrounding the origins of the DMCA and Creative Commons suggest two disparate ways of viewing our society. Lehman embraces the risk society discourse, promoting the ideas of technology as a threat and law as a solution—a rhetorical strategy that generally works well, given his rhetorical situation, although he could have received more traction had he extended his threat to the general populace more explicitly. Lessig suggests that technology is beneficial to society, sidestepping any risk society discourse to focus on the postmodern potential for collaboration that Creative Commons offers. The way each frames its discourse thus demonstrates very different ideas of the role of copyright law in the digital age. These
differences will be highlighted in the next two sections, as I directly compare the metaphor clusters used in each.

**Constructing a Balance: Similarities**

I have already discussed the different applications of the protection metaphor clusters in the discourse about the formations of the DMCA and Creative Commons. Outside of the risk society discourse, the pair also both employ balance metaphors, but each has different ideas as to what has thrown copyright law out of balance. Like the DMCA discourse’s frontier metaphors, Creative Commons’s construction and materiality clusters work to conceptualize digital copyright law in physical space terms, which can help boost the importance and comprehension of the topic for the general public.

The fight for the balance metaphor in copyright law is nothing new. “When technology and copyright law come together, arguments often surround the balance between the interest of rightsholders to control their work and those of broader society to participate in and develop its culture” (Harper, 2005, p. 14), says an article in *New Media Age*. The balance metaphor, indeed, is one of those that all parties in the debate attempt to use on their side. Litman traces its origins in the copyright debate to the turn of the 20th century, suggesting that the first metaphor was “quid pro quo. The public granted authors limited exclusive rights (and only if the authors fulfilled a variety of
formal conditions) in return for immediate public dissemination of the work and the eventual dedication of the work in its entirety to the public domain” (2006, p. 78).

Over time, the metaphor changed to the idea of a “bargain in which the public granted limited exclusive rights to authors as a means to advance the public interest” (Litman, 2006, p. 78). Such metaphors all fit in the balance cluster. Although Litman claims that control has replaced balance now, that is merely true in the debates about the actual DMCA, not in the first formations of the law, I have found. And it is not true in the debate about Creative Commons.

The balance metaphor works well for both causes because the topic under discussion is a legal one, evoking imagery of the scales of justice. As I argued in Chapter 3, justice serves as a “god term” in American society, making this metaphor an ideologically satisfying one for all parties in a debate to claim on their side. Lehman’s employment of the balance metaphor is helped by the fact that he is already arguing in front of a Congressional subcommittee and committee, meaning his argument already has the idea of law and justice built into it by default. Lehman metaphorically linked the changes to the Copyright Act he was advocating to the development of that very Copyright Act by employing the balance metaphor. Creative Commons, however, uses this metaphor first to link its licensing scheme to the historical elements of copyright law debate, since it is not a government-sanctioned law, but a way of getting around
copyright law by using licenses instead. Since Creative Commons is a nonprofit organization not affiliated with the government or the law, framing the terms of their system in the metaphoric clusters of the past copyright laws is a smart way of evoking the legitimacy of historical precedent to their licensing scheme.

One important facet to note about the way Lehman and proponents of strict digital copyright law employ the balance metaphor is the timing of their metaphor uses. Lehman employs a balance metaphor in his Congressional testimony, but after that, the popular press articles mostly quote those who oppose Lehman’s bill using the balance metaphor. It is only after he has suffered defeats in getting the bill passed in Congress and faced a similar outcome at the World Intellectual Property Organization that Lehman began using the balance metaphor again. Lessig, however, sprinkles the balance metaphor cluster throughout his discourse, beginning with his early introduction to the idea of Creative Commons in *The Future of Ideas* and the explanatory section in *Free Culture*. Throughout the popular press articles that address Creative Commons, the balance metaphor also is prevalent, meaning that there is a continuous stream of usage. This frequency of metaphoric use helps Lessig to overcome the disadvantage of not being directly associated with the government-based history of conceptualizing digital copyright. Because Creative Commons operates as a workaround of the DMCA—relying on licensing provisions rather than copyright
law—it is important for Lessig to nevertheless draw from the discourse of traditional copyright law.

Although both argue that the current system is out of balance, the reason for it differs in each metaphor cluster. DMCA proponents suggest that the development of new technology is the cause for the technological problems (the imbalance), while Creative Commons suggests that it is the DMCA that has upset the balance. This distinction is important because it enables the Creative Commons proponents to claim that they are on the side that is already balanced, forcing the DMCA into a position of one side of the teeter-totter. By placing their opponents pitted against the public good at each end, with Creative Commons as the compromise in the middle, they metaphorically take the higher ground. Partially, this position is due to timing; Creative Commons was developed after the DMCA was enacted into law. Nevertheless, in claiming the balance metaphor for Creative Commons, proponents were able to sidestep the dualism that is already inherent in a balance metaphor by suggesting that they rise above the ideological debate.

Arguably, the balance metaphor is effective for both camps, and the debate comes down to a difference in what has put the scales of justice out of balance. Echoing risk society discourse, Lehman suggests that technology is responsible, while Creative Commons insists that it is the law stemming from the Lehman Working
Group that has created the imbalance. Because both argue the same point using the
same metaphors, but with different conclusions, this metaphor serves both camps.

Another similarity between the discourse of the origins of the DMCA and
Creative Commons is the use of materiality metaphors, in the form of frontier
metaphors for the DMCA and the commons, public domain, and construction
metaphors for Creative Commons. Such metaphors rely on connecting cyberspace to
the idea of real space, and, in doing so, they imply that the virtual realm should be
thought of in terms of physical space. These metaphors assist both digital copyright
law platforms, although their prevalence in Creative Commons far surpasses that in the
DMCA origins.

Frontier metaphors only occur in the popular press articles about the origins of
the DMCA, not from Lehman, but they nevertheless paint the picture of the Internet as
the new frontier. This metaphor use was by no means exclusive to the digital copyright
debate; much of the rhetoric of the mid-1990s saw cyberspace as a frontier to be
conquered. But it has particular resonance in the discussions of copyright law because
of the history of law in the American frontier. By suggesting that those who use the
Internet in the early years of it were like the inhabitants of the American Wild West,
popular press articles mapped idea that laws were challenging to implement at first but
in the end a success onto the development of the Internet. The metaphoric expressions
within the frontier clusters in the popular press articles generally evoke such a sentiment.

This strategy is very effective, as the metaphor cluster works well to echo a popular, idealized version of the frontier, so it is surprising that Lehman does not use it very much. Granted, there is the lone reference to the superhighway, which is related to the frontier, but Lehman’s metaphors are all very much on a virtual level, not metaphorically placing technology as a physical form. This strategy may also be related to risk society discourse; risks are often not tangible as much as potentials for harm. Because Lehman embraces risk society discourse, he may wish to avoid metaphors that would fix this risk in permanence by making the metaphors relate to materiality. If the risk were permanent, Lehman’s solution to the risk—digital copyright law—would no longer be enough. Popular press articles picked up on the metaphor and employed it for their readers, which introduced it into the discourse about the DMCA origins, but it is not a cluster that comes from the official voice, meaning that its power may be slightly diminished for some audiences who give more credence to discourse from government sources.

Creative Commons, however, embraces the materiality. From the name of the organization through the uses of commons, domain, and construction metaphors, Lessig actively attempts to secure the virtual in the physical realm. By continually
metaphorically referencing physical land forms in discussing Creative Commons, Lessig effectively makes the virtual concrete. The name of the organization metaphorically reinforces the common land by drawing from the traditional history of the commons, as does the continued references to the importance of the public domain, another historical reference to shared land. Construction metaphors further solidify the concept of physical space. Just as a structure can be built, a licensing scheme can enable the public domain to be built, Lessig says. Especially for an audience familiar with the frontier metaphors used with the beginnings of the Internet, the construction metaphor seems a natural extension; both address development of physical spaces. And it is one that Lessig himself promotes through the discourse; although the popular press certainly contributes to the metaphor usage, it begins with Lessig himself. While his ambiguity regarding the various vehicles within the build tenor (public domain, movement, technology, rules, and a tangible system) does arguably dim the power of the metaphor slightly, the saturation of that metaphor nevertheless is effective to make the concept of Creative Commons real for his audience and to continue the progress and development elements of the frontier metaphor used in early discussions of the Internet.

The similarities in metaphor uses demonstrate that both conceptualizations of digital copyright law rely on the same underlying principles. Both wish to
continue the tradition of copyright as a balance between the creators and the public, but they disagree on what form that balance should take. While the DMCA proponents believe that their law remedies the balance, Creative Commons suggests that it tips the balance too far in the direction of the creators at the expense of the public. Both metaphorically suggest that their solution is the most balanced way of addressing digital copyright law. Both also metaphorically frame the Internet in terms of physical space, demonstrating that they believe it is an important facet of copyright law that should be addressed. I will address the ideological implications of these similarities in the final section of this chapter.

Piracy v. Freedom: Differences

Along with the similarities in metaphor usage between the DMCA and Creative Commons, there are some interesting differences. The news reports surrounding the origins of the DMCA employ the piracy metaphor, but this is notably absent from any Creative Commons discourse, likely because they do not wish to emphasize the problems with digital copyright nor associate with criminal behavior. The discourse about Creative Commons also draws upon freedom and economics metaphors, which the DMCA discourse does not. The freedom and economics metaphors make more sense for Creative Commons than for the DMCA because the people Creative Commons wants to convince are the representatives of the business side of content
production. Such individuals generally may not understand why someone would want to put their work on the Internet without getting financial compensation.

The piracy metaphor has received widespread attention from the popular press throughout the digital copyright law debates, especially during the peak of the Napster debates. It works beautifully for the DMCA proponents, as I argued in Chapter 2, because of its association with danger and theft, thus encouraging lawmakers to crack down on supposed perpetrators by creating strict laws. And it makes sense for Creative Commons to avoid the metaphors; for them, the problem with the current system has more to do with what they viewed as overly stringent copyright law, rather than with people infringing upon that law. Differing beliefs of what the digital copyright law exigence was explains the differences in metaphors; for Lehman and company, digital piracy was perceived to be a very real risk, but Lessig was more concerned with enabling people who wished to collaborate and to have their work enter the public domain. It must also be noted that the wildly popular Pirates of the Caribbean movie trilogy debuted in 2003; the plot of the movie glorifies the lives of pirates and arguably has diluted the power of the piracy metaphor in modern popular culture. Therefore, the metaphor is unlikely to work as well now as it did in the early 1990s, but either way, Lessig had nothing to gain by introducing the metaphor of piracy into the discourse.
about Creative Commons, for his focus was instead on developing a way for people to
share so that the notion of thievery would be irrelevant.

The freedom metaphor works well for Creative Commons, but it would also
have been a strong metaphor for the DMCA. As I argued in Chapter 3, freedom
functions as an ideograph that carries the ideology of U.S. laws. Because the United
States was founded on the principles of “life, liberty, and the pursuit of happiness,” the
liberty ideograph—the cluster of which includes freedom—is an incredibly powerful
metaphor, and one that both sides would do well coopting. Interestingly enough,
however, it is the sole domain of Creative Commons. And they use it liberally:
freedom permeates everything ever published on Creative Commons. Lessig employs
the vehicle of free or freedom in almost every way imaginable, all to the ultimate
conclusion that Creative Commons is inherently connected with the principles of
American constitutional law.

Because of this deep connection to law, it is surprising that Lehman and the
DMCA supporters do not also embrace this metaphor. Certainly, their law is aimed at
restricting certain uses, but it would be powerful for them to write that “creators have
the freedom to express themselves without worrying about their work being stolen” or
some such use of the metaphor. Instead, Lehman leaves the freedom metaphor alone,
and Lessig pounces.
Another metaphor that Creative Commons introduces but Lehman and the DMCA proponents do not is the economics metaphor. The economics metaphor works well for Creative Commons because it frames the discussion of their licensing scheme in business terms. While the target audience for Creative Commons licenses is probably not businesspeople, they are nevertheless the ones who would raise the most staunch opposition to Creative Commons—and be the ones supporting the provisions of the DMCA. By metaphorically explaining their organization’s goals in terms that people who are familiar with market economics could understand, Creative Commons stands a chance of convincing those people to not oppose their licensing scheme; it is, after all, part of a free market economy. Lehman and the DMCA proponents have no reason to describe their proposals in these metaphoric terms because their proposal is already friendly to a business audience, so it makes sense that this metaphor is the property of Creative Commons only.

These differences in metaphor uses highlight the differences in direction in how the DMCA and Creative Commons approach digital copyright law. For the DMCA proponents, law is there to combat thievery. For Creative Commons proponents, the ideology of freedom guides how they view the law: the creators should be able to set the exact standards of what sorts of law they would like applied to their works. The differences between the two conceptualizations of copyright law in the
Internet age are thus mirrored in their choices of metaphors in the discourse about their plans.

**Competing or Complementing? Concluding Thoughts**

In the final paragraph of *Free Culture’s* section on Creative Commons, Lessig writes: “The project does not compete with copyright; it complements it” (2004, p. 286). In literal terms, perhaps; but ideologically? In this final section, I return to my research question posed at the beginning of this project: What do the metaphors used in the discourse about the Digital Millennium Copyright Act and Creative Commons—at the point of their formations—reveal about their conceptualizations of copyright law in the digital age, and what commonalities emerge that could form the middle ground for the two polarized camps to meet? My research question reveals my underlying assumption that the two are competing; Lessig’s outspoken opposition to the DMCA and the subsequent formation of Creative Commons as a legal alternative suggests that his claim that they complement and not compete is pure public relations. Lessig—a lawyer and law professor—likely does not wish to appear to develop a competitive alternative to American law, although this is what he effectively does. The provisions of the DMCA would otherwise cover all the creative works licensed under Creative Commons, so Lessig’s argument that it is complementary and not competitive is not persuasive.
So is there a chance for middle ground? Creative Commons argues that they do represent the middle ground, and in a way, this is true: Creators can elect to use or not use their licensing scheme. But true middle ground will come only when the metaphors that both use to describe themselves match in both tenor and vehicle. At the present time, they use some of the same vehicles, but mapped to different tenors. When the tenor–vehicle pairs match, it demonstrates that they are operating with the same ideological world view; at the present time, however, the DMCA discourse suggests an ideology of risk and fear and the Creative Commons, collaboration and public good.

Will the tenor–vehicle pairs ever match? I find it unlikely, given the history of these two conceptualizations of digital copyright law. The disparities in ideologies behind the metaphor use are simply too great to overcome. In the present day, they co-exist, espousing different ideologies—one with the backing of the American government and one with the backing of the technology geeks (who honestly are the ones most apt to take advantage of the Creative Commons platform anyway).

Is this co-existence peaceful? Currently, yes, although I believe events like the Flickr-hosted and Creative Commons-licensed photo of the girl in the Texas church carwash that ended up in an Australian mobile phone advertisement could cause a rupture. As more and more sites like Flickr offer Creative Commons licenses for their hosted services, users who do not fully investigate what they are signing themselves up
for may license works under Creative Commons only to find the works used in ways with which they are not comfortable. News coverage of these instances brings more discourse about digital copyright law into the national consciousness, and it is possible that deeper investigations into the differences between the two conceptualizations of copyright law could shatter the peace. For it is the creators who ultimately choose which ideology they subscribe to: do they retain the full control and protection available to them in the risk society law of the DMCA, or do they cherry-pick the rights they wish to maintain, giving up the remainder for the good of the community in the collaboration-oriented Creative Commons? Such choices are made every day by creators and the public, and they represent the choices that we as a society must make as we continue down the path of the digital age.

In this project, I have set out to analyze the public discourse surrounding two legal topics through a rhetorical lens, analyzing the metaphor use in each. Drawing upon the history of copyright’s origins with the Gutenberg printing press through the introduction of the Lehman Working Group’s Green Paper and White Paper and on to Lessig’s Creative Commons, I have demonstrated the evolution of ways of conceptualizing of copyright law. I have touched on the how rhetorical scholars have analyzed legal texts and metaphors. In arguing for a critical rhetorical methodology to my topic, I have drawn from the fragmentation inherent in postmodern culture. To this
end, I have used Ulrich Beck’s notion of risk society as a guiding theoretical framework that addresses the prevailing social view of technological change. I have pulled from popular press, testimony, and books written on the topics to search out significant metaphor clusters for analysis. I have argued that Lehman and the discourse surrounding the origins of the DMCA employ metaphors in the risk, security, piracy, balance, and frontier clusters, while Lessig and news coverage of Creative Commons favors materiality, construction, balance, freedom, economics, and protection metaphors.

In this chapter, I have pointed out the ideological difference between the two approaches, demonstrating how the discourse about the DMCA—especially the risk and security metaphors—echo risk society discourse, while Creative Commons shies away from depicting technology with any kind of negative elements, instead appealing to the harmonious aspects of technological possibility. I have identified similarities in the metaphoric approaches—both believe they offer a return to balanced law and discuss their proposals in terms of physical space—as well as targeted the differences—namely, the DMCA discourse relies heavily on piracy metaphors, while Creative Commons pulls from freedom and economics source domains. Even within these similarities are differences, however; both believe in the balance that has
historically driven copyright law, but they disagree on a fundamental level about what that balance is.

Ultimately, these differences become too much to overcome ideologically: Their metaphor uses reveal that each conceives of the role of digital copyright law differently. Just as the two sides of the balance protect the creators and the public, the DMCA and Creative Commons each ultimately reveal an emphasis on one side of the debate. The DMCA offers extremely tight restrictions for creators who are concerned about their works being reproduced without their knowledge or without receiving compensation for it. And Creative Commons puts the public first, suggesting that to maintain the philosophy of community and freedom, creators should voluntarily give up some of their many rights granted under the DMCA. In other words, the metaphor use in the discourse surrounding the development of the DMCA demonstrates that it prioritizes creators, and Creative Commons, the public.

I should also acknowledge that I am not a lawyer, but a rhetorical scholar, and thus my understanding of these copyright law elements is informed by my reading of the language they use to describe it. I believe, however, that this research is an important step in developing our collective understanding of the role of copyright law in the digital age. I hope that this project will inspire others from different disciplinary understandings to approach the topic of digital copyright. The topic relates to nearly
every interaction we engage in online, and as our society delves more and more into the virtual realm, the subject becomes even more critical.
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