

The Solipsist and the Internet

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Exactly two years ago today, the New York Times published [an op-ed](#) about copyright by a novelist. The piece caused something of a digital riot. As we learn now from his book, *Digital Barbarism* (HarperCollins 2009), Mark Helprin was at the time completely ignorant about the hornet's nest he was about to kick. For him, the op-ed was a professional rapprochement with the New York Times, a chance to make things right once again (though why they were then wrong is a story left mysteriously (and thankfully) out of the book).

Helprin's thesis is simple and familiar to any intelligent sort who first comes to think about the way the law regulates creative work: that there's something fundamentally unjust about the law of copyright. While the law protects ordinary property forever — your car, or the land on which your house might sit — the law of copyright protects creative work for a limited time only. At the end of that limited time, the author's "exclusive right" (as the Constitution puts it) expires, and the work passes into the public domain. Anyone is then free to copy the work, publish the work, translate the work, make a film based upon the work, or publicly perform the work without permission from the original copyright owner.

This difference is odd. As the famous copyright scholar Melville Nimmer put it, "If I may own *Blackacre* in perpetuity, why not also *Black Beauty*?" But, as Helprin acknowledged, puzzles notwithstanding, the Constitution seems clear enough. The power Congress has is to "secure" this "exclusive right" "for limited Times" only. Perpetual terms were thus ruled out.

But like an overly precocious child who has figured a way around his father's injunction "you may take just one cookie" — take one cookie, but five times! — Helprin's op-ed offered a simple solution to this obvious injustice:

The genius of the framers in making this provision is that it allows for infinite adjustment. Congress is

¹ Professor of Law, Stanford Law School. This essay is licensed [CC-BY](#), which according to Helprin means I'm a "blockhead," but according to the law means you're free to do with it as you wish, so long as you give me attribution for this work.

free to extend at will the term of copyright. It last did so in 1998, and should do so again, as far as it can throw. Would it not be just and fair for those who try to extract a living from the uncertain arts of writing and composing to be freed from a form of confiscation not visited upon anyone else? The answer is obvious, and transcends even justice. No good case exists for the inequality of real and intellectual property, because no good case can exist for treating with special disfavor the work of the spirit and the mind.

To a certain bizarrely diverse community that has developed over the past decade, Helprin's evasion was simple incitement. It was not even five years since the Supreme Court had upheld Congress's power to extend the terms of existing copyrights, so long as each extension was "limited." (A pattern American University Professor Peter Jaszi [famously called](#) "perpetual copyright on the installment plan.") And it was just shy of a decade since Congress had last extended the term of existing copyrights — its 11th such extension in forty years. This was a community that was enormously frustrated by the refusal of Congress to permit the Framers' bargain — that an author gets an "exclusive right" for some number of years, and then the work enters the public domain — to be executed. The idea that here again someone was calling for yet another term extension was a red cape in front of a bull.

I first read Helprin's essay while waiting to board a plane from Boston to Frankfurt. At first I wasn't sure whether he was serious (indeed, a colleague and friend, and strong copyright supporter tells me he routinely reads sections of the op-ed to audiences to see if they can tell whether he's serious or not). But after becoming convinced that Helprin had simply tripped into this mine field unawares, I posted a suggestion [to my blog](#). As I wrote:

So I've gotten (literally) scores of emails about this piece by Mark Helprin promoting perpetual copyright terms. "Write a reply!" is the demand. But why don't you write the reply instead. Here's a page on wiki.lessig.org. Please write an argument that puts this argument in its proper place.

Eight hours later, a bit bleary eyed from the relatively sleepless flight, I checked my email. At the top of the list was one that said, “Wow! Pretty amazing wiki article.” I quickly turned to the wiki, and sat astonished to see just what this community had done. Literally hundreds had contributed to pages and pages in reply to Helprin’s op-ed. Some of it was silly. Some of it was great. But in the main, it was a powerful and comprehensive account of the many reasons for this apparent “inequality” at the core of our Constitution.

To be fair to Helprin — and 99% of Americans if they could be brought to think about the matter — there really is something apparently weird about the Constitution’s design. Given the way we regulate ordinary property, it is completely understandable to be ignorant about the justification behind this weirdness. I spent the first five years as a constitutional law professor with no clue about the justifications for this “obvious inconsistency,” as I once described it to my students. “A bit of Karl Marx slipped into an otherwise conservative text,” was how it was described to me.

So I could well understand the intuition that drove Helprin to write as he did, and can even empathize with how he must have felt to see his breezy reflection on copyright policy explode on the New York Times website, and elsewhere. Helprin was ignorant. But it was an understandable, and forgivable, ignorance. The sort all of us have about most things save those few things we spend time trying to understand.

What is not understandable, however, and certainly not forgivable, is everything that has happened since. For in the months since triggering his digital riot, Helprin has been busy penning a book about his digital putdown. And while the ignorance of the essay may be forgiven, the ignorance of the book cannot. There is no excuse for the careless and uninformed screech that *Digital Barbarism* is.

I don’t know what this is a story about. It might simply be a story about a single author — angry, self-righteous, and oblivious

in his solipsism. It might be a story about bad friends. Friends don't let friends publish books like this.²

Or maybe most troublingly, it is a story about the state of the publishing industry. HarperCollins is no lightweight. Yet this book is riddled with the most basic errors of fact. It would be an embarrassment were it an essay by a first year law student, let alone a major work by (at least what was thought to be) one of America's greatest novelists. So what exactly does a publisher do anymore? Are there no editors? Is there no one with the power to say to a

² The work is filled with passages like: "This is not surprising to me, in that I've always run fastest in my oldest shoes." (211); "At risk of straying too far, I must relate the story of how a long time ago a great friend and I, alighting from a freight train in northern Virginia, proceeded to Crystal City, where we insolently skated in our shoes across an empty ice rink while a Zamboni machine was grooming it, leading to our detention by a security guard with the physique of a whale." (163); "Not born to be rich, by 1981 I had nonetheless begun to use a PC that required for its operation the absorption of several hundred pages of protocols and the placement of very large floppy disks in the freezer to fix frequent crashes." (153) (A freezer to fix crashes? Who was the geek who fooled Helprin into that one? No wonder he hates you guys.); "Approaching a buoy where I would make a turn and head back, I looked to my left and saw, on the bank, an idiot was mocking the ancient and unassuming motions of rowing. Evidently unfamiliar with the kind of racing shell that Eakins portrayed and that is a thing of beauty, and perhaps amused that it didn't have a motor, he was aping my motions and laughing maliciously. After all, how stupid can you be to row five miles in the heat when you might never move a muscle, eat cupcakes and pork rinds all day, smoke like a volcano, and sit in your bass boat hooked up to an oxygen bottle." (142); "When the MBAs collapse and reorder the structures of the large controlling corporations, people are thrown from them in Dantesque fashion. Some find another publishing boat into which to climb, some go into other fields, some retire, some drink and some die." (55) (actually, I would think that most die, but that's just a nit); "Not long ago, on one of those Virginia days that relieves potters of the necessity of firing their kilns, I was rowing on glassy water down the Rivanna River." (142) (remember, this is a book about copyright policy); "When I was on a team, if we won I would be very quiet on the drive home. This had nothing to do with wisdom, which though I am old I still think I'm too young to claim (and certainly could not have had at age fourteen), but with temperament, because, if you keep your eyes open, the light of triumph is always strong enough briefly to illuminate the darkness that lies ahead and at the end of which is death." (135); "I have to confess that I have so rarely experienced triumph that I cannot claim to know it well enough to judge, but it seems to be at best a momentary joy followed instantly by sadness, and, then, of necessity, by wariness." (135); "Were I to write the great American novel tomorrow (again?)..." (28); "I have been fighting over commas all my life." (59); and this my favorite: "Though beset with nuclear anxiety, the nation was at once pre-eminent and at peace, the long chain of proxy wars that would unfold across the century's second half had just begun, and we were eight years old." (21).

raving author, “Mr. Helprin, sir, what you’ve said is actually just not correct.”

Like another favorite book of mine (*see* Andrew Keen’s, *The Cult of the Amateur* (2007)), this book teases the reader with the delicious hint that possibly it is really just a self-parody. Like Keen, Helprin is railing against the “machine revolution.” (216). The machine is the Internet. Feeding this machine are “armies of blogging-ants steeped in self-righteous anger.” (202)³ The product of this feeding, Helprin suggests, is just so much trash. The work of the Internet is an intellectual waste. No serious reader, or especially writer, should pay any attention to this waste.

But then here’s the astonishing fact about *Digital Barbarism*: Though the Internet is a waste, though blogs are “subliterate” and wiki’s are written “the way Popeye speaks,” Helprin *draws exclusively upon the Internet* to form the knowledge he needs to launch his attack. He cites no book, or scholarly article, that might help explain the copyright puzzle that started him on his odyssey. Literally everything he points to to explain the weirdness that is copyright is either a blog, or a wiki, or an essay in an Internet publication.

Now I like the Internet as much as the next guy, and I guess I had never really had to think about the question before. But Helprin has convinced me that you can’t understand the subject of copyright law by simply reading blog posts. To get it, or at least to

³ The book is filled with this sort of hate: The people Helprin criticizes are “gullible idiots” (66); they represent “a vast reservoir of hostile inanity” (88); they write “subliterate blogs” (127) — unless it is a wiki that they write, in which case they “write the way Popeye speaks, though with less polish” (65); they come from a culture that produces “mouth-breathing morons in backwards baseball caps” (57); they are “basically stupid [people] with an advanced degree” (44); they “cannot read, which may mean also that they do not read” (41) (logical enough, that); they are “not sensible people” (41); “quick, massive, muscular, untiring and stupid” (35); “nudniks” (31); appropriately likened to the Unabomber (31); or to “shoplifters” (160). Helprin doesn’t reserve his insults for the nameless “blogging-ants,” either. He says of Duke Professor James Boyle: “Rather than wit, what is apparent here is a desire to appear almost English, an embarrassing phase some insecure colonials enter never to exit.” (107) Actually, Boyle is from Scotland. I’m sure Scotland would not consider itself a colony of England. About a third of the way through this tirade, Helprin actually writes: “I don’t believe in ad hominem attacks unless ... the target is the holder of collective or coercive power...” (76) God protect us from the “blogging-ants”!

get it well enough to write a frakking book about it, you're going to need to read something other than *techdirt.com*.

You might well wonder, though, at least if you're not in the center of this debate, how many books about this subject there could actually be? How many scholarly articles? How much attention has been devoted to this relatively obscure clause in the Framers' Constitution?

The answer is lots, and more interestingly, lots from a wide range of perspectives and political positions. Liberal economists (Kenneth Arrow), and conservative/libertarian economists (Milton Friedman, Friedrich Hayek). Strongly pro-IP scholars (Paul Goldstein, Melville and David Nimmer), strongly pro-balance IP scholars (Pam Samuelson, Jessica Litman, Neil Netanel). Scholars from the past (Benjamin Kaplan, Lyman Ray Patterson). Scholars from the present (William Fisher, Yochai Benkler). Judges from the left (Justice Stevens), from the middle (Justice Breyer), and from the right (Judge Richard Posner). There is an endless list of sources that one might have consulted in trying to understand the odd "unfair exception" in the structure of copyright law. No doubt, some of this material is not available on the Internet. One might have to — God forbid — go to a library, and check out a book. But anyone who cares to could come to understand why the law is as it is, and why the way the law is is neither inconsistency nor injustice.

Most of course won't ever do this. The number of Americans who will actually read a book about copyright this year is just rounding error on the population of New York. But among those Americans who read at least one book about copyright should certainly be any American who is writing a book about copyright. I'm not sure what the proper proportion is — 10 books in to get one book out? 100 books in to get one book out? Whatever the ideal number, it is greater than zero. Yet zero is the number of books this romantic defender of books has apparently read about copyright before he wrote this book that he would like you now to buy (and his great grandchildren to earn royalties from).

"Maybe," you say, charitable reader that you are, "he read the books, but just didn't cite them." And true enough: Helprin has this weird thing against citation. He quotes me criticizing him (on my blog): "Helprin barely cites anyone [He] doesn't bother with what others have written...." (164) but then defends his prac-

tice: “It’s one thing to learn from others, but another to copy them.” (164). True enough. But then it is a third thing to acknowledge a point you have drawn from another — assuming, of course, *pace* solipsism, you believe that there are other people in the world, and they might possibly have something to say. At another part of the book, he mocks students who “support their assertions with crushing citations.” (162) A sin, perhaps, but nothing as compared to an author who supports his assertions with no citations at all.

But if he actually read any of these books, he didn’t take notes. The structure of his book is sprinkles of promises to make an argument, mixed with the most self-indulgent reflections upon his own life. And when Helprin actually gets around to argument, the arguments are a series of questions.⁴ None of these questions are profound or new. None of them would be unanswered if the author had spent two weeks researching before he wrote. But Helprin apparently didn’t have time to research. And who does these days? We’re living in Internet time. It’s work enough simply to keep up with the blogs!

Helprin’s argument (to the extent there is one in these 232 pages) begins with an objection similar to the objection I’ve launched against him: his critics, Helprin insists, didn’t read his op-ed carefully. He did not argue, he maintains, for perpetual copyrights (as many who criticized his piece, including I, summarized his position to be). He had instead explicitly stated that the Framers’ limits had to be respected. Sure, he was arguing that Congress should extend the copyright term again. But there’s a difference, he insists, between “infinite adjustment” and “infinite extension.” (44) (“That your Barcalounger may be infinitely adjustable does not mean that it will take you into other universes.” (44)) The extent of proper protection, Helprin tells us, is a “question ... of degree.” (30) It must be a balance, and of course, nothing he said was meant, Helprin insists, to be unbalanced. “I don’t know how

⁴ For example: “Where do they get the idea that copyright is a drag on artistic production? Are they suggesting that Pasternak could not write because Yeats had beaten him to the punch, that Tolstoy didn’t write *War and Peace* because *Moby Dick* was copyrighted?” (140); or “What magic influence comes into play to convert a condition that does not hinder publication or however many years of commercial availability into a condition that then has the opposite effect?” (77); “Is the argument that books that go into print while copyrighted and stay in print for twenty years while copyrighted go out of print because they are copyrighted?” (77)

this could have been misunderstood,” he rages, “unless one reads my further comment that ‘the genius of the Framers in stating this provision is that it allows for infinite adjustment.’” (44)

You don’t know how this could have been misunderstood, Mr. Helprin? Let’s look again at what you wrote:

The genius of the framers in making this provision is that it allows for infinite adjustment. Congress is free to extend at will the term of copyright. It last did so in 1998, and should do so again, as far as it can throw. Would it not be just and fair for those who try to extract a living from the uncertain arts of writing and composing to be freed from a form of confiscation not visited upon anyone else? The answer is obvious, and transcends even justice. No good case exists for the inequality of real and intellectual property, because no good case can exist for treating with special disfavor the work of the spirit and the mind.

“Would it not be just and fair for those who try to extract a living from the uncertain arts of writing and composing to be freed from a form of confiscation not visited upon any one else?” But such “confiscation” continues so long as copyright terms are limited at all. So where in the sentence is the suggestion that you want just a little confiscation? Or: *“The answer is obvious, and transcends even justice. No good case exists for the inequality of real and intellectual property.”* Do you see what you wrote, Mr. Helprin? *“No good case exists for the inequality.”* So if “no good case exists,” where is your case for the resulting “inequality” that would exist if Congress extended terms but stopped before the term was (effectively) infinite? How long are you arguing for? “Infinite adjustment” may well be different from “infinite extension,” but the question for you is *where in your essay do you suggest that the adjustments that Congress should make are to be anything short of forever?* Sure, Congress would have to give us (again quoting Jaszi) perpetual terms on the installment plan. But what in what you wrote suggests that you don’t want perpetual terms? Or to remix a bit the argument you use to suggest that I and others are “against copyright” (and more on this argument below): You say: “[i]f, as they assert, copyright stifles culture and intellectual advancement, if it is a tax, a monopoly injurious to the public good ... why would they be for it?” (33-34); we might say in re-

turn: If the difference in treatment is an “inequality,” why permit it at all? What justice loving people would ever not extend an expiring term, so as again to eliminate that “inequality.”

Actual copyright scholarship has long answered this question of “inequality,” and the charge of “confiscation.” Both answers follow from the same logic that the law applies to property generally. The bias of the law is libertarian. It says don’t intervene — don’t regulate — unless there’s a public reason to do so. A “public reason” means a reason that benefits the public generally, not particular people individually. Legislation that “takes from A and gives to B,” or “takes from the public and gives to B” (at least without any public benefit) is not law. It is, from this traditional perspective, injustice.

When you apply that principle to different kinds of property, the particular mix of protections granted by the state differs. This difference isn’t “inequality.” It is instead a principle of justice applied to different contexts. Helprin gets this difference when it helps him argue against a property tax being imposed upon copyrighted property, like other forms of property. As he writes “the fact that [copyright] is not taxed does not prove that it is not property, and the fact that it is property does not require that it be taxed.” (86) Exactly right. But then the same point can be made about copyright terms: “the fact that copyright is not perpetual does not prove that it is not property, and the fact that it is property does not require that its term be perpetual.” In both cases — indeed, in all cases in any sensible property system — the metes and bounds (so to speak) of this state secured right are determined by the public benefit that would be gained by any particular mix of rights. The law of real property says if you don’t properly register the property, you can lose it. Not so with copyright. The law of New York says that if you don’t keep a bank informed about your address, after 5 years, your savings account can be forfeit. Not so with copyright. These differences in these property systems are not “inequities.” They are systems that treat different things differently.

Indeed, the point about taxation goes a long way to showing why limited terms are not some sort of unjust “confiscation.” Unlike real property, copyrights are not taxed. (I’m talking about the property, not income earned from the property.) This difference is an enormous benefit to copyright owners. If you could

choose between (a) having your property taxed during the full life of the property, and (b) enjoying an immunity from tax for, say, 95 years (which is the term of copyright for works “made for hire” and roughly the average term for individuals), but then forfeiting the work after 95 years, as counter-intuitive as this may seem, you would be better off choosing option (b). That’s because taxation is a kind of confiscation. And the significance of 95 years of small confiscations (even just 1.5%, assuming a discount rate at 5% or more) is greater than the significance of a complete confiscation 95 years from now. (Thus the logic of the Faustian bargain.) From this perspective, copyright owners are not worse off than, say, farmers. They are indeed better off. And the law is justified in making this distinction because it is impossibly difficult to measure accurately what the current “value” of a copyright is. So rather than taxing a percentage of an uncertain value, the law’s tax is complete confiscation after a (very long) term.

Again, Helprin would not have missed this obvious point had he spent two weeks in the stacks. Nor would he have missed the real argument that has been made against the proposal that he advanced in the *New York Times* (to extend terms). The public benefit of the regulation we call copyright is the world of fantastic creative work that will be inspired by the state backed offer of an exclusive right. So a government might well be justified in expanding the scope or duration of that exclusive right, but only if it inspires great new work. And here then is the rub with extending the term of existing copyrights (just what Helprin’s essay argued for): by definition, it is a right *given in exchange for no new work*. It is an extended right for *existing* work, alien to the logic that justifies this exclusive right granted by the state, because this exclusive right produces no incentives. It is a simple transfer from the public to a private party.

It was that basic illogic that animated the “blogging-ants” as Helprin describes them, to respond to Helprin’s essay as they did. Like so much from Washington over the past decade, his was yet another proposal that private interests get the government to

give them a benefit without any regard to whether that government backed monopoly⁵ produced any public benefit.

Almost the same criticism can be made about extending the term of future copyrights as well. No doubt, extending a term does increase the present incentive. But equally certain, at some point the term is so long that the marginal additional incentive is tiny. Helprin quotes Macaulay making the same point:

We all know how faintly we are affected by the prospect of very distant advantages, even when they are advantages which we may reasonably hope that we shall ourselves enjoy. But an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action. (109)

Economists have formalized Macaulay's point in the idea of discounted present value. Assume that if I promised you \$100 today to read Helprin's book, you would read it, but if I promised you only \$40, you would not. If so, would you (rationally) read Helprin's book today if I promised to give you \$100 in 20 years? Macaulay (and hundreds of years of economics) would say no, because \$100 in 20 years is worth the same amount as \$37.69 today (less than \$40), since if you put your \$37.69 in the bank today at 5% (go ahead, dream a little) in 20 years it would be worth \$100.

Helprin has no patience for such reasoning. He instead tells us that Macaulay was "blind to economics." (112). Rather, Helprin asks "What of someone who reduces his 'carbon footprint' in the

⁵ Helprin objects to calling copyright a "monopoly" because, as he argues, the term "monopoly" is reserved to "commodit[ies]." (115) How does he know that? Well, it says so in black and white in the Oxford English Dictionary. (115). Too bad the lawyers at AT&T didn't read the OED when Reagan's Justice Department intervened to break up its monopoly in "telephone service." I can hear Attorney Helprin now: "Your honor, excuse me, but the government has no case here. AT&T is not a monopoly, because AT&T sells no 'commodity.' A commodity is a 'thing,' your honor. All we sell is telephone service." But Helprin forgets that it was the Framers who spoke of an "exclusive right," and in its original sense of the term, an "exclusive right" granted by the state is precisely what a monopoly is. Helprin confuses this definitional question — Is a copyright a monopoly? Obviously so. — with the policy question — Does a monopoly copyright give one monopoly power in any relevant market? Ordinarily not.

belief that it will benefit people with no connection to him whatsoever, hundreds of years from now? How ‘faintly’ is he ‘affected by the prospect of very distant advantages?’” (109).

But Helprin has confused an externality with an incentive. One should want to reduce his “carbon footprint” because carbon is an externality, a cost imposed upon others, just as oil spilled in the ocean, or mercury spewed from coal fired power plants, is a cost imposed on others. The “incentive” here is simply not to impose (at least unbargained for) costs on others, not any future benefit. Of course, one could not give a frakk about costs imposed on others, but if one did, then avoiding such a cost is a benefit *today*, not in the future. Again, not a difficult point for anyone who cares to read before he writes.

Helprin’s book, however, is not just a response to the Internet’s response to his ill-conceived op-ed. It was a bigger cause that led him to fell these forests. To hear Helprin tell it, there is an extraordinarily powerful anti-property, anti-copyright movement (or “anti-copyrightists” (160)) sweeping across the Internet, and bleeding into real space as well. This movement wants “to abolish all forms of intellectual property” (160); it represents the “rejection of or attack upon intellectual property” (53); it seeks the “disappearance of copyright” (83); the “absence of copyright” (83); it would “abolish copyright” (82); “abolished” (39); “the heart of their cause is to abolish it” (33); “abolish [it] for the sake of an ill-defined collectivist ideology” (58); a “shared passion in attacking copyright” (33). I am named as a leader of this quasi-communistic front. (I am also likened to Idi Amin. (76)) An organization I helped found, Creative Commons, is placed at its helm. People like me, and Creative Commons, have a simple and utterly transparent objective: To destroy copyright.

That’s a serious charge. Yet again, Helprin cites not a single source to back it up. And that’s not just because he hasn’t actually read anything that I, or James Boyle, or any of the many others who would be included on this list, have written. It is instead because *none of us are anti-copyright*. Not one of the scholars attacked in Helprin’s book (as he describes us, “little professors in glasses” leading “a bunch of wacked-out muppets” (18); “legalists” who “are incompetent and wrong” (128)) opposes copyright. All of us believe copyright is an essential part to a rich and diverse culture. All

of us are pro-copyright — in the strict sense of arguing that a copyright system is necessary, and should be supported. No doubt, all of us argue for changes in how the law of copyright regulates culture today. Some argue that the term of copyright should be shorter. Some argue it should be restructured more broadly. But to say that someone is “anti-copyright” because they argue for a more “limited” term is as fallacious as arguing that someone is in favor of a perpetual term merely because he argues the term should be longer. (An injustice that Helprin insists has been visited upon him.)

I know my own work here best. Nothing in what I’ve written is against copyright. Indeed, to the contrary, I have repeatedly argued that copyright is essential for certain kinds of important creative work. Moreover, nothing in what I’ve written supports what the industry calls “piracy.” My book *Free Culture* explicitly calls such illegal use “wrong” at least 9 times. See *Free Culture* 10, 18, 62, 63, 64, 65, 66, 139, 255 (2004). So too does my latest book, *Remix*. Helprin’s slander is just that. But the offense is not the harm he does me; the offense is to the reader who has paid \$24.99 for a book that purports to be nonfiction, but is instead Helprin’s worst novel (yet).

Closely tied to his false claim that “the movement” is “against copyright” is the book’s almost constant Red-baiting. He tells us “the choice is between the preeminence of the individual or the collective” (217); he accuses his opponents of “blithely recommend[ing] expropriation as a means of ‘economic justice.’” (180); he says “they have already decided ... against property, competition and the free market. ... Their arguments are mainly a subspecies of the greater and more consequential battle between those who favor a world that is planned, controlled, decided, entirely cooperative, and conducive of predetermined outcomes, and those who favor and tolerate market based systems that admit and honor chance, competition, unexpected developments, peril and reward.” (169) “There is to be sure,” he warns us, “a diffuse, watered-down echo of Marxist and other utopian objections to the idea of property...” (161) He characterizes the freedom the movement wants as “a bloody nightmare Infinitely worse than being in a hippie commune in which anyone who wants to can use your toothbrush—or your diaphragm.” (62) (Really?! “Infinitely worse” than sharing a diaphragm? Wow.) Impatient with the ignorance of the movement

he attacks, he writes “those who now call themselves progressives would substitute the state for the king and once again make the individual a subservient means to an abstract end.” (61)

Yet it is in this extreme of Red-baiting that one can see the mushiness of Helprin’s brain: Let’s say he were attacking a bunch of scholars who believed copyright should be as robust as the Framers of our Constitution had it. That was a regime that secured copyrights only to those who registered their work. And not just any work, but only “maps, charts, book or books” (music, for example, was excluded). Imagine the term of the protection was again just as the Framers made it — 14 years, renewable by the author, if living, for another 14 years (but again, only if he registered the renewal). And imagine finally that the rights granted were forfeit if the author failed to deposit the copyrighted work with the government, or if he failed to mark the work with the appropriate sign. Such a reform would certainly be radical. It is wildly more radical than anything any of the scholars Helprin attacks would recommend.

But here’s the question: would one who so recommended be a “collectivist”? Were our Framers “collectivists”? Obviously not. Because the consequence of a limited copyright is not that the collective gets to control who does what. The consequence of a limited copyright is that the work is in the public domain, and *anyone has the liberty to do anything he or she wants with the work*. The state or the “collective” is not privileged over the individual. The individual is privileged over the state or “collective.” And so strong is that privilege in America that a Court of Appeals in Colorado recently held that the government can’t remove work from the public domain unless it satisfies a strict First Amendment test first.

The confusion that haunts Helprin is that he (still) hasn’t come to understand *why* the contours of copyright are different from other ordinary rights. And so like many of us, he ignores what he doesn’t understand. The best example of this is a particularly self-righteous chapter which tries to establish the sanctity of copyright by analogy to property generally. Helprin begins the chapter with a story of a younger, less property respectful Mark Helprin, traveling across country by bike at the age of 14. Helprin stops by a corn field “as dense as a Vietnamese bamboo forest,” (166) picks an ear of corn, shucks it, and begins to eat it. A farmer

approaches him and asks, “Where’d you get that corn.” (166) Helprin confesses he had taken it from the field. The farmer continues, “That’s my corn. You have no right to take it. You stole it from me.” (166) What follows is a pathetic argument between the adolescent Helprin and the farmer, by the end of which Helprin comes to see the justice in the farmer’s view. The chapter ends with an extraordinary bit of Ayn-Rand-wannabe prose:

Property is to be defended proudly rather than disavowed with shame. Even if for some it is only a matter of luck or birth, for the vast majority it is the store of sacrifice, time, effort, and even, sometimes, love. It is, despite the privileged inexperience of some who do not understand, an all-too-accurate index of liberty and life. To trifle with it is to trifle with someone’s existence, and as anyone who tries will find out, this is not so easy. Nor has it ever been. Nor should it ever be. (181)

So should Helprin have been ashamed that he stole the farmer’s food. *Of course he should be!* What kind of confused mind would think it right to take another person’s property? There are a million reasons Helprin’s juvenile behavior was wrong, not the least that it would deprive the farmer of a chance to profit from the food he was growing. Helprin’s taking that ear of corn meant that the farmer couldn’t sell it. It is inconceivable that this should even have been a question for him.

But what’s less clear is what Helprin thinks follows from this moral tale. Does he think that it shows that one can’t “take” another person’s words? That when, for example, I quote a sentence from Helprin’s book in this review, I am doing the same thing he was doing when he stole some corn?

If Helprin says “yes” — that my using his words in this review is just like his taking an ear of corn from the farmer — then it is clear he is not defending “the copyright system that has been with us, in one form or another, for three hundred years....” (202-203) For my use of Helprin’s words are plainly “fair use,” and as the Supreme Court said in *Eldred v. Ashcroft*, “fair use” is one of the “traditional contours of copyright protection,” so fundamental that removing it would raise First Amendment questions.

But if Helprin says I am allowed to “take” his words in this review, then what’s the point of the story? None of the people Helprin attacks by name endorse people violating other people’s rights. Again, I have explicitly called such behavior “wrong,” and explicitly condemned those who use technology to violate other people’s rights. The moral tale is just a fantasy to fire-up self-righteousness. It has nothing to do with any real argument anyone serious is having about the scope or reach of copyright.

Helprin’s errors are not limited to the stuff he should have learned from books. He even messes up his Internet research. The organization that I helped found, Creative Commons, is named by Helprin as the leading anti-copyright organization. Here is how he explains to his readers what Creative Commons is:

Creative Commons is the self-congratulatory name of a self-congratulatory movement. Somewhat like kibbutz on the internet, the idea is to write programs—“free ware”—and distribute them without charge. While presumably striking a blow at corporate giants like Microsoft, this demonstrates the generosity and selflessness of the programmer, musician, writer, or scholar who donates his work to the common weal. And it becomes in turn a premise that is promiscuously extended to those works the authors of which do not want to give them away, of whom the presumption, becomes that they are not generous. Therefore, they are selfish. Therefore, they should be brought around, one way or another, to the ideal—for the public good and to save their souls. (51)

The reader of *Digital Barbarism* might then be surprised to read (as is stated directly on the Creative Commons site): “Creative Commons licenses should not be used for software.” She might be puzzled as well to read an op-ed by Helprin in the Wall Street Journal, where he explains that Creative Commons is “richly financed by ... Microsoft...” Those silly people at Microsoft, “richly financ[ing]” a movement aimed at “striking a blow at ... Microsoft.”

More fundamentally, a reader of Helprin’s description might be surprised to see that no where on the Creative Commons

site does the organization purport to say what authors or musicians “ought” to or “should” do. Creative Commons gives away legal tools to enable authors to exercise their rights *as they wish*. There’s no effort to guilt or shame anyone into anything.

Likewise, Helprin writes:

A movement that, whatever its ideological origins, finds its most congenial home and support in the geek city states of Silicon Valley, has successfully channeled and combined the parochial interests both of giant corporations and legions of resentful adolescents who believe that they have a natural right to whatever they want. It is known informally as the “Creative Commons,” and the charitable mask it presents, selfless people contributing their work—software, music, writing—to the common weal, is merely the cover (not much bigger than a postage stamp) for a well organized effort to cut away at intellectual property rights until they disappear. (xii-xiii)

Though I was working two jobs in Boston’s hottest summer ever, I had neither envy nor a quarrel, until I saw a bumper sticker on their van that said, “Eat the Rich.” These were the predecessors of the Creative Commons movement, which suffers the illusion that if ownership is abolished, everything will be free, when the opposite is true; and thinks that in opposition to copyright it is the ally of the little man, even as it fights the battle in behalf of the great combines and business powers of the imminent future. (180)

Yet again, a careful reader would be puzzled by these descriptions. There is not a single statement anywhere on the Creative Commons site calling for “ownership” to be “abolished.” Indeed, there is absolutely nothing on the site calling for “intellectual property rights” to be “cut away” or changed *at all*. That’s because Creative Commons is not a movement aimed at reforming copyright law. It is a nonprofit established to give copyright owners free tools to exercise their copyrights as they wish. The project thus *depends* upon copyright. Without copyright, none of the objectives of

authors or creators to assure that their work was shared consistent with their preferences could ever work. To say such a system is against copyright is like saying Intuit is against the income tax because it sells products that help you find tax deductions.

Helprin expresses only scorn for any creator who would use a Creative Commons license to waive any of his rights. He tells us, echoing Johnson, “No man but a blockhead ever wrote, except for money.” (108) (Did Einstein write for money? Or was he just a “blockhead”?) Elsewhere he describes creators who use Creative Commons licenses:

Either they have made their mark and have so much already that whatever they do in this regard will serve as an exercise of public relations that will generate more revenue; or, despairing of ever publishing a word or collecting a dime, they have nothing to lose; or they are at points in their careers where they need to look “good” or generate attention; or they are simply cowards who succumb to pressure and coercion. (67)

We are not told anything about the basis upon which he draws his conclusions about who uses Creative Commons licenses and why. Or about the basis for his right to tell anyone how they should use the rights the law gives them. As he lectures us elsewhere, “a willing contribution to the ‘Creative Commons’ does not bestow upon the contributor or observers the moral authority to compel others to do the same.” (52) Of course it doesn’t. But why does the refusal to grant any rights to anyone except a publisher give Helprin the moral authority to heap scorn or insult on those who do?

There are many other lesser errors in this book as well. Helprin writes: “Previously, a copyright assigned to a publisher or a studio would remain there for all the days of its life. Now, and thanks to Sonny Bono, if it is not a work for hire (which nothing should or need be), a licensee can keep it for only thirty-five years, after which the rights return to the author, the composer, the artist, or the heir.” (127). Wrong. The Sonny Bono Act didn’t create the termination right. It merely extended it.

He writes: “It would be one thing if such a revolution produced Mozarts, Einsteins, or Raphaels, but it doesn’t.” (57) Hel-

prin apparently didn't notice that none of those creators enjoyed anything like the "copyright" of today. One might as well say the world of non-copyright gave us Mozart, Bach and Beethoven, while the world of copyright gave us Britney Spears. That too would be a bad argument, but just sort of argument that is at home in this book.

He gives extreme obeisance to the Constitution ("I so revere the Constitution and the Declaration, which is the conscience and fire of the Constitution" (44)), but his claims about the Constitution are simply made up. He writes, "because the Constitution unambiguously instructs that the period of copyright protection be limited, and because the record of constitutional deliberations clearly supports this..." (45). In fact, had Helprin read even one text about the Constitution and the Progress Clause, he would have learned that we have no record at all about the "constitutional deliberations" about this clause. There is a single reference in the Federalist Papers:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. ... The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress. (Federalist, No. 43).

This says zero about "limited Times." Zero can't "clearly support" anything.

He tries to mark himself as more reasonable than the IP-maximalist Mark Twain, who he asserts proposed a term of "a million years." I've never seen that claim attributed to Samuel Clemens, and of course, Helprin doesn't cite anything. But Twain did testify that he didn't believe copyright should extend to his grandchildren. "They could take care of themselves," Clemens said.⁶ Helprin thinks to the contrary, for his purpose in extending the term beyond life plus 70 years is to benefit his grandchildren.

⁶ See Joseph A. Lavigne, *For Limited Times? Making Rich Kids Richer Via the Copyright Term Extension Act of 1996*, 73 U. DET. MERCY LAW REV. 311 (1996).

While he is respectful of “the Wikipedia” (64), he scorns wikis more generally. As he writes,

Where the wiki concept fails most disturbingly, however, even with the most careful oversight, is in the attribute of fixedness, for no matter what the precautions or purity of motivation, the wikis are like the Great Soviet Encyclopedia on speed. Instead of an office in the Kremlin sending out new paragraphs and doctored photographs to be inserted in a row of heavy books, a process that took weeks or months and was detectable as the paste wrinkled the page, it is done seamlessly, instantly, anonymously, and without cease. Revision as used by the Soviets was a tool to disorient and disempower the plasticized masses. Revision in the wikis is an escapable attribute that eliminates the fixedness of fact. (65)

Wrong. Unlike Soviet revision, every change on a wiki is recorded, and always visible for anyone to review. Click the “history” tab and you’ll see who made what change and when. Research what you’re writing about before you write, and you won’t make these sorts of mistakes again.

Mark Helprin is an angry man. His book rages against the machine. It rages against modern education. (“[M]odern education promotes collectivism verses what it perceives as destructive, self-promoting individualism.” (53); “Intense ‘communitarianism’ is continued through elementary and secondary education, and then nailed firmly into the wood by experts, ideologues, and lunatics in the university.” (54)). It scorns collaboration. (“Collaboration, collective punishment, and group responsibility are now the watchwords of the classroom. As the chairman of the Oxford History Faculty Board, Christopher Haig, recently put it: ‘Historians used once to work alone, reading in archives and writing in college rooms. History is now a more collaborative exercise.’” (53)) It hates just about everyone it describes. It practices an arrogance that assures ignorance. It teaches absolutely nothing about the hard and important questions of copyright.

That's too bad. There are difficult questions about how we regulate culture that we desperately need to address. The digital age has done much harm as well as much good. Craigslist is amazing, but it has created enormous pressure on journalism. The "generative" Net, as Zittrain describes it, is extraordinary, but it has also generated a host of destructive "malware" that threatens much more than the comment section on your favorite blog. These are not copyright questions. But they are questions fairly raised by the spread of digital technologies. And likewise are the fair and legitimate questions Helprin raises about the need to "slow" "tranquility" (16), and about "the atomization of attention spans" (209). It would be good for these questions to be addressed by someone not so identified with Internet cheerleaderism (for example, me). It is always good that a different generation provides perspective on the new.

But progress on these questions will not happen without understanding. Mark Helprin has demonstrated no understanding in this book. And between a copyright system that fails to give royalties to grandchildren, and a culture of publishing that spreads the sort of ignorant raving that this book is, I should think we should be more concerned about the latter rather than the former. After all, all of American literature through 1976 survived on a copyright system that gave authors at most 56 years of protection. But I don't think we've yet tried HarperCollins-as-vanity-blog. Helprin's book gives us very little reason to be sanguine about this development.