Executive Summary

THE MACARTHUR FOUNDATION EVALUATION

Special Initiative on Intellectual Property and the Long-Term Protection of the Public Domain

EXECUTIVE SUMMARY

I. BACKGROUND OF THE INITIATIVE

The term "digital revolution" distinguishes an era of technological innovation characterized by continuously evolving global communications networks. The widespread availability of personal computers in the 1980s, declining Internet costs in the 1990s, and in the 2000s, rapid convergence of hardware and extraordinary divergence of software in new consumer electronic products, empowered ordinary people to access and utilize a range of knowledge assets, including literary and artistic works, at a scale unparalleled in prior technological breakthroughs involving radio and satellite technologies. Today, anyone with access to a computer and the Internet can instantaneously, perfectly and easily copy, transform and transmit these works across the globe. And just as previous technological breakthroughs in photocopying, recording and broadcasting technologies elicited reforms consistent with the perceived effects of the technical changes of *their* time, the digital technologies of *our* time have forced reconsideration of fundamental policies in fields as far-flung as telecommunications, intellectual property (IP), human rights and international trade.

In 1967, renowned copyright scholar Benjamin Kaplan noted an "almost obligatory" tendency to invoke the "communications revolution" caused by radio and satellite technologies as a basis for pronouncing the inadequacies of the 1909 Copyright Act.[1] It certainly is the case that each wave of technological change seems deeply incompatible with existing laws governing social behavior, and exceptionally disruptive of settled norms regarding ownership and control of creative works.[2] There is, however, general consensus that the intensity and scale of distribution capacity available through digital networks, combined with rapid technological innovation in consumer electronics, distinguishes the digital era from previous

[1] BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 1 (1967).

[2] Previous policy and legislative efforts responding to disruptions caused by technological innovation tried to avoid a definitional approach to creators' rights tied to a particular technological state. As stated in the 1965 House Report to the Copyright Revision Bill, "[o]bviously no one can foresee accurately and in detail the evolving patterns in the ways author's works will reach the public 10, 20, or 50 years from now. Lacking that kind of foresight, the bill should, we believe, adopt a general approach aimed at providing compensation to the author for future as well as present uses of his work that materially affect the value of his copyright." *See* General Revision of the U.S. Copyright Law, House Committee Report, 1965.

breakthroughs, and deeply complicates the nature of competing interests at stake in the regulation of the digital environment. Computing devices are becoming more and more similar in terms of size, battery life and processing power; laptops, netbooks, and tablets continue to be made smaller, while smart phones are larger and more powerful. The distinction between device classes is increasingly blurry, with design features that make it easier to "privatize" and "personalize" experiences in the on-line environment. The result is acceleration of an increasing and unparalleled capacity for most citizens to engage in widespread distribution of works of authorship. These developments have engendered tremendous concerns, especially in industries such as software, entertainment and publishing, about the role of copyright law in preserving economic incentives to create knowledge-based assets. Consistent with historical practice, [3] the affected industries turned to policymakers, urging legislative efforts to design new legal rules that could be used to counteract the unfettered exploitation of copyrighted works in the digital economy.

At the same time, however, by the 1980s and 1990s, the freedom of the public to access vast amounts of information and knowledge in the context of a wide range of political and cultural activities introduced serious questions about the effects of intellectual property rights (IPRs) on the exercise of civil liberties and opportunities to nurture robust democratic engagement in the online environment. In addition, there were questions about whether digital technologies could empower greater creativity, thus occasioning more good than harm from a public welfare perspective. The disruption of traditional markets and channels for distribution of creative works generated a diversity of creative projects from non-traditional outlets, fracturing industry and business models that had long thrived by serving as intermediaries between creators and the public. On-line video rentals with creative business models such as Netflix displaced brick and mortar stores; social networking sites allowed users to communicate and interact simultaneously in word, picture and sound; and fan fiction websites allowed users to creatively interject their own ideas into conventional scripts and to share those with other followers.

With the dissemination of works no longer a meaningful obstacle to aspiring artists and creators of all stripes, the continued relevance of the classic institutional functions of traditional copyright markets represented by music labels, collecting societies and publishers, among others, were largely in question. Empirical evidence regarding the impact of digital technologies on creative output and economic growth, where any existed, was both minimal and highly contested. At a minimum, many believed that concerns about weakened economic incentives were counterbalanced with gains from increased productivity from a larger, more diverse group of creators coming to market due to reduced costs.

In light of these fast-moving technological changes and their implications, between 1999 and 2001, the MacArthur Foundation, under the auspices of its General Program, began

[3] Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989). *See also* Jessica Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987).

exploring prospects for a Special Initiative on the impact of new digital communications in society. The broad outlines of the Foundation's interest in this field were shaped principally by: (1) an understanding that the regulation of digital technologies would have significant consequences for human social and economic development; (2) a concern for the sustainability of innovative endeavor in the face of strong proprietary rights applied to upstream public goods, such as scientific data and other results of publicly funded research activities; (3) the lack of transparency and public accountability in the law-making processes that governed various aspects of the digital infrastructure, including intellectual property legislation and; (4) the felt need for the development of alternative legal paradigms to mediate the longstanding tension between the public interest in accessing and using cultural and public goods, and the interests of authors and creators in receiving fair returns for their investments in the creative enterprise.[4] Internal MacArthur Foundation documents explicitly focused on the public interest as an overarching theme. The Foundation wanted to support research and analysis of the impact of private control over technologies, to explore new approaches that had the potential to stimulate increased knowledge dissemination, to safeguard and advance principles of freedom of communication and association (including the right to privacy), and broadly to encourage a diverse range of views in fora where new policy initiatives in the IP field were being discussed.

II. THE FORMAL LAUNCH OF THE INITIATIVE

The MacArthur Special Funding Initiative was formally launched in late 2002 with the title "Intellectual Property and the Long-Term Protection of the Public Domain" (hereinafter, "Initiative" or "MacArthur Initiative"). Through this time-limited program, the Foundation sought to "contribute to the evolution of an IP system that provides incentives for creation of scientific and cultural materials, protects copyright owners who bring these materials to consumers, and enables users to take advantage of the opportunities presented by digital technologies to create and share content, especially for educational, scientific, and artistic purposes."[5] Contributing to the design of institutions that govern how rights to data and information will be constructed in the online environment, and helping improve the laws that define the scope and reach of those rights, were at the core of this Initiative by the MacArthur Foundation.

In many regards, the Initiative was a logical extension of the Foundation's long-standing commitment to support human rights and facilitate the optimal supply of global public goods, such as education and public health, in pursuit of human development. The first grant in the Initiative was awarded in February 2002. The inaugural grantee was the American Library Association (ALA), which received support to educate librarians about the implications of digital

[4] MacArthur Foundation, Working Drawings (2005), as revised August, 2006. *See also* Memorandum to the Board of Directors from Woodward Wickham and Elspeth Revere, January 26, 2001.
[5] *See* Appendix A.

copyright.[6] As the primary source of publicly accessible knowledge, the copyright framework has always included special provisions for libraries. Not only do libraries represent a gateway to vast repositories of information and data, they have served as reservoirs for huge stores of human recorded knowledge, and as sources to preserve and catalog such knowledge. The capacity to digitize, store, and make collections of libraries universally searchable transformed the structure of functions that libraries have long performed in most societies. Digital technologies altered the relationship between libraries and their patrons, between libraries and publishers, and initiated a cultural transformation in the way that libraries have been traditionally staffed, as well as in the nature of services they offer to the public.

This initial grant illustrated the spirit of the MacArthur Initiative. Societies have valued the preservation of knowledge long before copyright laws existed.[7] Today, however, copyright law has significant implications for the future of libraries.[8] The Initiative clearly had a strong interest in the role of libraries as social institutions that effectuate cultural and democratic engagement, while also promoting research and educational opportunities for the public. When the Initiative was launched, libraries were struggling with issues that current laws had not envisioned and could not address, such as large-scale digitization of collections and automated harvesting and collecting of Internet-based materials. There was little research available on the nature and scope of legal rules affecting libraries and what would be needed to help adapt library services to the digital age. Further, libraries were typically absent in the national and international negotiations over new IP rules. The Initiative funded research activities concerning the effect of digital technologies on libraries; development of educational materials to equip and educate librarians on copyright issues in the digital age; and supported conferences and travel by library associations to international negotiations.

The results have been significant. The foundational work of the ALA and various other grantees in advocacy, research and proposing new initiatives at the international level galvanized a global movement to seek effective ways to preserve and enhance the role of libraries in the digital economy. Currently, momentous efforts are underway to negotiate an international treaty on copyright limitations and exceptions for libraries, among other things paving the way for a new regulatory structure to govern relations between libraries, publishers and patrons.

[6] *See* Appendix F for a biography of the ALA, grants awarded under the Initiative and principal outputs.
[7] *See* Peter Menell, *Knowledge Policy for the Digital Age*, 44 HOUSTON L. REV. 1014, 1019 (2007) [internal citations omitted].
[8] Copyright law has had a formal role in enhancing library collections, especially in the U.S. where copyright formalities once served to ensure a steady supply of books to the Library of Congress, now the largest library in the world. *See* 17 U.S.C. § 407. For a brief history of the Library of Congress, see www.loc.gov.

III. Main Themes of the Initiative and Grant-Making Strategies

With input from a diverse group of experts, the Foundation identified three key themes on which the Initiative would focus, consistent with the concerns which had motivated the initial inquiries. The first theme identified threats to institutions vital to the preservation and dissemination of literary and artistic works such as libraries and publicly funded research organizations; the second theme identified the role of scientific research endeavors and the impact of stronger copyright laws on the "transnational innovation system," particularly in down-stream applications of up-stream research findings; the third theme focused on the role of courts and the legislature in reshaping the IP system and the challenge of ensuring that an explicitly public interest perspective would be represented in the debate over how best to recast the traditional framework of IP regulation for the digital age. These themes were reflected in the grant-making strategies first published on the MacArthur website. As listed, they were: (1) domestic policy analysis and targeted education to engage key constituencies in discussions about intellectual property; (2) analysis of international IP treaty-making processes and support for enhanced participation of civil society organizations in international fora; (3) support for the development of new models under existing law to address innovation and dissemination challenges unique to the digital environment; and (4) special opportunities for research on specific issues critical to IP debates, field-building activities and "cross-cutting work" connecting intellectual property relevant to the Foundation's other interests in media and digital learning.[9]

About three years into the Initiative, the Foundation re-examined its grant-making strategies.[10] This appears to have been a largely informal exercise conducted by the MacArthur staff alone. There is no evidence that this mid-term assessment changed the Foundation's focus or priorities. The only visible change in the new announcement, again published on the Foundation's website, was an explicit reference to international policy, legal and technical analysis as part of the grant-making strategies. The kind of grants awarded and the grantees that were supported, were substantially identical prior to and after the mid-term assessment.

IV. Structure and Overview of the Initiative

The MacArthur Initiative lasted for seven years, from 2002 to 2009. During this period, the Foundation made 48 separate grants totaling $18.647 million to 28 grantees.[11] A close examination of the grant awards reveals that the Initiative was much broader in depth, scope and complexity than its official title suggests. The grantee activities more deeply reflected the themes that motivated inquiries into this subject matter, far more than the formal grant-making strategies might suggest. Grantees were involved in a significant range and diversity of

[9] *See* Appendix A.
[10] Conversation between the evaluator and Ms. Elspeth Revere, December 2, 2011.
[11] *See* Appendix F for grantee bios; Appendix D for a complete summary of all the grantees and their activities.

activities – congressional briefings; testimonies and consultations with senior staff members in agencies involved with U.S. IP policy formulation; advising representatives of foreign governments in international negotiations; developing digital tools to facilitate uses of copyrighted works on the Internet; developing briefings for Members of Congress on the patent system and reform efforts; publishing informational resources and other tools to help consumers understand and use copyright laws – or, in the words of Professor Peter Jaszi, to "make the public domain functional."[12] Examples of such tools include resource guidelines for librarians,[13] fair use guidelines to facilitate use of content by documentary film-makers,[14] development of new Internet protocols to enable new models of licensing copyrighted works[15] and much more.[16]

Reflecting on the MacArthur Initiative overall, it could be more accurately described as one focused on the question of how to direct technological progress to strengthen and advance social, cultural and economic growth. New models of innovation, new methods of private-public partnerships, new legal theories and new forms of creative enterprise occupied a contested space, which legislation and policy were not equipped to effectively govern. Many grantee proposals reflected a basic concern about how and what should fill the regulatory void created by the rapid growth of digital technologies. The Initiative sought to identify the relevant questions and propose globally appropriate responses guided by a commitment to the role of knowledge in enhancing human welfare and improving the prospects for a healthy democracy.

On close examination, then, the Initiative was not merely about IPRs as such, but instead about a fundamental principle grounded in the explicit language and goal of the U.S. Constitution that the public welfare could and *should* be explicitly attended to in the design of laws that define the rights and interests of consumers and creators. In so doing, the ideal end result of IP regulation is to strengthen prospects to improve the material, cultural and political well-being of the public at large. Building on the Foundation's background research, the Initiative began on the premise that while expanded proprietary rights secured the interests of rights owners, such rights could also constitute barriers to new market entrants, new business models, new forms of creativity and new opportunities to engage in democratic dialogue. The work of all the grantees addressed aspects of these considerations, especially in research and advocacy, to tackle legal and policy questions about the impact of technological change on users.

A significant amount of funding was also directed at prospects for the design of an innovation policy not built on principles of closed systems represented by property rights, but

[12] Final meeting of MacArthur Grantees, Washington, D.C., September 17, 2010.
[13] *See* Section IV.1.1.2, *infra* pg. 29.
[14] *See id.*; *see also* Section IV.1.3.3, *infra* pg. 32.
[15] *See* Section IV.3, *infra* pg. 36.
[16] *See* Appendix F for a complete listing of outputs by grantee.

on open access models consistent with advances in software development.[17] For example, a grant in 2002 to the National Academy of Sciences (NAS) supported a symposium on the role of science and technology data and information (STI) in the public domain. The symposium attracted leading scientists and scholars from law, economics and science policy. Representatives from industry and the government also participated and the resulting report was made available to the public in an open access format. The analysis by the grantee, in conjunction with earlier research results, ultimately formed the basis for development of a new open access model for making available scientific data and information in public science. That model, Science Commons, is regarded by many scientists and policymakers as one of the most promising approaches to help the scientific community respond to copyright barriers imposed in the traditional print medium. A dedicated scientific commons is expected to accelerate the pace of research by providing tools to access data and information stored in digital repositories, and to encourage sharing across scientific disciplines.

Open access journals in the scientific arena were just one iteration of a broader effort under the Initiative to support alternatives approaches to fostering creativity and access to knowledge. Today, even as the hardware profiles of devices continue to merge, there has been an explosion of operating systems and platforms using open source-derived technological innovation. Systems such as iOS from Apple, BlackBerry from RIM, Android from Google, Symbian from Nokia, and Windows 7 phones from Microsoft dominate the mobile market, each offering distinct flavors of user experiences.[18] In the desktop space, there is Windows from Microsoft, OSX from Mac, and a plethora of Linux distributions. Google recently joined the "race to the top" with ChromeOS.[19] What the MacArthur Initiative tapped into with respect to its strategy for the development of new models was the fundamental shift in the relative expense of producing software and hardware. It used to be the case that hardware was quite expensive, and the software that it could run was small and cheap to produce. That picture is now completely reversed: hardware is quite cheap to mass produce, and software can be enormously complicated and costly to produce.

In this context of expensive software, Open Source projects have stood out as a promising countervailing approach to innovation. Open Source tools like Apache (web server), SQLite (database) and Linux (OS) allow companies and individuals to employ existing tools as building blocks, rather than starting from scratch. Advocates of the Open Source model claim that code that is widely reviewed by peers is generally of high quality; mistakes and security flaws are pointed out, criticized and corrected quickly. Most important, Open Source projects give freedom of choice and flexibility because IP rules are re-set from the default of an exclusive right to exclude to a norm of open use without fear of legal reprisal or the cost of negotiating permission from the copyright owner. Together with the deployment of new legal regimes,

[17] *See* Section IV.3, *infra* pg. 36.

[18] My thanks to Mr. Tom Deering, Ph.D candidate, Iowa State University, for this explanation about computing shifts and IP implications.

[19] *Id*.

such as Creative Commons (CC) licenses, the Initiative played a distinctive role in helping change the legal culture regarding the development, use and dissemination of new technologies.

V. ADMINISTRATION OF THE INITIATIVE

The MacArthur Initiative was designed under the auspices of the General Program. The team administering the Initiative consisted of three principal staff members: (1) Ms. Elspeth Revere, who was the key person in planning and supervising the Initiative, Vice President of Media, Culture, and Special Initiatives; (2) Ms. Kathy Im, Director of Media, Culture, and Special Initiatives, who focused on international aspects of the Initiative; and (3) Mr. John Bracken, Program Officer who worked with domestic grantees.[20]

VI. PRINCIPAL SUCCESSES AND CHALLENGES

As a group, the grantees produced well over 200 publications, designed courses and educational materials on copyright, attended over 150 agency hearings, organized over 250 seminars/conferences, participated in over 300 international meetings and negotiations, and wrote over 100 briefs in court proceedings. The vigorous debates and interactions between grantees, representatives from the consumer electronics industry and Internet Service Providers on the one hand, and representatives of the music, software and entertainment industries ("content providers") on the other, in some cases produced more enlightened policies, created new avenues for compromise positions on proposed legislation, or simply educated policy makers and government officials on a variety of perspectives. To this end, the Initiative undoubtedly accomplished its stated overall objective to contribute to the development of an intellectual property system that takes into account the interests of creators, intermediaries, users and the public.

The Initiative was not without its critics. Most were from industries whose interests in a strengthened IP regime for the digital environment often meant their efforts for heightened enforcement of IPRs online, or to introduce new initiatives designed to expand the scope of traditional IPRs, were met with strong, coordinated and well-researched opposition by groups who worked in close collaboration with the grantees or even by the grantees themselves. In the loose configuration of actors consisting most broadly of those resistant to an expanded intellectual property regime, some grantees unfortunately were associated, in the minds of critics, with the "free access" movement paradigmatically represented by illegal hackers as part of a growing sub-culture of unauthorized distribution of music and films in the online environment. *The evaluator found no evidence that any grantee, or the Initiative as a whole, whether directly or indirectly, ever supported, engaged in or became involved with any such groups.* Further, the evaluator found no evidence that the Initiative sought to undermine intellectual property rights as currently designed. To the contrary, the Initiative – and most

[20] Ms. Susan Salaba was the Program Administrator for the Initiative.

grantees' projects – were focused not on resistance to intellectual property rights as such, but to reform of the basic, underlying assumption that stronger rights in the digital age would lead ineluctably to more innovation, better technologies or increased social welfare. To the extent there was a common theme beyond concern for the impact of expanded rights on the public welfare, the grantees shared a commitment to engage in research to verify or challenge the data supplied to Congress and government agencies on intellectual property issues.

Even the Initiative's most ardent critics agree that the Initiative was timely, necessary and helpful in restoring balance to the public debate about the nature, scope and role of intellectual property rights. Industry representatives interviewed for purposes of this report agreed that at the start of the Initiative, the debates were too one-sided in favor of content providers. However, opinions diverged sharply between grantees and representatives of industry over the extent to which the MacArthur Foundation should have continued funding projects and activities focused principally on the question of access to knowledge. Regardless of one's views on this issue, important successes of the Initiative include the following:

1. *The Initiative accomplished exactly what the Foundation set out to do*: An extensive data audit of the reports submitted by the grantees shows that all the grant-making strategies were addressed, often by more than one grantee. Indeed, a notable strength of the Initiative is the extent to which most grantees were involved in an average of three to four of the various activities listed among the grant-making strategies.

2. *The Initiative paved the way for other foundations*: The MacArthur Foundation was the first foundation to develop a broad initiative on intellectual property rights and their impact on society. Other foundations such as Ford, Rockefeller and the Open Society Institute (OSI) supported specific subject matter projects related to intellectual property, particularly in the field of public health, privacy, freedom of the press, etc. However, based on interviews and publicly available data about the work of other Foundations, it appears that only MacArthur set forth an integrated approach to the regulation of technology in the digital age. In this regard, the Initiative pioneered the development of a "field" dedicated to cross-disciplinary analysis of the interaction between innovation and society at large.

3. *Strong research output*: The lynchpin of the Initiative was research and education, with over 35 percent of all monies allocated to grantees directed towards such activities.[21] The Initiative motivated new research questions in economics, political science, law and computer science, generating a robust set of literature and empirical data on which several reform efforts have either been justified or blocked.

4. *Global education impact*: The Initiative supported worldwide education efforts with respect to IPRs generally. Particularly in the developing and least developed countries, the work

[21] *See* Table 1 in Appendix B.

of the grantees constituted a serious effort to educate the most impoverished communities around the world about the role of IPRs in advancing human development.

5. *Policy impact of grantees' work*: A strong indicator of the success of the Initiative is the extent to which the work of several grantees has informed significant policy shifts domestically and internationally. Below are some important examples:

- The World Intellectual Property Organization (WIPO) recently announced the need for copyright reform to account for users' interests, and the importance of alternative dissemination mechanisms.[22] Creative Commons, one of the major grantees in the Initiative, is credited with transforming the legal landscape of the digital copyright system with the creation of Creative Commons (CC) licenses.[23] These licenses have been adopted by universities, governments, industry and others worldwide, making vast stores of information available for use under easily understandable conditions.[24] They have been embedded in the architecture of the Internet, thus facilitating sharing and dissemination of cultural goods, and enabling a legal culture of "free" to substitute for the illegal culture that for long had threatened the legitimacy of the demands for access to information and data. To date, there are an estimated 150 million CC licenses in use.

- Intellectual Property Watch, or "IP-Watch", the first and only media outlet dedicated to news reporting on matters related to IPRs, has become a household name and industry "gold standard" for obtaining information on developments in intellectual property law and policy. IP-Watch news blurbs are a staple source of information about IP for governments, research scholars and the public at large. It is credited with singularly enhancing the quality and speed of information dissemination about developments around the world. Since 2004, IP-Watch has had well over 2 million visits and approximately 3 million page views.

- The work of the Congressional Research Service on patent reform helped shape the most recent bill introduced in Congress. Most commentators observe that the bill will become law shortly.[25]

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[22] *See* WIPO Director General Addresses the Future of Copyright, *available at* http://www.wipo.int/pressroom/en/articles/2011/article_0005.html ("We need a global infrastructure that permits simple, global licensing, one that makes the task of licensing cultural works legally on the Internet as easy as it is to obtain such works there illegally.") For full coverage of this notable speech, see http://www.ip-watch.org/weblog/2011/03/15/.

[23] *See* http://creativecommons.org/

[24] There are currently over 150 million users of CC licenses.

[25] *See, e.g.*, Patentlyo, Patent Reform – An Important Amendment to the Bill, *available at* http://www.patentlyo.com/patent/2011/03/patent-reform-an-important-amendment-to-the-bill.html (last visited March 10, 2011).

- A new treaty to address access to copyrighted works for the visually impaired is, for the first time, a major issue in international copyright law due to the activities of Knowledge Ecology International (KEI) working with a coalition of organizations for the blind.

- Due to the work of numerous grantees, including Yale University, Knowledge Ecology International, South Centre, the American Library Association, American University, IP-Watch, and Duke University, among others, WIPO currently is undergoing a limited audit of its technical assistance activities to developing countries. Several grantees had been critical of WIPO's technical assistance to developing countries. This assistance often encouraged the poorest countries to adopt IP legislation that, in the views of many commentators, was inconsistent with their levels of economic development. Further, the technical assistance often marginalized key stakeholders in those countries from the law-making process, transforming the regulation of IPRs into an elite and impenetrable system for which there often was no domestic public accountability. The current audit of WIPO has been welcomed, albeit cautiously, as an important step in transforming the culture of WIPO and making processes in this leading IP organization more transparent and inclusive of divergent opinions.[26]

- Due to the activities of the ALA, the Electronic Information for Libraries (eIFL.net) and other grantees, WIPO launched a study on limitations and exceptions for libraries. The study was undertaken by Professor Kenny Crews, now of Columbia University, and was the first study of libraries undertaken by WIPO.[27] Such WIPO studies often inform debates within WIPO, and can serve as authoritative sources of existing international norms.

In terms of weaknesses of the Initiative,[28] the most salient was the lack of effective communication between the Foundation and the grantees on a number of key issues. For example, despite the fact that the MacArthur Initiative was billed as a "time-limited" Initiative, many grantees expressed a contrary view, commenting that they understood that there had always been a possibility for extension. In reviewing the original document concerning the Initiative published on the MacArthur website, it is true that it did not state explicitly that the Initiative would be time-limited.[29] This was corrected in the second posting on the Foundation's website. There were no records available to the evaluator showing when the decision was made that the Initiative would be limited to seven years; how or why seven years was the timeframe chosen; or what factors were relevant to the Foundation's consideration of the timing question. Moreover, it is not clear when or how the decision was communicated to

[26] *See* www. wipo.int/export/sites/www/ip-development/en/…/survey_dcgov.doc for the survey sent to members of the public regarding this external audit.
[27] *See* http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192.
[28] I discuss shortcomings of the Initiative more fully in Part IV of the Detailed Report, *infra* pg. 67.
[29] *See* Appendix A.

grantees, especially those whose who were first funded under the original call for proposals (which is about 90% of all the grantees).

Further, many grantees expressed the view that the Initiative ended at a point when the work accomplished over the past seven years had just started to mature and bear real fruit. Some grantees repeated the widespread view and concern that the Foundation did not extend the Initiative because of pressure from content providers who represent industry interests in the policy debate over the role of IPRs. Most grantees felt that, if true, this pressure which was directed at all foundations supporting work in the field, reinforced precisely why private funding is so important to protect the public interest in innovation policy.

Finally, some grantees and several observers were critical of the process of the Foundation's termination of the Initiative. They felt that having pioneered important work in the field, the MacArthur Foundation should have been more sensitive to the cascading effect of its exit from the field – an event which may have led to the exit by other foundations.[30]

VII. THE ROLE OF PRIVATE CHARITIES IN ADVOCACY

As expressed earlier, the concerns raised by industry groups about the work of a few grantees[31] in advocating change in IP laws created some tension around the Initiative. The Foundation asked me to reflect on the role of private foundations in supporting advocacy. My views are that objections concerning improper "advocacy" are highly subjective, and that conflicts over preferred policy approaches are to be expected. Conflicts are inevitable in so large a venture as the MacArthur Initiative, especially in an area characterized by rapid changes in technology and powerful private economic interests with major stakes in policy outcomes and regulatory structure.

This MacArthur Foundation Initiative sought to frame a view of what IP regulation should look like in the digital age, with the public interest being its core motivating concern. Conceptions of the public interest of course differ, and are influenced by idealism, politics, and economic interests. Inevitably, there has been friction among proponents of different conceptions. That is to be expected and does not undermine the Initiative's value and its notable achievements. MacArthur was the first and only major foundation to establish a sizable program on IPRs and the public domain. The wisdom in doing so is evidenced by other major foundations' subsequent establishment of programs directed at particular aspects of the MacArthur Initiative.

[30] Only one foundation currently supports an entire program in the IP field. Others, such as Ford, have recently supported small in-house meetings on IP. However, no grants are being awarded for IP-related activities.

[31] From my interviews and independent research, only two grantees were identified as problematic from the view of industry representatives.

Divergent views about what the public interest *is* or *should be* are largely at the root of disagreements about particular aspects of the Initiative. That is as it should be. Foundations that aim to influence the world in positive ways necessarily are organized around a core conviction about what constitutes "the good" for society. Those convictions are not normatively neutral; they shape the character and mission of the organization, and inform a view of the kind of society the foundation wants to help fashion. I am not persuaded that the MacArthur Initiative engaged in "advocacy" in adopting a set of premises focused on how to reconceptualize the public interest in relation to IP in the wake of rapid technological change. But if that constitutes advocacy, in my view it is the kind of disinterested advocacy in which foundations should engage.

VIII. CONCLUSIONS

It is fair to conclude that the Initiative was highly successful, both in terms of what it set out to accomplish and with respect to its enduring contributions to a number of difficult policy debates in various subject matter fields. The questions that motivated the Foundation's work in the area remain largely unresolved, highly relevant and insistently contentious. This situation is unlikely to change in the near future. Almost daily, new developments, nationally and internationally, reinforce the vital role of the Internet and digital platforms in every sphere of human activity. From civil uprisings in the Middle East activated by the deployment of social networking sites,[32] government efforts to shut down Internet access to quell such movements or deny access to information about current events, to the recent decision by a major U.S. book publisher to limit the number of times e-books can be checked out from public libraries[33] (while also reducing the number of hard-copies of the same book), the regulation of digital technologies and content remains one of the most important issues of our time. No one is exempted from the impact of the laws that currently regulate the Internet and no activity—private or public—is immune from the reach of intellectual property regulation as the relevant governance framework for the digital age. How Congress, the courts, markets, creators and users alike will adapt, conform or re-imagine the existing regulatory and policy conflicts continues to unfold and the end (if one there is one) still remains to be seen.

[32] U.S. Panel puts Google, Facebook, Communications Platforms on Human Rights Frontline, http://www.ip-watch.org/weblog/2011/03/05/.

[33] *See* Julie Bosman, *Library E-Books Live Longer, So Publisher Limits Shelf Life*, NEW YORK TIMES, March 15, 2011.