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Copyright's Communications Policy

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COPYRIGHT'S COMMUNICATIONS POLICY

*Timothy Wu**

INTRODUCTION

There is something for everyone to dislike about early twenty-first century copyright. Owners of content say that newer and better technologies have made it too easy to be a pirate. Easy copying, they say, threatens the basic incentive to create new works; new rights and remedies are needed to restore the balance. Academic critics instead complain that a growing copyright gives content owners dangerous levels of control over expressive works. In one version of this argument, this growth threatens the creativity and progress that copyright is supposed to foster; in another, it represents an “enclosure movement” that threatens basic freedoms of expression.¹ Copyright, these critics argue, has wandered beyond its proper boundaries. They also contend that the balance must be restored.

What all these arguments have in common is a focus on copyright’s “authorship” function. Copyright policy, in this view, is fundamentally about providing a balance of incentives for authors to effectuate one of several possible goals, such as progress of science, democratic governance, or the system of free expression. Few disagree that these are the goals; the main disagreement is over what means best serve these ends.

Yet the recent history of copyright forces us to ask whether this debate can capture what is right and wrong with the law. Both sides

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1. An exemplar of the latter view is Yohai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 358 (1999) (arguing that legal rules “enclosing” information risk the diversity of information sources and threaten freedom of speech); the former view, LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 85-97 (2001) (endorsing an “information commons” from which authors may draw for creative inputs).

point to the same problem: a tragedy of authorship caused by their opponents. Critics of copyright say that aggressive over-enforcement deters those who would borrow from others to create, such as music samplers, satirists, and filmmakers. Copyright's backers warn, conversely, that piracy threatens the very livelihood of the artist and creative industries. The story of twin tragedies, however, creates an indeterminate debate. Both positions have difficulty demonstrating empirically, as opposed to anecdotally, that either overprotection or piracy has stilled the engines of creativity. Any putative change in copyright protection can both be defended as a necessary creative incentive and attacked as an unnecessary control.

This Article suggests that the main challenges for twenty first century copyright are not challenges of authorship policy, but rather new and harder problems for copyright's *communications* policy: copyright's poorly understood role in regulating competition among rival disseminators. Since its inception, copyright has set important baselines upon which publishers and their modern equivalents do business. As the pace of technological change accelerates, copyright's role in setting the conditions for competition is quickly becoming more important, even challenging for primacy the significance of copyright's encouragement of authorship.

None of this is to say that the debate over authorship is a sham, or that copyright's role in incentivizing authorship is unimportant. The law, I suggest, can be usefully understood in a modular fashion: as comprised of both authorship and communication regimes with often independent functions. The first regime is the familiar system, run by the courts, that grants exclusive rights to encourage creativity. The second is a messier regulatory regime comprised mainly of the sections of copyright that have always perplexed copyright theorists and have never fit the central theme of author-incentives. This *de facto* communications regime runs through the legislative process and the courts, and largely takes the form of industry specific liability rules, court created immunities, and special accommodations.

The study of copyright's communications policy has both a descriptive and a normative payoff. First, it helps us understand both the existing copyright code and the history of twentieth century copyright. Much of the existing copyright code is difficult to describe as a device for providing incentives to create new works. That description may fit various "core" doctrines that consume the bulk of scholarly attention, such as the idea/expression dichotomy, term limits, and parts of the fair use doctrine.² But the copyright code is also full of complex compulsory licensing schemes and technologically specific

2. See 17 U.S.C. §§ 102, 107, 302-04 (2000).

immunities.³ The link to authorship in such sections is unclear at best. I suggest it will be useful to understand these apparent anomalies as part of copyright's regulation of competing disseminators.

The observation is confirmed by copyright in the twentieth century, where the law has played a recurring role in competition between incumbent and challenger disseminators. What follows characterizes the copyright's communications policy into two modes ("classic" and "new") corresponding to two time periods. In the first, from 1900-1976, the copyright's classic communications regime evolved through a series of long and extensive conflicts between competitive rivals, such as cable and broadcast, radio and song-writers, and the early recording players and sheet music publishers. This era is characterized by judicial reluctance, even in the face of precedent, to extend to incumbents rights of copyright that might be used for market advantage over a technologically advanced rival. The statutory result were the series of government mandated access schemes, known to copyright lawyers as "compulsory licenses," that make up the bulk of the copyright code and are otherwise difficult to characterize.

The second period, from the 1976 Act onward, has witnessed the emergence of a "new" communications policy. New sections of the law regulating competition among disseminators have emerged as a response to a transformation in the nature of the challenge to incumbents. Faced with an alliance between passive but enabling technologists and non-commercial but infringing users, copyright owners have convinced Congress to enact two new streams of copyright law. The first is a set of rules for managing the relationship between technologists — largely, the electronics and internet industries — and traditional disseminating industries, typically in the form of judicial or legislative safeharbors. The second stream is a series of "anti-piracy" rules that seek to put direct controls on user behavior.

The study of copyright's role in regulating competition, I suggest, reveals a copyright that theorists may hardly recognize. It is not that scholars are unaware of copyright's role in communications policy — the importance of "dissemination" has always been recognized as a goal of copyright.⁴ The point, rather, is that the author-centrism of copyright theory has left little basis to evaluate or criticize copyright's decisions that create communications policy.

There is, finally, a normative payoff from the study of copyright's role in communications regulation. In the last several decades, the

3. These sections are described in depth in Part I.C, *infra*.

4. See, e.g., *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[The copyright holder's] private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts.").

United States has generally endorsed a model of open, competitive innovation as its national communications policy. It is, in other words, a point of agreement that neither government nor industry monopolists are well situated to choose what technologies or firms the nation should use to communicate, now or in the future. Copyright, as it grows in importance, should not be exempt from such principles. Few would disagree that the basic vision of competitive innovation is an attractive vision. Although many may disagree on how the goal might best be achieved, it cannot be reached without an awareness of the role that copyright plays in setting national communications policy. That requires that judges and policymakers further develop an appreciation of copyright's effects on parties other than authors.

The Article is divided into three parts. The first describes American copyright's "classic" communications policy. After situating the communications perspective in traditional copyright theory, it explains where the legal expression of copyright's communications regime can be found, and details its evolution during the period of 1900-1976. The second part is primarily theoretical. It provides tools, taken from telecommunications and competition theory, for understanding and analyzing the communications policies that copyright has implemented. The third part describes copyright's "new" communications policy, which has evolved post-1976. It closes on a normative note, suggesting how courts and lawmakers can decide copyright issues with an eye to their effects for competition and national communications policy.

I. A DESCRIPTIVE MODEL OF COPYRIGHT

A. *Author-Centrism*

Copyright theory is traditionally depicted as a long conflict between two dueling theories. In accounts now very familiar to copyright theorists, the first of these warring theories is Anglo-American and describes the purposes of copyright as "utilitarian" or "economic."⁵ It premises the existence of copyright on market failure.⁶ Copyright exists to provide incentives for authors to produce works and thereby avoid the underproduction that might otherwise result.⁷ Under this theory copyright law is ultimately similar to other forms of

5. See, e.g., William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989) ("Striking the correct balance between access and incentives is the central problem in copyright law. For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection.").

6. See *id.* at 333-34.

7. See *id.* at 327-28.

economic legislation; it is Lord Macaulay's "tax on readers for the purpose of giving a bounty to writers."⁸

The rival to the Anglo-American view resides mainly on the Continent and is known in the United States as the natural rights theory of copyright. It suggests that authors have a moral right to the fruits of their labors: copyright is granted because the author deserves it.⁹ One version of this idea says that authors should be rewarded for the value they contribute to society.¹⁰ Another suggests a natural link between creation and ownership: the author owns his (smaller) creation in just the manner that God owns his (slightly larger) creation. What you create is yours: "to every cow her calf."¹¹

Today this traditional debate has taken on a modern gloss. Natural rights theories, in the United States at least, have retreated to the status of foil, used more to accuse than to defend.¹² The dominant starting point for most American scholarship is an incentives theory, or the "incentive/access" paradigm, which is the idea that copyright expresses some balance between encouraging creation of expressive works, while providing for adequate access to the work for new authors and others. As Mark Lemley expresses the conventional wisdom, "both the United States Constitution and judicial decisions seem to acknowledge the primacy of incentive theory in justifying intellectual property."¹³

Taking incentive theory as a baseline, writers have moved in two major directions, emphasizing the private and public benefits of

8. Thomas Babington Macaulay, Speech Delivered to British House of Commons Regarding 1841 Copyright Bill (Feb. 5, 1841), in *MACAULAY'S SPEECHES ON COPYRIGHT AND LINCOLN'S ADDRESS AT COOPER UNION* 25 (Charles Robert Gaston ed., 1914).

9. See Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 522-24 nn.27-44 (1990) (detailing the evolution of natural rights theory through Roman and English Law). For an example of a contemporary natural rights theory, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1535 (1993) (arguing that a return to natural rights theory would protect free speech interests).

10. See MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* 58 (3d ed. 1999).

11. AUGUSTINE BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 42 (1899).

12. Much recent writing on natural rights theories of copyright seeks not to defend it, but rather to accuse Congress or the courts of wrongly reinstating a natural rights regime through expansion of copyright. See, e.g., JAMES BOYLE, *SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY* 56-59 (1996); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* 125-28 (1993); Gordon, *supra* note 9, at 1540 (arguing that courts have mistakenly interpreted the natural law theory of copyright and afforded too much protection to authors at the expense of free speech interests); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 471-90; see also Yen, *supra* note 9, at 529-39 (stressing that natural law concepts are inherent in copyright law).

13. Mark A. Lemley, *The Economics Of Improvement In Intellectual Property Law*, 75 TEX. L. REV. 989, 993 (1997).

copyright, respectively. A group of economic theorists have supplemented basic incentives theories with work stressing the static benefits of copyright as a form of property, relying generally on the utility of assigning property rights to owners.¹⁴ The second cluster of theories stresses public rationales other than market failure for encouraging authorship. Enjoying great academic, if not judicial, popularity are theories that conceive of copyright's incentive system as part of the larger system of free expression associated with the First Amendment.¹⁵ Another group treats copyright's incentive structure as playing a role in promoting a republican system of governance.¹⁶

This story is familiar and greatly interesting to copyright theorists, but can be misleading. The access/incentives paradigm and the theories that follow it are principally theories that center on the author and the creation or ownership of expressive works. They have much less to say about disseminators and the economics of distribution. They are, in short, author-centric theories of copyright. And although theories of authorship are a crucial part of copyright theory, they provide only a partial description of the law.

This basic contention is supported by a casual read of the copyright code. Large portions of the statute are difficult to describe as parts of a property scheme balanced to encourage the creation of new works. That description may fit certain core sections such as the idea/expression dichotomy in section 102 of title 17, the exclusive rights expressed in section 106 and general exceptions such as the fair use doctrine, found in section 107. But large parts — indeed the greatest volume of actual text — fail to conform to this model. These parts are rather devoted to industry specific liability rules (compulsory licensing schemes) and immunities — sections that are ugly,

14. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 85-123 (2003) (describing various economic roles played by copyrights, mainly related to the reduction of transaction costs); Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 *STAN. L. REV.* 1343, 1435-49 (1989) (pointing to “authors’ entitlements as the starting points from which markets evolve”); Robert P. Merges, *Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright*, 21 *AIPLA Q.J.* 305, 306 (1993) (stating that economic analysis of copyright has “progressed beyond the point where a crude ‘incentive’ story passes for analysis in every case”).

15. See, e.g., Benkler, *supra* note 1, at 391-94; Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 *YALE L.J.* 4 (2002) (evaluating copyright on a theory of free speech centered on the “freedom of imagination”); Rebecca Tushnet, *Copyright As A Model For Free Speech Law: What Copyright Has In Common With Anti-Pornography Laws, Campaign Finance Reform, And Telecommunications Regulation*, 42 *B.C. L. REV.* 1 (2001). Despite the academic attention, arguments calling for greater scrutiny of copyright under the First Amendment have been nearly without exception rejected by the Supreme Court, most recently in *Eldred v. Ashcroft*, 537 U.S. 186, 198 (2003) and earlier in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

16. See, e.g., William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 *HARV. L. REV.* 1659, 1691 (1988); Netanel, *infra* note 381, at 347.

complicated, and obscure.¹⁷ They include the mechanical license in section 115, the secondary transmission license (for cable television) in section 111, and particular immunities for particular groups, such as internet service providers in section 512 and digital audio recording devices in sections 1001-1010. Their relationship to a putative author's incentives to create would seem at best indirect; the schemes, on their face, seem to have much more to do with managing competition between industry rivals.

Purely author-centric theories also have trouble explaining the "secondary" costs of copyright: those imposed on actors other than authors and consumers. Incentive theories are interested in two categories of copyright's effects: the benefits that accrue to authors and the corresponding costs imposed on consumers and new creators. Yet it is evident that much of the costs of copyright are borne by other actors. One need only look to those who object to copyright to see where costs are felt. The costs of piracy are invariably a complaint of incumbent disseminators, whereas new market entrants for their part complain about being squashed by incumbents.¹⁸ Finally, telecommunications firms and electronics manufacturers complain about the costs they bear when enlisted to enforce copyright schemes of contributory liability.¹⁹ These secondary costs of copyright, together with the large sections of the code described above, are data points that classic authorship theories have difficulty explaining.

The point is not that scholars are unaware of the secondary costs of copyright or unacquainted with the difficult sections of the copyright code just described. Scholars like Paul Goldstein, Jane Ginsburg and Jessica Litman have long portrayed copyright's history as a struggle to adapt to new technologies.²⁰ Meanwhile, numerous copyright scholars from the San Francisco Bay Area and other high-tech zones, like Pamela Samuelson, Mark Lemley, Julie Cohen, Peter Jaszi and James Boyle, have been arguing for the last decade that copyright may

17. These sections enjoy only passing attention in copyright casebooks. *See, e.g.*, NIMMER ET AL., CASES AND MATERIALS ON COPYRIGHT 225-28, 556 (6th ed. 2000) (including five pages on compulsory licensing in a book of 1230 pages). The difficulty and tedium of teaching statutory licenses, however, explains this cursory treatment.

18. *See, e.g.*, Lee Gomes, *In Name of Innovation Some Let Technology Get Away With Murder*, WALL ST. J., May 5, 2003, at B1 (discussing whether technological innovation provides an excuse for piracy); Jack Kapica, *Copyright Litigation is Threatening Innovation*, THE GLOBE AND MAIL, Dec. 11, 2003, at B13 (suggesting that copyright threatens innovation).

19. *See, e.g.*, Mike Musgrove, *Copyright Renewal: Owners of Digital Devices Sue to Assert the Right to Record*, WASH. POST, June 7, 2002, at E1 (detailing fight between electronics firms and Hollywood).

20. *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX (rev. ed., Stanford Univ. Press 2003); Jane Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1622 (2001); Jessica Litman, *Digital Copyright* (2001).

threaten technological innovation.²¹ And closest to the methods of this Article, economic-oriented copyright theorists, including Robert Merges, Randal Picker, Richard Posner, William Landes and Douglas Lichtman are in the midst of an ongoing effort to generate secondary economic explanations for aspects of copyright that do not fit the central incentives story.²² What follows is both indebted and complementary to these efforts to undercover secondary purposes of the copyright law.

What differentiates this Article is its focus on the role and history of disseminators, as opposed to authors, under copyright law. The descriptive theory following is also an effort to consolidate many of the various insights from the last decade of scholarship into a larger theory. Whether called the regulatory or communications theory of copyright, it aims to consolidate our understanding of the regulation of both disseminators and authors to give a more complete account of what copyright is doing and why. If what follows is correct, copyright's role in communications policy is both only partially understood, and also likely to have increasing importance as the scope of copyright increases.

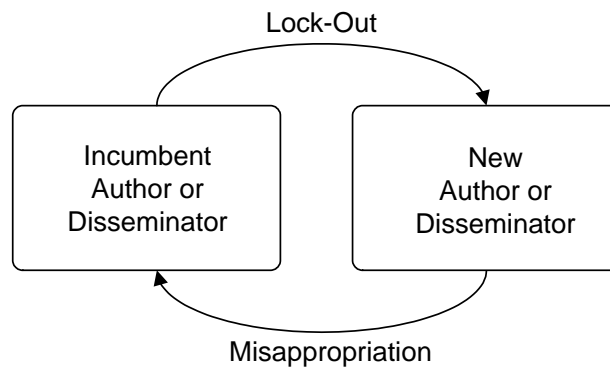
B. *A Descriptive Theory of Copyright Law*

It is not wrong or inaccurate to say that copyright is a system of property rights designed to encourage creation. I argue, however, that one can also usefully describe copyright as a system that has evolved to manage competition among natural rivals in the world of packaged information. To see what this means, consider the world of packaged information as comprised primarily of three groups: authors, disseminators, and consumers of expressive works.

21. A few representative examples include James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 *LAW AND CONTEMP. PROBS.* 33 (2003); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 *VAND. L. REV.* 1799 (2000); Peter Jaszi, *Caught in the Net of Copyright*, 75 *OR. L. REV.* 299 (1996); Mark Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 *TEX. L. REV.* 989 (1997); Pamela Samuelson, *Regulation of Technologies to Protect Copyrighted Works*, 39 *COMMUNICATIONS OF THE ACM* (1996). Some have also reversed the question and asked whether copyright itself will fall victim to forces of technological change. See, e.g., Eben Moglen, *Anarchism Triumphant: Free Software and the Death of Copyright*, First Monday, August 1999.

22. Principal examples include LANDES & POSNER, *supra* note 14, at 17-18; Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 *DUKE L.J.* 683, 705 (2003) (describing sections of copyright as motivated by an evidentiary function); Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 *ANTITRUST BULL.* 423 (2002); Michael Abramowicz, *Copyright Redundancy* 9 (March 2003), at http://ssrn.com/abstract_id=374580 (describing much of copyright as motivated by an interest in preventing redundancy and rent dissipation).

FIGURE 1.1: COPYRIGHT RELATIONSHIPS

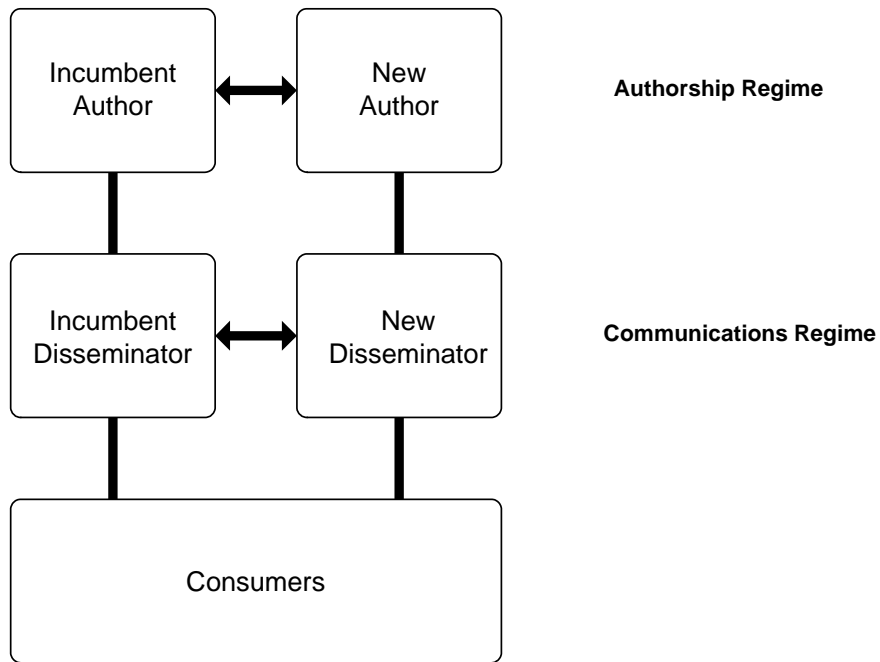


The thesis is that copyright law emerges as a byproduct of conflict between the parties pictured here. All of these parties — incumbent and new authors, incumbent and new disseminators, and consumers — are in relationships made up of repeat interactions fraught with potential for conflict and abusive behavior. Although conflicts may arise between any of the pictured parties,²³ the law focuses on two relationships: those amongst new and existing authors and those amongst incumbent and challenger disseminators. The first is familiar: it is copyright’s *authorship* regime. The second is less so: it is copyright’s *communications* regime — so named because it regulates the same parties (disseminators) as communications law, and because it confronts similar problems. As presented in this paper, moreover, the term “communications policy” is taken simply to mean a special case of competition, or antitrust policy as between disseminators.²⁴

23. The contest between freelance writers and those who distribute their materials online is an example of the relationship between existing authors and new disseminators. *See, e.g.,* *New York Times Co. v. Tasini*, 533 U.S. 483, 487-88 (2001) (concerning a clash over the newspaper’s sale of copyrighted text to be retrievable in a database search). So, to a degree, was the conflict between composers and music publishers and the radio broadcast industry. *See infra* notes 109-159 and accompanying text.

24. For the view that communications policy is an application of antitrust principles in a particular context, *see, e.g.,* J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1237-38 (1993) (book review) (arguing for the consolidation of reasoning in communications law and antitrust). The context is distinguished by two factors: first, the frequent existence of bottleneck infrastructures, *see infra* Part II.A, and second, the existence of fixed statutory policies that occasionally mandate deviations from the goal of maximizing consumer welfare, such as the goals of “universal service” (communications technologies should be available to every citizen), *see generally* Milton Mueller, *Universal Service in Telephone History: A Reconstruction*, 17 TELECOMM. POL’Y 352, 356 (1993), and “localism” (support for local media outlets over national), *see, e.g.,* 47 U.S.C.A. § 521(2) (2001) (discussing importance of local control over cable).

FIGURE 1.2: PROBLEMATIC BEHAVIOR IN THE WORLD OF COPYRIGHT



What kinds of problems emerge amongst new and existing players? Copyright law has evolved to deal with two recurrent types of abusive behavior. The first is misappropriation, which arises because each “new” actor (whether author or disseminator) has the capability to appropriate and free ride off of the investments made by existing actors, whether in expressive works, distribution channels, or otherwise.²⁵ The mirror image of misappropriation is lock-out behavior, which arises from the capability of an existing actor to block market entry and exclude or control potential new competitors. The

25. Wendy Gordon describes this as the “restitutionary impulse.” See Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 150-51 (1992); see also Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 621-25 (2003) (arguing that misappropriation “is a candidate to be the overarching principle that would rationalize intellectual property law as a whole . . . [but] is too sprawling a concept to serve as the organizing principle”).

various legal schemes engineered to prevent these two private wrongs can be understood to comprise much of what we call copyright law.

Nothing here assumes that the actors pictured will always behave in abusive ways. Not every new writer is a plagiarist nor is every incumbent industry bent on destroying emerging competitors. But in this view copyright has, as Oliver Wendell Holmes suggested generally, evolved to meet systematic misbehavior.²⁶

Copyright's authorship regime needs little introduction because it is already the focus of most scholarly attention. It is only worth noting that copyright handles the misappropriation problem among authors in very clever ways. Copyright for authors has created a doctrinal "floor" and "ceiling," where the floor is the requirement of originality, and the ceiling is the lack of protection for the ideas underlying expression.²⁷ Together, and joined by the fair use exception,²⁸ these core doctrines create the familiar idea of a balance that allows certain but not all forms of appropriation. This is a familiar subject to anyone who has studied copyright and needs little repetition. Conversely, copyright's communications regime, which manages similar problems among disseminators, is far less studied and understood. The remainder of this Part is an effort to remedy that imbalance.

C. *The Communications Regime Revealed*

Copyright's communications regime, its management of rival disseminators, is not a recent phenomenon, for it actually predates copyright's authorship regime. The management of competition among publishers, copyright historians tell us, was actually the earliest purpose of copyright. Historian Ray Patterson explains, "[H]istory shows us [that] copyright began as a publisher's right, a right which functioned in the interest of the publisher, with no concern for the author."²⁹

26. See Mr. Justice Holmes, Address at Boston University School of Law (Jan. 8, 1897), in *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). This was also a view of law stated by Epicurus: "The laws exist for the sake of the wise, not that they may not do wrong, but that they may not suffer it." Epicurus, *The Extant Writings of Epicurus*, in THE STOIC AND EPICUREAN PHILOSOPHERS 51 (C. Bailey trans., Whitney J. Oates ed., 1940).

27. See 17 U.S.C. § 102(a) (2000).

28. See Wendy J. Gordon, *Fair Use as Market Failure*, 30 J. COPYRIGHT SOC'Y 253, 256 (1983).

29. LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 8 (1968). Some, such as Jane Ginsburg, would argue that the word copyright should not be understood other than as a right subsisting in an author, and that to speak of a publisher's or stationer's copyright is a contradiction in terms. I take no position on this issue, but note that some historians do use the term copyright in reference to the early rights of publishers. See *id.* at 43; see also BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 5 (1967) (using the term in this manner).

According to copyright historians the stationers' (publishers') rights in the 1500s and 1600s, later codified in the Statute of Anne,³⁰ allocated among the stationers the exclusive rights to copy a given manuscript (the copy rights).³¹ The original copyrights functioned as a device that eliminated direct competition between stationers and were generally unconcerned with authorial matters.³² As Joseph Loewenstein explains, the earliest ancestors of copyright were "a privilege conferred by the guild on one of its members, part of an imperfect but not ineffective system by which the guild sought to preserve internal order."³³

Matters have changed less in the last 400 years than one might think. Copyright, as in the seventeenth century, is still quite concerned with maintaining order among the rival stationers of our era. The only difference is that we call the stationers disseminators, and believe despite evidence to the contrary that modern copyright is primarily an author's right.

1. *Statutory Modules*

The most obvious and important manifestations of copyright's communication regime take up most of title 17 of the United States Code. They are the complex statutory management schemes that balance the respective rights of dissemination industries. The rules embedded in title 17 are modules of communications policy specific to a particular industry and, usually, to a specific historical context. Each is complicated and lengthy, and collectively make for perhaps the least glamorous parts of copyright.

Most of the modules occupy section 111 to section 122 of title 17 of the United States code. Each has much in common, speaking to and managing competition between potential communications rivals: broadcast and cable, broadcast and satellite, phonograph and Internet, and so on. The most common way of achieving a compromise between rivals is a "compulsory licensing" scheme: laws that force the copyright owner to provide open and non-discriminatory access to a work in exchange for a fixed payment. Modern modules, such as the section 512 scheme for internet service providers, create immunities schemes.

30. Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 (Eng.).

31. For a discussion of the early history involving the Stationers' Copyright and the Statute of Anne, see L. Ray Patterson & Craig Joyce, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 913-28 (2003).

32. See KAPLAN, *supra* note 29, at 4 ("[The stationers' copyrights] did not, however, stand on any notion of original composition, for they might be granted for ancient as well as new works.").

33. JOSEPH E. LOEWENSTEIN, *THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT* 29 (2002).

A summary description of the major modules and their features follows:

a. Secondary transmissions by cable operators and others. This is an extremely complex compulsory license scheme enacted in 1976. Congress enacted it in response to cable operators' unpaid usage of broadcast signals from the 1950s to the 1970s. It requires rebroadcasters — principally, cable operators, but also hotels and apartment complexes — to pay a fixed fee for a license to rebroadcast copyrighted materials and is found in title 17, section 111 of the U.S. Code.

b. Digital audio transmission/webcasting license. A provision requiring Internet "radio stations" to pay a statutory fee in order to rebroadcast copyrighted materials is found in section 114.

c. The "mechanical license." This compulsory license allows anyone wanting to record a composed song to pay a fixed fee to the composer. It also allows recording of "cover" versions of famous songs. The mechanical license is found in section 115.

d. Jukebox negotiated licenses. This section mandates negotiation for the licenses to play sound recordings of nondramatic musical works on jukeboxes and is located in section 116.

e. Public broadcast license. Section 118 of the Copyright Act creates a compulsory license for the use of published nondramatic musical works and published pictorial, graphic, and sculptural works in connection with noncommercial broadcasting.

f. Satellite retransmissions of television signals. A compulsory license scheme, similar to that found in section 111, applies specifically to satellite rebroadcast of content both from broadcasters and from cable operators. It is found in section 119.

g. Satellite retransmissions of television signals into local markets. A bargain between the satellite, broadcast, and cable industries, section 122 grants satellite rebroadcasters a free (no royalty) compulsory license for local broadcasting, provided they agree to carry all television broadcast stations located within the local market.³⁴

h. Immunity for ISPs transmitting or hosting infringing material. A compromise reached in 1998 between Internet Service Providers ("ISPs") and content owners grants ISPs varying levels of immunity for the storage or transmission of copyrighted content. ISPs are generally immune from the transmission of infringing content, while search engines and those who host content are subject to a duty to take or delink infringing material upon notice. These rules are found in section 512 of title 17.

34. See Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. TELECOMM. & HIGH TECH. 217 (2002).

i. Immunity for producers of digital audio recording devices. Section 1008 contains a grant of immunity to manufacturers of digital audio recording devices (like “DATs”) on condition of the payment of a royalty on each sale.

The existence and significance of the statutory modules cannot be questioned. The cable industry, just to take one example, based its early existence on access to copyrighted works, and has paid billions in access fees to broadcasters.³⁵ Yet where do these modules come from and what purpose do they serve?

Unlike the familiar judicial process behind most of copyright's authorship decision, the process behind copyright's communications regime is a much murkier subject. The complex statutory modules described above are the product of a different and somewhat unusual institutional process: a mixed procedure of the federal courts (particularly the Supreme Court), and a separate process of mediated *copyright settlement*. The usual but not invariable results are the modules that are the active mainstay of copyright's communications regime.

2. *Copyright's Evolution*

Scholarly depictions of the evolution of copyright in the twentieth-century generally fall into two schools. The first is optimistic, and explicitly or implicitly inspired by the economist Harold Demsetz.³⁶ It regards the expansion of copyright as a series of efficiency-promoting adjustments made necessary by changes in technology and the increased importance of the information economy. Legislatures, in this model, have enacted new copyright laws to bring the benefits of copyright propertization to new industries. Robert Merges writes, for example, that “through a combination of judicial adaptation and legislative updates, the copyright system has — so far, at least — been up to the job at every turn.”³⁷

The second school is pessimistic, and depicts the expansion of copyright with the aid of classic public choice theory. Inspired by Mancur Olsen rather than Demsetz, it sees copyright owners as a discrete and highly organized group whose lobbying acumen has led to

35. The cable industry had paid about \$2.3 billion as of 1997 for access to broadcast signals. U.S. COPYRIGHT OFFICE, A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 20 (1997) (citing testimony of the National Cable Television Association).

36. See, e.g., GOLDSTEIN, *supra* note 20; Robert Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900-2000*, 88 CAL. L. REV. 2187 (2000); see generally Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181 (2003).

37. Merges, *supra* note 36, at 2191.

a century of advantageous legislation.³⁸ Consumers, disorganized and disparate, end up as the principal victims. As Jessica Litman wrote in 1989, “Each time we rely on current stakeholders to agree on a statutory scheme, they produce a scheme designed to protect themselves against the rest of us.”³⁹

Most scholars — even those associated with one or another school — will admit that copyright’s evolution reflects elements of both approaches. What I present here is not a general theory of copyright’s evolution, but rather a theory that is primarily designed to explain the evolution and origins of copyright’s liability rules. (A more general theory of the evolution of liability rules is planned but not found in this Article). These, I suggest, can be best understood through a model of conflict that sees law emerging as a political reaction to changes in relative prices resulting from technological change. This borrows from similar simple models of conflict between more and less efficient producers recurrent in trade economics.

3. *A Model of Conflict*

The central modules of copyright’s classic communications policy have arisen out of conflict — out of bitter, public battles between incumbent and challenger disseminators who often seem determined to do or say anything to get their way. That, at least, is the repeated pattern of the twentieth century and, if the first few years are any indication, it will persist as a part of the twenty-first century copyright landscape.

The twentieth century witnessed decades-long battles between, to name just a few examples, the recording industry and sheet music publishers, cable companies and broadcasters, electronics manufacturers and recording companies, and the recording industry and online music distributors. But why do these conflicts arise? Are they a permanent part of the landscape?

This Section argues that given only very basic assumptions, public conflicts among rival disseminators are nearly inevitable and therefore a permanent problem for copyright’s regulation of packaged information. We can predict that conflicts between incumbent and challenger disseminators will arise so long as two things are true: first, that more efficient technologies of dissemination will be invented and second, that there exists the possibility, but not the certainty, of convincing government to provide laws that can be used against a competitor. I suggest, in other words, that the conflicts that arise in the

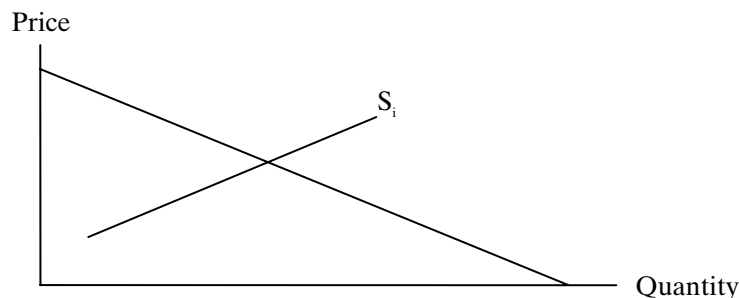
38. See, e.g., LESSIG, *supra* note 1; Jessica Litman, *Copyright Legislation and Technological Change*, 68 ORE. L. REV. 275 (1989).

39. Litman, *supra* note 38, at 359.

copyright world are not much different from those in other areas where government might act, if convinced, to protect market competitors. For example, the conflicts between classes of disseminators are conceptually similar to the conflicts that arise when domestic industries face more efficient foreign competitors.⁴⁰ The difference is that the parties invoke or seek new copyright laws, rather than tariffs and other trade barriers.

An incumbent disseminator industry sells expressive works using existing technology. The industry's costs, including payments to authors, result in supply curve S_i . To simplify, assume that the copyright law confers no ability to set a supra-competitive price, so that the price is determined by where supply meets demand, as follows:⁴¹

FIGURE 2.1: THE INCUMBENT INDUSTRY ALONE



A challenger industry is any group of entities that enjoy an advantage in the efficiency of dissemination (supply curve S_c). This condition can arise for several reasons. The first reason derives from any technological advantage in the delivery of content — either better quality (like cable or piano rolls), or lower cost (like broadcasting or online distribution).⁴² Either form of technological advantage can be modeled as simply a more efficient supply curve. The second reason derives from the challenger's ability to disseminate content less

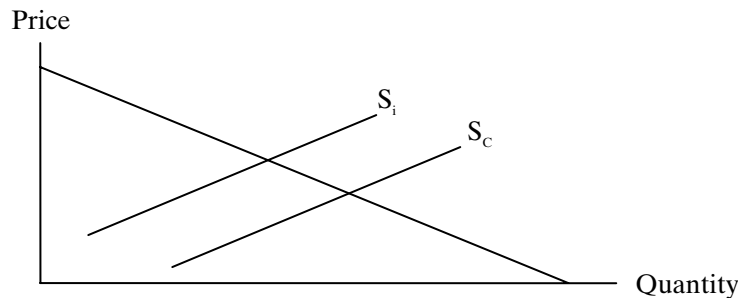
40. See Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285 (2003) (describing similar model).

41. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.5 (4th ed. 1992) (observing that different estimates of the odds of favorable government action make settlement of lawsuits less likely).

42. Some, including Scott Hemphill, suggest it is strange to model increased quality as a more efficient supply curve, arguing that a product of increased quality should be modeled as a new product with a separate demand curve. To clarify, the suggestion is that a better quality TV can be compared to the old TV plus a cash supplement. This I think is a fair representation of what is usually the reduced annoyance and greater enjoyment that comes from a better quality product.

expensively because it does not pay for the works itself. That may be the case either because existing copyright law does not explicitly apply (as was the case with early cable and gramophone technology) or because of some capability to evade copyright law's requirement to license the work (as in the example of online distribution). In either case, part of the challenger's advantage in efficiency stems from what is usually described as piracy.

FIGURE 2.2: THE CHALLENGE



But why does the arrival of a more efficient technological rival create conflict? Conflict arises because of my second assumption: that government can sometimes be convinced to protect the incumbent industry, but not always, and not predictably. If the degree of protection is difficult to predict and depends in part on investments in persuasion, it makes sense for both the incumbent and the challenger to invest in efforts to obtain a favorable outcome. These rival investments in obtaining a favorable governmental action result in some of the longest running conflicts in copyright history.⁴³

More precisely, conflict arises in a form that public choice theorists call a contest between “rent-protecting” and “rent-seeking” interests. This is a contest where an incumbent dedicates resources to protecting its favorable position against encroachment by other groups.⁴⁴ The incumbent holds a number of potential legal threats against any challenger, including the imposition of incessant litigation costs,⁴⁵ an ability to convince regulators (like the Federal Communications

43. Cf. James M. Buchanan, *Rent Seeking and Profit Seeking*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 3, 9-11 (James M. Buchanan et al. eds., 1980) (explaining that the possibility of government action encourages investments in efforts to obtain rents).

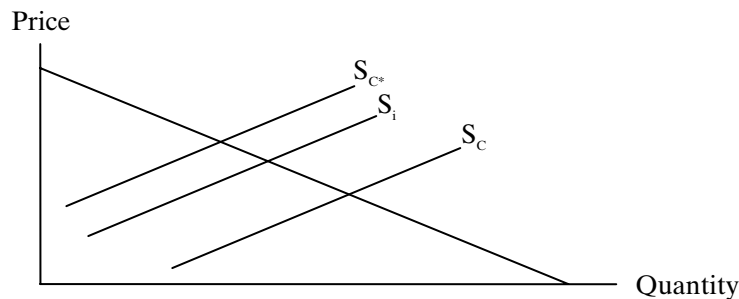
44. For an explication of rent-protecting in the context of public choice theory, see Robert D. Tollison, *Rent Seeking*, in *PERSPECTIVES ON PUBLIC CHOICE* 506, 515-17 (Dennis C. Mueller ed., 1997).

45. See Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 705 (2003).

Commission (FCC)) to restrict the challenger,⁴⁶ or lobbying for laws that will put the challenger at a serious disadvantage.⁴⁷

Part II of this Article describes in greater detail how copyright laws and other laws can be used as a tool of foreclosure. Here we can set forth the incumbent's potential strategies. There are two: the first is to try eliminate the challenge by increasing the challenger's costs by, for example, denying the challenger access to an essential input (the copyrighted work). The result is pictured below, where the challenger's supply curve is shifted to the uncompetitive S_{c^*} . This is a strategy akin to seeking trade protection through tariff or an import ban. The second strategy is to co-opt the challenger: to allow the challenger to sell at a price corresponding to its more efficient supply curve, but to pay a tax to the incumbent that transfers as much of its producer surplus as possible. In either case the incumbent relies on government assistance to achieve its desired result.

FIGURE 2.3: SUCCESSFUL ELIMINATION OF COMPETITION



The technological challenger, meanwhile, invests its own producer surplus (based on its more efficient supply curve) in efforts to prevent government from protecting the disseminator or increasing the challenger's costs. Such investments can be as basic as defending copyright litigation, but can also include more outlandish measures such as using the antitrust law or devising better means of evading copyright enforcement (a recent strategy).⁴⁸

For all of these strategies, the critical assumption is that the form and even the odds of favorable government's action will be hard to predict. Imperfect information is the barrier to settlement, and the

46. See, e.g., *infra* note 223.

47. See Wu, *supra* note 45, at 705.

48. See generally, Wu, *When Code Isn't Law*, *supra* note 45, *passim*.

unknown and unknowable is what the government will do.⁴⁹ Conversely, if everyone knew what government was likely to do, or even knew the odds of government acting one way or another, settlement of copyright's communications disputes would be fast.

There are many reasons why government action will be hard to predict when new technologies of dissemination are invented. First, unlike, say, traffic accidents, there are relatively few inventions of major new dissemination technologies — in the twentieth century, at best about one per decade. There is therefore a thin market for paying off challenger industries wielding new technologies. Second, unlike a tort lawsuit, there are multiple government actors involved. Courts using copyright law may take one side, Congress another; antitrust law and the FCC make occasional cameo appearances.⁵⁰ As a result, the odds of favorable government action are much harder to predict than in the settlement of a run-of-the-mill lawsuit. This inherent and historical unpredictability makes early settlement unlikely. Finally, not only is the direction of government action difficult to predict, but so is its effectiveness. Copyright enforcement can be costly and challenging. The knowledge that government action may be of unpredictable effectiveness increases the uncertainty that leads to copyright conflicts.

What would happen in the absence of any government rules, regulations, decrees or other involvement? If the government denied an incumbent any possibility of obtaining protection from a technologically advanced challenger, then the incumbent's strategy would depend on its capability for self-enforcement: its ability to protect its products and its producer surplus by nonlegal means. For example, in a world without government, broadcasters might have prevented the cable industry from "stealing" its signals by using physical force, or today, better scrambling of signals.⁵¹ Even with a copyright law, the recording industry currently uses nonlegal means to increase the costs of distributing its products online.⁵²

The effectiveness of such self-enforcement is likely unpredictable, and so total absence of government involvement would not necessarily lead to peace and agreement between competing disseminators.

49. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.5 (4th ed. 1992) (observing that different estimates of the odds of favorable government action make settlement of lawsuits less likely).

50. For a discussion of FCC involvement in radio see *infra* notes 109-159 and accompanying text. For a discussion of the involvement in the cable-broadcast dispute, see *infra* notes 188-260.

51. Cf. Lee Kovarsky, *Technological Substitution and the Arms-Race Theory of Copyright* (draft on file with author) (arguing that copyright owners have a choice between seeking self-protection, copyright protection, or both).

52. See Wu, *supra* note 45, at 743-45 (describing non-legal methods used by recording industry against online music distribution).

Again, what is most likely to lead to rapid settlement is predictable government action with known effects in any direction.

From this discussion one might expect me to advocate greater predictability in order to minimize investments in seeking government favor, behavior that public choice theory considers wasteful “rent-seeking.”⁵³ But I have not argued here, as the classic rent-seeking literature would, that such expenditures are wasteful or undesirable. As Part II explains, the costs of rent-seeking may be worthwhile if it is unclear which technology is actually better, and if the rent-seeking process eventually allows the better technology to win out. Predictable government action — a hypothetical copyright dictator — could eliminate all conflict by choosing a winner but could also pick the wrong winner. So the costs of rent-seeking may be justified by a better substantive result.

To summarize: the existence of unpredictable copyright protection and new technologies should produce long contests to obtain favorable governmental decisions. Because it is not obvious what government will do, incumbent industries — e.g., broadcasters, the recording industry, and sheet-music publishers, — can be expected to end up in long contests with challengers to persuade government to take favorable action. The result of such contests is copyright’s *de facto* communications regime. But this is quite a bare description. In the Sections that follow, we can see what government has done in the face of conflicts between challengers and incumbents, and how copyright’s communications policy has actually developed.

D. *Communications Policy, 1900-1976*

1. *The Birth of the Recording Industry*

The birth of the recording industry in the late 1890s and early 1900s is the model, for better or for worse, for copyright’s communications policy in the twentieth century. The recording industry, predating today’s online distribution via cable and other media, was the original technological free rider — the first to build a business whose success depended, in part, on the incidence of copyright arbitrage.⁵⁴

The recording industry pioneers were the manufacturers of piano rolls and of “talking machines,” or early record players. Early versions

53. See Buchanan, *supra* note 43, at 4 (“The term *rent seeking* is designed to describe behavior in institutional settings where individual efforts to maximize value generate social waste rather than social surplus.” (emphasis in original)).

54. For a discussion on copyright arbitrage, see Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55 (2001) (applying economic models of price discrimination to copyright law).

of these technologies were introduced in the late 1890s.⁵⁵ By 1902, at least a million piano rolls, each representing a copyrighted song, were in distribution.⁵⁶ The record industry grew even faster: by 1899, 2.8 million records had been sold.⁵⁷ These mechanical reproductions were produced without paying any licensing fees to the owners of the respective copyrights.⁵⁸

Technologically, the player piano and the record player were each the “receiver” for a new form of mass media — the paper piano roll and the record, respectively. A single purchase of copyrighted sheet music could be transformed by the recording industry into rolls and records that reached tens of thousands of listeners. As a result, the success of mechanical recordings sparked a conflict with the incumbent industry: publishers of sheet music.⁵⁹

a. The rhetoric. The rhetoric of the early recording industry conflict is both independently fascinating and a template for other conflicts that followed. The incumbent owners of copyrights adopted a theme familiar to modern ears: they depicted the recording industry as irresponsible pirates whose reckless copying of music threatened to destroy American creativity. What was, in retrospect, a battle over the impact of new technology was at that time portrayed as a threat to traditional values and artistic development. As composer John Phillip Sousa informed Congress:

These talking machines are going to ruin the artistic development of music in this country. When I was a boy . . . in front of every house in the summer evenings you would find young people together singing the songs of the day or the old songs. To-day you hear these infernal machines going night and day. We will not have a vocal chord left. The vocal chords will be eliminated by a process of evolution, as was the tail of man when he came from the ape.⁶⁰

55. See Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 350 nn.69-70 (2002) (noting that composers did not earn royalties from these distribution mechanisms).

56. See *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 9 (1908) (“The record discloses that in the year 1902 . . . from one million to one million and a half of such perforated musical rolls . . . were made in this country in that year.”).

57. ANDRE MILLARD, *AMERICA ON RECORD: A HISTORY OF RECORDED SOUND* 49 (1995).

58. See *White-Smith*, 209 U.S. at 16-18; Litman, *supra* note 55, at 350 n.70.

59. There were a number of legal battles between the two camps. See, e.g., *White-Smith*, 209 U.S. 1, 18 (holding that 1897 Act did not assign composers right to piano roll reproduction of composition); *Stern v. Rosey*, 17 App. D.C. 562, 564-66 (1901) (refusing to hold phonograph presentation of sounds as a “copy” within the meaning of existing statute); *Kennedy v. McTammany*, 33 F. 584, 584-85 (C.C.D. Mass. 1888) (holding that perforated strips of paper used in tune-producing organettes do not violate copyrighted music of the same tune).

60. *Arguments Before the Comms. on Patents of the S. & H.R., Conjointly, on the Bills S. 6330 and H.R. 19,853, to Amend and Consolidate the Acts Respecting Copyright*, 59th Cong. 24 (1906) [hereinafter *1906 Hearings*] (statement of John Philip Sousa), reprinted in 4

Another line of argument portrayed the recording industry (“The Talking Machine Trust”) as a dishonest, monopolistic business. A model letter written for composers stated the case:

[W]hat is the result? I see my compositions . . . stolen bodily by the phonograph trust and piano-player combination, and ground out daily from thousands of cylinders, disks, and rolls, without paying me or any of us one single, solitary penny . . . [Congress must] assist in protecting me against such robbery, such unfairness, and such a terrible disadvantage.⁶¹

A slightly more sophisticated argument presented the recording industry’s activities as a threat to the incentives to compose music in the first place. In a 1907 letter to the *New York Globe and Advertiser*, the Authors and Composers’ Copyright League put things as follows:

[T]he “Talking Machine Trust” . . . with all the greed of a hungry wolf seizes upon the composition and turns out countless records and perforated rolls, thereby killing the sales, for it is a proven fact that as soon as the penny talking machines reproduce a musical composition it is dead as far as the public is concerned.

. . . .

[Without copyright reform] the musical art and all other musical industries in this country will languish, as the authors and composers, not receiving any royalties on records, and their royalties on sheet music decreasing from year to year, will have no incentive to write or compose.⁶²

How about the challengers — the recording industry? Sounding themes also familiar today, the recording industry identified itself as the inventing class, heroes of American ingenuity and engineering. They portrayed the incumbent industry as a monopoly threat interested only in destroying a technologically advanced rival.

Self-described inventor Howlett Davis, who testified before Congress “without invitation from any source whatever,”⁶³ depicted the arts as necessarily dependent on inventors: “In all arts the work of the inventor will be found at the foundation of the progress and prosperity of the country.”⁶⁴ Inventors, he argued, serve the people. “The farmer or the workingman,” he argued, relies on his record

LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT pt. H, at 24 (E. Fulton Brylawski & Abe Goldman eds., 1976).

61. *Hearings Before the Comms. on Patents of the S. & H.R. on Pending Bills to Amend and Consolidate the Acts Respecting Copyright*, 60th Cong. 255 (1908) [hereinafter *1908 Hearings*] (model letter to Congress in statement of John J. O’Connell) reprinted in 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT pt. K, at 255 (E. Fulton Brylawski & Abe Goldman eds., 1976).

62. *Id.* at 257 (newspaper letter in statement of John J. O’Connell).

63. *1906 Hearings*, *supra* note 60, at 97 (statement of G. Howlett Davis).

64. *Id.*

player “to relax the tension of their daily labor.”⁶⁵ He condemned expanded copyright as a plan to “take away from the inventor the product of his brain and to deliver it over to the composer.”⁶⁶ “So far as the mass of the people of this country is concerned, the work of the composer is infinitesimal as compared with the work of the inventor.”⁶⁷

Inventors also argued that an expanded copyright would defeat their vested rights, both as an industry and, more particularly, the vested rights of inventors holding patents to mechanical players. Expanded copyright, Davis argued “practically depreciates or destroys the marketable value of my inventions or machines . . . as well as destroying in part or whole my existing patent rights.”⁶⁸ His view, evidently, was that the patent grant included a right to be free from copyrights that might interfere with the value of the patent.

A more strategic theme advanced by the early recording industry played on contemporary fears of monopoly trusts, particularly those with a foreign element. In a clever turn, much of the recording industry mobilized against a single manufacturer of player pianos, the Æolian Company. They argued that the demand for copyright expansion had nothing to do with composer welfare, but was rather part of a grand international conspiracy. Howlett Davis described the alleged collusion between publishers and composers as “a complete monopolistic octopus, in which the Æolian Company forms the head and brains, the Music Publishers’ Association the body, the independent publishers the writhing arms, and the composers the suckers and baiters.”⁶⁹

A series of inflammatory 1908 editorials in the newssheet “Musical Age” depicted a sinister international “syndicate” agitating for copyright’s expansion.⁷⁰ It asked: “who raises this hue and cry and creates this clamorous demand for new and drastic [copyright] legislation? Is it the author? [No] . . . It is the speculator and gambler.” After detailing the syndicate’s origins in France (and in particular, its connection to a shadowy figure named Lucien Vives), the Æolian company was named as local outpost of the global conspiracy. “In this country, it is the Æolian company which assumes the role of ‘chief speculator.’”

A final argument, also present in contemporary debate, was that the recording industry was actually helping composers by spurring the

65. *Id.* at 103-04.

66. *Id.* at 104.

67. *Id.*

68. *Id.* at 101.

69. *Id.* at 98.

70. M. Dorian, *The Men Behind*, THE MUSICAL AGE, Feb. 29, 1908, at 76-77.

sales of sheet music; hence, no change to copyright was needed. A representative of the talking machine lobby stated that “[i]t is impossible that there should be any sale of records of the composition without there being a corresponding sale of the sheet music. Each may help the other, but phonograph reproduction is certainly a powerful stimulus to the sale of sheet music.”⁷¹

This argument — that the new technology of dissemination will ultimately aid composers irrespective of the level of copyright protection granted to their works — remains a persistent theme in the defense of challenger activity.

b. Copyright settlement. We are now in a position to understand the legal course of events that led to settlement. The incumbents, unsurprisingly, took the lead. Early on, publishers asked lower courts to find piano rolls (1888) and records (1901) an infringement of copyright rights.⁷² These efforts failed.⁷³

The incumbents, making the piracy arguments detailed above, then moved to Congress, achieving through a publishers’ conference a draft copyright bill that would have granted composers full rights in mechanical recordings.⁷⁴ At the same time, in 1906, a new effort was made to obtain an appellate decision finding mechanical recordings to be infringing copies. The test lawsuit was litigated all the way to the Supreme Court: the now famous “piano-roll” case, *White-Smith Music Publishing Co. v. Apollo Co.*⁷⁵

Unfortunately for the incumbents, the Supreme Court was unwilling to extend copyright in the manner requested. It ruled that a “copy” in the statute was a “reproduction or duplication of the original,” which the perforated paper roll evidently was not. In hindsight it is clear that the decision could have gone either way.⁷⁶ The Court repeatedly relied on the fact that piano rolls were not visually similar to sheet music — a curious means to adjudge the meaning of a “copy” of an aural work.

71. 1908 Hearings, *supra* note 61, at 300 (statement of Frank L. Dyer).

72. See *Stern v. Rosey*, 17 App. D.C. 562, 564-66 (1901) (refusing to hold phonograph presentation of sounds as a “copy” within the meaning of existing statute); *Kennedy v. McTammany*, 33 F. 584, 584-85 (C.C.D. Mass 1888) (holding that perforated strips of paper used in tune-producing organettes do not violate copyrighted music of the same tune).

73. See *Stern*, 17 App. D.C. at 564-66; *Kennedy*, 33 F. at 584-85.

74. See *Litman*, *supra* note 38, at 284-86.

75. 209 U.S. 1, 17-18 (1908).

76. The Court’s holding in *White-Smith* was premised on the notion that piano rolls did not constitute a physical copy of the work. *White-Smith*, 209 U.S. at 18. The Court did so because the rolls were not directly accessible to humans, and did so over the objection of Justice Holmes that “[o]n principle anything that mechanically reproduces that collocation of sounds ought to be held a copy” 209 U.S. at 20 (Holmes, J., concurring). This conception of fixation was quickly overturned by the copyright statute in 1909. See 17 U.S.C. § 101 (2000) (defining fixation); see also Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683, 716 n.140 (2003) (discussing meaning of fixation).

Many have criticized the purported formalism of the *White-Smith* Court.⁷⁷ Reflecting early twentieth century practice, the Court declined to explain the reasons or policy behind its decision. But the decision, whether consciously or not, put the Court squarely in the midst of communications policy. The doctrinal and rather clumsy rationale was the difference between a given work and its means of expression. The Court, critically, stated that “[t]he statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be.”⁷⁸ It instead “has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.”⁷⁹

The distinction between the “intellectual conception” and the “tangible thing” therein described is difficult to defend or maintain. If copyright is merely protection against the copying of a “tangible thing,” how could it protect adaptations to other languages, conversions to other media, or performance rights, for which the law has already provided? Yet the entire Court signed on to the opinion — even Justice Holmes, whose subsequent body of copyright writings would act against the principle stated in *White-Smith*.⁸⁰

For this reason we must look to other motivations and concerns. One cannot help noticing that the effect of the decision was to place a limit on the market power of the effective owner of the “intellectual conception,” namely, the incumbent industry. The decision also set an institutional precedent (though one unevenly followed) of deciding technologically sensitive copyright cases in favor of a challenger industry in a manner likely to force Congress’s hand. The denial of protection in the context of a technologically innovative market entrant will resurface in the history that follows. Seventy-six years later, the *Sony* decision would cite *White-Smith* as the origin of this “policy”: “Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.”⁸¹ In practice, the decision to “defer” to Congress activates copyright’s communications regime, and

77. See, e.g., Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1622 (2001).

78. *White-Smith*, 209 U.S. at 17.

79. *Id.*

80. In *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61 (1911), Justice Holmes held the film *Ben-Hur* to infringe a copyright on the novel, holding that “[t]he essence of the matter in the case last supposed is not the mechanism employed but that we see the event or story lived.” See also *Herbert v. Shanley Co.*, 242 U.S. 591 (1917) (discussed *infra* in text accompanying notes 116-119).

81. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

the beginnings of a process of negotiated settlement between the parties to the conflict.

* * *

Following *White-Smith* publishers and the mechanical machine manufacturers moved quickly for a legislative settlement. Why settlement?

First, the *White-Smith* litigation and the failure of earlier congressional efforts provided important information. Despite all its efforts, the publishing industry was unlikely to get either the courts or Congress to provide a full-strength copyright that it might use in its contest with the nascent recording industry. And by this time both challengers and incumbents began to represent a serious threat to one another. Following *White-Smith*, composers and publishers risked an ongoing decay of their profitability because of their inability to extract income from the recording industry. Conversely, the recording industry still faced some possibility that publishers would succeed in their efforts to extend copyright to mechanical recordings and use this power against them.

Under these conditions the two parties settled on a statutory "royalty" scheme that was the first compulsory license system. The settlement was centered on a fixed, universal rate of two cents per song, per copy. This settlement was primarily achieved during sessions in 1908, and was codified as section 1(e) of the 1909 Copyright Act.⁸²

The nature of the settlement was as follows: on the one hand, Congress extended the copyright in compositions to mechanical recordings. In exchange, the recording industry received statutorily guaranteed access to all copyrighted compositions provided they pay a standard fee. So long as the composer agreed or "knowingly acquiesced" to an initial recording (an important condition), anyone willing to pay the statutory fee would then be entitled to use any copyrighted composition to record his own version of the song.

This mechanical license scheme survives to the present day. Among academics it is occasionally praised for reducing transaction costs, but more typically berated for its inflexibility and insensitivity to changing economic conditions.⁸³ Yet interestingly, neither party has made a serious effort to repeal the mechanical license system. Representatives of composers did not argue for its repeal in the 1976

82. See HARRY G. HENN, COPYRIGHT PRIMER 207 n.2 (1979).

83. See, e.g., I. Trotter Hardy, *Copyright and "New-Use" Technologies*, 23 NOVA L. REV. 659, 699-702 (1999) (criticizing compulsory licensing regimes as price-fixing); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1300 (1996) (same).

Copyright Act⁸⁴ and today it is defended both by representatives of composers and by the music industry.⁸⁵ The only change has been the effort to make the license fee adjustable.⁸⁶

2. *The Wireless Age*

“Radio is yet in its infancy,” the doctor concluded, as he rose to go. “But one thing is certain. In the lifetime of those who witnessed its birth it will become a giant — but a benevolent giant who, instead of destroying will re-create our civilization.”⁸⁷

Thus spoke Dr. Dale, sage of the 1922 book *Radio Boys*.⁸⁸ He had reason to think radio was on the rise. Just one year earlier, a record 300,000 listened as boxer Jack Dempsey, the Manassa Mauler, knocked out Georges Carpentier to defend the heavyweight title. For perhaps the first time in history, more people experienced the event distally than locally, most listening at “radio halls.”⁸⁹ According to the *Wireless Age*: “The magic of the radio telephone had accomplished new wonders. A daring idea had become a fact.”⁹⁰

But the wonder of radio also gave birth to a festering, drawn-out conflict: a decades-long war between the broadcast industry and an alliance of sheet music publishers, composers and songwriters. The conflict differs in an important respect from the piano roll and cable broadcast disputes that came before and after it, respectively. There was no incumbent broadcast industry interested in destroying or stopping radio. Instead, existing authors wanted radio to succeed, but they also wanted to milk radio for as much money as possible. Radio’s interest in paying as little as possible for its primary input created the conflict described in what follows.

Commercial radio, like most new disseminator industries, began its history accused of copyright piracy. Unlike modern radio with its “disc jockeys,” early 1920s broadcast usually meant setting up a microphone

84. 17 U.S.C. § 115 (2000).

85. See, e.g., Ken Anderson, *Preserve the Compulsory License*, BILLBOARD, June 11, 1994, at 6 (arguing that rescinding the compulsory license would create industry turmoil and potential of monopolization).

86. The price is now set by a system of ad hoc Copyright Arbitration Royalty Panels. See 17 U.S.C. § 801 (2000) (creating the Copyright Arbitration Royalty Panels). For the year 2004, the mechanical license rate is 8.5 cents per song, or 1.65 cents per minute of playing time, whichever is greater. See COPYRIGHT OFFICE, COPYRIGHT ROYALTY RATES, at <http://www.copyright.gov/carp/m200a.html> (last visited Sept. 10, 2004).

87. ALLEN CHAPMAN, *THE RADIO BOYS TRAILING A VOICE* 60 (1922).

88. *Id.*

89. See *Voice-Broadcasting the Stirring Progress of the “Battle of the Century”: How the Largest Audience in History Heard the Description of the Dempsey-Carpentier Contest Through the Use of the Radiophone*, THE WIRELESS AGE, August, 1921, page 11-21, at 11.

90. *Id.* at 11.

for a performance, either within the studio or at a concert hall.⁹¹ Since the music was already purchased or playing, ignoring copyright was easy. But radio faced an organized adversary: the American Society of Broadcasters, Composers and Publishers (ASCAP).

In 1913, the legend goes, composer Victor Herbert was dining in New York's Shanley's Restaurant when the in-house orchestra struck up one of his songs, "Sweethearts."⁹² He complained to the proprietor, who presented him with a theory of copyright liability: since no admission was being charged, the performance was not "for profit," and the restaurant not guilty of infringement. Herbert was determined to prove him wrong and in 1914, with others, founded the ASCAP, a collection of 170 authors and composers of music, along with 22 publishers of sheet music.⁹³ The ASCAP's first target was the restaurant and the performance that had attracted Herbert's ire. In *Herbert v. Shanley Co.*, the ASCAP convinced the Supreme Court that public performance in restaurants, despite no fee being charged, was an unauthorized "public performance for profit."⁹⁴

Justice Holmes wrote a simple three-paragraph opinion, concluding that since restaurants are not charities, when they play music it must be in the interest of profit even if they do not charge at the door. Restaurants, he observed, are not "eleemosynary."⁹⁵ They provide music to provide their customers, "people having limited powers of conversation . . . a luxurious pleasure not to be had from eating a silent meal." In short, "[i]f music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit and that is enough."⁹⁶

The opinion is simple economics, but underlying it is a substantive view of the rights of the copyright holder. Holmes's opinion here and in his other writings⁹⁷ saw copyright as a commercial property to an extent never reached before. His view, now mainstream, presumed the copyright owner should have the power to demand a license for every revenue stream dependent on the copyrighted work — even revenue from adaptations to other media, or revenue arising from improved

91. See Stephen Davis, *The Law of the Air*, in *THE RADIO INDUSTRY: THE STORY OF ITS DEVELOPMENT 186-87* (1928).

92. See EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT* 41 (David Stanford Burr ed., Thomas Dunne Books 2000); Leonard Allen, *The Battle of Tin Pan Alley*, 181 *HARPER'S MAG.* 514, 516 (1940).

93. See 2 MELVIN NIMMER, *NIMMER ON COPYRIGHT* § 8.19 (1988).

94. *Herbert*, 242 U.S. 591 (1917).

95. *Id.* at 594.

96. *Id.* at 595.

97. See, e.g., *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911) (suggesting jobber could be contributorily liable for unauthorized film version of book); *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903) (holding commercial advertisement copyrightable).

restaurant atmospherics. This, this *Herbert* principle, has had a powerful impact on copyright's theory and evolution. It also put the ASCAP in the business in which it remains today: offering "blanket" licenses to restaurants, dance halls, and other places that perform music.⁹⁸ The blanket licenses, for a fixed percentage dependent on the venue, allow the performance of all of the works written by ASCAP members (members assign their performance rights to the ASCAP for this purpose).⁹⁹ It was these blanket licenses that the ASCAP offered radio broadcasters, at first for free or for very low prices. But much of the broadcast radio industry refused, and several decades of ferocious animosity ensued.

Facing the demands of the ASCAP and feeling a sense of mutual grievance, radio decided to get organized. On April 25, 1923, fifty-four broadcasting men met at the Drake Hotel in Chicago.¹⁰⁰ The product of their meeting was the National Association of Broadcasters (NAB), and its first priority was getting radio out of the copyright statute.¹⁰¹ Within a year, the NAB had a bill in the Senate that would have exempted radio from copyright liability altogether.¹⁰² The bill, S. 2600, proposed to amend section 1 of the 1909 Act, adding:

[C]opyright control shall not extend to public performances whether for profit or without profit, of musical compositions where such performance is made from printed or written sheets or by reproducing devices issued under the authority of the owner of the copyright, or by use of the radio or telephone, or both.¹⁰³

But the bill died, and in retrospect the radio problem probably never came closer to a legislative solution.

The broadcaster-composer conflict was open by the time of the 1925 Radio Convention, called by the Commerce Department, where an early effort was made to settle the dispute. Notes from the meeting show that the two sides agreed upon several points, including that "there can be no continuation of broadcasting unless musical compositions are made available to broadcasters upon a fair,

98. See *Buffalo Broad. Co., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 546 F. Supp. 274, 277 (S.D.N.Y. 1982).

99. See *id.* at 276.

100. See NAB: The First 75 Years, at <http://www.nab.org/about/timeline.asp> (last visited Jan. 24, 2004).

101. See Angela J. Cambell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 720 n.49 (1999).

102. *To Amend the Copyright Act: Hearings Before a Subcomm. of the Comm. on Patents on S. 2600*, 68th Cong., 9-14 (1924) (statements of E.F. McDonald and Paul B. Klugh).

103. S. 2600, 94th Cong. (1924).

equitable, and permanent basis.”¹⁰⁴ Nonetheless, “all attempted solutions through negotiation . . . have proved unavailing.”¹⁰⁵ It was resolved that Congress should settle things, but it never did.

The parties were probably unwilling to settle because each was in the midst of pursuing its own legal strategy seeking total victory. While the NAB unsuccessfully petitioned Congress, the ASCAP was doing far better in the courts.¹⁰⁶ Unlike *White-Smith* and later cases, no radio cases reached the Supreme Court, mainly because the holdings followed *Herbert*. So instead it was the Sixth Circuit whose word became policy for radio.¹⁰⁷

In 1924, the ASCAP brought a test case against radio station WLW in Cincinnati for its unlicensed broadcast of a song named “Dreamy Melody.”¹⁰⁸ The legal question was whether a radio broadcast was in fact a “public performance for profit” under the statute. The Sixth Circuit, following Holmes in *Herbert v. Shanley Co.*, answered the question “yes.”¹⁰⁹ Said the court: “The artist is consciously addressing a great, though unseen and widely scattered, audience, and is therefore participating in a public performance.”¹¹⁰

What of *White-Smith*'s practice of leaving new technologies to Congress? The broadcasters did in fact argue that the fate of radio was better handled by the legislature, and Judge Mack duly noted that “[b]ills have been introduced in both House and Senate to permit broadcasting without infringing copyrights.”¹¹¹ While agreeing that the final status was “eminently [a matter] for considered legislation,” the court nonetheless felt it had a duty to “decide whether and to what extent statutes covering the subject-matter generally . . . are, fairly construed, applicable to the new situation.”¹¹² The extension of the Copyright Act's text to a new technology — the opposite approach to that adopted in *White-Smith* and later Supreme Court cases — was a turning point in the history of the radio conflict.

104. Proceedings of the Fourth National Radio Conference and Recommendations for the Regulation of Radio, Nov. 9-11, 1925, at 37-38 (Government Printing Office 1926).

105. *Id.*

106. The litigation brought by composers was quite successful, particularly with respect to the public performance right. *See, e.g., Jerome H. Remick & Co. v. Am. Auto. Accessories Co.*, 5 F.2d 411 (6th Cir. 1925) (enjoining defendant from radio broadcasting); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776, 780 (D.N.J. 1923) (holding that broadcasting in department store was “publicly for profit” within the meaning of the Copyright Act); *Harms v. Cohen*, 279 F. 276 (E.D. Pa. 1922) (assessing liability against a theater employing an organist playing copyrighted musical compositions).

107. *See infra* notes 130-134 and accompanying text.

108. *Jerome H. Remick & Co.*, 5 F.2d 411 (6th Cir. 1925).

109. *Id.* at 412.

110. *Id.*

111. *Id.* at 411.

112. *Id.* at 411-12.

The ASCAP's victory in the Sixth Circuit carried forward to other courts and other decisions,¹¹³ as the Supreme Court denied certiorari. The radio broadcasters had lost the first round, having no legislation and no excuse. By 1931, they had little recourse but to begin paying for ASCAP blanket licenses, and most began doing so.

It may be correct, as Jane Ginsburg argues, that the radio courts did not sense any risk that the ASCAP wanted to destroy radio, and that this may have affected both their decisions and the Supreme Court's denials of certiorari.¹¹⁴ But if one goal of the radio cases was to settle the relationship between radio and copyright once and for all, they were a failure. The declaration of the rights of the copyright holders was not a settlement of the conflict. The fight moved past copyright to other legal strategies which served, as a 1941 commentator put it, to "deaden the effectiveness of the copyright law."¹¹⁵ As we will see, after another three decades of continuous conflict, antitrust law eventually imposed the settlement that the copyright courts avoided.

In the mid-1930s, the NAB pushed the federal "Duffy Bill," targeting the remedies instead of the scope of copyright. Because actual damages from copyright infringement could be minimal or difficult to demonstrate, broadcasters noted that it was only the *terrorum* effect of statutory damages that compelled compliance. The Duffy Bill would have repealed the statutory damage provisions of the 1909 Copyright Act.¹¹⁶ As a commentator in the 1940s stated, "[i]f the minimum statutory damages were abolished, radio owners could knowingly ignore the copyright laws . . ."¹¹⁷ But with only the broadcasters behind it, the Duffy Bill died.

As early as 1926, the NAB also began pressuring the Justice Department to seek antitrust enforcement against the ASCAP, but to no avail.¹¹⁸ In September 1933, the broadcasters filed their own private antitrust suit,¹¹⁹ and in 1934 the Justice Department, with the broadcasters as cheering squad, changed its mind and filed its own

113. *Pastime Amusement Co. v. M. Witmark & Sons*, 2 F.2d 1020 (4th Cir. 1924); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776, 779-80 (D.N.J. 1923).

114. See Ginsburg, *supra* note 20, at 1619-21.

115. See Marcus Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 GEO. L.J. 407, 415 (1941).

116. S. 2465, 74th Cong. § 17 (1935) (limiting damages to the copyright owner's actual damages and the infringer's profits).

117. Cohn, *supra* note 115, at 416.

118. In 1926, the Justice Department investigated ASCAP but found no reason to bring an antitrust suit. See Cohn, *supra* note 115, at 424 n.91.

119. See *Pennsylvania Broadcasting Co. v. Buck*, (S.D.N.Y. , filed Sept. 7, 1933).

antitrust petition against the ASCAP.¹²⁰ But the government asked for an adjournment after just two weeks of trial.¹²¹ The radio broadcasters' legal strategy was again stalled.

Having no luck with the federal government, the radio broadcasters turned to the states. The result was called "a series of comprehensive and systematic attacks on the ASCAP, through the medium of state legislatures."¹²² The methods of choice were "anti-monopoly" statutes that declared it illegal for owners of copyrighted works to combine for purposes of fixing licensing fees.¹²³ In other words, the broadcasters sought and obtained state statutes making the ASCAP illegal. Over several years, the broadcasters succeeded in introducing such laws in thirty-five states and passing them in ten.¹²⁴ Unfortunately for broadcasters, however, courts quickly found the state laws preempted by the federal commerce power.¹²⁵ The NAB's efforts had failed again.

As an ASCAP commentator in 1939 put it, the broadcasters "had resorted to every conceivable device and stratagem to destroy the right of composers and authors to bargain collectively All to no purpose."¹²⁶ But the NAB was persistent. It compared its struggle against the ASCAP to the fight against Hitler and redoubled its efforts: "War is Hell, whether its purpose is to preserve democracy in Europe against a madcap dictator or to preserve it in radio against an arbitrary totalitarian ASCAP."¹²⁷

The broadcasters' breakthrough came in 1941. That year, NAB ran a successful year-long boycott of all ASCAP songs, relying instead on songs in the public domain and those from the industry's own performance rights organization, Broadcast Music, Inc. (BMI).¹²⁸ This

120. See *United States v. Am. Soc'y of Composers, Authors & Publishers*, No. 78-388 (S.D.N.Y., filed August 30, 1934).

121. Why they stopped the case is not entirely clear. According to Lionel Sobel, it was in part because the broadcasters and ASCAP agreed on a five-year compromise agreement during the trial. See Lionel S. Sobel, *The Music Business and the Sherman Act: An Analysis of the "Economic Realities" of Blanket Licensing*, 3 *LOY. L.A. ENT. L. REV.* 1, 5 (1983).

122. Cohn, *supra* note 115, at 416.

123. Two examples are 1937 Fla. Laws c. 17807, *discussed in* *Gibbs v. Buck*, 307 U.S. 66, 69 (1939), and 1937 Wash. Laws 218, *discussed in* *Buck v. Gallagher*, 307 U.S. 95, 97 (1939).

124. See Cohn, *supra* note 115, at 417 nn.60-63 (collecting state statutes).

125. See, e.g., *Gibbs*, 307 U.S. 66 (1939); *Buck v. Harton*, 33 F. Supp. 1014 (M.D. Tenn. 1940); *Buck v. Swanson*, 33 F. Supp. 377 (D. Neb. 1939); Notes and Legislation, *Musical Monopolies and Legislative Control*, 53 *HARV. L. REV.* 458 (1940) (collecting cases).

126. E.C. Mills, Current Comment, *The ASCAP-NAB Controversy: The ASCAP View*, 11 *AIR. L. REV.* 394, 397 (1940).

127. Editorial, *War, Hell and ASCAP*, *BROADCASTING*, Oct. 1, 1939, at 48.

128. In 1940, the NAB organized an ASCAP boycott — members, for about a year, only played songs from their own, competing performing rights society, Broadcast Music Inc. ("BMI"). See Cohn, *supra* note 115, at 420-421.

time fate and history were on the broadcast industry's side. The ASCAP didn't control every composer and every song: it required composers to achieve a minimum of five hit songs before joining.¹²⁹ This standard excluded less well known artists and also "hillbilly" and "race" music (now known as "country" and "rhythm and blues," respectively).¹³⁰ Switching to playlists comprising BMI and public domain songs was therefore manageable, if not ideal.¹³¹

The Justice Department, meanwhile, was convinced to bring yet another antitrust action. This time, the ASCAP decided to negotiate a settlement, resulting in the 1941 consent decree.¹³² This, in turn, was renegotiated in 1950,¹³³ after the movie industry joined in and filed a successful antitrust action against the ASCAP.¹³⁴

The details of the antitrust litigation against the ASCAP have been told many times.¹³⁵ What is relevant here is that the results of the antitrust litigation and settlement were quite similar to those of copyright settlements achieved elsewhere.

The 1950 decree limited the scope of copyright in compositions rather like a statutory or compulsory license. Section VI of the decree ordered the ASCAP to grant blanket licenses to its copyrights, and section IV required the ASCAP to grant such licenses non-exclusively and without discrimination.¹³⁶ These are, of course, the basic features of a compulsory license: it guarantees that the work will be available, and it remains available regardless of how many other parties have already received a compulsory license.

129. See PAUL KINGSBURY, *BMI 50TH ANNIVERSARY HISTORY BOOK 2* (1990) ("At one time, many types of music had limited access to the mainstream of the American music business, and to the American audience at large.").

130. See *id.*

131. Herman Finkelstein, an ASCAP attorney, stated in 1954 that during the boycott "the value of radio sets was substantially lessened for those who enjoyed the best in popular music." Herman Finkelstein, *The Composer and the Public Interest — Regulation of Performing Right Societies*, 19 *LAW & CONTEMP. PROBS.* 275, 287 (1954). Conversely, some radio stations reported that their public praised them for the new type of music they broadcasted during the boycott. See *WFBL Optimistic on BMI*, *VARIETY*, Dec. 25, 1940, at 24.

132. *United States v. Am. Soc'y of Composers, Authors & Publishers*, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

133. See *United States v. Am. Soc'y of Composers, Authors & Publishers*, 1950 Trade Cas. (CCH) ¶ 62,595, at 63,751 (S.D.N.Y. 1950).

134. See *Alden-Rochelle, Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888 (S.D.N.Y. 1948).

135. See, e.g., Richard W. Ergo, Comment, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, 1959 *DUKE L.J.* 258 (1959); Susan Stager, *Musical Performing Rights in the Television Industry: Has the Blanket License Finally Seen Its Demise?*, 14 *SW. U. L. REV.* 569, 572-73 (1984).

136. See *United States v. Am. Soc'y of Composers, Authors & Publishers*, 1950 Trade Cas. (CCH) at 63,753.

The 1950 consent decree, like a statutory license, also had something to say about pricing. Unlike the mechanical license, which set a statutory price (two cents per song per recording), the 1950 consent decree gave an Article III court the final say in music pricing. Section IX of the 1950 consent decree required the ASCAP to notify users of its fees, which were to be reasonable. In the event that the ASCAP and its users could not agree on a price within sixty days, appeal was available to the district court, which would set a "reasonable price."¹³⁷

Under these terms, the legal regulation of broadcast music effectively became a form of liability, as opposed to property, regime.¹³⁸ Broadcasters were not liable for infringement as long as they paid a price set by the government. The story of the birth of radio, in short, has more in common with other copyright conflicts than meets the eye. The initial decision of the copyright courts to extend full copyright in radio broadcasts did not prevent the emergence of a compulsory licensing scheme.

3. *Cable Television & the Broadcasting Industry*

The third major example of what I have described as copyright's settlement function arises out of the bitter mid-century conflict between broadcasters and the upstart cable industry. Reduced to its essentials, beginning in the late 1950s the broadcast industry and its affiliates mounted a large, successful effort to contain the growth of cable using every regulatory and political device at their disposal,¹³⁹ while the cable industry capitalized on its unregulated status to erode the dominant position of broadcast.¹⁴⁰

A general (albeit uneasy) settlement to the conflict was achieved by the late 1970s through a compromise on copyright legislation and the rescission of the most onerous of the FCC's regulations and

137. See *id.* at 63,754. Rate-setting requests have been brought to the Court, but have always been settled before the merits are reached. See W. Michael Garner, *United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 BULL. COPYRIGHT SOC'Y 119, 127-28 (1976).

138. For the seminal discussion of property versus liability rules, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

139. For a very brief history of the relationship among cable, the FCC, and Congress, see Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture*, 74 N.C. L. REV. 141, 150-55 (1995).

140. See Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": an Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 416-17 (2001).

pseudo-copyrights.¹⁴¹ With this settlement, cable began a smoother accession to its present domination of television dissemination.¹⁴²

a. The challenge. Cable was not, at first, a challenger to the broadcast industry. The first cable systems, then known as “community antenna” television (CATV), developed in rural areas in the late 1940s. The goal of the early deployments was modest: solving the problem of bringing broadcast television to remote or mountainous areas otherwise left in the dark.¹⁴³ In the late 1940s, early cable operators in places like Astoria, Oregon (the site of the first recognized CATV deployment) erected large, community antennas to bring distant signals to small towns.¹⁴⁴ The broadcast signal captured by the community antenna was retransmitted to people’s homes using physical cables.¹⁴⁵

In this early manifestation, cable simply complemented broadcast service.¹⁴⁶ By allowing the broadcast signal to reach areas not served by broadcast, it expanded the television audience to the advantage of broadcast stations. This changed, however, by the late 1950s, when broadcasters realized cable’s threat as a successor industry.

Broadcasters had reason to fear. Cable technology had two clear advantages over broadcast technology that are now obvious: programming diversity¹⁴⁷ (more channels) and signal quality. In the face of this competitive threat, the broadcast industry adopted the familiar arguments of piracy,¹⁴⁸ unfair competition,¹⁴⁹ and economic

141. See, e.g., *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 414 (1974) (refusing to apply copyright law in the cable retransmission context); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 399-402 (1968) (holding that cable TV is a “viewer” and therefore does not “perform” within the meaning of the controlling copyright law). Congress “settled” this dispute by promulgating a cable compulsory licensing scheme. See 17 U.S.C. § 111 (2000).

142. See Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 521(a)(2)-(5) (2000) (detailing the increase in cable viewership and noting that “the cable television industry has become a dominant nationwide video medium”).

143. See Kent D. Wakeford, Note, *Municipal Cable Franchising: An Unwarranted Intrusion into Competitive Markets*, 69 S. CAL. L. REV. 233, 237 n.16 and accompanying text (1995).

144. See *id.* n.15.

145. See *id.*

146. See Patrick Murphy, Note, *Retransmission Consent: A Mixed Signal for Cable Copyright*, 17 COLUM.-VLA J.L. & ARTS 237, 240 (1993) (describing this model).

147. In the 1960s, diversity meant the importing of signals from other areas using microwave transmission technology. See *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 400 n.4 (1974) (describing microwave transmission technology). For example, to create an attractive service, a cable operator in Philadelphia might import independent stations from New York City in order to offer a broader selection of content than available from broadcast alone.

148. This was the rhetoric surrounding, for example, the compulsory-license provisions allowing cable to rebroadcast captured signals. See Mary C. Dollarhide, Note, *Surrogate Rule*

disruption favored by incumbent industries. In other words, it adopted the arguments of the sheet music manufacturers in the piano-roll era and of the record companies today.¹⁵⁰ Along with these claims of unfair competition, the broadcast industry added appeals to “localism,” the national policy of subsidizing the existence of local broadcasting stations in every community.

The unfair competition or piracy claim was simply that cable operators, because they did not pay for the content they retransmitted, were stealing content and competing unfairly. Rhetorically, the broadcast industry openly and repeatedly accused cable operators of “signal piracy.” As the copyright office summarized their argument in 1965: “[Cable operators] neither need nor deserve a free ride at the expense of copyright owners The activities of the CATV operators constitute a ‘clear moral wrong’ comparable to the old practice of ‘bicycling’ movies from one theater to another in order to get two performances out of one license.”¹⁵¹

As a local broadcaster testified in 1958: “We believe that when a community antenna system takes our programs out of the air, without our permission, and sells that program material at a profit — and in many cases, a fantastic profit, indeed — this is a violation of our property rights.”¹⁵²

Jack Valenti of the Motion Picture Association made similar arguments on the eve of settlement, June 1975, in testimony before Congress:

If the Congress exempts television — cable television — from copyright . . . [it] will not only be magnifying and sanctifying a terrible injustice, but it will have created a huge parasite in the marketplace, feeding and fattening itself off of local television stations and copyright owners of copyrighted material. We do not like it because we think it wrong and unfair.¹⁵³

Making: Problems and Possibilities Under the Administrative Procedure Act, 61 S. CAL. L. REV. 1017, 1027 (1988).

149. The Supreme Court accepted the unfair competition rationale in *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 652 (1994) (“In short, the must-carry provisions are not designed to favor or disadvantage speech of any particular content. Rather, they are meant to protect broadcast television from what Congress determined to be *unfair competition* by cable systems.” (emphasis added)).

150. See *supra*, text accompanying notes 60-71.

151. HOUSE COMMITTEE ON THE JUDICIARY, 89TH CONG., COPYRIGHT LAW REVISION PART 6 SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 42 (Comm. Print 1965).

152. *Hearings Before the Senate Comm. on Interstate and Foreign Commerce, United States Senate*, 85th Cong., 2d Sess. (1959) (statement of William C. Grove).

153. See *U.S. Cong. House Comm. on the Judiciary Subcomm. on Courts, Civil Liberties and the Administration of Justice Hearings*, 92d Cong. (1972) (statement of Jack Valenti), reprinted in 15 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 727 (George S. Grossman ed., 1976).

Broadcasters associated themselves with the creation of programming content and linked cable to the destruction of incentives for creation. The incumbents argued that the creation of programming rested on a delicate balance of incentives: broadcasters paid for the creation of the programming content and received local advertising revenue in return, serving the public interest by creating new works. Cable operators, on the other hand, did not create new works and therefore competed unfairly.

But if cable simply carried broadcast signals, how did it endanger broadcasting or the creation of new works? The broadcasters' arguments relied on the concept of audience fragmentation.¹⁵⁴ They argued that the cable operators' practice of importing signals from "foreign" markets (i.e., from Memphis to St. Louis) would fragment the viewing audiences between local stations and the foreign imports.¹⁵⁵ Imports would destroy advertising revenue because St. Louis advertisers, faced with an audience fragmented between stations of both cities, would pay less. Meanwhile, since local advertisers in Memphis had no interest in reaching buyers in St. Louis audiences, the result was a net loss in the amount broadcasters could charge for advertising.¹⁵⁶ Broadcasters charged that the fragmentation problem would destroy the economic viability of free television.

The broadcast industry advanced concerns for "localism" in addition to those regarding audience fragmentation.¹⁵⁷ The FCC in 1952 declared localism a goal of national broadcasting policy: broadcast should "provide each community with at least one television broadcast station."¹⁵⁸ The idea was that the public interest was served not only by the programming of the "big three" networks, but also by local broadcast stations that could provide content on matters of local importance.¹⁵⁹ Cable operators, by importing signals, were a particularly serious threat to the viability of local broadcasters in small markets.

Finally, even if cable did offer desirable diversity in programming, broadcasters argued that the goal of diversity was better achieved through more broadcast stations in every community, not the import

154. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 160 n.4 (detailing concerns regarding fragmentation in the San Diego market).

155. See *id.*

156. See *id.*

157. Localism as a concept is discussed in Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 904 (1998).

158. See Report and Order, 17 Fed. Reg. 3912 (1952).

159. See *id.*

and export of signals around the country.¹⁶⁰ In particular, broadcasters promoted developing new ultra-high frequency (UHF) stations as the preferred means for achieving programming diversity.¹⁶¹

In retrospect, the weakness of these arguments is apparent. Cable was indeed a threat to broadcasting because it was a better means of disseminating television. Yet it did not follow that cable was also a threat to programming, because it could (and did) ultimately develop an interest in the availability of new works. In particular, cable, as most now recognize, was the savior of UHF broadcasting because it improved the weak signal strength of UHF stations.¹⁶² In retrospect, the key would be to make cable a stakeholder — part of the compensation system for newly created works — without giving broadcast a tool to destroy its rival. This, ultimately, was the role that the copyright liability scheme would play.

b. Controlling the challenger. Faced with the competitive threat of cable, in the 1960s the broadcast industry and its allies¹⁶³ exploited all available regulatory means to control the growth of cable. The industry pursued three separate legal strategies: common-law misappropriation arguments, copyright infringement litigation, and a kind of “pseudo-copyright” through FCC regulation.

The TV broadcast industry turned first to the common law in an effort to gain property rights in its broadcast signals. Beginning in the late 1950s, the broadcasters asked the courts to find the behavior of cable companies a violation of common-law misappropriation under *International News Service v. Associated Press* and other common-law theories.¹⁶⁴ The argument in these lawsuits was simple: cable operators are stealing our product (the signal) without providing compensation, are therefore competing unfairly, and should be stopped. In *International News Service*, this basic theory had persuaded the Supreme Court to prevent one wire service from stealing news from

160. These arguments were reflected in the 1958 “Cox Report” on cable television. See Kenneth Cox, *The Problem of Television Service for Smaller Communities. Staff Report to the Senate Committee on Interstate and Foreign Commerce*, 26 Dec. 1958.

161. *See id.*

162. See Joel Rosenbloom, *The “Vast Wasteland” in Retrospect*, 55 *FED. COMM. L.J.* 571, 575 (2003) (citing BRUCE M. OWEN & STEVEN S. WILDMAN, *VIDEO ECONOMICS* 214-15 (1992)).

163. An example of an ally is the manufacturers of television antennas, organized as the Television Accessory Manufacturers’ Institute (“TAME”), who obviously had much to lose from competition with cable. See DON R. LE DUC, *CABLE TELEVISION AND THE FCC* 142-143 (1972).

164. 248 U.S. 215 (1918). *Int’l News Serv.* held that news wires have a quasi-property right in hot news. *See id.* at 245-46. The broadcasters also argued for tortious interference with contract, see *Associated Press v. Int’l News Serv.*, 240 F. 983, 995 (S.D.N.Y. 1917), but the misappropriation theory received the most attention in the court of appeals. *See Associated Press v. Int’l News Serv.*, 245 F. 244, 252 (2d Cir. 1917).

another, creating a pseudo-property interest in hot news.¹⁶⁵ Such a right would have served broadcasting's interests perfectly.

But these efforts failed. In closely watched litigation, the Ninth Circuit held that the broadcasters' remedy, if any, must lie in copyright.¹⁶⁶ Pointing out that the broadcasters sought "what are in essence copyright interests," the court found the state grounds for protecting broadcasters' rights federally preempted.¹⁶⁷ The case was decided on the authority of two recently decided intellectual property preemption cases: *Sears, Roebuck & Co. v. Stiffel Co.*¹⁶⁸ and *Compco Corporation v. Day-Brite Lighting, Inc.*¹⁶⁹ The court recognized that the common law right threatened the "primary right of public access to all in the public domain . . ." ¹⁷⁰ It reasoned that the creation of "a new protectible interest . . . [would] 'interfere with the federal policy . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.'" ¹⁷¹

On the other hand, the FCC was seemingly immune to such concerns. With the FCC's regulation of cable began a tradition of using the FCC to achieve regulatory outcomes that had been rejected by Congress or the copyright courts (and vice versa). Bit by bit, urged on by broadcasters, the FCC created a regime of pseudo-property rights and other rules. For a time, this gave the broadcast industry the means to control the development of the cable industry.¹⁷²

While initially hesitant,¹⁷³ the FCC began asserting jurisdiction in 1962.¹⁷⁴ By 1966, in its Second Report and Order,¹⁷⁵ the FCC had come

165. See *Int'l News Serv.*, 248 U.S. at 245-46.

166. *Cable Vision, Inc. v. KUTV Inc.*, 335 F.2d 348, 350 (9th Cir. 1964).

167. *Id.*

168. 376 U.S. 225 (1964).

169. 376 U.S. 234 (1964).

170. 335 F.2d at 350.

171. *Id.* at 351 (quoting *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964)).

172. See *infra* notes 222-247. See also Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, LAW & CONTEMP. PROBS., Winter 1981, at 77, 81-91 (documenting FCC activity constraining the growth of cable).

173. See *Frontier Broad. Co.*, 24 F.C.C. 251 (1958) (declining to exercise jurisdiction over cable on the ground that it was not a common carrier), *reconsideration denied*, 26 F.C.C. 403, 428 (1959).

174. The FCC assumed jurisdiction over microwave service transmitting distant TV signals to cable television in 1962, requiring cable systems to carry local broadcast signals as a condition of a microwave license to rural cable systems. See *Carter Mtn. Transmission*, 32 F.C.C. 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.) (1963), *cert. denied*, 375 U.S. 951 (1963).

175. See Amendment of Subpart L, Part 91, to Adopt Rules & Regulations to Govern the Grant of Authorizations in the Bus. Radio Serv. for Microwave Stations to Relay Television Signals to Cmty. Antenna Sys., Second Report and Order, 2 F.C.C.2d 725 (1966) [hereinafter Second Report and Order].

to agree with the broadcasters' substantive arguments and to associate harm with cable's existence.¹⁷⁶ By 1966, broadcasters had persuaded the FCC to enact a full regime of cable regulation that effectively conferred property rights upon broadcasters' asserted interests. The FCC rules barred duplication of local broadcasting (non-duplication rules),¹⁷⁷ forced cable systems to carry local signals (must-carry rules),¹⁷⁸ and barred cable operators from importing signals into any of the top 100 television markets unless the cable operator could obtain a waiver by obtaining the consent of local broadcast stations.¹⁷⁹ These "unbelievable"¹⁸⁰ rules, articulated by the FCC as a defense of localism, provided the broadcast industry with effective governmental protection from its nascent cable rival. They were the high-water mark of late 1960s FCC interventionism, aptly characterized as the Commission's own Vietnam.

In retrospect, the experiment with the waiver regime was something of a dry run for a full copyright regime. The results were not promising. A 1976 study found that during the period from 1968 to 1972, broadcasters agreed to a waiver allowing import in only one instance.¹⁸¹ While it may be that the regime was not given enough time to work, the more likely explanation is that the broadcast industry tried to starve its rival.¹⁸² It hints at some of the dangers of copyright as between rival disseminators, particular in early stages.

Broadcasters' third line of attack was a copyright litigation campaign. In 1968, the inevitable question of cable's copyright liability reached the Supreme Court in *Fortnightly Corp. v. United Artists Television, Inc.*¹⁸³ The case was factually simple. A West Virginia cable operator had retransmitted various broadcasted programs to its customers. The broadcast industry, through copyright owners, argued that the cable industry's retransmission amounted to an unauthorized public performance under the Copyright Act.¹⁸⁴

176. See *id.* at 774-78 (attempting to limit growth of cable).

177. See *id.* at 746.

178. See *id.*

179. See *id.* at 782.

180. Fred H. Cate, *The Future of Communications Policy Making*, 3 WM. & MARY BILL RTS. J. 1, 3 (1994).

181. See Michael Botein, *The New Copyright Act and Cable Television — A Signal of Change*, 24 BULL. COPYRIGHT SOC'Y U.S.A. 1, 4 (1976) ("[C]able operators somehow never were able to get consent.").

182. Niels B. Schaumann, Note, *Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption*, 51 FORDHAM L. REV. 637, 648 n.105 (1982) (speculating as to the reasons for the failure).

183. 392 U.S. 390 (1968).

184. See *id.* at 395.

But the Court disagreed, ruling that cable television was the functional equivalent of a more powerful antenna and that it was no more of a performer than an antenna manufacturer would be.¹⁸⁵ As in *White-Smith*, not all of the Court's reasoning was apparent in the decision. The court held that the cable operators were part of the audience for broadcast, and hence were not "performing" the work.¹⁸⁶ Yet it was clear that the cable operators were making money using copyrighted content — what had happened to the *Herbert* principle? What about Justice Holmes' point that "the purpose of employing it is profit, and that is enough"? Moreover, in 1931 the Court had decided a factually similar radio case in the opposite manner, holding that a hotel that rebroadcast radio stations into private rooms without permission was infringing copyright.¹⁸⁷ Something else was clearly afoot. Did the Court actually believe that its decision served the interests of copyright holders? Was the Court deferring to the FCC, or practicing its own communications policy?

We can only get our clues from the dissent.¹⁸⁸ Justice Fortas presented the policy considerations squarely, and in the language of communications policy, not copyright law: "it is darkly predicted that the imposition of full liability upon all CATV operations could result in the demise of this new, important instrument of mass communications"¹⁸⁹ "On the other hand," Justice Fortas noted, "it is foreseen that a decision to the effect that CATV systems never infringe the copyrights of the programs they carry would permit such systems to overpower local broadcasting stations"¹⁹⁰ The case, as he saw it, was almost pure communications policy, pitting the interests of a new telecommunications medium against a national policy of localism. Fortas believed the Court should act to "do as little damage as possible to traditional copyright principles and to business relationships," but also favored a legislative solution to "relieve[] the embarrassment which [the Court] and the interested parties face."¹⁹¹

The seeds of a future copyright settlement are evident from the *Fortnightly* litigation. Solicitor General Erwin Griswold suggested in his amicus brief on the merits that the Supreme Court could

185. *See id.* at 399.

186. *See id.* 400-01.

187. *See* *Buck v. Jewell LaSalle Realty Co.*, 283 U.S. 191, 198-99 (1931) (holding that playing copyrighted musical compositions broadcast from radio station via hotel loudspeakers is infringing performance).

188. 392 U.S. at 402-8 (Fortas, J., dissenting).

189. *Id.* at 403 (Fortas, J., dissenting). Justice Fortas would have found cable operators liable under the authority of *Buck v. Jewell-LaSalle Realty Corp.*, 283 U.S. 191 (1931).

190. *Id.* at 403.

191. *Id.* at 404.

reasonably impose a copyright settlement in its decision.¹⁹² He asked the Court to find cable broadcasters liable, but to imply a license in areas where broadcast signals were weak. The Solicitor General was, in effect, inviting the Supreme Court to write communications regulation into its interpretation of the copyright statute. While both majority and dissent declined the invitation to settle the dispute in this manner, it foreshadowed a copyright settlement.

Where the Court would not go, the FCC would. In the aftermath of *Fortnightly*, the FCC proposed granting broadcasters rights even more similar to copyright than the existing regime did, as if to compensate for their loss. In 1968 the FCC proposed the introduction of importation consent.¹⁹³ As the name suggests, this rule would require cable operators to obtain the consent of the originating broadcaster before importing any program into a top 100 market.¹⁹⁴ But Congress was more interested in a copyright solution, and the proposal was never enacted.¹⁹⁵

c. Settlement & copyright. In 1970, it appeared that the predicted rise of cable technology was slowed, if not frozen. A law review article appearing that year declared that “[a]lthough cable television offers the potential of greatly increased television diversity, its possibilities have been left largely unrealized.”¹⁹⁶ While cable had grown to reach about 6% of households, with approximately 4.5 million subscribers,¹⁹⁷ its challenge to broadcast was halted at the urban border. As economists Stanley Besen and Robert Crandall explained matters, “[c]able entered the 1970s as a small business relegated principally to rural areas and small communities and held hostage by television broadcasters to the [FCC’s] hope for the development of UHF.”¹⁹⁸

By the end of the decade, however, cable had been released from its figurative prison. Through a decade-long process of compromise, negotiation, FCC rulemaking and congressional legislation, a truce of sorts was reached. Most of the FCC’s pseudo-property rights idea and other restrictions were abandoned¹⁹⁹ and what emerged was a system

192. *See id.* at 401 n.32.

193. *See* Notice of Proposed Rulemaking and Notice of Inquiry, 15 F.C.C.2d 417, 432 (1968).

194. *See id.* at 459.

195. *In re* Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115, 115-17 (1971) (letter from the FCC to Senate Communications Subcommittee).

196. Leonard Chazen & Leonard Ross, *Federal Regulation of Cable Television: The Visible Hand*, 83 HARV. L. REV. 1820, 1820 (1970).

197. Television Digest, 51 TELEVISION & CABLE FACTBOOK 1, 1560 (1983).

198. Besen & Crandall, *supra* note 172, at 93.

199. That they were abandoned did not prevent their subsequent reintroduction. The Federal Communications Commission in the 1980s and Congress in 1992 reintroduced various forms of protection for the broadcast industry. *See, e.g.*, Cable Television Consumer

centered on a copyright liability regime.²⁰⁰ While by no means an aesthetic exercise, that period's history illustrates the role the copyright regime played in one of the most bitter technological succession wars of the century.

By 1970, broadcasters had successfully convinced the FCC to impose serious limits on the growth of cable.²⁰¹ So why would broadcasters even want to turn to a copyright compromise, given that it might jeopardize a favorable status quo?

Primarily, a copyright solution appeared more durable. The restrictive regime created by the FCC was in a state of constant flux and was easier to change than copyright legislation. New commissioners at the FCC could (and ultimately did) agree with the positions of cable television, jeopardizing broadcasters' favorable position. In particular, mounting evidence suggested that the danger of cable systems to television (as opposed to broadcasters) was exaggerated.²⁰² This suggests that broadcasters may have felt pressure to convert their temporary regulatory advantage into a more lasting source of revenue.

For broadcasters, this problem was compounded by the growing power of the cable industry. Despite the limitations on growth in urban areas, cable continued to grow in rural and small markets, trebling in size between 1966 and 1970.²⁰³ The growing power of the cable industry suggested that broadcasters' ability to influence the regulatory and legislative process might erode over time, making a more durable compromise attractive.

Finally, in the late 1960s, many broadcasters began investing in cable systems. By 1966, broadcasters had some stake in 30 percent of cable companies.²⁰⁴ With interests on both sides, broadcasters wanted a solution that would allow cable to grow in exchange for payoffs to the broadcasting industry, a purpose better served by a copyright royalty system than FCC regulations.

Yet none of this meant that broadcasters were interested in an immediate copyright settlement. They still had a chance of achieving

Protection and Competition Act of 1992, 47 U.S.C.A. § 521 (2004) (enacting retransmission consent); Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C.R. 5299, 5300 (1988) (report and order) (syndication rules)

200. This regime was the compulsory licensing system of § 111 of the 1976 Copyright Act. 17 U.S.C. § 111 (2000).

201. Primarily through the provisions in the Second Report and Order, *supra* note 175.

202. See Besen & Crandall, *supra* note 172, at 97.

203. Viewership rose from about 1.5 million viewers to 4.5 million. See Television Digest, *supra* note 197.

204. See PATRICK R. PARSONS & ROBERT M. FRIEDEN, THE CABLE AND SATELLITE TELEVISION INDUSTRIES 47 (1998).

total victory: namely, a Supreme Court decision finding cable retransmission illegal without permission. It was not until the Supreme Court played its final hand in 1974²⁰⁵ that settlement became imminent.

An early blueprint of the cable-broadcast settlement was the "Compromise Agreement of 1971,"²⁰⁶ representing an agreement between major cable, broadcasting, and programming interests. The basic outlines of the compromise were as follows: cable, for the first time, would agree to some system of copyright liability, in exchange for a general loosening of FCC restrictions on entry into urban markets and other concessions to public service.²⁰⁷ While the consensus did not last, in the end the agreement was the starting point for a near-total deregulation of cable systems in exchange for copyright liability.

The compromise, brokered in part by new FCC chairman Dean Baruch, began to be implemented on the regulatory side with new FCC rules that allowed cable systems limited importation rights in the top 100 markets.²⁰⁸ The 1972 rules, described as "among the most complex rules and regulations ever devised by the mind of man," began a gradual process of FCC deregulation of the cable industry.²⁰⁹

The copyright side of the deal took four more years to settle through the legislative process. While the major industry associations remained committed to the agreement, many members of the cable industry sought to defect. For example, representatives of Teleprompter Corp., one of the nation's largest cable systems, appeared before Congress to demand continued immunity from copyright, claiming that the consensus agreement was "pushed down

205. See *infra* text accompanying note 234.

206. The consensus agreement is described in *U.S. Cong. House Comm. on the Judiciary Subcomm. on Courts, Civil Liberties and the Administration of Justice Hearings*, 92d Cong. (1972), in 14 OMNIBUS COPYRIGHT REVISION LEGIS. HIST. 502 (George S. Grossman ed., 1976) (statement of Rex A. Bradley).

207. See Cable Television Report and Order, 36 F.C.C.2d 143 (1972). As described by the chairman of the National Cable and Telecommunications Association, "in 1971, in an effort to break the regulatory impasse over cable, the Office of Telecommunications Policy and the FCC fashioned the so called 'Consensus Agreement' under which the parties — broadcasters, copyright owners, and cable — affirmed support for copyright legislation and approved the outline for new FCC cable regulations." *U.S. Cong. House Comm. on the Judiciary Subcomm. on Courts, Civil Liberties and the Admin. of Justice Hearings (Part 1)*, *supra* note 204, at 502..

208. See Cable Television Report and Order, 36 F.C.C.2d at 241. The new rules allowed cable systems to import sufficient signals to offer 3 network plus 3 independent signals in markets 1-50, 3 network plus 2 independents in markets 51-100, and 3 networks plus 1 independent outside the top 100 markets. See *id.* The rules also required a minimum 20 channel capacity. See Cable Television Report and Order, 36 F.C.C.2d at paras. 57-77.

209. See generally Besen & Crandall, *supra* note 172, at 93-103.

the throat of the cable television industry.”²¹⁰ Teleprompter and other cable operators returned to the position that cable systems were nothing but another form of antenna: “[W]hy should there be any liability when the viewer avails himself of the antenna tower erected by the cable television station?”²¹¹

On the other side, broadcasters made a final effort to obtain full copyright liability with the *Teleprompter* litigation.²¹² *Teleprompter*, unlike *Fortnightly*, was a signal importation case. Columbia Broadcasting Systems could point to Teleprompter’s imports, some from distances as far as 450 miles,²¹³ and make the audience fragmentation argument described above. Yet the Supreme Court proved uninterested in undoing the line drawn in the *Fortnightly* decision. “Broadcasters perform. Viewers [including cable] do not perform.”²¹⁴ With that, broadcasters exhausted their last chance at obtaining full victory — total copyright liability.

Congress enacted the copyright side of the compromise in 1976. The form was a compulsory licensing law, codified in section 111 of the 1976 Act.²¹⁵ As a settlement, on the one hand it allowed the cable systems to continue their basic means of doing business: retransmission of broadcast programs. Yet in exchange, cable systems agreed to pay royalties on imported signals,²¹⁶ not to alter the content or advertising of the signals it retransmitted,²¹⁷ and to retransmit programs simultaneously with the broadcast.²¹⁸ In short, the licensing scheme mapped the existing business practices of cable companies, and added transfer payments to it. The extent of these payments was to be determined by a new statutory creation, the Copyright Royalty Tribunal.²¹⁹

210. *U.S. Cong. House Comm. on the Judiciary Subcomm. on Courts, Civil Liberties and the Administration of Justice Hearings (Part 1)*, 94th Cong. (1975), in 14 OMNIBUS COPYRIGHT REVISION LEGIS. HIST. 671 (George S. Grossman ed., 1977) (statement of William J. Brennan).

211. *U.S. Cong. House Comm. on the Judiciary Subcomm. on Courts, Civil Liberties and the Administration of Justice Hearings (Part 1)*, *supra* note 210, at 667 (statement of William J. Brennan).

212. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

213. *Id.* at 400.

214. *Id.* at 403 (quoting *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 398 (1968)).

215. 17 U.S.C. § 111(c)(1) (2000).

216. *Id.*

217. 17 U.S.C. § 111(c)(3).

218. 17 U.S.C. § 111(c)(1), (f) (2000).

219. 17 U.S.C. §§ 801-810 (1976). The Tribunal was abolished in 1993 and its functions transferred to the Copyright Office and the Librarian of Congress. *See* Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (1993) (codified at 17 U.S.C. §§ 801-03 (2000)).

In the last stage of the 1970s settlement, the FCC repealed most of the remaining regulation of the cable industry. By January 1, 1978, as the copyright system came into force, the core remaining limitations of the old regime were the “distant-signal” limitations, which limited the import of programming into large (top 100) television markets,²²⁰ and the syndicated exclusivity rules, which allowed local stations in urban areas to force cable to black out programs for which they had purchased exclusive exhibition rights.²²¹ Together, these two rules continued to limit cable’s exploitation of urban markets. But in 1980, the FCC repealed these last regulations.²²² It concluded that the absence of evidence of economic harm and the new copyright scheme had eliminated any need for its copyright “surrogates.”²²³ With this decision, the replacement of prohibitive FCC regulations with copyright liability was essentially complete.²²⁴

Freed from regulatory limits, cable subscription exploded, quadrupling from 1975 to 1985. The 3,506 systems serving nearly ten million subscribers became, by 1985, 6,600 systems serving nearly forty million Americans.²²⁵ It had taken thirty years and much regulatory warfare, but cable completed its succession of broadcast and assumed its place as the dominant technology of television.

d. Epilogue. As telecommunications historians know, the 1970s did not entirely end the regulatory battles between cable and broadcasting. The Copyright Royalty Tribunal, for example, attracted enormous litigation in its setting of fees.²²⁶ There emerged in the 1980s a movement (backed by broadcasters) to tame the power of cable, culminating in Congress reinstating some of the regulations that the FCC had dropped in the late 1970s. For example, in 1992 Congress adopted the retransmission consent rule first proposed by the FCC in

220. FCC Cable Television Service, 47 C.F.R. §§ 76.59(b)-(e), 76.61(b)-(f), 76.63 (1980).

221. 47 C.F.R. §§ 76.151-61.

222. See Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom*, *Malrite T.V. of N.Y. v. FCC*, 652 F.2d 1140 (2d Cir. 1981).

223. Inquiry into the Economic Relationship between Television Broadcasting & Cable Television, 71 F.C.C.2d 632 (1979).

224. Only the network non-duplication and must-carry rules remained in place. See Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom*, *Malrite T.V. of N.Y. v. FCC*, 652 F.2d 1140 (2d Cir. 1981).

225. See PARSONS & FRIEDEN, *supra* note 204, at 57-60 (detailing the cable “explosion” of the 1980s); see also Sharon Strover, United States: Cable Television, at <http://www.museum.tv/archives/etv/U/htmlU/unitedstatesc/unitedstatesc.htm> (detailing facts of cable’s growth).

226. See Register of Copyright, Compulsory Licensing in the Television Industry (1990).

1968, giving broadcasters, for the first time, a clear property right in their signals.²²⁷

Yet at this stage these conflicts were between mature industries, not incumbent and challenger. The example of the 1992 retransmission consent rules shows the difference. Had the courts granted broadcasters such rights in 1961 (as common-law unfair competition rights), the rights would have put cable development in the control of broadcasters.²²⁸ In 1992, things were much different. Congress described the cable industry not as a pirate, but as “a dominant nationwide video medium.”²²⁹ And when confronted with demands for further payment, the cable networks asserted their power and struck a not unfavorable deal.²³⁰ Cable’s stance made it clear that broadcast was now dependent on cable, and not vice versa. Their roles had reversed.

E. *The Classic Communications Regime Arrives*

The birth of the recording industry, radio broadcast, and cable created a pattern for setting copyright’s communications policy. The classic regime, as I have described its operation from 1900 to 1976, is centered on the model of access fees, or compulsory licenses. New technologies capable of delivering copyrighted content will be granted access to the copyrighted works essential to their business, but for a price. This basic approach was followed in several subsequent matters, including satellite television in the 1980s²³¹ and radio webcasting in the 1990s.²³² The classic regime is therefore something of a default for

227. See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2)-(5), 106 Stat. 1460, 1460-61 (detailing the increase in cable viewership).

228. For a description of efforts to obtain a common law right in signal, see *supra* text accompanying notes 163-170.

229. Cable Television Consumer Protection and Competition Act § 2(a)(3).

230. See Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination of the Retransmission Consent Provision (47 U.S.C. § 325(b)) of the 1992 Cable Act*, 49 FED. COMM. L.J. 99, 144-49 (1996) (noting that instead of cash, most broadcasters exchanged their retransmission consent for cable’s agreement to carry additional channels); Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L.J. 1579, 1658-59 (2003) (same).

231. The Satellite Home Viewer Act of 1988 created a compulsory license for satellite broadcasting similar in structure to the cable compulsory license. Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (codified as amended in scattered sections of 17 U.S.C.).

232. Webcasters pay royalties for sound recordings according to a complicated scheme first made law in the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995). For an overview of the political process that led to the compulsory license, see Kimberly L. Craft, *The Webcasting Music Revolution Is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1 (2001).

industries that do not fit the model of exemptions, which are the “new” copyright communications regime described in Part III.

For copyright theorists, the historical evolution of the classic regime holds important lessons. However pure and true copyright's goals of promoting authorship may be, the law will inevitably be used by communications companies as an instrument of competitive advantage. Copyright cannot help creating the baseline for competition among disseminators. It creates communications policy not by design but by necessity.

II. POLICY

I have suggested that copyright has evolved to regulate competition among rivals, that it in effect comprises independent authorship and communications regimes, and that within the communications regime has evolved a standing institutional practice of using copyright to settle near-inevitable conflicts among rival disseminators. These are descriptive claims. The second part addresses the obvious policy questions that arise from study of copyright's communications regime.

A. *Bottlenecks and Vertical Foreclosure*

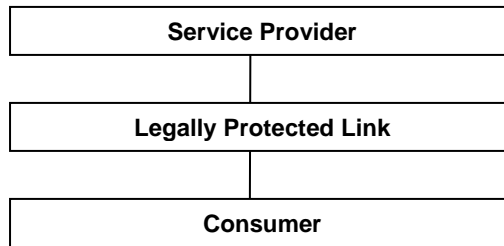
The economic analysis of authorship revolves around the nonrivalrous nature of information goods and the problems thereby created. Copyright's role in communications policy, conversely, is more readily analyzed as the “bottleneck” problem deriving from copyright's grant of control over an asset essential to market entry (namely, copyrighted works), and the potential created for vertical foreclosure of rivals. In this effort, it should be noted at the outset that the goal of this section is to outline the argument as it appears in telecommunications policy, and not conclusively defend the premise that vertical foreclosure is problematic.²³³

To understand the model we must consider the conditions of competition that face rival disseminators regulated by copyright.

233. That debate is addressed by a rich literature on vertical foreclosure. In general, see Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515 (1985); Janusz A. Ordover et al., *Equilibrium Vertical Foreclosure*, 80 AM. ECON. REV. 127 (1990); and Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345 (1988). With regard to telecommunications policy in particular, see Paul L. Joskow & Roger G. Noll, *The Bell Doctrine: Applications In Telecommunications, Electricity, and Other Network Industries*, 51 STAN. L. REV. 1249 (1999), and Alexander Larson et al., *Competitive Access Issues and Telecommunications Regulatory Policy*, 20 J. CONTEMP. L. 419 (1994). For an excellent overview of the economic arguments regarding vertical integration and their relevance for communications policy, see Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. L. & TECH. 85 (2003).

Consider a disseminator to be anyone who owns a legally protected means of communication with a customer:

FIGURE 3.1: COMMUNICATIONS MODEL



In the field of communications, the legally protected link pictured here can take many forms. It can be physical, protected by the rules of personal property: copper loops between the telephone company and the consumer, the cable infrastructure, and so on. But the link can also be a legal entitlement that does not reference any particular physical infrastructure, such as the allocation of a certain spectrum frequency to a broadcaster to reach its customers.²³⁴ From this arises a central and recurring policy question: To what degree should the legal protection afforded that bottleneck allow the owner to exploit his ownership to maximum advantage?

Two potential abuses of bottleneck power are of particular interest and recur in the study of communications law. The first is the simple problem of monopoly price-setting.²³⁵ The incumbent should be expected to charge a supra-competitive price if its ownership of the protected link makes it the only entity in a position to provide the service in question. In telecommunications law this problem has traditionally led to extensive government rate-setting, such as the setting of local telephone rates.²³⁶

The second is the problem of vertical foreclosure: the use of the protected link to prevent a competing disseminator, or challenger, who depends on the link, from reaching the customer in question. The foreclosure is “vertical” because the incumbent uses its control over

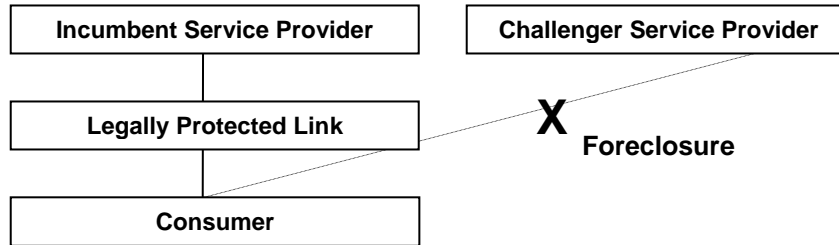
234. See 47 U.S.C. § 307 (2000) (containing procedures for federal grants of licenses to broadcast spectrum).

235. INGO VOGELSANG & BRIDGER M. MITCHELL, TELECOMMUNICATIONS COMPETITION: THE LAST TEN MILES 55-58 (1997) (discussing the effect of bottlenecks on price-setting policy).

236. See 2 HARVEY ZUCKMAN ET AL., MODERN COMMUNICATION LAW § 9.2 (1999) (describing various aspects of rate setting for local carriers).

an independent input at another level (copyrighted materials) to affect competition at the level of dissemination.²³⁷

FIGURE 3.2: VERTICAL FORECLOSURE VIA BOTTLENECK



An illustration of the vertical foreclosure problem comes from the example of long distance telephone service. If the incumbent (Bell) owns the local telephone lines, it can potentially foreclose a long-distance service provider (MCI) from reaching any customers, favoring Bell's own long distance service. Hence a critical question for telecommunications law has always been determining the extent to which the owner of the local phone service should be required to provide access to local lines to vendors of long-distance telephone service.²³⁸

Both problems stemming from the bottleneck are central to most contemporary communications policy: wireline regulation, broadband regulation and spectrum policy are three current examples. In each case the basic problem is the same. On the one hand, allowing the incumbent too much power to prevent challengers from reaching customers retards both price competition and innovation in new communications technologies. Yet granting too little legal protection to the original link might erase the incentives to build the original link and its technological successors.

With some simplifying assumptions, it is not hard to see how copyright law can be used as a potential tool for monopoly price-setting or vertical foreclosure, raising the same questions faced in communications.²³⁹ The vertical foreclosure problem is evident from the story of the broadcast and cable industries in the 1960s.²⁴⁰ Each possessed its own technology for reaching consumers, yet each needed

237. Whether copyrighted materials are described as upstream or downstream is largely a semantic issue. The foreclosure is vertical in either case.

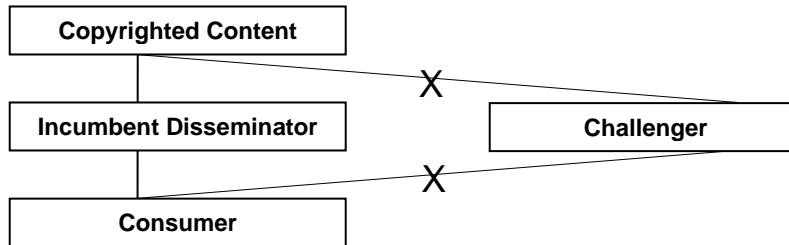
238. See 2 HARVEY ZUCKMAN ET AL., MODERN COMMUNICATION LAW § 9.1 (1999) (describing the various access issues addressed by the Telecommunications Act of 1996).

239. Cf. Picker, *supra* note 22.

240. See *supra* Part I.D.3.b.

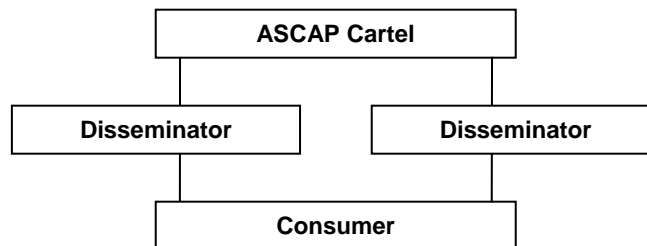
access to copyrighted works in order to provide a service that customers would pay for. The copyrighted works were the bottleneck necessary to compete in the industry. Therefore, if the broadcast industry (the incumbent) could have enforced the copyrights in television content, it could have prevented the cable industry from reaching television customers. It could have achieved similar results to what the telephone industry might achieve by controlling local phone lines.

FIGURE 3.3: COPYRIGHT USED FOR VERTICAL FORECLOSURE



The vertical foreclosure model, however, only describes one class of communication problems that arises in the copyright context. The problems of monopoly price-setting can also occur. This has happened in situations where authors maintain independent control of their copyrights, as in the ASCAP-radio dispute described above.²⁴¹ The communications model for the ASCAP problem is a horizontal cartel among the suppliers of copyrighted works (authors), leading to monopoly price-setting. The necessity of having access to content and the legal protection of copyright creates the possibility of an ASCAP cartel in the first place.

FIGURE 3.4: THE DIFFERENCE THAT AUTHORIAL CONTROL MAKES



241. See *supra* Part I.D.2.

There is an important difference between the problems created by the horizontal (ASCAP) and vertical (broadcast) competition problems. While a horizontal cartel among authors may be expected to raise consumer prices, it will not necessarily block market entry or technological innovation. For economic theories that take innovation, as opposed to price competition, as the primary engine of economic growth,²⁴² the vertical foreclosure problem is more serious.

All of this goes to show that copyright law's protections can and do create the same competition problems regularly encountered in telecommunications law. None of this is to suggest that the best way of dealing with these problems is self-evident. Sizable disagreement exists over what, if any, government role is appropriate in the face of potential vertical foreclosure or monopoly price-setting.²⁴³ Yet over the years positions have hardened and it is easier to understand the choices available. What follows describes the policy alternatives that have emerged.

B. *National Communications Policy*

To understand the choices faced in copyright we must turn to the subject of national communications policy. There have long existed two basic models of the optimal communications policy: the "stewardship" model and "competitive" (or "open") model.²⁴⁴ Both models have a pedigree in national communications policy, though the latter is dominant today.

1. *Stewardship Communications Policy*

A steward-based communications policy²⁴⁵ is premised on the grant, to private parties, of clear and uncontested property entitlements in future media and technologies. The rationale for such grants is the premise that the private owner of such a grant will, in the interest of profit maximization, efficiently steward the growth of an

242. See, e.g., JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 81-86 (3d ed. 1950).

243. For a useful normative overview of when governmental intervention may be justified to prevent vertical integration, see Farrell & Weiser, *supra* note 233.

244. For another description of these two models in the internet context, see Philip J. Weiser, *The Internet, Innovation, and Intellectual Property Policy*, 103 COLUM. L. REV. 534, 568-83 (2003).

245. Advocates will sometimes describe this as a "deregulatory" communications policy... This language is difficult to support when it is a copyright system, a form of regulation, that is conferring the right to block or license market entry. See Maureen Ryan, *Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World*, 79 ORE. L. REV. 647, 694-95 (2000).

efficient communications system and the development of new technologies.²⁴⁶

The stewardship model has historically enjoyed many arguments in its favor, including support from economist Joseph Schumpeter.²⁴⁷ Chief among them is the view that the dominant firm can be expected to internalize what would otherwise be externalities in a competitive scenario. For example, competitors may have incentives to free-ride on the research efforts of others, while a dominant incumbent has no such option. Similarly, a dominant incumbent may exercise quality control to prevent shoddy products from being used on its system.²⁴⁸

The problem of natural monopoly also drives the argument for a steward-based communications policy. Economists have argued that with economies of scale and scope characterizing the production of telecommunications services, monopoly is the likely outcome.²⁴⁹ If monopoly is inevitable in communications markets, a policy that directs the monopolist to secure innovation and act in the public interest may seem the only recourse.

Relatedly, a steward-based communications policy also avoids much arguably wasteful duplication. The dominant market player can avoid duplicative investments for the transmission of the same information to the same consumer (such as two sets of telephone lines, or two different printings of the same book). This is the argument for allowing communications infrastructures to take the form of natural monopolies. And pertaining to technological innovation, the dominant player can prevent duplicative races to reach the same invention, much like preventing multiple missions to pursue the same sunken treasure.²⁵⁰

As a model of innovation, the planned view shares much with the “prospect theory” of patent law, which holds that control centralized in a pioneer industry allows a more orderly process of follow-on innovation.²⁵¹ The costs of conflict, or “rent dissipation,” may be eliminated if broad, enforceable rights are granted to the pioneer

246. This stewardship model is similar to the “prospect theory” of patent protection. See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265 (1977).

247. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 100-06 (3d ed. 1950).

248. Cf. Douglas Lichtman, *Property Rights in Emerging Platform Technologies*, 29 J. LEGAL STUD. 615 (2000) (arguing that intellectual property law should encourage price coordination in emerging technology contexts).

249. See VOGELSANG & MITCHELL, *supra* note 235, at 51 (describing natural monopoly as one justification for telecommunications regulation).

250. Cf. POSNER, *supra* note 49, at 35-38 (examining rent dissipation theory by analyzing costs through the example of a hunt for sunken treasure).

251. See Kitch, *supra* note 246.

industry, creating a prospect that can be explored without fear of competition.

Finally, the stewardship model's greatest appeal for many is that it implies a much simpler (though not necessarily reduced) governmental role. The government need only assign and enforce property rights; it need not decide whether its grants of property rights are improperly blocking market entry. The incumbent industry does so itself.

In short, the vision of the stewardship model relies on a distrust of government in favor of the developmental wisdom of an incumbent communications industry. The model claims simplicity, efficiency and a limited role for the state.

2. "Competitive" Communications Policy

A "competitive" or "open" communications policy sacrifices the order, predictability and stability of a planned policy for greater allowance of market entry and (backers believe) faster technological development.²⁵²

Competitive communications policies are premised on the belief that technical innovation plays a central role in economic growth, and that technical change is best understood as an evolutionary process. These ideas also claim their origin in Joseph Schumpeter's work, but their roots lie in his conception that "creative destruction" is the source of capitalism's benefits, not mere price competition.²⁵³ Economists like Richard Nelson argue that technological change is by necessity an error-driven, evolutionary process.²⁵⁴ Markets select from a variety of competing approaches whose relative merits are otherwise difficult to assess in advance.²⁵⁵

This view leads to distrust of the stewardship model and dominant firm theories. If the most promising path of development is difficult to predict in advance, Nelsonites argue, it is unrealistic to expect a single company to take the optimal path of technological development, however well-intentioned it may be. This problem is compounded if any single party can be expected to have anything less than perfect decisionmaking skills resulting from, for example, a predisposition to

252. See Mark A. Lemley and Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 961 (2001).

253. See SCHUMPETER, *supra* note 247, at 81-86.

254. See, e.g., RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 14-21 (1982); John Ziman, *Evolutionary Models for Technological Change*, in TECHNOLOGICAL INNOVATION AS AN EVOLUTIONARY PROCESS 3 (John Ziman ed., 2000).

255. See NELSON & WINTER, *supra* note 254, at 15 ("[E]volutionary theory [recognizes] that there are stochastic [random] elements both in the determination of decisions and of decision outcomes.").

continue with current ways of doing business.²⁵⁶ Along similar lines, legal theorists argue that vesting control over improvement in a single figure creates an enormous risk of stagnancy deriving from the danger of an incumbent industry's disinterest in change.²⁵⁷

The competitive model usually suggests a more active governmental role, particularly in removing barriers to market entry. In this model the government is pictured (ideally) as something like a beneficent gardener, trying to preserve conditions for innovation while simultaneously preventing a dominant firm from choking new growth. If innovation does indeed occur the way Nelsonites believe, greater government involvement may be necessary to prevent industrial and technological stagnation.

3. *The Consensus Position*

Whatever the substantive merits of these two approaches to communications policy, as a descriptive matter, some version of the competitive model has dominated national communications policy since the mid-1980s.²⁵⁸ It is true that there remains much disagreement on how competition is best promoted and, in particular, how intrusive a role government should play. Yet the FCC and Congress now uniformly adhere to the model of competitive innovation.

Things were not always tipped in favor of the competitive model. The balance of twentieth century communications policy was driven, instead, by a stewardship model, a model most clearly apparent in the Bell System's stewardship of the national telephone system. The Bell Company is *the* definitive model of the regulated monopolist asked to implement the public policy aspirations of national communications policy.²⁵⁹ Yet from the late 1960s onward, the courts, the FCC and finally Congress began a slow migration to the now-dominant competitive communications model. Glen Robinson describes the thirty-year shift as "one of the stunning achievements of modern public policy, the transformation of a staid and stagnant industry into the most dynamic and rapidly growing industry in the modern

256. See NELSON & WINTER, *supra* note 254, at 72-95 (discussing the concept of organizational "skills").

257. See, e.g., Robert P. Merges and Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 890-94 (1990) (criticizing the stewardship model in the patent context). This is also an animating principle of Lawrence Lessig's work, particularly *The Future of Ideas*. See LESSIG, *supra* note 1.

258. See, e.g., GERALD W. BROCK, TELECOMMUNICATIONS POLICY FOR THE INFORMATION AGE (1994); Glen O. Robinson, *The Titanic Remembered: AT&T and the Changing World of Telecommunications*, 5 YALE J. ON REG. 517, 520-31 (1988) (recounting the history of telecommunications policy).

259. See Robinson, *supra* note 258, at 517 (describing the Bell System).

economy.”²⁶⁰ As he argues, it “did not come about through technology alone; it came about by rethinking notions about natural monopoly, [and] economies of scale and scope — concepts near and dear to the ancient regime.”²⁶¹

There are many legal milestones in the policy migration. The most notable and dramatic was the 1984 breakup of the AT&T monopoly by federal judge Harold Green.²⁶² But the clearest legislative manifestation of this policy shift is the 1996 Telecom Act,²⁶³ the central statute of communications law. As the FCC explains, the law was meant “to let any communications business compete in any market against any other.”²⁶⁴ While the Act is far too complicated to summarize, its most important and best-known change is the authorization of open competition in both local and long-distance telephone services.²⁶⁵ These changes are a sharp break from previous policies, which still adhered to the Bell model. And while assessments of the success of 1996 Act’s promotion of competition are mixed,²⁶⁶ its policy is clear.

Stated adherence to the competitive model of communications policy is now de rigeur for the FCC. Across every area of stated policy, the FCC states goals that could have been drafted by Richard Nelson. The competitive goal of the FCC is to “support the Nation’s economy by ensuring that there is a comprehensive and sound competitive framework for communications services . . . foster[ing] innovation and offer[ing] consumers meaningful choice in services.” In the contentious area of broadband, the FCC aims to “establish regulatory policies that promote competition, innovation, and investment in broadband service.” Or as Commission Chairman

260. Glen O. Robinson, *The “New” Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 304 (1996).

261. *Id.* (emphasis omitted).

262. The breakup of AT&T is recounted in detail in GERALD R. FAULHABER *TELECOMMUNICATIONS IN TURMOIL: TECHNOLOGY AND PUBLIC POLICY* (1988).

263. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered portions of 47 U.S.C.).

264. See Federal Communications Commission, *Telecommunications Act of 1996*, at <http://www.fcc.gov/telecom.html> (updated Mar. 29, 2004).

265. See 47 U.S.C. § 251 (2000).

266. The Act’s effort to create more local telephone competition is widely described as a “failure.” See, e.g., Reza Dibadj, *Competitive Debacle in Local Telephony: Is the 1996 Telecom Act to Blame?*, 81 WASH. U. L. 1, 2-6 (2003) (summarizing academic, judicial, and public critiques of the 1996 Telecom Act). However, it is credited by some for opening up the market for telecommunications services more generally. See, e.g., Corey Grice, *How the Telecom Act created a new breed of speed*, CNET News, at http://news.com.com/2009-1033_3-251796.html (Feb. 1, 2001) (last visited Sept. 30, 2004) (arguing that the 1996 Act set off the expansion and development of broadband internet access).

Michael Powell puts it, the FCC must do what is necessary to foster “competitive innovation.”²⁶⁷

Much of this, of course, is at a certain level of abstraction, and there is much debate over what policies will, in fact, facilitate competitive innovation in the communications industry. But in the areas of communications law outside of copyright law, the existence of a basic consensus is notable. The starting point for debate is the view that open communications competition drives innovation and economic growth. The question is what role copyright law plays in that vision.

C. Copyright’s Classic Communications Policy

How can copyright’s classic communications policy best be described in terms of the models described here? Copyright’s record is, of course, complicated and inconsistent. There are also too few examples to come to a definite conclusion. Yet it is notable that, when faced with the potential problem of vertical foreclosure — copyright creating bars to market entry by disseminators — copyright’s rules have often bent to prevent an incumbent from using copyright to control a technological challenger. Stated differently, the courts and Congress have in practice avoided a stewardship model of communications and delivered results closer to a competitive model of communications policy.

As the history explained above demonstrates, when faced with potential lockout, the copyright system avoided granting incumbent disseminators full control over a technologically advanced rival (the same also holds for cases not recounted above).²⁶⁸ Instead, both incumbent and challenger were forced to put their case to the government and to invest in efforts to steer policy in their favored direction.

Obviously things could have been different. With just a few decisions the Supreme Court could have easily steered the law toward the stewardship model, trusting the incumbent to direct the subsequent development of cable, the recording industry, or the photocopier. As Jane Ginsburg has argued, many of the pro-challenger Supreme Court decisions, from *White-Smith* to *Fortnightly*, can be impossible to understand without some idea that the Court

267. Michael K. Powell, Remarks at the Silicon Flatirons Symposium on “The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age” at the University of Colorado School of Law (Feb. 8, 2004).

268. The other major example is that of the photocopier, which was exempted from copyright protection in *Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345 (Ct. Cl. 1973), *aff’d*, 420 U.S. 376 (1975) (constituting an equally divided Supreme Court). For a wonderful account of the photocopier saga, see GOLDSTEIN, *supra* note 20.

feared that the incumbent wanted copyright for the wrong reasons.²⁶⁹ Similarly, the most common statutory form of settlement, the compulsory license, is a liability scheme that prevents market lockout while compensating the incumbent. Such a scheme, as discussed above, is inconsistent with a steward model of communications policy.

Even though the classic communications regime mainly reflected an open model of communications policy, it must be admitted that no self-conscious reasoning can be found to that effect in the caselaw or in other sources. The main communications cases, like *Teleprompter*, are almost entirely free of any policy-based explanations for the courts' decisions.

D. *Understanding the Critiques of the Classic Communications Regime*

With this framework of analysis in mind, we are in a better position to understand the criticism of what I have termed copyright's classic communications regime. The practice from 1900-1976 has never been terribly popular. Both contemporary and present copyright commentators have attacked its operation for a range of reasons — most of which, I argue, miss the point. While there are reasons to disfavor the competitive model of communications policy, it seems rare that critics of the process actually refer to them.

As early as 1903 the Copyright Office began to argue that a revised copyright statute should be flexible enough to deal with new technologies as they arose. The Office argued in its report that copyright “ought to be dealt with as a whole, and not by further merely partial or temporizing amendments.”²⁷⁰ It stated that the “acts now in force should be replaced by one consistent statute, of simple and direct phraseology.”²⁷¹ With greater force and effect in 1961, the Office argued for a copyright law that would be “broad enough to include not only those forms in which copyrightable works are now being produced, but also new forms which are invented or come into use later.”²⁷² These are very common arguments. Many copyright thinkers argue that the 1909 Act and other early acts were too clumsy,

269. See Ginsburg, *supra* note 20, at 1617 (“[W]hen copyright owners seek to eliminate a new kind of dissemination, and when courts do not deem that dissemination harmful to copyright owners, courts decline to find infringement, even though the legal and economic analyses that support those determinations often seem strained, not to say disingenuous.” (emphasis in original)).

270. See Thorvald Solberg, *Copyright Law Reform*, 35 YALE L. J. 48, 62 (1925) (reprinting Report on Copyright Legislation, Dec. 1, 1903).

271. *Id.*

272. Staff of the House Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 11 (Comm. Print 1961).

requiring amendment or difficult judicial interpretation for each new technology.

It is true that the pre-1976 Acts produced uncertainty as to the rights of a copyright owner. But such uncertainty can also advance a communications policy that favors new entry. A simpler law can nonetheless be a bad law; the value of clarity must be weighed against such larger concerns. It might be said that the problem with statutory ambiguity is that it has encouraged parties to invest in efforts to gain favorable government action. That is true, but it is also true that forcing parties to come to the government could have forced both sides to present information that may have led to better and earlier settlements.²⁷³

Some academics have criticized the classic model's tendency toward compulsory licensing on different economic grounds. Robert Merges has argued that enforcing property entitlements is more likely to promote the private bargaining necessary for creation of "collective rights organizations," such as the ASCAP.²⁷⁴ The value of collective rights organizations, according to Merges, is that they are better than compulsory licensing schemes for reducing the transaction costs of licensing a diverse mixture of copyrights. Merges argues that policymakers should in all cases "stay away from compulsory licensing for new media!"²⁷⁵

Merges, in collaboration with Richard Nelson, has criticized the stewardship model of innovation in the patent context²⁷⁶; his position with respect to copyright can be tested against his own arguments. Merges takes the purpose of compulsory licensing schemes to be the reduction of transaction costs — he does not account for the role a liability regime might play in market entry of new technologies. The earlier Merges teaches that intellectual property's "social costs should include its potential to reduce competition in the market for improvements" and "there are many instances when a firm that thought it had control over a broad technology rested on its laurels until jogged to action by an outside threat."²⁷⁷ If this is so with respect to patent holders, why don't the same considerations suggest scrutiny of copyright? In addition, Merges relies on the ASCAP as an alternative model to compulsory licensing, but the analogy is inapposite, for several reasons.

273. Cf. Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1036-72 (1995).

274. See Robert Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996).

275. See *id.* at 1300.

276. See Merges & Nelson, *supra* note 257.

277. *Id.* at 843, 872.

The ASCAP is a coalition of *authors*. As a model it is therefore no answer for the problems created when rival *disseminators* use copyright against another rival. As long as the disseminator in a given industry has effective control or actual ownership of copyright necessary to its business model, the ASCAP model is not a viable alternative. The compulsory licensing regimes that Merges opposes are (as Section II.A points out), solutions to a different problem: vertical foreclosure of one disseminator by another. The ASCAP model is only viable where authors have sufficiently independent power and control over their own copyrights. As for the subject of pricing, the fact that the ASCAP's independent pricing scheme was set in the shadow of an antitrust decree²⁷⁸ renders questionable the argument that the ASCAP's pricing is fully independent of government supervision.

A final argument against the compulsory licensing model rests on the proposition that broad property entitlements are attractive because they will speed technological development. As Peter Huber, John Thorne and Michael Kellog state this argument in their 1995 treatise, granting broadcasters immediate rights over cable would have hastened its development:

It is interesting to speculate how differently things might have developed if the Supreme Court had affirmed both cable's copyright obligations and its First Amendment rights simply and clearly at the outset Without a right to pull signals at will from the air, cable might have started up more slowly, but it would probably then have grown more quickly.²⁷⁹

Huber and his compatriots are proposing the stewardship model of communications policy. Their belief is that simple, clear and broad entitlements, unfettered by any regulation, will lead to the optimal deployment and development of communication technologies.

As discussed in Section II.B, the wisdom of such an approach must take into account the objections stemming from evolutionary theories of innovation. This point can be expressed in terms of the bottleneck problem described in Part II.A. For any form of expressive work (such as video, book, or music) there exist several potential technologies of dissemination. Yet not every method of dissemination is invented at the same time, and indeed many cannot be predicted *ex ante*. For example, the pioneering system of mass television dissemination was terrestrial broadcast — rabbit-ear antennas and tall towers. In time various successive technologies of mass video dissemination were developed and reduced to practice, including wire (cable television), satellite, and most recently, streaming applications on the Internet.

278. See *United States v. Am. Soc'y of Composers, Authors & Publishers*, 1950 Trade Cas. (CCH) ¶ 62,595 at 63,751 (S.D.N.Y. 1950).

279. See JOHN THORNE ET AL., *FEDERAL BROADBAND LAW* § 10.11 (1995).

From these conditions we can see that granting a copyright entitlement that covers all forms of dissemination will have the effect of giving the pioneer industry the power to control the follow-on development of technology. Assuming that the pioneer controls the creation of content (either by controlling copyrights, vertical integration, or through simple economic dependence), it can dictate what happens and what does not. In the example of broadcast, if copyright in programming had clearly included future technologies like cable and satellite transmission, the decision to allow these dissemination technologies to develop would have rested with the broadcast industry.²⁸⁰ Everything then depends on whether policymakers believe that an incumbent can be trusted to promote, rather than to destroy, its technological rivals.

Finally, there are a second set of reasons to question the model of broad initial entitlements. The model can only yield the claimed benefits when the entitlements can actually be enforced. For example, copyright was generally seen as unenforceable against casual home copying in the 1970s and early 1980s.²⁸¹ While this point is complicated by improved technologies of copy protection, so long as there exist rights that would be extremely expensive to enforce, the model of broad initial grants cannot be a complete answer.

In short, while there is much automatic support for a “flexible” or “future-proof” copyright, there seems less consideration of whether such a law would be good for innovation. The argument, however, can be made, and Peter Huber comes closest to making it. But while not conclusive, much recent economic thinking and even mainstream communications policy casts doubt on a model that grants the incumbent control over future inventions.

E. *Author-Driven Communications Policy?*

The analysis in this Part should make one thing clear: who owns or controls the relevant copyrights in an industry sets the nature of the competition and communications problems created. Authorial control of copyrights (as in the case of the ASCAP) will lead to potential pricing problems, but is less likely to lead to the problem of vertical foreclosure. Conversely, it is when an incumbent disseminator owns, or has effective control over, copyright that the potential for more troubling efforts to foreclose technological rivals emerges.

This analysis makes the possibility of *author-driven* dissemination attractive. As a policy it would support broad and clear rights in

280. Accord Trotter Hardy, *Copyright and “New-Use” Technologies*, 23 NOVA L. REV. 657 (1999) (discussing new-use technology royalty obligations using “type-I” and “type-II” error methodology).

281. See *infra* note 342 and accompanying text.

authors; authors should want maximum exposure for their work, regardless of dissemination media. And if an author decided not to release her works using a given technology (say, film), then we might expect this to reflect artistic, rather than anti-competitive, concerns.

Perhaps unsurprisingly, this concept has been a long-time aspiration of copyright law: the hope that authors would one day become masters of their own destiny.²⁸² In its latest form, the idea is that the emergence of digital media and the Internet may make authors the relevant actors for copyright's communications policy. Jane Ginsburg's words describe this school of thought: "I suggest that digital media, by making the means of production and dissemination available to any computer-equipped author, give authors a realistic opportunity to bring their works to the public without having to put themselves in thrall to traditional intermediaries."²⁸³ A grant of greater authorial rights through copyright, according to Ginsburg, "not only enhances the moral appeal of the exercise of copyright, but also may offer the public an increased quantity and variety of works of authorship."²⁸⁴

If authorial control over copyrights could help control some of the most troubling anti-competitive consequences of copyright, how achievable is that vision? The problem remains what it always has been. Despite the fact that authors who are not employees nominally own copyrights upon creation, they rarely control copyrights. Most copyrights are contractually assigned to disseminators, owned by the employer through the work-for-hire doctrine, or otherwise effectively controlled by the disseminator.²⁸⁵ It is a function of the relative bargaining power of authors and disseminators. Unless this difference in power or the laws controlling copyright contracting changes, true authorial control of copyright will likely remain an attractive vision but not a discernable reality.

Might digital dissemination technologies change things by strengthening the relative power of authors, as Ginsburg suggests?

282. See, e.g., LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* 5 (1968) ("Not until after the Statute of Anne did the modern idea of copyright as a right of the author develop."). See generally LOEWENSTEIN, *supra* note 33.

283. Ginsburg, *supra* note 20, at 1619.

284. *Id.* Paul Goldstein's vision of a "celestial jukebox" that stores all copyright works and makes them available on demand is also an author-driven vision. He writes: "by charging subscribers electronically for each use of the prerecorded works it offers — motion pictures, sound recordings, books, magazines, or newspaper articles — the celestial jukebox will be able to compensate copyright owners each time their works are chosen." See GOLDSTEIN, *supra* note 20, at 23.

285. See, e.g., ALBERT N. GRECO, *THE BOOK PUBLISHING INDUSTRY* 152-55 (1997) (providing a sample of typical publishing contract assigning copyright to publisher); Bruce H. Phillips & Carl R. Moore, *Digital Performance Royalties: Should Radio Pay?*, 3 VAND. J. ENT. L. & PRAC. 169 n.28 (2001) (noting that copyrights in the music industry are typically assigned to publishers and recording companies).

While the question is empirical, there are reasons to suspect that developments like the Internet or indeed any technologies are unlikely to eliminate the central role of disseminators and other intermediaries and their continued control over copyright.

It is, first of all, hard to get rid of intermediaries for a reason having nothing to do with law or technology, but instead stemming from the basic theory of comparative advantage.²⁸⁶ Specialized intermediaries exist, after all, because they specialize in doing things that others do not necessarily do well themselves. Carpenters specialize in making furniture; while it is possible for others to make their own furniture, it comes at great tangible and opportunity cost.

The logic of specialization carries over to the world of packaged information and suggests a continuing role for specialized disseminators. Authors, after constructing their own furniture, could also serve as their own publishers and publicists. But the author who does so will usually be at a disadvantage compared to one who collaborates with someone else, particularly someone like a publisher, who specializes in publication and publicity. Changes in technology have not changed that basic dynamic, even though today's intermediaries have changed.

While we are only a decade into the universalization of the Internet, there is limited evidence that it has eliminated the control that disseminators have over copyrights. There are a few examples of authors — often famous and rich — who have temporarily become their own disseminators. Stephen King, for example, famously distributed one of his books directly to his fans.²⁸⁷ Rapper Ice-T decided to distribute one of his albums, for \$4.99 per copy, via the online distribution service KaZaA.²⁸⁸ Yet these are the exceptions. Even the Beatles, who founded Apple Records to give artists more power over their work,²⁸⁹ have many of their sound recording copyrights controlled by publisher EMI. That company has used its ownership of the Beatles' copyrights to prevent unauthorized remixing

286. The seminal statement of the theory of comparative advantage was made by David Ricardo. See DAVID RICARDO, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (Prometheus Books 1996) (1817). See also Jack Goldsmith & Timothy Wu, *The Return of the Leviathan* ch. 4 (manuscript on file with author) (developing the point with regard to online activities).

287. See *Stephen King offers online thrills*, SAN DIEGO UNION-TRIB., July 24, 2000, at A5.

288. See *Ice T offers album for sale to music-swap site users*, USA TODAY, April 10, 2003, at http://www.usatoday.com/tech/webguide/internetlife/2003-04-10-icet-kazaa_x.htm (last visited Sept. 9, 2004).

289. See generally BRUCE SPIZER, *THE BEATLES ON APPLE RECORDS* (2003) (describing reasons for the founding of Apple Records).

in rap songs, when it is not clear whether the Beatles themselves would have cared.²⁹⁰

In short, despite centuries of good intentions, the goal of moving actual, as opposed to notional, control over copyright to authors remains unachieved. It remains for many an aspiration of copyright policy, and a communications analysis suggests the aspiration has independent economic justifications. But in the meantime, copyright theorists must continue to analyze a world in which various disseminators are the effective owners of copyright. This fact makes copyright's role in communications policy more, not less, important.

III. COPYRIGHT'S NEW COMMUNICATIONS POLICY

The main point of this Article has been to describe copyright's communications regime and to explain the choices it has been making. Up to this point we have focused on the "classic" communications regime, centered on compulsory licensing. Since the passage of the 1976 Act, the legal operation of copyright's communications policy has shifted in important and fundamental ways — enough to identify and describe a "new" communications regime.

A. *A Changing Code*

The 1976 Act marked an effort to solve many of copyright's perceived communications-related problems once and for all. A key portion of the 1976 Act was the section 102 specification that copyright would subsist in "original works of authorship fixed in *any* tangible medium of expression, *now known or later developed*. . . ."²⁹¹ As the House Report explained, "[u]nder the bill it makes no difference what the form, manner, or medium of fixation may be."²⁹² One hope was that the 1976 Act might "future-proof" the copyright code.

It was not to be. As this Article has argued, conflict between dissemination rivals is probably inevitable as long as technological change creates the opportunity to undercut incumbents. It should therefore be no surprise that the 1976 Act failed to end the pattern of conflict that characterizes copyright's history. Since that time, some challenges, such as satellite television and web-casting, have followed the classic pattern of copyright settlement centered on a compulsory license arrangement.²⁹³ But many of the technological challenges, from

290. Noah Shachtman, *Copyright Enters a Gray Area*, WIRED NEWS, Feb. 14, 2004, at <http://www.wired.com/news/print/0,1294,62276,00.html> (last visited Sept. 13, 2004).

291. 17 U.S.C. § 102(a) (2000) (emphasis added).

292. H.R. REP. NO. 94-1476, at 52 (1976).

293. With results codified in 17 U.S.C. § 119 and § 114, respectively.

the VCR to the Digital Audio Tape (DAT) and onward have been handled in a very new manner, suggesting changes in the political economy of disseminator regulation.

The best evidence of the change comes from the study of the copyright code itself. As David Nimmer has shown to great effect, we have witnessed a dramatic shift in the nature of copyright amendment over the last decade.²⁹⁴ Nimmer identifies a major turning point in the year 1992. After that year, says Nimmer, “each amendment outdoes its predecessor, not only for incoherence that commands national attention, but for pioneering new methods of bringing the legislative process into disrepute.”²⁹⁵ The post-1992 amendments, according to Nimmer, consist of “bloated provisions that do not meet the various criteria of formal lawmaking success.”²⁹⁶

While Nimmer is focused on the form of copyright amendments, a simple read of the code confirms that something has indeed changed. First, the code now contains entire chapters, such as the anti-bootlegging statute in section 1101, the anti-circumvention laws in section 1201, and part of the Audio Home Recording Act in section 1008 that clearly regulate end-user behavior. Coupled with the enlargement of criminal liability in the 1997 No Electronic Theft Act, they constitute what can be described as an “anti-piracy” code and compromise some of the first, clearly-stated prohibitions on the behavior of non-commercial users in copyright’s history.

Second, since 1992, the law has witnessed the addition of the first technology specific safe harbor regimes: section 1001 *et seq*, the safe harbors for digital audio recording devices, and section 512, the safe harbor regime for online service providers. While compulsory licensing regimes for specific technologies were a central feature of the classic regime, the safe harbor regimes are an obvious break from that model.

Third, in addition to these statutory changes, since the early 1980s, the *Sony* rule has emerged as a key doctrine for determining the liability of manufacturers of devices that facilitate copying. The *Sony* rule is premised not on any provision of the copyright statute, but rather on judge-made secondary and vicarious liability principles, and represents a new type of judge-mediated communications policy.

These three developments — the rise of end-user sanction regimes, safe harbors and judicially-managed market entry regimes — clearly require a new model for their political explanation. The next Section presents such a model.

294. See David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1238 (2004).

295. *Id.* at 1381-82.

296. *Id.* at 1238.

B. *A Model for the Copyright's New Communications Regime*

A central premise of the classic model was that new copyright law emerges from conflicts between technological incumbents and challengers. I suggest that the same basic model can help explain much of the post-1976 transformation of copyright's communications policy and copyright law in general. The principal difference is institutional: it is a transformation in the identity of the challenger, and a corresponding change in the government protection sought.

Douglass North has suggested that there are only two sources of institutional change: changes in relative prices and changes in tastes.²⁹⁷ The changes to copyright's communications regime described here can be succinctly described as the result of three distinct changes in relative prices. From the period of 1970-2000, three products became dramatically cheaper: analog copying technology (home tape recorders and VCRs), digital copying technology (the computer, and later devices like CD-burners) and, finally, mass distribution technology (the Internet). One upshot of these changes was the emergence of a new type of technological challenger to the copyright world.

The new challenger can best be pictured as a team effort. The team consists of passive, enabling technologists paired with infringing users.²⁹⁸ Both have clearly identifiable interests in undercutting the incumbent. The technologist earns extra profits from providing users the ability to disseminate works without paying for permission. (A tape recorder is valuable not only for playing tapes, but also for its ability to record music that can be given to friends.) The infringing user does not profit (other than possibly in reputation) but saves, by not having to pay retail prices for copyrighted works.²⁹⁹ In short, infringing users equipped with copying technology take on the economic role previously occupied by challenger industries.

These changes have transformed the political economy of copyright. Post-1976 copyright has pitted incumbents against two challengers: passive technological rivals and infringing users. The

297. See DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 89 (1990).

298. Some may object that the term "infringing users" states a legal conclusion. I use the term only as shorthand to denote users who incumbent disseminators see as a threat to their revenue.

299. On the behavior of infringing users and their interests, I have previously noted the tension between infringing users as a sub-group and users at large. See Wu, *supra* note 45, at 683-84 ("[T]he sub-group of P2P users, young and computer-savvy, can take advantage of the continued compliance of regular consumers. The mass of regular users pay for the works, thereby maintaining incentives for artists to create them, while the P2P sub-group defects en masse . . ."); see also Lior Jacob Strahilevitz, *Charismatic Code, Social Norms and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505 (2003) (explaining behavior on P2P networks).

result is two new streams of copyright law that have emerged like plumes from twin exhaust pipes.

The first stream consists of new copyright rules for the passive technologists: electronics manufacturers and telecommunications firms. These rules differ from some of the copyright settlements that have come before, for several reasons. First, in the conflicts that follow, the settlements have not taken the form of compulsory licenses but of safe harbors. The technologists are not interested in compulsory licenses because they do not need access to copyrighted works and hence do not bargain for them. The most important legal output from these conflicts are the *Sony* regime (a judge-run immunity scheme) and the safe harbor scheme for Internet Service Providers codified in section 512. Second, the technologists are more effective at influencing government than were their predecessors. When, for example, Sony or Bell Atlantic first began to offer dissemination technologies to their consumers, they were not startups but established and powerful firms, with long experience lobbying government. Their model was not entrepreneurial, but rather horizontal, market entry. As a result, the political conflicts between the technologists and the incumbent copyright disseminators have, in general, made for a fairer fight.

The second stream of new law emerges from a legislative process that pits organized incumbents against infringing users. The results may constitute the institutional change with the longest lasting effects for copyright law as a whole. As I have written elsewhere, the copyright law long relied on a gatekeeper system for its enforcement: the targeting of specialized intermediaries.³⁰⁰ Until recently, enforcement against normal, non-commercial individuals was extremely rare, and effectively not a part of copyright. As the Technology Assessment Office wrote in the 1989, “[a]ll U.S. copyright law, including the Copyright Act of 1976, proceeds on the assumption that effective and efficient copying is a large-scale, publicly visible, commercial activity.”³⁰¹ That has changed, and the conflict between incumbent disseminators and infringing users is open and obvious. The political economy of this conflict could not be any more different from that with the technologists. It is a conflict between organized industry groups and scattered individuals. As basic public choice theory would suggest, the legislative results are largely dictated by the organized, copyright-owning industries.

The incumbent-user conflict has begat new laws regulating individual infringers, including the No Electronic Theft Act,³⁰² the

300. See Wu, *supra* note 45, at 685-86 (describing the evolution of copyright's enforcement system).

301. Office of Tech. Assessment, U.S. Cong., *Copyright and Home Copying: Technology Challenges the Law* 11 (Oct. 1989).

302. Pub. L. No. 105-147, 111 Stat. 2678 (1997) [hereinafter NET Act].

anti-bootlegging law (17 U.S.C. § 1101), the anti-circumvention portions of the Digital Millennium Copyright Act (17 U.S.C. § 1201 *et seq*), and section 1008 of the Audio Digital Home Recording Act. Whether for good or for ill, these measures are hard to describe as settlements negotiated between incumbent industries and users as a group. In addition, the tension between disseminators and infringing users has led to some of the first lawsuits filed against “recreational” infringers in the history of copyright.

With this new model in mind, we now turn to examining some of the most important episodes that have created copyright's new communications policy.

1. *The Technologists*

In 1971, Congress commented that copyright was never meant to “restrain the home recording, from broadcasts or from tapes or records, of recorded performances.”³⁰³ That widespread assumption — that home copying was no threat to copyright-dependent industries — changed forever in November of 1975.

That was the month Sony Japan began selling its first consumer version of the “Video Tape Recorder.” Selling for the suggested retail price of \$2295, the floor model LV-1901 Betamax combined a nineteen-inch color television with a VCR capable of storing a full hour of television programming on a single cassette. The advertisement that launched the VCR conflict ran as follows:

NOW YOU DON'T HAVE TO MISS KOJAK BECAUSE YOU'RE
WATCHING COLUMBO (OR VICE VERSA)/BETAMAX — IT'S A
SONY³⁰⁴

With this advertisement, “time-shifting,” or recording programs to watch later, entered the public imagination. But the film industry was not impressed. Within a year, on November 11, 1976, Universal Studios and Walt Disney filed complaints of copyright infringement.³⁰⁵

Some of the familiar patterns of copyright conflict were evident. Sony and other electronics manufacturers were offering a new and better way to watch broadcast content. Part of their market advantage, of course, came from not having to pay anything for copyright licenses to films and television programs. Yet there was one important difference between Sony and the challengers that came before it. As opposed to actively disseminating copyrighted works itself, Sony merely provided a technology that gave users the capacity to access

303. H.R. REP. NO. 92-487, at 7 (1971).

304. *Reprinted in* JAMES LARDNER, *FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR* 21 (1987).

305. *Id.* at 34.

copyrighted works in new ways, and without paying royalties. This more passive role would ultimately work to Sony's advantage in court. Meanwhile, the movie studios' principal interest was, as in previous conflicts, seeking some means of control: either to stop the VCR or obtain a portion of its sales revenue in royalties. Both sides, as usual, went to the federal government to plead their case.

Jack Valenti stated the film industry's case in congressional hearings. The VCR, he opined, is "advertised for one purpose in life . . . to copy copyrighted material that belongs to other people."³⁰⁶ But, Mr. Valenti warned:

Nothing of value is free. It is very easy, Mr. Chairman, to convince the people that it is in their best interest to give away somebody else's property for nothing, but even the most guileless among us know that this is a cave of illusion where commonsense is lured and then quietly strangled.³⁰⁷

In addition to blaming Japanese VCRs for the American trade deficit, Valenti expressed a candid view of copyright as a form of protection for the film industry:

[W]e are facing a very new and a very troubling assault on our fiscal security, on our very economic life and we are facing it from a thing called the video cassette recorder and its necessary companion called the blank tape. And it is like a great tidal wave just off the shore. This video cassette recorder and the blank tape threaten profoundly the life-sustaining protection, I guess you would call it, on which copyright owners depend, on which film people depend, on which television people depend and it is called copyright.³⁰⁸

As Valenti concluded, in what has become his most famous quote, "I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone."

By 1981, the film industry had convinced the Ninth Circuit to hold Sony liable for contributing to the copyright infringement of home viewers.³⁰⁹ That court found that the videotape recorder had no purpose other than to infringe: it was "manufactured, advertised, and sold for the primary purpose of reproducing [copyrighted] television programming."³¹⁰ Since the court could find no exception in the

306. *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 5 (1982) [hereinafter VCR Hearings] (statement of Jack Valenti, President, Motion Picture Association of America).

307. VCR Hearings, *supra* note 306.

308. VCR Hearings, *supra* note 306, at 4, 8.

309. *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963 (9th Cir. 1981).

310. *Id.* at 975.

copyright code for personal or home copying, Sony was infringing. The court suggested either placing a permanent injunction on the sale of the VCR or setting up a royalty scheme, i.e., a judicial version of a compulsory license.

Within twenty-four hours of the decision, both sides went to Congress with different proposals. The electronics industry wanted a full exemption from copyright liability for home video recording.³¹¹ The film industry counteroffered with an exemption tied to a royalty scheme for the film and television industries.³¹² It seemed that the VCR matter would follow the pattern of the classic communications regime, and end in a congressionally implemented settlement.

But the Supreme Court upstaged Congress with its first major copyright communications policy case since *Fortnightly*. In *Sony* the Court sided with the electronics industry, delivering the exemption from copyright they were seeking in Congress. The Court did so by holding that the VCR would be exempt from contributory or vicarious copyright liability provided that its technologies were, in fact, technologies of general or broad purpose.³¹³ As Justice Stevens stated in his oft-cited *Sony* rule, “the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.”³¹⁴ To put the matter further: “Indeed, [the technology] need merely be capable of substantial noninfringing uses.”³¹⁵

Even by some of its former critics, *Sony* is acclaimed if not for its analysis, for its foresight. As Edward Samuels, a skeptic at the time, writes, “the VCR turned out to be one of the most lucrative inventions — for movie producers as well as hardware manufacturers — since movie projectors.”³¹⁶ Unlike the other major copyright communications cases, *Sony* did not lead to the formal establishment of a liability regime. As detailed by James Lardner, the film industry slowly began to take a softer line after the Court’s ruling. The industry itself concluded that “squelching” the VCR was not necessarily in its

311. See S. 175, 98th Cong., 1st Sess., 129 CONG. REC. 851 (1983); see also H.R. 5250, 97th Cong., 128 CONG. REC. 9863 (1982); H.R. 4783, 97th Cong. (1981).

312. See S. 31, 98th Cong. (1983); H.R. 1030, 98th Cong. (1983); H.R. 5705, 97th Cong. (1982).

313. The Court also ruled time-shifting a “fair use.” See *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 442 (1984) (“[T]he unauthorized home time-shifting of respondents’ programs is legitimate fair use.”).

314. *Id.*

315. *Id.*

316. SAMUELS, *supra* note 92, at 70.

interest.³¹⁷ This judgment was correct: in time the VCR became a major source of revenue for the film and broadcast industries.³¹⁸

The *Sony* decision will always be open to the criticism that the Court could have done more to differentiate between VCRs that record and VCRs that simply play pre-recorded videos. But as a pragmatic matter, one reason *Sony* may have succeeded is that it self-consciously abandoned a simple authorship analysis when faced with the use of copyright by an incumbent industry to control or block legitimate technological rivals.³¹⁹ The *Sony* rule can be understood as a rule to help a court distinguish between problems of authorship and the more difficult problems of competition among disseminators. The fact that a new communications technology can be used for “legitimate, unobjectionable purposes” establishes that the court is faced with a market entrant, as opposed to mere evasion of the copyright statute. Therefore the court knows that it faces a problem of regulating competition among rivals, and acts accordingly. Conversely, if the technology in question is used to infringe, the court is faced with a problem where protecting authorship incentives predominates. This division is suggested by the Court’s statement that “[s]ound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.”³²⁰

There is an important difference between the *Sony* rule and the unanchored “free pass” for new technologies found in cases like *Teleprompter*. *Sony* forces federal courts to pass judgment on new technologies, to act as a kind of technological gatekeeper. The courts must make some assessment of whether, on balance, the likely harm created by the subject technology — most obviously, through damage to creation incentives — actually makes market entry desirable. The *Sony* rule therefore requires courts to develop some concept of “legitimate” technology that constitutes a bona fide market entrant. Its suggestion is very open-ended: being “capable of substantial non-infringing uses” is good enough.

The *Sony* rule puts courts in an odd position, for they must rely on their instincts and the limited evidence before them to decide whether a new technology seems legitimate. The fact that so many now-

317. LARDNER, *supra* note 304, at 284.

318. *See id.* at 325-28 (detailing how videocassette revenue grew to equal that of ticket revenue).

319. *See Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

320. *See id.* at 431.

mainstream communications technologies were born as pirates further complicates matters. These limits of judicial competence might suggest a lenient reading of the *Sony* rule, but some have come to the opposite conclusion. Randy Picker sees *Sony* as a rule of entry that is too lenient. In his view, the *Sony* rule by its own logic allows harmful market entry: it would allow market entry of a product that had \$100 of legitimate use, but causes a \$1000 harm through loss of creation incentives. Allowing such a product to be on the market is therefore, according to Picker, a bad result.

But there are good responses to Picker's argument which support a lenient market entry rule for new communications technologies. The first is institutional. If a court using the *Sony* rule gets it wrong and allows technological market entry that turns out to be harmful, Congress can later reverse the determination. Indeed, had the *Sony* decision led to the near-collapse of the film industry, surely a congressional remedy would have been forthcoming. Conversely, court suppression of a new technology is, for all intents and purposes, congressionally irreversible. A new technologist almost by definition has little chance of convincing Congress to reverse a copyright holding.

Second, Picker's view may put too much faith in the courts to act as accurate gatekeepers of market entry. It is certainly beyond the ability of a court, or indeed anyone, to accurately predict the future social benefit of a new technology — such are the teachings of evolutionary innovation theory.³²¹ To compare the future benefit to the present and future harm introduces still greater chances for error. For one thing judges might, like other governmental actors, consistently overrate present and visible harms.³²² Picker does acknowledge that the assessment of benefit should include the possibility that the technology will turn out to be much more socially beneficial than originally imagined, but he does not develop the point further.³²³

Innovation theory teaches that predicting the evolution of technology is difficult, making it important to let the market assess the potential of any new technology, whether a mousetrap, molecule, or copying device. This suggests that the government should ban a new technology only if the harm of allowing the technology to reach the market very clearly outweighs the benefits. These are not

321. See *supra* Part II.B.

322. Cf. Anne O. Krueger, *Asymmetries in Policy Between Exportables and Import-Competing Goods*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE* 161 (Ronald W. Jones & Anne O. Krueger eds., 1990) (discussing "identity bias," or the tendency of government actors to act to protect the identifiable tragedy of lost jobs instead of diverting rents to the creation of new jobs).

323. Picker, *supra* note 22.

controversial sentiments outside of the copyright debate. Government only very rarely reaches out to ban technological developments that might be harmful, even those that distress people like genetic engineering. In copyright, the equivalent policy is the lenient version of the *Sony* rule. It asks judges to filter clearly illegitimate technological uses, such as those that could not survive but for the advantage of piracy. It leaves the rest to the market and Congress if the court is terribly wrong. This formulation of the *Sony* rule might occasionally lead to dramatic results, but creative destruction is not a dinner party.

Whether *Sony* is too lenient or too strict a rule of market entry remains an open question.³²⁴ But the case's institutional significance for copyright's communications policy cannot be doubted. *Sony* set the precedent for settling technological rivalry problems with judicially-balanced immunity rules. It is the foundation and centerpiece of copyright's new communications policy.

2. Internet Service Providers

By the early-1990s it was already clear that a new technology and a new industry benefited from copyright infringement and represented a threat to traditional disseminators. That new technology was the Internet, and the benefiting industry was the Internet Service Providers.

The response to this threat was not modest. As the Internet became mainstream, the incumbent disseminators proposed a sweeping set of copyright reforms. Most were adopted as Clinton administration policy by the Commerce Department, and published as the 1995 *Report on Intellectual Property and the National Information Infrastructure*, better known as the "White Paper."³²⁵ In retrospect, the publication of the White Paper was the opening shot in what became a grand legislative battle between traditional copyright disseminators and their internet challengers.

The White Paper adopted the position that the greatest potential of the Internet depended on expanded copyright protection. "The full potential of the NII," it said "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."³²⁶ For copyright purposes, the White Paper's implementation

324. For another view of what the *Sony* rule should be, see Glenn Lunney Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 977 (2002).

325. Commerce Department, *Intellectual Property and the National Information Infrastructure: Report of the Working Group on Intellectual Property Rights* (1995) [hereinafter *White Paper*].

326. *Id.* at 10.

contemplated two major sets of changes: one targeted at infringing users, and another at ISPs. In short, White Paper targeted the two groups who posed a challenge to existing models of dissemination.

The first group of important proposals consisted of two new “anti-piracy” reforms. The White Paper argued that “current law is insufficient to prevent flagrant copyright violations” in the Internet context.³²⁷ It proposed expanding the criminal side of copyright to make non-profit, or “recreational piracy” of copyrighted works criminal.³²⁸ The second proposal was also directed at individual pirates, aiming to stop copy-protection systems, or “digital locks,” from being circumvented. As the White Paper argued, “technological protection likely will not be effective unless the law also provides some protection for the technological processes and systems used to prevent or restrict unauthorized uses of copyrighted works.”³²⁹ It proposed more criminal liability, and also liability for traffickers of protection-breaking technologies. We’ll come back to both these proposals later.

The second major proposed reform was a clear recognition of “transmission,” including digital transmission, as a form of “reproduction,” or copying under the copyright statute. The White Paper took the position that this would merely reaffirm established law, but that position was slightly misleading. The liability of ISPs for copyright infringement occurring on their networks was, at the time, still an open question.³³⁰ The White Paper argued in favor: “Service providers reap rewards for infringing activity. It is difficult to argue that they should not bear the responsibilities.”³³¹ Since ISPs are “in a better position to prevent or stop infringement than the copyright owner,” the White Paper concluded, “the best policy is to hold the service provider liable.”³³²

To this conclusion the service provider industry took great exception. From their view, the White Paper’s proposals had the potential to put the industry on the hook for a massive volume of copyright infringement practiced via the Internet, and in least in theory, billions in statutory damages. As the White Paper proposals quickly became bills in the House and Senate, the threat woke up the ISP industry and the power of its lobby. This must be understood clearly: the ISP industry, while in parts new, also included many

327. *Id.* at 127.

328. *Id.* at 228-29.

329. *Id.* at 230.

330. Among others, the *Netcom* decision, discussed *infra* text accompanying notes 340-342, took the different position.

331. White Paper, *supra* note 325, at 117.

332. *Id.*

powerful telecommunications companies like Bell Atlantic and AT&T, long-term players with deep experience with telecommunications regulation. These companies ordered their lobbyist armies in Washington to fight the copyright threat both in the capital and in Geneva. Bruce Lehman, then Patent and Trademark Commissioner, characterized matters well: "You've got two gigantic, very powerful industries in Washington: the telephone companies and the computer industry on one side, the content industries, the record companies, the movie industry on the other."³³³ He predicted that "they won't make a deal with each other until they start counting votes in Congress." He was right.

In an early victory for the ISP industry, neither 1995 bill made it out of committee, despite Jack Valenti's warning that without congressional action, "the information superhighway . . . will collapse the great wonder of intellectual property."³³⁴ The Commerce Department, however, took the substance of its proposals to Geneva. That's where the World Intellectual Property Organization (WIPO) was working on "digital-era" amendments to the Berne Convention, the world's principal copyright treaty. The strategy — mostly successful — was to join with European allies to negotiate a treaty comprising much of the substance contained in the 1995 Act, as part of the effort to bring the law back to Washington as a treaty-implementing measure.

In December 1996 WIPO convened its diplomatic conference in Geneva to consider several new copyright treaties. While nominally a meeting of nation-states, domestic lobbyists of all stripes were in attendance, including American representatives from both the traditional disseminators and ISP industries. Much lobbying effort centered on Article 7(1) of the draft WIPO Copyright Treaty, which was a replica of the White Paper's "transmission" proposal.³³⁵ It stated that the "right of reproduction" shall include "direct or indirect reproduction . . . whether permanent or temporary, in any manner or form." The draft treaty also created an exception for "transient or incident" reproduction, Article 7(2), designed to favor ISPs.³³⁶ But the ISP industry, rightly or wrongly, felt that the broad language of 7(1) was dangerously close to strict liability for all temporary copies of

333. Seth Schiesel, *Copyright Treaties Still Have Opponents in Congress*, N.Y. TIMES, Jan. 1, 1997.

334. NII Copyright Protection Act of 1995, Hearing Before the Subcommittee on Courts and Intellectual Property, 105th Cong. (1996) (testimony of Jack Valenti).

335. Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to Be Considered by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Art. 7(1) WIPO Doc. CRNR/DC/4 (Aug. 30, 1996) [hereinafter WIPO Draft Copyright Treaty].

336. *Id.* Art. 7(2).

works passing through their networks. Some Internet carriers analogized themselves to the Postal Service: "Just like the postal service cannot (and indeed should not) monitor the contents of all the envelopes it handles, it is simply not possible for an infrastructure provider to monitor whether the millions of electronic messages it transmits daily have been authorized."³³⁷

To the surprise of some observers, close to the end of negotiations, Article 7 was deleted from the WIPO Treaty in its entirety. While explanations for the deletion vary, both the ISPs and entertainment industries claimed victory.³³⁸ Meanwhile, the rest of the White Paper proposals survived, including, most-importantly to the copyright owners, the central anti-circumvention proposal. The legislative fight returned to Washington. Said Larry Clinton, a Bell lobbyist, "[t]his battle has been going on for a year from our point of view, so it's continuing — not brewing."³³⁹

As the White Paper and Geneva processes played out, the judiciary entered the picture, deciding several important cases in the Ninth Circuit. As in other copyright conflicts, the decisions mostly strengthened the hand of challengers (the ISPs) and above all changed the baselines for negotiation. The most politically important case was *Religious Technology Center. v. Netcom On-Line Communication Services*.³⁴⁰ *Netcom* was the first true ISP liability case, and to the delight of the ISP industry, the district court rejected a rule of direct liability for the ISP. Said the court, "it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet."³⁴¹ The *Netcom* court did, however, find that liability was possible on what became known as a "notice-and-take-down" theory. It held that actual notice of a user's infringing actions could create a duty on the part of the ISP to take preventive measures (a "take-down"), else contributory copyright liability.

The *Netcom* rule was not, of course, the full immunity that the ISP industry might have preferred. And it was also only a district court

337. Ad Hoc Alliance for a Digital Future, Suggested Revisions to the Chairman's Basic Proposal for the Treaty Formerly Known as the Berne Protocol 2, (Oct. 31, 1996).

338. See, e.g., Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 VA. J. INT'L L. 369, 391-92 (discussing how both sides claimed victory from the deletion of Article 7, but noting "it is significant that the copyright treaty signed in Geneva does not include a provision on temporary copying given how intent the U.S. and E.U. delegations had been about getting such a treaty provision").

339. Seth Schiesel, *Copyright Treaties Still Have Opponents in Congress*, N.Y. TIMES, Jan. 1, 1997.

340. 907 F. Supp. 1361 (N.D. Cal. 1995).

341. *Id.* at 1372.

decision.³⁴² But *Netcom*'s rejection of direct liability contradicted the White Paper's assumption that ISPs would be directly liable. It also granted substantially more protection than the levels of liability sought by the traditional incumbents and proposed by the WIPO Draft Treaty. Preserving the protections of *Netcom* became an industry mantra.

Meanwhile, back in Washington, the slow-motion legislative struggle continued. To strengthen their hand, the ISPs turned to their champion, Senator John Ashcroft, who proposed legislation that would have come close to completely immunizing the ISP industry from secondary copyright liability.³⁴³ In the summer of 1997 the Commerce Department finally sent over its legislation for implementing the WIPO treaty, including the controversial anti-circumvention rules.³⁴⁴ And in search of compromise, Representative Coble introduced what the ISPs wanted: an On-Line Copyright Liability Limitation Act, H.R. 2180.³⁴⁵

At this point the legislative calculus put ISPs and traditional copyright owners in a slightly complex standoff. The copyright owners most of all wanted treaty-ratification and implementation of most of all the anti-circumvention measures they had fought for in the WIPO Copyright Treaty and the White Paper.³⁴⁶ While their preference for ISPs was still strict liability, it was by now clear that such prospects were dim. They bet, instead, that *Netcom* would not last, and that the courts would ultimately deliver ISP liability. The ISPs had good reason to fear that *Netcom* might be an aberration, and wanted, more than anything, to codify that decision in strong liability-limiting legislation. Their bargaining chip was enough influence over key members of Congress to block the anti-circumvention rules unless the copyright owners agreed to their liability limits. Finally, for both ISPs and copyright owners there were dangers waiting. The ISPs risked the erosion of their *Netcom* position through ongoing litigation. And for copyright owners the entire investment in the White Paper / WIPO process was in jeopardy.

342. In fact, the Ninth Circuit began backing away from *Netcom* in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996).

343. Digital Copyright Clarification and Technology Education Act of 1997, S. 1146, 105th Cong. (1997). The companion bill in the House, the Digital Era Copyright Enhancement Act, H.R. 3048, was co-sponsored by Reps. Boucher (D-VA) and Campbell (R-CA).

344. H.R. 2281, 105th Cong. (1996).

345. H.R. 2180, 105th Cong. (1997).

346. The recording industry also wanted various protections stemming from a second WIPO Treaty, the WIPO Performances and Phonograms Treaty, adopted Dec. 20, 1996, WIPO Doc. CRNR/DC/95.

New Congressional hearings came in September of 1997, where the telecommunications and entertainment industries went head-to-head.³⁴⁷ Jack Valenti from the film industry used his time to attack the ISP's liability-limitation bill, calling it an effort to "weaken" copyright. Passing the bill, he said, would create "a clear and present danger, inviting the slow undoing of America's most precious trade asset, its native-born intellectual property."³⁴⁸ Hilary Rosen, President of the RIAA, was more aggressive. She accused the telecommunications industry of holding "hostage" the treaty process, stating, "I urge you not to let the "Online Service Provider" debate . . . slow deliberation on this issue when swift U.S. Congressional action is so important to U.S. economic interests around the globe." Following tradition, the recording industry brought an artist, this time country singer Johnny Cash, to speak on the evils of piracy. But things did not go exactly as planned: Cash departed from his prepared text, blurting out that he'd actually sold his foreign copyrights years ago.³⁴⁹

Roy Neel, a close friend of Vice President Al Gore, testified on behalf of the powerful Bell Companies. A week earlier, he had made it clear in Senate testimony that the Bells would block any Treaty-implementation bill that lacked a provision limiting ISP liability.³⁵⁰ In the House, Neel advocated as much immunity as possible, charging that "copyright law threatens to put a damper on the expression of ideas on the Internet." He also accused the entertainment industries of trying to sue ISPs out of existence. "[W]hile [the Telecom Industry is] committed to the Internet, the threat of copyright lawsuits is becoming an increasingly salient consideration in offering the service at all." (For his part, Representative Barney Frank commented "I have never encountered so many people who seem to me to be well off and doing quite well feeling so victimized.")³⁵¹

Settlement came in the Spring. A joint bill, now named the Digital Millennium Copyright Act (DMCA) was introduced on April 1, 1998. The new bill represented a deal between the ISPs and traditional copyright owners that merged their principal interests. The anti-circumvention laws became Title I of the Act, while the On-Line Copyright Liability Limitation Act became Title II. This left only user groups to deal with, many of whom, joined by the occasional copyright professor, argued that the law would erode fair-use rights. Professor

347. The WIPO Copyright Treaties Implementation Act and Online Copyright Liability Limitation Act, Hearing Before the Subcommittee on Courts and Intellectual Property, 105th Cong. (1997).

348. *Id.* (statement of Jack Valenti).

349. See Courtney Macavinta, *Johnny Cash sings copyright blues*, CNET, Sept. 17, 1997, at <http://news.com.com/2100-1023-203367.html?legacy=cnet> (last visited Dec. 20, 2004).

350. See 1997 Hearings (statement of Hilary Rosen).

351. 1997 Hearings at 279 (statement of Rep. Frank).

Peter Jaszi, for example, argued that the law “would effectively gut fair use by giving copyright owners broad new authority to block what are now lawful acts.”³⁵² But as public choice theory might predict, user groups lacked the power to stop Title I. Instead, various legitimate user-groups (like libraries) were granted specific exceptions, along with the possibility for more down the line, creating a legislative product of extraordinary complexity. After several more months of wrangling for exceptions, President Clinton signed the entire Act into law on October 28, 1998. He remarked, without irony, that the Act “reflects the diligence and talents of a great many people.”³⁵³

The final compromise on ISP liability was codified as 17 U.S.C. section 512. This is not the place for a full description of section 512 and its complexities. But the law is notable for using a highly characteristic device for managing copyright’s relationships: statutory safe harbors.³⁵⁴ Technologists, unlike the challengers of the “classic” period, do not need access to copyrighted works to make money, and do not bargain for compulsory licenses. Instead, they seek statutory versions of the *Sony* rule: provisions that establish under what conditions a given technology will be free from copyright liability. In the case of section 512, the end result was rather close to the codification of the *Netcom* rule that the ISPs sought.

It is true that section 512 has created some problems and certainly some unexpected consequences. Depending on what you take as your baseline, it is also true that section 512 has either increased the costs of business for service providers or made copyright infringement more difficult to police. But like many of the copyright settlements described here, the rule’s accomplishment is the reduction of some uncertainty as between the parties. For better or for worse, section 512 must be taken as the definitive example of copyright’s new communications policy in action.

C. *Toward Greater Control of End-Users*

As copyright’s new communications policy has developed, the change with perhaps the greatest long-term consequences the effort to change the relationship between disseminators and users. For the first time, consumers themselves (at least some of them) have formed part of the threat to the market position of the incumbents. As a result,

352. Hearing On The World Intellectual Property Organization Copyright Treaty and World Intellectual Property Organization Performances And Phonograms Treaty, Sept. 10, 1998 (Statement of Peter Jaszi).

353. Statement by President William J. Clinton, October 28, 1998.

354. The use of statutory safe harbors was pioneered in the negotiations over the Digital Audio Tape, which eventually led to the Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237.

laws have been enacted that for the first time clearly and explicitly govern user behavior. In addition, users, as opposed to specialized intermediaries, have been sued for violating the law of copyright.

In the 1990s, an unofficial “anti-piracy” code was added to the copyright law through three amendments: the No Electronic Theft (“NET”) Act, the Anti-bootlegging law, 17 U.S.C. § 1101, and Title I of the DMCA, the anti-circumvention law provisions, whose enactment was just discussed. We look here at two of those amendments.

1. *The No Electronic Theft Act*

In 1993, David LaMacchia was a 20-year-old student at the Massachusetts Institute of Technology and also the operator of a pirate bulletin board system named “Cynosure.” His board made available free copies of expensive commercial software programs like Excel, WordPerfect and Simcity.³⁵⁵

Unfortunately for LaMacchia, word got out and one day he was arrested. Boston’s U.S. Attorney, Donald Stern, announced the arrest, stressing the economic costs of software piracy. “The pirating of business and entertainment software through clandestine computer bulletin boards is tremendously costly to software companies, and by extension, the economy.”³⁵⁶

But LaMacchia was a different kind of copyright infringer than the criminal provisions of the copyright code had contemplated. He was what is called a “recreational pirate”: he earned no money from his enterprise, nor anything that might be termed a “commercial advantage.” As of 1994 criminal copyright punished only infringement “for purposes of commercial advantage or private financial gain.”³⁵⁷ LaMacchia’s free bulletin board satisfied neither element. He was, as this Article has described, the perfect example of a “user” infringer. He disseminated copyrighted works for fun and a kind of glory.

These facts, however, made him no less of a threat to the software industry’s business model. LaMacchia was not, of course, a direct competitor to software companies as a creator of software. But he was, in effect, a rival disseminator. And just like many challengers considered in this Article, LaMacchia was a disseminator not covered by the Copyright statute. The federal district court quickly dismissed his prosecution, and in 1994, David LaMacchia went free.³⁵⁸

355. See U.S. v. LaMacchia, 871 F. Supp. 535, (D. Mass. 1994).

356. Ralph Ranalli, *Student Nabbed in Computer Fraud Case*, BOSTON HERALD, Apr. 8, 1994, p. 33.

357. 17 U.S.C. § 506(a) (1994).

358. See *LaMacchia*, 871 F.Supp. at 535.

Recreational piracy like LaMacchia's was criminalized in 1997. As discussed above, the 1995 White Paper proposed a legislative response to the *LaMacchia* case, and it came in 1997, as the No Electronic Theft Act. The NET Act eliminated the requirement of commercial profit that had been a part of the law since 1897.³⁵⁹ First, "financial gain" would be defined to include "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works."³⁶⁰ This language would make private, quid-pro-quo trading of copyright works a criminal offense. Second, the Act added that infringement of more than \$1000 worth of copyright works within a 180 day period would constitute criminal copyright infringement.³⁶¹ While this language would not cover one-time, casual infringement, it would cover anyone who, for example, used a substantial amount of infringing software on their computer.

Unsurprisingly, the NET Act did not encounter substantial legislative resistance. Framed by its sponsors as a law meant to close a loophole in the copyright law, it passed the House by a voice vote, and passed the Senate unanimously. The contrast with the DMCA enactment process, or indeed any of the conflicts considered in this Article, could not be starker. There were no protracted negotiations or battles, nor a struggle between the software industry and a putative "National Association of Pirate Bulletin Boards." In Congressional hearings held a week before the contentious WIPO Implementation hearings, not a single witness testified against the Act.³⁶² Both the interest in a NET Act and the relative ease with which it was passed show how the political economy of copyright amendment has changed.

Since its enactment in 1997, the NET Act has been used to prosecute slightly over 80 people, all for non-profit "sharing" of copyrighted works.³⁶³ The Justice Department has yet to lose a case. Of those sentenced to prison, the average length is approximately 25.7 months; the longest jail sentence was forty-six months and the shortest was four months.³⁶⁴ Robin Rothberg represents a typical software prosecution. The 34-year-old Boston-area computer consultant was convicted as the leader of "Pirates With Attitude," an online software-piracy group.³⁶⁵ He was sentenced 18 months in federal prison. The

359. Act of January 6, 1897, ch. 4, 29 Stat. 481-482.

360. NET Act, *supra* note 302, § 2(a).

361. *Id.*

362. See "No Electronic Theft (Net) Act," Hearing on H.R. 2265, 105th Cong., (1997).

363. Eric Goldman, *Warez Trading and Criminal Copyright Infringement*, 51 J. COPYRIGHT SOC'Y U.S.A. 395, 427 (2004).

364. *Id.* at 412.

365. Lee Gomes, *Software Pirates Face Brig Time, Angering Critics*, WALL ST. J., Mar. 21, 2002, at B1.

first film infringement prosecution came in 2000, when 25-year-old Jason Spatafore was charged with criminally infringing copyright in the film "Star Wars: The Phantom Menace."³⁶⁶ Spatafore was indicted after uploading portions of the Star Wars prequel to various web sites and encouraging others to download it.

The point here is not to debate the merits of the NET Act. The point is to show how the potential for users to act as rival disseminators has led to a growth of copyright's direct regulation of end users. That is a change copyright's communications regime, and one with potentially long-lasting consequences for the nature of copyright itself.

2. *The Anti-Circumvention Provisions of the DMCA*

The anti-circumvention provisions of the DMCA (codified in 17 U.S.C. § 1201 *et seq*) have been understood in many different ways by different people. The law and its effects (intended and otherwise) are too complicated to give full treatment here. The only point of relevance is that the anti-circumvention rules are perhaps best understood as a legislative byproduct of the conflict between disseminators and consumers in the 1990s. As Peter Menell writes, "analogous concerns" lay behind the anti-circumvention law and the NET Act: the suppression of "digital piracy."³⁶⁷

Unlike many of the other amendments studied in this Article, the anti-circumvention rules do not target an industry rival or technological challenger. They do not fit the pattern of, for example, the broadcasters' efforts against cable, ASCAP's efforts to derive revenue from radio, or the proposed royalty scheme for the VCR. Instead, the point of the anti-circumvention laws was to supplement technological efforts (digital locks) to make home copying more expensive if not impossible. Considered as a package with encryption initiatives, it becomes clear that the goal was eliminating the threat from infringing consumers acting as rival disseminators.

In 1995, when the anti-circumvention rules were first placed before Congress, Jack Valenti argued powerfully that the goal of anti-circumvention laws was to fight piracy, and as such any law must include criminal punishments. "One key weapon in our anti-piracy arsenal," he said, "is technology itself: electronic locks of various kinds that seek to prevent high-tech burglars from breaking, entering, and

366. Scott Craven, 'Phantom Menace' Case May Test Laws, THE ARIZ. REPUBLIC, Sept. 22, 2000, at 1B.

367. Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 133 (2002-03).

plundering our intellectual property.”³⁶⁸ For anti-circumvention laws to work, he said “Criminal sanctions are essential. Too many NII bandits, some operating totally in the underground economy, will scoff at the threat of civil damages, which many regard as simply a cost of doing business.”³⁶⁹ The emphasis on criminal liability is consistent with efforts, like the NET Act discussed above, to regulate infringing users, and not just large intermediaries.

Understanding the anti-circumvention laws as part of an anti-piracy campaign helps explain the very odd structure of the exceptions found in section 1201. As discussed above, unlike many of the other conflicts studied here, and unlike section 512 as a direct comparison, there was no direct conflict between industries that led to the anti-circumvention laws. There was no “circumvention” industry demanding a safe harbor or compulsory licensing scheme. Instead, the prohibitions in section 1201 includes particularized and confusing exceptions for certain types of users: libraries, law enforcement and government users, the software industry, and encryption researchers.³⁷⁰ It also creates the possibility for other exceptions by stating that it preserves fair use and creating a rule-making process for other exceptions conducted by the Library of Congress.³⁷¹ These exceptions are obvious accommodations to user groups who happened to be party to the legislative process. But it must again be stressed how different the result is as compared with the process of copyright settlement between rival industries. A represented industry does not ask for the preservation of “fair use”; it demands an exception written for itself. Section 1201 of the DMCA and the confusion that surrounds it are, in other words, a result attributable to the unusual political economy surrounding copyright in the 1990s and persisting today.

D. *The War Over Online Distribution*

In the 2000s, it is difficult to pick up a newspaper or magazine without seeing something about an ongoing “war” between the entertainment industry (Los Angeles) and computer programmers (San Francisco). Some of the excitement and rhetoric have masked the basic questions of communications policy presented.

What is termed the California civil war reveals the patterns of conflict between challenger and incumbent dissemination industries described here. The incumbent, the existing recording industry, relies

368. NII Copyright Protection Act of 1995: Hearing before Subcommittee on Courts and Intellectual Property, 104th Cong. (1997).

369. *Id.*

370. *See* U.S.C. § 1201(d)-(g).

371. *See* U.S.C. § 1201(a)(1)(C).

on “fixed” distribution: distribution of content fixed in CDs, DVDs or books, sold in retail stores. The challenger is the team effort described above: an (intentionally) passive online technologist coupled with highly active infringing users. As between online and retail distribution, neither from first principles has the obvious upper hand. Online distribution does eliminate many overhead costs (e.g., retail stores) and should be cheaper; it also provides customers the ability to get copyrighted content without actually going to a store. But fixed media has the advantage of the fixed form, packaging, and in some cases a superior product (real books are beautiful, very portable, and operate without batteries). Were neutral conditions of competition to apply, it might be a fair fight. But fair fights have never been a feature of the history of new communications technologies. We must look to see how copyright sets the stage for competition between incumbent and challenger.

Like their predecessors, certain online distributors have taken advantage of copyright “piracy” to gain an advantage over the incumbent. This was a particularly salient issue with respect to music, and the ability to appropriate copyrighted material was behind the growth of well-known companies like Napster and KaZaA. To repeat a point made earlier, the structure of the 1976 Act makes trying to rely on the ambiguity of the copyright statute (like the recording industry in 1909 or cable in the 1950s) a dicey proposition.³⁷² Instead, the historical infrequency and high cost of end-user enforcement were the vulnerabilities exploited by programmers.³⁷³ It is important to understand that pure “peer-to-peer” filesharing programs are not necessarily the best systems of online distribution. Their popularity and comparative advantage lies in the fact that they are designed to evade copyright’s enforcement system, and therefore minimize the price of an essential input (copyrighted materials).³⁷⁴

Meanwhile, the incumbent recording industry, like some of its predecessors, has done just what it can to gain control over the challengers. What is distinctive about these efforts is the extent to which they target both the challenger disseminators and its users. The full extent of their efforts has been detailed elsewhere: it includes entirely new strategies of enforcement, such as the dramatic targeting

372. Early companies that tried to do so lost nearly immediately. My MP3.com was an early online distributor that tried to “go legit” by licensing music and allowing people to download music that they already owned on CD. It was, however, quickly shut down despite their protestations of fair use. *See* UMG Recordings v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

373. *See* Wu, *supra* note 45, at 711-16 (describing copyright’s gatekeeper system).

374. *See id.* at 731-37 (describing the evolution of programs around the problem of copyright liability).

of end-users,³⁷⁵ investments in extralegal remedies,³⁷⁶ and demands that the Justice Department use criminal sanctions.³⁷⁷ The recording and film industries, like other incumbents, have not shown an interest in destroying online distribution. It is a question of control: the industry would prefer to steward the arrival of online distribution technology, so that it arrives on their schedule and creates collectible revenue.³⁷⁸

While the basic question of online distribution is mainly a question of communications policy, the rhetoric of authorship is nonetheless pervasive. Early on, Metallica Drummer Lars Ulrich said he found Napster “sickening,” for use of Napster, in his view, constituted “stealing” and was “morally and legally wrong.”³⁷⁹ On the other side, artists like Public Enemy’s Chuck D speak of the benefits of online distribution as an authorship issue. In 2000, in Napster’s glory days, he wrote in the New York Times that artists “should think of it as a new kind of radio — a promotional tool that can help artists who don’t have the opportunity to get their music played on mainstream radio or on MTV The Internet has created a new planet for musicians to explore, and I’m with that.”³⁸⁰

What can the communications policy perspective tell us? On the one hand, the recording industry’s efforts to control online distribution are a classic example of the vertical foreclosure discussed in Part II. Online distribution is a rival technology to the recording industry’s existing distribution of compact discs. The industry would like to use their control over copyright, an essential input, to control how and when online distribution reaches consumers. From this perspective the copyright lawsuits are suspect as a barrier to free technological competition. But that is not the end of the analysis, because unlike other technological challengers throughout history, it is not at all clear that entities like Napster, Aimster, or KaZaA represent legitimate market entrants. The complicated part is that peer-to-peer file-sharing networks and online music distribution are not the same thing: P2P networks are a particularly harmful form of online

375. See, e.g., *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Serv., Inc.*, 351 F.3d 1229, 1230 (D.C. Cir. 2003) (involving recording industry attempt to use subpoenas to “unmask” alleged copyright infringers).

376. See Wu, *When Code Isn’t Law*, *supra* note 45, at 473-75 (describing extra-legal methods used by the RIAA).

377. See Rick Boucher, *Justice Department as antipiracy shill?*, Oct. 30, 2003, CNET NEWS.COM, at <http://news.com.com/2010-1028-5099583.html>.

378. See, e.g., Remarks of Preston Padden, Executive Vice-President, Disney, Silicon Flatirons Telecommunications Conference Feb. 9 2003 (detailing film industry’s plans to introduce online distribution).

379. Metallica Press Release, Apr. 13, 2000.

380. Chuck D, *‘Free’ Music Can Free the Artist*, N.Y. TIMES, April 29, 2000, at A13.

distribution, at least as measured by the potential loss of revenue to creators.

The communications policy perspective, in other words, sees online distribution as a weighing of two costs, both difficult to assess. On one side are the costs of the foreclosure, which are the forgone benefits of the new technology and of disrupting the market power of existing content industries. On the other side are the lost incentives for new authors and value (if any) of the reliance interests in the property rights guaranteed the copyright law. Weighing these two costs leads to a spectrum of plausible policy positions on the question of online content distribution, each of which reflects different views of national communications policy. We can group them into three basic positions (reflecting the policies described in Part II): open, stewarded, and judicially balanced.

The open position is highly optimistic about the market and the process of creative destruction. A strong proponent of an open communications policy would give online distribution systems an exemption from contributory copyright liability despite the fact that they can be demonstrated to harm or even destroy authorial incentives. The article of faith is that such action, however traumatic in the short term for both disseminators and creators, will not destroy authorial incentives in the long term. If that is correct, consumer welfare will be served both in the short term (free content) and also the long term (cheaper content). But how might authorial incentives be restored? There are two possible accounts. First, there is faith that the demands of the market will necessarily recreate authorial incentives from somewhere, even if it is hard to specify where right now. If an online distributor like KaZaA becomes a powerful distributor of music, it will have a natural need to see its content creators survive, and therefore create some mechanism for paying authors. An alternative view places faith in the political process. Exempting the P2P companies from copyright liability could force some matters into copyright's classic communications regimes, forcing a settlement that will liberate online music distribution.³⁸¹

The Ninth Circuit's 2004 *MGM v. Grokster* decision adopts the "open" policy in strong fashion.³⁸² Judge Thomas's decision, if affirmed by the Supreme Court and not annulled by Congress, would create wide-open competition amongst music disseminators. As the court stated in a crucial passage:

381. The proposition is contemplated in Neil Weinstock Netanel, *Impose A Noncommercial Use Levy To Allow Free Peer-To-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003), and William Fisher, *A Royalties Plan for File Sharing*, July 11, 2003, CNET NEWS.COM, at http://news.com.com/2102-1070-1_3-1024856.html.

382. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004).

The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player.³⁸³

The court's view that the copyright market can correct any chaos created by copyright infringement is a clear endorsement of a policy of open market entry.

The diametric opposite to the radical open position is the stewardship position. The open position's alleged faith in the political process and free market does not impress proponents of a steward-based communications policy. In their view, copyright is property, and property is a market precondition. To argue that the state should allow an exemption to the enforcement of property rights to promote the functioning of the market is a logical contradiction. The stewardship view at its strongest also believes that the incumbent industry can and should be trusted to introduce online dissemination in an efficient and timely manner.³⁸⁴

In the P2P debate, the draft Induce Act, introduced in the summer of 2004, embodies the stewardship position.³⁸⁵ The law created copyright liability for anyone who "intentionally induces" infringement of copyrighted works. The term "induces," moreover, was defined to mean "aids, abets, induces, or procures" while the test for "intention" was defined to include whether a party "relies on infringement for its commercial viability." In short, the Act was written to make the passive but knowing facilitation of copyright infringement illegal, thereby making copyright owners the stewards not of online music distribution, but possibly of other passive distribution technologies as well.

The third view puts the judiciary in charge of overseeing market entry based on its assessment of harms. Unlike the stewarded view, it sees incumbent control of a new technology as undesirable, yet is sensitive, unlike the radically open view, to the destruction of creative incentives. Hence it asks the judiciary to determine whether a pirate industry is likely to become a legitimate market player. The effect is to call for the greatest judicial involvement and oversight of the three views described here. The radically open view would abandon the future of content distribution to market forces or Congress, while the stewardship view places the incumbent in a position to decide when

383. *Id.* at 1167.

384. *See supra* Part II.B(2).

385. S. 2560, 108th Cong., 2d Sess.

and how online distribution will arrive. But the intermediate position in *Napster* and *Aimster* puts the federal judiciary in a position of continuing supervision of the online distribution industry, waiting for the moment that the pirate becomes legitimate.

The clearest example of this approach is Judge Richard Posner's *Aimster* decision, which is unusually candid about the competitive consequences of the case.³⁸⁶ The decision opens with a rejection of the stewardship model as contrary to *Sony*: the recording industry had argued that actual knowledge of *any* infringement was sufficient to find liability. Posner rejects that position, saying it "could result in the shutting down of the [distribution] service or its annexation by the copyright owners (contrary to the clear import of the *Sony* decision)."³⁸⁷ But Judge Posner is also unwilling to grant open ended market entry to *Aimster* and similar online distribution systems. *Aimster*'s lawyers pressed for an interpretation that would essentially mimic the results of *Teleprompter*: a holding that even *potential* of legitimate uses are enough to create an exemption from copyright. This view is also rejected: "It is not enough, as we have said, that a product or service be physically capable, as it were, of a noninfringing use."³⁸⁸

Instead, the Seventh Circuit lays out, in detail, what an online content distribution system must do to gain market entry.³⁸⁹ The result is slightly reminiscent of technologically specific communications regulation. Judge Posner gives five examples of non-infringing uses that, with substantial evidence, would make it a legitimate market entrant under the *Sony* rule. His examples range from the obvious to the slightly less so, including the distribution of uncopyrighted music exchange as well as anonymous sharing of uncopyrighted photographs and dirty jokes.³⁹⁰ The upshot is the decision puts the judiciary in the role of deciding when the market entry has reached legitimacy.

As the Supreme Court reconsiders *Sony* in the context of online content distribution, it faces the three policy options described here. It can make market entry substantially easier with a broad exemption for bold new pirate technologies, and hope that the market or Congress will take care of the resultant chaos. It can hark back to the Bell System, tighten incumbent control, and trust existing players to introduce new technologies in a planned way. Or it can stick with the *Sony* rule and its consequent involvement of the federal judiciary in the weighing of the merit of new technological entrants. As the

386. *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003).

387. *Id.* at 648-49.

388. *Id.* at 653.

389. *Id.* at 645-51.

390. *See id.* at 652-53.

descriptions suggest, none of these options is particularly tidy. Yet the history of copyright's communications policy gives us no reason to expect clean solutions to conflicts among rival disseminators.

What the right answer is to the online distribution problem is hard to say. But it is important that the courts be aware that their copyright decisions are de facto setting a substantial and growing part of the nation's communications policy. The instinct that what matters in copyright is that authors be protected is not incorrect but simply an insufficient accounting of the issues presented. For behind authorship concerns lies a cycle of incumbent and challenger technologies that will never end. The only question is how painful and costly the transitions will be.

CONCLUSION

This Article has identified and described a dynamic that at once underlies much of copyright law and yet is not considered part of orthodox copyright theory. That dynamic is copyright's role in the regulation of competing disseminators, and particularly new and incumbent industries.

There is generous evidence of the effects of this dynamic in both the history of copyright and the law itself. Some of the strongest examples are the compulsory licensing settlements written directly into the copyright law. But the question of copyright's effects on competition among disseminators is evident in many of the important doctrines of copyright. Concern for the competitive effects of copyright underlies the fair use decisions on reverse engineering, some of the copyright-contract discussions, and other matters. Today, the dominant example is the *Sony* doctrine, which has been used by courts as a gateway between authorship policy and communication policy: to decide whether a court faces a problem of market entry, and whether it needs to do something about it.

Many of these effects are not unknown to copyright theorists. The principal goal of this paper has been to analytically consolidate these scattered doctrines and to understand them as a de facto communications policy. The secondary goal is to theorize copyright's effects on competition among disseminators, to understand what choices copyright decisions have, and what values the decisions are promoting. As copyright law becomes more important, it is essential that judges, lawmakers, and academics understand the effects of the law on parties other than authors.