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## On Copyright's Communications Policy

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# On Copyright's Communications Policy

Tim Wu<sup>†</sup>

## Introduction

There is something for everyone to dislike about early twenty-first century copyright. Owners of content say that new and better technologies of infringement have made it too easy to copy expressive works. Easy copying, they say, threatens the basic incentive to create new works; hence, new rights and remedies are needed to “restore the balance.” Most academic critics complain, instead, that a newly enlarged copyright and new mechanisms of technological self-help give content owners unprecedented levels of control over content. This, in one version of the argument, threatens the creativity and progress that copyright is supposed to foster;<sup>1</sup> in another, it represents an “enclosure movement” that threatens basic freedoms of expression.<sup>2</sup> Copyright, these critics argue, has overgrown its proper boundaries. The balance, again, must be restored.

What these arguments have in common is a focus on copyright's “authorship” function. Copyright policy must balance incentives and access costs to effectuate one of various constitutional goals: progress of science,<sup>3</sup> democratic governance<sup>4</sup> or the system of free expression.<sup>5</sup> Few disagree that these are the goals: the main disagreement is over what means serve these ends.

Yet the recent history of copyright asks whether such a debate can really capture what has gone wrong with copyright. The incentives debate has proved indeterminate. Both owners and their critics claim a tragedy of authorship. Yet both have difficulty demonstrating empirically that the engines of creativity has been quelled by either piracy or overprotection. At a theoretical level, any

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<sup>1</sup> See generally, Lawrence Lessig, *The Future of Ideas* (2001).

<sup>2</sup> See generally 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 (1999).

<sup>3</sup> As expressed in the copyright clause itself. U.S. Const. Art. §8.

<sup>4</sup> See Neil Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283 (1996).

<sup>5</sup> A value given priority in Benkler, *supra* n. 2.

putative change in copyright protection defended as necessary to preserve incentives to create, and attacked as unnecessary control.<sup>6</sup>

I suggest today's malaise is poorly described as a tragedy of authorship or a failure of incentives. It is better understood, I suggest, as a failure of copyright's communications policy. The effort to link every dissatisfaction to sympathetic conceptions of authorship or concerns about free expression obscures what copyright is doing as a matter of communications policy. The real question should be this: do stronger or weaker rights better promote the goals of promoting innovation, competition, and access to new communications technologies? This is not to say that the debate over authorship is nothing but a sham. It is to say, rather, that there are questions that authorship theories cannot answer. The purpose of this is to stress possibilities and benefits of a communications-centered copyright theory.

What I propose is to take copyright's role in communications policy seriously, and takes a modular approach to understanding the functions of copyright. We should, I suggest, explicitly recognize that copyright comprises distinctive authorship and communications regimes, whose function can often be independent. Stated otherwise, copyright regulates the dynamic relationships both between: (1) authors, new and existing, and (2) communications technologies, incumbent and challenger. The first regime is the familiar system that grants a balance of exclusive rights to encourage creativity. The second is a messier regulatory regime, premised largely on industry-specific liability rules, immunities and special accommodations.

The payoff from this approach is both analytic and descriptive. Analytically, it improves the prospects for understanding and criticizing copyright. It enlists the tools of communications and competition policy to examine copyright's *de facto* communications regime. Copyright's assignment of rights has a clear effect on the conditions of competition for rival disseminators. We should understand the goal of the communications function of copyright as those of national communications policy: promoting competition, and innovation, and access in new communications technologies. Second, the modular model is a better descriptive fit with both the existing copyright code and the particular history of 20th century copyright. Much of the existing copyright code is very difficult to

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<sup>6</sup> Access costs is used here to mean (1) any costs a potential new author would incur to access materials necessary to creating a new work, such as licensing fees and the transaction costs of licensing, along with (2) deadweight losses that are a consequence of the market power created by copyright.

describe as a device for providing incentives to create new works.<sup>7</sup> That description may fit various “core” doctrines that consume the bulk of scholarly attention, such as the idea / expression dichotomy,<sup>8</sup> term limits,<sup>9</sup> and parts of the fair use doctrine.<sup>10</sup> But the copyright code is also full of industry specific immunities, compulsory licensing schemes, and other accommodations. The link to authorship in such sections is unclear at best. I suggest it will be useful to take these as a separate communications regime, occupied with the management of challenger and incumbent dissemination industries.

The 20th century history of copyright shows that copyright has in fact played a nuanced and recurring role in managing competition between incumbent and challenger disseminators on numerous occasions. These include the conflicts between cable and broadcast, photocopiers and publishers, the early recording players and sheet music publishers, and others. In the main, copyright has sought to end such conflicts with specific statutory settlements mediated by various players.

All of this, I suggest, reveals a copyright that theorists hardly know. It is not that scholars are unaware of copyright's role in communications policy—it is that the focus on incentives for authors or freedom of expression leaves little basis to evaluate or criticize copyright's communications policy. A closer look reveals a copyright system that was once sensitive to its role in communications regulation, but that has since lost nearly any conception of that role.

The study of copyright's communications policy reveals copyright as the embodiment of a theory of innovation and competition that has grown strongly into disfavor in the communications field. Namely, the rhetoric of authorship leads incidently to a model that puts the incumbent rights-holder in a supervisory role over future technological innovation. Such approaches to innovation, while historically popular, are today mostly discredited. They have suffered under the criticisms of evolutionary theorists in the economic literature and the obvious success of non-centralized innovative models. Unfortunately, under copyright, the stewardship model of innovation enjoys a tenure protected by its inobviousness.

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<sup>7</sup> This fact is not unnoticed among some scholars, who have with some success attempted to supplement the incentives account with various secondary theories, such as evidentiary functions. See, e.g., Douglas Lichtman, *Copyright as A Rule of Evidence* (working paper, 2002); Richard Posner & William Landes, *Intellectual Property Chapter 3-7* (forthcoming 2003).

<sup>8</sup> Embodied in 17 U.S.C. §102(a).

<sup>9</sup> See Copyright Term Extension Act.

<sup>10</sup> 17 U.S.C. §107.

This paper wants to recognize what copyright does in the communications field, as the first step toward asking whether that is the kind of communications policy we want. This paper is organized as follows. Part I makes the case against author-centric theories of copyright, and shows that such theories can lead to an incumbent-favoring communications policy. Part II makes a descriptive claim: that much of the copyright law and its institutional structure are in fact an under-theorized communications regime. Part III, finally, shows how copyright's communications policy has functioned in the 20th century.

## **Part I:**

### **Against Author-Centrism**

Copyright theory is often depicted as a long conflict between two dueling theories, in kind of a legal approximation of the 100-year War. The first theory, often taught to Americans as “our” theory, is Anglo-American, and describes the purposes of copyright as utilitarian or “economic.” It premises the existence of copyright on a market failure. Copyright exists to provide incentives for authors to produce works, and avoid a sub-optimal creation of expressive works that might otherwise result. It should accept limits on the right granted, if doing so will encourage still greater creation of new works—justifying limitations like the doctrine of fair use, and the idea-expression dichotomy. Copyright in this view is ultimately about incentivizing creation, like other forms of economic legislation: Lord Macaulay's “tax on readers for the purpose of giving a bounty to writers.”<sup>11</sup>

The traditional nemesis of the Anglo-American view is depicted as the European, or moral theory of copyright. It holds that authors have a natural right to the fruits of their labors; copyright is granted because the author deserves it. One version of this idea says that it is just that authors be rewarded for the value they contribute to their society (which is different than putting up a reward to encourage creation). Another, older version is as simple as the idea that as the author owns his (smaller) creation in just the manner that God owns his (larger) Creation. What you create is yours: “to every cow its calf.”<sup>12</sup>

On top of this traditional debate we find some modern complications. The moral theory, in the United States at least, has mainly retreated to the status

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<sup>11</sup> T. Macaulay, *Speeches On Copyright* 25 (C. Gaston ed. 1914)

<sup>12</sup> A. BIRRELL, *SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS* 42 (1899).

of foil, used more to accuse more than defend.<sup>13</sup> Several new clusters of copyright theories now start with the American premise that copyright exists to incentivize creative expression, but search for reasons apart from economic market failure to believe that this might be important. The move is usually Constitutional: the major examples are theories that see copyright's incentive structure as playing a role in a republican system of governance,<sup>14</sup> or see copyright's incentive system as part of the larger system of free expression associated by the First Amendment.<sup>15</sup>

This debate is familiar, interesting to copyright theorists, but also quite misleading. It is misleading because it is not really a debate about copyright theory, for what are advanced are not comprehensive theories of copyright. Rather, the economic, moral and related approaches are theories of *authorship*, and author-centric theories of copyright, for their concern is the effects the grant of copyright on the individual creators of expressive works. This is not to say it is wrong to consider copyright's effects on authors; the mistake is to imagine that this is a theory that accounts of copyrights' effects on the industries it serves.

The goal of this Paper is to reintroduce a different kind of distinction: between *author-centric* and *communications* theories of copyright, and to argue for the primacy of the latter. This Part reintroduces the view of copyright that puts primacy on copyright's communications policy, the regulating of conditions of competition among publishers or disseminators, and the promotion of innovation in dissemination technologies.

### *The Problem with Authorship Theories*

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<sup>13</sup> 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* (1993); Jaszi, *supra* note 9; Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 *Duke L. J.* 455; Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *Yale L.J.* 1533, 1540 (1993) (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). See also Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 *Ohio St. L.J.* 517, 529-39 (1990) (stressing that natural law concepts are inherent in copyright law).

<sup>14</sup> See, e.g., Neil Netanel, *Copyright And A Democratic Civil Society*, 106 *Yale L.J.* 283 (1996); William W. Fisher III, *Reconstructing The Fair Use Doctrine*, 101 *Harv.L.Rev.* 1659 (1988).

<sup>15</sup> See, e.g., 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 (1999);

An important reason for copyright theory to abandon author-centrism are the accepted limits of the approach. Copyright researchers have long struggled to understand what the actual effects of the copyright law on creative individuals are. They therefore have great difficulty showing that the current or some imagined state of copyright law is impeding the optimal production of expressive works. Even if we were perfectly able to understand copyright's effects on authors, there would still be reasons to consider other effects. But with diminishing returns to our ability to optimize copyright with respect to individual creativity, the case for considering other goals is stronger.

Sticking with the incentives theories that dominate U.S. copyright, most theorists agree<sup>16</sup> (1) that granting some exclusive rights in works of authorship will encourage creation of expressive works, but (2) that the law must strike some balance between the concerns of existing authors and new authors.<sup>17</sup> The general agreement on these positions, however, masks great difficulties in answering very basic questions. Suppose we faced dueling proposals for copyright reform. One, the “strong rights” view, would simplify copyright by eliminating any limitation on the rights of copyright owners other than the rule that ideas cannot be copyrighted, and the existing fair use doctrine.<sup>18</sup> The “weak rights” view would move in the opposite direction, returning copyright owners back to the twin 14 year terms of the 1790 Act.<sup>19</sup> How do we know which would be closer to a socially optimal incentives for creating new works?

This question is uncomfortably hard to answer. The greatest indeterminacy arises from the unknown degree to which copyright law, as opposed to other barriers to entry or sources of utility motivate authors to create expressive works. No one denies that money encourages writing. But since Arnold Plant's study of publishers in 1934, theorists have been pointing out the multiplicity of means available for remuneration or market advantage.<sup>20</sup> The

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<sup>16</sup> Not all. There is a persistent literature that rejects these assumptions and argues that copyright does not inspire the creation of new works. See, e.g., Mark Nadel, *Questioning the Economic Justification for Copyright*, (draft 2003), <http://www.serci.org/congress/papers/nadel.pdf>.

<sup>17</sup> Some take the relevant balance to be between owners of copyright and the public, see e.g., Pam Samuelson. This expresses a distributional concern that will be addressed presently.

<sup>18</sup> See 17 U.S.C. § 102(b). The denial of protection to ideas, as opposed to their expression, is usually taken, along with term limits, as the most basic concession to the public domain.

<sup>19</sup> Such an approach is recommended in, for example [James Boyle].

<sup>20</sup> See Arnold Plant, *The Economic Aspects of Copyright in Books*, 1 *ECONOMICA* (n.s.) 167 (1934) (arguing that publishers have sufficient means other than copyright to obtain remuneration and recommending a compulsory licensing scheme that takes effect five years after publication); see also, Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 *HARV. L. REV.* 281, 350

relative size of copyright versus other sources of rewards remains unknown. Some suspect, as Stephen Breyer did in 1970, that if copyright is just a means of encouraging creation of new works, it might be a redundancy, or there might be cheaper ways of achieving the same results.

Second, the relationship between the copyright law and the market for expressive products is not well understood. At an extreme, we know that putting a work in the public domain will affect the price that can be charged. But for smaller doctrinal differences—like as between a copyright with a stronger or weaker fair use doctrine, it is hard to tell whether the effect on the market price will be significant, particularly as compared to competing effects on market price. Even if there becomes some effect, the effect on authorial as opposed to disseminator income is another step blurrier. Finally, the effect of small doctrinal changes on what a potential author takes to be the projected future benefits of creative work—the point at which the incentives to create actually matter—is by this point shrouded in economic mystery.

A final and non-trivial complication arises from the question of whether the social goals of copyright are simply quantitative (produce more works), or whether copyright should concern itself with the nature or quality of the goods produced. For example, Glenn Lunney, who is concerned with the effects of too generous incentives to create, argues that more generous rights may steer authors to produce popular, as opposed to great works.<sup>21</sup> Yohai Benkler, meanwhile, argues that strong rights systems promote certain modes of information production, namely, “commercialization, concentration, and homogenization.”<sup>22</sup> Some have taken excessive production of expressive works as a form of social waste: Why support the work of Tom Clancy and Danielle Steele and John Grisham when all write books that are entertaining and easy to read? Writers like Michael Abramowicz believe that we live in a world of redundancy: that the “consumer of copyright works buys in markets overflowing in variety, bordering on redundancy ... to intellectual property theorists ... copyright must seem successful indeed.”<sup>23</sup>

These kinds of questions have dogged efforts to assess whether the weakness or strength of copyright laws are impeding creative expression. The result is that different camps have constructed completely independent tragedies

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(1970) (arguing that copyright may not be necessary to encourage creation of various types of works).

<sup>21</sup> See Glenn Lunney, *The Death of Copyright, Digital Technology*, 87 Va. L. Rev. 813 (2001).

<sup>22</sup> Yohai Benkler, *Intellectual Property And The Organization Of Information Production*, 22 Int'l Rev. L. & Econ. 81 (2002).

<sup>23</sup> See Michael Abramowicz, *Copyright Redundancy* (draft on file with author, 2003).



of authorship following from too much, or too little, copyright protection respectively. This is possible because the method consists of internal critiques, hunches, and frightening stories, as opposed to clear evidence of quantitative or qualitative harm to the creative process.

Consider the current debate. The loudest arguments that mass infringement threatens authorship comes from the recording industry. Their argument is as follows: CD sales have fallen since the development of effective evasion; hence there is less money to develop talent; hence, the incentive system of copyright is threatened. While superficially possessed of infallible logic, closer examination reveals serious flaws. First, the data itself has difficulty independent analysts have found that the decline in CD sales is equally consistent with explanations such as economic recession and competition from other forms of entertainment. But even if CD sales have declined because of copyright infringement, the harder question is whether CD sales—as just one technology of dissemination—are in fact a good proxy for the incentives facing creators of music. Sheet music sales declined in the age of the phonograph; yet this was hardly the end of music in America. Put another way: recorded music revenue is proportionally far larger now than it was in the 1950s - 1970s, yet those eras are generally regarded as a golden age of creativity in popular music. So while the argument has intuitive appeal, the evidence of harm to authorship, as opposed to the dominant disseminator, is lacking.

The critics of copyright's growth do not fare better. One approach is to take the past as a baseline and base criticism on the fact of change itself. Terry Fisher, for example, has illustrated the growth of copyright and other intellectual property regimes in the 20th century, and suggested that things have gone too far. But (as Fisher acknowledges), the difficulty with this argument is that the markets for expressive works have changed so much it is hard to tell whether the expansion of rights in the 20th century was warranted.

Another is the use of stories and anecdotes that portray a level of protection would strike a reasonable person as excessive. For example, critics of current copyright doctrine complain that singing "Happy Birthday" in front of a crowd violates the right of public performance in a copyrighted work.<sup>24</sup> Jessica Litman argues that imagining a different actor in a movie you just saw is technically the creation of a derivative work.<sup>25</sup> Lawrence Lessig's *The Future of Ideas* opens with a filmmaker faced with the hassle of licensing every bit of background work that appears in every scene. These examples may strike people as a bit loony, or in the filmmaker story, upsetting. But while the anecdotes and

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<sup>24</sup> Jonathan Zittrain, Remarks at Catholic University Law School, Oct. 9, 2002.

<sup>25</sup> Jessica Litman, *Digital Copyright* \_\_\_\_ (2000).

hypotheticals may inspire the sense that copyright has gone to far, assessing whether any of this has inhibited creation of new works remains difficult.

*The Communications Approach*

Casting copyright as a question of communications policy allows us to see the same question differently, and arrive at different goals for the copyright law.

To think of copyright in communications policy terms requires beginning with a basic model. A disseminator is anyone owns a legally protected means of communication with a customer, as follows:

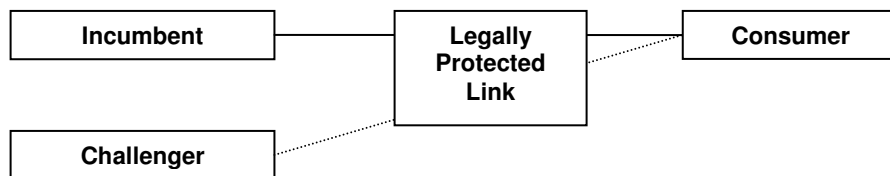
**Fig. Communications Model**



The legally protected link can be physical copper loops between the telephone company and the consumer; the cable infrastructure, and so on. In such cases we see the legal protection stemming primarily from the ownership of physical infrastructure. But the link can also be a purely legal entitlement, like the allocation of a certain spectrum to a broadcaster to reach his customers.

From here the policy questions now all concern the degree to which the legal protection afforded that link should allow the original owner, or the *incumbent* disseminator, from preventing a competing disseminator, a challenger, from reaching the customer in question, using either new media, complementary products, or otherwise. This is what is familiar to communications policy theorists refer to as the “bottleneck problem.”<sup>26</sup>

**Fig. The Bottleneck Problem**



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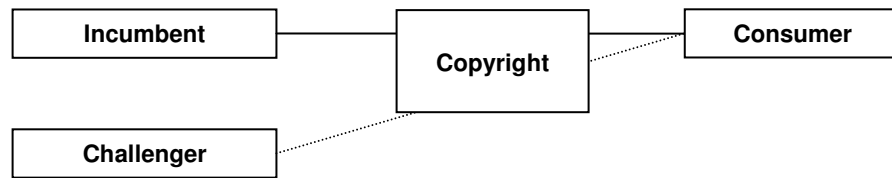
<sup>26</sup> See, e.g., Ingo Vogelsang and Bridger M. Mitchell, *Telecommunications Competition* 55 (2001) (on the effect of bottlenecks in communications policy).

As phrased, the bottleneck problem ends up being central question to most contemporary areas of communications policy: wireline regulation, broadband regulation, and spectrum policy.<sup>27</sup> (It is also a restatement of issues of barriers to entry in antitrust policy, but in a specific context). In each case the basic tradeoff is the same. On the one hand, allowing the incumbent too much power to prevent challengers from reaching customers retards both price competition and (according to the modern view) innovation in new communications technologies. But granting too little legal protection to the original link create incentives to free-ride and underinvest in building the original link and its technological successors.

With some simplifying assumptions, it is not hard to see the copyright law as simply another means of protecting a link between an incumbent disseminator and his customers. The principal difference is that the links that communications law is accustomed to tend to be different types of media, rather than different individual products. But that is a difference that does not change the analysis.

Under this view, the publisher<sup>28</sup> of a copyrighted book has a legally protected link between himself and the consumers of that book, analogous to the local exchange carrier's ownership of the telephone lines. The question then becomes the extent to which copyright should block challenger disseminators from reaching that consumer with some kind of competitive product, either through the contents of the book recast in different media, or a different product altogether.

**Fig. Copyright as Communications Bottleneck**



To make this example more realistic, consider a book publisher with a copyright to a well known book, like *Harry Potter and the Philosophers' Stone*. The communications questions that arise are the degree to which challenger disseminators reach consumers with two different types of competing products: (1) versions of the original delivered via competing media, and (2) similar

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<sup>27</sup> See Ingo Vogelsang and Bridger M. Mitchell, *Telecommunications Competition* 51-59 (2001).

<sup>28</sup> For present purposes we ignore the fact that copyright is vested in authors, rather than disseminators, for reasons explained below.

products. We see these questions raised by the following kinds of products

- Movie adaptations
- Television adaptations
- Translations
- Electronic versions of the Book delivered through the Internet
- Other Child-Wizard books

Based on ideas of authorship that transcend media-types,<sup>29</sup> copyright gives the incumbent the right to block a challenger in most of these forms of challenger or cross-media competition, but does not block competition in similar books. It is also significant that today that electronic versions of the book are freely downloadable in a mainly unenforced violation of the copyright law. We can therefore see in today's copyright law a choice of communications policy with effects on challenger industries.

This basic idea—that the grant of copyrights will affect competition for expressive products—is obviously not new. The insight here is understanding the dynamic effects of the inhibition of competition on industry innovation. Most particularly, viewing access to consumers as a competition between incumbent and challenger disseminators will tend to put the incumbent in a position to control the or strongly influence the development of new dissemination technologies.

*Against Granting Clear Entitlements Up Front*

While copyright's communications regime is generally under-theorized, there are nonetheless some ideas on how copyright should function with respect to cross-media competition. Property theorists often argue that best approach to any potential dispute between incumbent and competitor is to grant as broad and clear a copyright entitlement up front, applicable across a breadth of dissemination media. This, it is argued, would force parties into private negotiation and eliminate the possibility of destructive conflict.<sup>30</sup> And this approach is to a degree codified in the 1976 Copyright Act, which states that copyright subsists in "original works of authorship fixed in *any* tangible medium of expression, *now known or later developed* ...."<sup>31</sup>

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<sup>29</sup> 17 U.S.C. §102(a)

<sup>30</sup> See generally, Robert P. Merges, Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations, 84 CAL. L. REV. 1293 (1996).

<sup>31</sup> 17 U.S.C. § 102(a) (italics added).

In the communications field, Peter Huber is a well-known proponent of this approach. As he along with John Thorne and Michael Kellog argue in their treatise with respect to the mid-century conflict between cable and broadcast:

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 from the air, cable might have started up more slowly, but it would have probably grown more quickly.<sup>32</sup>

There are, I want to suggest, strong reasons to question this intuition: reasons why it may not be optimal to create a scheme that puts the incumbent disseminator in a position to enforce (or try to enforce) a clear, copyright entitlement from the outset. There are two classes of argument. The first largely mirror the arguments against the prospect theory in patent,<sup>33</sup> or the existence of the derivative works doctrine in copyright<sup>34</sup>—that they put too much faith in a pioneer to steward the growth of the industry. The arguments for clear and broad property entitlements to eliminate conflict may incidentally embody a theory of innovation of questionable merit.

The second argument recognizes that the costs of enforcing certain rights may make granting a broad initial entitlement irrelevant as a means of limiting conflict. Home copying is an example: if enforcing limits on home copying is unfeasibly expensive, conflict between the challenger and incumbent is unavoidable, and the model of broad rights provides no answer.

First, the argument from innovation theory. For any form of expressive work (video, book, music, etc.) there will exist several potential technologies of dissemination. However, 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 developed and reduced to practice, including wire (cable television), satellite, and most recently, streaming applications on the world wide web.

From this we can see that granting a copyright entitlement that covers all forms of dissemination can have the effect of giving the pioneer industry the

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<sup>32</sup> See John Thorne et al., *Federal Broadband Law* §10.11 at 642 (1995).

<sup>33</sup> See, e.g., Merges and Nelson, *On the Complex Economics of Patent Scope*, 90 *Colum. L. Rev.* 839, 890-94 (1990).

<sup>34</sup> See Mark Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 *Texas Law Review* 989 (1997)

power to control follow-on development of technology for delivering video. Assuming that the pioneer controls the creation of content (either by controlling copyrights, vertical integration or 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.<sup>35</sup>

There are advantages of this approach. As suggested by Ed Kitch's original work on the prospect theory in patent law, control centralized in a pioneer industry allows a more orderly process of deploying follow-on innovation.<sup>36</sup> The costs of conflict discussed above may be eliminated if broad, enforceable rights are granted. The broadcasting industry could, for example, have directed the orderly build-out of cable systems, avoiding some the endless fighting and hostility that characterized the actual process.

But over the last two decades the argument against such centralized models has strengthened. Economists led by writers like Richard Nelson and Sidney Winter argue that innovation is best described as a trial-and-error, evolutionary process.<sup>37</sup> Markets select from a variety of competing approaches to improvement whose relative merit is difficult to assess in advance. Believers in a Darwinian process believe both that the most promising path of development is difficult to predict in advance, and that any one party will suffer from cognitive biases (such as a predisposition to continue with current ways doing business) that make it unlikely to come to the right decisions, despite best intentions. If innovation does indeed occur this way, legal theorists argue that a model that vests control over improvement in a central authority may yield unfavorable results.<sup>38</sup>

A critical assumption here is that the incumbent controls the copyrights that the challenger would like to disseminate. As we will see, as a descriptive matter this tends to be the case. The RIAA brings copyright lawsuits against Napster;<sup>39</sup>

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<sup>35</sup> Accord, Trotter Hardy, Copyright and "New-Use" Technologies, 23 *Nova S.E. Univ. L. Rev.* 657 (1999).

<sup>36</sup> See Edmund Kitch, The Nature and Function of the Patent System, 20 *JLE* 265 (1977).

<sup>37</sup> See, e.g., John Ziman, evolutionary models for technological change, in *Technological Innovation as an Evolutionary Process* 3 (John Ziman, ed., 2000); Richard Nelson, *Understanding Technical Change as an Evolutionary Process* (1987).

<sup>38</sup> E.g., Merges and Nelson, On the Complex Economics of Patent Scope, 90 *Colum. L. Rev.* 839, 890-94 (1990); generally, Lawrence Lessig, *The Future of Ideas* (2000).

<sup>39</sup> *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2001).

sheet music publishers who brought suit against the piano roll industry,<sup>40</sup> and it was broadcasters who sought to control cable in the 1960s.<sup>41</sup>

I don't want to deny the possibility that, in theory, creators of content could separate their interests from the incumbent disseminator and support the development of a challenger. There are simply very few examples of this happening.<sup>42</sup> So long as incumbent disseminators continue to control important copyrights, the grant of broad rights will raise serious questions of innovation policy.

Second, the model of broad initial rights can only be an answer when such rights can be enforced. Yet the recent history of copyright is full of scenarios where rights exist without reasonable prospects of enforcement. For example, as is discussed in the section following, all sides recognized that copyright was unenforceable against casual home copying in the 1980s. 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.

None of this is to suggest that there is no use in trying to optimize copyright's authorship function. Instead, I am suggesting that portray every perceived problem as a threat to authorship ultimately serves more of a rhetorical than analytic function. The concept of copyright as an engine of free expression and creativity is wonderfully attractive, and both sides exploit the drama of authorship imperiled. Yet I suggest that we find clearer direction by looking to today's problems as a failure in copyright's relatively unattractive role in communication regulation, where, I suggest, we may see clearly that the law has fallen into dysfunction.

## **PART II – Copyright's *De Facto* Communications Regime**

The first Part of this article has been largely normative: it is the argument that an author-centric view of copyright is of limited utility and has the incidental effect of creating poor communications policy. Part II makes a descriptive claim: that much of the copyright law and its institutional structure are in fact an under-theorized communications regime.

### **The Modular View of Copyright**

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<sup>40</sup> *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17-18 (1908).

<sup>41</sup> See *infra*.

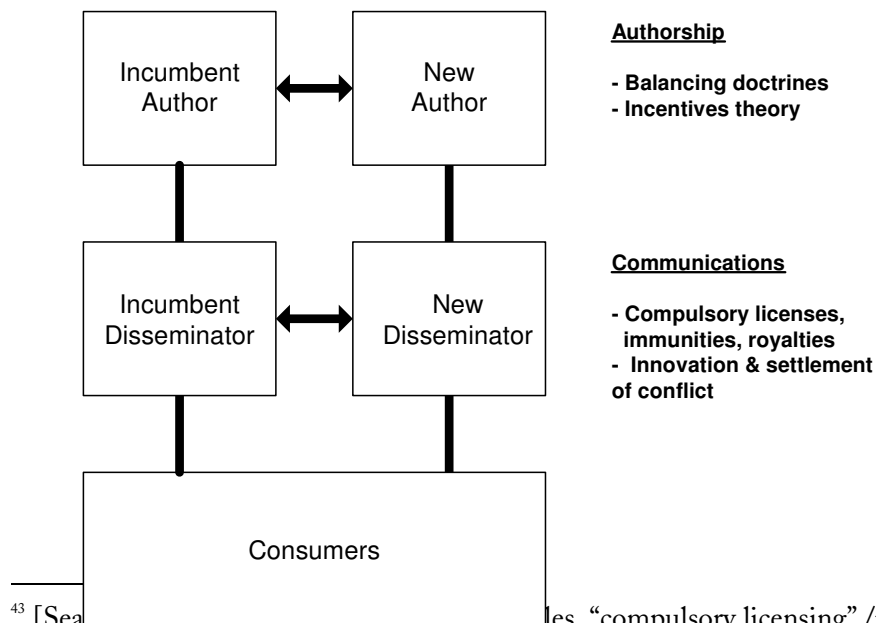
<sup>42</sup> There are occasional exceptions (like Stephan King's experiment with distributing his book online), but these tend to reinforce this suspicion. In music, this was the "celestial jukebox" model that has failed to materialize.

A casual reader of the copyright code itself would quickly realize that much in the statute is difficult to explain as a property rights scheme designed to encourage creation of new works. That description may fit certain core sections, like the statement of subject matter in §102, and the exclusive rights expressed in §106, and general exceptions, like the fair use doctrine, in §107. These are the mainstay of the copyright law, and attract by far the most academic attention.<sup>43</sup>

But large sections of the code seem to have little to do with this model. They are, rather, devoted to industry-specific liability rules (compulsory licensing schemes) and immunities. These sections are ugly, complicated, and obscure to copyright students.<sup>44</sup> They include the mechanical license in section §115, the secondary transmission license (for cable television) in §111, and particular immunities for particular groups, such as internet service providers in §512 and digital audio recording devices in §1001 *et seq.* Largely concerned with the interests of disseminators, their relationship to a putative author's incentives to create would seem, at best, indirect.

How do we account for these sections? I argue that they are evidence of copyright's divided functionality: the fact that the law is managing distinct relationships, under different theories, using different institutions. Consider the world of packaged information as comprised primarily of three groups: authors, disseminators, and consumers of expressive works.

**Fig. Copyright Modules**



<sup>43</sup> [Search for "compulsory licensing" /p "compulsory licensing" 527 articles in WESTLAW JLR database].

<sup>44</sup> These sections are granted only passing attention in copyright casebooks. [Copyright casebooks.]



The modular description of copyright suggests that the law is focused on the management of two distinct relationships: between new and existing authors, and between incumbent and challenger industries of dissemination. The former is copyright as a authorship regime; the later is copyright as a communications regime.<sup>45</sup>

*The De Facto Communications Regime*

Copyright's de facto communications regime manages relationships between rival disseminators: like cable systems and broadcasters, or CD publishers and Internet service providers. In the doctrine this role is reflected in the following sections. One cluster reflects concessions or immunities that limit the scope of the right in a manner that is expressed as a public limit, yet which benefits a particularized private group:

- § 112 – Ephemeral recordings
- § 117 – Computer programs and RAM copies
- § 118 – Public broadcasting license
- § 121 – Reproductions of nondramatic works for those with disabilities
- § 906 – Reverse engineering of mask works permitted
- § 907 – Immunity for innocent infringers of mask works
- § 1201 – “Backup” provisions of DMCA copy control circumvention

Another set of immunities fall within a second class, reflecting a balance between competing private interests.

- § 111 – Secondary transmissions by cable operators
- § 114 – Digital Audio Transmission / Webcasting license
- § 115 – Musical works recording license
- § 116 – Jukebox negotiated licenses
- § 119 – Satellite retransmissions of television signals
- § 122 – Satellite retransmissions of television signals into local markets
- § 512 – Immunity for ISPs transmitting or hosting infringing material
- § 1008 – Immunity for producers of digital audio recording devices

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<sup>45</sup> I don't mean to suggest that these two functions are the only possible major functions of copyright. For example, there appears to be much in the code that cannot be explained other than as a system for protecting the reputation of existing works, in a manner similar to trademark. Examples include some of the latest term extensions and arguably the derivative works doctrine. There is also evidence to suggest parts of copyright are optimized to play an evidentiary role, see, e.g., Douglas Lichtman, *Copyright as a Rule of Evidence* (working paper 2002).

What characterizes these parts of the copyright statute as a *de facto* communications regime is the fact they speak principally to rival disseminators. They are, more precisely, the results of a settlement process that has attempted to mediate the interests between incumbent and challenger industries.

*The Process and Institutions of Copyright Settlement*

So how, precisely, does copyright's communications regime operate? This part claims that the primary mode has been the process of *copyright settlement*. That is to say, the various statutory schema are the consequence of complex negotiated settlements between rival industries that are codified directly in the copyright statute.

Part III offers a more detailed history of copyright settlement in 20th century history. Here, however, we can describe the copyright settlement model in more general terms.

As in the basic communications model developed above, there are two relevant actors. In one figurative corner is an incumbent disseminator, already earning a supra-competitive profit, thanks its control of expressive works that enjoy exclusive rights created by copyright. This is the sheet music publishing industry before the piano-roll and gramophone; the broadcasting industry before cable, and so on. In this situation, the primary concern of the incumbent is what public choice theorists like call "rent-protecting"; that is, dedicating resources to protecting its favorable position from encroachment from other groups.<sup>46</sup> The incumbent holds a number of potential legal threats against any challenger, including the imposition of incessant litigation costs, an ability to convince regulators (like the Federal Communications Commission) to restrict the challenger, or to lobby for laws that will put the challenger at a serious disadvantage. The incumbent, increasingly, may also to employ technological self-help measures that deny access to the content it controls in the first place.

On the other side are the challengers: the new disseminators, be they the nascent cable industry, piano roll companies, or internet services. The challengers are challengers for two relevant reasons. First, they enjoy some technological advantage in the delivery of content – either better quality (like cable or piano rolls), or lower cost (like broadcasting or peer filesharing). To simplify things, we can simply model this as a lower marginal cost of dissemination. In the history of conflict, the second typical advantage enjoyed by challengers is their unregulated status, as compared with the incumbent.

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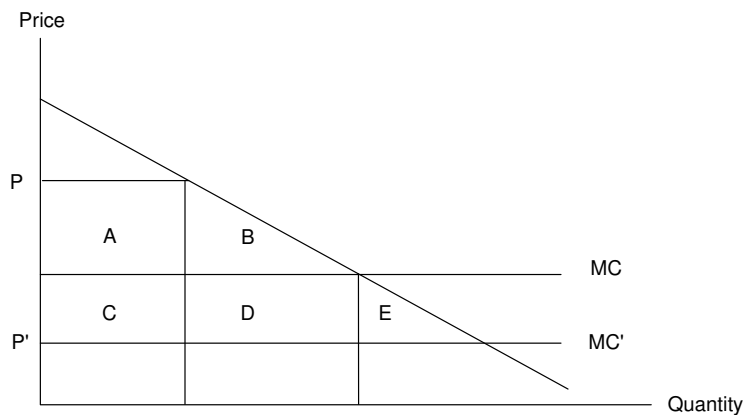
<sup>46</sup> For an explication of rent-protecting in the context of public choice theory, see Robert E. Tollison, Rent Seeking, in *Perspectives on Public Choice* 506, 515-517 (Dennis Mueller, ed., 1997).

They may be unregulated either because existing copyright or communications law was not written to apply to them (as in the cases of cable or gramophones, or internet service providers), or because of some capability to evade the law (as in third generation peer filesharing and unregulated satellites).

Given this scenario, a simple way the challenger can compete is through acting in the interests of consumers, providing transmission of copyrighted content at a steep discount. Stated less charitably, challengers free-ride and pass on some of the savings. The discount is at some price above its marginal costs of transmission, but below the market price set by the content owners. The new dissemination technologist is restoring to consumers part of the consumer surplus taken by the copyright law, consisting of both the monopoly rents and deadweight losses.

A conflict arises because the incumbent resists the wealth transfer, while the challenger fights to gain it. Viewed in basic rent-seeking terms, each side will be willing to spend considerable amounts of money protecting or seeking to transfer the surplus created by the copyright law.<sup>47</sup>

**Fig. The Gains from Piracy**



What precisely are these expenditures? As we will see, they can manifest in several ways: incessant litigation between the parties, lobbying for laws to disadvantage the other, and (increasingly) investments in self-help measures, such as technologies of protection, and technologies of evasion.

From the histories that follow, we can describe the pattern more precisely. In an early period, the incumbent industry may not recognize the challenger as a

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<sup>47</sup> It may have occurred to some readers that the ideal outcome for both the incumbent and the challenger is to collude against the consumers. Acting together, they might set a monopoly price and split the greatest possible producer surplus (not pictured). This can eventually happen (such as the merger between AOL and Time Warner), but seems to take time.

challenger. For example, cable broadcasting was regarded principally a complement to broadcast for the first decade of its existence, as a kind of signal boosting technology.

Once the incumbent recognizes the threat, its first move is convince the judiciary or a regulatory agency to recognize and prevent the theft. The incumbent sues for copyright infringement, common law unfair competition, or convinces a regulator that the public interest is threatened. This gives the court a distributive choice between the new disseminator and the existing owners. Historically, the court has taken the side of new technologies of disseminators, generally for doctrinal reasons, though perhaps thanks to an underlying interest in maximizing consumer welfare. Yet that initial decision is not the final say. It is simply a prelude to a negotiated settlement that is implemented in copyright legislation.

In general, the legislative settlement splits the surplus between the content owner and the new technologist. It has two advantages. First, it brings an end to the waste incurred struggling over the distribution of the copyright surplus.<sup>48</sup> In effect, the challenger is paying off the incumbent to avoid the incumbent's most serious threats.

Second, and perhaps most importantly, it prevents the repression of a new technological innovation. As long as there is some reduction of in price thanks to the new technology of dissemination, consumers should benefit as well, albeit less than if it were not necessary to pay off the existing owner. So, in theory at least, copyright's settlement role in areas of new technology should be capable of producing results that, if not optimal, may at least be socially beneficial.

*Is Copyright's Settlement Function Defensible?*

I have suggested (1) that copyright comprises independent authorship and communications regimes, and (2) the communications regime functions through specific settlement of disputes among rival disseminators. The question is, does this settlement role serve the public interest?

In general, academics, whether pro- or anti- copyright, have been highly critical of both the process and results of copyright's settlement function. First, those who resist the growth of copyright criticize as too fact-specific, complicated, inflexible, and charge that they unfairly disadvantage parties absent to the negotiation (namely, consumers). For example, Jessica Litman, a leading critic, argues that "negotiations among current stakeholders tend to produce laws that resolve inter-industry disputes with detailed and specific statutory language

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<sup>48</sup> Of course, this must include the negotiation itself and convincing Congress to pass the law.

which rapidly grows obsolete.”<sup>49</sup> As for absent interests, she charges that “[e]ach time we rely on current stakeholders to agree to a statutory scheme, they produce a scheme designed to protect themselves against the rest of us.”<sup>50</sup> Litman, in general, advocates simpler, and more general copyright laws: “a law that balances elastic rights with comparatively elastic, flexible limitations.”<sup>51</sup>

Property-side critics like Bob Merges and Peter Huber also berate statutory settlements—in particular, compulsory licensing regimes—but for different reasons. They generally regard such settlements as a poor substitute for privately negotiated solutions. These authors favor a clear allocation of property entitlements up front that might promote the resolution of disputes through more flexible price-fixing agreements brokered through private collective rights regimes, such as ASCAP.<sup>52</sup>

Can copyright's settlement function for disseminators nonetheless be defended? The critics have a point. Copyright settlements not for the aesthetic: they comprise by far the least readable sections of the copyright code. As solutions to a conflict of a certain time and place, they are frequently outdated by economic and technological change. And they do not always succeed in eliminating continuing conflicts between the relevant parties.

Nonetheless I would suggest that copyright settlement function can be defended. First and foremost are the reasons discussed in Part I: the arguments from innovation theory.<sup>53</sup> The main point is that if the alternative is granting clear entitlements up front, the cure is not worth the disease. To repeat, the problem with a grant of rights that reliably extends to all new technologies is that it puts the incumbent in the position of managing future innovation. And while there remains some reason to believe that a monopolist is good for technological innovation, the dominant view among innovation and competition theorists is that the opposite is true.

But there is another defense of copyright settlement worth elaborating: as an alternative device to contractual settlement. The assumption is that there will exist at least two classes of conflict between disseminators: some in which parties will reach agreements of mutual benefit; and others where, absent some

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<sup>49</sup> Jessica Litman, *Copyright Legislation and Technological Change*, 68 *Or. L. Rev.* 275, 357 (1989). Professor Litman is writing of copyright revision generally, and also highlighting some of the advantages of interindustry negotiation, see *id.* at 358-359.

<sup>50</sup> *Id.* at 359.

<sup>51</sup> *Id.* at 361.

<sup>52</sup> See generally Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 *CAL. L. REV.* 1293 (1996). Huber, *Treatise*.

<sup>53</sup> See *supra*, Part I.

state action, parties will create tremendous social waste in their efforts to destroy one another.<sup>54</sup> In this respect copyright is justified by lending aid in instances where it bargaining does not succeed independently.

The degree to which this is an important role depends on whether we believe that such conflicts exist. If groups can be assumed to inevitably reach bargains of the greatest possible mutual advantage, copyright's dispute resolution function would be unnecessary.<sup>55</sup> But if we expect that at least some conflicts in the copyright world will result in bargaining failures with social consequences, a dispute resolution role is justified.

These points are important for dealing the criticisms of settlements cast in copyright, as opposed to contract. As discussed above, the substance of the deals struck can easily be criticized as sub-optimal. For example, the fees embedded in compulsory licensing schemes can be ludicrously slow to adapt to modern conditions.<sup>56</sup> The point of the dispute resolution argument is that this inefficiency must be weighed against the social value of ending conflict, or removing the most destructive options from the option set of competing entities.<sup>57</sup>

### **Part III: Copyright's Communications Policy in the Twentieth Century**

I have suggested in this paper that copyright's communication policy has generally been implemented through statutory settlements between rival communications industries. In the part that follows I outline what has given rise to such disputes in the first place, and how copyright's communications module has tried to resolve them.

#### **The Birth of the Recording Industry**

The birth of the recording industry in the late 1890s and early 1900s marked the century's first use of copyright to settle a major conflict. The recording industry, predating today's online distribution, cable and others, was the original technological free-rider: the first to build a business whose success depended, in part, on copyright arbitrage.

The pioneers of the recording industry were the manufacturers of piano rolls and the manufacturers of "talking machines," or early record players. Early versions of these technologies were introduced in the late 1890s. By 1902, at least a million piano rolls, each a representing copyrighted song, were in

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<sup>54</sup> See Robert Cooter, *The Costs of Coase* 1981 (Hobbes and Coasian theories).

<sup>55</sup> Cooter at \_\_.

<sup>56</sup> Robert P. Merges, *Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293 (1996).

<sup>57</sup> Cooter, *costs of coase*.

distribution.<sup>58</sup> The record industry grew even faster: by 1899, 2.8 million records had been sold.<sup>59</sup> These mechanical reproductions were produced without paying any licensing fees to the owners of the respective copyrights.

Technologically, the player piano and the record player were the “receiver” for a new form of mass media—the paper piano roll or 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. But the success of mechanical recordings as a mass media sparked a conflict between the incumbent industry: publishers of sheet music.

*The Rhetoric*

The rhetoric of the conflict is both independently fascinating and a template for what has followed. The incumbent owners of copyrights adopted a theme familiar to present ears: they depicted the recording industry as irresponsible pirates whose reckless copying of music threatened American creativity. What was in retrospect a battle over the impact of new technology was nonetheless portrayed as a tragedy of authorship. 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 old songs. Today you hear these infernal machines going night and day ... The vocal chord will be eliminated by a process of evolution, as was the tail of man when he came from the ape.<sup>60</sup>

Or as model lobbying letter from the composer's perspective, dating from 1907 put it as follows:

What do I see? I see my compositions ... stolen bodily by the phonographic trust and piano-player combination, and ground out daily from thousands of cylinders, disks, and rolls, without paying me or anyone of us one solitary penny...<sup>61</sup>

A 1908 letter from the American Federation of Musicians, in another vein, accuses the recording industry of free-riding on successful songs:

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<sup>58</sup> Cite to the case, first few pages.

<sup>59</sup> Andre Millard, *America on Record* 49

<sup>60</sup> 4 Bry 24.

<sup>61</sup> Model Letter to Congress, 5 Brylawski 255.

We musicians feel that an injustice is perpetrated upon American composers who, after popularizing their works, must stand by defenseless and see others reap the benefits. In our observations we find that phonograph companies, talking machines, etc. do not popularize works or compositions, but on the contrary do only seize upon and utilize such as have already become popular...<sup>62</sup>

How about the challengers? 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. The testimony of an industry representative is representative:

[M]echanical players are distinctly the product of American inventive genius and of American factories and should not be despoiled for the sake of a small group of publishers, the largest percentage of which are foreigners.

Self-described inventor Howlett Davis (who came to Congress to testify without particular invitation) explained to Congress that composing new works was simply not as important to the United States as invention of new technologies:

In all arts the work of the inventor will be found at the foundation of the progress and prosperity of the country. ...

So far as the mass of the people of this country is concerned, the work of the composer is infinitesimal as compared to the work of the inventor.

Another theme stressed by the early recording industry was that the demand for copyright expansion to records had nothing to do with composers themselves, but merely the interests of intermediaries in achieving monopoly profits. In particular, the recording industry argued that the sheet music publishers were planning to ally themselves with one single manufacturer (the Aeolian company) who would then monopolize the entire recording industry.

A inflammatory 1908 editorial in the newssheet "Musical Age" stated this case:

Now, 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. ... In this country we find it is the Aeolian company which assumes the role of "chief speculator."

Similarly:

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<sup>62</sup> 5 Bry 189.



*On Copyright's Communications Policy*

It is not right ... to destroy [the recording industry] for the benefit of a half dozen alleged composers allied with a life-long and absolutely exclusive monopoly [the Aeolian company]. The composer gets on the sheet music all that he is entitled to get.<sup>63</sup>

A final argument, again recurrent in present times, was that the recording industry was actually helping composers by spurring the sales of sheet music; hence no change to copyright was needed. As stated by a representative of the talking machine lobby:

It is impossible that there should be any sales of records of the composition without there being a corresponding sale of sheet music. Each may help each other, but phonographic reproduction is certainly a powerful stimulus to the sale of sheet music.<sup>64</sup>

This argument—that the new technology of dissemination will ultimately aid composers even without copyright—is a persistent theme.

*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 (in 1888) and records (1901) an infringement of copyright rights. These efforts failed.<sup>65</sup>

The incumbents, making the piracy arguments above, then moved to Congress, achieving through a publisher's conference a draft copyright bill that would have granted composers full rights in mechanical recordings.<sup>66</sup> 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. This was the now famous "piano-roll" case *White-Smith Music Publishing Co. v. Apollo Co.*<sup>67</sup>

Unfortunately for the incumbents, the Supreme Court was unwilling to extend copyright in the manner requested. It ruled, as the earlier courts had, that a "copy" in the statute was a "reproduction or duplication of the original," which the perforated paper roll was evidently not. In hindsight it is clear that the decision could have gone either way. The Court repeatedly relied on the fact

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<sup>63</sup> 5 Bry 348.

<sup>64</sup> 5 Bry 300.

<sup>65</sup> See *Kennedy v. McTammany*, 33 F. 584 (C.C.D. Mass. 1888); *Stern v. Rosey*, 17 App. D.C. 562 (1901).

<sup>66</sup> [Bill].

<sup>67</sup> 209 U.S. 1, 17-18 (1908).

that piano rolls were not visually similar to sheet music—a curious means to adjudge the meaning a “copy” of an aural work.<sup>68</sup>

Many have criticized the purported formalism of the *White-Smith* Court.<sup>69</sup> But at heart the decision embodies strong view of innovation policy. The court sought to find in copyright a difference between a given work and its means of expression:

The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but 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 . . . .

In other words, *White-Smith* (and later cases) suggest that the pioneer disseminator will be granted control over copyrighted works in her medium, but not any future, competing means of dissemination. This principle has not been universally followed, but is nonetheless a central theme of much copyright dissemination caselaw of the century, as we will see.

The decision also has institutional, as opposed to doctrinal, significance. The Court recognized that as between dissemination rivals it is in a poor position to pick winners. It announced, instead, that it would the role of the Court to choose the course most likely to lead to a Congressional settlement. The Court stressed this aspect of *White-Smith* and other cases 76 years later, in the Sony betamax decision:

Sound 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 institutional capability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.<sup>70</sup>

In practice, a policy deference to Congress has meant deference to a process of negotiated settlement between the parties to the conflict.

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<sup>68</sup> Cf. Justice Holmes, dissenting.

<sup>69</sup> See, e.g., Jane Ginsburg, Copyright and Control Over New Technologies of Dissemination, 101 Columbia Law Review 1613 (2001)

<sup>70</sup> See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 431 (1984).

Following *White-Smith*, publishers and the mechanical machine manufacturers moved quickly to settle in a Congressional setting. Why settlement? We can see that at this point, both challengers and incumbents represented a serious threat to one another. Following *White-Smith*, composers and publishers risked an ongoing decay of their profitability with no ability to extract income from the recording industry. Conversely, the recording industry risked the fact that publishers would succeed in their effort to extend copyright to mechanical recordings and use this power to control their business. Principally, they feared that expansion of copyright would be used by publishers to create a monopolistic champion of their interests who would use copyright to destroy its mechanical music rivals.<sup>71</sup>

Under these conditions, the two parties settled on a statutory “royalty” scheme that was the first compulsory license system. The settlement extended to a fixed, universal rate: 2 cents per song, per copy. These settlement was primarily achieved in sessions in 1908, and was codified as section 1(g) of the 1909 copyright act.<sup>72</sup>

The nature of the settlement was as follows. On the one hand, Congress created extended the copyright in compositions to mechanical recordings. But in exchange, the recording industry received statutorily guaranteed access to all copyrighted compositions, in exchange for a fee. Anyone willing to pay the statutory fee was entitled to use any copyrighted composition to record his own version of the song.

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This mechanical license scheme survives to the present day. Among academics, it is occasionally defended for its reduction in transaction costs,<sup>73</sup> but more typically berated for its inflexibility and insensitivity to changing economic conditions.<sup>74</sup> But both arguments may miss the point. Adjudged as a settlement to the dispute among relevant actors, the mechanical license does better. It resolved the dispute between sheet-music producers and the nascent recording industry in a manner considered mutually beneficial. This doesn't mean that the mechanical license, in its terms, remains an optimal solution under present conditions. But the willingness of the concerned parties to live with their deal must be a part of any assessment.

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<sup>71</sup> See legislative history, 1909 Act.

<sup>72</sup> Harry Henn at 5 (1956).

<sup>73</sup> See Goldstein.

<sup>74</sup> Merges, Huber, e.g., Trotter Hardy, Copyright and New-Use Technologies, 23 *Nova L. Rev.* 659, 699-702 (1999) (criticizing compulsory licensing regimes as price-fixing.).

Important in this assessment is that neither party has made a serious effort to repeal the mechanical license system.<sup>75</sup> Representatives of composers did not argue for its repeal in the 1976 Copyright Act,<sup>76</sup> and today it is even defended by representatives of the composer and music industry.<sup>77</sup> The only change has been an effort to make the license fee capable adjustable.

### **Cable Television & the Broadcasting Industry**

A second major example of what I have described as copyright's settlement function is the bitter mid-century conflict between broadcasters and the upstart cable industry. Reduced to its essentials, beginning the late 1950s the broadcast industry and its affiliates mounted a large successful effort to contain the growth of cable using every regulatory device at their disposal, while the cable industry strove to take advantage of its unregulated status to erode the dominant position of broadcast.

A general (albeit uneasy) settlement to the succession conflict was achieved by the late 1970s, through a compromise on copyright legislation and rescinding on the most onerous of FCC's regulations and pseudo-copyrights. With this settlement, cable began a more gracefully accession as the successor in television dissemination.

#### *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 remote or mountainous areas otherwise left in the dark. 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. The broadcast signal captured by the community antenna was retransmitted to people's homes using physical cables.

In this early manifestation cable was simply a complement to broadcast service.<sup>78</sup> By allowing the broadcast signal to reach areas not served by broadcast, it expanded the television audience to the advantage of broadcast stations. This

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<sup>75</sup> There was some interest in the 1950s.. see older copyright treatise in office.

<sup>76</sup> 17 U.S.C. §115.

<sup>77</sup> 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.)

<sup>78</sup> See

had 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 broadcasters that are now obvious: programming diversity<sup>79</sup> (more channels) and signal quality. In face of this competitive threat, the broadcast industry adopted the familiar arguments of piracy, unfair competition, and economic disruption favored by incumbent industries. It adopted, in other words, the arguments of sheet music manufacturers in the piano-roll era, and record companies today. 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 a claim that that cable operators, because they did not pay for the content they retransmitted, were a form of pirate, 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 or 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 theatre to another in order to get two performances out of a single license.<sup>80</sup>

...

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.<sup>81</sup>

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

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<sup>79</sup> In 1960s, diversity meant the importing signals from other areas, using microwave transmission technology. For example, to create an attractive service, a cable operator in Philadelphia might import independent stations from New York City, offering a broader selection of content than available from broadcast alone.

<sup>80</sup> Copyright Law Revision Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Bill 43 (1965).

<sup>81</sup> Hearings Before the Committee on Interstate and Foreign Commerce, United States Senate, 85th Cong. Second. Sess. 3613 (1959) (Statement of William C. Grove)

If 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.<sup>82</sup>

Broadcasters associated themselves with the creation of programming content, and cable with 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 in the creation of new works. Cable operators, on the other hand, contributed nothing to the creation of new works and therefore competed unfairly.<sup>83</sup>

But if cable simply carried broadcast signals, how did it endanger broadcasting or the creation of new works? The broadcaster's arguments relied on the concept of audience fragmentation. They argued that the cable operator's 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. This would destroy advertising revenue, because St. Louis advertisers, faced with an audience fragmented between stations of both cities, would pay less, while local advertisers in Memphis advertisers could care less about reaching buyers in St. Louis audiences, meaning a net loss. This, broadcasters argued, would destroy the economic viability of free television.

Concerns for "localism" amplified the fragmentation argument.<sup>84</sup> The FCC in 1952 declared localism a goal of national broadcasting policy: broadcast should "provide each community with at least one television broadcast station."<sup>85</sup> The idea was that the public interest was served by local broadcast stations that could provide content of matters of local importance, and not just the programming of the big three networks.<sup>86</sup> Cable operators, by importing signals, were a particular threat to the viability of local broadcasters in small markets.

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<sup>82</sup> See 15 Grossman 727.

<sup>83</sup> These arguments are reflected in (several places).

<sup>84</sup> See Glenn Robinson, *Duke L. Rev.* (1997).

<sup>85</sup> See Report and Order, 17 Fed. Reg. 3912 § 63 (1952).

<sup>86</sup> See *id.*, see also summary in that 1958 report that was a warning to the FCC.

Finally, even if cable did offer a desirable diversity in programming, broadcasters argued that the goal of diversity was better achieved through more broadcast stations in every community, not the import and export of signals around the country. In particular, broadcasters promoted developing new ultra high frequency (UHF) stations as the preferred means for achieving programming diversity.<sup>87</sup>

In retrospect, the weakness of these arguments are apparent. Cable was indeed a threat to broadcasting as a better means of disseminating television. Yet it did not follow that cable was also a threat to programming, because it too ultimately came to have interest in the availability of new works. In particular, cable, as most now recognize, was the savior of UHF broadcasting, because cable improved the weak signal strength of UHF stations. The key, in retrospect, 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 was to play.

#### *Controlling the Challenger*

Faced with the competitive threat of cable and armed with these arguments, the broadcast industry and its allies<sup>88</sup> in the 1960s exploited all available regulatory means to slow the growth of cable.

The industry attempted three separate avenues: common-law misappropriation arguments, copyright infringement, and a kind of “pseudo-copyright” through FCC regulation.

The broadcasting industry turned first to the common law in an effort to gain a 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.<sup>89</sup> The argument in these lawsuits was simple: cable operators are stealing our product (the signal) without providing compensation, and are therefore competing unfairly and should be stopped. In *Associated Press*, this basic theory had persuaded the Supreme Court to prevent one wire service from stealing news from another, creating a pseudo-property

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<sup>87</sup> See 1958 report.

<sup>88</sup> An example of an ally were the manufacturers of television antennas, organized as the Television Accessory Manufacturers' Institute (TAMI), who obviously had much to lose from competition with cable. See Don R. Le Duce, *Cable Television and the FCC* 142-143 (1972).

<sup>89</sup> 248 U.S. 215 (1918). *International News Service* held that news wires have a quasi-property right in “hot news.” The broadcasters also argued for tortious interference with contract, see second lower court decision, but the misappropriation theory received the most attention in the court of appeals.

interest in “hot news.” The right would have served the 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.<sup>90</sup> Pointing out that the broadcasters sought “what are in essence copyright interests,” the court found that the state grounds for protecting broadcasters rights federally preempted. Technically, this decision came under the authority of then recently decided copyright preemption cases *Sears Roebuck & Co. v. Stiffel Co.*<sup>91</sup>, and *Compco Corporation v. Day-Brite Lighting, Inc.*<sup>92</sup> But what is interesting as a policy matter is the court’s recognition that the common law right threatened the “primary right of public access to all in the public domain...”<sup>93</sup> It reasoned that the creation of a “new protectible interest that would interfere with the federal policy of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”<sup>94</sup>

On the other hand, the Federal Communications Commission was seemingly immune to such concerns. Bit-by-bit, it created a regime of pseudo-property rights and other rules that, for a time, allowed the broadcast industry to control the development of the cable industry.

While initially hesitant,<sup>95</sup> the FCC began asserting jurisdiction in 1962; by 1965 “Second Report and Order,” the FCC had come agree with the broadcaster’s substantive arguments and assume harm from cable’s existence. By 1966, broadcasters had persuaded the FCC to enact a full regime cable regulation can be seen as a duplicate for the control broadcasters would have asserted with property rights. The FCC rules barred duplication of local broadcasting (non-duplication rules), forced cable systems to carry local signals (must-carry rules), and barred cable operators from importing signals into any of the top 100 television markets unless it could demonstrate that such a important would not harm local broadcast stations. In short, the FCC rules put cable where broadcast wanted it: as a complement, rather than a competitor, to the broadcasting industry.

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<sup>90</sup> *Cable Vision v. KUTV Inc.*, 335 F.2d 348 (9th Cir. 1964).

<sup>91</sup> 376 U.S. 225 (1964).

<sup>92</sup> , 376 U.S. 234 (1964).

<sup>93</sup> 335 F.2d at 350.

<sup>94</sup> 335 F.2d at 351.

<sup>95</sup> 1958 case and 1959 First Report and Order



Broadcaster's third offensive came through copyright litigation, but here broadcasters failed to achieve copyright control. In 1968, the inevitable question of cable's copyright liability reached the Supreme Court in *Fortnightly Corp. v. United Artists*.<sup>96</sup> The case was factually simple: a West Virginia cable operator had retransmitted to its customers various broadcasted programs, and the copyright holders claimed this to be an unauthorized performance under the Copyright Act.

The Court disagreed, ruling (5-1) that cable television was the functional equivalent of a more powerful antenna, and no more of a performer than an antenna manufacturer would be. Policy considerations were left to the dissent. Justice Fortas presented the problem as follows:

On the one hand, 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 ... On the other hand, 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 ....<sup>97</sup>

He suggested the court should act to "do as little damage as possible to traditional copyright principles and to business relationships, until Congress legislates and relieves the embarrassment which we and the interested parties face."

The seeds of a future copyright settlement are evident from the *Fortnightly* litigation. Solicitor General Erwin Grisgold suggested in his amicus brief on the merits that the Supreme Court could reasonably impose a copyright settlement in its decision.<sup>98</sup> He asked the court to find performance liability on the one hand, but an implied license where broadcast signals were weaker. While both majority and dissent declined the invitation to settle the dispute in this manner, it foretold a copyright settlement in the horizon.

In the meantime, copyright settlement was not yet forthcoming. In the aftermath of *Fortnightly*, broadcasters succeeded in convincing the FCC to grant

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<sup>96</sup> 392 U.S. 390 (1968).

<sup>97</sup> 392 U.S. at 403-404 (J. Fortas, dissenting). Justice Fortas would have found cable operators liable, under the authority of *Buck v. Jewell-LaSalle Realty Corp.*, 283 U.S. 191 (1931) which found the owner of a hotel liable for copyright infringement when he retransmitted radio broadcasts to private rooms. Indeed the two cases are nearly impossible to distinguish, suggesting a policy of protecting the cable industry from broadcast and network domination drove the court to decline to follow its own precedent.

<sup>98</sup> See 392 U.S. at 401 n. 32; Get solicitor general brief on merits.

rights even more similar to copyright to broadcasters, as if in compensation for their loss. 1968 saw the introduction of the right of “retransmission consent.”<sup>99</sup> As the name suggests, under this rule, cable operators were required to obtain the consent of the relevant broadcaster before importing any program into a top 100 market.

In retrospect, the experiment with a retransmission consent rule was something of a dry run for a full copyright regime. The results were not promising. A 1979 study found that during the period of 1968-1972, broadcasters granted virtually no consent for retransmission.<sup>100</sup> While it may be that the regime was not given enough time to work, the more likely explanation is that broadcast was interested in starving its rival.<sup>101</sup> It hints at some of the dangers of copyright as between rival disseminators, particular in early stages.

*Settlement & Copyright*

In 1970, it appeared that the cable's full potential as a mass media had been walled-off. 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.”<sup>102</sup> While cable had grown to reach about 6% of households, with approximately 4.5 million subscribers<sup>103</sup> its challenge to broadcast was halted at the urban border. As economic historians Stanley Besen and Robert Crandall explained matters:

Cable entered the 1970s as a small business relegated primarily to rural areas and small communities and held hostage by television broadcasters to the Commission's hope for the development of UHF.<sup>104</sup>

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 and other restrictions were abandoned,<sup>105</sup> in exchange for a system centered on a copyright liability regime.<sup>106</sup>

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<sup>99</sup> *CATV Notice of Proposed Rulemaking*, 15 F.C.C.2d 432 (1968).

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<sup>101</sup> See argument in *Copyright Protection*, 51 *Fordham L. Rev.* 647.

<sup>102</sup> Leonard Chazen & Leonard Ross, *Federal Regulation of Cable Television, the Visible Hand*, 83 *Harv. L. Rev.* 1820 (1970).

<sup>103</sup> *Television Factbook, Services Volume 83a* (1979).

<sup>104</sup> Stanley Besen and Robert Crandall, *The Deregulation of Cable Television*, 44 *Law & Contemporary Problems* 77, 94 (1981).

<sup>105</sup> That they were abandoned did not prevent their subsequent reintroduction. The Federal Communications Commission in the 1980s and Congress in 1992

<sup>106</sup> This regime was the compulsory licensing system of §111 of the 1976 Copyright Act.

While by no means an aesthetic exercise, the history of that time shows the role the copyright regime played in perhaps the most bitter succession war of the century.

In 1970, broadcasters had successfully convinced the FCC impose serious limits on the growth of cable; akin, perhaps, to the early success of the recording industry in stopping the filesharing industry. So why would broadcasters even want to turn to a copyright compromise, if it might jeopardize a favorable status quo? We can see several possible explanations.

Primarily, a copyright solution promised to be more durable. The restrictive regime created by the FCC was in a state of constant fluctuation, and was easier to change than copyright legislation would be. New commissioners at the FCC could (and ultimately did) agree with the positions of cable television, jeopardizing broadcasting's favorable position. In particular, mounting evidence suggested that the danger of cable systems to television (as opposed to broadcasters) was exaggerated.<sup>107</sup> This suggests that broadcasters may have felt pressure to convert what regulatory advantage they had currency into a more lasting source of revenue.

For broadcasters, this problem was compounded by the growing power of the cable industry relative to themselves. Despite the limitations on urban growth, cable continued to grow in rural and small markets, trebling in size between 1966 and 1970.<sup>108</sup> The growing power of the cable industry suggested that broadcaster's ability to influence the regulatory and legislative process might erode over time, making a more durable compromise more 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.<sup>109</sup> With interests on both sides, broadcasters were interested in a solution that would allow cable to grow in exchange for payoffs to the broadcasting industry, a purpose bettered served by a copyright royalty system than FCC regulations.

The original embodiment of the settlement was the "Compromise Agreement of 1971," representing an agreement between major cable, broadcasting, and programming interests. The basic elements of the compromise were this: Cable, for the first time, agreed to some system of

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<sup>107</sup> See Besen & Crandall at 97.

<sup>108</sup> Television Factbook, Services Volume 83a (1979 ed.) (from about 1.5 million viewers to 4.5 million).

<sup>109</sup> See Patrick Parsons & Robert Frieden, *The Cable and Satellite Television Industries* 47 (1998).

copyright liability, in exchange for a general loosening of FCC restrictions on entry into urban markets, and other concessions to public service.<sup>110</sup> 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 the copyright system.

The compromise, brokered 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.<sup>111</sup> The 1972 rules, described as “among the most complex rules and regulations ever devised by the mind of man” began a gradual process of FC deregulation of the cable industry.<sup>112</sup>

The copyright side of the deal took a further 4 years to settle through the legislative process. While the major industry associations remained committed to the agreement, problematically, 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 the throat of the cable television industry, in my opinion, by the White House.”<sup>113</sup> They and other cable operators returned to the position that cable systems were nothing but another form of antenna – “why should there be any liability when the viewer avails himself of the antenna tower erected by the cable television station?”<sup>114</sup>

On the other side, broadcasters made a final effort to obtain full copyright liability with the *Teleprompter* litigation.<sup>115</sup> In *Teleprompter*, unlike *Fortnightly*, was an signal importation case. Columbia Broadcast Systems could point to

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<sup>110</sup> Find letter of compromise. As described by the chairman of the NTCA, “in 1971, in an effort to break the regulatory impasse over cable, the Office of Telecommunications and the FCC fashioned the so called ‘consensus agreement’ under which the parties – broadcaster, copyright owners, and cable—affirmed support for copyright legislation and approved the outline for new FCC cable regulations.” 14 Grossman 502.

<sup>111</sup> See Cable Television Report and Order, 36 FCC 2d 241 (1972). These rules are highly complex: they have been called “among the most complex rules and regulations ever devised by the mind of man.” U.S. Congress House Committee on the Judiciary Subcommittee on Courts, Civil Liberties, and the Administration fo Justice Hearings 1975 501 in 14 Grossman (Statement of Rex A. Bradley). 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 and other rules.

<sup>112</sup> See generally, Besen & Crandall, 93-103.

<sup>113</sup> 14 Grossman 667 (statement of George J. Barco).

<sup>114</sup> *Id.*

<sup>115</sup> *Teleprompter Corp. v. Columbia Broadcasting Systems*, 415 U.S. 394 (1974).

Teleprompters imports, some from as far as 450 miles<sup>116</sup> – and make the audience fragmentation argument described above. The result was nonetheless the same. The Supreme Court affirmed its simple holding: “Broadcasters perform. Viewers [including cable] do not perform.”<sup>117</sup>”

These last-ditch efforts notwithstanding, Congress finally enacted the copyright side of the compromise in 1976. The form was the compulsory licensing law in §111. As a settlement, it 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,<sup>118</sup> not to alter the content or advertising of the signals it retransmitted,<sup>119</sup> and to retransmit programs simultaneously with the broadcast.<sup>120</sup> In short, the licensing scheme mapped the existing business practices of cable companies, and added liabilities to it. The extent of these liabilities was to be determined by a new statutory creation, the Copyright Royalty Tribunal.<sup>121</sup>

In the last stage of the 1970s settlement, the Federal Communications 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 remained the “distant-signal” limitations, which limited the import of programming into large (top 100) television markets,<sup>122</sup> and the syndicated exclusivity rules, which gave local stations in urban areas to force cable to black-out programs to which it had purchased exclusive exhibition rights.<sup>123</sup> Together, these two rules continued to limit cable’s exploitation of urban markets.

In 1980, the FCC announced the repeal of these regulations<sup>124</sup>. It concluded that the absence of evidence of economic harm, and the new copyright scheme had eliminated any need for its copyright “surrogates.”<sup>125</sup> With this

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<sup>116</sup> Id. at 400

<sup>117</sup> Id. at 403.

<sup>118</sup> 17 U.S.C. §111(c)(1)

<sup>119</sup> 17 U.S.C. §111(c)(2)

<sup>120</sup> 17 U.S.C. §111(c)(1), (f)

<sup>121</sup> 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 the Copyright Royalty Tribunal Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (1993) codified at 17 U.S.C. §803.

<sup>122</sup> 47 C.F.R. §§76.59(b)-(e), 76.61(b)-(f), 76.63 (1980).

<sup>123</sup> 47 C.F.R. §§76.151-76.161 (1980).

<sup>124</sup> Report and Order, Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom* Malrite Television v. FCC, 652 F.2d 1140 (2d Cir. 1981).

<sup>125</sup> Inquiry into the Economic Relationship between Television Broadcasting & Cable Television, 71 F.C.C.2d 632 (1979).

decision, the replacement of prohibitive FCC regulations with copyright liability was essentially complete.<sup>126</sup>

*Assessment*

The story of the conflict between cable and broadcast is complicated immensely by the overlap of FCC regulation and copyright. Nonetheless, the history at minimum demonstrates the role copyright played in the settlement and management of the disputes.

It is hard to argue that copyright's role in the cable / broadcast conflict has been a great success. On the one hand, the substitute of the copyright system for FCC regulations led to a era of great growth both for the cable industry and broadcasting networks.<sup>127</sup> though the latter increasingly were forced to accept cable's dominant role in the dissemination of programming. In this respect, the system has succeeded.

But the copyright settlement did end regulatory battles between the parties. The copyright royalty tribunal, for example, attracted enormous litigation in its setting of fees.<sup>128</sup> Broadcasters in the late 1980s successfully convinced Congress to reinstate some of the regulations that the FCC had dropped in the late 1970s and 1980. For example, Congress recreated the retransmission consent rule, giving broadcasters, for the first time, a clear property right in their signals.

Yet at this stage these conflicts, however, are between mature industries. The example of the 1992 retransmission consent rules is telling. 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. Granted the same right in 1992, the cable networks refused to pay a cent for retransmission consent. The networks capitulated, demonstrating cable's new role as the dominant television disseminator.

## **Conclusion**

Copyright's role in communications policy is not exactly unknown to copyright theorist, but rather lies neglected in favor of ever more sophisticated authorship theories. The purpose of this article has been to stress the possibilities and benefits of a communications-centered copyright theory.

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<sup>126</sup> Only the network non-duplication and must-carry rules remained in place.

<sup>127</sup> See Parsons & Frieden 57-60 (detailing the cable "explosion" of the 1980s).

<sup>128</sup> See Register of Copyright; see, e.g., ....