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Jane C. Ginsburg
Columbia Law School, jane.ginsburg@law.columbia.edu

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“THE EXCLUSIVE RIGHT TO THEIR WRITINGS”: COPYRIGHT AND CONTROL IN THE DIGITAL AGE

Jane C. Ginsburg

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"THE EXCLUSIVE RIGHT TO THEIR WRITINGS": COPYRIGHT AND CONTROL IN THE DIGITAL AGE

Jane C. Ginsburg*

I. INTRODUCTION

Let me begin with an historical anecdote:

"In the beginning was the Reader." And the Reader, in a Pirandello-esque flash of insight, went in search of an Author, for the Reader realized that without an Author, there could be no Readers. But when the Reader met an Author, the Author, anticipating Dr. Johnson, scowled, "No man but a blockhead ever wrote except for money."¹

And the Reader calculated the worth of a free supply of blockhead-written works against the value of recognizing the Author's economic self-interest. She concluded that the author's interest is also her interest, that the "public interest" encompasses *both* that of authors and of readers.

So she looked upon copyright, and saw that it was good.

This, in essence, is the philosophy that informs the 1710 English Statute of Anne (the first copyright statute), and the 1787 U.S. Constitution's Copyright Clause. The latter provides: "Congress shall have Power . . . [t]o promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their respective Writings. . . ."² In the Anglo-American system, copyright enabled the public to have "a supply of good books"³ and other works that promote the progress of learning. Copyright did this by assuring authors "the exclusive Right to their . . . Writings,"⁴ that is, a property right giving authors sufficient control over and compensation for their works to make it worth their while to be creative. But that does not tell us how *much* compensation authors or other copyright holders should get from copyright, nor how much control they should be able to exercise over their works. That turns on the scope of copyright protection, particularly

* Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law. Many thanks for research assistance to Tucker McCrady and to Caroline Corbin, Columbia Law School, both class of 2001. This article is based on the Godfrey Lecture delivered at the University of Maine School of Law on September 18, 2001. Prior versions of this text appeared in Jane C. Ginsburg, *Copyright Versus Control in the Digital Age*, 7 N. Z. BUS. L. Q. 136 (2001), Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613 (2001), and in Jane C. Ginsburg, *Copyright and Intermediate Users' Rights*, 23 COLUM-VLA J.L. & ARTS 67 (1999).

1. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 316 (Justin Kaplan ed., 16th ed. 1992) (quoting Samuel Johnson).

2. U.S. CONST. art. I, § 8, cl. 8.

3. Thomas B. Macaulay, Speech Before the House of Commons (Feb. 5, 1841), in *PROSE AND POETRY* 731, 733 (G.M. Young ed. 1967).

4. U.S. CONST. art. I, § 8, cl. 8. Both the Statute of Anne (England 1710) and the U.S. Constitution's Copyright Clause highlight the role of exclusive rights in promoting the progress of learning.

with respect, nowadays, to new markets created by new technologies.

The recent coincidence of new technology and new legislation in the United States may have enhanced the ability of U.S. copyright owners to wield electronic protective measures to control the exploitation of their works. The legislation, which reinforces the technology, has led many to perceive and to deplore a resulting imbalance between copyright owners and the copyright-using public.⁵ Critics assert that the goals of copyright law have never been, and should not now become, to grant "control" over works of authorship. Instead, copyright should accord certain limited rights over some kinds of exploitations.⁶ Economic incentives to create may be needed to achieve the goal of public instruction, but those incentives should be as modest as possible. Copyright, the argument goes, has not historically covered every way of making money from, or of enjoying, a work of authorship; anything uncovered belongs in the public domain. Thus, when new technologies spawn new markets for copyrighted works, we should not simply assume that copyright owners ought to control those new markets.

There is doctrinal support for this contention. Indeed, there is a strong streak of copyright skepticism in U.S. jurisprudence.⁷ Moreover, the incentive rationale for copyright invites its own rebuttal. For one thing, we may have an ample supply of "blockheads," poets who burn with inner fire, for whom creation is its own reward, or for whom other gainful employment permits authorial altruism. These creators do not need the incentive of exclusive rights in order to produce works of authorship. As to this group of authors, then, copyright might be a wasteful wind-

5. See, e.g., Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); Julie E. Cohen, *Some Reflections on Copyright Management Systems and Laws Designed to Protect Them*, 12 BERKELEY TECH. L.J. 161 (1997); Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive*, EUR. INTELL. PROP. REV. 236 (1999); Robert C. Denicola, *Freedom to Copy*, 108 YALE L.J. 1661, 1675-79 (1999); Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millennium*, 47 J. COPYRIGHT SOC'Y USA 193 (2000); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 523 (1999); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Pamela Samuelson, *Good News and Bad News on the Intellectual Property Front*, COMMS. OF THE ACM, March 1, 1999, at 19.

6. See, e.g., Jessica D. Litman, *The Demonization of Piracy*, Address to the Tenth Conference on Computers, Freedom & Privacy (Apr. 6, 2000), at <http://www.law.wayne.edu/litman/> (last visited Mar. 5, 2001); L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y USA 365 (2000).

7. See, e.g., H.R. REP. NO. 60-2222 at 7 (1909) (because copyright is "not based upon any natural right," legislation must balance the public benefit of the incentive effect against the public detriment of a monopoly); Thomas B. Macaulay, *Speech Delivered in the House of Commons* (Feb. 5, 1841), in *THE WORKS OF LORD MACAULAY* 195, 197, 201 (Trevelyan ed. 1879) (although copyright is "the least objectionable way of remunerating" authors, "[t]he tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures. . ."); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421, 429 (1966) (copyright protection is not necessarily "the best device for inducing the optimal number of books"). Recently, economic analysis has been used frequently to criticize copyright protection. See, e.g., Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462 (1998); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1 (1997); Anastasia P. Winslow, *Rapping on a Revolving Door: An Economic Analysis of Parody and Campbell v. Acuff-Rose Music, Inc.*, 69 S. CAL. L. REV. 767 (1996).

fall. Moreover, even if the incentive rationale justified some copyright control and/or compensation, we may be allowing too much. That is, the scope of copyright protection may be more generous than is needed to spur initial creativity.

In the abstract, this critique may have some appeal, but it also has considerable practical disadvantages. For example, the scope of a work's protection could not be known *ex ante* (thus permitting predictability in licensing), but would only be discovered in the course of an infringement proceeding, in which the court would address the question whether this incentive was necessary to create this work. Obviously, it also is rather difficult to project how one would show whether or not copyright was a necessary incentive in a given case. Then professor (now Justice) Stephen Breyer once suggested that the case for the copyright incentive rationale has not really been made,⁸ but neither, I would suggest, has the case against it. It depends who has the burden of proof: authors to justify copyright, or users to justify non-protection.

If abstract arguments about economic incentives do not advance the discussion, perhaps an appeal to history will. Copyright, its skeptics remind us, has not historically covered every way of making money from, or of enjoying, a work of authorship.⁹ For example, the "first sale doctrine" (or, in non-U.S. terms, the "exhaustion doctrine") removes the resale and rental markets from copyright owner control.¹⁰ The fair use exception permits a variety of unauthorized reproductions or derivative works, sometimes even for commercial purposes.¹¹ New technology cases of the past, from piano rolls to cable television to video tape recorders, have limited the scope of U.S. copyright, either by finding that the exploitation did not come within the copyright holder's statutory rights, or, despite *prima facie* infringement, by finding fair use.¹²

But the exercise and the rhetoric of control enjoy a long pedigree, too.¹³ The historical, if now largely abandoned, division between common law and statutory copyright rested on "publication," the distribution of copies to the public.¹⁴ Until

8. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photographs, and Computer Programs*, 84 HARV. L. REV. 281, 322 (1970) ("[T]he case for copyright in books rests not upon proven need, but rather upon uncertainty as to what would happen if protection were removed").

9. See sources cited *supra* note 4. See also William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 331 (1989); Steve P. Calandrillo, *An Economic Analysis of Property Rights in Information: Justifications and Problems of Exclusive Rights, Incentives to Generate Information, and the Alternative of a Government-Run Reward System*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 301, 316-23 (1998).

10. 17 U.S.C. § 109(a) (2000). But see *id.* § 109(b) (copyright owners retain rental right control of sound recordings and computer programs).

11. *Id.* § 107. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 594 (1994) (commercial sound recording of a song parody may be fair use).

12. See, e.g., *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 454-56 (1984) (video tape recorders); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 405, 412-14 (1974) (cable transmissions); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 400-02 (1968) (cable transmissions); *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (piano rolls).

13. See generally EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* (1879) [hereinafter *DRONE ON COPYRIGHT*]; GEORGE TICKNOR CURTIS, *TREATISE ON THE LAW OF COPYRIGHT* (1847) [hereinafter *CURTIS ON COPYRIGHT*].

14. See, e.g., *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214-15 (11th Cir. 1999).

that moment, the author controlled the decision and the implementation of public disclosure of copies. Moreover, because of the peculiarities of the publication doctrine under the prior U.S. copyright law and the state of technology before mass market audio and audiovisual recorders, the copyright owner might economically exploit the work through extensive public performance, yet never lose control over the work because the public could not make copies from live or transmitted performances of the work. Traditionally, the fair use doctrine was of little if any application to unpublished works; the law strongly protected the author's control over public disclosure, for both economic and moral reasons.¹⁵ Economic and moral rights also underlie the development of the derivative works right, particularly as applied to the control over adaptations of literary works.¹⁶ Here, again, Dr. Johnson reminds us of the venerable vintage of authors' objections to unauthorized adaptations. Boswell recounts a conversation about copyright in which he evoked the view that one who memorizes another's work might legitimately publish the results of his recollections. Johnson objected, "No, sir, a man's repeating it no more makes it his property than a man may sell a cow which he drives home." Boswell then observed that under English decisions, "printing an abridgement was allowed, which was only cutting the horns and tail off the cow." Retorted Johnson, "No, sir, 'tis making the cow have a calf."¹⁷

Copyright has evolved compromise measures as well, trading control for compensation. The compulsory licenses that punctuate the reproduction and public performance rights are one illustration.¹⁸ Private organizations, such as the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), which issue blanket performing rights licenses, are another example.¹⁹ A review of past confrontations between copyright and new technological means of dissemination suggests that courts may be reluctant to restrain the public availability of new technologies, even when they appear principally designed to exploit copyrighted works, but Congress often has stepped in to assure some form of compensation to copyright owners through imposition of a compulsory license.²⁰

In the digital environment, which approach to copyright and control will prevail? Under the copyright owner control view, so long as the new technological means of dissemination comes within the general scope of the statutory grant, copyright holders should continue to exercise exclusive rights. Moreover, because

15. See, e.g., William S. Strauss, *Study 29: Protection of Unpublished Works*, in 1 STUDIES ON COPYRIGHT 189 (Arthur Fisher Memorial Edition 1963); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549-55 (1985).

16. See generally Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y USA 209 (1983).

17. Zechariah Chafee, Jr., *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 511-12 (1945) (quoting BOSWELL'S JOURNAL OF A TOUR TO THE HEBRIDES WITH SAMUEL JOHNSON 49 (Pottle & Bennett eds., 1936)).

18. See 17 U.S.C. §§ 111, 115, 118, 119 (2000).

19. See generally Bernard Korman & I.4»red Koenigsberg, *Performing Rights in Music and Performing Rights Societies*, 33 J. COPYRIGHT SOC'Y USA 332 (1986).

20. See, e.g., 17 U.S.C. §§ 111 (cable), 115 (mechanical license) (2000). See also *id.* § 1201(k) (mandating copy control devices for analog videotape recorders, and prohibiting their circumvention). An additional rationale for compulsory license schemes is reduction of the transaction costs that negotiated licenses would impose. See, e.g., Stanley M. Besen et al., *An Economic Analysis of Copyright Collectives*, 78 VA. L. REV. 383, 408 (1992).

online licensing reduces transactions costs, and technological measures ensure adherence to the terms of the license, copyright owners can now price discriminate and offer access to works at increasingly granular levels of enjoyment.²¹ This approach maximizes control, but also, at least in theory, is consumer-friendly because it tailors the price the consumer pays to her actual use of the work.

Under a view that privileges compensation over control, as long as authors get paid something for new technological exploitations, anyone should be able to obtain or make a copy of anything.²² This view may converge with an "all you can eat" style licensing mechanism: payment of a flat fee entitles the consumer to copy whatever and however much she wants.²³ But will authors in fact be paid if they cannot control price and manner of distribution? The exercise of control entails the ability to set one's own price. Equally significantly, it empowers copyright owners to select their licensees; licensees who must vie for the grant are likely not only to bid up the price, but to offer assurances of quality control. As a result, one might expect that authors will be paid less than they would be had they the power to negotiate licenses (or to impose them on end-users). In addition, the administrative costs of identifying users and authors entitled to a share of levy fees are also likely to be prohibitively high if all authors are to be remunerated; these costs might be reduced, but at the expense of niche authors that sampling techniques do not discover.²⁴ As a result, some might fear that authors will be paid so much less that the incentive to create will be lost.

But perhaps the choice is not between being paid more or being paid less, but between being paid less and not being paid at all. There remains a third more radical paradigm: authors do not enjoy "exclusive rights" to exploit their works, but only narrowly defined and uneasily tolerated opportunities to extract compensation; these should in no event hamper the progress of technology. Under this view, new markets created by new technology should not automatically enter the author's purview. Moreover, the role of new technology should be user-empowering as much as copyright holder-empowering. While new technology may enhance copyright holder control, it can also destroy it, because users as well as copyright owners now may avail themselves of technological locks and keys. New technology in users' hands can, and for some commentators should, strip authors of any meaningful ability to control and enforce copyrights.²⁵ One might call this last view "techno-postmodernism." Technology allows users to take what postmodernism justifies as truly belonging to the audience in any event. Some postmodernists tell us that a work's value comes not from its author's creativity,

21. See generally Tom W. Bell, *Fair Use v. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367 (1998); Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

22. Cf. Alex Kozinski & Christopher Newman, *What's so Fair About Fair Use?* 46 J. COPYRIGHT SOC'Y USA 513, 525-28 (1999) (suggesting limiting derivative works right to receipt of compensation for unauthorized uses, but denying injunctive relief).

23. See, e.g., *Copyright Issues and Digital Music on the Internet*, 107th Cong. (July 11, 2000) (testimony of James Hazen Griffin, CEO, Cherry Lane Digital), 2000 WL 23831279.

24. For a criticism of existing survey techniques, see Harvey Reid, *ASCAP & BMI—Protectors of Artists or Shadowy Thieves?*, at <http://www.woodpecker.com/writing/essays/royalty-politics.html> (last visited on Feb. 4, 2002).

25. See, e.g., John Perry Barlow, *The Next Economy of Ideas*, WIREd, Oct. 2000, at 238, at <http://www.wired.com/wired/archive/8.10/download.html>.

but from the public's affection for the work.²⁶ Without its public, the work is nothing,²⁷ so the public should "share" in its value, perhaps by acquiring it for free, if the technology so allows.

Will the technology so allow? This is a focus of the current dispute. On the one hand, self-styled "cyber anarchists" invite us to "copyright's funeral," proclaiming that no protective measures that copyright owners devise will withstand the efforts of hackers who will, moreover, avail themselves of pervasive yet untraceable means of file sharing to distribute the decrypted works and/or the decryption codes.²⁸ Other copyright skeptics foresee the opposite, but equally apocalyptic, result: copyright owners will impose "digital lockup," relying on technology, contracts, and law to banish fair use and drain the public domain.²⁹ Either no copyright control can ever be enforced or, on the contrary, copyright control will acquire Orwellian effectiveness. Either way, resistance will be futile; the only thing that changes is the camp of the frustrated resister.

This article does not attempt to gauge future technology, whether protective or anarchic. Rather, it addresses a basic premise underlying many of the current critiques of copyright law in the wake of the 1998 U.S. Digital Millennium Copyright Act (DMCA): that the DMCA has vested copyright owners with a power of "control" that is fundamentally at odds with the U.S. copyright scheme articulated in the U.S. Constitution and implemented through 200 years of copyright legislation preceding the 1998 amendments. I disagree. Instead, I contend that the Constitution embodies the concept of author control. I acknowledge that the intervening statutory and caselaw history until 1976 often elevated claims for enhanced availability of works over copyright owner interest in exercising control over new modes of exploitation. The 1976 Act, however, implements a vision of "exclusive rights"³⁰ to which control is integral. This does not mean that the control implicit in the author's "exclusive right" must be impregnable. Free uses and compulsory licenses remain appropriate and necessary.³¹ But control is still very much a part

26. See, e.g., David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 LAW & CONTEMP. PROBS. 139 (1992) (arguing that if intellectual property survives, it will no longer lend itself to a romantic construction of authorship for the purposes of suppressing speech). Some critics take the somewhat less radical position that copyright need not die, but that it must be revised to reflect the reality of a pluralistic authorship process. See, e.g., Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293, 302 (1992) (arguing that the notion of romantic authorship on which copyright law is based fails to reflect the reality of contemporary polyvocal writing); see also Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 307 n.97 (1996) (listing—but disagreeing with—several copyright and literature scholars who "assert that a misguided natural rights approach, together with vestiges of nineteenth-century Romanticism, has pushed copyright in the direction of a full common law property right, a right that is immune to claims of public access").

27. A pre-postmodernist film expressed it this way: promoter [Spencer Tracy] to boxer: "Who made you, Huckle?" "You, Mike." "Who owns the biggest piece o' ya?" "You, Mike." "What'll happen if I drop ya?" "I go right down the drain, Mike." "And?" "And . . . and stay there." PAT AND MIKE (MGM 1953).

28. See e-mail from June M. Besek, Director of Studies, Kernochan Center for Law, Media and the Arts, Columbia Law School, to Jane C. Ginsburg (Sept. 27, 2000, 12:38 p.m.) on file with author) (quoting newsgroup conversation).

29. See sources cited *supra* note 4.

30. 17 U.S.C. § 106 (2000).

31. See *id.* §§ 107 (fair use), 115 (compulsory license for the creation of phonorecords of nondramatic musical works).

of the U.S. copyright system. The technological protections, further secured by legal protections, that may be required to preserve control, should also be seen as part of, rather than alien to, that system.

In this article, I will explore the concept of control and the meaning of exclusive rights in the constitutional text, the pre-1976 Copyright Act regime, and the 1976 Act. I then consider the new technology cases from piano rolls through videotape recorders, as well as Congress' responses to new technological means of exploitation. I make two submissions. First, I conclude that when copyright owners seek to eliminate a new kind of dissemination, and when courts do not deem that dissemination harmful to copyright owners, courts decline to find infringement, even though the legal and economic analysis that support those determinations often seems strained, not to say disingenuous. Second, this does not always mean, however, that courts refuse protection or that Congress imposes a compulsory license, each time copyright encounters new technology. Rather, when copyright owners seek to exploit the new modes of communication, the courts and Congress appear more favorable. In these circumstances, they embrace the propositions not only that copyright owners should get *something* for the new exploitation, but, more importantly, that when the new market not merely supplements but rivals prior markets, copyright owners should *control* that new market, and therefore should be able to charge market prices.³²

I will conclude with a somewhat different consideration: Even assuming that copyright doctrine supports the exercise of control over new media of dissemination, is this power misplaced if it primarily benefits industrial-strength copyright owners, as opposed to authors themselves? The current debate over copyright control focuses on perceived or potential overreaching by powerful intermediaries; the prospects for authors most often are overlooked. Greater author control not only enhances the moral appeal of the exercise of copyright, it also may offer the public an increased quantity and variety of works of authorship, as authors whom the traditional intermediary-dominated distribution system have excluded now may avail themselves of digital media and accompanying copyright controls to propose their creations directly to the public (and be compensated for them).

II. AUTHORS' "EXCLUSIVE RIGHT"

The Constitution authorizes Congress to "secure" to authors "the exclusive Right to their . . . Writings . . ."³³ In eighteenth-century terms, "exclusive right" meant property. Madison, in the Federalist Papers, supported this measure by emphasizing both the public benefit to be derived from authors' private rights, and that the authors' exclusive right had already been recognized in England as "a right at common law."³⁴ Copyright was a property right like other property rights, vesting its owner with control over its disposition. The constitutional text's employment of the word "securing" demonstrates that the property right was not for Congress to *create*, but rather to reaffirm and to strengthen. That right included exclusive control over the work before its publication, as well as the right to prevent unauthorized copying, selling, and publicly performing thereafter.

32. See *id.* §§ 106(6), 114(d) (digital sound performance right in sound recordings: compulsory license for webcasting, but exclusive rights for interactive services).

33. U.S. CONST. art. I, § 8, cl. 8.

34. THE FEDERALIST NO. 43, at 288 (James Madison) (Jacob E. Cooke ed., 1961).

If the Constitution perceived copyright as a form of property, the early statutes implementing the Copyright Clause significantly qualified that characterization. Congress recognized only the rights to "print, reprint, publish [and] vend," and only with respect to certain subject matter: maps, charts, books.³⁵ More importantly, Congress imposed a prerequisite of compliance with formalities: publication without compliance forfeited the copyright.³⁶ Congress recognized rights of public performance and of dramatization and translation relatively late,³⁷ hence the federal copyright law did not assure to authors control over the full economic value to be derived from their published works.

But it is important to recall that federal copyright law concerned only *published* works. As long as the work remained unpublished, the author's exclusive right was exclusive indeed, because the common law continued to govern. At first blush, it might appear that exclusive rights in unpublished works would be of little economic value. In fact, common law copyright protected not only the right to publish a work, meaning to make the first distribution to the public in copies, but also the right to public performance of unpublished works.³⁸ In other words, publication, the all-important dividing line between common law copyright and its regime of exclusive control on the one hand, and federal copyright's limited protection on the other, did not mean the same thing as public *disclosure* or public exploitation of a work. So long as the work was not distributed to the general public in copies, the author or right holder was deemed to have retained common law copyright over the work,³⁹ and to be entitled to enforce against unauthorized copying or publicly performing. Thus, a vast public might have seen an unpublished work performed, still, it remained unpublished, and therefore not subject to the limitations of federal copyright.

As a practical matter, this meant that copyright owners of works whose economic value derived from their performance, rather than their publication in copies, enjoyed a significant measure of legal control over their works. For works whose economic value also or primarily lay in distribution of copies, however, federal protection was quite slim, until supplemented by performing rights and derivative works rights. With the inclusion of those rights, as well as with the expansion of federal subject matter,⁴⁰ copyright owners who complied with formalities could assert exclusive claims to perform publicly for profit,⁴¹ to reproduce and distribute their works, or to make adaptations of their works. Copyright

35. Act of May 31, 1790, ch. 15, Sec. 1, Stat. 124 (repealed 1831).

36. *See id.* Sec. 3; *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 692-96 (1834).

37. Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (repealed 1870); Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106 (repealed 1909).

38. *See, e.g.,* *Ferris v. Frohman*, 223 U.S. 424, 435-37 (1912); *Crowe v. Aiken*, 6 F. Cas. 904, 906 (C.C. N.D. Ill. 1870) (No. 3,441); *Tompkins v. Halleck*, 133 Mass. 32, 45 (1882); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 950 (1836).

39. *See, e.g.,* *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299-300 (1907); *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 194 F.3d 1211, 1214-15 (11th Cir. 1999).

40. *See, e.g.,* Act of Apr. 29, 1802, ch. 36, 2 Stat. 171 (prints); Act of Feb. 3, 1831, ch. 16, 4 Stat. 436 (musical compositions); Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (dramatic compositions); Act of Mar. 3, 1865, ch. 126, 13 Stat. 540 (photographs); Act of July 8, 1870, ch. 230, 16 Stat. 198, 212 (paintings, drawings, sculpture, and models or designs for works of the fine arts).

41. *See* Act of Aug. 18, 1856, ch. 169, 11 Stat. 138 (repealed 1870) (granting right to dramatic compositions and the right to public performance thereof).

owners could, moreover, control access to a work, whether published or unpublished, that was made publicly available primarily through performances, and later, transmissions. Until the advent of mass market audio and video recording equipment, the public could not acquire access to a work without purchasing a copy, or borrowing one from a library or a friend, or viewing/listening to it through media licensed by the copyright owners.

The 1976 Act largely merged federal and common law copyright, leaving only "un-fixed" works within the domain of the common law.⁴² Congress integrated unpublished works into federal copyright law, making both published and unpublished works substantially subject to the same regime.⁴³ Several considerations motivated the merger: for the reasons suggested above, the distinction between published and unpublished works bore little economic significance, as many "unpublished" works were in fact substantially exploited to the public; unpublished works enjoyed perpetual protection, while the term of published works was limited by statute; common law copyright was a matter of state law, but the interstate and international exchange of "unpublished" works counseled application of uniform federal law.⁴⁴ One effect of the merger was increasingly to align federal copyright with natural property rights conceptions of common law copyright: federal copyright now commenced upon creation, rather than upon publication together with compliance with formalities.⁴⁵

Moreover, the 1976 Act conferred broadly-stated exclusive rights, qualified by narrowly-drawn exceptions and limitations.⁴⁶ Thus, where under prior Acts copyright owners were required to show that the specific statutory language encompassed the unlicensed exploitation,⁴⁷ under the 1976 Act, in effect, exclusive control supplied the default position; the burden then shifted to unlicensed exploiters to show that a specific exemption or limitation applied.⁴⁸ The prominence of

42. See 17 U.S.C. § 102(a) (2000).

43. Some differences persist. Under section 104, unpublished works are protected regardless of the nationality of the author, while nationality is relevant for published works; under section 107, the fair use doctrine is applied less generously to unpublished works; under section 108, libraries are given wider exemptions in the photocopying of unpublished works; under section 302 (c) and (e), the duration of protection for anonymous and pseudonymous works and works made for hire is measured from publication or creation; and under section 303, works created before 1978 but not yet published are protected for a different duration; and under section 407, deposit for Library of Congress purposes is mandatory for works once they are published. *Id.* §§ 104, 107, 108, 302(c), (e), 303, 407.

44. See Strauss *supra* note 14; Ralph S. Brown, Jr., *Unification: A Cheerful Requiem for Common Law Copyright*, 24 UCLA L. REV. 1070 (1977).

45. See, e.g., L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 5-6 (1987).

46. Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 281 (1989). Compare the 1909 Act and predecessors: even when the term "exclusive rights" is employed, the rights are stated more specifically, more in the style of English law "restricted acts."

47. See, e.g., *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. at 397, nn.1-2; *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. at 394-95, nn.9-10; *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. 191, 196-97 (1931); *Herbert v. Shanley Co.*, 242 U.S. 591, 593-95 (1917); *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 61-63 (1911).

48. The expansion in scope of exclusive rights, and the corresponding narrowness of exceptions and limitations has put considerable pressure on the fair use doctrine to absorb and excuse *prima facie* infringements that nonetheless appear to be reasonable uses. See Litman, *supra* note 45, at 340-42.

exclusive rights in the 1976 Act also reflects Congress' response to Supreme Court decisions narrowly interpreting the scope of the exclusive right of public performance under the 1909 Act.⁴⁹ Those decisions, in turn, illustrate the judiciary's frequent reaction to infringement suits that appeared designed to prevent the exploitation of new technological means of making works available to the public.

III. THE IMPACT OF NEW TECHNOLOGIES

At first blush, the new technology cases, from piano rolls to videotape recorders, might appear to support the proposition that every time a copyright owner tries to control a new dissemination technology, technology wins. In fact, the cases fall into two distinct categories. The first covers new technological modes of dissemination of works, when copyright owners seek not to obliterate the technology, but to be paid for the new means of exploitation, for example, radio broadcast of musical compositions. Here, copyright owners have generally prevailed.⁵⁰ The second category comprehends new technological modes of dissemination of works, when copyright owners are perceived to be trying to prevent these new means from becoming available to the public. This is the class of cases in which copyright owners have consistently fared ill.⁵¹ Even with respect to the second category, however, copyright owners have not always remained remedy-less. Congress has often imposed a compromise, allowing continued exploitation of the technology, but with remuneration to the copyright owners, in other words, substituting compensation for control. I first will consider the relevant cases; I will then turn to the legislative responses.

One of the first new modes of dissemination that copyright owners sought to participate in, rather than to prevent, was radio broadcasting. The relatively newly-formed collective licensing society, ASCAP, offered performance rights licenses to radio stations. The broadcasters declined the licenses on the statutory ground that their broadcasts were neither public performances "for profit," because there was no charge to hear the music,⁵² nor were they "public," because the performances were received in private homes.⁵³ The broadcasters also advanced the

49. See *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. at 405; *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. at 400-01. See also H.R. REP. NO. 94-1476, at 63 (1976) ("[T]he concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or performance . . . ; a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it re-transmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set.").

50. See, e.g., cases cited *infra* notes 51-52, 55-56.

51. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. at 456 (1984); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. at 405; *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. at 400-02; *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. at 17-18; *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1081 (9th Cir. 1999).

52. See, e.g., *Pastime Amusement Co. v. M. Witmark & Sons*, 2 F.2d 1020, 1020 (4th Cir. 1924) (mem.); *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. 776, 777, 780 (D.N.J. 1923); *Associated Music Publishers v. Debs Mem'l Radio Fund*, 46 F. Supp. 829, 829-31 (S.D.N.Y. 1942).

53. See, e.g., *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F.2d 411, 412 (6th Cir. 1925).

economic ground that songwriters were not harmed, because the broadcasts promoted sales of sheet music and sound recordings of the songs. All of these defenses failed.⁵⁴

Courts had already evolved an expansive doctrine of "public performance for profit" for live performances in establishments open to the public, even when no admission was charged.⁵⁵ The transmission to individual homes required a greater doctrinal leap, as the 1909 copyright statute did not elaborate on the meaning of public performance.⁵⁶ Courts adopted the common sense view that these transmissions communicated the performance to the public, even though the members of the public might be separated in space. Economic concerns may underlie this reasoning: if the public can hear the band's or orchestra's performance at home for free, why incur the expense and inconvenience of going to the performance in the concert hall? Radio was competing with licensed live performances, as well as opening up a new market for at-home enjoyment of those performances.⁵⁷

Retransmissions of radio broadcasts of music over closed-circuit systems in hotels proved another source of licensing disputes, with hotel operators contending the transmissions were not to the public if they were received in private guest rooms. Again, the issue was not whether the hotel operators could avail themselves of the technology; rather it was whether they were obliged to pay the authors for the exploitation by means of the new technology. In upholding the copyright owners' claims, Justice Brandeis remarked, "While this [form of exploitation] may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer."⁵⁸

When, however, the Supreme Court perceived that copyright owners were seeking to prohibit a new form of reproduction and distribution, or to leverage their exclusive reproduction rights into monopoly power over the devices employed to effect the new kinds of reproductions, the Court has been considerably more reluctant to "give full protection to the [copyright] monopoly." An early case in this vein, *White-Smith Music Co. v. Apollo Co.*,⁵⁹ decided in 1908, concerned pianola rolls. The musical composition was reproduced onto the piano roll through perforations that, when run through a player piano, would perform the musical composition. The Supreme Court nonetheless held that the unauthorized pianola rolls were not infringing "copies" because, unlike sheet music, the musical composition

54. See *supra* notes 51-52.

55. See, e.g., *Herbert v. Shanley Co.*, 242 U.S. at 594-95.

56. Cf. 1976 Copyright Act, 17 U.S.C. § 101 (definition of "perform publicly," includes by transmission).

57. The first radio cases concerned broadcasts of music performed in studios, rather than prerecorded music. See, e.g., *M. Witmark & Sons v. L. Bamberger & Co.*, 291 F. at 777; *Jerome H. Remick & Co. v. American Auto. Accessories Co.*, 5 F.2d at 411. Thanks to economist Michael Einhorn for discussing the substitution effect early radio broadcasts were perceived to have with licensed live performances.

58. *Buck v. Jewell-LaSalle Realty Co.*, 283 U.S. at 198 (playing copyrighted musical compositions broadcast from radio station via hotel loudspeakers is infringing performance). For a more recent version of the problem, with a similar outcome, see *On Command Video Corp., v. Columbia Pictures Indus.*, 777 F. Supp. 787, 789-90 (N.D. Cal. 1991) (closed circuit video transmissions to hotel guest rooms).

59. 209 U.S. 1 (1908).

was not directly perceptible from the perforations.⁶⁰ The majority so held despite Justice Holmes's objection that "[o]n principle, anything that mechanically reproduces that collocation of sounds ought to be held a copy. . . ."⁶¹

The Court's decision is best understood in light of the then-nascent recording industry.⁶² It appears that the Court anticipated that unauthorized pianola rolls would not furnish the only challenge to music copyright owners' exclusive reproduction rights.⁶³ The Court may have suspected that the music publishers were endeavoring either to prevent the distribution of a new format that competed with sheet music, or, equally perniciously, to control the market for phonogram recording equipment and phonograph players. Indeed, music publishers initiated the case as part of a plan between music publishers and a manufacturer of phonogram recording equipment to establish that the copyright extended to mechanical reproduction, and then to transfer mechanical recording rights to a single establishment, in return for a kickback on sales of recording equipment.⁶⁴ A victory in the piano roll case thus would bode ill for the nascent recording industry; the logic of Justice Holmes's concurrence clearly applied as well to other forms of mechanical recording.

Solicitude for a nascent dissemination industry also underlies the Court's determinations in two controversies in which it held that cable retransmissions of broadcast television did not involve a "performance" of the works, and thus fell outside the copyright monopoly.⁶⁵ In one case, the cable retransmission enhanced local signals; in the other, it imported distant signals. The Court determined that the retransmissions did not "perform" the works contained in the signals because performance implied active conduct, while the retransmission was more passive. In the first case, *Fortnightly Corp. v. United Artists Television, Inc.*,⁶⁶ the Court distinguished cable retransmission from a performance on the ground that cable was more akin to mere "viewing" than "performing."⁶⁷ The analogy held even when, in the second case, *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*,⁶⁸ the "viewer" reached out to bring in programming not otherwise available in that area.⁶⁹ The Court's analysis is rather strained,⁷⁰ and should be seen in the context of its perception that the broadcast industry was endeavoring to kill off a

60. *Id.* at 18.

61. *Id.* at 20 (Holmes, J., concurring).

62. For a general overview, see WALTER L. WELCH & LEAH BRODBECK STENZEL BURT, *FROM TINFOIL TO STEREO: THE ACOUSTIC YEARS OF THE RECORDING INDUSTRY 1877-1929* (1994).

63. Moreover, at the time of the decision, player pianos enjoyed considerable popularity; thousands of player pianos and millions of piano rolls had been sold. *White-Smith Music Co. v. Apollo Co.*, 209 U.S. at 9.

64. See H.R. REP. NO. 2222, at 6-8 (1909) ("These contracts [between music publishers and a mechanical reproduction company] were made in anticipation of a decision by the courts that the existing law was broad enough to cover the mechanical reproduction, and one consideration on the part of the reproducing company was an agreement that that company would cause suit to be brought which would secure a decision of the Supreme Court of the United States"). On the tactics of the music industry, see generally, PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 64-77 (1994).

65. *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. at 400-402; *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. at 405.

66. 392 U.S. 390 (1968).

67. *Id.* at 399-400.

68. 415 U.S. 394 (1974).

69. *Id.* at 408-09.

70. Or "simplistic," see *id.* at 415 (Blackmun, J., dissenting).

new rival, cable.⁷¹ In addition, the *Teleprompter* majority contended that television broadcasters and copyright owners would not be harmed by distant signal retransmissions, because they could adjust their advertising rates to account for the broader audience.⁷² Thus, copyright owners appeared to be behaving like unseemly monopolists, while in the Court's perception the new technology in fact would not harm, but might in fact expand, their traditional markets.

Given those considerations (and in hindsight), the Court's decision in the "Betamax" controversy⁷³ might seem like "[*déjà*] vu all over again."⁷⁴ There, motion picture producers sued the manufacturers and distributors of mass market video tape recorders, on the ground that the recorders facilitated massive uncompensated and infringing private copying.⁷⁵ On a traditional copyright analysis, the dissent is considerably more carefully reasoned than the majority opinion,⁷⁶ which treats the statutory fair use factors rather cavalierly, and strains the doctrine of contributory infringement to exculpate devices that are "merely capable of substantial noninfringing uses," perhaps regardless of the actual infringing use to which they are put.⁷⁷ The majority's extraordinarily forgiving approach is best understood in light of the features the controversy shared with the cable cases. First, the motion picture industry was attempting to prevent the distribution of video tape recorders, in favor of a different technology, non-recordable videodisc players.⁷⁸ Second, the majority found no economic harm to existing markets from "time-shifting" of free broadcast television programming (having excluded other kinds of copying or programming from its analysis).⁷⁹ The dissent charged the majority with focusing on the wrong market; the court should have inquired into the impact of the video tape recorder on new markets for television programming, not merely on extant television markets.⁸⁰ This objection recalls the cable cases as well, where the dissenters observed, particularly in *Teleprompter*,⁸¹ that the technology had

71. See *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. at 403 (Fortas, J. dissenting) ("[I]t 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; or in its becoming a tool of the powerful networks which hold a substantial number of copyrights on materials used in the television industry.").

72. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. at 411-13.

73. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 456 (1984).

74. Yogi Berra, *Famous Yogi Berra Quotes*, available at <http://www.yogiberraclassic.org/quotes.htm> (last visited Feb. 2, 2002).

75. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. at 440.

76. This may well be because Justice Blackmun's dissent was to have been the majority opinion, until Justice Stevens rallied sufficient colleagues to his dissent to shift the outcome. See GOLDSTEIN, *supra* note 61, at 149-57. See generally Jonathan Band & Andrew J. McLaughlin, *The Marshall Papers: A Peek Behind the Scenes at the Making of Sony v. Universal*, 17 COLUM.-VLA J.L. & ARTS 427 (1993).

77. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. at 442. The "merely capable" standard may be dictum, since the record indicated that the predominant use for the videotape recorder at the time was for "time-shifting" free-broadcast television, this is the non-infringing use the "Betamax" majority found. *Id.* at 421.

78. For a full and fascinating account of the business as well as the legal aspects of the "Betamax" case, see generally JAMES LARDNER, *FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR* (1987).

79. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. at 456.

80. *Id.* at 483-86.

81. 415 U.S. at 412.

opened up a new market, that normally would come within copyright owner control, and the majority responded that copyright owners could nonetheless extract revenues from the new markets.⁸² While the "Betamax" majority did not project what benefits the new technology would bring copyright owners, that outcome is well-known (and frequently asserted against subsequent copyright owner objections to new technologies of copying).⁸³

Finally, the Ninth Circuit's decision in a controversy between the recording industry and the manufacturers of the "Rio" portable MP3 player also demonstrates that courts will interpret the statutory grant of rights narrowly if they perceive that copyright owners are trying to stop technology.⁸⁴ In that case, the Recording Industry Association of America sought to enjoin distribution of the Rio on the ground that the Rio violated the terms of the 1992 Audio Home Recording Act,⁸⁵ because the Rio was a "digital audio recording device" that did not incorporate the Serial Copy Management System (SCMS) mandated by the statute.⁸⁶ The district court had held that the Rio was a device covered by the statute, and that the producers therefore were obliged to pay a statutory royalty for each machine sold, but that the SCMS requirement was irrelevant, as the Rio was not capable of making serial recordings in any event.⁸⁷ Both sides appealed. The Ninth Circuit held that the Rio was not a "digital audio recording" device, and therefore was exempt both from the SCMS requirement, and from any obligation to pay royalties.⁸⁸ The question whether the Rio was a device covered by the statute was a difficult one. The device did not itself record MP3 files directly from the Internet; a general purpose computer performed that task, then transferred those files either to the Rio's internal memory, or to a memory card that could be played in the Rio.⁸⁹ Even though the Rio did not initiate the recording of MP3 files, one might nonetheless determine, as did the district court, that the transfer from a computer hard drive to the Rio's memory required the Rio to make its own reproduction of those files; as a result, the Rio could be deemed a "digital audio recording device."⁹⁰ If

82. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. at 412-13, 419.

83. For example, Napster defenders regularly point to the economic benefits the movie industry reaped from the videocassettes technology at issue in *Sony*. Reply Brief of Appellant Napster, Inc. at 20, *Napster Inc. v. A&M Records, Inc.* (9th Cir. 2000) (Nos. 00-16401 and 00-16403); Sam Costello, *How VCRs May Help Napster's Legal Fight*, THE INDUSTRY STANDARD (July 25, 2000) at <http://www.thestandard.com/article/display/0,1151,17095,00.html> ("The similarity in the court of public opinion that Napster is going for is that the film industry hated the VCR, hated Betamax, they wanted to wipe it out, but it turned out to make them a lot of money.") (quoting Eric Scheifer, a media analyst); Richard B. Simon, *Music Fans Buying What They Hear Online, Study Says*, Sonicnet.com News (June 16, 2000), at <http://www.sonicnet.com/news/archive/story.jhtml?id=1021472>.

84. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc.*, 180 F.3d at 1076-81.

85. 17 U.S.C. §§ 1001-1010 (2000). The genesis of this statute is discussed *infra* in Part (IV)(B).

86. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d at 1075. SCMS allows the recorder to make "first generation" copies from the original source, but not to make further copies from the first generation copy.

87. *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d, 624, 629-32 (C.D. Cal. 1998).

88. *Recording Indus. Assoc. of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d at 1081.

89. *Id.* at 1074-75.

90. *Id.* at 1076.

the Ninth Circuit rejected that reasoning, it may at least in part have been influenced by the RIAA's apparent desire to block distribution of the Rio altogether, rather than simply to receive a royalty from its sale.

IV. CONGRESSIONAL COMPROMISES: MUTING CONTROL FOR COMPENSATION

In many of the new technology cases, courts faced with what appeared to be all-or-nothing attempts at copyright enforcement, preferred to interpret the statute in a way that would leave the copyright owners with nothing.⁹¹ Congress, however, has often readjusted the balance by imposing a compulsory license scheme that permitted continued distribution of the new technology, while assuring payment to copyright owners. While the early forms of statutory intervention generally removed copyright owners from control over the licensed exploitation, more recent versions combine compensation with control, or even restore a degree of control, notably by specifying how copyright owners may employ technology to protect their works from copying.

A. *Compensation in Lieu of Control*

The 1909 Act established the first compulsory license regime. After *White-Smith*, record producers sought to preserve the free rein the Supreme Court had left them, while copyright holders endeavored to repair the loss of exclusive rights wrought by their ill-fated litigation strategy. The Senate, less moved than the Court by the claims of new technology, was initially disposed to restore full exclusive rights.⁹² The House, however, sought to reconcile the right of the composer to prohibit mechanical reproduction with a public policy to prevent "the establishment of a mechanical-music trust."⁹³ The House feared that music copyright owners "by controlling these copyrights [would] monopolize the business of manufacturing [and] selling music-producing machines, otherwise free to the world."⁹⁴ Copyright on the music should not result in an additional patent on the machinery. Con-

91. This reaction to perceived copyright owner overreaching is not limited to new technology cases. It underlies the articulation of the "idea/expression merger" doctrine, which precludes protection for expression that cannot be separated from the idea, system, or process it expounds. Thus, for example, a copyright owner who endeavored to exercise a monopoly in his system of bookkeeping on the ground that defendant copied from his copyrighted book the charts necessary to implement the system found himself with no copyright at all. *Baker v. Selden*, 101 U.S. 99, 107 (1880).

In *Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 976 & n.18 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984), by contrast, the Ninth Circuit held that the videotape recorder violated the motion picture producers' reproduction rights, but suggested that the district court on remand could craft a judge-made compulsory license that would permit continued distribution of the devices, subject to a royalty paid to the copyright owners.

92. See S. REP. NO. 6187 at 3: "Some protest has been heard from the manufacturers of mechanical musical instruments against any legislation which would control their unrestricted right to use the property of others for their private gain, but this protest has been so manifestly selfish that it has only served to impress upon the committee more strongly the injustice of the existing state of the law." Although the Senate Report preceded the Supreme Court's decision, the Senate committee was reacting to lower court decisions in the same case, which had also held for the defendant. *Id.* See also *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. at 12 (discussing earlier cases).

93. H.R. REP. NO. 2222 at 7 (1909).

94. *Id.*

gress ultimately diverged from the *White-Smith* holding by extending the reproduction right to mechanical reproductions, but then substantially limited the exclusivity of the right. The legislative compromise gave the composer the exclusive right to determine if any recording would be made at all, but once the first recording was authorized, any other record producer was entitled, upon obtaining the statutory license and paying the statutory fee, to make its own recording of the musical composition.⁹⁵ This measure thus compensated copyright holders, but permitted the development of a recording industry, by ensuring competition among record producers and the manufacturers of the phonograph equipment.

The cable retransmission compulsory license introduced in the 1976 Copyright Act followed a similar pattern. After the Supreme Court had held that the retransmissions were not "performances," Congress defined "performance" in extremely broad terms amply sufficient to cover the conduct at issue in *Fortnightly* and *Teleprompter*. Congress then instituted a complicated compulsory license scheme designed to permit retransmission of local and distant signals, but subject to payment of the statutory license fee, as well as to a requirement that the cable operator not change the content of the retransmitted signal in any way.⁹⁶

B. Some Compensation, Some Control

More recently, Congress has introduced more complicated ways of splitting the difference between the control that exclusive rights implies and the fostering of new technologies of dissemination. For example, the 1992 Audio Home Recording Act (AHRA) was a post-*Betamax* measure designed to respond to the perceived threat to the music industry (record producers and musical composition right holders) from digital audio recording media. Copyright owners contended that digital audio recorders would harm sales of authorized phonorecords, because digital recorders, unlike analog devices, could make perfect multigenerational copies of the recorded music.⁹⁷ Having learned a lesson from *Betamax*, copyright owners cooperated with hardware manufacturers in proposing to Congress that the distribution of digital audio recording devices be permitted, subject to a statutory royalty on the equipment and blank recording media, and so long as the devices allowed the recording only of a first-generation copy. In other words, copyright owners conceded a de facto license to make private digital copies from the original recorded source, in return for a royalty that would help compensate for the copying.⁹⁸

On the other hand, copyright owners secured control over second-generation copying, because the statute curtailed copyright owners' exclusive rights only for the first generation, and more importantly, because the statute mandated the inclusion of the Serial Copy Management System in every covered digital audio re-

95. 17 U.S.C. § 1(e) (1925) (repealed 1978).

96. 17 U.S.C. § 111 (2000); see also *WGN Cont'l Broad. Co. v. United Video, Inc.*, 693 F.2d 622, 624 (7th Cir. 1982).

97. See, e.g., H.R. REP. NO. 102-873 (I) at 18 (1992), reprinted in 1992 U.S.C.C.A.N. 3578, 3588. ("The genesis of the legislation was concern by copyright owners that the fidelity of digital reproductions of recorded music would lead to massive unauthorized copying, significantly displacing sales").

98. See 17 U.S.C. §§ 1001-1010. Note that § 1008 bars infringement actions for private analog copying, without a corresponding statutory remuneration. *Id.* § 1008.

cording device. SCMS recognizes when a copy has been made, and prevents further copying from that copy. In addition, the AHRA made it unlawful to offer services or to distribute devices primarily designed to circumvent SCMS.⁹⁹ For the first time, Congress reinforced exclusive legal rights by providing for technological measures to protect those rights, and then by granting additional legal protection to those technological measures. As publishing lawyer Charles Clark often proclaimed, "[t]he answer to the machine [may be] in the machine,"¹⁰⁰ in that an anti-copying device may forestall rampant digital reproductions; technology might therefore fix what technology breaks. But, given that a third machine will likely come along to defeat the second, leaving copyright entirely up to technological fixes may simply produce a never-ending "arms race."¹⁰¹ Congress recognized that preservation of exclusive rights in a digital environment may require not only technological adjuncts, but a legal cease fire in the form of a prohibition on circumvention.

Congress applied a similar approach of mandating a technological response to private copying in a provision of the DMCA addressed to analog video tape recording. In *Betamax*, the Supreme Court had held that time shifting of free broadcast television programming was fair use; the Court explicitly side-stepped the questions whether retaining copies and whether taping cable or other forms of paying television were fair uses. In the DMCA, Congress closed the open questions, by mandating the inclusion of copy-protection technology in all new or newly-repaired analog video recorders.¹⁰² When a user attempts to record from encoded prerecorded tapes or transmissions, any copy the compliant recorder makes will be substantially unviewable. Congress also made it unlawful to circumvent the copy-protection system. As part of the scheme, Congress prohibited copyright owners from encoding free broadcast television transmissions. Thus, private analog videotaping of free broadcast television transmissions will remain unrestricted and uncompensated by a statutory license but copyright owners will be able to control copying of pay television programming, and of commercially produced videocassettes that are sold or rented.

Seen in this light, Congress' addition in the DMCA of a new level of copyright owner control, through the legal protection of technological measures, is consistent with a pattern of ensuring that exclusive rights remain exclusive when entrepreneurs or users of new technologies propose not merely to "share" in a new market that the technologies have opened, but to undermine the rewards drawn from the old. At least, that claim can be made of the DMCA provisions on circumvention of measures protecting "a right of the copyright owner"¹⁰³—essentially, technological protections against copying. But those provisions have not provoked the same ire as the prohibition on circumvention of technological measures con-

99. *Id.* § 1002(c).

100. Charles Clark, *The Answer to the Machine is in the Machine*, in *THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT* 139 (P. B. Hugenholtz ed., (1996).

101. Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 251 (1996).

102. 17 U.S.C. § 1201(k).

103. *Id.* § 1201(b).

trolling access to a work,¹⁰⁴ principally because users are used to autonomy in the enjoyment of their copies. But that may change. If one believes that the market for hard copies is likely to recede as works become ubiquitously available through audio- and videostreaming and downloading, then obtaining access will become the principal way in which works are enjoyed. As a result, control over access will become the principal way that exclusive rights are exercised.¹⁰⁵ Without control over access, copyright owners may be disinclined to make their works available in ways tailored to the evolving consumption habits of individual users.

V. AUTHORS' EXERCISE OF CONTROL

Thus, legal protection of access may encourage copyright owners to offer more kinds of distributions, from pay-per-view to unlimited copying, but this presumes that the technological measures that back up these offerings can in fact be enforced. As a practical matter, this means that users can be persuaded to refrain from rampant copying through file sharing and dissemination of circumvention hacks. In the post-Napster world, it would be a foolish copyright owner indeed who assumed that users' consciences are quickened by the direction in the decalogue, "Thou shalt not steal."¹⁰⁶ Copyright owners will therefore have to be able to compete with "free."

How? Depending on the kind of work, copyright owners might offer auxiliary services, such as updates of informational works, or helplines for software.¹⁰⁷ For more freestanding kinds of works, particularly entertainment product, copyright owners might propose auxiliary goods, such as fan club merchandise, or attractive packaging. In general, if the digital copy can be bundled with a hard copy whose disposition the copyright owner can regulate, control may yet survive. But this depends on the hard copy's retention of independent value as an object, such as a beautifully bound book, or as an artifact, such as an autographed CD cover. Alternatively, copyright owners may persuade consumers to switch to a new format; this has happened before, when consumers, convinced of the new format's superior convenience and durability, switched from vinyl LPs to CDs. One may

104. See, e.g., Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 414-29 (1999); Julie E. Cohen, *WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive*, EUR. INTELL. PROP. REV. 1999, 21(5), 236; Robert C. Denicola, *Mostly Dead? Copyright Law in the New Millenium*, 47 J. COPYRIGHT SOC'Y USA 193, 202-04 (2000); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 538-39 (1999); Litman, *The Demonization of Piracy*, *supra* note 5; L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC'Y USA 365 (2000); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519 (1999); Pamela Samuelson, *Good News and Bad News on the Intellectual Property Front*, COMMUNICATIONS OF THE ACM, Mar. 1999, at 19.

105. See Jane Ginsburg, *From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, in U.S. INTELLECTUAL PROPERTY: LAW AND POLICY (Hugh Hansen ed., forthcoming 2002) available at http://papers.ssrn.com/5013/papers.cfm?abstract_id=222493.

106. *Exodus* 20:15.

107. See, e.g., Esther Dyson, *Intellectual Value*, WIRED (July 1995) at http://www.wired.com/wired/archive/3.07/dyson_pr.html.

anticipate that, unlike current CDs, the next consumer-desirable format (perhaps a DVD audio that holds 100 songs) will be access- and copy-protected.¹⁰⁸

Perhaps most likely, copyright owners might offer consumer convenience: they can make it easier to access and copy with a license than without one. A licensed download of audio or videostream would need to be easier to find, faster to acquire, and give a better quality copy than a “shared” file or a hacked download. Indeed, in the digital environment, given the easy manipulability of unprotected documents, copyright owners may enhance the attraction of licensed copies by assuring their authenticity. The price, if low enough, or varied enough, would be worth the savings in transaction costs of finding the file or downloading the hack and using it. Technological protections remain relevant to this system, since the transaction costs of unauthorized access and copying are increased if the user has to circumvent, and if at least some of the circumvention activity and device market can be discouraged through the anticircumvention provisions of the DCMA. Similarly, technological protections can ensure that the document delivered has not been altered.

Finally, what has all this to do with authors? The Framers of the U.S. Constitution provided that the “exclusive Right” was to be “secur[ed] . . . to Authors,”¹⁰⁹ not directly to publishers, producers, or other intermediate exploiters. The control that non-author right holders enjoy derives from the rights the Constitution ensures to creators. If authors do not benefit from the control they cede, then concerns about the potential incursion on public prerogative achieved through technologically enhanced means of control assume greater force. If authors drop out of the copyright balance, we should more carefully watch the weight of the right holders.

But do authors have to drop out? Employee authors and others subject to the “works made for hire” rule,¹¹⁰ are cast out of copyright, since the statute deems their employers and hiring parties the “author.”¹¹¹ Moreover, in many sectors, creators who retain authorship status nonetheless assign all rights for a small royalty, or even a flat one-time payment.¹¹² Perhaps, then, just as 18th-century publishers advanced their claims through appeals to the moral justice of remunerating

108. It is also possible that some users, like supporters of public radio and public television, will be willing to pay a subscription or even per use, because they perceive a need to support the dissemination of quality content that would not otherwise be available in a purely market or advertising-based model.

109. U.S. CONST., art. I, § 8, cl. 8 (emphasis added).

110. 17 U.S.C. §§ 101, 201(b) (2000).

111. *Id.*

112. See, e.g., MICHELE VESSILLIER-RESSI, *THE AUTHOR’S TRADE: HOW DO AUTHORS MAKE A LIVING?* 69, 197 (John Hargreaves, trans., John M. Kernochan, ed.) (1993). Not surprisingly, author organizations oppose assigning all rights. On its website, the American Society for Journalists and Authors “reiterates its opposition to WMFH [works-made-for-hire] or all-rights contracts . . .” ASJA Contracts Committee, *Work-Made-For-Hire And “All Rights” Contracts*, at <http://www.asja.org/new/pubtips/wmfh01.php> (last visited Feb. 4, 2002). Similarly, the Authors Guild advises: “Never transfer or assign the copyright.” The Authors Guild, *Improving Your Book Contract: Negotiation Tips for Eight Typical Clauses*, at <http://www.authorsguild.org/contractadvice.html> (last visited Feb. 4, 2002).

authors whom they promptly despoiled,¹¹³ today's copyright rhetoric of control is merely a pretext for corporate greed.¹¹⁴

Indeed, one might suppose that authors would be better off with a compulsory license regime than an "exclusive right," at least if a statute guaranteed creators a fixed and generous percentage of the sums collected under the license.¹¹⁸ But the conclusion that a compulsory license regime is better for authors than exclusive rights presumes that authors are obliged in practice to give up their rights to a publisher; it disregards the potential of digital media to free authors from the corporate distributors on whom they once depended to bring their work to the public. Traditionally, publishers have performed or overseen the following functions: selection; editing; reproducing the work in copies for distribution; distributing; marketing, including advertising and promotion; and accounting to the author for royalties. Today, some of these functions are no longer required and others can be disaggregated; we can foresee that authors may undertake many of these tasks themselves, or subcontract them without giving up their copyrights. Similarly, freelance authors who can self-distribute may more effectively resist hiring parties' attempts to contract into work for hire status. As a result, it would be premature to surrender the control the copyright law vests in authors, at least if that surrender despairs of authors' abilities effectively to manage their own copyrights in a digital environment.

113. See, e.g., the 1777 petition of the advocate Cochu on behalf of the Paris publishers, reprinted in E. LABOULAYE & G. GUIFFREY, *LA PROPRIÉTÉ LITTÉRAIRE AU XVIII^È SIÈCLE* (Paris 1859), at 159-98. For a brief history of early copyright development, see generally John Feather, *Authors, Publishers and Politicians: the History of Copyright and the Book Trade*, 10 EUR. INTELL. PROP. REV. 377 (1988).

114. See, e.g., Andrew Sullivan, *Counter Culture: Dot-communist Manifesto*, NEW YORK TIMES MAGAZINE, June 11, 2000 available at <http://bits.westhost.com/061200/counter3.htm>; Hane C. Lee, *Another Voice Enters the Napster Debate*, THE INDUSTRY STANDARD, June 5, 2000, available at <http://www.thestandard.com/article10,1902,15718,00.html>. For a musician's perspective, see Lars Ulrich, Science Technology column, NEWSWEEK, June 5, 2000, available at http://www.rapstation.com/files/news/archive/Newsweek_com_Newsweek_US_Edition_Science_and_Technology_Its_Our_Property.html. Cf. Neil W. Netanel, *Market Hierarchy and Our System of Free Expression*, 53 VAND. L. REV. 1879 (2000).

115. Urhebergesetz, German Copyright Act, Amendments of Mar. 1, 2002 relating to reasonable remuneration §§ 54 ff, arts. 32, 32a, 32b, 36, 36a. See also Calandrillo, *supra* note 8 at 338-39.