Copyright's Communications Policy

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INTRODUCTION

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

What all these arguments have in common is a focus on copyright's "authorship" function. Copyright policy, in this view, is fundamentally about providing a balance of incentives for authors to effectuate one of several possible goals, such as progress of science,[2] democratic governance,[3] or the system of free

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[1] An examplar of the latter view is Yohai Benkler, *Free As The Air To Common Use: First Amendment Constraints On Enclosure of The Public Domain*, 74 N.Y.U. L. REV. 354 (1999) (arguing that legal rules "enclosing" information risk the diversity of information sources and threatens freedom of speech); the former view, LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001) (endorsing an "information commons" from which authors may draw for creative inputs).

[2] This is a goal expressed in the copyright clause itself. *See* U.S. Const. Art. I, § 8, cl. 8.

[3] *See generally* Neil Netanel, C*opyright and a Democratic Civil Society*, 106 YALE L.J. 283 (1996) (arguing that copyright has two democracy-enhancing functions in that (1) it incentivizes production and (2) it supports a sector of creative activity free from government subsidy, patronage, etc.).

expression.[4] Few disagree that these are the goals: the main disagreement is over what means serve these ends.

Yet the recent history of copyright begs the question of whether this debate captures what is right and wrong with the law. Both sides point to the same problem: a tragedy of authorship caused by their opponents. Critics of copyright say that aggressive over-enforcement of copyright deters those who would borrow from others to create, such as music samplers, satirists, and film-makers. Copyright's backers warn, conversely, that piracy threatens the very livelihood of the artist and creative industries. The story of twin tragedies, however, creates an indeterminate debate. Both positions have difficulty demonstrating empirically, as opposed to anecdotally, that either overprotection or piracy has stilled the engines of creativity. At a theoretical level, any putative change in copyright protection can both be defended as a necessary creative incentive and attacked as an unnecessary control.

This article suggests that the main challenge for 21st century copyright are not challeges of authorship policy, but rather new and harder problems for copyright's *communications* policy: copyright's poorly understood role in the regulating competition among rival disseminators.[5] Since its inception copyright has set important baselines upon which publishers and their modern equivalents do business. As the pace of technological change accelerates, copyright's role in setting the conditions for competition is quickly becoming more important, even challenging for primacy the significance of copyright's encouragement of authorship.

None of this is to say that the debate over authorship is a sham, or that copyright's role in incentivizing authorship is unimportant. The law, I suggest, can be usefully understood in a modular fashion: as comprised of both authorship and communication regimes whose functions are often independent. The first regime is the familiar system, run by the courts, that grants exclusive rights to encourage creativity.[6] The second is a messier regulatory regime comprised mainly

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[4] This is a value given priority in Benkler, *supra*, note 1.

[5] For a discussion of this definition of "communications policy," *see infra* note 41.

[6] *See infra* note 23.

of the sections of copyright that have always perplexed copyright theorists and have never fit the central theme of author-incentives. This *de facto* communications regime runs through the legislative process and the courts, that takes largely the form industry-specific liability rules, court-created immunities and special accommodations.[7]

The study of copyright's communications policy has both a descriptive and a normative payoff. First, it helps us understand both the existing copyright code and the history of 20th century copyright. Much of the existing copyright code is difficult to describe as a device for providing incentives to create new works.[8] That description may fit various "core" doctrines that consume the bulk of scholarly attention, such as the idea/expression dichotomy,[9] term limits,[10] and parts of the fair use doctrine.[11] But the copyright code is also full of complex compulsory licensing schemes and technologically-specific immunities.[12] The link to authorship in such sections is unclear at best. I suggest it will be useful to understand these apparent anomalies part of copyright's regulation of competing disseminators.

The observation is confirmed by the 20th century of Copyright, where the law has played a recurring role in competition between incumbent and challenger disseminators. What follows characterizes the copyright's communications policy into two modes ("classic," and "new") corresponding to two time periods. In the first, from 1900-1976, the copyright's classic communications regime evolved through a series of long and extensive conflicts between competitive rivals: such as cable and broadcast, radio and song-writers, and the early recording players and sheet music publishers.[13] This era is characterized by judicial reluctance, even in the face of precedent, to extend to incumbents rights of copyright that might be used for market advantage over a technologically-advanced rival. The statutory

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[7] *See* Section I.C., infra.

[8] This fact is not unnoticed among economic scholars. *See infra*, discussion at text accompanying note 38.

[9] See 17 U.S.C. § 102(a) (2000).

[10] *See* Copyright Term Extension Act, Pub. L. 105-298, § 102(b) and (d), 112 Stat. 2827-2828 (amending 17 U.S.C. §§ 302, 304).

[11] *See* 17 U.S.C. § 107 (2000).

[12] These sections are described in depth in Section I.C, *infra*.

[13] These three conflicts are described in Section I.D, *infra*.

result were the series of government-mandated access schemes, known as "compulsory licenses," that make up the bulk of the copyright code and are otherwise difficult to characterize.

In the second period, from the 1976 Act onward has witnessed the emergence of a new form of communications policy: judicial creation of copyright immunities meant to benefit competitive innovation.[14] The foundation is the rule announced in *Sony Corp. v. Universal City Studios, Inc,*[15] which grants some immunity from copyright liability for technological inventions of general utility. [16] It can be understood as a device for the judiciary to try and balance the concerns of authorship against those of competition and communications policy.[17] Coupled with other immunities, such as those created for Internet Service Providers in 1997[18] and the rule on reverse engineering,[19] the result is a copyright law that has taken new measures to deal with use of copyright as a tool of competitive advantage.

The study of copyright's role in regulating competition, I suggest, reveals a copyright that theorists hardly know. It is not that scholars are unaware of copyright's role in communications policy—the importance of "dissemination" has always been recognized as a goal of copyright.[20] The point, rather, is that the author-centrism of copyright theory has left little basis to evaluate or criticize copyright's decisions that create communications policy.

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

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[14] *See* Section III.B-D, *infra.*

[15] 464 U.S. 417, 431 (1984).

[16] More precisely, *Sony* holds that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes." *Id.* at 442.

[17] *Cf.* Randal Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 424 (2002) (describing *Sony* as a rule of market entry).

[18] *See* 17 U.S.C. § 512 (immunity scheme for internet service providers).

[19] *See* Section III.C(1), *infra*.

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

generally endorsed a model of open, competitive innovation as its national communications policy.[21] It is, in other words, generally agreed that neither government nor industry monopolists are well situated to choose what technologies or firms the nation should use to communicate, now or in the future.[22] Copyright, as it grows in importance, should not be exempt from such principles. Few would disgree that the basic vision of competitive innovation is an attractive vision. While many may disagree on how the goal might best be achieved, it cannot be reached without an awareness of the role that copyright plays in setting national communications policy. That requires that judges and policymakers further develop an appreciation of copyright's effects on parties other than authors.

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

[21] *See* Section II.B, *infra*.

[22] *See id.*

PART I: A DESCRIPTIVE MODEL OF COPYRIGHT

A. Author-Centrism

Copyright theory is traditionally depicted as a long conflict between two dueling theories, a jurisprudential approximation of the 100-year War. In accounts now very familiar to copyright theorists, the first of these warring theories is Anglo-American and describes the purposes of copyright as "utilitarian" or "economic."[23] It premises the existence of copyright on market failure.[24] Copyright exists to provide incentives for authors to produce works and thereby avoid underproduction that might otherwise result.[25] Under this theory copyright law is ultimately similar to other forms of economic legislation, for it is Lord Macaulay's "tax on readers for the purpose of giving a bounty to writers."[26]

The rival to the Anglo-American view resides mainly on the continent and is known in the United States as the natural-rights theory of copyright. It suggests that authors have a moral right to the fruits of their labors: Copyright is granted because the author deserves it.[27] One version of this idea says that authors should be rewarded for the value they contribute to society.[28] Another, older version posits a natural link between creation and ownership: the author owns his

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

[24] *See id.* at 327.

[25] *See id.* at 328.

[26] T. Macaulay, SPEECHES ON COPYRIGHT 25 (C. Gaston ed. 1914).

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

[28] *See* Marshall Leaffer, UNDERSTANDING COPYRIGHT LAW 58 (3d ed. 1999).

(smaller) creation in just the manner that God owns his (slightly larger) Creation. What you create is yours: "to every cow its calf."[29]

Today this traditional debate has taken on a modern gloss. Natural rights theories, in the United States at least, have retreated to the status of foil, used more to accuse than to defend.[30] The dominant starting point for most American scholarship is an incentives theory, or the "incentive/access" paradigm, the idea that the copyright expresses some balance between encouraging creation of expressive works, while providing for adequate access to the work for new authors and others. As Mark Lemley expresses the conventional wisdom, "both the United States Constitution and judicial decisions seem to acknowledge the primacy of incentive theory in justifying intellectual property."[31] Starting from this premise, theorists move in different directions. More sophisticated economic theories stress the utility of assigning intellectual property rights to owners, arguing that owned assets will gravitate towards their most valuable use.[32] Meanwhile, a cluster of new copyright theories seek reasons other than market failure to explain why

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[29] Augustine Birrell, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 42 (1899).

[30] Much recent writing on natural rights theories of copyright seeks not to defend it, but rather to accuse Congress or the courts of wrongly reinstituting a natural rights regime through expansion of copyright. *See, e.g.*, James Boyle, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 56-59 (1996); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 125-28 (1993); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L. J. 455; Gordon, *supra* note 27, at 1540 (arguing that courts have mistakenly interpreted the natural law theory of copyright and afforded too much protection to authors at the expense of free speech interests). *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).

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

[32] *See, e.g.*, Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1435-49 (1989) (arguing that "author's entitlements as the starting point from which markets evolve"); Robert P. Merges, *Are You Making Fun of Me?: Notes on Market Failure and the Parody Defense in Copyright*, 21 AIPLA Q.J. 305, 306 (1993) (economics analysis of copyright has "progressed beyond the point where a crude 'incentive' story passes for analysis in every case."); Richard Posner & William Landes, THE ECONOMIC ANALYSIS OF INTELLECTUAL PROPERTY, Ch. 5 (2004) (describing various economic roles played by copyrights, mainly related to the reduction of transaction costs).

encouraging authorship might be important. Enjoying great academic, if not judicial, popularity are theories that conceive of copyright's incentive system as part of the larger system of free expression associated with the First Amendment.[33] Another group treats copyright's incentive structure as playing a role in promoting a republican system of governance.[34]

This debate is familiar and greatly interesting to copyright theorists, but can also be misleading. The problem with the dominant theories of copyright is that they increasingly fail to describe important parts of existing law and their effects. The reason is that the dominant access/incentives paradigm and its spin-off theories are not comprehensive theories of copyright. Rather, they are mainly theories of *authorship* or of *creation*. They lead, in turn, to author-centric theories of copyright. And while theories of authorship are a crucial part of copyright theory, they provide only a partial description of the law.

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

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[33] *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); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L. J. 1 (2002) (evaluationg copyright on a theory of a free speech centered on the "freedom to imagine"); Rebecca Tushnet, *Copyright As A Model For Free Speech Law: What Copyright Has In Common With Anti-Pornography Laws, Campaign Finance Reform, And Telecommunications Regulation*, 42 B.C. L. REV. 1 (2001). Despite the academic attention, arguments calling for greater scrutiny of copyright under the First Amendment have been nearly without exception rejected by courts, most recently in Eldred v. Reno, 537 U.S. 186, 198 (2003) and earlier in Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 560 (1985).

[34] *See, e.g.*, William W. Fisher III, *Reconstructing The Fair Use Doctrine*, 101 HARV.L.REV. 1659 (1988); Netanel, *supra* note 3.

that are ugly, complicated, and obscure to copyright students.[35] They include the mechanical license in § 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*. Their relationship to a putative author's incentives to create would seem at best indirect: the schemes, on their face, seem to have much more to do with managing competition between industry rivals.

Author-centric theories also have trouble explaining the "secondary" costs of copyright: those imposed on actors other than authors and consumers. Incentive theories are interested in two categories of copyright's effects: the benefits that accrue to authors and the corresponding costs imposed on consumers and new creators. Yet it is evident that much of the costs of copyright are borne by other actors. One need only look to those who object to copyright to see where costs are felt. Piracy is invariably a complaint of incumbent industries, while challengers for their part complain about being squashed by incumbents.[36] Finally, telecommunications firms and electronics manufacturers complain about the costs they bear when enlisted to enforce copyright schemes of contributory liability.[37] These secondary costs of copyright, together with the large sections of the code described above are datapoints that today's theories fail to explain.

It is important to stress that scholars are not altogether unaware of the limits of authorship theories. Economic theorists, in particular, are in the midst of an ongoing effort to generate economic explanations for aspects of copyright that do not fit the central incentives story. Transactions costs, evidentiary concerns, and

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[35] These sections enjoy only passing attention in copyright casebooks, *see*, e.g., Nimmer et al., CASES AND MATERIALS ON COPRIGHT 225-227, 556 (6th ed. 2000) (4 pages on compulsory licensing in a book of 1230 pages) although the difficulty and tedium of teaching statutory licenses explains this cursory treatment.

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

[37] *See, e.g.*, Mike Musgrove, "Copyfight Renewal: Owners of Digital Devices Sue to Assert the Right to Record," WASH. POST April 7, 2002, at E01 (detailing fight between electronics firms and Hollywood).

rent dissipation play a major role in such efforts.[38] What follows is for the most part complementary, rather than a rival to these efforts to undercover secondary purposes of of the copyright law.[39]

The descriptive theory that follows unifies authorship and communications policies is an effort to give a more complete account of what copyright is doing, and why. Even authorship and communication policy cannot, of course, explain all of copyright, and many sections of the law reflect multiple considerations. However, if what follows is correct, copyright is playing a role in communications policy only partially described by today's theories and one likely to be of increasing importance as the scope of copyright increases.

B. A Descriptive Theory of Copyright Law

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

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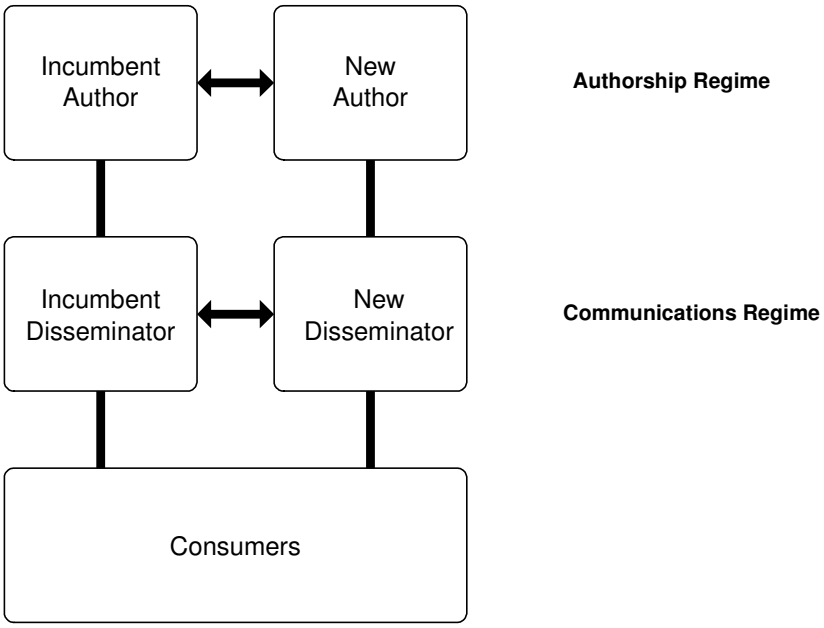
[38] Principal examples include RICHARD POSNER & WILLIAM LANDES, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003); Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L.J. 683 (2003) (describing sections of copyright as motivated by an evidentiary function); Picker, *supra* note 17; Michael Abramowicz, Copyright Redundancy (2003), *available at* http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID374580_code030130570.pdf?abstractid=374580 (describing much of copyright as motivated by an interest in preventing redundancy and rent dissipation).

[39] This is particular true with respect to Randy Picker's recent work, which is interested in copyright from the perspective of antitrust policy and a foundation for much of what follows here. *See* Picker, *supra* note 17; Randal Picker, *From Edison to the Broadcast Flag: Mechanisms of Consent and Refusal and the Propertization of Copyright*, 70 U.CHI. L. REV. 28 (2003).

Fig 1.1: Copyright Relationships



These parties—authors, old and new disseminators, and consumers, are in repeat relationships fraught with potential for conflict and abusive behavior. While conflicts may arise between any of the pictured parties,[40] the law focuses on two repeated relationships: those between new and existing authors and those between incumbent and challenger disseminators. The first is familiar; it is copyright's *authorship* regime. The second is less so; it is copyright's *communications* regime—so named because it regulates the same parties (disseminators) as communications law, and because it confronts similar problems.[41]

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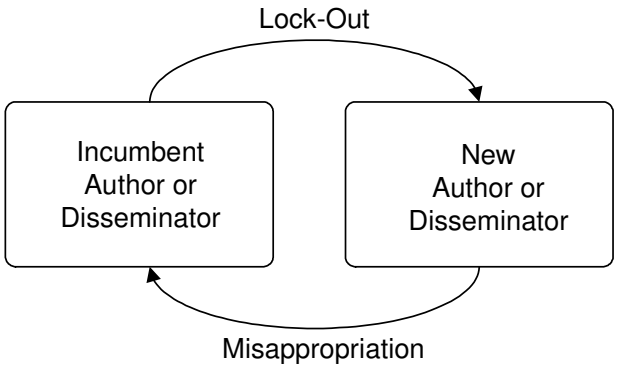
[40] The contest between freelance writers and those who distribute their materials online is an example of the relationship between existing authors and new disseminators. *See, e.g.,* New York Times Co. v. Tasini, 533 U.S. 483 (2001) (concerning a clash over the newspaper's sale of copyrighted text to be retrievable in a database search). So, to a degree, was the conflict between composers and music publishers and the radio broadcast industry, *see* infra notes 107-158.

[41] As used in this paper, the term "communications policy" refers to the particular questions of competition policy that emerge in the industries of telecommunications. Communications policy is therefore an application of antitrust principles in a repeat context. Cf. J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209, 1237-38 (1993) (arguing

Fig. 1.2 Problematic Behavior in the World of Copyright



What kinds of problems emerge amongst new and existing players? Copyright law has evolved to deal with two recurrent types of abusive behavior. The first is *misappropriation*, which arises because each "new" actor (whether author or disseminator) has the capability to appropriate and free-ride off of the investments made by existing actors, whether in expressive works, distribution channels, or otherwise.[42] The mirror image of misappropriation is *lockout* behavior, which arises from the capability of an existing actor to block market entry and exclude or control potential new competitors. The various legal schemes engineered to prevent these two private wrongs can be understood to comprise much of what we call the copyright law.

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for the consolidation of reasoning in communications law and antitrust). The context is distinguished by two factors: first, the frequent existence of bottleneck infrastructures, see *infra* II.A, and second, the existence of fixed statutory policies that occasionally mandate deviations from the goal of maximizing consumer welfare, such as the goals of "universal service" (communications technologies should be available to every citizen), *see generally* Milton Mueller, *Universal Service in Telephone History: A Reconstruction*, 17 TELECOMMUNICATIONS POL'Y 352, 356 (1993), and "localism" (support for local media outlets over national), *see, e.g.*, 47 U.S.C.A. § 521(2) (discussing importance of local control over cable).

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

It is important to stress that nothing here assumes that the actors pictured will *always* behave in abusive ways. Not every new writer is a plagiarist nor is every incumbent industry bent on destroying emergent competitors. But in this view copyright has, as Oliver Wendell Holmes suggested generally, evolved to meet systematic misbehavior.[43]

Given this introduction of the problems copyright faces, we can now turn to the substance of the regimes that have arisen to counter them. Copyright's authorship regime needs little introduction because it is already the focus of most scholarly attention. It is only worth noting that copyright handles the misappropriation problem among authors in very clever ways. Copyright for authors has created a doctrinal "floor" and "ceiling," where the floor is the requirement of originality, and the ceiling is the lack of protection for the ideas underlying expression.[44] Together, and joined by the fair use exception,[45] these core doctrines create the familiar idea of a balance that allows certain but not all forms of appropriation. This is a familiar subject to anyone who has studied copyright and needs little repetition. Conversely, copyright's communications regime, which manages similar problems among disseminators, is far less studied and understood. The remainder of this Part is an effort to remedy that imbalance.

C. The Communications Regime Revealed

Copyright's communications regime, its management of rival disseminators, is not a recent phenomenon, for it actually predates copyright's authorship regime. The management of competition among publishers, copyright historians tell us, was actually the earliest purpose of copyright. Historian Ray Patterson explains:

> [H]istory shows us [that] copyright began as a publisher's right, a right which functioned in the interest of the publisher, with no concern for the author.

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[43] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). This was also a view of law stated by Epicurus: "the laws exist for the sake of the wise, not that they may not do wrong, but that they may not suffer it." Epicurus, *The Complete Extant Writings of Epicurus*, *in* THE STOIC AND EPICUREAN PHILOSOPHERS 51 (Trans. Cyril Bailey 1940).

[44] *See* 17 U.S.C. § 102(a).

[45] *See* Wendy Gordon, *Fair Use as Market Failure*, 30 J. COPYRIGHT SOC. 253 (1983)

> Indeed, it existed as such for over a hundred and fifty years before it was … deemed to function primarily in the interest of the author."[46]

According to copyright historians the stationer's (publishers) rights of the 1500s and 1600s, later codified in the Statute of Anne,[47] allocated among the stationers the exclusive rights to copy a given manuscript (the copy-rights).[48] The original copyrights functioned as a device that eliminated direct competition between stationers and were generally unconcerned with authorial matters.[49] As Joseph Lowenstein explains, the earliest ancestors of copyright were "a privilege conferred by the guild on one of its members, part of an imperfect but not ineffective system by which the guild sought to preserve internal order."[50]

Matters have changed less in the last 400 years than one might think. Copyright, as in the 17th century, is still quite concerned with maintaining order among the rival stationers of our era. What follows through the end of Part I is an effort to describe the "classic" communications regime, centered on legislative settlements placed in the copyright code. After discussing communications policy in Part II, Part III describes copyright's "new" communications regime, which has evolved mainly after 1976 and is centered on specific immunities to copyright liability.

1. Statutory Modules

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[46] LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 8-9 (1968). Some, such as Jane Ginsburg, would argue that the word copyright should not be understood other than as a right subsisting in an author, and that to speak of a publisher's or stationer's copyright is a contradiction in terms. I take no position on this issue, but note that some historians do use the term copyright in reference to the early rights of publishers. *See id.*; *see* also Benjamin Kaplan, AN UNHURRIED VIEW OF COPYRIGHT 5 (1967) (using the term in this manner).

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

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

[49] *See* Kaplan, *supra* note 46, at 5 ("They [stationer's copyrights] did not, however, stand on any notion of original composition, for they might be granted for ancient as well as new works.").

[50] JOSEPH LOWENSTEIN, THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT 29 (2002).

The most obvious and important manifestation of copyright's communication regime take up the most of Title 17 of the United States Code: the complex statutory management schemes that balance the respective rights of dissemination industries. The rules embedded in Title 17 are modules of communications policy specific to a particular industry and, usually, to a specific historical context. Each is complicated and lengthy, and make for perhaps the least glamorous parts of copyright. Yet it is the ambition of this section to reveal the sections for what they are: the embodiments of copyright's classic communications policy.

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

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

a. Secondary transmissions by cable operators and others.

This is an extremely complex compulsory license scheme enacted in 1976. It was enacted in response to cable operators' unpaid usage of broadcast signals in the 1950s-70s. It requires rebroadcasters—principally, cable operators, but also hotels and apartment complexes—to pay a fixed fee for a license to rebroadcast copyrighted materials and is found in 17 U.S.C. § 111.

b. Digital Audio Transmission/Webcasting license

A provision requiring Internet "radio-stations" to pay a statutory fee in order to rebroadcast copyrighted materials is found in § 114.

c. The "Mechanical License"

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

d. Jukebox negotiated licenses

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

e. Public Broadcast License

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

f. Satellite retransmissions of television signals

A compulsory license scheme, similar to that found in § 111, applies specifically to satellite rebroadcast of content both from broadcasters and from cable operators and is found in § 119.

g. Satellite retransmissions of television signals into local markets.

A bargain between the satellite, broadcast, and cable industries, § 122 grants satellite rebroadcasters a free (no-royalty) compulsory license for local broadcasting, provided they agree to carry all television broadcast stations located within the local market.[51]

h. Immunity for ISPs transmitting or hosting infringing material

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

i. Immunity for producers of digital audio recording devices

§ 1008 contains a grant of immunity to manufacturers of digital audio recording devices (like "DATs") on condition of the payment of a royalty on each sale.

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[51] *See* Ellen P. Goodman, *Bargains In The Information Marketplace: The Use Of Government Subsidies To Regulate New Media*, 1 J. TELECOM & HIGH TECH. 217 (2003).

The existence and significance of the statutory modules cannot be questioned. The cable industry, just to take one example, based its early existence on access to copyrighted works, and has paid billions in access fees to broadcasters.[52] Yet where do these modules come from and what purpose do they servce?

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

Scholars are aware of and have documented the history of negotiated settlement in the context of copyright and new technologies.[53] But what follows is an effort to understand the process not as just as a history but as an institution. What immediately follows is not a claim about the ideal institutional process for creating communications policy, but rather a description of how such policy is made.

3. A Model of Conflict

The central modules of copyright's classic communications policy have arisen out of conflict–out of bitter, public battles between incumbent and challenger disseminators who often seem determined to do or say anything to get their way. That is the repeated pattern of the 20th century copyright conflict and, if the first few years are any indication, will persist as a part of the 21st century copyright landscape.

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[52] The cable industry had paid about $2.5 billion as of 1997 for access to broadcast signals. See COPYRIGHT OFFICE, A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 43 (1997) (citing testimony of the National Cable Television Association).

[53] *See*, e.g., PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY (2003); Jane Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUMBIA LAW REVIEW 1613 (2001); Jessica Litman, *Copyright Legislation and Technological Change*, 68 OREGON LAW REVIEW 275 (1989); Trotter Hardy, *Copyright and "New Use" Technologies,* 23 NOVA L. REV. 659 (1999).

The 20th century witnessed decades-long battles between, to name just a few examples, the recording industry and sheet music publishers,[54] cable and broadcast, [55] electronics manufacturers and recording companies,[56] and online music distributors.[57] But why do these conflicts arise? To what degree are they a permanent part of copyright's environment?

This Section argues that given only very basic assumptions, public conflicts—efforts to enlist government aid—among rival disseminators are nearly inevitable and therefore that they are a permanent problem for copyright's regulation of packaged information. What follows is closely related to the model of misappropriation and lockout discussed above, and to the "bottleneck-foreclosure" problem discussed in Part II. [58] It is a model based on a simple public choice theory.[59]

We can predict that conflicts between incumbent and challenger disseminators will arise so long as two things are true: first, that more efficient technologies of dissemination will be invented and second, that there exists the possibility, but not the certainty, of convincing Government to provide laws that can be used against a competitor. I suggest, in other words, that the conflicts that arise in the copyright world are not much different from those in other areas where government might act, if convinced, to protect market competitors.[60] For example, the conflicts between classes of disseminators are conceptually similar to the conflicts that arise when domestic industries face more efficient foreign competitors.[61] The difference is that the copyright law, rather than tariffs and other trade barriers, is invoked.

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[54] *See infra* section II.D(1).

[55] *See infra* section II.D(3).

[56] *See infra* section III.B.

[57] *See infra* text accompanying notes 354 to 373.

[58] *See* Section II.A., infra.

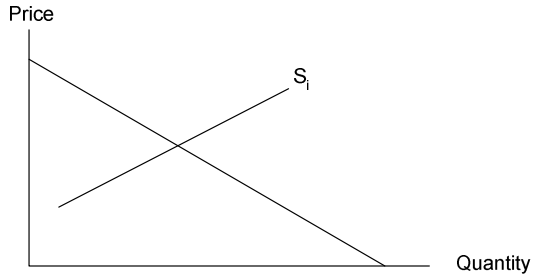
[59] *See* infra notes 65 to 70.

[60] *Cf.* James B. Speta, *A Vision of Internet Openness by Government Fiat*, 96 Nw. U. L. Rev. 1553, 1573 (2002).

[61] *Cf.* Joel R. Paul, *Do International Trade Institutions Conotribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285 (describing similar model).

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

Fig. 2.1 The Incumbent Industry Alone



A challenger is any entity who enjoys an advantage in the efficiency of dissemination (supply curve S_C). This condition can arise for several reasons. The first reason derives from any technological advantage in the delivery of content – either better quality (like cable or piano rolls), or lower cost (like broadcasting or online distribution). Either form of technological advantage can be modeled as simply a more efficient supply curve. The second derives from the challenger being able to disseminate content less expensively because it does not pay for the works itself. That may be the case either because existing copyright law does not explicitly apply (as was the case with early cable and gramophone technology)[62] or because of some capability to evade copyright law's requirement to license the work (as in the example of online distribution).[63] In either case, part of the challenger's advantage in efficiency stems from what is usually described as piracy.

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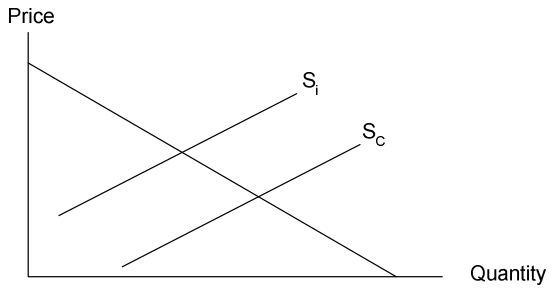
[62] In fact, in the case of gramophones, it was written explicitly not to, because Congress did not want operators of penny arcades to have to buy a copy of the sheet music for use of a novelty device. *See* Jessica Litman, War Stories, 20 Cardozo Arts & Ent. L.J. 337, 352 (2002) (citing H.Rep. No. 2222, at 7-9 (1909)).

[63] *See infra* notes 342 to 373 and accompanying text.

Fig. 2.2: The Challenge



But why does the arrival of a more efficient technological rival create conflict? Conflict arises because of the second assumption: that government can sometimes be convinced to protect the incumbent industry, but not always, and not predictably. If the degree of protection is difficult to predict and depends in part on investments in persuasion, it makes sense for both the incumbent and the challenger to invest in efforts to obtain a favorable outcome. These rival investments in obtaining a favorable governmental action result in some of the longest running conflicts in copyright history.[64]

More precisely, conflict arises in a form that public choice theorists call a contest between "rent-protecting" and "rent-seeking" interests. This is a contest where an incumbent dedicates resources to protecting its favorable position against encroachment by other groups.[65] The incumbent holds a number of potential legal threats against any challenger, including the imposition of incessant litigation costs,[66] an ability to convince regulators (like the Federal Communications

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[64] *Cf.* James Buchanan, Rent Seeking and Profit Seeking, in *Toward a Theory of the Rent-Seeking Society* 9-11 (1980) (explaining that the possibility of government action encourages investments in efforts to obtain rents).

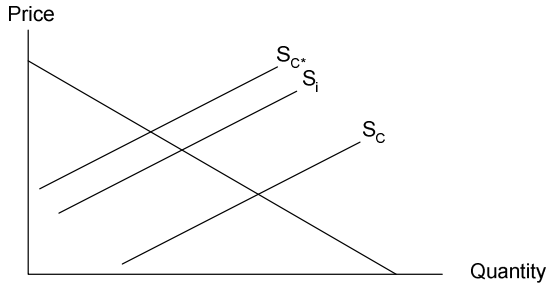
[65] For an explication of rent-protecting in the context of public choice theory, *see* Robert E. Tollison, *Rent Seeking*, in PERSPECTIVES ON PUBLIC CHOICE 506, 515-517 (Dennis Mueller, ed., 1997).

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

Commission) to restrict the challenger,[67] or lobbying for laws that will put the challenger at a serious disadvantage.[68]

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

Fig 2.3: Successful Elimination of Competition



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

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[67] *See, e.g.*, *infra* note 221.

[68] *See* Wu, *supra* note 66, at 705.

For all of these strategies, the critical assumption is that the form and the outcome of the government's action will be hard to predict. Imperfect information is the barrier to settlement, and the unknown and unknowable is what the Government will do.[69] If, conversely, everyone knew what Government was likely to do, then settlement of copyright's communications disputes would be fast.

There are many reasons why Government action will be hard to predict when new technologies of dissemination are invented. First, unlike, say, traffic accidents, there are relatively few inventions of major new dissemination technologies—in the 20th century, at best, one a decade or so. There is therefore a thin market for paying off challenger industries wielding new technologies. Second, unlike a tort lawsuit, there are multiple government actors involved. Courts using copyright law may take one side, Congress another; the antitrust law and Federal Communications Commission make occasional cameo appearances.[70] As a result, the sum total of government action is much harder to predict than it is in the settlement of a run-of-the-mill lawsuit. This inherent and historical unpredictability makes early settlement unlikely. Finally, not only is the direction of government action difficult to predict, but so is its effectiveness. Copyright enforcement can be costly and challenging. The knowledge that government action may be of unpredictable effectiveness increases the uncertainty that leads to copyright conflicts.

Conversely, what would happen in the absence of any government rules, regulations, decrees or other involvement? If the incumbents were denied any possibility of obtaining government protection from the technologically advanced challenger, its strategy would then depend on its capability for self-enforcement: its ability to protect its products and its producer surplus by non-legal means. For example, in a world without government, broadcasters might have prevented the cable industry from "stealing" its signals by using physical force or, today, better

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[69] *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW § 21.5 (4th ed. 1992) (observing that lack of information makes settlement of lawsuits less likely).

[70] For a discussion of FCC involvement in radio *see* infra notes 107 to 158 and accompanying text. For a discussion of the involvement in the cable-broadcast dispute, *see* infra notes 186 to 259.

scrambling of signals.[71] Today, even with a copyright law, the recording industry uses non-legal means to increase the costs of distributing its products using online distribution.[72]

The effectiveness of such self-enforcement is likely unpredictable, and so total absence of government involvement would not necessarily lead to peace and agreement between competing disseminators. Again, what is most likely to lead to rapid settlement is predictable government action with known effects in any direction.

From this discussion one might expect me to advocate greater predictability in order to minimize investments in seeking government favor, behavior that public choice theory considers wasteful "rent-seeking."[73] But I have not argued here, as the classic rent-seeking literature would, that such expenditures are wasteful or undesirable. As Part II explains, the costs of rent-seeking may be worthwhile if it is unclear which technology is actually better, and if the rent-seeking process eventually allows the better technology to win out. Predictable government action—a hypothetical copyright dictator—could eliminate all conflict by choosing a winner but also pick the wrong winner. So the costs of rent-seeking may be justified by a better substantive result.

To summarize: the existence of unpredictable copyright protection and new technologies should produce long contests to obtain favorable governmental decisions. Because it is not obvious what government will do, incumbent industries, like broadcasters, the recording industry, and sheet-music publishers, can be expected to end up in long contests with challengers to persuade government to take favorable action. The result of such contests is copyright's *de*

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

[72] *See* Wu, *supra* note 66, at 739-741 (describing non-legal methods used by recording industry against online music distribution).

[73] *See* James M. Buchanan, *Rent Seeking and Profit Seeking*, *in* TOWARD A THEORY OF THE RENT SEEKING SOCIETY 3, 4 (James M. Buchanan et al., eds., 1980) ("The term *rent seeking* is designed to describe behavior in institutional settings where individual efforts to maximize value generate social waste rather than social surplus.").

facto communications regime. But this is quite a bare description. In the sections that follow, we can see what government has done in the face of conflicts between challengers and incumbents, and how copyright's communications' policy has actually developed.

D. Communications Policy, 1900-1976

1. The Birth of the Recording Industry

The birth of the recording industry in the late 1890s and early 1900s is the model, for better of for worse, for copyright's communications policy in the 20th century. The recording industry, predating today's online distribution via cable and other media, was the original technological free-rider—the first to build a business whose success depended, in part, on the incidence of copyright arbitrage.[74]

The recording industry pioneers were the manufacturers of piano rolls and of "talking machines," or early record players. Early versions of these technologies were introduced in the late 1890s.[75] By 1902, at least a million piano rolls, each representing a copyrighted song, were in distribution.[76] The record industry grew even faster: by 1899, 2.8 million records had been sold.[77] These mechanical reproductions were produced without paying any licensing fees to the owners of the respective copyrights.[78]

Technologically, the player piano and the record player were each the "receiver" for a new form of mass media—the paper piano roll and the record, respectively. A single purchase of copyrighted sheet music could be transformed

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

[75] *See* Jessica Litman, *Copyirght Law as Communications Policy: Convergence of Paradigms and Cultures*, 20 Cardozo Arts & Ent. L.J. 337, 350 nn. 69-70 (2002) (noting that composers did not earn royalties from these distribution mechanisms).

[76] *See* White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 9 (1908) ("The record disclosed that in the year 1902 … that from one million to one million and a half of such perforated musical rolls … were made in this country in that year.").

[77] *See* Andre Millard, AMERICA ON RECORD: A HISTORY OF RECORDED SOUND 49 (1995) .

[78] *See White-Smith Publishing*, 209 U.S. at 16-18; Litman, supra note 75, at 350 n.70.

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 instrumentality sparked a conflict with the incumbent industry: publishers of sheet music.[79]

a. The Rhetoric

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

> These talking machines are going to ruin the artistic development of music in this country. When I was a boy … in front of every house in the summer evenings you would find young people together singing the songs of the day or old songs. Today you hear these infernal machines going night and day. We will not have a vocal chord left. The vocal chord will be eliminated by a process of evolution, as was the tail of man when he came from the ape.[80]

Another line of argument portrayed the recording industry ("The Talking Machine Trust") as a dishonest, monopolistic business. A model letter written for composers stated the case: "What do I see? I see my compositions … stolen bodily

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[79] There were a number of legal battles between the two camps. *See*, e.g. *White-Smith Publishing*, 209 U.S. 1 (holding that 1897 Act did not assign composers right to piano roll reproduction of composition); Stern v. Rosey, 17 App.D.C. 562 (C.A.D.C. 1901) (refusing to hold phonograph presentation of sounds as a "copy" within the meaning of existing statute); Kennedy et al. v. McTammany, 33 F. 584 (C.C.D.Mass 1988) (holding that perforated strips of paper used in tune-producing organettes do not violate copyrighted music of the same tune).

[80] *Argument on H.R. 11,943, to Amend Title 60, Chapter 3, of Revised Statutes of the United States, Relating to Copyrights Before the House Comm. On Patents*, 59th Cong. 24 (1906) [hereinafter *1906 Hearings*] (testimony of John Philip Sosa), *in* 4 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E.Fulton Brylawski & Abe Goldman eds., 1976).

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… [Congress must] assist in protecting me against such robbery, such unfairness, and such a terrible disadvantage."[81]

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

> [T]he "Talking Machine Trust" … with all the greed of a hungry wolf seizes upon the [successful] composition and turns out countless records and perforated rolls, thereby killing the sales, for it is a proven fact that as soon as the penny talking machines reproduce a mechanical composition it is dead as far as the public is concerned.
>
> …
>
> [Without copyright reform] the musical art and all musical industries in this country will languish, as the authors and composers, not receiving any royalties on records, and their royalties on sheet music decreasing from year-to-year, will have no incentive to write or compose.[82]

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

Self-described inventor Howlett Davis testified before Congress ("without invitation from any source whatsoever")[83] depicted the arts as necessarily dependent on inventors: "In all arts the work of the inventor will be found at the

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[81] *Hearings on Pending Bills to Amend and Consolidate the Acts Respective Copyright Before the Comm. on Patents of the Sen. and House*, 60th Cong. 255 (1908) [hereinafter *1908 Hearings*] (model letter to Congress in statement of Mr. John J. O'Connell) *in* 5 LEGISLATIVE HISTORY OF THE 1909 COPYRIGHT ACT (E.Fulton Brylawski & Abe Goldman eds., 1976)

[82] *Id.* at 257 (newspaper Letter in statement of Mr. John J. O'Connell).

[83] *Id.* at 104 (statement of Hewlett Davis).

foundation of the progress and prosperity of the country." Inventors served the people: "the farmer or the workingman," he argued, depends on his record player "to relax the tension of daily labor," thanks not to the composer "who rarely reached them.[84] He condemned expanding copyright: it would "reach out and take from the inventor the product of his brain and deliver it over to the composer."[85] In his view, "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."[86]

Inventors also argued that an expanded copyright would defeat their vested rights, both as an industry and, more particularly, the vested rights of inventors holding patents to mechanical players. Expanded copyright, Davis argued "practically depreciates or destroys the value of my inventions or machines … as well as destroying in part of whole my existing patent rights."[87] His view, evidently, was that the patent grant included a right to be free from copyrights that might interfere with the value of the patent.

George Pound, representing two manufacturers, argued that when "great vested interests have grown up … it is not right to destroy them for the benefit of a half dozen alleged composers allied with a life-long and absolutely exclusive monopoly. The composer gets on the sheet music all that he is entitled to get.[88]

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

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[84] *1908 Hearings*, *supra* note 81, at 104 (statement of G. Howlett Davis).

[85] *Id.*

[86] *Id.*

[87] *Id.* at 101.

[88] *1908 Hearings*, *supra* note 81, at 98 (statement of Mr. George W. Pound)..

the body, the independent publishers, the writhing arms, and the composers the suckers and baiters."[89]

A series of inflammatory 1908 editorials in the newssheet "Musical Age" depicted a sinister international "syndicate" agitating for copyright's expansion.[90] It asked: "who raises this hue and cry and creates this clamorous demand for new and drastic [copyright] legislation? Is it the author? [No] … It is the speculator and gambler." After detailing the syndicate's origins in France (connected to a shadowy figure named Lucien Vives), the Æolian company was named as local outpost of the global conspiracy. "In this country, it is the Æolian company which assumes the role of 'chief speculator.'"

A final argument, again present in contemporary debate, was that the recording industry was actually helping composers by spurring the sales of sheet music; hence, no change to copyright was needed. A representative of the talking machine lobby stated that "[i]t is impossible that there should be any 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."[91]

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

b. Copyright Settlement

We are now in a position to understand the legal course of events that led to settlement. The incumbents, unsurprisingly, took the lead. Early on, publishers asked lower courts to find piano rolls (in 1888) and records (1901) an infringement of copyright rights.[92] These efforts failed.[93]

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[89] *1908 Hearings*, *supra* note 81, at 98 (statement of G. Howlett Davis).

[90] M. Dorian, *The Men Behind*, The Musical Age, Feb. 29, 1908.

[91] *1908 Hearings*, *supra* note 81, at 295 (statement of Mr. Frank L. Dyer).

[92] *See* Stern v. Rosey, 17 App.D.C. 562 (C.A.D.C. 1901) (refusing to hold phonograph presentation of sounds as a "copy" within the meaning of existing statute); Kennedy et al. v. McTammany, 33 F. 584 (C.C.D.Mass 1988) (holding that perforated strips of paper used in tune-producing organettes do not violate copyrighted music of the same tune).

The incumbents, making the piracy arguments detailed 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.[94] 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.*[95]

Unfortunately for the incumbents, the Supreme Court was unwilling to extend copyright in the manner requested by the incumbents. 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 evidently was not. In hindsight it is clear that the decision could have gone either way.[96] The Court repeatedly relied on the fact that piano rolls were not visually similar to sheet music—a curious means to adjudge the meaning of a "copy" of an aural work.

Many have criticized the purported formalism of the *White-Smith* Court.[97] Reflecting early 20th century practice, the Court declined to explain the reasons or policy behind its decision. But the decision, whether consciously or not, put the Court squarely in the midst of communications policy. The doctrinal, and rather clumsy, rationale was the difference between a given work and its means of expression. The Court, critically, stated that "the statute has not provided for the protection of the intellectual conception apart from the thing produced, however

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[93] *See Stern*, 17 App.D.C. 562; *Kennedy*, 33 F. 584.

[94] *See* Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 284-85 (1989).

[95] 209 U.S. 1, 17-18 (1908).

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

[97] *See, e.g.*, Jane Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1622 (2001).

meritorious such conception may be."[98] It instead "has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer."[99]

The distinction between the "intellectual conception" and the "tangible thing" therein described is difficult to defend or maintain. If copyright is merely protection against the copying of a "tangible thing," how could it protect adaptations to other languages, media, or performance rights for which the law has already provided? Yet the entire Court signed on to the opinion—even Justice Holmes, whose subsequent body of copyright writings would act against the principle stated in *White-Smith*.[100]

For this reason we must look to other motivations and concerns. One cannot help but notice that the effect of the decision was to place a limit on the market power of the effective owner of the "intellectual conception," namely, the incumbent industry. The decision also set an institutional precedent (though one unevenly followed), of deciding technologically-sensitive copyright cases in favor of a challenger industry in a manner likely to force Congress's hand. The denial of protection in the context of a technologically innovative market entrant will resurface in the history that follows. Seventy-six years later, the Sony Betamax decision would cite *White-Smith* as the origin of this "policy:"

> Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. 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.[101]

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[98] *White-Smith*, 209 U.S. at 17.

[99] *White-Smith*, 209 U.S. at 17.

[100] In *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911) Justice Holmes held the film Ben-Hur to infringe a copyright on the novel, holding that "[t]he essence of the matter in the case last supposed is not the mechanism employed, but that we see the event or story lived." *See also* Herbert v. Shanley, 242 U.S. 591 (1917) discussed in text accompanying notes *infra* 114-117.

[101] Sony Corp. v. Universal City Studios, Inc., 464 U.S., at 431 (1984).

In practice, the decision to "defer" to Congress activates copyright's communications regime, and the beginnings of a process of negotiated settlement between the parties to the conflict.

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

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

Under these conditions the two parties settled on a statutory "royalty" scheme that was the first compulsory license system. The settlement set a fixed, universal rate: 2 cents per song, per copy. This settlement was primarily achieved during sessions in 1908, and was codified as § 1(e) of the 1909 copyright act.[102]

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

This mechanical license scheme survives to the present day. Among academics it is occasionally defended for its reduction in transaction costs, but more typically

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[102] *See* HARRY HENN, COPYRIGHT PRIMER 207 n.2 (1979).

berated for its inflexibility and insensitivity to changing economic conditions.[103] Yet, interestingly, neither party has made a serious effort to repeal the mechanical license system. Representatives of composers did not argue for its repeal in the 1976 Copyright Act[104] and today it is even defended, both by representatives of composers and by the music industry.[105] The only change has been the effort to make the license fee adjustable.[106]

2. The Wireless Age

"Radio is yet in its infancy," the doctor concluded, as he rose to go. "But one thing is certain. In the lifetime of those who witnessed its birth it will become a giant--but a benevolent giant who, instead of destroying will re-create our civilization."[107]

Thus spoke Dr. Dale, sage of the 1922 book *Radio Boys*.[108] He had reason to think radio was on the rise. Just one year before, a record 300,000 listened as Jack Demsey knocked out Georges Carpentier to take the heavyweight boxing title. For perhaps the first time in history, more people experienced the event distally than locally, most listening at "radio halls."[109] On the authority of the *Wireless Age:*

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

[104] 17 U.S.C. § 115 (2000).

[105] *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.).

[106] The price is now set by a system of ad hoc Copyright Arbitration Royalty Panels. *See* 17 U.S.C. § 801 (creating the Copyright Arbitration Royalty Panels). For the year 2004, the mechanical license rate is 8.5 cents per song, or 1.65 cents per minute playing time, whichever is greater. *See* Copyright Office, Mechanical License Rates, http://www.copyright.gov/carp/m200a.html (last visited Jan 31, 2004).

[107] Allen Chapman, The Radio Boys Trailing a Voice 60 (1922).

[108] *Id.*

[109] *See The Wireless Age*, August, 1921, page 11-21, *available at* http://earlyradiohistory.us/century2.htm (last visited Jan. 24, 2004).

"The magic of the radio telephone had accomplished new wonders. A daring idea had become a fact."[110]

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

Commercial radio, like every new industry preceding and succeeding it, began by trying to circumvent copyright protection of the underlying works. Unlike modern radio with its "disk-jockeys," early 1920s broadcast usually meant setting up a microphone for a performance, either within the studio or at a concert hall.[111] Since the music was already purchased or playing, ignoring copyright was easy. But unlike its predecessors, the gramophone industry, radio faced a better organized adversary: the American Society of Broadcasters, Composers and Publishers (ASCAP).

In 1913, the legend goes, composer Victor Herbert was dinning in New York's Shanley restaurant when the in-house orchestra struck up one of his songs, "Sweethearts."[112] He complained to the proprietor, who presented him with a theory of copyright liability: since no admission was being charged, the performance was not "for profit," and the restaurant not guilty of infringement. Herbert was determined to prove him wrong and in 1914, with others, founded ASCAP, a collection of 170 authors and composers of music, along with twenty-two publishers of sheet music.[113] ASCAP's first target was the restaurant and the performance that had attracted Herbert's ire. In 1917's *Herbert v. Shanley Co.*,

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[110] *Id.*

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

[112] *See* Leonard Allen, "The Battle of Tin Pan Alley," 181 HARPERS 514 (1940); Samuels, *supra* n. 37, at 41.

[113] *See* Melvin Nimmer, NIMMER ON COPYRIGHT § 8.19 (1988).

ASCAP convinced the Supreme Court that public performance in restaurants, despite no fee being charged, was an unauthorized "public performance for profit."[114]

Justice Holmes wrote a simple three-paragraph opinion, concluding that since restaurants are not charities, when they play music it must be in the interest of profit even if they don't charge at the door. Restaurants, he observed, are not "eleemosynary."[115] They provide music to provide their customers, "people having limited powers of conversation," "a luxurious pleasure not be had from eating a silent meal."[116] In short, "if music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough."

The opinion is simple economics, but underlying it is a substantive view of rights of the copyright holder. Holmes' opinion here and in his other writings[117] saw copyright as a commercial property to a extent never reached before. His view, now mainstream, presumed the copyright owner should have the power to demand a license for every revenue-stream dependent on the copyrighted work—even revenue from adaptations to other media, or revenue arising from improved restaurant atmospherics. In any case, the holding put ASCAP in the business in which it remains today: offering "blanket" licenses to restaurants, dance halls, and other places that perform music.[118] The blanket licenses, for a fixed percentage dependent on the venue, allow the performance of all of the works written by ASCAP members (members assigned their performance rights to ASCAP for this purpose).[119] It was these blanket licenses that ASCAP offered radio broadcasters, at first for free or for very low prices. But much of the broadcast radio industry said no, and several decades of ferocious animosity ensued.

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[114] 242 U.S. 591 (1917).

[115] *Id.* at 595.

[116] *Id.*

[117] *See, e.g.*, Kalem Co. v. Harder Bros., 222 U.S. 55, 63 (finding jobber contributory liable for unauthorized film version of book); Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) (holding commercial advertisement copyrightable).

[118] *See* Buffalo Broadcasting Co., Inc. v. American Soc. Of Composers, Authors and Publishers, 546 F.Supp. 274, 277 (S.D.N.Y. 1982).

[119] *See id.* at 276.

Radio, facing the demands of ASCAP and feeling a sense of mutual grievance, decided to get organized. On April 25, 1923, fifty-four broadcasting men met at the Drake Hotel in Chicago.[120] The product of their meeting was the National Association of Broadcasters ("NAB"), and its first priority was getting radio out of the copyright statute.[121] Within a year, the NAB had a Bill in the Senate that would have excempted radio from copyright liability altogether.[122] The Bill, S. 2600, proposed to amend § 1 of the 1909 Act, adding:

> Copyright control shall not extend to public performances, whether for profit or without profit, of musical compositions where such performance is made from printed or written sheets or by reproducing devices issued under the authority of the owner of the copyright, or by use of radio or telephone or both.[123]

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

The broadcaster-composer conflict was open by the time of the 1925 Radio Convention, called by the Commerce Department, where an early effort was made to settle the dispute. Notes from the meeting show that the respective sides agreed upon several points, including that "there can be no continuation of broadcasting unless musical compositions are made available to broadcasters upon a fair, equitable, and permanent basis." [124] However, "all attempted solutions through negotiations … proved unavailing."[125] It was resolved that Congress should settle things, but it never did.

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[120] *See* NAB: The First 75 Years, *available at* http://www.nab.org/about/timeline.asp (last visited Jan. 24, 2004)..

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

[122] *To Amend the Copyright Act: Hearings on S. 2600*, 68th Cong, 1st Sess. 9-14 (1924) (statements of E.F. McDonald and Paul B. Klugh).

[123] S. 2600, 94th Cong. (1924).

[124] Proceedings of the Fourth National Radio Conference and Recommendations for the Regulation of Radio 41-42 (Nov. 9-11, 1925).

[125] *Id.*

The parties were probably unwilling to settle because each was in the midst of pursuing its own legal strategy seeking total victory. While NAB unsuccessfully petitioned Congress, ASCAP was doing far better in the courts.[126] Unlike in *White-Smith* and later cases, no radio cases reached the Supreme Court, mainly because the holdings followed *Herbert.* So instead it was the Sixth Circuit whose word became policy for radio.[127]

In 1924 ASCAP brought a test case against radio station WLW Cincinnati for its unlicensed broadcast of a song named "Dreamy Melody."[128] The legal question was whether radio broadcast was in fact a "public performance for profit" under the statute. The Sixth Circuit, following Holmes in *Herbert v. Shanley Co.*, answered the question "yes."[129] Said the court: "the artist is consciously addressing a great, though unseen and widely scattered audience, and is therefore participating in a public performance."[130]

What of *White-Smith*'s practice of leaving new technologies to Congress? The broadcasters did in fact argue that the fate of radio was better handled by the legislature, and Judge Mack duly noted that "bills have been introduced in both House and Senate to permit broadcasting without infringing copyrights."[131] However, while agreeing that the final status was "eminently [a matter] for considered legislation," the court nonetheless felt it had a duty to "decide whether and to what extent statutes covering the subject matter generally … are, fairly construed, applicable to the new situation."[132] The extension of the Copyright

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

[127] *See* infra notes 127 to 132 and accompanying text.

[128] *Remick.*, 5 F.2d 411.

[129] *Id.* at 412.

[130] *Id.*

[131] *Id.* at 411.

[132] *Id.* at 412.

Act's text to a new technology—the opposite approach to that adopted in *White-Smith* and later Supreme Court cases—was a turning point in the history of the radio conflict.

ASCAP's victory in the Sixth Circuit carried forward to other courts and other decisions;[133] the Supreme Court denied *certiorari*. The radio broadcasters had lost the first round. They had no legislation and no excuse. By 1931, they had little recourse but to begin paying for ASCAP blanket licenses, and most began doing so.

It may be correct, as Jane Ginsburg argues, that the radio courts did not sense any risk that ASCAP wanted to destroy radio, and that this may have affected both their decisions and the Supreme Court's denials of *certiorari*.[134] But if one goal of the radio cases was to settle the relationship between radio and copyright once and for all, they were a failure. The declaration of the rights of the copyright holders was not a settlement of the conflict. The fight moved past copyright to other legal strategies which served, as a 1941 commentator put it, to "deaden the effect of the copyright law."[135] After another three decades of continuous conflict the antitrust law eventually imposed the settlement that the copyright courts avoided.

In the mid-1930s, the NAB pushed the federal "Duffy Bill," targeting the remedies instead of the scope of copyright. Because actual damages from copyright infringement could be minimal or difficult to demonstrate, the Broadcasters noted that it was only the *in terrorum* effect of statutory damages that compelled compliance. The Duffy Bill would have repealed the statutory damage provisions of the 1909 copyright law.[136] As a commentator in the 1940s stated, "If the minimum statutory damages were abolished, radio owners could knowingly ignore the copyright laws. . . ."[137] But the Duffy Bill, with only the broadcasters behind it, died.

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

[134] *See* Ginsburg, *supra* note 53, at 1621.

[135] *See* Marcus Cohn, *Music Radio, and the Sherman Act*, 29 GEORGETOWN L. J. 407, 415 (1941).

[136] S. 2465, 7th Cong., 1st Sess. (1935).

[137] Cohn, supra note 135, at 415.

As early as 1926, the NAB also began pressuring the Justice Department to seek antitrust enforcement against ASCAP, but to no avail.[138] In September 1933, the Broadcasters filed their own private Antitrust suit,[139] and in 1934 the Justice Department, with the broadcasters as cheering squad, changed its mind and filed its own an antitrust petition against ASCAP.[140] But the Department asked for an adjournment after just two weeks of trial.[141] The radio broadcaster's legal strategy was again stalled.

Having no luck with the federal government, the radio broadcasters turned to the states. The result was called "a series of comprehensive and systematic attacks on ASCAP, through the medium of state legislatures."[142] The methods of choice were "anti-monopoly" statutes that declared it illegal for owners of copyrighted works to combine for purposes of fixing licensing fees.[143] In other words, the Broadcasters sought, and obtained, state statutes making ASCAP illegal. Over several years, the broadcasters succeeded in introducing such laws in 35 States and passing them in ten.[144] Unfortunately for broadcasters, however, courts quickly found the state laws preempted by the Federal Copyright power.[145] NAB's efforts had failed again.

As an ASCAP commentator in 1939 put it, the broadcasters "had resorted to every conceivable device and stratagem to destroy the right of composers and

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[138] In 1926, the Justice Department investigated ASCAP but found no reason to bring an antitrust suit. *See* Cohn, *supra* note 135, at 424 n.91.

[139] *See* Pennsylvania Broadcasting Co. v. Buck, (S.D.N.Y. Filed Sept. 7, 1933).

[140] *See* United States v. ASCAP, No. 78-388 (S.D.N.Y., filed August 30, 1934).

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

[142] Cohn, supra note 135, at 416.

[143] Two examples are Fla. Gen. Laws 1937, Vol. I, c. 17807, discussed in Gibbs v. Buck, 307 U.S. 66, 69 (1939), and Washington Laws 1937, c. 218, p. 1070, discussed in Buck v. Gallagher, 307 U.S. 95, 97 (1939).

[144] *See* Cohn, supra note 135, at 417 nn.60-63 (collecting state statutes).

[145] *See, e.g.*, *Gibbs*, 307 U.S. at 66; Buck v. Swansom, 33 F.Supp. 377 (D. Neb. 1939); Buck v. Harton, 33 F.Supp. 1014 (M.D. Tenn. 1940); Notes, 53 Harv. L. Rev. 461 (1939) (collecting cases).

authors to bargain collectively. … All to no purpose."[146] But the NAB was persistent. It compared its struggle against ASCAP to the fight against Hitler and redoubled its efforts: "War is hell, whether its purpose is to preserve democracy in Europe against a madcap dictator or to preserve it in radio against an arbitrary totalitarian ASCAP."[147]

The broadcasters' breakthrough came in 1941. That year, NAB ran a successful year-long boycott of all ASCAP songs, relying instead on songs in the public domain and those from the industry's own performance rights organization, Broadcast Music, Inc. ("BMI").[148] This time fate and history were on the broadcast's industry's side. ASCAP didn't control every composer and every song: it required composers to achieve a minimum of five hit songs before joining.[149] This standard excluded less well known artists and also "hillbilly" and "race" music (now known as "country," and "rhythm & blues," respectively).[150] Switching to playlists comprised of BMI and public domain songs was therefore manageable, if not ideal.[151]

The Justice Department, meanwhile, was convinced to bring yet another antitrust action. This time, ASCAP decided to negotiate a settlement, resulting in

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[146] E.C. Mill, *The ASCAP View*, 11 AIR. L. REV. 394, 397 (1940).

[147] Editorial, *Broadcasting*, Oct 1, 1939.

[148] In 1940, the NAB organized an ASCAP boycott—members, for about a year, only played songs from their own, competing performing rights society, Broadcast Music Inc. ("BMI"). *See* Cohn, supra note 135, at 420-421.

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

[150] *See id.*

[151] Herman Finkelstein, an ASCAP attorney, stated in 1954 that during the boycott "the value of radio sets was substantially lessened for those who enjoyed the best in popular music." Herman FinkelsteinI, 19 LAW & CONTEMP. PROBS. 275, 287 (1954). Conversely, some radio stations reported that their public praised them for the new type of music they broadcasted during the boycott. *See* VARIETY, Dec. 25, 1940 at 24.

the 1941 consent decree.[152] That, in turn, was renegotiated in 1950,[153] after the movie industry joined in and filed a successful antitrust action against ASCAP.[154]

The details of the antitrust litigation against ASCAP have been told many times.[155] What is relevant here is the fact that the results of the antitrust litigation and settlement were quite similar to those of copyright settlements achieved elsewhere.

The 1950 decree limited the scope of copyright in compositions rather like a statutory or compulsory license. Section VI of the decree ordered ASCAP to grant blanket licenses to its copyrights, and section IV required that such licenses be granted non-exclusively and without discrimination.[156] These are, of course, the basic features of a compulsory license: it guarantees that the work will be available, and it remains available regardless of how many other parties have already been granted a compulsory license.

The 1950 consent decree, like a statutory license, also had something to say about pricing. Unlike the mechanical license, which set a statutory price (two cents per song per recording), the 1950 consent decree gave an Article III court the final say in music pricing. Section IX of the 1950 consent decree required ASCAP to notify users of its fees, which were to be reasonable. In the event, within 60 days, that ASCAP and its users were unable to agree on a price, appeal was available to the District Court, which would set a "reasonable price."[157]

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[152] United States v. ASCAP, 1940-1943 Trade Cas. (CCH) ¶ 56,104 (S.D.N.Y. 1941).

[153] *See* United States v. ASCAP, 1950 Trade Cas. (CCH) ¶ 62,595 at 63,751 (S.D.N.Y. 1950).

[154] *See* Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888 (S.D.N.Y. 1948).

[155] *See, e.g.*, Richard Ergo, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, 1959 DUKE L. J. 258 (1959); Susan Stager, *Musical Performing Rights in the Television Industry: Has The Blanket License Finally Seen Its Demise?*, 14 SW. U. L. REV. 569, 572-573 (1984).

[156] *See* United States v. ASCAP, 1950 Trade Cas. (CCH) P 62,595 at 63,751 (S.D.N.Y. 1950).

[157] *See id.*

Rate-setting requests have been brought to the court; but have always been settled before the merits are reached. *See* Garner, *United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 BULL. COPYRIGHT SOC'Y 119, 127-128 (1976).

Under these terms, the system of copyrights in music compositions effectively became a form of liability, as opposed to property, regime.[158] Broadcasters were not liable for infringement as long as they paid a price set by the government. The story of the birth of Radio, in short, has more in common with other copyright conflicts than meets the eye. The initial decision of the copyright courts to extend full copyright in radio broadcasts did not prevent the emergence of a compulsory licensing scheme.

3. Cable Television & the Broadcasting Industry

The third major example of what I have described as copyright's settlement function arises out of the bitter mid-century conflict between broadcasters and the upstart cable industry. Reduced to its essentials, beginning the late 1950s the broadcast industry and its affiliates mounted a large, successful effort to contain the growth of cable using every regulatory and political device at their disposal,[159] while the cable industry capitalized on its unregulated status to erode the dominant position of broadcast.[160]

A general (albeit uneasy) settlement to the conflict was achieved by the late 1970s through a compromise on copyright legislation and the rescission of the most onerous of the FCC's regulations and pseudo-copyrights.[161] With this settlement,

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

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

[160] *See* Thomas W. Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's "Big Joke": an Essay on Airwave Allocation Policy*, 14 HARV. J.L. & TECH. 335, 417-18 (2001).

[161] For Court decisions, *see* for example Teleprompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394, 414 (1974) (refusing to apply copyright law in the cable retransmission context); Fortnightly Corp. v. United Artists, 392 U.S. 390, 399 (1968) (holding that cable tv is a "viewer" and therefore does not "perform" within the meaning of the controlling copyright law). Congress "settled" this dispute by promulgating a cable compulsory licensing scheme. *See* 17 U.S.C. § 111 (2000).

cable began a smoother accession to its present dominantion of television dissemination.[162]

a. The Challenge

Cable was not, at first, a challenger to the broadcast industry. The first cable systems, then known as "community antenna" television (CATV), developed in rural areas in the late 1940s. The goal of the early deployments was modest: solving the problem of bringing broadcast television to remote or mountainous areas otherwise left in the dark.[163] In the late 1940s, early cable operators in places like Astoria, Orgeon (the site of the first recognized CATV deployment) erected large, community antennas to bring distant signals to small towns.[164] The broadcast signal captured by the community antenna was retransmitted to people's homes using physical cables.[165]

In this early manifestation, cable was simply a complement to broadcast service.[166] By allowing the broadcast signal to reach areas not served by broadcast, it expanded the television audience to the advantage of broadcast stations. This 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 broadcast technology that are now obvious: programming diversity[167] (more

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[162] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) § 2(a)(2)-(5) (codified as 47 U.S.C. § 521(a)(2)-(5)) (detailing the increase in cable viewership and noting that "the cable television industry has become a dominant nationwide video medium.").

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

[164] *See id.* at 237 note15

[165] *See id.*

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

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

channels) and signal quality. In face of this competitive threat, the broadcast industry adopted the familiar arguments of piracy,[168] unfair competition,[169] and economic disruption favored by incumbent industries. It adopted, in other words, the arguments of the sheet music manufacturers in the piano-roll era and of the record companies today.[170] Along with these claims of unfair competition, the broadcast industry added appeals to "localism," the national policy of subsidizing the existence of local broadcasting stations in every community.

The unfair competition or piracy claim was simply that cable operators, because they did not pay for the content they retransmitted, were stealing content and competing unfairly. Rhetorically, the broadcast industry openly and repeatedly accused cable operators of "signal piracy." As the copyright office summarized their argument in 1965:

> [Cable operators] neither need 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.[171]

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

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[168] This was the rhetoric surrounding, for example, the compulsory-license provisions allowing cable to rebroadcast captured signals. *See* Mary C. Dollarhide, *Surrogate Rule Making: Problems and Possibilities Under the Administrative Procedure Act*, 61 S. CAL. L. REV. 1017, 1027 (1988).

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

[170] *See supra*, text accompanying notes 80 to 91.

[171] Copyright Law Revision Part 6, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Bill 43 (1965).

sells that program material at a profit—and in many cases, a fantastic profit, indeed—this is a violation of our property rights."[172]

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

> 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.[173]

Broadcasters associated themselves with the creation of programming content and linked 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 by creating new works. Cable operators, on the other hand, did not create new works and therefore competed unfairly.

But if cable simply carried broadcast signals, how did it endanger broadcasting or the creation of new works? The broadcaster's arguments relied on the concept of audience fragmentation.[174] 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.[175] Imports would destroy advertising revenue because St. Louis advertisers, faced with an audience fragmented between stations of both cities, would pay less. Meanwhile since local advertisers in Memphis could care less about reaching buyers in St. Louis audiences the result was a net loss in amount broadcasters

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[172] Hearings Before the Senate Comm. on Interstate and Foreign Commerce, United States Senate, 85th Cong., Second. Sess. 3613 (1959) (statement of William C. Grove)

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

[174] *See, e.g.*, U.S. v. Southwestern Cable Co., 392 U.S. 157, 160 note 4 (detailing concerns regarding fragmentation in the San Diego market).

[175] *See id.*

could charge for advertising.[176] The fragmentation problem, broadcasters charged, would destroy the economic viability of free television.

The broadcast industry advanced concerns for "localism" in addition to those regarding audience fragmentation.[177] The FCC in 1952 declared localism a goal of national broadcasting policy: broadcast should "provide each community with at least one television broadcast station."[178] The idea was that the public interest was served not only by the programming of the "big three" networks, but also by local broadcast stations that could provide content of matters of local importance.[179] Cable operators, by importing signals, were a particularly serious threat to the viability of local broadcasters in small markets.

Finally, even if cable did offer desirable diversity in programming, broadcasters argued that the goal of diversity was better achieved through more broadcast stations in every community, not the import and export of signals around the country.[180] In particular, broadcasters promoted developing new ultra high frequency (UHF) stations as the preferred means for achieving programming diversity.[181]

In retrospect, the weakness of these arguments is apparent. Cable was indeed a threat to broadcasting because it was a better means of disseminating television. Yet it did not follow that cable was also a threat to programming, because it could (and did) ultimately come to have an interest in the availability of new works. In particular, cable, as most now recognize, was the savior of UHF broadcasting because it improved the weak signal strength of UHF stations.[182] The key, in retrospect, would be to make cable a stakeholder—part of the compensation

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[176] *See id.*

[177] Localism as a concept is discussed in Glenn O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L. REV. 899, 904 (1997).

[178] *See* Report and Order, 17 Fed. Reg. 3912 § 63 (1952).

[179] *See id.*

[180] These arguments were reflected in the 1958 "Cox Report" on Cable Television. S*ee* Kenneth Cox, The Problem of Television Service for Smaller Communities. *Staff Report to the Senate Committee on Interstate and Foreign Commerce*, 26 December 1958.

[181] *See id.*

[182] *See* Joel Rosenbloom, *The "Vast Wasteland" in Retrospect*, 55 FED. COMM. L.J. 571, 575 (2003) (citing Bruce M. Owen & Steven S. Wildman, Video Economics 214-15 (1992)).

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.

b. Controlling the Challenger

Faced with the competitive threat of cable and armed with these arguments, the broadcast industry and its allies[183] in the 1960s exploited all available regulatory means to control the growth of cable. The industry pursued three separate legal strategies: common-law misappropriation arguments, copyright infringement litigation, and a kind of "pseudo-copyright" enforcement through FCC regulation.

The broadcasting industry turned first to the common law in an effort to gain property rights in its broadcast signals. Beginning in the late 1950s, the broadcasters asked the courts to find the behavior of cable companies a violation of common-law misappropriation under *International News Service v. Associated Press* and other common-law theories.[184] 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 interest in "hot news."[185] 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.[186] Pointing out that the broadcasters sought "what are in essence copyright interests," the court found

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[183] 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).

[184] 248 U.S. 215 (1918). *International News Service* held that news wires have a quasi-property right in "hot news." *See* id. at 245-46. The broadcasters also argued for tortious interference with contract, *see* Associated Press v. International News Service, 240 F. 983, 995 (S.D.N.Y. 1917), but the misappropriation theory received the most attention in the court of appeals, *see* Associated Press v. International News Service, 245 F. 244, 252 (2nd Cir. 1917).

[185] *See International News Service*, 248 U.S. at 245-46.

[186] Cable Vision v. KUTV Inc., 335 F.2d 348 (9th Cir. 1964).

the state grounds for protecting broadcasters rights federally preempted.[187] Technically, this decision came under the authority of then recently decided copyright preemption cases *Sears Roebuck & Co. v. Stiffel Co.*[188] and *Compco Corporation v. Day-Brite Lighting, Inc.*[189] But what is interesting is the court's recognition that the common law right threatened the "primary right of public access to all in the public domain.…"[190] It reasoned that the creation of a "new protectible interest would interfere with the federal policy of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain."[191]

On the other hand, the Federal Communications Commission was seemingly immune to such concerns, and the broadcasters' strategy was here the most effective. Bit-by-bit, urged on by the broadcasters, it created a regime of pseudo-property rights and other rules that, for a time, gave the broadcast industry the means to control the development of the cable industry.[192]

While initially hesitant,[193] the FCC began asserting jurisdiction in 1962.[194] By 1966, in its *Second Report and Order*[195] the FCC had come to agree with the broadcasters' substantive arguments and assume harm from cable's existence.[196]

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[187] 335 F.2d at 350.

[188] 376 U.S. 225 (1964).

[189] 376 U.S. 234 (1964).

[190] 335 F.2d at 350.

[191] *Id.* at 351.

[192] *See infra* notes 220 to 246. *See also* Stanley M. Besen & Robert W. Crandall, *The Deregulation of Cable Television*, 4 LAW & CONTEMP. PROBS. 77, 81-91 (1981) (documenting FCC activity constraining the growth of cable)

[193] *See* Frontier Broadcasting Co. v. Collier, 24 FCC 251 (1958) (declining to exercise jurisdiction over cable on the ground that it was not a common carrier), reconsideration denied, Report and Order, Docket No. 12443, 26 F.C.C. 403, 428 (1959).

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

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

[196] *See id.* at 123-30 (attempting to limit growth of cable)

By 1966, broadcasters had persuaded the FCC to enact a full regime of cable regulation that effectively protected the interests broadcasters would seek to protect with property rights. The FCC rules barred duplication of local broadcasting (non-duplication rules),[197] forced cable systems to carry local signals (must-carry rules),[198] and barred cable operators from importing signals into any of the top 100 television markets unless the cable operator could obtain a waiver by obtaining the consent of local broadcast stations.[199] These "unbelievable"[200] rules, articulated by the FCC as a defense of localism, provided the broadcast industry with effective governmental protection from its nascent cable rival.

In retrospect, the experiment with the waiver regime was something of a dry run for a full copyright regime. The results were not promising. A 1976 study found that during the period of 1968-1972, broadcasters agreed to just one instance of a waiver allowing import.[201] 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.[202] It hints at some of the dangers of copyright as between rival disseminators, particular in early stages.

Broadcaster's third line of attack was a copyright litigation campaign. In 1968, the inevitable question of cable's copyright liability reached the Supreme Court in *Fortnightly Corp. v. United Artists*.[203] The case was factually simple. A West Virginia cable operator had retransmitted to its customers various broadcasted programs. The broadcast industry through copyright owners argued the cable's

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[197] *See id.* at 48.

[198] *See id.* at 49.

[199] *See id.* at 141.

[200] Fred H. Cate, *The Future of Communications Policy Making*, 3 WM. & MARY BILL RTS. J. 1, 2 (1994).

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

[202] *Accord*, *Note, Copyright Protection in the Cable Television Industry*, 51 FORDHAM L. REV. 637, 648 n.105 (1982) (speculating as to the reasons for the failure).

[203] 392 U.S. 390 (1968).

retransmission amounted to an unauthorized "public performance" under the Copyright Act.[204]

But the Court disagreed, ruling (5-1) that cable television was the functional equivalent of a more powerful antenna and that it was no more of a performer than an antenna manufacturer would be.[205] As in *White-Smith*, not all of the reasoning apparent in the decision. The court held that the cable operators were part of the audience for broadcast, and hence were not "performing" the work.[206] Yet it was clear that the cable operators were making money using copyrighted content—what had happened to Justice Holmes' point that "the purpose of employing it is profit, and that is enough?" The Court had, moreover, in 1931 decided a factually similar radio case in the opposite manner, holding that a hotel that rebroadcast radio stations into private rooms without permission was infringing copyright.[207] Something else was clearly afoot. Did the court actually believe that its decision someone served the interests of copyright holders? Or was the Court defering to the Federal Communications Commission, or practicing its own communications policy?

We can only get our clues from the dissent.[208] Justice Fortas presented the policy considerations squarely, and in the language of communications policy, not copyright law: "it is darkly predicted that the imposition of full liability upon all CATV operations could result in the demise of this new, important instrument of mass communications." [209] 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."[210] The case, as he saw it, was almost pure communications policy, pitting the interests of a new

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[204] *See* 393 U.S. at 395.

[205] *See id.* at 414.

[206] *See id.*

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

[208] 392 U.S. at 402-8 (Fortas, J., dissenting)

[209] *Id.* at 403-404 (Fortas, J., dissenting). Justice Fortas would have found cable operators liable under the authority of *Buck v. Jewell-LaSalle Realty Corp.*, 283 U.S. 191.

[210] *Id.* at 404.

telecommunications medium against a national policy of localism. Fortas believed the court should act to "do as little damage as possible to traditional copyright principles and to business relationships," but also favored a legislative soution: "until Congress legislates and relieves the embarrassment which we and the interested parties face."[211]

The seeds of a future copyright settlement are evident from the *Fortnightly* litigation. Solicitor General Erwin Griswold suggested in his amicus brief on the merits that the Supreme Court could reasonably impose a copyright settlement in its decision.[212] He asked the court to find cable broadcasters liabile, but to imply a license in areas where broadcast signals were weak. The Solictor General was, in effect, inviting the Supreme Court to write communications regulation into its interpretation of the copyright statute. While both majority and dissent declined the invitation to settle the dispute in this manner, it foreshadowed a copyright settlement on the horizon.

Yet where the Court wouldn't go, the FCC was more willing. In the aftermath of *Fortnightly* the FCC proposed granting broadcasters rights even more similar to copyright than did the existing regime (as if to compensate for their loss). 1968 saw the proposed introduction of "importation consent."[213] As the name suggests, under this rule, cable operators be would required to obtain the consent of the orginating broadcaster before importing any program into a top 100 market.[214] But Congress was more interested in a copyright solution, and the proposal was never enacted.[215]

c. Settlement & Copyright

In 1970, it appeared that the predicted rise of cable technology was slowed, if not frozen. A law review article appearing that year declared that "[a]lthough cable television offers the potential of greatly increased television diversity, its

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[211] *Id.*

[212] *See id.* at 401 n.32.

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

[214] *See id.*

[215] Commission Proposals for Regulation of Cable Television, 31 F.C.C.2d 115, 117 (1971) (letter from FCC to Senate Communications Subcommittee).

possibilities have been left largely unrealized."[216] While cable had grown to reach about 6% of households, with approximately 4.5 million subscribers,[217] 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."[218]

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[219] and what emerged was a system centered on a copyright liability regime.[220] While by no means an aesthetic exercise, that period's history illustrates the role the copyright regime played in one of the most bitter technological succession wars of the century.

By 1970, broadcasters had successfully convinced the FCC to impose serious limits on the growth of cable.[221] So why would broadcasters even want to turn to a copyright compromise, given that it might jeopardize a favorable status quo?

Primarily, a copyright solution appeared more durable. The restrictive regime created by the FCC was in a state of constant fluctuation and was easier to

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[216] Leonard Chazen & Leonard Ross, *Federal Regulation of Cable Television, the Visible Hand*, 83 HARV. L. REV. 1820, 1820 (1970).

[217] Services Volume, Television Factbook, 83-a (1982) [hereinafter *TV Factbook*].

[218] Besen & Crandall, *supra* note 192, at 94.

[219] That they were abandoned did not prevent their subsequent reintroduction. The Federal Communications Commission in the 1980s and Congress in 1992 reintroduced various forms of protection for the broadcast industry. *See, e.g.*, Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C.R. 5299, 5300 (1988) (report and order) (sydication rules); Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 (1992) (codified as amended at 47 U.S.C.A. § 521 (2004) (enacting retransmission consent).

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

[221] Primarily through the provisions in the Second Report and Order, *supra* note 195.

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.[222] This suggests that broadcasters may have felt pressure to convert their temporary regulatory advantage into a more lasting source of revenue.

For broadcasters, this problem was compounded by the growing power of the cable industry. Despite the limitations on urban growth, cable continued to grow in rural and small markets, trebling in size between 1966 and 1970.[223] The growing power of the cable industry suggested that the broadcasters' ability to influence the regulatory and legislative process might erode over time, making a more durable compromise attractive.

Finally, in the late 1960s, many broadcasters began investing in cable systems. By 1966, broadcasters had some stake in 30 percent of cable companies.[224] 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.

Yet none of this meant that broadcasters were interested in an immediate copyright settlement. They still had a chance of achieving total victory: namely, a Supreme Court decision finding cable retransmission illegal without permission. It was not until the Supreme Court played its final hand in 1974[225] that settlement became imminent.

An early blueprint of cable-broadcast settlement was the "Compromise Agreement of 1971,"[226] representing an agreement between major cable,

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[222] See Besen & Crandall, *supra* note 192, at 97.

[223] Viewership rose from about 1.5 million viewers to 4.5 million. *See* TV Factbook, *supra* n. 217.

[224] *See* Patrick Parsons & Robert Frieden, THE CABLE AND SATELLITE TELEVISION INDUSTRIES 47 (1998).

[225] Discussed *infra* at text accompanying note 232.

[226] The consensus agreement is described *in U.S. Congress House Comm. on the Judiciary Subcomm. on Courts, Civil Liberties and the Administation of Justice Hearings*, 92d Cong. (1972), *in* 14

broadcasting, and programming interests. The basic outlines of the compromise was this: cable, for the first time, would agree to some system of copyright liability, in exchange for a general loosening of FCC restrictions on entry into urban markets and other concessions to public service.[227] While the consensus did not last, in the end the agreement was the starting point for a near-total deregulation of cable systems in exchange for copyright liability.

The compromise, brokered in part by new FCC chairman Dean Baruch, began to be implemented on the regulatory side with new FCC rules that allowed cable systems limited importation rights in the top 100 markets.[228] The 1972 rules,

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Omnibus Copyright Revision Legislative History 502 (George S. Grossman ed., 1976) (statement of Rex A. Bradley).

[227] *See* In the Matter of Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals. Amendment of Section 74.1107 of the Commission's Rules and Regulations to Avoid Filing of repetitions Requests. Amendment of Section 74.1031(c) and 74.1105(a) and (b) of the Commission's Rules and Regulations as they Relate to Addition of New Television Signals. Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Federal-State or Local Relationships in the Community Antenna Television System Field; and/or Formualtion of Legislative Proposals in this Respect. Amendment of Subpart K of Part 74 of the Commission's Rules and Regulations with Respect to Technical Standards for Community Antenna Television Systems, 36 F.C.C.2d 143 (1972) [hereinafter *1972 Cable Television Report and Order*]. As described by the chairman of the National Cable and Telecommunications Association, "in 1971, in an effort to break the regulatory impasse over cable, the Office of Telecommunications 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." *U.S. Congress House Comm. on the Judiciary Subcomm. on Courts, Civil Liberties and the Administation of Justice Hearings*, 92d Cong. (1972), *in* 14 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 502 (George S. Grossman ed., 1976) (statement of Rex A. Bradley).

[228] *See* 1972 *Cable Television Report and Order*, 36 FCC 2d 241. 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 Comm. on the Judiciary Subcomm. on Courts, Civil Liberties, and the Administration for Justice Hearings, 92d Cong. (1972), *in* 14 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 501 (George S. Grossman ed., 1976) (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

described as "among the most complex rules and regulations ever devised by the mind of man" began a gradual process of FCC deregulation of the cable industry.[229]

The copyright side of the deal took 4 more years to settle through the legislative process. While the major industry associations remained committed to the agreement, many members of the cable industry sought to defect. For example, representatives of Teleprompter Corp., one of the nation's largest cable systems, appeared before Congress to demand continued immunity from copyright, claiming that the consensus agreement was "pushed down the throat of the cable television industry."[230] Teleprompter 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?"[231]

On the other side, broadcasters made a final effort to obtain full copyright liability with the *Teleprompter* litigation.[232] *Teleprompter*, unlike *Fortnightly,* was a signal importation case. Columbia Broadcast Systems could point to Teleprompters imports, some from as far as 450 miles[233] – and make the audience fragmentation argument described above. Yet the Supreme Court proved uninterested in undoing the line drawn in the *Fortnightly* decision. "'Broadcasters perform. Viewers [including cable] do not perform.'[234]" With that, the Broadcasters exhausted their last chance at obtaining full victory—total copyright liability.

51-100, and 3 networks plus 1 independent outside the top 100 markets. *See id.* The rules also required a minimum 20 channel capacity.

[229] *See generally,* Besen & Crandall, supra note 192, at 93-103.

[230] U.S. Congress House Comm. on the Judiciary Subcomm. on Courts, Civil Liberties, and the Administration for Justice Hearings, 92d Cong. (1972), *in* 14 Omnibus Copyright Revision Legislative History 667 (George S. Grossman ed., 1976) (statement of George J. Barco).

[231] *Id.*

[232] Teleprompter Corp. v. Columbia Broadcasting Systems, 415 U.S. 394 (1974).

[233] *Id.* at 400.

[234] *Id.* at 403.

Congress enacted the copyright side of the compromise in 1976. The form was a compulsory licensing law, codified in § 111 of the 1976 Act.[235] As a settlement, it on the one hand 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,[236] not to alter the content or advertising of the signals it retransmitted,[237] and to retransmit programs simultaneously with the broadcast.[238] 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.[239]

In the last stage of the 1970s settlement, the FCC repealed most of the remaining regulation of the cable industry. By January 1, 1978, as the copyright system came into force, the core remaining limitations of the old regime remained the "distant-signal" limitations, which limited the import of programming into large (top 100) television markets,[240] and the syndicated exclusivity rules, which allowed local stations in urban areas to force cable to black-out programs for which they had purchased exclusive exhibition rights.[241] Together, these two rules continued to limit cable's exploitation of urban markets. But in 1980, the FCC repealed these last regulations.[242] It concluded that the absence of evidence of economic harm and the new copyright scheme had eliminated any need for its

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[235] 17 U.S.C. § 111(c)(1) (2000).

[236] *Id.*

[237] 17 U.S.C. § 111(c)(2).

[238] 17 U.S.C. § 111(c)(1), (f) .

[239] 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 (2000).

[240] 47 C.F.R. §§ 76.59(b)-(e), 76.61(b)-(f), 76.63 (1980).

[241] 47 C.F.R. §§ 76.151-76.161.

[242] *See* 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).

copyright "surrogates."[243] With this decision, the replacement of prohibitive FCC regulations with copyright liability was essentially complete.[244]

Freed from regulatory limits, cable subscription exploded. From 1975-1985 subscription quadrupled. The 3,506 systems serving nearly 10 million subscribers became by 1985 6,600 systems serving nearly 40 million Americans.[245] It had taken thirty years and much regulatory warfare. But cable the succession was complete, and the cable industry assumed its place as the dominant technology of television.

d. Epilogue

As telecommunications historians know, the 1970s did not entirely end the regulatory battles between cable and broadcasting. The copyright royalty tribunal, for example, attracted enormous litigation in its setting of fees.[246] There emerged in the 1980s a movement (backed by broadcasters) to tame the power of cable, culiminating in Congress reinstating some of the regulations that the FCC had dropped in the late 1970s. For example, in 1992 Congress adopted the retransmission consent rule first proposed by the FCC in 1968, giving broadcasters, for the first time, a clear property right in their signals.[247]

Yet at this stage these conflicts were between mature industries, not incumbent and challenger. The example of the 1992 retransmission consent rules shows the difference. Had the courts granted broadcasters such rights in 1961 (as common-law unfair competition rights), the rights would have put cable development in the

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

[244] Only the network non-duplication and must-carry rules remained in place. *See* Cable Television Syndicated Program Exclusivity Rules, 79 F.C.C.2d 663 (1980), *aff'd sub nom* Malrite Television v. FCC, 652 F.2d 1140 (2d Cir. 1981).

[245] *See* Parsons & Frieden, supra note 222, 57-60 (detailing the cable "explosion" of the 1980s); *see also* United States, Cable Television, *available at* http://www.museum.tv/archives/etv/U/htmlU/unitedstatesc/unitedstatesc.htm (detailing facts of cable's growth).

[246] *See* Register of Copyright, Compulsory Licensing in the Television Industry (1990).

[247] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) § 2(a)(2)-(5) (codified as 47 U.S.C. § 521(a)(2)-(5)) (detailing the increase in cable viewership).

control of broadcasters.[248] In 1992, things were much different. Congress described the cable industry not as a pirate, but as the "dominant nationwide video medium."[249] And when confronted with demands for further payment the cable networks asserted their power and refused to pay for retransmission consent.[250] Cable's stance made it clear: broadcast was now dependent on cable, and not vice versa. Their roles had reversed.

E. The Classic Communications Regime Arrives

The birth of the recording industry, radio broadcast and cable created a pattern for setting copyright's communications policy. It is centered on the model of access fees, or compulsory licenses. New technologies capable of delivering copyrighted content will be granted access to the copyrighted works essential to their business, but for a price. This basic model was followed for several subsequent matters, including satellite television in the 1980s,[251] and radio webcasting in the 1990s.[252] The model is therefore something of a default for industries do not fit the model of exemptions that are the "new" copyright communications regime described in Part III.

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[248] For a description of efforts to obtain a common-law right in signal, *see supra*, text accompanying notes 184-191.

[249] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) § 2(a)(2)-(5).

[250] *See* Charles Lubinsky, *Reconsidering Retransmission Consent: An Examination Of The Retransmission Consent Provision (47 U.S.C. S 325(B)) of the 1992 Cable Act*, 49 FED. COMM. L. J. 99, 144-149 (1996) (noting that instead of cash, most broadcasters exchanged their retransmission consent for cable's agreement to carry additional channels); Christopher S. Yoo, *Rethinking the Commitment to Free, Local Television*, 52 EMORY L. J. 1579, 1658-59 (2003) (same).

[251] The Satellite Home Viewers Act of 1988, Pub.L. No. 100-667, 102 Stat. 3935, 3949 (Title II codified as amended in scattered sections of 17 U.S.C.) created a compulsory license for satellite broadcasting similar in structure to the cable compulsory license.

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

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

PART II: POLICY

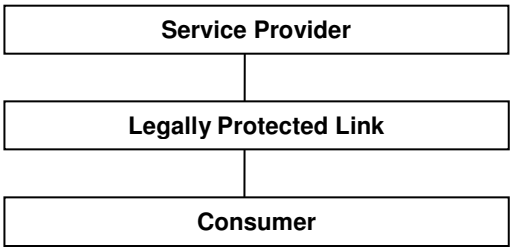
I have suggested that copyright has evolved to regulate competition among rivals, that it in effect comprises independent authorship and communications regimes, and that the communications regime has evolved a standing institutional practice of using copyright to settle near-inevitable conflicts among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

A. Bottlenecks and Vertical Foreclosure

The economic analysis of authorship revolves around the nonrivalrous nature of information goods and the problems thereby created. Copyright's role in communications policy, conversely, is more readily analyzed as the "bottleneck" problem deriving from copyright's grant of control over an asset essential to market entry (namely, copyrighted works), and the potential created for vertical foreclosure of rivals.

To understand what this means we must consider the conditions of competition that face rival disseminators regulated by copyright. Consider a disseminator to be anyone who owns a legally protected means of communication with a customer:

Fig. 3.1 Communications Model



In the field of communications, the legally protected link pictured here can take many forms. It can be physical, protected by the rules of personal property: copper loops between the telephone company and the consumer, the cable infrastructure, and so on. But the link can also be a legal entitlement that does not reference any particular physical infrastructure, such as the allocation of a certain spectrum frequency to a broadcaster to reach its customers.[253] From this state of affairs arise a central and recurring policy questions. To what degree should the legal protection afforded that bottleneck allow the original owner, or the incumbent disseminator from engaging in anti-competitive practices?

There are two anti-competitive practices that are of particular interest and recur in the study of communications law. The first is the simple problem of monopoly price-setting.[254] The incumbent should be expected to charge a supra-competitive price if its ownership of the protected link makes is the only entity in a position to provide the service in question. In the telecommunications law this problem has traditionally led to extensive government rate-setting, such as the setting of local telephone rates.[255]

The second is the problem of vertical foreclosure: the use of the protected link to prevent a competing disseminator, or *challenger*, who depends on the link, from

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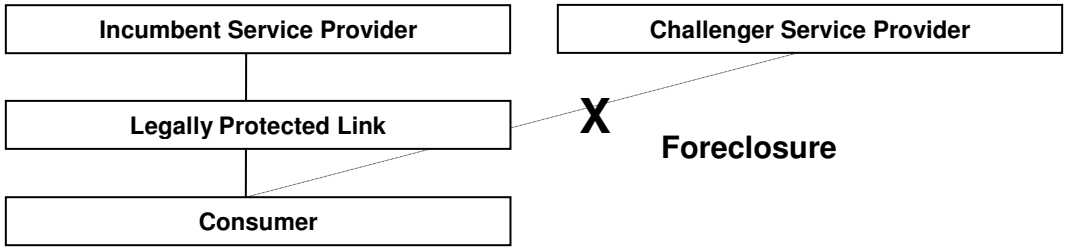
[253] *See* 47 U.S.C. § 307 (procedures for federal grants of licenses to broadcast spectrum).

[254] Ingo Vogelsang and Bridger M. Mitchell, TELECOMMUNICATIONS COMPETITION 55 (2001) (discussing the effect of bottlenecks on price-setting policy).

[255] *See* 1 HOWARD ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW §9.2 (1999) (describing various aspects of rate-setting for local carriers).

reaching the customer in question.[256] The foreclosure is "vertical" because the incumbent uses its control over an independent input at another level (copyrighted materials) to affect competion at the level of dissemination.[257]

Fig. 3.2 Vertical Foreclosure via Bottleneck



An illustration of the vertical foreclosure problem comes from the example of long distance telephone service. If the incumbent (Bell) owns the local telephone lines, it can potentially foreclose a long-distance service provider (MCI) from reaching any customers, favoring its own long distance service. Hence a critical question for telecommunications law has always been determing the extent to which the owner of the local phone service should be required to provide access to local lines to vendors of long-distance telephone service.[258]

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[256] There is a rich literature on vertical foreclosure in general, see, e.g., Janusz A. Ordover et al., Equilibrium Vertical Foreclosure, 80 AM. ECON. REV. 127 (1990); Louis Kaplow, Extension of Monopoly Power Through Leverage, 85 COLUM. L. REV. 515 (1985); Michael A. Salinger, Vertical Mergers and Market Foreclosure, 77 Q.J. ECON. 345 (1988); and as relates to telecommunications policy in particular, see, e.g., Alexander Larson et al., *Competitive Access Issues and Telecommunications Regulatory Policy*, 20 J. CONTEMP. L. 419 (1994); Paul Joskow & Roger Noll, *The Bell Doctrine: Applications In Telecommunications, Electricity, And Other Network Industries*, 51 Stan. L. Rev. 1249 (1999). For an excellent overview of the economic arguments regarding vertical integration and their relevance for communications policy, see Phil Weiser & Joseph Farrell, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. L. & TECH. 86 (2004).

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

[258] *See* 1 1 HOWARD ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW §9.1 (1999) (describing the various access issues addressed by the 1996 Telecom Act).

Both of these problems stemming from the bottleneck are central to most contemporary communications policy: wireline regulation, broadband regulation and spectrum policy are three present examples.[259] In each case the basic problem is the same. On the one hand, allowing the incumbent too much power to prevent challengers from reaching customers retards both price competition and (according to modern views) innovation in new communications technologies. But granting too little legal protection to the original link might erase the incentives to build the original link and its technological successors.

With some simplifying assumptions, it is not hard to see how the copyright law can be used as a potential tool for monopoly price-setting or vertical foreclosure, raising the same questions faced in communications.[260] The vertical foreclosure problem is evident from the story of broadcast and cable industries in the 1960s.[261] Each possessed its own technology for reaching consumers. Yet each needed access to copyrighted works in order to provide a service customers would pay for. The copyright works were the bottleneck necessary to compete in the industry. Hence, if broadcast (the incumbent) could enforce the copyrights in television content, it could have prevented or foreclosed the cable industry from reaching television customers. It can achieve similar results that the telephone industry might achieve by controlling local phone lines.

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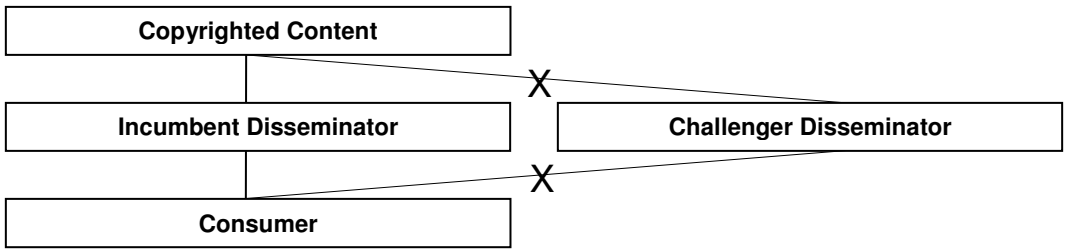
[259] *See id.* at 51-59 (2001).

[260] Cf. Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423 (2002).

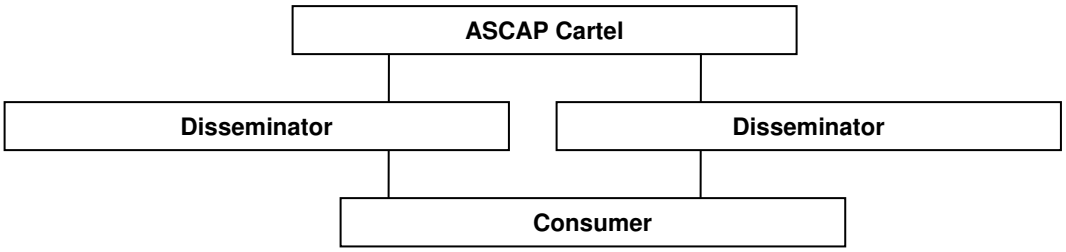
[261] See *supra,* Section I.G(1)

Fig. 3.3 Copyright used for Vertical Foreclosure



The vertical foreclosure model, however, only describes one class of communications problem that arises in the copyright context. The problems of monopoly price-setting can also occur. This has happened in situations where authors maintain independent control of their copyrights, as in the ASCAP-Radio dispute described above.[262] The communications model for the ASCAP problem is a horizontal cartel among the suppliers of copyrighted works (authors), leading to monopoly price-setting. It is the necessity of having access to content, and the legal protection of copyright, that create the possibility for an ASCAP cartel in the first place.

Fig. 3.4 The Difference that Authorial Control Makes



There is an important difference between the problems created by the horizontal (ASCAP) and vertical (broadcast) competition problems, respectively. While a horizontal cartel among authors may be expected to raise consumer prices,

[262] *See* supra I.G(2).

it will not necessarily block market entry of technological innovation. For economic theories which take innovation as opposed to price-competition as the primary engine of economic growth,[263] the vertical foreclosure problem is more serious.

All of this goes to show that the copyright law's protections can and do create the same competition problems regularly encountered in telecommunications law. None of this is to suggest that the best way of dealing with these problems is self-evident. There is sizable disagreement over what, if any, government role is appropriate in the face of potential vertical foreclosure or monopoly-price setting.[264] Yet over the years positions have hardened and it is easier to understand the choices available. What follows describes the policy alternatives that have emerged.

B. National Communications Policy

To understand the choices faced in copyright we must now turn to the subject of national communications policy. There have long existed two basic models of the optimal communications policy, which may be usefully called the "stewardship" and "competitive" or "open" models.[265] Both models have a pedigree in national communications policy, though the latter is today dominant.

1. Stewardship Communications Policy

A steward-based communications policy[266] is premised on the grant, to private parties, of clear and uncontestable property entitlements in future media and

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

[264] For a useful normative overview of when governmental intervention may be justified to prevent vertical integration, see Weiser & Farell, *supra* n. 256.

[265] For another description of these two models in the internet context, see Philip J. Weiser, *The Internet, Innovation, and Intellectual Property*, 103 COLUM. L. REV. 534, 568-583 (2003).

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

technologies. The rationale for such grants is the premise that the private owner of such a grant will, in the interest of profit maximization, efficiently steward the growth of an efficient communications system and the development new technologies.[267]

The stewardship model has historically enjoyed many arguments in its favor, including support from economist Joseph Schumpeter.[268] Chief among them is the view that the dominant firm can be expected to internalize what would otherwise be externalities in a competitive scenario. For example, competitors may have incentives to free-ride on the research efforts of others, while a dominant incumbent has no such option. Similarly, a dominant incumbent may exercise quality control to prevent shoddy products from being used on its system.[269]

The problem of natural monopoly also drives the argument for a steward-based communications policy. Economists have argued that economies of scale and scope characterizing the production of telecommunications services makes a monopoly the likely outcome.[270] If a monopoly is an inevitability in communications markets, a policy that directs the monopolist to secure innovation and act in the public interest may seem the only recourse.

Relatedly, a steward-based communications policy also avoids much arguably wasteful duplication. The dominant market player can avoid duplicative investments for the transmission of the same information to the same consumer (such a two sets of telephone lines, or two different printings of the same book). This is the argument for allowing communications infrastructures to take the form of natural monopolies. And as pertains to technological innovation, the dominant

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

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

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

[270] *See* Ingo Vogelsang & Bridger Mitchell, TELECOMMUNICATIONS COMPETITION 51 (1997) (descring natural monopoly as the justification for telecommunications regulation.)

player can prevent duplicative "races" to reach the same invention, much like preventing multiple missions to pursue the same sunken treasure.[271]

As a model of innovation, the planned view shares much with the "prospect theory" in patent law, which holds that control centralized in a pioneer industry allows a more orderly process of follow-on innovation.[272] The costs of conflict, or "rent dissipation," may be eliminated if broad, enforceable rights are granted to the pioneer industry, creating a prospect that can be explored without fear of competition.

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

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

2. *"Competitive" Communications Policy*

A "competitive" or "open" communications policy sacrifices order, predictability and stability of a planned policy for greater allowance of market entry and (backers believe) faster technological development.[273]

Competitive or open communications policies are premised on the belief that technical innovation plays a central role in economic growth, and that technical change is best understood as an evolutionary process. The ideas also claim their origins in Joseph Shumpeter's work: but in his conception that "creative destruction" is the source of capitalism's benefits, not mere price competition.[274] Economists like Richard Nelson argue that technological change is by necessity an

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[271] *Cf.* Richard Posner, ECONOMIC ANALYSIS OF LAW, *supra* note 69, at 35-38 (examining rent dissipation theory by analyzing costs through example of hunt for a sunken treasure).

[272] *See* Kitch, *supra* note 267.

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

[274] *See* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 81-86 (3d ed. 1950).

error-driven, evolutionary process.[275] Markets select from a variety of competing approaches whose relative merit, crucially, is difficult to assess in advance.[276]

This view leads to distrust of the stewardship model and dominant firm theories. If the most promising path of development is difficult to predict in advance, Nelsonites argue, it unrealistic to expect a single company to take the optimal path of technological development, however well intentioned it may be. This problem is compounded if any single party can be expected to have anything less than perfect decision-making skills resulting from, for example, a predisposition to continue with current ways doing business.[277] Legal theorists on similar lines argue that vesting control over improvement in a single figure creates an enormous risk of stagnancy deriving from the danger of incumbent industry's uninterest in change.[278]

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

3. *The Consensus Position*

Whatever the substative merits of these two approaches to communications policy, as a descriptive matter, some version of the "competitive model" has

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[275] *See, e.g.*, Richard Nelson, *Understanding Technical Change as an Evolutionary Process* 14 –21 (1987); John Ziman, *Evolutionary Models for Technological Change*, *in* TECHNOLOGICAL INNOVATION AS AN EVOLUTIONARY PROCESS 3 (John Ziman, ed., 2000).

[276] See Nelson, supra note 275, at 15 (evolutionary theory recognizes that "there are stochastic [random] elements both in the determination of decisions and of decision outcomes.").

[277] See Nelson, *supra* note 275, at 72-95 (discussing the concept of organizational "skills.").

[278] *See, e.g.,* Robert P. Merges and Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 890-94 (1990) (criticizing stewardship model in the patent context). This is also an animating principle of Lawrence Lessig's work, particularly THE FUTURE OF IDEAS (2000).

dominated national communications policy since the mid-1980s.[279] It is true that there remains much disagreement on how competition is best promoted, and in particular how intrusive a role government should play. Yet it is to the model of competitive innovation that both the Federal Communications Commission and Congress now uniformly adhere to.

Things were not always so tipped in favor of the competitive model. The balance of 20th century communications policy was driven, instead, by a stewardship model, a model most clearly apparent in the Bell System's stewardship of the national telephone system. The Bell Company is *the* definitive model of the regulated monopolist asked to implement the public policy aspirations of national communications policy.[280] Yet from the late 1960s onward, the courts, Federal Communications Commission and finally Congress began a slow migration to the competitive communications model now dominant. Glen Robinson describes the 30-year shift as "one of the stunning achievements of modern public policy, the transformation of a staid and stagnant industry into the most dynamic and rapidly growing industry in the modern economy."[281] As he argues, it "did not come about through technology alone; it came about by rethinking notions about natural monopoly, economies of scale and scope--concepts near and dear to the ancient regime."[282]

There are many legal milestones in the policy migration. The most notable and dramatic was the 1984 breakup of the AT&T monopoly by federal judge Harold Green.[283] But the clearest legislative manifestation of this policy shift is the 1996

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

[280] *See* Glen Robinson, supra note 279, at 517 (1988) (describing the Bell System).

[281] Glen Robinson, *The New Communications Act: A Second Opinion*, 29 CONN. L. REV. 289, 304 (1996).

[282] *Id.*

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

Telecom Act, the central statute of communications law.[284] As the Federal Communications Commission explains, the law was meant to "let any communications business compete in any market against any other."[285] While the Act is far too complicated to summarize, its most important and best known change was the authorization of open competition in both local and long-distance telephone services.[286] These changes were a sharp break from previous policies, which still adhered to the Bell model. And while assessments of the success of 1996 Act's promotion of competition is mixed,[287] its policy is clear.

Stated adherence to the competitive model of communications policy is now de riguer for the Federal Communications Commission. Across every area of stated policy, the FCC states goals that could have been drafted by Richard Nelson. The competitive goal of the FCC is to "support the Nation's economy by ensuring that there is a comprehensive and sound competitive framework for communications services … foster[ing] innovation and offer[ing] consumers meaningful choice in services." In the contentious area of broadband, the FCC aims to "establish regulatory policies that promote competition, innovation, and investment in broadband service." Or as Commission Chairman Michael Powell puts it, the FCC must do what is necessary to foster "competitive innovation."[288]

Much of this, of course, is at a certain level of abstraction, and there is much debate over what policies will, in fact, facilitate competitive innovative in the communications industry. But in the areas of communications law outside of

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

[285] *See* Federal Communications Commission, *The Telecommunications Act of 1996*, *at* http://www.fcc.gov/telecom.html (last updated Nov. 13, 2001).

[286] *See* 47 U.S.C. § 251 (2000).

[287] The Act's effort to create more local telephone competition is widely described as a "failure." See, e.g., However, it is credited by some for opening up the market for telecommunications services more generally. *See, e.g,* Corey Grice, *How the Telecom Act created a new breed of speed*, CNET News, *at* http://news.com.com/2009-1033_3-251796.html (Feb. 1, 2001) (arguing that the 1996 Act set off the expansion and development of broadband internet access).

[288] Remarks of Michael K. Powell at the Silicon Flatirons Symposium on "The Digital Broadband Migration: Toward a Regulatory Regime for the Internet Age" University of Colorado School of Law, Boulder, Colorado, February 8, 2004.

copyright law, the existence of a *basic* consensus is notable. The starting point for debate is the view that open communications competition drives innovation and economic growth. The question is what role the copyright law plays in that vision.

C. Copyright's Classic Communications Policy

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

As the history explained above demonstrates, the copyright system, when faced with major examples potential lockout, avoided granting dissemination incumbents full control over a technologically advanced rival (the same holds also for cases not recounted above).[289] Instead, both the incumbent and the challenger were forced to put their case to government and to invest in efforts to steer policy in their favored direction.

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

[289] The other major example is that of the photocopier, which was exempted from copyright protection in Williams & Wilkins Co. v. U.S., 487 F.2d 1345 (Ct. Cl. 1973), aff'd by an equally divided Supreme Court, 420 U.S. 375 (1975). For a wonderful recount of the photocopier saga, *see* Paul Goldstein, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX (1994).

incumbent wanted copyright for the wrong reasons.[290] Similarly, the most common statutory form of settlement, the compulsory license, is a liability scheme that prevents market lockout while compensating the incumbent. Such a scheme, as discussed above, is inconsistent with a steward model of communications policy.

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

One important factor that may have driven copyright's early communications policy and the liability rules it created was the media-specific nature of early copyright. The early Acts, including the 1909 Act, specifically named the materials which could be protected by copyright. This created a certain statutory uncertainty surrounding copyright's application to new technologies and consequently left opportunities for parties to influence the final outcome. While often decried as poor drafting, it is a classic historical example of an anomaly that became a feature.

Stated otherwise, the only reason that questions of application to new technologies were ever open for courts or Congress to decide was because the early copyright acts, based on the Statute of Anne, specifically enumerated materials in which copyright adhered. Famously, the Copyright Act of 1790 protected "maps, charts, book or books."[291] The 1909 Act used the same format, but contained ten categories (books, lectures, musical compositions, etc.) of copyrightable works. When a new work fell outside of these categories, parties on each side were forced to present their case to government entities to decide what to do. The result was to

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[290] *See* Ginsburg, *supra* note 53, at 1617 ("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 analyses that support those determinations often seem strained, not to say disingenuous.").

[291] *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 12, 124 (repealed 1831).

force a case-by-case adoption of a communications policy. Courts had the legal room to decide things in a way that left open the option of denying an incumbent control over new media. The result was Copyright's classic communications policy.

D. Understanding the Critiques of the Classic Communications Regime

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

As early as 1903 the Copyright Office began to argue that a revised Copyright statute should be flexible enough to deal with new technologies as they arose. The Office argued in its report that "[copyright] ought to be dealt with as a whole, and not by further merely partial or temporizing amendments."[292] It stated that the "acts now in force should be replaced by one consistent statute, of simple and direct phraseology."[293] With greater force and effect in 1961, the Office argued for a copyright law that would be "broad enough to include not only those forms in which copyrightable works are now being produced, but also new forms which are invented or come into use later."[294] These are very common arguments. Many copyright thinkers argue that the 1909 Act and other early acts were too clumsy, requiring amendment or difficult judicial interpretation for each new technology.

The problem with this critique is that it is seemingly rooted in interests involving certainty and legal aesthetics (a simple statute) more than those involving the consequences of the rule for competition. It is true that § 5 of 1909

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[292] *See* Thorvald Soldberg, *Copyright Law Reform*, 35 YALE L. J. 48, 62 (1925) (reprinting Copyright Report, Dec. 1 (1903)).

[293] *Id.*

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

Act produced uncertainty as to the rights of a copyright owner. But such uncertainty can be part of a kind of communications policy that favors new entry. A simpler and clearer law is not a trump; the value of clarity must be weighed such larger concerns. Perhaps implicit in the argument is also a kind of public choice concern: the problem with statutory ambiguity is that it has encouraged parties to invest in efforts to gain favorable government action. That is true, but it is also true that forcing parties to come to Government could have forced both sides to present information that may have led to better and earlier settlements.[295]

Some academics have criticized the classic model and its tendency toward compulsory licensing on different economic grounds. Robert Merges has argued that enforcing property entitlements is more likely to promote the private bargaining necessary for creation of "collective rights organizations."[296] The value of collective rights organizations, according to Merges, is that they are better than compulsory licensing schemes for reducing the transaction costs of licensing a diverse mixture of copyrights. Merges argues that policy makers should in all cases "stay away from compulsory licensing for new media!"[297]

Merges, in colloboration with Richard Nelson, has criticized the stewardship model of innovation in the patent context,[298] so his position with respect to copyright is slightly surprising. Merges takes the only purpose of compulsory licensing schemes to be the reduction of transaction costs—he does not account for the role a liability regime might play in market entry of new technologies. The earlier Merges teaches that intellectual property's "social costs should include its potential to reduce competition in the market for improvements" and "there are many instances when a firm that thought it had control over a broad technology rested on its laurels until jogged to action by an outside threat."[299] If this is so with respect to patent holders, why don't the same considerations drive scrutiny of

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

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

[297] *See id*. at 1300.

[298] *See* Merges & Nelson, supra note 278.

[299] *Id.* at 843, 872.

copyright? In addition, Merges' relies on ASCAP as an alternative model to compulsory licensing, but the analogy is inapposite, for several reasons.

ASCAP is a coalition of *authors.* As a model it is therefore no answer for the problems created when rival *disseminators* use copyright against a rival. As long as the disseminator in a given industry has effective control or actual ownership of copyright necessary to its business model, the ASCAP model is not a viable alternative. The compulsory licensing regimes which Merges opposes are (as Section II.A points out), solutions to a different problem: vertical foreclosure of one disseminator by another. The ASCAP model is only viable where authors have sufficient independent power and control over their own copyrights. As for the subject of pricing, the fact that ASCAP's independent pricing scheme in under the shadow of an antitrust decree renders questionable the argument that ASCAP's pricing is fully independent of government supervision.[300]

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

> It is interesting to speculate how differently things might have developed if the Supreme Court had affirmed both cable's copyright obligations and its First Amendment rights simply and clearly at the outset … Without a right to pull signals from the air, cable might have started up more slowly, but it would have probably grown more quickly.[301]

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

As discussed above, the wisdom of such an approach must take into account the objections stemming from evolutionary theories of innovation. This point can

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[300] *See* United States v. ASCAP, 1950 Trade Cas. (CCH) P 62,595 at 63,751 (S.D.N.Y. 1950).

[301] *See* John Thorne et al., FEDERAL BROADBAND LAW § 10.11 (1995).

be expressed in terms of the bottleneck problem described above. For any form of expressive work (video, book, music, etc.) there will exist several potential technologies of dissemination. Yet not every method of dissemination is invented at the same time, and indeed many cannot be predicted *ex ante*. For example, the pioneering system of mass television dissemination was terrestrial broadcast—rabbit ear antennas and tall towers. In time various successive technologies of mass video dissemination were developed and reduced to practice, including wire (cable television), satellite, and most recently, streaming applications on the Internet.

From these conditions we can see that granting a copyright entitlement that covers all forms of dissemination will have the effect of giving the pioneer industry the power to control the follow-on development of technology. Assuming that the pioneer controls the creation of content (either by controlling copyrights, vertical integration, or through simple economic dependence), it can dictate what happens and what does not. In the example of broadcast, if copyright in programming had clearly included future technologies like cable and satellite transmission, the decision to allow these dissemination technologies to develop would have rested with the broadcast industry.[302] Everything then depends on whether policy-makers believe that an incumbent can be trusted to promote, rather than to destroy, its technological rivals.

There are, finally, a second set of reasons to question the model of broad initial entitlements. The model of broad initial rights can only yield the claimed benefits when such rights can be enforced. For example copyright was generally seen as unenforceable against casual home copying in the 1970s and early 1980s.[303] 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.

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

[303] *See infra* note 342 and accompanying text.

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

E. Author-Driven Communications Policy?

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

This analysis makes the possibility of *author*-driven dissemination attractive. As a policy it would support broad and clear rights in authors, as authors should want maximum exposure for their work, regardless of dissemination media. And if an author decided not to release her works using a given technology (say, film), then we might expect this to reflect artistic, rather than anti-competitive, concerns.

Perhaps unsurprisingly, the concept has been a long-time aspiration of the copyright law: the hope that authors would one-day become masters of their own destiny.[304] In its latest form, the idea is that the emergence of digital media and the Internet may make authors the relevant actors for copyright's communications policy. Jane Ginsburg's words describe this school of thought: "I suggest that digital media, by making the means of production and dissemination available to any computer-equipped author, gives authors a realistic opportunity to bring their works to the public without having to put themselves in thrall to traditional

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[304] *See, e.g.*, LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 5 (1968) ("Not until after the Statute of Anne did the modern idea of copyright as a right of the author develop."); *see generally*, JOSEPH LOWENSTEIN, THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT (2002).

intermediaries."[305] A grant of greater authorial rights through copyright, according to Ginsburg, "not only enhances the moral appeal of the exercise of copyright, but also may offer the public an increased quantity and variety of works of authorship."[306]

If authorial control over copyrights could help control some of the most troubling anti-competitive consequences of copyright, how achievable is that vision? The problem remains what it always has been. Despite the fact that authors who are not employees nominally own copyrights upon creation, they rarely control copyrights. Most copyrights are contractually assigned to disseminators, owned by the employer through the work-for-hire doctrine, or otherwise effectively controlled by the disseminator.[307] It is a function of the relative bargaining power of authors and disseminators. Unless this difference in power or the laws controlling copyright contracting changes, true authorial control of copyright will likely remain an attractive vision but not a discernable reality.

Might, as Ginsburg suggests, digital dissemination technologies change things, and strengthen the relative power of authors? While the question is factual there are reasons to suspect that development like the internet or indeed any technologies are unlikely to eliminate the central role of disseminators and other intermediaries, and their continued control over copyright.

It is, first of all, hard to get rid of intermediaries for a reason, one having nothing to do with law or technology, but instead for reasons stemming from the

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[305] Ginsburg, *supra* note 53, at 1646.

[306] *Id.* Paul Goldstein's vision of a "celestial jukebox" that stores all copyright works and makes them available on demand is also an author-driven vision. He writes "by charging subscribers electronically for each use of the prerecorded works it offers -- motion pictures, sound recordings, books, magazines or newspaper articles -- the celestial jukebox will be able to compensate copyright owners each time their works are chosen." *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 30 (1994).

[307] *See, e.g,* ALBERT N. GRECO, THE BOOK PUBLISHING INDUSTRY 152-55 (1997) (sample of typical publishing contract assigning copyright to publisher); Bruce H. Phillips & Carl R. Moore, *Digital Performance Royalties: Should Radio Pay?*, 3 VAND. J. ENT. L. & PRAC. 169, n. 28 (nothing that copyrights in the music industry are typically assigned to publishers and recording companies).

basic theory of comparative advantage.[308] Specialized intermediaries exist, after all, because they specialize in doing things that people don't necessarily do well themselves. Carpenters specialize in making furniture; while it is possible for people to make their own furniture, it comes at great tangible and opportunity cost.

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

While we are only a decade into the universalization of the Internet, there is only limited evidence that it has eliminated the control that disseminators have over copyrights. There are a few examples of authors—often famous and rich—who have temporarily become their own disseminators. Stephan King, for example, famously distributed one of his books directly to his fans.[309] Rapper Ice T decided to distribute one of his albums, for $4.99 per copy, via the online distribution service KaZaA.[310] Yet these are the exceptions. Even the Beatles – who founded Apple Records to try and give artists more power over their work[311] -- have many of their sound recording copyrights controlled by publisher EMI. That company has used its ownership of the Beatles copyrights to prevent

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[308] The seminal statement of the theory of comparative advantage is found in David Ricardo, *see* David Ricardo, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION (1963).. The point with regards to online activities is developed further in JACK GOLDSMITH & TIMOTHY WU, THE RETURN OF THE LEVIATHAN, Chapter 4 (Manuscript on file with author).

[309] *See* "Stephen King offers online thrills," SAN DIEGO UNION-TRIB., July 24, 2000, at A5.

[310] *See* "Ice T offers album for sale to music-swap site users," USA TODAY, April 10, 2003.

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

unauthorized remixing in rap songs, when it is not clear whether the Beatles themselves would have cared.[312]

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

PART III: COPYRIGHT'S NEW COMMUNICATIONS POLICY

The main point of this Article has been to describe copyright's communications regime and to explain the choices it has been making. Up until this point we have focused on the classic communications regime, centered on compulsory licensing regime. Since the 1976 Act the legal operation of copyright's communications policy has shifted in important ways, though the policy questions remain the same. While the pattern of congressional settlement remains, a new pattern of judicial immunities, under the doctrines of contributory liability and fair use, that constitute copyright's new communications policy.

A. The Communications Policy of the 1976 Act

The 1976 Act marked an effort to try and to solve many of copyright's perceived communications problems once and for all. A key portion of the 1976 Act was the § 102 specification that copyright would subsist in "original works of authorship fixed in *any* tangible medium of expression, *now known or later developed* …."[313] As the House Report explained, "This broad language is intended to avoid the artificial and largely unjustifiable distinctions, derived from cases such as White-Smith Publishing Co. v. Apollo Co. … Under the bill it makes no difference

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[312] Noah Shachtman, "Copyright Enters a Grey Area," WIRED NEWS, Feb 14, 2004, available at http://www.wired.com/news/print/0,1294,62276,00.html

[313] 17 U.S.C. § 102(a) (2000) (emphasis added).

what the form, manner, or medium of fixation may be."[314] As the Copyright Office had argued, the 1909 Act compounded the constant conflict surrounding the arrival of new technologies. One hope was that the 1976 Act could solve this "problem."

But as this Article has argued, conflicts among communications rivals are likely to be inevitable as long as new technologies are invented that give challengers the opportunity to undercut incumbents.[315] It should therefore be no surprise that the 1976 Act failed to end the pattern of conflict that characterizes copyright's history. Some of the challenges, such as satellite, and webcasting, have followed the classic pattern of copyright settlement centered on a compulsory license. The principle examples are the Satellite compulsory license (1988), and the Webcasting compulsory license (1995). Notably, both of these post-1976 settlements have resulted in terms less favorable to the challenger, possibly because the comprehensive nature of the 1976 Act weakened their initial position.

Yet since the 1976 Act a new type of technological challenger has emerged, and with it a different type of copyright accommodation. Under the 1909 Act, technologies like radio and cable operated openly because their status under copyright was unclear. Post-1976 challengers have relied on a different loophole in the copyright scheme: its difficulty with enforcement against individual infringers.[316] And the result is copyright's new communications regime, centered not on compulsory licenses, but on judicially granted immunities from copyright liability. The foundation of this new system is the *Sony* case, and it is to that conflict that we now turn.

B. Sony-driven Communications Policy

In November 1975, Sony Japan began selling its first consumer version of the "Video Tape Recorder" based on Betamax technology. Selling for the suggested retail price of $2295, the floor model LV-1901 combined a 19" color television with

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[314] H. R. Rep. No. 94-1476, 94th Cong., 2d Sess, at 52 (1994).

[315] *See* supra text accompanying notes 60 to 79 and accompanying text.

[316] Until recently, enforcement against individuals was extremely rare, to a degree that one might say it was not a part of copyright. The evolution of copyright's enforcement system is described in Wu, supra note 66, at 685-686.

a VCR capable of storing a full hour of television programming on a single cassette. The advertisement that began the VCR conflict ran as follows:

> NOW YOU DON'T HAVE TO MISS KOJAK BECAUSE YOU'RE WATCHING COLUMBO (OR VICE VERSA)
>
> BETAMAX—IT'S A SONY[317]

With this advertisement, "time-shifting," or recording programs to watch later, entered the public imagination. But the film industry was not impressed. Within a year, on November 11, 1976, Universal Studios and Walt Disney filed complaints of copyright infringement.[318]

The familiar pattern of copyright conflict was set. Sony and other electronics manufacturers were challengers offering a new and better way to watch broadcast content. Part of their market advantage, of course, came from not having to pay anything for copyright licenses to films and television programs. Meanwhile, movie studios displayed little interest in promoting VCR technology, and much more interest in either trying to stop the VCR in its tracks or obtaining royalties. Both sides, as usual, went to the federal government.

Jack Valenti stated the film industry's case in Congressional hearings. The VCR, he opined, "exists for one purpose in life … to copy copyrighted material that belongs to other people."[319] But, Mr. Valenti warned, "Nothing of value is free. It is very easy, Mr. Chairman, to convince people that it is in their best interest to give away somebody else's property for nothing, but even the most guileless among us know that this is a cave of illusion where commonsense is lured and then quietly strangled."[320]

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

[318] *Id.* at 34.

[319] Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. On Courts, Civil Liberties, and the Administration of Justice of the House Comm. On the Judiciary, 97th Cong, 2d Sess. 6 (1982) [hereinafter VCR Hearings] (statement of Jack Valenti).

[320] *Id.*

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

> "We [the film industry] are facing a very new and a very troubling assault on our fiscal security, on our very economic life and we are facing it from a thing called the video cassette recorder and its necessary companion called the blank tape. And it is like a great tidal wave just off the shore. This video cassette recorder and the blank tape threaten profoundly the life-sustaining protection, I guess you would call it, on which copyright owners depend, on which film people depend, on which television people depend and it is called copyright. … I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone."[321]

By 1981 the film industry had convinced the Ninth Circuit to hold Sony liable for contributing to the copyright infringement of home viewers.[322] That court found that the videotape recorder had no purpose other to infringe: it was "manufactured, advertised, and sold for the primary purpose of reproducing [copyrighted] television programming."[323] Since the court could find no exception in the copyright code for personal or home copying, Sony was infringing. The court suggested either placing a permanent injunction on the sale of the VCR or setting up a royalty scheme: a judicial version of a compulsory license.

Within 24 hours of the decision, both sides went to Congress with different proposals. The electronics industry wanted a full exemption from copyright liability for home video recording.[324] The film industry counter-offered with an exemption tied to a royalty scheme for the fim and television industries.[325] It seemed that the VCR matter would follow the pattern of the classic communications regime, and end in a Congressionally-implemented settlement.

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[321] *Id.* at 8.

[322] Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963 (9th Cir. 1981).

[323] *See id.* at 975.

[324] *See* S. 175, 98th Cong., 1st Sess., 129 CONG.REC. S668 (daily ed. Jan. 26, 1983); see also H.R. 5250, 97th Cong., 2d Sess., 128 CONG.REC. H2241 (daily ed. May 13, 1982); H.R. 4783, 97th Cong., 1st Sess. (1981).

[325] *See* S. 31, 98th Cong., 1st Sess., 129 CONG.REC. S255 (daily ed. Jan. 26, 1983); H.R. 1030, 98th Cong., 1st Sess. (1983); H.R. 5705, 97th Cong., 2d Sess. (1982).

But the Supreme Court upstaged Congress with its first major copyright communications policy case since *Fortnightly.* In *Sony* the Court, as is well known, sided with the electronics industry, delivering the exemption from copyright they were seeking in Congress. The Court did so by holding that the VCR would be exempt from contributory or vicarious copyright liability provided that its technologies were, in fact, technologies of general or broad purpose.[326] As Justice Stevens stated in his oft-cited *Sony* rule, "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes."[327] To put the matter further: "Indeed it [the technology] need merely be capable of substantial noninfringing uses."[328]

Sony is acclaimed for its foresight: in retrospect, the VCR and the DVD did much for the film industry. As Edward Samuels states, "the VCR turned out to be one of the most lucrative inventions—for movie producers, as well as hardware manufacturers—since movie projectors." [329] Unlike the other major copyright communications cases, *Sony* did not lead to the formal establishment of a liability regime. As detailed by writer James Lardner, the film industry opted for a softer line, and slowly began to reject the popular view that the industry needed to "squelch" the VCR.[330] And in time the VCR became a major source of revenue for the film and broadcast industries, so a liability regime would have been one without damages.[331]

One reason *Sony* may have succeeded analytically is that it self-consciously abandoned a simple authorship analysis when faced with the use of copyright by an incumbent industry to control or block legitimate technological rivals.[332] Indeed the *Sony* rule can be understood as a rule to help a court *distinguish* between

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[326] The court also ruled time-shifting a "fair use." *See Sony*, 464 U.S. at 442 ("[T]he unauthorized home time-shifting of respondents' programs is legitimate fair use.").

[327] *Id.*

[328] *Id.*

[329] Edward Samuels, THE ILLUSTRATED HISTORY OF COPYRIGHT 70 (2000).

[330] Lardner, supra n. 317, at 284.

[331] *See id.* at 325-328 (detailing how videocassette revenue grew to equal that of ticket revenue).

[332] *See Sony*, 464 U.S. 417.

problems of authorship and the more difficult problems of competition among disseminators. The fact that a new communications technology can be used for "legitimate, unobjectionable purposes" establishes that the court is faced with a market entrant, as opposed to mere evasion of the copyright statute. Hence the Court knows that it faces a problem of regulating competition among rivals, and act accordingly. Conversely, if the technology in question is used merely to infringe, the Court is faced a problem where protecting authorship incentives predominates. This division is suggested by the Court's statement that "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 the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology."[333]

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

The *Sony* rule puts courts in an odd position, for they must rely on their instincts and the limited evidence before them to decide whether a new technology seems legitimate. The fact that so many now-mainstream communications technologies were born as pirates further complicates matters. These limits of judicial ability might suggest a lenient reading of the *Sony* rule, but some of come to the opposite conclusion. Randy Picker sees *Sony* as a rule of entry, sees the *Sony* rule as too lenient. In his view, *Sony* rule by its own logic allows harmful market entry: it would allow market entry of product that had $100 of legitimate use, but

[333] *See id.* at 431.

causes a $1000 in harm, through loss of creation incentives. Allowing such a product to be on the market is therefore, according to Picker, a bad result.

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

Second, Picker's view may put too much faith in the courts to act as accurate gatekeepers of market entry. It is certainly beyond the ability of a court, or indeed anyone, to accurately predict the future social benefit of a new technology—such are the teachings of evolutionary innovation theory.[334] To compare the future benefit to the present and future harm introduces still greater chances for error. For one thing judges might, like other government actors, consistently overrate present and visible harms.[335] Picker does acknowledge that the assessment of benefit should include the possibility that the technology will turn out to be much more socially beneficially than originally imagined. However, he does not develop the point further.[336]

Innovation theory teaches that since technological prediction is difficult, it is important, if possible, to let the market assess the potential of any new technology, whether a mousetrap, molecule, or copying device. Government should, this suggests, ban a new technology only if the harm of allowing the technology reach the market very clearly outweigh the benefits. These are not controversial sentiments outside of the copyright debate. Government only very rarely reaches

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[334] See *supra* Section II.B.

[335] *Cf.* Anne Krueger, *Asymmetries in Policy Between Exportables and Import-Competing Goods*, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE (R. Jones and A. Krueger eds. 1990) (discussing "identity bias," or the tendancy of government actors to act to protect the identifiable tragedy of lost jobs instead of diverting rents to the creation of new jobs).

[336] Picker,

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

Whether *Sony* is too lenient or too strict a rule of market entry is remains an open question.[337] But the case's institutional significance for copyright's communications policy cannot be doubted. *Sony* set the precedent for settling technological rivalry problems with the judicially-balanced immunity rules. It is the foundation and centerpiece of copyright's new communications policy.

C. Beyond Sony

From *Sony*, courts have contined to use various judicial immunities, particularly fair use, to manage anti-competitive behavior. While the subject is too broad to capture entirely greater awareness of the competitive consequences of their decisions for competition among rival disseminators helps illuminate other doctrines.

1. Reverse-Engineering.

Courts have addressed questions of competition among rivals when forced to determine whether reverse-engineering of copyrighted computer software should be legal. [338] In a typical scenario, a dominant market player owns a given "platform" protected by copyright, which amounts to a legally protected link between it and its customers. The competitors of the platform owners seek to reach the same customers, and use reverse-engineering to achieve interoperability.

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

[338] *See, e.g.*, Sony Computer Entertainment, Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000) (considering fair use the reverse-engineering of game console for the purposes of creating virtual computer console); Sega Enterprises Ltd. V. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992) (finding that reverse-engineering of software for the purposes of interoperability constitutes fair use).

The resulting problem is a precise replica of the "bottleneck" problem discussed above.

Such a bottleneck problem was presented in the seminal case *Sega v. Accolade*.[339] Sega owned the link to the customer: the Genesis game console system. Accolade sought to deliver its own content to Sega's customers, namely computer games like "Hardball" and "Mike Dikta Power Football."[340] The question for the Ninth Circuit was something the FCC would have found very familiar: does Accolade get to use Sega's protected link to deliver its own content?

The rule adopted by the Ninth Circuit is perhaps the broadest endorsement of an open competition policy theory seen in post-1976 copyright. Under the fair-use doctrine, Judge Rheinhardt held that competitors were free to make copies in the course of reverse engineering "solely in order to discover the functional requirements for compatibility with the Genesis console--aspects of Sega's programs that are not protected by copyright."[341]

While the *Sega* rule, which is widely followed,[342] is usually justified as the "extraction" of unprotected information, the decision could easily have gone either way. Fair use analysis usually turns on how "commercial" the use is, and there is no question that Accolade wanted to make money and, at least in Sega's judgment, was endangering Sega's profits.

The *Sega* rule therefore makes sense if understood as a prophylactic rule preventing market lockout by dominant market players. In communications law terms, it goes further than rate-setting (a liability scheme). It instead declares Sega's and other platforms a commons. There is an active debate over whether "open" or "closed" platforms make better sense for the owner of the platform. [343] But the *Sega* rule does not trust platform owners to make this decision, echoing the

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[339] *See Sega*, 977 F.2d 1510.

[340] *Id.* at 1516.

[341] *Id.* at 1522.

[342] *See*, *e.g.,* Assessment Technologies of WI v. WIREData, 350 F.3d 640, 644 (7th Cir. 2003); DSC Communications Corp. v. DGI Techs., Inc., 81 F.3d 597, 601 (5th Cir. 1996); Bateman v. Mnemonics, Inc., 79 F.3d 1532, 1539 n.18 (11th Cir. 1996); Mitel, Inc. v. Iqtel, Inc., 896 F. Supp. 1050, 1056-57 (D. Colo 1995), aff'd on other grounds, 124 F.3d 1366 (10th Cir. 1997).

[343] *See*, e.g., Lemley & Lessig, supra note 273 at 939-40.

distrust of incumbents common to the open model of communications policy. The *Sega* rule and its follow-ons are examples of decisions having almost nothing to do with authorship policy and everything to do with copyright's policy as between communications rivals.

2. Contracts - Copyright.

In many markets, particularly computer software, it is commonplace to use contractual provisions to override copyright doctrines like the first-sale doctrine or certain aspects of fair-use rights. Courts have given the enforcement of such agreements a mixed reception,[344] while academics usually have been more overtly hostile.[345] But what remains underrecognized is the degree to which contractual overrides of copyright rules relate to conditions of competition among rivals.

Academic critics of contractual supplements to copyright bring two lines of criticism. The first comes from contract policy, asserting that the form of the contracts (usually shrinkwraps) are at best contracts of adhesion, or not contracts at all.[346] The second criticism, of more significant interest here, however, comes from

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[344] Compare Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F. 2d 91 (3d Cir. 1991) (stating that "limited use license agreement" printed on package containing computer software did not become part of sales agreement for software where it was not assented to at time the goods were sold); Klocek v. Gateway, Inc., 104 F.Supp. 2d 1332 (D. Kan. 2000) (holding that shrink-wrap license provisions requiring arbitration do not become part of agreement merely by retaining or using product after notice of terms), with ProCD v. Zeidenberg, 86 F3d 1447 (7th Cir. 1996) (holding that shrinkwrap licenses are enforceable) and i.Lan Systems, Inc. v. Netscout Service Level Corp., 183 F. Supp. 2d 328, 337-39 (D. Mass. 2002) (same).

[345] *See, e.g.,* Peggy Radin, "The Evolution of Property and Contract in the Digital Environment" (January 2001), *available at* http://www.innovationlaw.org/lawforum/pages/lectureseries.htm; *see also* Terry Fisher, *Property And Contract On The Internet*, 73 CHI.-KENT L. REV. 1203 (1998).

[346] *See*, e.g., David A. Einhorn, *Box-Top Licenses and the Battle-of-the-Forms*, 5 SOFTWARE L.J. 401 (1992) (arguing that shrinkwrap licenses unlikely to be enforced under contract law); David L. Hayes, Shrinkwrap License Agreements: New Light on a Vexing Problem, 9 Computer L. 1 (1992) (contending that shrinkwrap licenses unlikely to be enforced under § 2-207); Thomas Hemnes, *Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing*, 71 DENV. U. L. REV. 577 (1994) (suggesting that shrinkwraps are attempt to return to feudal controls on the alienability of property); Michael Schwarz, *Tear-Me-Open Software License Agreements: A Uniform Commercial Code Perspective on an Innovative Contract of Adhesion*, 7 COMPUTER L.J. 261 (1986) (conspicuously placed shrinkwrap licenses should be enforced).

copyright policy. It is the argument that contracts on copyrighted goods distort the optimal balance between public access and private incentives that the rules of copyright are meant to embody.[347]

The problem with the policy criticism is that it is too general for courts to know when not to enforce contracts that override copyright rules. It relies on the presumption that copyright's rules are all mandatory and none mere defaults. That assumes that the law has guessed the right rules to govern the relationship between owner and buyer across the many different markets where copyright matters, a supposition that seems unlikely, at best. The mandatory view neglects the value of contractually-modified copyrights for specific markets: a mixture of rights better-tailored to fit market preferences than the rules of copyright would grant.[348]

Courts would benefit from thinking of the copyright-contract problem as the problem of blocking market entry. Where contracts are being used to prevent the entry of potential rivals, the concern for modification of copyright's default rules is warranted. Conversely, when such is not the case, it is easier to presume that (as contract policy suggests) the modified set of rights that emerged are a better fit than copyright's default choices. To see what this might mean in practice, consider the contrasting examples of contractual protection of facts and the first sale-doctrine.

The use of contractual provisions to block potential rivals represents the victory of contract over the first-sale doctrine.[349] The first-sale doctrine prevents the copyright owner from destroying or controlling the after-market for its product. The contractual override can be used as a means to destroy rivals, suggesting a separate and important rationale not to enforce such a restraint. It is, for example,

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[347] *See* Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1248-56, 1283-91 (1995); *see also*, Pamela Samuelson, *Symposium: Intellectual Property and Contract Law in the Information Age: The Impact of Article 2B of the Uniform Commercial Code on the Future of Transactions in Information and Electronic Commerce*, 13 BERKELEY TECH. L. J. 809 (1998) (discussing the relationship between contract and intellectual property).

[348] *See* Glen Robinson, *Personal Property Servitudes*, 70 U. Chi. L. Rev. (forthcoming 2004).

[349] 17 U.S.C. § 109 (2000).

probably a failing of copyright policy that there is no apparent market for used software.[350] Software is very expensive, and as it becomes more mature, one would expect, just as in other markets, some people to opt for a used or older version of the product that is cheaper. People, after all, buy used computers and other hardware even though such products are obviously not cutting edge.

Today, major software copyright license contains various kinds of provisions that effectively forbid resale.[351] The effect is to expose potential resellers of used copyrighted software to liability, which is why used book stores don't sell used software. There seems little, from a communications or competition policy perspective, to justify this result.

Conversely, copyright doctrine specifies that facts, even those laboriously created, are not entitled to copyright protection.[352] But should that preclude the protection of facts by *any* legal device? Contract, of course, creates rather a different form of protection for facts—enforceable only as between parties. Hence there is a stronger argument for allowing protection for facts so as create a market for a product that might not otherwise exist is convincing. This is perhaps what motivated the Seventh Circuit's controversial decision in ProCD, Inc. v. Zeidenberg,[353] which upheld contractual protection of facts against a claim of copyright preemption. While the language of *ProCD* broadly suggests that copyright will generally yield to contract, the decision is strongest when limited to its facts (the protection of facts).

3. The War over Online Distribution

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[350] *See* Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPS Game*, 88 MINN. L. REV. 249, 290 (2003).

[351] For example, the Microsoft Windows XP End-User License Agreement bans sale of the software independent of the computer it comes with:

You may permanently transfer all of your rights under this EULA only as part of a permanent sale or transfer of the COMPUTER, provided you retain no copies, if you transfer the SOFTWARE (including all component parts, the media, any upgrades, this EULA and the Certificate of Authenticity), and the recipient agrees to the terms of this EULA.

[352] *See* Publications, Inc. v. Rural Telephone Service Co., Inc. 499 U.S. 340, 344 (1991).

[353] 86 F.3d 1447 (7th Cir.1996).

In the 2000s, it is difficult to pick up a newspaper or magazine without seeing something about "digital piracy" and an ongoing "war" between the entertainment industry (Los Angeles) and computer programmers (San Francisco). There is, I agree, a certain political significance to the efforts of programmers to write programs tailored to copyright's enforcement weaknesses.[354] But some of the excitement and rhetoric have masked the basic questions of communications policy presented.

What is termed the California civil war in fact follows the familiar pattern of conflict between challenger and incumbent dissemination industries. The incumbent, the existing recording industry, relies on "fixed" distribution: distribution of content fixed in CDs, DVDs, or books, sold in retail stores. The challenger relies on online distribution: that is, direct, Internet-based delivery of content in digital form. No mode of dissemination, from first principles, has the obvious upper hand. Online distribution does eliminate much overhead costs (e.g., retail stores) and should be cheaper; it also provides customers the ability to get copyrighted content without actually going to a store. But fixed media has the advantage of the fixed form, packaging, and in some cases a superior product (real books are beautiful, very portable, and operate without batteries). Were neutral conditions of competition to apply, it might be a fair fight. But fair fights have never been a feature of the history of new communications technologies. We must look to see how copyright sets the stage for competition between the incumbent and challenger.

Like their predecessors, certain online distributors have taken advantage of copyright "piracy" to gain an advantage over the incumbent. This was a particularly salient issue with respect to music, and the ability to appropriate copyrighted material was behind the growth of well-known companies like Napster and KaZaA. To repeat a point made earlier, the structure of the 1976 Act makes trying to rely on the ambiguity of the copyright statute (like the recording industry in 1909 or Cable in the 1950s) a dicey proposition.[355] Instead, the limited

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[354] *See* Wu, *supra* note 66, at 680.

[355] Early companies that tried to do so lost nearly immediately. My MP3.com was an early online distributor who tried to "go legit" by licensing music and allowing people to download music that they already owned on CD. It was, however, quickly shut down despite their

history and cost of end-user enforcement was the vulnerability exploited by programmers.[356] It is important to understand that the pure "Peer-to-peer" filesharing programs are not always and necessarily the best systems of online distribution. Their popularity and comparative advantage lies in the fact that they are designed to evade copyright's enforcement system, and therefore minimize the price of an essential input (copyrighted materials).[357]

Meanwhile, the incumbent recording industry, like some of its predecessors, has done just about everything possible to gain control over the challenger. The extent of their efforts has been detailed elsewhere: it includes entirely new strategies of enforcement, such the dramatic targeting of end-users,[358] investments in extra-legal remedies[359] and demands that the Justice Department use criminal sanctions.[360] The recording industry and film industry, like other incumbents have not shown an interest in destroying online distribution. It is a question of control: the industry would prefer to steward the arrival of online distribution technology, so that it arrives on their schedule and creates collectible revenue.[361]

While the basic question of online distribution is a mainly a question of communications policy, the rhetoric of authorship is nonetheless pervasive. Early on, Metallica Drummer Lars Ulrich, not known for his meekness, said he found Napster "sickening," for Napster, is his view, constituted "stealing" and was

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protestations of fair use. *See* UMG Recordings v. MP3.com, Inc., 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

[356] *See* Wu, *supra* note 66, at 711-716 (describing copyright's gatekeeper system).

[357] *See id.* at 731-737 (describing the evolution of programs around the problem of copyright liability).

[358] *See, e.g.*, Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc., 351 F.3d 1229, 1230 (D.C. Cir. 2003) (involving recording industry attempt to use subpoenas to "unmask" alleged copyright infringers)

[359] The RIAA, for example, has used pop up windows to alert those potentially guilty of infringement that they are infringing. *See* Declan McCullah, *Watchdogs rap RIAA's file-trade assault*, News.com.com, *at* http://news.com.com/2100-1023-956176.html (April 30, 2002).

[360] *See* Rick Boucher, *Justice Department as antipiracy shill*, Cnet News.com, *at* http://news.com.com/2010-1028-5099583.html (October 30, 2003)

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

"morally and legally wrong."[362] On the other side, artists like Public Enemy's Chuck D speak of the benefits of online distribution as an authorship issue. In 2000, in Napster's glory days, D wrote in the New York Times that artists "should think of it as a new kind of radio -- a promotional tool that can help artists who don't have the opportunity to get their music played on mainstream radio or on MTV. … The Internet has created a new planet for musicians to explore, and I'm with that."[363]

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

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

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[362] Metallica Press Release, April 13, 2000.

[363] Chuck D, "'Free' Music Can Free the Artist," N.Y. TIMES, April 9, 2000.

The radically open position is highly optimistic about the market and the process of creative destruction. A strong proponent of an open communications policy would give online distribution systems an exemption from contributory copyright liability *despite* the fact that they can be demonstrated to harm or even destroy authorial incentives. The article of faith is that such action, however traumatic in the short term for both disseminators and creators, will not destroy authorial incentives in the long term. If that's right, consumer welfare will be served both in the short-term (free content) and also the long-term (cheaper content). But how might authorial incentives be restored? There are two possible accounts. First, there is faith that the demands of the market will necessarily recreate authorial incentives from *somewhere*, even if where is hard to specify right now. If an online distributor like KaZaA becomes a powerful distributor of music, it will have a natural need to see its content creators survive, and therefore create some mechanism for paying authors. An alternative view places faith in the political process. Exempting the P2P companies from copyright liability could force some matters into copyright's classic communications regimes, forcing a settlement that will liberate online music distribution.[364]

The strongest historical precedent for the radical view is the Supreme Court's 1968 *Fortnightly* and 1974 *Teleprompter* decisions.[365] Those decisions were a leap of faith. They projected that even though cable companies at the time did nothing but free-ride on broadcast, cable would nonetheless one day take on serious responsibilities rather than run television into the ground. In the current conext, the closest legal endorsement of this viewpoint comes from Judge Stephen Wilson, district judge in the *Grokster* litigation,[366] the the recording industry's lawsuit against KaZaA and similar programs. Judge Wilson, granted *Grokster* summary judgment against the copyright claims against it, did so stating that "In a case like this, in which Congress has not plainly marked our course, we must be

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[364] As contemplated in Neil Weinstock Netanel, *Impose A Noncommercial Use Levy To Allow Free Peer-To-Peer File Sharing*, 17 Harv. J. L. & Tech. 1 (2003), and William Fisher, *A Royalties Plan for File Sharing*, CNET News, July 11, 2003.

[365] Discussed in Part I.G(3) , *supra.*

[366] See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 259 F.Supp.2d 1029 (C.D. Cal. 2003).

circumspect in construing the scope of rights created by a legislative enactment which never calculated such a calculus of interests."[367] Wilson's stated view of copyright that does not automatically apply in new settings is a lenient view of *Sony* and a policy of open market entry.

The diametric opposite to the radical open position is the stewardship position. The open position's alleged faith in the political process and free market does not impress proponents of a Steward-based communications policy. In their view, copyright is property, and property a market precondition. To argue that the state should allow an exemption to the enforcement property rights to promote the functioning of market is therefore is a logical contradiction. The Steward view at its strongest also believes that the incumbent industry can and should be trusted to introduce online dissemination in an efficient and timely manner.[368]

The third view is the *Sony* position adhered to by the Ninth[369] and Seventh Circuits[370]—a middle road between the open and stewarded views. Unlike the stewarded view, it sees incumbent-control of a new technology as undesirable, yet is sensitive, unlike the radically open view, to the destruction of creative incentives. Hence it asks the judiciary to judge whether a pirate industry is likely to become a legitimate market market player. The effect is to call for the greatest judicial involvement and oversight of the three views described here. The radically open view would abandon the future of content distribution to market forces or Congress, while the stewarded view places the incumbent in a position to decide when and how online distribution will arrive. But the intermediate position in *Napster* and *Aimster* puts the federal judiciary in a position of continuing supervision of the online distribution industry, waiting for the moment that the pirate becomes legitimate.

The clearest example of this approach is Judge Richard Posner's *Aimster* decision, which is unusually candid about the competitive consequences of the case. The decision opens with a rejection of the stewardship model as contrary to

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[367] *Id.* at 1046.

[368] As discussion in Section II.B(2), *supra.*

[369] A & M Records v. Napster, Inc., 239 F.3d 1004, 1022 (9th Cir. 2001).

[370] In re Aimster, 334 F.3d 643 (7th Cir. 2003).

Sony: the recording industry had argued that actual knowledge of *any* infringement was sufficient to find liability. Posner rejects that position, saying it "could result in the shutting down of the [distribution] service or its annexation by the copyright owners (contrary to the clear import of the *Sony* decision)."[371] But Judge Posner is also unwilling to grant open-ended market entry to Aimster and similar online distribution systems. Aimster's lawyers press for an interpretation that would essentially mimic the results of *Teleprompter:* a holding that even *potential* of legimate uses are enough to create an exemption from copyright. This view is also rejected: "It is not enough, as we have said, that a product or service be physically capable, as it were, of a noninfringing use." [372]

So instead the Seventh Circuit lays out, in detail, what an online content distribution system must do to gain market entry. The result is slightly reminiscent of technologically-specific communications regulation. Judge Posner gives five examples of non-infringing uses that if in substantial evidence would make it a legitimate market entrant under the *Sony* rule. His examples range from the obvious to the slightly less so, including the distribution of uncopyrighted music exchange as well as anonymous sharing of uncopyrighted photographs and dirty jokes.[373] The upshot is a decision that both leaves open the door for future market entry, and tells businesses where that door is. This level of guidance and judicial assessment of technology in *Aimster* is the consequence of the system *Sony* created.

If the Supreme Court should reconsider *Sony* in the context of online content distribution, it will face three policy options described here. It can make market entry substantially easier with a broad exemption for bold new pirate technologies, and hope that the market or Congress will take care of the resultant chaos. It can harken back to the Bell System, tighten incumbent control, and trust existing players to introduce new technologies in a planned way. Or it can stick with the *Sony* rule and its consequent involvement of the federal judiciary in the weighing of the merit of new technological entrants. As the descriptions suggest, none of these options is particularly tidy. Yet the history of copyright's communications

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[371] *Aimster,* 334 F.3d at 648.

[372] *Id*. at 653.

[373] See *Aimster*, 334 F.3d at 652-653.

policy gives us no reason to expect clean solutions to conflicts among rival disseminators.

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

CONCLUSION

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

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

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