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# Real Copyright Reform

Jessica Litman



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# Real Copyright Reform

Jessica Litman\*

*ABSTRACT: A copyright system is designed to produce an ecology that nurtures the creation, dissemination, and enjoyment of works of authorship. When it works well, it encourages creators to generate new works, assists intermediaries in disseminating them widely, and supports readers, listeners, and viewers in enjoying them. If the system poses difficult entry barriers to creators, imposes demanding impediments on intermediaries, or inflicts burdensome conditions and hurdles on readers, then the system fails to achieve at least some of its purposes. The current U.S. copyright statute is flawed in all three respects. In this Article, I explore how the current copyright system is failing its intended beneficiaries. The foundation of copyright law's legitimacy, I argue, is built on its evident benefits for creators and for readers. That foundation is badly cracked, in large part because of the perception that modern copyright law is not especially kind to either creators or to readers; instead, it concentrates power in the hands of the intermediaries who control the conduits between creators and their audience. Those intermediaries have recently used their influence and their copyright rights to obstruct one another's exploitation of copyrighted works. I argue that the concentration of copyright rights in the hands of intermediaries made more economic sense in earlier eras than it does today. The key to real copyright reform, I suggest, is to reallocate copyright's benefits to give more rights to creators, greater liberty to readers, and less control to copyright intermediaries.*

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The copyright statute is old, outmoded, inflexible, and beginning to display the symptoms of multiple systems failure. Congress enacted the current law more than thirty years ago. Most of its essential provisions had been drafted years earlier. Copyright lobbyists wrote the 1976 Copyright Act<sup>1</sup> in the course of protracted multilateral negotiations. The statute includes a host of provisions that resolve difficult disputes by adopting detailed specifications. It replaced its predecessor statute's statements of general principle with particular language rooted in the technology and markets of the 1960s and early 1970s.<sup>2</sup> The statute was not well-designed to withstand change, and has aged badly. The details of specific solutions have become irrelevant or obsolete in the face of social, cultural, and technological change.<sup>3</sup> Copyright-intensive businesses have come to Congress insisting on new specifications to solve new problems.<sup>4</sup> In the ensuing process of inter-industry negotiations to tailor statutory proposals to the quirks and caprice of affected interests, the specifications have attracted a swarm of limitations, qualifications, restrictions, and conditions as a compliant Congress inserted them into the law.<sup>5</sup> Today, title 17 of the *United States Code* is a swollen, barnacle-encrusted collection of incomprehensible prose.<sup>6</sup>

Historians and copyright lawyers with long memories know that we've faced this problem before.<sup>7</sup> Copyright law's confrontation with evolving technology has been a near-constant theme since Congress enacted its first copyright law in 1790.<sup>8</sup> More than once in the past, copyright laws have

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1. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-1205 (2006)).

2. See JESSICA LITMAN, DIGITAL COPYRIGHT 22-34, 54-63, 122-45 (2d ed. 2006). Compare, e.g., Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075 (defining scope of and exceptions to exclusive right to perform musical compositions publicly for profit), with Copyright Act of 1976 § 110 (listing exemptions from public performance right).

3. LITMAN, *supra* note 2, at 57-63, 197-202.

4. See, e.g., Performance Rights Act of 2009, H.R. 848, 111th Cong. (2009); Fair Copyright in Research Works Act of 2009, H.R. 801, 111th Cong. (2009); Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008); Intellectual Property Enforcement Act of 2007, S. 2317, 110th Cong. (2007); Inducing Infringement of Copyrights Act of 2004, S. 2560, 108th Cong. (2004).

5. See, e.g., Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., and 42 U.S.C.); Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218 (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C.); Satellite Home Viewing Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 3393 (codified as amended in scattered sections of 17 U.S.C. and 47 U.S.C.).

6. See, e.g., 17 U.S.C. §§ 110(2), 114.

7. See, e.g., LIBRARY OF CONG., REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1902, S. DOC. NO. 57-6, at 64 (2d Sess. 1902), available at <http://www.copyright.gov/reports/annual/archive/ar-1902.pdf>; Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 515-16 (1945).

8. Act of May 31, 1790, ch. 15, 1 Stat. 124.

grown badly outdated before copyright-affected industries could muster the political influence to persuade Congress to enact new ones. The current law may break down in more extreme ways than in the past, and the law's language may be many times longer, more detailed, and less comprehensible than in earlier episodes, but this sort of difficulty has plagued copyright history repeatedly.<sup>9</sup> When faced with this problem in the nineteenth and twentieth centuries, lawyers for copyright-intensive interests pursued several strategies to enable them to make do. First, copyright lawyers avoided inconvenient statutory language by persuading courts to interpret the words of the statute to mean one thing in one context, and a very different thing in another.<sup>10</sup> Second, they negotiated a series of band-aid solutions with other copyright interests in which they agreed to behave as if the statute on the books said what they wished it did.<sup>11</sup> Third, they sat down with one another and tried to come up with a revision of the copyright statute that would scratch their respective itches. That process always took much longer than they expected, but, eventually, copyright lobbyists generated the language of a statute that Congress obligingly enacted into

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9. Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275 (1989).

10. Perhaps the best-known example is the meaning of the word "publication" under sections 10 and 19 of the 1909 Copyright Act. See *Am. Visuals Corp. v. Holland*, 239 F.2d 740, 744 (2d Cir. 1956) ("[T]he courts apply different tests of publication depending on whether plaintiff is claiming protection because he did not publish and hence has a common law claim of infringement—in which case the distribution must be quite large to constitute 'publication'—or whether he is claiming under the copyright statute—in which case the requirements for publication are quite narrow."). Compare *Cont'l Cas. Co. v. Beardsley*, 253 F.2d 702 (2d Cir. 1958) (holding that distribution of one hundred copies without notice to small group constituted general publication and divested copyright), and *White v. Kimmell*, 193 F.2d 744 (9th Cir. 1952) (holding distribution of twenty copies with a cover letter suggesting recipients pass the copies on constituted divestive general publication), with *King v. Mister Maestro, Inc.*, 224 F. Supp. 101 (S.D.N.Y. 1963) (holding that distribution of many copies to the press from the press tent was only a limited publication, which did not forfeit copyright). Today we see something similar with computer-mediated uses: Copyright owners have persuaded courts that a work is fixed for the purpose of the creation of an infringing copy as soon as it appears in the random access memory ("RAM") of a computer, but do not argue that appearance in RAM is sufficient fixation for the purpose of copyright's vesting. Aaron Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV. (forthcoming 2010). Similarly, copyright owners have argued that the transmission of a single copy over a network should count as publication for the purposes of infringement, but have denied that transmitting a single copy triggers the Library of Congress deposit obligations that attach to a work upon initial publication. See generally 17 U.S.C. § 407.

11. See LITMAN, *supra* note 2, at 47–50. For a current analogue, see, for example, *Principles for User Generated Content Services*, UGCPRINCIPLES, <http://www.ugcprinciples.com/> (last visited Sept. 16, 2010).

law. The resulting statute was, of course, longer, less flexible, and more vulnerable to obsolescence than the one it replaced.<sup>12</sup>

Copyright insiders, having watched (or participated in) some of the early ameliorative moves this time around, are beginning to make noises suggestive of a new round of statutory overhaul. Groups are meeting privately to generate preferred solutions to copyright law problems.<sup>13</sup> Businesses are asking their pet members of Congress to float statutory balloons.<sup>14</sup> Various trade associations are trying to position themselves to claim that the items at the top of their wish lists are already well-established under current law.<sup>15</sup>

There's some queasiness attached to launching a new copyright overhaul. Copyright revision is lengthy and expensive, even in the best of circumstances. The number of interests affected by copyright is huge, and the complaints those interests have with the current regime are diverse. Overhauling the copyright statute took more than twenty years the last time Congress tried it, and there's no reason to think it could happen more quickly today. These are not, moreover, the best of circumstances. The

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12. See LITMAN, *supra* note 2, at 48–63, 122–45. It's commonplace that copyright rights keep expanding. U.S. copyright statutes are worse, doubling in size faster than healthcare or tuition costs.

13. See, e.g., Pam Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. (forthcoming 2010), available at [http://btlj.org/data/articles/25\\_3/cpp.pdf](http://btlj.org/data/articles/25_3/cpp.pdf) (reporting conclusions of three-year project that invited a group of twenty copyright experts “to explore whether it was possible to reach some consensus about how current copyright law could be improved and how the law's current problems could be mitigated”); *A Special Conversation with Marybeth Peters*, AUDIO ARCHIVE (Sept. 17, 2007), <http://www.archive.org/details/FMCsummit07.petersconversation> (describing unsuccessful negotiations among music and recording industry interests to reform 17 U.S.C. § 115).

14. See, e.g., Ted Johnson, *Pols OK Bill on Royalties*, VARIETY, May 14, 2009, 2009 WLNR 9209693 (describing lobbying over bill to require radio broadcasters to pay performance royalties to the owners of sound recording copyrights); Wendy Davis, *Entertainment Industry Pushes for Law Requiring Colleges To Filter Networks*, MEDIAPOST (March 24, 2008), <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=79058&Nid=40725&p=918739> (describing lobbying over bill to require colleges to block students' peer-to-peer file sharing).

15. See, e.g., *Capitol Records, Inc. v. Bertelsmann*, 377 F. Supp. 2d 796 (N.D. Cal. 2005) (seeking to expand the scope of secondary liability for copyright infringement); Brief for Americans for Tax Reform as Amici Curiae Supporting Appellees at 15–17, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (Nos. 07-1480-cv (L), 07-1511-cv (CON)) (arguing that momentary transient reproduction in computer's RAM violates § 106(1)); Brief for ASCAP et al. as Amici Curiae Supporting Plaintiffs at 17–19, *Viacom Int'l v. YouTube, Inc.*, Nos. 07 Civ. 2103 (LLS), 07 Civ. 3582 (LLS), 2010 WL 2532404 (S.D.N.Y. June 23, 2010) (seeking a narrow construction of the scope of the Internet service provider safe harbors in 17 U.S.C. § 512); Brief for Motion Picture Ass'n of Am. as Amici Curiae at 14–20, *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-1497) (claiming that making a file available for distribution violates 106(3)); see generally LITMAN, *supra* note 2, at 24.

copyright bar, once a cozy sewing circle of plaintiffs' lawyers,<sup>16</sup> has grown intensely polarized over the past twenty years, and copyright discourse has become increasingly strident.<sup>17</sup> That has nourished an atmosphere of profound distrust, which makes it harder to agree on terms.

Interested parties have reason to be nervous about what might go wrong. Because major copyright legislation typically takes many iterations and many years between introduction and enactment, most copyright lawyers are, at least to some degree, experts in copyright legislative history. Students of past legislation know that in the course of any major copyright revision, new copyright-affected players have popped up and demanded that the law be reshaped to accommodate their needs. In the revision process that culminated in the enactment of the 1909 Copyright Act, for example, the manufacturers of phonographs and phonograph records nearly derailed the entire effort until they were satisfied with their treatment under the statute.<sup>18</sup> Multiple attempts to modernize the copyright law during the 1920s and 1930s foundered because new players ASCAP and radio broadcasters could not agree on anything.<sup>19</sup> In the revision process that led to the 1976 Act, broadcast television, and then cable television, showed up and demanded special treatment; copyright revision ground to a halt until they got it.<sup>20</sup> In the five-year effort that resulted in the Digital Millennium Copyright Act,<sup>21</sup> telephone companies and Internet service providers were able to block the enactment of provisions sought by the entertainment and software industries until liability safe-harbor provisions for ISPs were added to the bill.<sup>22</sup>

The prospect of upstart new copyright interests may be especially scary today because there are millions of ordinary people whose use of YouTube and peer-to-peer file-sharing networks gives them a direct, personal stake in the copyright law.<sup>23</sup> Nobody has yet succeeded in mobilizing them into a

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16. See Lloyd L. Weinreb, *Copyright Unbound*, in AN UNHURRIED VIEW OF COPYRIGHT, REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS), at WEIN-1, WEIN-1 (Iris C. Geik et al. eds., 2005).

17. See Jessica Litman, *War and Peace: The 34th Annual Donald C. Brace Lecture*, 53 J. COPYRIGHT SOC'Y U.S.A. 1 (2006).

18. See LITMAN, *supra* note 2, at 39-40 and sources there cited.

19. See *id.* at 42-45.

20. See Litman, *supra* note 9, at 326-32 and sources there cited.

21. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (1998) (codified at 17 U.S.C. §§ 101, 108, 109, 112, 114, 512, 1301).

22. See LITMAN, *supra* note 2, at 127-45 and sources there cited. During the same five-year period, composers, music publishers, and motion picture studios pursued an extension of copyright's term from seventy-five (or life plus fifty) years to ninety-five (or life plus seventy) years. Bar and restaurant owners, angry at the cost of performing rights licenses, blocked term extension until proponents agreed to insert a bar and restaurant exemption into the term-extension bill.

23. See, e.g., Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 845-46 (2009) ("Hundreds of millions of Internet

significant political force, but the majority of them are over eighteen, and many of them vote. It's entirely possible that over the course of a multiyear, highly publicized copyright reform effort, the interests of ordinary voters could end up playing more than a nominal role.<sup>24</sup> One can imagine circumstances in which a new awareness on the part of Congress that voters care about copyright could move the law pretty far from where current players would like to see it go.

If I am right that a new cycle of copyright revision is beginning, though, it is only barely beginning. We are currently in the very early, pre-history stages of a revision effort. We are not yet locked in. We can still make choices about the premises and underlying assumptions that will form the basis of the next revision.<sup>25</sup>

Much of my prior work has chronicled a depressing history of copyright legislation, in which copyright lobbyists engaged in protracted negotiations with one another to arrive at copyright laws that enriched established copyright industries at the expense of both creators and the general public.<sup>26</sup> There's ample reason to anticipate that the next copyright revision will proceed in similar fashion to similar ends. But what if it didn't? What if we were able to take the opportunity to rethink our copyright system? What sort of copyright law might we craft instead?

In Part I of this Article, I describe some of the problems the current copyright system poses for creators, for intermediaries, and for readers, listeners, and viewers. In Part II, I look at the copyright reform proposals drawing serious attention, and I argue that they fail to address the problems I described in Part I. I then, in Part III, suggest alternative goals for copyright reform, designed to enhance the copyright system's effectiveness

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users are downloading, altering, mixing, uploading, and/or making available audio, video, and text content on personal web pages, social sites, or using peer-to-peer technology to allow others to access content on their computer.”). According to YouTube, “People are watching 2 billion videos a day on YouTube and uploading hundreds of thousands of videos daily. In fact, every minute, 24 hours of video is uploaded to YouTube.” *YouTube Fact Sheet*, YOUTUBE, [http://www.youtube.com/t/fact\\_sheet](http://www.youtube.com/t/fact_sheet) (last visited Sept. 17, 2010). The *Wall Street Journal* reported in August 2009 that “YouTube has grown into a massive destination, with 428 million unique monthly visitors in June.” Jessica E. Vascellaro, *YouTube Pumps More Ads into Lineup*, WALL ST. J., Aug. 20, 2009, at B1.

24. In June of 2009, Sweden's Pirate Party, founded in 2006 with a platform of IP reform, captured enough votes to win a seat on the European Parliament. See Mats Lewan, *Ahoy! Pirate Party Gets Berth in European Parliament*, CNET (June 8, 2009), [http://news.cnet.com/8301-13578\\_3-10259048-38.html](http://news.cnet.com/8301-13578_3-10259048-38.html). In Canada, University of Ottawa law professor Michael Geist had notable success using Facebook and his personal blog to organize opposition to Canadian copyright reform proposals. See MICHAEL GEIST BLOG, <http://www.michaelgeist.ca/>; *Government Retreats on Copyright Reform*, Dec. 13, 2007, CBC NEWS, <http://www.cbc.ca/technology/story/2007/12/13/tech-copyright-delay.html>.

25. See generally Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804 (2008); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 3 UTAH L. REV. 551 (2007).

26. See, e.g., LITMAN, *supra* note 2.

and its legitimacy. I argue that wise copyright reform should simplify the law; should make the copyright system more useful for creators and for readers, listeners, and viewers; and should divest intermediaries of excess power and control. Those changes, I suggest, are necessary to enhance the law's legitimacy. By that rubric, none of the current copyright reform proposals seem like a wise revision. In Part IV, I outline a few specific suggestions for changes that I believe would improve the copyright system's value for both creators and their audiences. Finally, in Part V, I discuss whether there is a realistic possibility for copyright reform of the sort I described. I cannot currently envision a way to transform the premises of the copyright debate enough to make it likely that such changes would be enacted anytime soon. If we can manage, however, to encourage a broad conversation about copyright in which we're willing to imagine unconventional solutions to copyright's problems, we may discover that some changes are less impossible than we expect.

### I. THE WEAKNESSES OF THE CURRENT COPYRIGHT SYSTEM

A copyright system is designed to produce an ecology that nurtures the creation, dissemination, and enjoyment of works of authorship.<sup>27</sup> When it works well, it encourages creators to generate new works, assists intermediaries in disseminating them widely, and supports readers, listeners, and viewers in enjoying them.<sup>28</sup> If the system poses difficult entry barriers to creators, imposes difficult impediments on intermediaries, or inflicts burdensome conditions and hurdles on readers, viewers, and listeners, then the system fails to achieve at least some of its purposes. The current U.S. copyright statute is flawed in all three respects.

#### A. CREATORS' COPYRIGHT

Copyright laws, at least in theory, are designed to encourage the creation of new works of authorship by offering creators incentives in the

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27. A note on terminology: In this article, unless I am referring to specific statutory categories, I use the word "creator" rather than "author," "disseminate" rather than "distribute," and "enjoy" rather than "use." I do that primarily to avoid the baggage that "author," "distribute," and "use" have accumulated over the past few decades. By "creator," I intend to name the individuals who make works of authorship, to the exclusion of the entities and employers who finance their work, whether or not those individuals are deemed "authors" in current or past copyright laws. By "disseminate," I intend to encompass any means of making a work available to members of the public, whether or not that behavior is within the exclusive rights granted by copyright law. By "enjoy," I mean reading, listening, viewing, playing, learning from, and any other use short of commercial exploitation, whether or not current law holds that such use requires a license. *See also infra* note 54.

28. *See* L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright*, 46 HOUS. L. REV. 215, 383 (2009) (copyright should serve "the public interest in the creation, transmission, and use of knowledge"). Patterson and Birch argue that while conventional copyright theory envisioned a bilateral relationship between author and user, it should instead be based on a tripartite relationship among author, publisher, and user. *Id.*

form of control. Those incentives are said to spur creators to author new works and make them available to the public, and to enable creators to earn income from the dissemination of their creations.<sup>29</sup> The law's congruence with the theory, at least in many fields of authorship, is more aspirational than real.<sup>30</sup>

Creators face demoralizing obstacles in searching for opportunities to write, paint, play, or film anything the public will see or hear.<sup>31</sup> The chance to reach an audience has been turned into a tantalizing grand prize for aspiring musicians,<sup>32</sup> filmmakers,<sup>33</sup> actors,<sup>34</sup> painters,<sup>35</sup> sculptors,<sup>36</sup> and photographers,<sup>37</sup> who are willing to endure the indignities of reality television in the hope of scoring an apprenticeship, patron, or entry-level job creating works of authorship. Even when creators succeed in publishing a book, cutting an album, placing an article, or selling a screenplay, moreover, they typically earn only a small share of the proceeds of the copyrights in their works. In most creative spheres, authors' control over their works is short-lived, and the earnings they collect from them are

29. See, e.g., PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 7 (1994); Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1613 (2001). As Diane Zimmerman has recently reminded us, the soundness of the basic copyright incentive theory is, so far, merely theoretical. See Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. (forthcoming 2011), available at <http://ssrn.com/abstract=1515964>.

30. See WILLIAM PATRY, *MORAL PANICS AND THE COPYRIGHT WARS* 117–19 (2009).

31. See, e.g., TODD LONDON ET AL., *OUTRAGEOUS FORTUNE: THE LIFE AND TIMES OF THE NEW AMERICAN PLAY* 2 (2009) (Theatre Development Fund study finding a “system of theatrical production that has become increasingly alienating to individual artists and inhospitable to the cultivation of new work for the stage”); Michael Cieply, *Films Finding a Tougher Market in Toronto*, N.Y. TIMES, Sept. 14, 2009, at C1 (reporting that the vast majority of independent films shown at the 2009 Toronto film festival failed to find an American distributor); Jon Pareles, *1,700 Bands, Rocking as the CD Industry Reels*, N.Y. TIMES, Mar. 15, 2008, at A1 (“There’s never a shortage of eager musicians. Many bands drive cross-country by van or cross an ocean to perform an unpaid showcase at South By Southwest, and the most determined ones play not only their one festival slot but also half a dozen peripheral parties as well, hoping to be noticed.”); *BEFORE THE MUSIC DIES* (B-Side Entertainment 2006) (documentary film about the music and recording industries).

32. See, e.g., *American Idol* (FOX television series 2002–2010); see also Pareles, *supra* note 31.

33. See, e.g., *On the Lot* (FOX television series 2007); *Project Greenlight* (HBO 2001–2005).

34. See, e.g., *Grease: You’re the One that I Want* (NBC television series 2007); *High School Musical: Get in the Picture* (ABC 2008); *Legally Blond the Musical: The Search for Elle Woods* (MTV television series 2008).

35. See Randy Kennedy, *When Art Meets TV, Realism Might Not Make It to Reality*, N.Y. TIMES, July 20, 2009, at C1 (hundreds of painters audition for new reality show to discover unknown visual artists).

36. See *Work of Art: The Next Great Artist* (BRAVO television series 2010).

37. See *The Shot* (VHI television series 2007) (reality show competition among still photographers for “\$100,000, the chance to shoot a fashion spread for Marie Claire magazine, and have their shot on the cover of a Victoria Secret catalog”).

modest.<sup>38</sup> The control of their works and the bulk of the proceeds they earn are held instead by copyright owners who serve as intermediaries between the authors and their audiences.<sup>39</sup>

Only a few creators get rich from copyright royalties. A somewhat larger number are able to make a living from creating works of authorship, but the majority of creators need day jobs to supplement their income.<sup>40</sup> The academy is full of poets, novelists, painters, composers, and performers who teach; the waiter who brought your meal the last time you dined in New York or Los Angeles is most likely there awaiting his or her next audition.

Why is authorship so unremunerative? It isn't that people don't value works of authorship enough to spend money for them. Studies of the economic contribution made by copyright industries to the U.S. economy report that they generate more than a trillion dollars annually.<sup>41</sup> Very few of those dollars, however, end up in creators' pockets. The copyright statute incorporates a decided bias in favor of distributors. That bias comes primarily at creators' expense. Although U.S. copyright law vests copyright as an initial matter in authors' hands, the creator is not necessarily the author as a legal matter. All works created by employees within the scope of their employment and many works created by independent contractors are deemed to have been authored by the employer or commissioner as a matter of law.<sup>42</sup> For other works, the creator is the author and owns the

38. See, e.g., DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 68–98, 386–91, 398–404 (5th ed. 2003); Herman Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. PA. L. REV. 1025, 1051 (1956); BEFORE THE MUSIC DIES, *supra* note 31.

39. See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 75 (1967); PATRY, *supra* note 30, at 117; Graeme W. Austin, *Keynote Address*, 28 COLUM. J.L. & ARTS 397 (2004).

40. See LONDON ET AL., *supra* note 31, at 50–80 (reporting that even successful playwrights cannot make a living from their plays); U.S. BUREAU OF LABOR STATISTICS, *Musicians, Singers and Related Workers*, OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 EDITION, <http://www.bls.gov/oco/pdf/ocos095.pdf> (“Part-time schedules—typically at night and on weekends—intermittent unemployment, and rejection when auditioning for work are common; many musicians and singers supplement their income with earnings from other sources.”); U.S. BUREAU OF LABOR STATISTICS, *Artists and Related Workers*, OCCUPATIONAL OUTLOOK HANDBOOK, 2010-11 EDITION, <http://www.bls.gov/oco/ocos092.htm> (“Actors endure long periods of unemployment, intense competition for roles, and frequent rejections in auditions. . . . Because earnings may be erratic, many actors, producers, and directors supplement their incomes by holding jobs in other fields.”). For other examples, see Zimmerman, *supra* note 29, at 9–10.

41. See, e.g., THOMAS ROGERS & ANDREW SZAMOSSZEGI, FAIR USE IN THE U.S. ECONOMY: ECONOMIC CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 8 (2010), <http://www.cciagnet.org/CCIA/files/ccLibraryFiles/File/00000000354/fair-use-study-final.pdf> (“In 2007, fair use industries generated revenue of \$4.7 trillion, a 36 percent increase over 2002 revenue of \$3.4 trillion.”); STEPHEN E. SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2003–2007 REPORT 3 (June 2009), <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf> (“By 2007 . . . the value added to the U.S. GDP by the ‘total’ copyright industries rose to \$1.52 trillion . . . or 11.05% of U.S. GDP.”).

42. See 17 U.S.C. §§ 101, 201 (2006). The United States is one of a small number of countries to have a work made for hire doctrine, and even among countries that deem employers to be authors of some works, the scope of the U.S. doctrine is unusually broad.

copyright as an initial matter, but the copyright system encourages the author to assign her copyright to a distributor in exchange for exploitation.<sup>43</sup> Once the author transfers her copyright, the law does not make it easy for her to retrieve it. Although the statute contains a mechanism intended to allow authors to reclaim copyrights after 35, 40, 56, or 75 years,<sup>44</sup> the mechanism was designed to make it extremely difficult to do so.<sup>45</sup> Meanwhile, creators of some works cannot as a practical matter navigate the system as individuals. The statutory compulsory licenses, for example, contemplate that claimants to a share of statutory license fees will be represented by corporate or collective entities; those entities operate on the assumption that copyrights have been assigned to distributor intermediaries.<sup>46</sup>

Some people point out that authors have very little bargaining power as compared with publishers,<sup>47</sup> but that isn't inherent in the natural order. Rather, it reflects the fact that the American copyright law tilts, and has always tilted, the playing field in distributors' favor. The disparity of bargaining power is at least partly an artifact of the way the copyright law works.<sup>48</sup> The copyright statute has favored publishers, record labels, motion picture studios, and other distributors because Congress has, for the past century, encouraged lawyers for publishers, record labels, motion picture

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43. The law makes copyright assignment easy. *See id.* § 204. Once the copyright is assigned, the new copyright owner stands in the shoes of the original author, and will be entitled to exercise almost all copyright rights, including the right to sue the original creator for copyright infringement. *See, e.g., Fantasy, Inc. v. Fogerty*, 510 U.S. 517 (1994).

44. *See* 17 U.S.C. § 203(a)(3) (thirty-five or forty years after grant); *id.* § 304(c)(3) (fifty-six years after copyright first secured); *id.* § 304(d)(2) (seventy-five years after copyright first secured only if the § 304(c) termination opportunity was foregone).

45. *See generally* Howard Abrams, *Who's Sorry Now? Termination Rights and the Derivative Work Exception*, 62 U. DET. L. REV. 181 (1985); Allison M. Scott, Note, *Oh Bother: Milne, Steinbeck, and an Emerging Circuit Split over the Alienability of Copyright Termination Rights*, 14 J. INTELL. PROP. L. 357 (2007). *See infra* notes 163–73 and accompanying text.

46. *See* COPYRIGHT ROYALTY BD., LIBRARY OF CONG., <http://www.loc.gov/crb/> (last visited Sept. 17, 2010); SOUNDEXCHANGE, <http://www.soundexchange.com> (last visited Sept. 17, 2010).

47. *See, e.g.,* Gabe Bloch, Note, *Transformation in Publishing: Modeling the Effect of New Media*, 20 BERKELEY TECH. L.J. 647 (2005). Creators in some industries have additional clout as a consequence of unionization and collective bargaining, but must usually give up their copyrights as a condition of employment.

48. *See, e.g.,* Olufunmilayo B. Arewa, *Blues Lives: Promise and Perils of Musical Copyright*, 27 CARDOZO ARTS & ENT. L.J. 573 (2010). Recent court rulings reading the copyright statute to require copyright owner permission for even tiny uses of expression from copyrighted works, *see, for example, Bridgeport Music, Inc. v. Dimension Films*, 383 F.3d 390 (6th Cir. 2004), have exacerbated the problem. If creators must seek myriad licenses from multiple sources before releasing their works to the public, they will need to rely on the licensing resources of a major distributor. *See Copyright Criminals: This Is a Sampling Sport* (PBS television broadcast Jan. 19, 2010), available at <http://www.copyrightcriminals.com/>. An additional factor in the disparity is the large capital investment once required to engage in mass distribution of an author's works. *See infra* text accompanying note 49.

studios, and other distributors to write themselves a law that worked for them.<sup>49</sup> What worked for them was a system that reposed power in copyright owners and made it easiest for distributors to end up owning the copyrights.

A law favoring distributors at creators' expense made more practical sense in the nineteenth and twentieth centuries than it does in the twenty-first. Until recently, mass distribution of copies of works of authorship required large capital investment. Paper, printing presses, broadcast towers, motion picture and video cameras, stores, trucks, and the other incidents of mass distribution networks are very expensive. Before digital networks, it was entirely reasonable to assume that only if distributors could rely on collecting the largest share of proceeds from copyrighted works would the business of mass distribution seem likely to reward their investment.<sup>50</sup> Today, of course, there are many ways of disseminating works to everyone in the world without having to spend much money. One implication is that individuals can transmit copies of works to one another at insignificant expense. That is the one that's received all the attention, as copyright owners indulge in panic over unlicensed dissemination.<sup>51</sup> A second implication strikes me as more interesting: the new economics of digital distribution mean that we no longer need to shape our copyright law in ways that disadvantage creators vis-à-vis distributors unless we want to.

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49. See generally LITMAN, *supra* note 2. This isn't a recent phenomenon. Anglo-American copyright law originated as a law by and for printers and publishers and has always been distributor-centric. See KAPLAN, *supra* note 39, at 1-37; LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 42-178 (1968); MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 10-66 (1993).

50. See, e.g., KAPLAN, *supra* note 39, at 5-9, 75-78.

51. See, e.g., *An Update: Piracy on University Networks: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 6-8 (2007) [hereinafter *An Update: Piracy on University Networks*], available at <http://judiciary.house.gov/hearings/printers/110th/33812.PDF> (testimony of Cary Sherman, President, Recording Industry Association of America ("RIAA")) (complaining that universities have failed to stop "piracy where it is most rampant"); *id.* at 75-77 (letter from Dan Glickman, Chairman and Chief Executive Officer, Motion Picture Association of America ("MPAA")) (attributing forty-four percent of the film industry's domestic losses to college students); *Protecting Copyright and Innovation in a Post-Grokster World: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 16-17 (2005), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:34113.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:34113.pdf) (testimony of Marty Roe, Recording Artist, Arista Records) (stating that peer-to-peer businesses have forced musicians and songwriters to abandon their music careers); *id.* at 18 (testimony of Cary Sherman) (stating that peer-to-peer is the reason that "[t]housands of individuals engaged in the music, film and other entertainment industries have seen their jobs disappear"); INT'L INTELLECTUAL PROP. ALLIANCE, COPYRIGHT INDUSTRIES' GLOBAL CHALLENGES FOR 2009, <http://www.iipa.com/pdf/IIPA2009GlobalChallenges.pdf> ("Internet piracy, from infringing websites, top site pre-release groups, to unauthorized [peer-to-peer] file sharing, has undergone explosive growth, hindering legitimate electronic commerce opportunities and causing mounting losses to the music, movie, videogame, business software and publishing industries.").

### B. READERS' COPYRIGHT

If creators are the natural subject of copyright, readers, listeners, and viewers are its purpose. The most important reason we encourage creators to make, and distributors to disseminate, works of authorship is so that people will read the books, listen to the music, look at the art, and watch the movies.<sup>52</sup> We want readers, listeners, and viewers to enjoy the works, learn from them, interact with them, and communicate with one another about them. That is the way that copyright law promotes the Progress of Science.<sup>53</sup> In practical terms, that means we need to make sure there's enough freedom built into the law to ensure that copyright doesn't get in the way of reading, viewing, and listening.

Readers, listeners, and viewers<sup>54</sup> have, until recently, been the beneficiaries of a law designed to allow most people to enjoy copyrighted works without worrying about the copyright law. For most of copyright law's history, it has applied narrowly, directly affecting only individuals and businesses for whom copyright was a central concern. By granting copyright owners control over specified, defined uses and leaving other uses unconstrained, copyright law gave readers, listeners, and viewers considerable freedom to enjoy copyrighted works.<sup>55</sup> Copyright law protected only a small number of works, conferring narrow rights for relatively short periods of time. The limited scope of copyright left large free spaces that permitted readers, listeners, and viewers to enjoy copyrighted works as they wanted to without attention to what the copyright law said. There weren't many express user rights in the statute; there didn't need to be. Congress or the courts stepped in to add express user rights only in instances in which copyright owners overreached the boundaries of their rights by filing suit

52. See KAPLAN, *supra* note 39, at 75–76; L. Ray Patterson, *Fair Use for Teaching and Research: The Folly of Kinko's and Texaco*, in GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION, AND SOCIETY 351, 356–63 (Laura N. Gasaway ed., 1997).

53. *E.g.*, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). See generally Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 HARV. L. REV. 1149 (1998).

54. The literature discussing the public's interest in copyright is struggling with the issue of just what should we call the folks who read, listen to, look at, watch, play, run, and build works of authorship. Popular choices include “users,” see Julie Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347 (2005); Patterson & Birch, *supra* note 28, “consumers,” see Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH. L.J. 1119 (2007); Joseph Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003), and “fans,” see Fred Von Lohmann, *Is Suing Your Customers a Good Idea?*, LAW.COM (Sept. 29, 2004), <http://www.law.com/jsp/article.jsp?id=1095434496352>. See also Justin Hughes, *“Recoding” Intellectual Property and Overlooked Audience Interests*, 77 TEX. L. REV. 923 (1999) (“non-owners”). In this Article, I call individuals enjoying copyrighted works “readers” or “readers, listeners, and viewers.”

55. See KAPLAN, *supra* note 39, at 25–36; Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871 (2007).

over reasonable-seeming practices.<sup>56</sup> The basic architecture of the system respected the rights of readers, listeners, and viewers by limiting the reach of copyright rights, rather than by setting out the scope of individual audience interests in explicit terms.

Throughout the nineteenth and twentieth centuries, the idea that copyright law constrained how readers may read books, how listeners may listen to music, or how viewers could watch television programming would have been seen as a radical expansion.<sup>57</sup> As technology has enabled individuals to enjoy works in new ways, however, copyright owners have asked for greatly enhanced control over their works. Copyright owners have insisted to Congress and the courts that, because copyrights are their property, nobody should be allowed to make a valuable use of a copyrighted work without paying the copyright owner.<sup>58</sup> Those arguments have fueled both statutory and non-statutory expansions in the scope of copyright rights.<sup>59</sup> After persuading Congress to enact a statute prohibiting anyone from circumventing technological protections that prevent unauthorized access or use,<sup>60</sup> copyright owners have distributed copies of works in incompatible formats, and insisted that purchasers of those copies have and

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56. The statute's express user exemptions provisions are idiosyncratic, and most of them trace their origin from ill-considered lawsuits. *Compare, e.g.*, 17 U.S.C. § 109(a) (2006) (allowing resale of lawfully made copies), *id.* § 109(c) (permitting people to play videogames in public places), *id.* § 110(5)(A) (permitting people to play radio and television broadcasts in public places), *and id.* § 110(11) (permitting in-home use of censorware to block the sexual or violent scenes in movies released on DVDs), *with Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (rejecting infringement claim for playing radio in small restaurant), *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908) (rejecting infringement claim for discount book resale), *Red Baron-Franklin Park Inc. v. Taito Corp.*, 883 F. 2d 275 (4th Cir. 1989) (holding arcade liable for public performance of videogames), *and Cleanflicks of Colo., LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006) (enjoining commercial entities from editing commercially released DVDs to remove sexual or violent content).

57. See Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917, 932-42 (2005); L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry into a Need for a Federal Statute of Unfair Competition*, 17 U. DAYTON L. REV. 385 (1992).

58. See, e.g., *The Performance Rights Act and Parity Among Music Delivery Platforms: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 9-11 (2009) [hereinafter *The Performance Rights Act*], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111\\_senate\\_hearings&docid=f:54557.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:54557.pdf) (testimony of Marian Leighton-Levy, Founder and Owner, Rounder Records); see also *id.* at 14 (testimony of Ralph Oman, Lecturer, George Washington University, and former Register of Copyrights) ("It comes down to this, . . . [a]s a matter of property rights, men and women who create and own a copyrighted work should have the right to get paid for it by the people who use their works. That is the basic premise of copyright protection.").

59. Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 593-96 (2008).

60. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (codified as amended at 17 U.S.C. §§ 1201-1204); *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009).

should have no legitimate claim to be able to bypass technological locks.<sup>61</sup> Readers, listeners, and viewers today face inconvenience and inflated prices, and a future in which businesses roll out more maddeningly incompatible formats.<sup>62</sup> Meanwhile, enhanced copyright-owner control has squeezed reader, listener, and viewer freedom to enjoy works in ways that depart from the copyright owners' menu. If an important purpose of copyright law is to encourage reading, listening, and viewing, a law that makes those acts less likely is counterproductive.<sup>63</sup> If the copyright system is designed in a way that significantly impairs the reading, listening, and viewing of copyrighted works, then it will fail to accomplish one of its core goals.

Copyright laws that make reading, listening, and viewing more difficult are problematic for a second reason: the sheer pointlessness of some of these restraints has undermined the perceived legitimacy of the U.S. copyright system.<sup>64</sup> Copyright law's legitimacy has suffered marked erosion

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61. See, e.g., DVD Copy Control Ass'n, RM 2008-8, Reply Comments (Feb. 2, 2009), available at <http://www.copyright.gov/1201/2008/responses/dvd-cca-inc-38.pdf>; Motion Picture Ass'n of Am., RM 2008-8, Comments (Feb. 2, 2009), available at <http://www.copyright.gov/1201/2008/responses/mpaa-46.pdf>; Software & Info. Indus. Ass'n, RM 2008-8, Reply Comments (Feb. 2, 2009), available at <http://www.copyright.gov/1201/2008/responses/software-information-industry-assoc-17.pdf>.

62. See, e.g., TARLETON GILLESPIE, WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE 267-81 (2007); Nate Anderson, *DRM Still Sucks: Yahoo Music Going Dark, Taking Keys with It*, ARS TECHNICA (July 24, 2008, 3:00 PM) <http://arstechnica.com/news.ars/post/2008-07-24-drm-still-sucks-yahoo-music-going-dark-taking-keys-with-it.html>; Cory Doctorow, *How To Destroy the Book, Speech Before the National Reading Summit* (Nov. 13, 2009), in THE VARSITY, Dec. 14, 2009, available at <http://thevarsity.ca/articles/23855>. There are other problems with current DRM regimes: some of them give publishers more control over purchased content than consumers have any reason to expect. In July of 2009, for example, Amazon.com resolved a copyright dispute with the publisher of George Orwell's *Animal Farm* and *1984*, by automatically deleting purchased copies of both e-books from purchaser's Kindle e-book readers, and crediting their accounts for a "return." See David Pogue, *Pogue's Posts: Some E-Books Are More Equal than Others*, N.Y. TIMES (July 17, 2009, 12:57 PM), <http://pogue.blogs.nytimes.com/2009/07/17/some-e-books-are-more-equal-than-others/>. See generally *Updated and Corrected: E-Books Buyer's Guide to Privacy*, ELEC. FRONTIER FOUND. (Jan. 6, 2010), <http://www.eff.org/deeplinks/2010/01/updated-and-corrected-e-book-buyers-guide-privacy> (summarizing privacy-related policies of popular e-book readers).

63. See GILLESPIE, *supra* note 62, at 273-79; John A. Rothchild, *The Social Costs of Technological Protection Measures*, 34 FLA. ST. U. L. REV. 1181, 1198-1205 (2007).

64. See, e.g., PATRY, *supra* note 30, at 161-70 (criticizing copyright industries' misuse of anticircumvention provisions of DMCA); Jane C. Ginsburg, *The Right To Claim Authorship in U.S. Copyright and Trademarks Law*, 41 HOUS. L. REV. 263, 264 (2004) ("If you inquired among the general public, 'What does U.S. copyright law protect?' many people might start by grumbling that it overprotects piggish record companies."); John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 548-49 (arguing that more sophisticated copyright enforcement has forced us to confront the "vast disparity between what activities the Copyright Act proscribes and what the average American might consider fair or just").

in the public's view.<sup>65</sup> That damage is an independent threat to the health of the copyright system.

The current copyright system's disservice to readers, listeners, and viewers, however, goes beyond simply impeding their enjoyment of works by encouraging copyright owners to deploy annoying mechanisms to track, trace, meter, monetize, and restrict it. More fundamentally, it ignores or devalues the creativity that readers bring to the works they enjoy. Reading, listening, and viewing have never been acts of purely passive absorption; they have always entailed meaningful creativity and imagination.<sup>66</sup> The widespread deployment of digital technology now allows readers, listeners, and viewers to express their creative readings in fixed form and share them with the world. They have flooded the Internet with the digital, online instantiation of the same creative impulses that readers, listeners, and viewers have expressed since before the invention of copyright.<sup>67</sup> Most of this creative activity has been neither exploitative nor commercial.<sup>68</sup> It has seemed to enhance rather than detract from copyrighted works' success. Indeed, by serving as a focus for communities of fans, it has tended to stoke demand.<sup>69</sup> Most copyright owners have therefore been loath to condemn it. The copyright system views this activity as presumptively illegal, if commonly "tolerated."<sup>70</sup> Rather than sheltering it under a privilege or exemption, or drawing careful lines to divide the legal from the illegal, the law simply pretends that it isn't there. (Unless of course, the copyright owner deigns to object to it, at which point it needs to disappear for real.)<sup>71</sup> A system that treats creative activity in which readers, listeners, and viewers engage every day as a "tolerated use," ignored rather than promoted or permitted, is not a system designed to encourage the creative enjoyment of copyrighted works. If readers, listeners, and viewers see this law as neither sensible nor reasonable, who could blame them?

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65. *Accord* PATRY, *supra* note 30, at xx–xxiv; Paul Edward Gellar, *Beyond the Copyright Crisis: Principles for Change*, 55 J. COPYRIGHT SOC'Y U.S.A. 165, 175 (2008); Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 COLUM. J.L. & ARTS 61, 63–67 (2002); *see also* MARK HELPRIN, *DIGITAL BARBARISM*, at xiii (2009) ("[I]ntellectual property rights do not anymore enjoy the presumption either that they are justified or that they will endure.").

66. *See* Jessica Litman, *Creative Reading*, LAW & CONTEMP. PROBS., Spring 2007, at 175, 175–80.

67. *See* Sara K. Stadler, *Performance Values*, 83 NOTRE DAME L. REV. 697, 727–28 (2008).

68. *See generally, e.g.*, Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, LAW & CONTEMP. PROBS., Spring 2007, at 135.

69. *See* Litman, *supra* note 66, at 175–80.

70. *See* Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008) (defining "tolerated use" as "infringing usage of a copyrighted work of which the copyright owner may be aware, yet does nothing about").

71. *See* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513 (S.D.N.Y. 2008) (enjoining publication of *Harry Potter Lexicon*); *Cease and Desist Notices: Fan Fiction*, CHILLING EFFECTS CLEARINGHOUSE, <http://www.chillingeffects.org/fanfic/notice.cgi> (last visited Sept. 17, 2010) (archive of cease and desist letters objecting to fan sites).

The widespread perception of the current copyright system as illegitimate should be unsurprising. In significant part, it flows from copyright owners' assertions that, as established copyright players, they should be entitled to prescribe the rules for new entrants. Throughout copyright history, entrenched players have sought to hold new players to copyright rules written by and for established groups; the new players have challenged the legitimacy of that move, and by and large have succeeded in persuading Congress to enact new rules crafted to meet their needs.<sup>72</sup> In the early twentieth century, music publishers tried to bind piano roll makers to the rules they had set up with music printers; dramatists and novelists tried to force motion picture producers to follow the rules they had worked out with theatrical producers. In the 1920s, composers sought to require business establishments with radios to license music as if they were mounting live performances; in the 1930s, composers and music publishers made the same demands on motion picture theaters showing talkies. In the 1970s, copyright owners and broadcast television stations insisted that cable television operators should need to license every signal they transmitted on the same terms as broadcast television; in the 1980s, they made comparable demands of satellite-TV companies. In the 1990s, copyright owners insisted that Internet service providers should seek permission for every computer copy of any work on the same basis that publishers and record labels were required to license printed books and records. In every case, the businesses exploiting the new medium successfully insisted that the new technology required new, medium-specific rules.<sup>73</sup> Today, book publishers, record labels, and motion picture studios maintain that the laws they agreed on among themselves to govern their interactions with one another are the rules that should apply to all the ordinary readers, listeners, and viewers in their audiences.<sup>74</sup> Why should the public agree that these rules are either fair or wise?

Indeed, the dangers of this particular legitimacy crisis may be more significant than attacks by earlier outsider groups, because a public citizenry that believes its copyright law is illegitimate may respond by withdrawing its support from the system. The public, after all, invests in the copyright system both by granting rights to copyright owners through the enactment of copyright laws, and by complying with the laws its Congress enacts.<sup>75</sup> If the public perceives copyright law to give it a poor return on its investment, it may well respond by divesting—either pressing its elected representatives to enact additional limitations and privileges, or simply failing to comply with

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72. See LITMAN, *supra* note 2, at 39–41, 47–48, 58–62, 122–45.

73. See *id.* at 39–47, 58–60, 127–36.

74. See *id.* at 114–17.

75. See Joel R. Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 HOUS. L. REV. 1073, 1076–79 (2008). Reidenberg deploys this insight to argue that copyright disobedience is a frontal challenge to the rule of law. *Id.*

rules it no longer perceives as legitimate. Millions of citizens have used unlicensed peer-to-peer file-sharing applications to share music with each other, even though they faced a highly publicized risk of being sued for hundreds of thousands of dollars. Many, perhaps most, of them don't believe they're doing anything wrong. Enforcing copyright law in an atmosphere of public cynicism about the legitimacy of the law is a difficult task. A public that complies with copyright only because it's afraid of the copyright police will soon find ways to evade or restrain the copyright police. The long-term health of the copyright system, thus, requires that members of the public believe that their investment in copyright is well spent.

### C. INTERMEDIARIES' COPYRIGHT

The copyright system has traditionally relied on two different sorts of intermediaries whose motivation to further the goals of copyright is primarily economic. Distributors commonly make and distribute copies of works of authorship and authorize other uses. Under the legacy system we have inherited, distributors own the copyrights; they license reproduction, adaptation, and public distribution, performance, and display. Other intermediaries, whom I term "makers," invent and market devices and services for enjoying works of authorship, without themselves engaging in licensed uses. The relationship between distributors and makers has been contested for much of copyright's history.

#### 1. Distributors

Under the conventional law-and-economics view of copyright, distributors are essential.<sup>76</sup> By creating a market for copyrighted works, they both provide the money that acts as an incentive for creators to make new works, and move copies or performances of those works to where readers, listeners, and viewers can enjoy them.<sup>77</sup> As the entities who buy copyrights from creators, these intermediaries claim to stand in the shoes of the audience for the works;<sup>78</sup> as the interests who sell copies and performances

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76. See, e.g., 1 PAUL GOLDSTEIN, *COPYRIGHT: PRINCIPLES, LAW AND PRACTICE* 4–20 (1989); Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1907–16 (1990); see also *Am. Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1, 16 (S.D.N.Y. 1992) (explaining that “copyright protection is essential to finance the publications that distribute” scientific articles, even though authors are not paid for them), *aff'd*, 60 F.3d 913 (2d Cir. 1994).

77. See, e.g., Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209 (1983); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1602 (1982).

78. See, e.g., *Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary*, 109th Cong. 75–88 (2005) [hereinafter *Music Licensing Reform*], available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_senate\\_hearings&docid=f:22919.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:22919.pdf) (testimony of Rob Glaser, Chairman and Chief Executive Officer, RealNetworks,

to individual readers, viewers, and listeners, they claim to stand in the shoes of creators and collect rents on their behalf.<sup>79</sup> Of course, distributors don't enter into the copyright marketplace solely to promote the "Progress of Science,"<sup>80</sup> their participation in the copyright system is fueled primarily by self-interest.

Distributors find a lot to complain about in their current position in the copyright system. Although distributors were primarily responsible for the design of the current statute, they are discovering that they failed to anticipate and solve many of the problems that its architecture poses in the networked digital environment. Part of distributors' difficulty—the part that has garnered the most attention—stems from the challenges posed by digital distribution. The ease of unlicensed digital dissemination threatens the model underlying most distributors' businesses.<sup>81</sup>

A different but equally pressing set of problems derives from the tangled snarls attending licensing of copyrighted works.<sup>82</sup> The law is hospitable for large and well-established players pursuing traditional business models.<sup>83</sup> So long as a distributor is an established large copyright player determined to continue to do whatever brought it success in the past, the current U.S. copyright law is its friend. Control of a large repertoire of

Inc., for Digital Media Association); *id.* at 63–74 (testimony of Ismael Cuebas, Director of Merchandising Operations, TransWorld Entertainment Corp., for National Association of Recording Merchandisers).

79. *See, e.g., id.* at 145–48 (testimony of Irwin Z. Robinson, Chairman and Chief Executive Officer, Famous Music Publishing, for National Music Publishers Association).

80. U.S. CONST. art. I, § 8, cl. 8 ("Congress shall have Power . . . To promote the Progress of Science and useful Arts . . .").

81. *See, e.g.,* Jane Ginsburg, *Essay: From Having Copies to Experiencing Works: The Development of an Access Right in U.S. Copyright Law*, 50 J. COPYRIGHT SOC'Y U.S.A. 113 (2003).

82. *See Music Licensing Reform, supra* note 78, at 41–48 (testimony of Glen Barros, President and Chief Executive Officer, Concord Music Group); *id.* at 75–78 (testimony of Rob Glaser).

83. Lobbyists for copyright-owning businesses have succeeded in persuading Congress to enact copyright laws that allocate much of the benefit of copyright to intermediaries, and that incorporate powerful benefits for incumbents. This advantage comes in two basic flavors. First, when Congress enacts the rules surrounding a new right, license, or exception, it defines it in narrow terms that fit the current practice of the incumbents who negotiated the statutory provision but are not useful for outsiders. The exception in § 117(c) allowing computer maintenance and repair services to turn on computers for the sole purpose of maintaining or repairing them was drafted with sufficient narrowness to make it unavailable to people who wish to turn on their computers for other purposes. *See* 17 U.S.C. § 117(c) (2006). Second, Congress commonly gives copyright goodies to the incumbents who request them. Thus, when Congress in 1998 extended copyright terms by twenty years, it vested the extended term in current copyright proprietors rather than authors, subject to a narrow and difficult to exercise termination right for a limited class of authors who had not previously sought to recapture their copyrights. *See* Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified as amended in scattered sections of 17 U.S.C.). The termination provisions, like those for the 1976 extension of the copyright term, make it more difficult to reassign rights under a terminated copyright grant to anyone other than the original grantee. *See* 17 U.S.C. § 304(c)(6)(C)–(D).

copyrighted works or of large media outlets combined with economies of scale in licensing transactions enable established players to license conventional uses with only modest difficulty. A creator or distributor seeking to exploit works in new media, though, faces daunting problems in identifying the rightsholders entitled to license its uses and negotiating the terms of the licenses.<sup>84</sup> Even established industry groups have complained that the licensing provisions of the current law are simply unworkable for newer uses.<sup>85</sup> Innovations like copyright divisibility,<sup>86</sup> which seemed like a good idea at the time,<sup>87</sup> have vastly complicated the licensing of copyrighted works by subjecting would-be licensees to multiple and sometimes inconsistent demands.<sup>88</sup> Small businesses that want to pay reasonable royalties for the opportunity to exploit works in new markets can face insuperable difficulties in arranging to do so.<sup>89</sup> Failing to cross all the t's and dot the right i's, even with the assistance of counsel, is a good way to find your business sued into bankruptcy.<sup>90</sup>

Some erosion in the position of distributors under copyright is probably both natural and desirable. As expensive methods of distribution yield to

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84. See *Music Licensing Reform*, *supra* note 78; Editorial, *Orphan Works*, D-LIB MAGAZINE, June 2006, available at <http://www.dlib.org/dlib/june06/06editorial.html>; Anonymous, *Showstopper*, QUESTIONCOPYRIGHT.ORG (Jan. 5, 2010, 23:49), <http://questioncopyright.org/showstopper>.

85. See, e.g., *Section 115 of the Copyright Act: In Need of an Update?: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. (2004) [hereinafter *Section 115 of the Copyright Act*]; *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 22–37 (2004) (testimony of Dan Halyburton, Senior Vice President/General Manager of Group Operations, Susquehanna Radio Corp., on behalf of the National Association of Broadcasters) [hereinafter *Internet Streaming of Radio Broadcasts*].

86. Under 17 U.S.C. § 201(d)(2), any subset of copyright rights may be transferred and owned separately. 17 U.S.C. § 201(d)(2). The law does not require the owner of a copyright or any portion of a copyright to register her claim, and registration of transfers of parts of a copyright are rare. That makes it difficult for entities seeking to negotiate a license to determine the identity of the appropriate licensor.

87. See H.R. REP. NO. 94-1476, at 123 (1976) (“[Divisibility] has long been sought by authors and their representatives, and . . . has attracted wide support from other groups . . .”).

88. See, e.g., *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007); Mark A. Lemley, *Dealing with Overlapping Copyrights on the Internet*, 22 U. DAYTON L. REV. 547, 565–74 (1997); Jessica Litman, *Sharing & Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 18–23 (2005); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 689–702 (2003); Stadler, *supra* note, 67, at 732.

89. See, e.g., *Country Rd. Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325 (S.D.N.Y. 2003); *Twentieth Century Fox Film Corp. v. iCraveTV*, 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. 2000); *Non-waiver of Rights*, SOUNDEXCHANGE (Nov. 5, 2009), <http://soundexchange.com/?s=non+waiver+of+rights>.

90. See *Paramount Pictures Corp. v. RePlayTV*, 298 F. Supp. 2d 921 (C.D. Cal. 2004); *Copyright.net Music Publ’g LLC v. MP3.com*, 256 F. Supp. 2d 214 (S.D.N.Y. 2003); John Borland, *iCraveTV.com’s Exec Discusses His Start-up’s Short Life*, CNET (Feb. 29, 2000), <http://news.cnet.com/2100-1033-237450.html>.

inexpensive alternatives, the justification for giving distributors the lion's share of the copyright fades.<sup>91</sup> Where the design of the statute introduces unnecessary uncertainty, expense, and obstacles into distribution, though, it's simply wasteful.

## 2. Makers

I haven't yet spoken to the interests of a second sort of intermediary, which, historically, has found copyright law to cause significant problems. This is the group of people and businesses who make instruments, devices, and services designed for the enjoyment of copyrighted works. This category comprises trumpets, pianos, violins, radios, televisions, tape recorders, computers, DVD players, e-book readers, and iPods. The people who make trumpets are in the business of making money, sometimes lots of money, from music written by other people. Indeed, their entire business model depends on the commercial exploitation of other people's music. In general, instrument makers profit commercially by taking advantage of readers', listeners', and players' desires to enjoy works created by others.

For most of its history, the copyright law ignored instrument makers. After all, making and selling a trumpet, or a radio, or a digital video recorder does not necessarily involve any copying, adaptation, public performance, or public distribution of works of authorship. But a business that makes and sells instruments might make a pot of money because of the demand produced by the creators of copyrighted works. And that money attracted the attention of copyright owners. Where attention lands, litigation often follows. The history of copyright law reflects repeated efforts by copyright owners to bring the manufacture of devices and the sale of services for enjoying copyrighted works within copyright owners' control. Some of those efforts failed; others succeeded.

Toward the end of the nineteenth century, music publishers filed unsuccessful copyright infringement suits against the manufacturers of player pianos and piano rolls.<sup>92</sup> Rebuffed by the courts, music publishers persuaded Congress to extend copyright in 1909 to encompass control of "parts of instruments serving to reproduce mechanically the musical work."<sup>93</sup>

When radio broadcasts became common, copyright owners sought to enjoin broadcasters from unlicensed broadcast of the works, and

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91. I am indebted to Michael Carroll for this insight. See Michael W. Carroll, *Whose Music Is It Anyway?: How We Came To View Musical Expression as a Form of Property*, 72 U. CIN. L. REV. 1405, 1494-95 (2003).

92. See *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908); *Kennedy v. McTammany*, 33 F. 584 (D. Mass. 1888); see also *Stern v. Rosey*, 17 App. D.C. 562 (1901) (holding that it is not copyright infringement to make and sell wax cylinders for phonographs).

93. See Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075-76 (current version at 17 U.S.C. §§ 101-1205 (2006)).

establishments from unlicensed use of radios on their premises. The lawsuits generated a confusing array of conflicting decisions.<sup>94</sup> When courts assimilated either the radio broadcast or the use of a radio on commercial premises to a live musical performance, they held for the music publisher;<sup>95</sup> when, instead, they assimilated it to a device or service assisting the listener, they held it non-infringing.<sup>96</sup>

The notion that instrument makers should be held legally responsible for deriving a parasitic benefit from copyrighted works gained traction in the mid-twentieth century with the ubiquity of jukeboxes.<sup>97</sup> Under the 1909 Copyright Act, unlicensed public performances of music using jukeboxes were exempt from copyright liability.<sup>98</sup> Copyright owners insisted that the exemption promoted “legalized piracy of music by jukeboxes,”<sup>99</sup> and urged Congress to close the loophole. A sponsor of an unsuccessful 1959 bill seeking to remove the statutory jukebox exemption explained: “The basic theory behind this legislation is that everybody who makes a profit from the use of musical or literary property should pay his fair share.”<sup>100</sup> Despite the Copyright Office’s support, that jukebox bill and others like it failed to overcome political opposition.<sup>101</sup>

In 1976, motion picture studios relied on the same basic theory in filing suit against Sony for marketing the Betamax home video recorder.<sup>102</sup> The studios argued that Sony’s Betamax machines enabled individual consumers

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94. See *Buck v. Debaum*, 40 F.2d 734 (S.D. Cal. 1929); *Jerome H. Remick & Co. v. Gen. Elec. Co.*, 16 F.2d 829 (S.D.N.Y. 1926); *Jerome H. Remick & Co. v. Am. Auto. Accessories Co.*, 298 F. 628 (S.D. Ohio 1924), *rev’d*, 5 F.2d 411 (6th Cir. 1925); *M. Witmark & Sons v. Bamberger Co.*, 291 F. 776 (D.N.J. 1923). Early radio broadcaster defendants were often manufacturers or sellers of radio receiving sets who operated broadcast stations to promote the sale of their radios. See, e.g., *Am. Auto. Accessories Co.*, 298 F. at 629.

95. *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931); *Gen. Elec. Co.*, 16 F.2d 829.

96. *Debaum*, 40 F.2d 734; *Buck v. Duncan*, 32 F.2d 366 (W.D. Mo. 1929), *rev’d sub nom. Jewell-La Salle Realty Co.*, 283 U.S. 191; see also *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

97. See generally *Authorizing Royalties for Musical Compositions on Coin-Operated Machines: Hearing on H.R. 5921 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 86th Cong. (1959) [hereinafter *Authorizing Royalties*].

98. See Act of Mar. 4, § 1(e). See generally Jessica Litman, *War Stories*, 20 CARDOZO ARTS & ENT. L.J. 337, 350–54 (2002).

99. *Authorizing Royalties*, *supra* note 97, at 3.

100. *Id.* at 6 (remarks of Rep. Emanuel Celler).

101. See HOUSE COMM. ON THE JUDICIARY, 87TH CONG., COPYRIGHT LAW REVISION PART 6: SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 59–61 (1965). The jukebox exemption remained in the law until 1976, when it was replaced by a lightly enforced compulsory license at a nominal \$8 annual rate. Congress replaced the compulsory license with a voluntary blanket license in 1989 when it ratified the Berne Convention. See 17 U.S.C. § 116 (2006).

102. See generally JAMES LARDNER, FAST FORWARD: A MACHINE AND THE COMMOTION IT CAUSED (2002).

to copy the studios' television programs without the studios' consent. Any unlicensed copy, they argued, infringed their copyrights. Because it made and sold machines designed to make those copies, Sony should be held liable.<sup>103</sup> The United States Supreme Court rejected the theory:

One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible.<sup>104</sup>

In 1991, however, copyright owners filed a suit on a similar theory to enjoin the sale of digital audio tape recorders.<sup>105</sup> To persuade plaintiffs to drop the suit, consumer electronics manufacturers agreed to support legislation obliging the makers and sellers of digital audio recording devices and media to implement copy-protection technology and to pay royalties to compensate copyright owners for forgone sales.<sup>106</sup> The 1992 Audio Home Recording Act implemented this compromise.<sup>107</sup>

In the ensuing years, statutory and regulatory provisions reaching makers, and suits to hold them liable as contributory infringers, have become familiar. In 1998, the Recording Industry Association of America filed an unsuccessful copyright infringement suit to enjoin the sale of the first portable MP3 player.<sup>108</sup> The 1998 Digital Millennium Copyright Act incorporated both narrow requirements that instrument makers implement copy-protection technology and broad prohibitions on making, selling, trafficking in, or providing instruments that might facilitate infringing acts by defeating copy-protection technology.<sup>109</sup> Some copyright owners maintain that Internet service providers should be obliged to redesign their architecture to incorporate infringement-prevention technology.<sup>110</sup> This

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103. See *Universal City Studios, Inc. v. Sony Corp. of Am.*, 480 F. Supp. 429, 432 (C.D. Cal. 1979), *rev'd*, 659 F.2d 963 (9th Cir. 1981), *rev'd*, 464 U.S. 417 (1984).

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

105. *Cahn v. Sony Corp.*, No. 90-CIV-4537 (S.D.N.Y. filed Jul. 9, 1990).

106. See H.R. REP. No. 102-873, pt. 1 (1992).

107. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as amended at 17 U.S.C. §§ 1001-1010 (2006)). One of the law's provisions prohibits copyright infringement suits against consumers for noncommercial copying of musical recordings; the scope of that provision remains controversial.

108. See *Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc.*, 29 F. Supp. 2d 624 (C.D. Cal. 1998), *aff'd*, 180 F.3d 1072 (9th Cir. 1999). The court refused to enter the injunction. 180 F.3d at 1081.

109. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2680 (1998) (codified as amended at 17 U.S.C. §§ 1201-1332).

110. See Saul Hansell, *Bits Debate: Should Internet Service Providers Block Copyrighted Works*, N.Y. TIMES (Jan. 15, 2008, 11:41 AM), <http://bits.blogs.nytimes.com/2008/01/15/bits-debate-should-internet-providers-block-copyrighted-works>; Mehan Jayasuriya, Jef Pearlman, Robb Topolski, Michael Weinberg & Sherwin Siy, *Forcing the Net Through a Sieve: Why Copyright Filtering*

expansion in the scope of copyright has encouraged copyright owners to insist that making money from copyrighted works should be actionable without regard to whether the entity earning the money is invading the copyright owners' express statutory prerogatives by actually reproducing, publicly distributing, or publicly performing their works.

There are a variety of troubling developments associated with this particular trend. First, the effort to hold makers liable as contributory infringers for facilitating enjoyment of works of authorship in unauthorized ways has required copyright owners to claim that the readers, listeners, and viewers who make use of the new devices and methods are direct infringers. The alleged direct infringers are not themselves before the court and cannot argue that their uses are within the law, and the defendant-makers have only limited incentives to argue on their behalf.<sup>111</sup> That has resulted in inexorable rights-creep as courts assume without deciding, or decide without reflecting, that a variety of personal uses violate the copyright law.<sup>112</sup> The legal cloud on profiting from new devices or services that enable enjoyment of works of authorship, meanwhile, deters investment in businesses that might further copyright's core goals by increasing the audience for works of authorship or the value of paying to enjoy them.<sup>113</sup> Those new opportunities may eat into the market share of the businesses that currently dominate the dissemination of works of authorship, but may also encourage greater dissemination and enjoyment of extant works as well as the creation of new ones. It makes little policy sense, then, to give the businesses that currently dominate the market for works of authorship the ability to prevent the development of new instruments, at least absent a persuasive showing that makers were reaping too much and creators or distributors too little under the current allocation of rights, such that a simple wealth transfer would improve the health of the system. We have never given copyright owners the right to control the sale, purchase, or use of pencils, crayons, paper, scissors, or glue, despite the near-certainty that sometimes they will be used to commit infringing acts. The same principle should apply to circuit boards, transistors, and electrons.

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*Is Not a Viable Solution for U.S. ISPs*, PUBLIC KNOWLEDGE (2009), <http://www.publicknowledge.org/pdf/pk-filtering-whitepaper-200907.pdf>.

111. Defendants who worry that a court may be reluctant to leave copyright owners with no remedy may determine that throwing non-party alleged direct infringers under the bus is a better strategy than insisting that no infringement has occurred. *See, e.g.*, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130–33 (2d Cir. 2008); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160–63 (9th Cir. 2007); *UMG Recordings, Inc. v. Veoh Networks Inc.*, 665 F. Supp. 2d 1099 (C.D. Cal. 2009).

112. *E.g.*, *MGM v. Grokster, Ltd.*, 545 U.S. 913, 925–27 (2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014–19 (9th Cir. 2001); *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1294 (D. Utah 1999).

113. *See* Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829 (2008).

#### D. SUMMARY

The current copyright statute is long, complicated, and difficult to understand. It instantiates a copyright system that places daunting obstacles in front of creators who seek to author works and convey them to audiences. A host of amendments and expansive court rulings have gradually shrunk the zone of liberty within which readers, listeners, and viewers are free to enjoy works. Distributors face the threat that cheap, easy, digital copying will undermine their business models at the same time as they find that licensing has become complicated and expensive. Makers of new devices and services for enjoying copyrighted works, meanwhile, face threats of ruinous litigation. As a result, many members of the public who are being called upon to follow the extant copyright rules in their daily lives have decided that the rules are unfair or unreasonable, or that they don't in fact do what they're claimed to do. The erosion in copyright's legitimacy is itself problematic for the health of the copyright system.

#### II. COPYRIGHT REFORM REALISM

The problems I've just raised are not the major focus of current efforts to stake out positions in connection with future copyright reform.<sup>114</sup> Instead, representatives of major copyright players currently seem to see statutory reform as an opportunity to cement their most heroic (by which I mean least plausible) victories<sup>115</sup> and reverse their unanticipated defeats.<sup>116</sup>

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114. Copyright scholars have, in fact, made a number of thoughtful proposals for recasting copyright law to give greater benefit to authors or to the public. See, e.g., WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004); Ginsburg, *supra* note 64, at 286–88; Neil Weinstock Netanel, *Impose a Noncommercial Use Levy To Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1 (2003); Jerome H. Reichman, Graeme B. Dinwoodie & Pamela Samuelson, *A Reverse Notice and Takedown Regime To Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981 (2007); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551. As far as I can discern, none of these proposals seems to have attracted serious legislative attention.

115. E.g., *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (holding that making a copy available for patrons to view in a non-circulating library violated the distribution right); *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994) (holding that photocopying articles for scientific research purposes was not fair use); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (holding that turning on a computer violates the reproduction right of the owner of the copyright in the operating-system software); *United States v. Am. Soc'y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007) (holding that downloading a recorded music file does not perform it).

116. E.g., *Am. Soc'y of Composers, Authors & Publishers*, 485 F. Supp. 2d at 441 (holding that downloading a recorded music file does not perform it). The usual outcome is for the two sides to agree on legislation that accepts the general principle underlying the heroic, implausible victory while rejecting its application in factual situations similar to those presented in the lawsuit. See Litman, *supra* note 59, at 592–93. Thus, *MAI Systems Corp.*, 991 F.2d 511, held that a computer-maintenance service made infringing copies of software when it turned on computers to service them. The holding was a surprising and controversial reading of the statutory language. See, e.g., Pamela Samuelson, *Legally Speaking: The NII Intellectual Property Report*, COMMS.

There's little serious attention paid to the idea that we may be able to build a cheaper, more efficient, and better distribution system for copyrighted works without bribing intermediaries by first endowing and then divesting creators. Most industry proposals to reform copyright law to accommodate networked digital technology are taking the opposite approach: they seek to broaden distributor rights and augment distributor control to compensate for the supposed decrease in copyright owner incentives effected by the threat of cheap and abundant unlicensed copies.<sup>117</sup>

The gist of many of the proposals currently making the rounds is to shore up weaknesses in the positions of established distributors and to strengthen their claims against makers and other intermediaries as well as readers, listeners, and viewers. Thus, some copyright owners support replacing the convoluted and outdated licensing provisions in the statute with language that would streamline licensing when they seek licenses, while requiring their permission when others seek licenses from them.<sup>118</sup> Others seek to enhance copyright-owner control over uses of copyrighted works, to enable owners to monetize, or at least monitor, any uses that have value.<sup>119</sup> These ideas would extend copyright rights and enforcement to myriad personal uses, including uses that are noncommercial and nonpublic, on the theory that copyright should enable copyright owners to profit from and control all valuable uses of their works.<sup>120</sup>

The story told in support of these efforts is that networked digital technology poses a fundamental threat to the copyright system, by making it easy and cheap for individuals to make multiple perfect copies of works in digital formats and to distribute those copies all over the world.<sup>121</sup> The

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OF THE ACM, Dec. 1994, at 21. As part of the Digital Millennium Copyright Act, Congress enacted an express exemption for computer-maintenance services to turn on computers to service them, but, bowing to industry pressure, didn't repudiate the surprising general conclusion that turning on a computer, without more, could constitute infringement of the copyright in the computer's operating-system software. See 17 U.S.C. § 117 (2006).

117. See, e.g., Karen Dearnle, *Secrecy Claims on Copyright Treaty*, AUSTRALIAN IT (Aug. 19, 2008), <http://www.australianit.news.com.au/story/0,24897,24202770-5013044,00.html>.

118. See generally *Section 115 of the Copyright Act*, supra note 85; *Internet Streaming of Radio Broadcasts*, supra note 85. This posture has made resolution of the music and sound recording licensing provisions of §§ 114 and 115 elusive.

119. See, e.g., *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 108th Cong. 1-3 (2007) (statement of Rep. Berman); *id.* at 31-33 (testimony of Judy Collins, recording artist); *An Update: Piracy on University Networks*, supra note 51, at 1-3 (statement of Rep. Berman); *id.* at 6-8 (testimony of Cary Sherman); *Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 6-8 (2005) [hereinafter *Content Protection in the Digital Age*] (testimony of Dan Glickman); *id.* at 11-13 (testimony of Mitch Bainwol, RIAA).

120. See Litman, supra note 59, at 595-99.

121. See Ginsburg, supra note 81; see also, e.g., *Piracy Deterrence and Education Act of 2003: Hearing on H.R. 2517 Before the Subcomm. on Courts, the Internet and Intellectual Prop. of the H.*

cheap and easy availability of unlicensed copies is said to have severely undermined the copyright incentive by depriving copyright owners of control of the mass distribution of their works.<sup>122</sup> Unless we repair the leaks in the copyright dike, some copyright owners claim, authors will be reluctant to create new works and publishers, motion picture companies, and record labels will be reluctant to make the investment in distributing them.<sup>123</sup> Thus, it is essential to augment available legal tools to restore copyright owner control over the making and distribution of copies of works, and (they continue) we have in fact bound ourselves to do just that in signing intellectual property treaties with our trading partners.<sup>124</sup> At the same time, they insist, copyright owners are entitled to the benefit of new forms of revenue that networked digital technology makes available, and the copyright statute should clarify that control of those new uses belongs, and should belong, to the owners of the copyright.<sup>125</sup>

It's worth questioning the premises that underlie this story, which embodies what I described earlier as the "conventional law-and-economics view of copyright,"<sup>126</sup> under which distributors are essential copyright actors and their interests simultaneously align with the interests of creators and of readers, listeners, and viewers. Whether strong distributor rights benefit either creators or readers is an empirical question that has not yet been subject to empirical testing.<sup>127</sup> It has some intuitive appeal. It is politically convenient if one happens to be a lobbyist for a distributor. This notion has justified a relentless aggrandizement of distributors' copyright rights over the past 100 years. In that period, the scope of copyright has expanded

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*Comm. on the Judiciary*, 108th Cong. 61–66 (2003) (testimony of Maren Christensen, Vice President, Intellectual Property Counsel, Universal Studios).

122. See, e.g., Stephen Manes, *Full Disclosure: Copyright Law—Ignore at Your Own Peril*, PCWORLD (July 30, 2003, 3:00 AM), [http://www.pcworld.com/article/111657/full\\_disclosure\\_copyright\\_lawignore\\_at\\_your\\_own\\_peril.html](http://www.pcworld.com/article/111657/full_disclosure_copyright_lawignore_at_your_own_peril.html).

123. See, e.g., HELPRIN, *supra* note 65, at 81–86; Henry Horbaczewski, *Copyright Under Siege: Reflections of an In-House Counsel*, 53 J. COPYRIGHT SOC'Y U.S.A. 387 (2006).

124. See, e.g., *Joint Study on 17 U.S.C. Sections 109 and 117: Public Hearing Before the U.S. Copyright Office and the Nat'l Telecomms. & Info. Admin.* (2000), available at <http://www.copyright.gov/reports/studies/dmca/testimony/transcript.pdf> (testimony of Steven Metalitz, representing American Film Marketing Association and six other trade groups); Brief of Americans for Tax Reform as Amicus Curiae in Support of Appellees Urging Affirmance at 15–20, *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (Nos. 07-1480-cv(L), 07-1511-cv(CON)), 2007 WL 6101600.

125. See, e.g., *Internet Streaming of Radio Broadcasts*, *supra* note 85, at 37–39 (testimony of Steven M. Marks, General Counsel, RIAA). See generally Julie E. Cohen, Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management," 97 MICH. L. REV. 462 (1998) (critiquing argument).

126. See PATRY, *supra* note 30, at 62; Cohen, *supra* note 125; Zimmerman, *supra* note 29; *supra* text accompanying notes 76–80.

127. See PATRY, *supra* note 30, at 62; David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 2–7 (2004); Zimmerman, *supra* note 29.

enormously.<sup>128</sup> The bulk of that expansion has enriched copyright intermediaries, rather than creators and readers.<sup>129</sup> If apologists for distributors are right that creators and readers benefit indirectly from any enhancement in distributors' copyright rights, then enhancing their copyright rights still further should automatically enrich us all. If the realities of the copyright system undermine its resemblance to the simple law-and-economics model, on the other hand, the only thing we may end up enhancing by such a course is what economists refer to as "deadweight loss."<sup>130</sup> The deficiencies of the copyright system I outlined earlier for the creators and readers it is designed to serve may be due at least in part to a misallocation of copyright benefits—giving intermediaries more control over the dissemination and enjoyment of works than makes sense in a networked digital world.

If the current, modest share of copyright that creators enjoy suffices to inspire continued authorship, and the current modest degree of reader, listener, and viewer liberties suffices to encourage enjoyment of the works that creators produce, one might ask: what work is being done by all that money in the middle? Perhaps the incentives the current copyright system offers for intermediaries to invest in the production and dissemination of works of authorship are simply excessive in a digital world.<sup>131</sup> Maybe the prospect of hefty monopoly rents has encouraged distributors to spend heavily on efforts to constrain the market for competing works or competing channels of distribution. Oversize distributor incentives might be reinforcing impulses to keep less profitable works from the public to enhance the opportunity to market more profitable works. Such a system may be encouraging wasteful investment in digital-rights-management technology. Indeed, if distributor incentives are excessive, one might expect that to inspire a hideously expensive series of lobbying efforts to craft copyright provisions that will serve as effective entry barriers to competing media. That's as good a description of the current efforts at copyright reform as any. Would the copyright system function as a healthier ecosystem if we just got rid of all that extra incentive?

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128. See, e.g., NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 54–80 (2008). "Compared with their early American counterparts, current copyright holders enjoy a capacious bundle of rights in many more uses of many more types of published works for a far greater time and with fewer preconditions." *Id.* at 55.

129. During the fifteen to twenty years that digital dissemination has emerged as a viable alternative to distribution of hard copies using factories, store-fronts and trucks, the copyright owner's legal control over potential uses of protected works has grown, rather than ebbed, through a massive, almost entirely non-statutory, expansion of the scope of copyright rights. See *id.* at 60–80; Litman, *supra* note 59, at 593–96.

130. See, e.g., Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1801–04 (2000).

131. See Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 870–93 (2001).

Suggestions that the sticks in the copyright bundle are already thicker than they should be commonly meet an incentive-based objection to any reduction in the scope, depth, strength, or duration of copyright rights. Diminishing copyright, we are told, will decrease authors' incentives to create and distribute new works, leaving readers, listeners, and viewers with fewer new works to enjoy.<sup>132</sup> The copyright incentive story turns out to be cloudier than its proponents admit. As David McGowan has succinctly argued, the economic justification for any particular copyright rule rests on instinct and guesswork.<sup>133</sup> The economic rationale for copyright law ascended to the status of an article of faith in the absence of any empirical validation. It may be that in the wake of the 1998 statute increasing the duration of all copyrights by twenty years,<sup>134</sup> publishers increased the advances paid to authors, and motion picture studios gave their screenwriters a raise. It could be that, in response to the 1995 Digital Performance Right in Sound Recordings Act,<sup>135</sup> musicians greatly increased the quality of their musical recordings. As Professor McGowan puts it: "We do not have the data, so we cannot do the math, so we cannot say for sure."<sup>136</sup>

A wise approach to copyright revision might inspire us to rethink the model. If both creators and readers are ill-served by distributor-centric copyright, and if the economics of digital distribution now make it possible to engage in mass dissemination without significant capital investment, perhaps it is time to reallocate the benefits of the copyright system. The consolidation of control in distributors' hands does not appear to have made life easier or more remunerative for creators. Copyright lobbyists have not shown that recent enhancements to copyright have made it easier or more rewarding for readers, listeners, and viewers to enjoy copyrighted works. Perhaps the classic picture of copyright is too far removed from its reality to be useful.

Instead of asking how to enhance copyright owner control, I suggest, we ought to be asking why.<sup>137</sup> Does a particular proposed enhancement of copyright-owner prerogatives seem likely to expand opportunities for

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132. See, e.g., I. Fred Koenigsberg, *The Fifth Annual Christopher A. Meyer Memorial Lecture: Humpty Dumpty in Copyrightland*, 51 J. COPYRIGHT SOC'Y U.S.A. 677, 689 (2004).

133. McGowan, *supra* note 127; accord Cohen, *supra* note 125.

134. Sonny Bono Copyright Term Extension Act of 1998, Pub. L. No. 105-298, § 102, 112 Stat. 2827, 2827-29 (amending 17 U.S.C. §§ 302-304 (1994) to extend the term of copyright protection for most works to life plus seventy years).

135. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 114-115 (2006)).

136. McGowan, *supra* note 127, at 26. If people in the copyright-lobbying business believed that such an effect could be demonstrated, you'd expect them to try to collect the data, but perhaps they don't believe that Congress needs any persuasion on the point.

137. See Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609, 664 (2006); Sara K. Stadler, *Incentive and Expectation in Copyright*, 58 HASTINGS L.J. 433 (2007).

creators or improve reader, listener, or viewer enjoyment of copyrighted works? Is it likely to make the copyright system simpler, more effective, or more transparent? Does it seem to be designed to shore up copyright's apparent legitimacy? If not, it is liable to make the current mess worse instead of better.

If a copyright system is intended to encourage creation, dissemination, and enjoyment of works of authorship, it might make sense to redraw the lines with the purpose of putting fewer burdens than current law on creation, dissemination, and enjoyment. This seems like a dangerous idea to those deeply steeped in current copyright practice, because burdening creation, dissemination, and enjoyment is an important way in which copyright is thought to "promote the Progress of Science." That approach requires us to reject the notion that robust use is somehow inconsistent with or undermining of the goals of copyright. Robust use is itself a core goal of copyright—encouraging it is the reason we have come to allow distributors so much control. If, in fact, extensive distributor control of copyrighted works is not clearly advancing the interests of either creators or readers, it seems likely that our ideas of how the system actually works need to be rethought.

### III. THE PURPOSES OF COPYRIGHT REFORM

There appears to be a broad consensus among scholars and journalists that what Jane Ginsburg has called "greed" has undermined copyright's legitimacy.<sup>138</sup> Some copyright professionals comfort one another with the assertion that appearances deceive; the alleged illegitimacy is really nothing of the sort. It is instead, they might argue, the combination of the voices of noisy teenage pirates, who think they should get something for nothing, with the misguided critiques of copyright academics.<sup>139</sup> The fact that mainstream media everywhere have recently come to question whether copyright has become unmoored from its constitutional purpose,<sup>140</sup> they suggest, misstates

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138. Ginsburg, *supra* note 65, at 61; *see, e.g.*, Editorial, *We Aren't All Pirates*, L.A. TIMES, July 10, 2006, at B10.

139. *See, e.g.*, HELPRIN, *supra* note 65, at 30–39, 213–14; Horbaczewski, *supra* note 123, at 393; Internet Anti-Piracy Task Force, Nat'l Music Publishers Ass'n, *The Engine of Free Expression: Copyright on the Internet*, [http://web.archive.org/web/2005-2004re\\_/http://www.nmpa.org/music101/copyrights.asp](http://web.archive.org/web/2005-2004re_/http://www.nmpa.org/music101/copyrights.asp).

140. *See, e.g.*, Editorial, *Buyer Beware: Music, Technology Industries Reach an Agreement That Neglects Consumers' Rights*, COLUMBUS DISPATCH, Feb. 4, 2003, at A8; Editorial, *Free Mickey Mouse*, WASH. POST, Jan. 21, 2003, at A16; Editorial, *Grokster and the Information Exchange*, N.Y. TIMES, Aug. 30, 2004, at A18; Editorial, *The Genuine Article: Appealing to Consumers' Better Nature May Be a More Effective Way To Curtail Rampant Piracy*, L.A. TIMES, Dec. 23, 2007, at M2; Editorial, *Tune in Fairness for Broadcast Music: Artists, Broadcasters Should Work Together for Solutions*, DETROIT FREE PRESS, June 14, 2009, at 28A; Steven Levy, *Info with a Ball and Chain*, NEWSWEEK, June 23, 2003, at 59; *Music Industry Fight To Block Net Access Hits New Lows*, USA TODAY, Dec. 10, 2002, at 22A.

real popular opinion, which supports copyright (or would, if we only exposed our children to their copyright education programs<sup>141</sup>).

My intuition is that Ginsburg was right when she suggested that the Sonny Bono Copyright Term extension bill, which added twenty years to the term of all extant copyrights and vested that extended term in the copyright proprietor rather than the author, would paradoxically weaken copyright by undermining public support for the entire enterprise.<sup>142</sup> I suspect that copyright appears most legitimate to the general public when it most transparently and directly serves its core goals of encouraging authorship and enjoyment of copyrighted works. The copyright story that the public is eager to invest in is a story about authors and readers. I can't *prove* this; I have no more data than the conventional copyright economic theorists who suggest that it makes little difference whether the copyright law gives the goodies to creators, readers, or the distributors between them, but I believe it to be true. (Lobbyists for major copyright players appear to believe it to be true as well, since they cast their arguments to Congress for more expansive copyright rights in appealing claims made on authors' and readers' behalf.)<sup>143</sup> If I'm right, recent efforts to persuade Congress and the public that the copyright law has never incorporated "user rights"<sup>144</sup> are short sighted and counter-productive. The public's fascination with "fair use rights," bemoaned by some members of the copyright bar,<sup>145</sup> is in fact a sign of broad public acceptance of and support for copyright laws, when copyright laws are understood as embodying readers' rights as well as authors' rights.

I also believe, but can't prove, that the deterioration in public support for copyright is the gravest of the dangers facing the copyright law in a digital era. Copyright stakeholders have let copyright law's legitimacy

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141. See William Patry, *Non-profit, Non-partisan Education in Copyright*, THE PATRY COPYRIGHT BLOG (Sept. 12, 2007, 7:53 AM), <http://williampatry.blogspot.com/2007/09/non-profit-non-partisan-education-in.html>.

142. See Symposium, *The Constitutionality of Copyright Term Extension: How Long Is Too Long?*, 18 CARDOZO ARTS & ENT. L.J. 651, 701 (2000); see also Ginsburg, *supra* note 65, at 65.

143. See, e.g., *The Performance Rights Act*, *supra* note 58, at 4-6, 36-38 (testimony of Sheila Escovedo, Recording Artist, MusicFIRST Coalition).

144. See, e.g., David R. Johnstone, *Debunking Fair Use Rights and Copyduty Under U.S. Copyright Law*, 52 J. COPYRIGHT SOC'Y U.S.A. 345 (2005); Koenigsberg, *supra* note 132; Randy Picker, *Fair Use v. Fair Access*, 31 COLUM. J.L. & ARTS 603 (2008); Patrick Ross, *The Remix Culture*, COPYRIGHT ALLIANCE BLOG (July 7, 2008, 2:50 PM), <http://blog.copyrightalliance.org/2008/07/the-remix-culture/>.

145. See, e.g., Johnstone, *supra* note 144, at 381 ("Time and again, congressional hearings have been tainted with the indefensible agendas of those who have a thinly concealed interest in decreasing copyright protection."); Koenigsberg, *supra* note 132, at 679 ("[E]nemies of creativity . . . speak of the fair use 'right.' But there is no 'right' to fair use."); Patrick Ross, *Perspective: Fair Use Is Not a Consumer Right*, CNET (Sept. 6, 2007), [http://news.cnet.com/Fair-use-is-not-a-consumer-right/2010-1030\\_3-6205977.html](http://news.cnet.com/Fair-use-is-not-a-consumer-right/2010-1030_3-6205977.html).

crumble (or have undermined it with ill-considered campaigns<sup>146</sup> and strategic blunders),<sup>147</sup> while comforting themselves with the promise that soon, technology would allow them to actually prevent copyright infringement rather than merely to forbid or deter it.<sup>148</sup> The lack of public support for copyright norms, then, would soon lose much of its bite, as people rushed to the stores to buy devices that would decline to make infringing copies or to play infringing content. I alluded earlier to the costs of such a strategy: burdening reader, listener, and viewer enjoyment of works by encasing the works in technology that meters and monitors exposure undermines one of copyright's essential goals. A dozen years into the digital rights management ("DRM")<sup>149</sup> experiment, moreover, it seems clear that it has not yet made a meaningful dent in copyright infringement of works released in DRM-protected forms. DRM has proved so far to be easy enough to hack to function as the sort of speed bump that is no impediment to deliberate infringers but still frustrates legitimate listeners when they try to play the music they bought on iTunes on their Palm Pre.<sup>150</sup> Circumvention tools are widely available, and widely perceived as

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146. Different scholars have different nominations for which campaigns were the most counterproductive. My own list includes Sony's rootkit, see *Sony BMG Settles FTC Charges*, FED. TRADE COMM'N (Jan. 30, 2007), <http://www.ftc.gov/opa/2007/01/sony.shtml>, the effort to expand the distribution right under § 106(3) to encompass "making available," see Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats*, 50 ARIZ. L. REV. 577, 578 n.1 (2008), and the "John Doe" lawsuits against individual peer-to-peer file sharers, see, e.g., *Capitol Records Inc. v. Thomas-Rasset*, No. 06-1497 (MJD/RLE), 2009 WL 1664468 (D. Minn. June 11, 2009).

147. Here, I would point to the prosecution of Dmitry Sklyarov and the threat to sue Ed Felten and his research team for presenting a scholarly paper on the team's decryption research on the Secure Digital Music Initiative's technologies. See *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002); *Felten v. Recording Indus. Ass'n of Am.*, Case No. CV-01-2669 (D.N.J. filed June 6, 2001).

148. See *Content Protection in the Digital Age*, *supra* note 119, at 6-8 (testimony of Dan Glickman); Jeffrey Cunard, *Technological Protection of Copyrighted Works and Copyright Management Systems: A Brief Survey of the Landscape, in ADJUNCTS AND ALTERNATIVES TO COPYRIGHT: PROCEEDINGS OF THE ALAI CONGRESS JUNE 13-17, 2001* (Jane C. Ginsburg & June M. Besek eds., 2002), available at [http://www.alai-usa.org/2001\\_conference/pres\\_cunard.doc](http://www.alai-usa.org/2001_conference/pres_cunard.doc); Lionel S. Sobel, *DRM as an Enabler of Business Models: ISPs as Digital Retailers*, 18 BERKELEY TECH. L.J. 667 (2003).

149. Copyright owners have used digital rights management technologies since the earliest days of digital distribution. In 1998, Congress added provisions to title 17 prohibiting the circumvention of DRM technologies designed to control access to works and prohibiting the marketing of devices or the provision of services to circumvent a wider category of DRM technologies. See 17 U.S.C. § 1201 (2006). See generally Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have To Give Notice of Their Use of Technical Protection Measures?*, 6 J. ON TELECOMM. & HIGH TECH. L. 41 (2007).

150. See Larry Magid, *Podcast: iTunes Cuts Off Palm Pre Sync*, CNET (July 16, 2009), [http://news.cnet.com/8301-19518\\_3-10288094-238.html](http://news.cnet.com/8301-19518_3-10288094-238.html); Charlie Sorrel, *Sync Your Palm Pre with iTunes. Again*, WIREDCOMM (July 17, 2009), <http://www.wired.com/gadgetlab/2009/07/sync-your-palm-pre-with-itunes-again/>.

legitimate,<sup>151</sup> despite the provisions in § 1201 of title 17 making it illegal to “circumvent a technological measure” or to “manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part” designed to help one to do so.<sup>152</sup> We face a real danger that by the time the content industries realize that technological protection measures cannot be effective without public consensus that they work to achieve sensible goals by reasonable means, the public will have decided that much of copyright law is neither sensible nor reasonable.

Real copyright reform should seek to make the copyright system more effective and to enhance its legitimacy. I believe that in order to accomplish that, reform should focus on four interrelated goals: radical simplification, creator empowerment, reader empowerment, and disintermediation.

#### A. RADICAL SIMPLIFICATION

I have banged this drum before, repeatedly.<sup>153</sup> The copyright law is long, complex, counterintuitive and packed with traps and pitfalls, some of which were inserted intentionally to trip unwary new entrants, hapless authors, or pesky potential competitors.<sup>154</sup> Market leaders in the entertainment and information businesses have learned to use copyright legislation as an opportunity to erect market barriers to block their nascent competition.<sup>155</sup> That may be an unavoidable by-product of our copyright lawmaking process, but it’s hard to argue that it’s an advantage we should try to preserve. Millions of dollars spent by readers, listeners, and viewers to pay for opportunities to enjoy copyrighted works are absorbed by our mechanisms for collection and distribution before more than token amounts make it into creators’ pockets. That, too, is a disadvantage rather than an advantage of our legacy copyright system. Finally, the fact that legacy copyright rules bind ordinary people engaging in everyday transactions, but are too complicated to explain to them, is nothing for us to be proud of. If we can find the political will to change these facts of copyright, we should do so; they are artifacts of a nineteenth- and twentieth-century copyright system whose major *raison d’être* is that it has taken copyright lawyers a long time

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151. See, e.g., Walter Mossberg, *Some Cures for the Multiple iPod Blues*, CHI. SUN-TIMES, Jan. 14, 2006, at 30 (“[H]ere’s how to use an iPod to copy music to multiple computers.”); Sorrel, *supra* note 150 (reviewing third-party workarounds to enable Palm Pre owners to use iTunes); *Mac the Ripper*, GUSTAVUS ADOPLHUS COLLEGE, [https://gustavus.edu/gts/Mac\\_the\\_Ripper](https://gustavus.edu/gts/Mac_the_Ripper) (last visited Sept. 17, 2010) (explaining that the college has installed software for ripping DVDs to the hard drive of a computer “so that you can copy it” on machines in its media center).

152. 17 U.S.C. § 1201 (a)(1)(A), (a)(2), (b)(1).

153. See, e.g., Jessica Litman, *The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 50–52 (1994).

154. E.g., 17 U.S.C. §§ 112, 203, 304, 1008.

155. See Litman, *supra* note 59, at 593–94.

to learn to work with it, and we are loathe to lose our investment in time and intellectual exertion.

Copyright lawyers have great affection for the arcane bits of the current system. Knowing how to navigate distinctions that make no apparent sense proves our membership in a priestly class of copyright-knowers. The arcaneness of the rules is tolerable when the club of copyright rule followers is small. If we are going to insist that the rules apply more broadly, though, we need to make them sensible, and a necessary first step is to make them simpler. We don't actually need seven different copyright rights, each with its own subject matter limitations, scope, and exceptions.<sup>156</sup> If you tell the owner of a sports bar that the copyright statute allows him to operate up to six television sets in his sports bar so long as the picture is turned off, but only one television set if the picture is turned on,<sup>157</sup> he will understandably tell you that the law is loony. Nor should we be proud of our bouquet of compulsory licenses, each with its own distinct terms, procedures, rates, conditions, and its own collection and disbursement process.<sup>158</sup>

There are statutory sections so complex that even copyright experts claim not to understand them.<sup>159</sup> Unless our goal is to make it impossible for creators, distributors, and readers to navigate the copyright system without representation, there's no excuse for that.

#### B. CREATOR EMPOWERMENT

In Part I, I explored some of the problems the current copyright system poses for creators. Using the copyright reform opportunity to remake the copyright system into a more creator-friendly scheme could enhance both its

156. See 17 U.S.C. §§ 106, 106A, 107–122.

157. Compare *id.* § 110(5)(A) (permitting the public performance of a broadcast on a single receiving set of the sort found in private homes), with *id.* § 110(5)(B) (permitting the public performance of the broadcast of only non-dramatic musical works using multiple speakers and display screens).

158. See *id.* §§ 111(d), 112(e), 114(d), 115, 118, 119, 122; see also *id.* § 116 (“negotiated” jukebox license).

159. E.g., *id.* § 114 (“[s]cope of exclusive rights in sound recordings”). Former Register of Copyrights Ralph Oman had this to say:

Somewhere in this favored land a copyright Pooh-bah really understands Section 111 (eight pages covering secondary transmissions by cable), Section 114 (18 pages covering the scope of exclusive rights in sound recordings and, now, webcasting), Section 115 (almost seven pages covering the compulsory license for making and distributing phonorecords, including digital delivery), and Sections 119 and 122 (almost 17 pages covering secondary transmissions by satellite). The current Register of Copyrights, Marybeth Peters, has stated publicly that there are large chunks of Section 114 that are utterly incomprehensible to most people, because over the years Congress has spliced and diced them, and then hemstitched them back together.

Ralph Oman, *Going Back to First Principles: The Exclusive Rights of Authors Reborn*, 8 J. HIGH TECH. L. 169, 172–73 (2008) (footnotes omitted).

legitimacy and its effectiveness in encouraging the creation and dissemination of works of authorship.

Many European nations cast their copyright law as an “authors’ rights” law, and build in a variety of creator-centric rules.<sup>160</sup> In the United States, we’ve purported to pursue a different model: our law encourages creators who wish to exploit their works commercially to assign all rights to an intermediary in return for some amount of money.<sup>161</sup> In most cases, the intermediary distributor will make the work available to the public within a fairly narrow time window, or will decide not to do so. The work will find its audience, or not; the initial marketing effort will run its course. For the vast majority of creators, the works will then enter a dormant phase that will last for the remainder of the copyright term.<sup>162</sup> Distributors have only modest incentives to invest real money in exploiting their backlists in new media or marketing them to new generations.<sup>163</sup> That is one reason why, before Congress made copyright renewal automatic, the overwhelming majority of works with registered copyrights were never renewed.<sup>164</sup>

When new opportunities and new media arise, creators who have assigned their copyrights lack the power to license their works for new uses; the copyright owners, meanwhile, may see little percentage in exploiting the new media themselves or in licensing their back catalogues to potential competitors.<sup>165</sup> A large number of works that people still want to read, hear, and see are unavailable without regard to whether their creators are eager to exploit them.<sup>166</sup>

160. *E.g.*, Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [Copyright Act], Sept. 9, 1965, BGBl. I at 1273, as amended by Gesetz [G], Oct. 26, 2007, BGBl. I at 2513, §§ 29–42 (Ger.) (German provisions on transfers and licenses of copyright); Texto Refundido de la Ley de Propiedad Intelectual tit. II, ch. III, §§ 14–16 (B.O.E. 1996, 1) (Spain’s *droit morale*), available at [http://noticias.juridicas.com/base\\_datos/Admin/rdleg1-1996.html#](http://noticias.juridicas.com/base_datos/Admin/rdleg1-1996.html#).

161. GOLDSTEIN, *supra* note 29.

162. *See, e.g.*, *Orphan Works Fact Sheet*, FUTURE OF MUSIC COALITION, <http://futureofmusic.org/article/fact-sheet/orphan-works> (last visited Sept. 17, 2010).

163. *See, e.g.*, DUKE CTR. FOR THE STUDY OF THE PUB. DOMAIN, ACCESS TO ORPHAN FILMS 1–3 (2005), available at <http://www.law.duke.edu/cspd/pdf/cspdorphanfilm.pdf>.

164. *See Copyright Renewal Provisions: Hearing on S. 756 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 102d Cong. 25–31 (1991) (statement of Ralph Oman, Register of Copyrights).

165. Some copyright contracts are construed by courts to reserve rights to license uses in new media, *see, e.g.*, *Random House, Inc. v. Rosetta Books LLC*, 283 F.3d 490 (2d Cir. 2002). Other contracts have express reversion terms, which are common in trade-book publishing contracts, *see* RICHARD CURTIS, HOW TO BE YOUR OWN LITERARY AGENT 106–13 (2003), but not so common in most other fields, *see, e.g.*, PASSMAN, *supra* note 38, at 245, 259–61, 392–94, 397.

166. *See, e.g.*, TIM BROOKS, SURVEY OF REISSUES OF U.S. RECORDINGS 4–14 (2005), available at <http://www.clir.org/pubs/reports/pub133/pub133.pdf>; Joel Rose, *Copyright Laws Severely Limit Availability of Music*, NPR.ORG (Jan. 9, 2006), <http://www.npr.org/templates/story/story.php?storyId=5139522&ft=1&f=2>.

Creators are in theory entitled to reclaim their copyrights under the statute's termination-of-transfer provisions.<sup>167</sup> Congress intended the termination provisions to give authors an opportunity to recapture their copyrights after their assignees have had a reasonable opportunity to exploit the assigned rights.<sup>168</sup> In general, thirty-five years after any grant, an author may notify the grantee that she is reclaiming her rights. The grantee must receive at least two years notice, and may continue to exploit any derivative works it created even after the grant is terminated.<sup>169</sup> In the negotiations leading to the enactment of the 1976 Copyright Act, authors' representatives pressed to protect their opportunity to recapture their copyrights from the demands of publishers that they assign any rights in copyright renewal or extension at the time they signed their original publication agreements. Distributors received a longer period of time before termination rights could be executed and express protection for the continued exploitation of derivative works—both significant improvements for them over the renewal provisions of the 1909 Act. In return for making termination inalienable, moreover, publishers and film studios insisted on making it difficult.<sup>170</sup> It is, in fact, sufficiently difficult to be largely illusory for most creators. When Congress extended the duration of copyright in 1976 and 1998, it vested the extended term in the current copyright proprietor, subject to a similar termination right that has proved similarly problematic for authors and their heirs.<sup>171</sup> Court decisions, meanwhile, have

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167. 17 U.S.C. §§ 203, 304(c), 304(d) (2006); see *Returning Authors Rights: The CC Termination of Transfer Tool [Beta]: Frequently Asked Questions*, CREATIVE COMMONS LABS, <http://labs.creativecommons.org/demos/termination/faq.php> (last visited Sept. 17, 2010); *Termination of Transfers and Licenses Under 17 U.S.C. § 203*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/203.html> (last visited Aug. 23, 2010).

168. U.S. copyright law has since 1831 incorporated provisions designed to allow authors to recapture their copyrights from assignees. See Barbara Ringer, *Study No. 31: Renewal of Copyright*, in 1 STUDIES ON COPYRIGHT 503 (Copyright Soc'y of the U.S.A. ed., 1963). Until 1976, copyrights expired after an initial term, and the author or the authors' heirs could apply for a second, "renewal" term, which vested free and clear of initial term assignments. The renewal provisions, however, were unsatisfactory for two reasons. First, authors and their heirs didn't understand the provisions well enough to follow the statutory steps. Second, copyright owners routinely required authors to assign their renewal expectancies at the same time they made their initial copyright assignment, and courts had upheld the validity of these advance grants. *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 383 (1960); *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 656 (1943). That meant that authors as a practical matter were unable to recapture their rights. See Ringer, *supra*.

169. 17 U.S.C. § 203(b); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 891–93 (1987). Authors of older works have a parallel right to terminate at the beginning of the nineteen-year copyright extension enacted in 1976 and the twenty-year copyright extension enacted in 1988. 17 U.S.C. § 304.

170. See Litman, *supra* note 169, at 892; *Burroughs v. MGM, Inc.*, 683 F.2d 610 (2d Cir. 1982).

171. See *Burroughs*, 683 F.2d at 620–31; *Marvel Worldwide, Inc. v. Kirby*, No. 10 Civ. 141 (CM) (KNF), 2010 WL 1655253, at \*4 (S.D.N.Y. Apr. 4, 2010); *Siegel v. Warner Bros. Entm't, Inc.*, 542 F. Supp. 2d 1098, 1120 (C.D. Cal. 2008).

narrowed the scope of the rights subject to recapture,<sup>172</sup> and upheld assignee strategies for evading termination by renegotiating the underlying contract before the date termination becomes available.<sup>173</sup>

Thus, we have a system that makes creators' rights easy to assign and exceptionally difficult to recapture. Depending on the terms of their copyright assignments, creators commonly have little control over the exploitation of their works in new markets or media. The detachment of copyrights from the creators who author works enhances the perception of copyright as illegitimate and unconnected with the progress of science.<sup>174</sup> Affording creators a mechanism to regain some control of the exploitation of their works could shore up copyright's legitimacy by strengthening the connection between creators and copyrights throughout the long copyright term. It could also give distributors and makers new opportunities to exploit old works in new ways that older media might deem unprofitable or a poor fit with extant business models. If reversion is a feature that has value to the overall copyright system, wise copyright reform should replace the current, largely illusory termination provisions with a recapture mechanism that might actually function as advertised.

### C. READER EMPOWERMENT

Copyright laws have a special place in our jurisprudence. That special place includes a presumption of First Amendment validity.<sup>175</sup> In *Eldred v. Ashcroft*, the Supreme Court dismissed a First Amendment challenge to the 1998 Copyright Term Extension Act, noting that so long as "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."<sup>176</sup> That seems paradoxical: copyright laws regulate expression more directly than most laws that routinely undergo First Amendment review. The key to the paradox is that copyright laws have traditionally encouraged expression while preserving the liberty to read, listen, and view the expression copyright protects. The importance of reading, listening, and viewing is a vital reason that copyright laws get special treatment. The freedom to read, listen, and view are essential attributes of human freedom, so much so that we take them for granted. They are

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172. See *Mills Music Inc. v. Snyder*, 469 U.S. 153, 177–78 (1985); *Copyright Holder Protection Act: Hearing on S. 1384 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 99th Cong. 40–42 (1985) (statement of Barbara Ringer); Litman, *supra* note 169, at 901–02.

173. See *Penguin Grp. (USA) Inc. v. Steinbeck*, 537 F.3d 193, 202–03 (2d Cir. 2008); Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right To Terminate*, 62 FLA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1611256>; Scott, *supra* note 45.

174. See PATRY, *supra* note 30, at 67–96, 171–75.

175. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985).

176. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003).

inextricable from the freedom to think. The liberties to read, listen, and view are crucial foundational liberties on which all copyright systems are built. Without those liberties, no copyright system makes any sense.

If copyright law secures rights for readers, listeners, and viewers, where are they? As I discussed in Part I, those rights have lived, for the most part, in the white spaces defined by successive copyright statutes. Early copyright statutes limited copyright owners to the exclusive rights to print, reprint, publish, and vend—they didn't extend to uses that readers, listeners, and viewers might make of copyrighted works. So long as copyright laws left individual readers, listeners, and viewers alone, no conflict arose. When copyright laws are narrowly drawn, it is easy to forget that readers' interests have any importance in the copyright scheme. For most of our history, copyright laws were cast more narrowly than they are today, and this set of issues came up only rarely. Today, of course, copyright rights are broader, and conflicts between copyright owners and readers, listeners, and viewers abound.<sup>177</sup> Even in the context of today's expansive copyright rights, though, the statute includes significant white spaces in which readers, listeners, and viewers are at liberty to enjoy copyright works the way they want to.<sup>178</sup> These white spaces, I would argue, are part of the traditional contours the Supreme Court mentioned in *Eldred*—they advance copyright's goals and the First Amendment by securing liberty to read, listen, look at, and think. In *Lawful Personal Use*, I called these reader, listener, and viewer rights "copyright liberties." They have been embedded in the fabric of U.S. copyright law since its early history and are essential to its design.<sup>179</sup>

As copyright owners have sought to control and monetize individual uses, though, they have increasingly argued that what readers, listeners, and viewers think of as user rights are instead contingent privileges extended to users by copyright owners as a matter of grace and good business sense, subject to being withdrawn whenever a business reason for doing so appears.<sup>180</sup> The general public's disenchantment with copyright law derives

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177. See NETANEL, *supra* note 128, at 109–53 (detailing the burdens contemporary copyright law places on free speech).

178. See Litman, *supra* note 55, at 1895–1919.

179. *Id.* at 1904–08.

180. The most notorious example is the question whether the law permits consumer copying of recorded music from a CD to a computer or digital playback device. During oral argument in *MGM v. Grokster*, Petitioner's counsel made the following representation: "The record companies, my clients, have said, for some time now, and it's been on their Website for some time now, that it's perfectly lawful to take a CD that you've purchased, upload it onto your computer, put it onto your iPod." Transcript of Oral Argument at 12, *MGM, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), 2005 WL 832356 at \*14. Ten months later, in a filing opposing exemptions to the anti-circumvention provisions of the DMCA, the record companies characterized it somewhat differently: consumers could lawfully copy music to their iPods only because copyright owners had granted them a revocable privilege to do so. See Ass'n of Am. Publishers et al., RM 2005-11, Joint Reply Comments at 22 (Feb. 2, 2006), [http://www.copyright.gov/1201/2006/reply/11metalitz\\_AAP.pdf](http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf) ("[C]reating a back-up copy of a music

in part from copyright owners' insistence that readers, listeners, and viewers are entitled to no rights under copyright. Express recognition of reader, listener, and viewer copyright liberties could protect them from encroachment, and thus help assure that the copyright system is able to achieve that part of its core purpose. It could also help affirm that copyright is, indeed, the law that most members of the public would like to believe in.

#### D. DISINTERMEDIATION

Simplifying the law to the point that one doesn't need a lawyer to be able to play, and giving more rights to creators and more freedom to readers, listeners, and viewers will necessarily reduce the profusion of incentives currently enjoyed by many distributor intermediaries. As I argued in Part I, I believe that distributors' current control of the copyright system is itself a major copyright ill. It derives from an era when distribution was much more expensive than it can be today. It continues in the twenty-first century because of the political power of copyright lobbies, aided by members of Congress eager to be glamoured by famous entertainers and willing to be persuaded that the only fundamental problem with the United States economy is widespread piracy of American creations.

The copyright system currently offers incentives to copyright owner intermediaries that are so substantial that they spend millions of dollars to lobby Congress to preserve and shore up the status quo. That suggests that the system tolerates, indeed supports, an embarrassing degree of waste. Concentrating most of the copyright law's power in the hands of distributors, though, is not merely wasteful. It is independently corrosive of the copyright system. Because copyright's current beneficiaries have the political power to prevent Congress from enacting copyright legislation, they insist on inserting provisions into new laws that will put their potential competitors at a disadvantage. Those impediments in the law make it more difficult for creators to reach audiences, and more difficult for readers, listeners, and viewers to enjoy works disseminated in new media. They can make it impractical to introduce works that creators hope to exploit and readers want to enjoy. A significant reduction in distributor intermediary incentives might discourage this sort of rent-seeking behavior. Even if it did not, a law that recasts current intermediaries as optional players in the copyright scheme would be a more sensible law. The intermediaries who today control the playing field are, and should be treated as, useful participants when they offer services that meet creators' and readers' needs, but no longer necessary in order to navigate the system.

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CD is not a non-infringing use."); *id.* at 22 n.46 ("Nor does the fact that permission to make a copy in particular circumstances is often or even 'routinely' granted necessarily establish that the copying is a fair use when the copyright owner withholds that authorization. In this regard, the statement attributed to counsel for copyright holders in the *Grokster* case is simply a statement about authorization, not about fair use." (citations omitted)).

*E. SUMMARY*

Workable copyright reform should almost certainly be reform that addresses the excesses responsible for copyright law's battered reputation.<sup>181</sup> One important ingredient in such a reform, in my view, is simplicity: as I've argued elsewhere, the public is far more likely to support a law that seems to it to be reasonable, fair, and easy to understand.<sup>182</sup> Ideally, copyright reform should also shore up the law's legitimacy by strengthening both the connections between copyright and creators and the connections between copyright and readers, listeners, and viewers. To accomplish that, it will need to dislodge many of the currently entrenched intermediaries who have united to block reforms that weaken their control.<sup>183</sup> If that requires changes that end up weakening copyright's current strong incentives for distributors, all to the good: limiting the excesses of distributor rights may have its own salutary effects on the copyright system. If the rewards of exclusivity are smaller, it may no longer be worth distributors' while to invest large amounts of money and effort in making it more difficult for potentially competing works and competing media to find their audiences.

## IV. REAL COPYRIGHT REFORM

Thus far, I have argued that real copyright reform should seek to improve the ways that the system works for creators and for readers, listeners, and viewers. I have suggested that the most important goals of such a reform are these: We should try to shore up the currently weakened legitimacy of copyright law. We should seek to make the currently complex copyright law simple enough that most creators will not need to consult a copyright lawyer before making and exploiting works of authorship, and most readers, listeners, and viewers will not need to consult a copyright lawyer before enjoying them. We should focus on empowering creators and readers and should, when it is feasible, do that at the expense of copyright intermediaries, who currently hold a counterproductively massive share of copyright's goodies. These goals reinforce each other rather than competing, since a simpler, more creator-reader-centric copyright law will seem more legitimate and be easier for creators and readers to use; and a law with enhanced legitimacy will be complied with more readily and will work more effectively.

There are a variety of ways one could embody these goals in statutory reform, and copyright commentators have floated imaginative proposals that would help to achieve these goals in many different ways.<sup>184</sup> I sketch out my

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181. See Ginsburg, *supra* note 65, at 65-67.

182. See LITMAN, *supra* note 2, at 116-17.

183. See *A Special Conversation with Marybeth Peters*, *supra* note 13.

184. See, e.g., FISHER, *supra* note 114, at 199-258 (proposing alternative system for compensating creators); ROBERTA K WALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS*

own favorite proposals below. The conventions of legal scholarship offer me an unfair advantage as compared with copyright lawyers, lobbyists, and legislative staffers. Because I am fixing my ideas in a law review article, I am allowed to propose reforms that have no realistic chance of enactment, solely on the excuse that I believe, and will try to persuade you, that the reforms I suggest would be wise. I can suggest an agenda of legitimation, simplification, creator and reader empowerment, and disintermediation without concerning myself (too much) that the legislative process we rely on to generate copyright laws ensures that the copyright law is never short, and never simple. It has not for years reflected concern with appearing to the public to be balanced, fair, or sensible; it pays shockingly little attention to the reasonable interests of creators or members of their audiences. Legal scholars are encouraged to dance in the realm of pure theory, where even outlandish ideas may be food for someone's thought. Thus, I don't actually need to worry about the fact that I see no plausible route by which we could get there from here. I have nonetheless worried long and hard about coming up with proposals that would actually work, if only we could get there.

#### A. REDEFINE THE SCOPE OF COPYRIGHT RIGHTS

Copyright rights should secure to creators the right to exploit their works commercially while assuring that readers, listeners, and viewers have the ability to enjoy the works in ways that don't involve commercial

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LAW FOR THE UNITED STATES 69–85, 147–65 (2010) (proposing expansion of moral rights); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN AN INTERCONNECTED WORLD* 250–59 (2001) (proposing short renewable copyright terms, new compulsory licenses, and absolving defendants of liability if they can prove lack of harm to the copyright owner); NETANEL, *supra* note 128, at 195–217 (proposing reforms to facilitate use and preservation of orphan works and a noncommercial use levy to compensating copyright owners for noncommercial peer-to-peer file sharing); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1122 (2007) (proposing an administrative body with authority to adjudicate fair use petitions and issue fair use rulings); Ginsburg, *supra* note 64, at 286–88, 301–06 (proposing copyright amendment giving human creators waivable attribution rights); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1410 (2004) (proposing streamlined administrative dispute resolution for small claims against consumers engaging in infringement over peer-to-peer networks); Loren, *supra* note 88, at 703 (proposing replacing six exclusive rights with single “right to commercially exploit’ the copyrighted expression”); R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 268–73 (2001) (proposing legislation to extend existing compulsory licenses and exemptions to temporary RAM storage incidental to licensed or exempt uses); Samuelson, *supra* note 114, at 556 (outlining the provisions of a model copyright law); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 497–510 (2009) (proposing amendments to copyright damages provisions); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 551 (2004) (proposing the adoption of “new style” Berne-compliant formalities); Stadler, *supra* note 67, at 746–57 (proposing amendments to narrow the scope of the public performance right).

exploitation. The law now on the books divides copyright into reproduction, derivative work, public distribution, public performance, and public display rights,<sup>185</sup> and encourages authors to dispose of them separately and piecemeal.<sup>186</sup> In many copyright industries, it has become conventional for different copyright rights to be separately controlled by different intermediaries.<sup>187</sup> As new opportunities to exploit works have arisen, those intermediaries have insisted that the new uses impinge on the rights they control instead of or as well as the rights controlled by other intermediaries.<sup>188</sup> Meanwhile, the distinctions among different exclusive copyright rights have come to seem increasingly inapposite to a networked digital world. When someone views a website or listens to a song over the Internet, is she committing a reproduction, a distribution, a performance or display, or all of them at once?<sup>189</sup> Is the person responsible for any invasion of exclusive copyright rights the individual viewer/listener, the owner of the computer hosting the files, the computer network that enables remote viewing and listening, or someone else?<sup>190</sup> Efforts to find a solution that would permit prospective licensees to obtain necessary licenses in a single transaction have failed because entrenched intermediaries cannot agree on which of them is the appropriate licensor.<sup>191</sup> Congress has been unwilling to characterize the different exclusive rights as exclusive of each other, rather than overlapping;<sup>192</sup> courts have been unwilling to apply statutory exceptions defined in terms of one exclusive right to the same behavior

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185. 17 U.S.C. § 106 (2006).

186. 17 U.S.C. § 201(d).

187. The canonical example is music, where the public performance rights are licensed by performing rights societies, like ASCAP, while music publishers control the reproduction and distribution rights. See PASSMAN, *supra* note 38, at 206–38. See generally *Music Licensing Reform*, *supra* note 78.

188. To stick with the music example, ASCAP insists that both transmission of a file containing recorded music over the Internet and the playing of a music ring-tone on a cellular phone should be deemed public performances within its purview. Music publishers insist that the transmission of the files and the sales of ringtones to cell-phone subscribers are not performances but distributions of copies. See *United States v. ASCAP*, 607 F. Supp. 2d 562, 571 (S.D.N.Y. 2009); *United States v. ASCAP*, 485 F. Supp. 2d 438, 441–42 (S.D.N.Y. 2007). Companies have learned to their peril that licensing the use from one is no defense to a suit for willful copyright infringement by the other. See, e.g., *Country Rd. Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325 (2003).

189. See, e.g., Lemley, *supra* note 88, at 550–62; Reese, *supra* note 184, at 240–49.

190. See, e.g., *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 125 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2890 (2009); *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002), *withdrawn*, 336 F.3d 811, 815–16 (9th Cir. 2003); *ASCAP*, 607 F. Supp. 2d at 565; *ASCAP*, 485 F. Supp. 2d at 446.

191. See *Music Licensing Reform*, *supra* note 78, at 106–44 (testimony of Marybeth Peters, U.S. Register of Copyrights).

192. See H.R. REP. NO. 94-1476, at 61–65 (1976).

characterized as impinging on another.<sup>193</sup> Copyright divisibility may have been intended to empower authors,<sup>194</sup> but it has ended up making more problems than it has solved.<sup>195</sup>

### 1. A Unitary Commercial Exploitation Right?

If simplicity, legitimacy, and author- and reader-empowerment were our only goals, untempered by past practice, vested rights, and international obligations, we could do worse than to recast copyright as a single exclusive right with carefully drawn boundaries. If we chose to define a single core copyright right, the most promising candidate for that right, in my view, would be a right to control commercial exploitation.<sup>196</sup> Limiting the scope of copyright to commercial exploitation would be simpler than the current array of five, six, seven, or eight<sup>197</sup> distinct but overlapping rights. Copyright defined as control over commercial exploitation, moreover, would accord with what we know of the public's understanding of what copyright law does, and should, reserve to the author.<sup>198</sup> It would also preserve for readers, listeners, and viewers the liberty to enjoy works in non-exploitative ways without seeking licenses for each.

A minority of copyright scholars has long insisted that the exclusive rights conferred by copyright are already limited, at least implicitly, to commercial exploitation. Ray Patterson and Judge Stanley Birch make this point at length in their *Unified Theory of Copyright*.<sup>199</sup> Others have argued that uses that are not commercially exploitative should in general be deemed outside of the copyright owner's control, whether under the fair-use rubric or otherwise.<sup>200</sup> Still others have argued that whatever rights current law gives copyright owners, Congress should modify the statute to allow a broad swathe of noncommercial uses without the copyright owner's permission,

193. See, e.g., *Kelly*, 280 F.3d at 940–44, 947–48; *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022–24 (9th Cir. 2001).

194. Justice Ginsburg suggested as much in *New York Times Co. v. Tasini*, 533 U.S. 483, 494–97 (2001).

195. See Loren, *supra* note 88, at 698–701.

196. I have argued elsewhere that replacing the current exclusive rights with a right of commercial exploitation would improve the copyright law. See LITMAN, *supra* note 2, at 180–86; accord Loren, *supra* note 88, at 717–18.

197. In addition to exclusive reproduction, adaptation, public distribution, and public display rights, the current statute gives differently defined public performance rights for sound recording copyrights and copyrights other than sound recordings. See 17 U.S.C. § 106(4), (6) (2006). Authors of works of visual arts have separate, inalienable attribution and integrity rights. See *id.* § 106A.

198. See Jessica Litman, *Copyright Noncompliance (or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. INT'L L. & POL. 237, 253 (1997); Litman, *supra* note 55, at 1912.

199. Patterson & Birch, *supra* note 28, at 293–96, 335–37, 385–95.

200. E.g., Glynn S. Lunney, Jr., *Fair Use and Market Failure: Sony Revisited*, 82 B.U. L. REV. 975, 1017–29 (2002).

either subject to a new copyright exemption or to a new statutory license.<sup>201</sup> Copyright apologists object that the law has never incorporated a privilege for noncommercial use, broadly defined, and that it should not do so.<sup>202</sup> The line between commercial and noncommercial, they continue, is too elusive to bear so much weight. If a use has no commercial significance, they say, a copyright owner is unlikely to object.

Although I acknowledge that the line-drawing difficulties are formidable,<sup>203</sup> I think the difference between commercial exploitation and noncommercial enjoyment captures a distinction that is fundamental to our understanding of how the copyright system works. Congress has on multiple occasions suggested that it views the line between commercial exploitation and reader, listener, and viewer consumption as an implicit limit on the scope of copyright rights.<sup>204</sup> Noncommercial uses further the copyright interest in encouraging enjoyment of works without unduly burdening the copyright owner's opportunities to earn revenue through commercial exploitation. Major international copyright treaties bind nations to a promise to give copyright owners control of reproductions and public performances, and then permit them broad latitude to exclude noncommercial uses from the scope of control.<sup>205</sup> The public tends to view copyright's legitimate sphere as limited to commercial exploitation. There seems to be broad public support for allowing creators to control commercial exploitation, and very little support for allowing copyright owners to control noncommercial uses.<sup>206</sup>

201. *E.g.*, FISHER, *supra* note 114; Netanel, *supra* note 114.

202. *See, e.g.*, Patrick Ross, *Live from Digital Hollywood: The Canary is Spain*, COPYRIGHT ALLIANCE BLOG (May 5, 2010, 8:36 AM), <http://blog.copyrightalliance.org/2010/05/live-from-digital-hollywood-the-canary-is-spain/>; Patrick Ross, *Seven Sneaky Words on Fair Use*, COPYRIGHT ALLIANCE BLOG (Mar. 10, 2010, 2:12 PM), <http://blog.copyrightalliance.org/2010/03/seven-sneaky-words-on-fair-use/>; Thomas D. Sydnor II, *Thomas on Copyright Reform: An Injudicious Threat to Consumers and Artists*, PROGRESS ON POINT (Progress & Freedom Found., Wash, D.C.), Dec. 2008, available at <http://www.pff.org/issues-pubs/pops/2008/pop15.18/thomasreform.pdf>.

203. *See, e.g.*, CREATIVE COMMONS, DEFINING "NON-COMMERCIAL": A STUDY OF HOW THE ONLINE POPULATION UNDERSTANDS "NON-COMMERCIAL USE" 11 (2009), available at [http://mirrors.creativecommons.org/defining-noncommercial/Defining\\_Noncommercial\\_fullreport.pdf](http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf) (reporting that both creators and users consider uses that earn money or involve advertising as commercial, but that there is "more uncertainty than clarity" about whether other online uses are commercial); *cf.* Lydia Pallas Loren, *The Evolving Role of "For Profit" Use in Copyright Law: Lessons from the 1909 Act*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 255, 269-80 (2010) (describing courts' efforts to construe the "for profit" limitation in the 1909 Act).

204. *See* Litman, *supra* note 55, at 1904-07.

205. *See* Daniel J. Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, 9 MARQ. INTELL. PROP. L. REV. 1, 27-34 (2005).

206. *See, e.g.*, PAT AUFDERHEIDE ET AL., CTR. FOR SOC. MEDIA, AM. UNIV., THE GOOD, THE BAD, AND THE CONFUSING: USER-GENERATED VIDEO CREATORS ON COPYRIGHT 8 (2007), available at [http://dspace.wrlc.org/bitstream/1961/4612/1/good\\_bad\\_confusing.pdf](http://dspace.wrlc.org/bitstream/1961/4612/1/good_bad_confusing.pdf); MARY MADDEN,

Thus, defining copyright as a right to control commercial exploitation could give creators meaningful economic rights while preserving their audiences' freedom to enjoy and interact with works in ways that further copyright's core objectives.<sup>207</sup> Eliminating the distinctions between the distinct rights in the copyright bundle, moreover, could give us an opportunity to oust the current vested intermediaries from their control of pieces of copyright, and return that power to the creators.

## 2. Reality Check

In a world without magic wands, though, recasting copyright as a unitary right to control commercial exploitation change could easily make a mess. When applied to extant copyrights, which are already the subject of an assortment of contracts and licenses, instantly converting all copyrights to a single commercial exploitation right would upset vested expectations, and would call into further question our compliance with international treaties that require us to give authors the right to authorize the reproduction, translation, performance, or communication to the public of the works they author.<sup>208</sup> Adopting that approach for works not yet fixed in tangible media of expression would pose more modest transitional issues, but would still introduce considerable uncertainty. Redefining copyright as an exclusive commercial exploitation right would provide an opportunity to expand U.S. copyright rights to include an exclusive right to make a work available to the public (at least when the "making available" occurred in connection with commercial exploitation). It would also offer a more compelling rationale than contributory infringement for imposing liability on makers. Those tantalizing possibilities might well become a powerful litigation magnet. Meanwhile, the complications of a hybrid system, treating new works under new rules while retaining all of the old rules for older works, would easily defeat any simplification benefits the transition might seek to achieve.

## 3. A More Prudent Alternative

Could we capture the benefits of that sort of redefinition without throwing the copyright world into chaos? I think we could. We could do

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PEW INTERNET & AM. LIFE PROJECT, ARTISTS, MUSICIANS AND THE INTERNET 75-77 (2004), available at <http://www.pewinternet.org/Reports/2004/Artists-Musicians-and-the-Internet.aspx>; Glynn S. Lunney, Jr., *Copyright, Private Copying, and Discrete Public Goods*, 12 TULANE J. TECH. & INTELL. PROP. 1, 27-33 (2009).

207. Cf. Loren, *supra* note 203, at 281-84 (suggesting that the scope of copyright's exclusive rights should be limited by requiring plaintiffs to prove that defendant's use caused "commercial harm").

208. See Berne Convention for the Protection of Literary and Artistic Works, arts. 8-9, 11-14, July 24, 1971, S. TREATY DOC. NO. 99-27. We are already arguably in breach of our treaty obligations because of our failure to grant authors meaningful attribution and integrity rights and our generous exemption for bars and restaurant to play music without getting a license to do so. See Gervais, *supra* note 205, at 14-16; Ginsburg, *supra* note 64, at 265-66.

that, I suggest, by adopting a more modest package of changes that reforms our current regime to make it behave, as much as feasible, as if restricting the scope of copyright to commercial exploitation were merely the explicit recognition of a limitation that had always been implicit in the law.<sup>209</sup> We could accomplish that by adopting a definition of copyright's multiple exclusive rights that included control over reproduction, adaptation, distribution, and public performance insofar as they represented commercial exploitation, but not otherwise. In addition, we could adopt other changes, also modest, to heal some of the most egregious problems of the current copyright system. Copyright reform should define the reach of copyright's exclusive rights to give copyright owners control over uses that inhabit the core of the commercial exploitation of their work, leaving noncommercial and non-exploitative uses uncontrolled.

Restricting the scope of copyright rights to uses involving commercial exploitation will not obviate the need for general privileges and limitations like the first sale doctrine and fair use. Such limitations arose in litigation over commercial uses,<sup>210</sup> and do important work in mediating which commercial activities should come within a copyright owner's control<sup>211</sup> and which should not.<sup>212</sup> When copyright is restricted to control over commercial exploitation, however, that should relieve the pressure on the law's few general privileges to be all things to all people.

If we choose to retain the principle that copyright is divisible into multiple exclusive rights each capable of separate ownership and control, we will need to do something to address the licensing logjam that divisible copyright has engendered. One obvious improvement would be to abandon the notion that copyright uses require multiple, distinct licenses for each sort of use. In earlier work, I suggested that it makes sense under current law to treat as impliedly licensed any reproduction, adaptation, distribution, performance, or display that is incidental to a licensed use.<sup>213</sup> If we are reforming the law, we can go further. First, we can allow divisible copyright ownership without continuing to insist that each fragment of copyright is distinct and non-overlapping. Any transfer of a part of a copyright should be understood to carry with it any rights necessary to allow its exercise and license; entities who own copyright fragments should have a duty to account

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209. See, e.g., *Patterson & Birch*, *supra* note 28, at 385–95.

210. See, e.g., *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *Simms v. Stanton*, 75 F. 6 (N.D. Cal. 1896).

211. See, e.g., *New York Times Co. v. Tasini*, 533 U.S. 483 (2001); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986).

212. See, e.g., *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 523 U.S. 135 (1998); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); *Christopher Phelps & Assocs. v. Galloway*, 477 F.3d 128 (4th Cir. 2007).

213. See *Litman*, *supra* note 55, at 1917.

to one another if they grant a license that invades a different owner's turf, but it should not be the responsibility of the user seeking a license to track down and negotiate with all owners. Second, we can adopt a principle that the creator and initial copyright owner of a work retains residual authority to license any uses even after assignment of her copyright, subject to a duty to account to her assignee(s). This will help to ameliorate confusion about what uses require what licenses from whom, and will at the same time restore to creators some connection with their copyrights.<sup>214</sup> To further empower creators and cut through licensing thickets, we should reform our current illusory termination of transfers. Finally, we should simply abolish the current statutory "compulsory" licenses. In the pages that follow, I explore these proposals in more detail.

If copyright's exclusive rights are limited to uses made in the course of commercial exploitation, and if licenses are understood to permit uses of works, rather than of splinters of different exclusive rights, many of the current pages of prose in the succeeding sections of the statute become unnecessary. Others may have made sense once, but function today chiefly to perpetuate the clout of entrenched intermediaries at creators' and readers' expense.<sup>215</sup> Still others distort the copyright system by allowing older media to exploit copyrighted works on more favorable terms than newer media.<sup>216</sup> If copyright's exclusive rights are cast with appropriate narrowness, we can sweep away the current crop of industry-specific exceptions, limitations, and complications. We can retain classic general limits like the idea/expression distinction, the first sale doctrine and fair use, while leaving narrow specific exceptions behind.

### B. RECONNECT CREATORS WITH THEIR COPYRIGHTS

In Part III, I discussed the problems for copyright's legitimacy that arise when creators are divested of the copyrights in their works. Authors complain that they can no longer exploit or license their work, because they

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214. It may once have been the case that it was easier to track down a work's publisher than to find its author. In a world of media conglomerates who purchase each other's divisions, spin off product lines, and liquidate in bankruptcy at a dizzying rate, an author is now far easier to track down than her assorted assignees, their successors, and their respective assignees. It also seems more likely that an author will have kept track of what publisher bought her publisher than that a publisher will know how to find all of the authors whose contracts it assumed when it purchased the company that purchased the company that initially held the authors' contracts. See, e.g., PATRICK BURKART & TOM MCCOURT, *DIGITAL MUSIC WARS: OWNERSHIP AND CONTROL OF THE CELESTIAL JUKEBOX* 24–37 (Andrew Calabrese ed., 2006); ALBERT N. GRECO, *THE BOOK PUBLISHING INDUSTRY* 51–65 (2d ed. 2005). Thus, plaintiff record companies in *Napster* insisted that it would be difficult or impossible for them to identify the works on whose behalf they brought suit. *A & M Records, Inc., v. Napster, Inc.*, 114 F. Supp. 2d 896, 925 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

215. E.g., 17 U.S.C. § 115 (2006).

216. E.g., *id.* §§ 111, 112, 114, 119.

assigned the copyright to an intermediary who refuses to release it.<sup>217</sup> In theory, the termination-of-transfers right should address it, but the termination right has turned out to be largely illusory. We can reunite creators with their copyrights and achieve significant disintermediation at the same time by replacing our current fake termination right with a real one.<sup>218</sup> Authors should be entitled to terminate any copyright grant they make, on five years notice, at any time beginning fifteen years after the date of the grant and continuing for the life of the copyright. Termination should continue to be subject, as it is under current law, to an exception allowing grantees to continue to exploit any derivative works created during the grant, but not to make new ones. The combination of a five-year notice period and a derivative works exception should give copyright intermediaries enough protection to make investment in copyrighted works worthwhile without vesting them with excessive control.<sup>219</sup> Meanwhile, the potential for termination at an earlier date may encourage intermediaries to structure their initial agreements for copyright acquisition in more creator-friendly forms.

### C. RECOGNIZE READERS' RIGHTS

Limiting the scope of copyright to commercial exploitation will go a significant way towards reinvigorating copyright law's traditional solicitude for readers, viewers, and listeners, and should enable them to enjoy copyrighted works in both consumptive and creative ways without unduly undermining the copyright owners' commercial incentives.<sup>220</sup> I would, however, go further. I believe that it would enhance the legitimacy of the copyright system if the copyright statute included explicit recognition of the core importance of reader, listener, and viewer liberties to enjoy copyrighted works without undue copyright owner interference. If copyright law expressly recognized that reader, listener, and viewer interests must

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217. See Jonathan Band, *Publish and Perish? Protecting Your Copyrights from Your Publisher*, ASCB NEWSLETTER, (Am. Soc'y for Cell Biology, Bethesda, Md.), May 2008, available at <http://www.policybandwidth.com/doc/20080523-PublishANDPerishFinal.pdf>; *Comments of Recording Artist Groups on Orphan Works*, FUTURE OF MUSIC COALITION (Mar. 25, 2005), <http://futureofmusic.org/filing/comments-recording-artist-groups-orphan-works>. See generally KEEP YOUR COPYRIGHTS, <http://www.KeepYourCopyrights.org> (last visited Sept. 17, 2010).

218. Other scholars have proposed different reforms that would be useful contributions to efforts to strengthen the perceived connection between creators and their copyrights, such as enacting an express attribution right. See Ginsburg, *supra* note 64, at 286–88.

219. That probably won't prevent some assignees from seeking to avoid termination by claiming that the works are works made for hire. See, e.g., *Sound Recordings as Works Made for Hire: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. (2000) (testimony of Marybeth Peters, U.S. Register of Copyrights). In order to safeguard authors' opportunities to exercise their broadened termination rights, we should probably narrow and perhaps eliminate the category of commissioned works made for hire under the second prong of the definition in § 101.

220. See Litman, *supra* note 66, at 179–83.

sometimes be protected against overreaching creators and distributors, it would be much easier for members of the public to invest in the principle that copyright should protect creators and distributors from exploitative readers, listeners, and viewers.

An additional reform that strikes me as useful is the creation of a position, within the Copyright Office but independent of its bureaucracy, for a copyright ombudsman to explain the copyright system to the public and articulate the public's interest to the staff of the Copyright Office and to Congress. I've explored in earlier work some of the reasons why it has been difficult for Congress, the Copyright Office, or a variety of copyright-affected organizations that have purported to speak for the public on particular issues to represent the public in any reliable way.<sup>221</sup> It may not actually achieve much to give the job to a lawyer with instructions to consult his client; different actors' notions of the public interest in copyright are exceptionally diverse.<sup>222</sup> But as innovations go, it's an inexpensive one with the potential to make a difference.

#### D. DISLodge ENTRENCHED INTERMEDIARIES

Assume a willing licensee who desires to license a copyrighted work on terms that the copyright owner would find acceptable. A functioning copyright system should make it easy to strike that deal. If the licensee cannot identify the appropriate licensor or divine the license terms; if the copyright owner cannot discover who has already exploited her work and who would like to do so, the system will entail tremendous waste. Where the value of an individual use is dwarfed by the transaction costs of negotiating a license, the U.S. copyright system has either completely excused unlicensed uses,<sup>223</sup> or allowed the uses under blanket collective<sup>224</sup> or statutory<sup>225</sup>

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221. See Litman, *supra* note 153, at 53–54; Litman, *supra* note 9, at 299–301, 311–16.

222. Compare, e.g., Neil Turkewitz, *Copyright, Fair Use and the Public Interest*, CULTURAL COMMONS (Dec. 2004), <http://web.archive.org/web/20050831033648/www.culturalcommons.org/comment-print.cfm?ID=22>, with, e.g., PATRY, *supra* note 30, at 101–02.

223. For example, a sports bar publicly performs games broadcast by ABC. The performance of the music accompanying the broadcast is exempt under 17 U.S.C. § 110(5) (2006).

224. For example, the local ABC affiliate broadcasts the game to viewers in its local service area, having secured blanket performance licenses from ASCAP, BMI and SESAC to broadcast the music accompanying the game.

225. For example, Comcast Cablevision transmits the ABC broadcast to its subscribers, having paid a statutory license fee under 17 U.S.C. § 111 to permit its retransmission. The fee will be combined with other fees and then divided at the end of the year between motion picture studios, major sports leagues, ASCAP, BMI and SESAC, and others who claim copyright ownership in programming transmitted over cable under the § 111 license. See 17 U.S.C. §§ 801–805; Nat'l Ass'n of Broadcasters v. Librarian of Cong., 146 F.3d 907, 911–12 (D.C. Cir. 1998). A similar regime applies to satellite television. See 17 U.S.C. § 119. A dissimilar and horribly complex regime covers the digital transmission of recorded music by satellite radio and

licenses. Collective licenses are devised by performing rights organizations who operate within constraints imposed by antitrust consent decrees.<sup>226</sup> Compulsory licenses are statutory, although their terms were devised by representatives of copyright owners and the statutory licensees before congressional enactment.<sup>227</sup>

Although copyright theorists talk about copyright licensing as an individually negotiated transaction between a creator and a distributor,<sup>228</sup> much licensing of copyright works involves statutory or collective licenses. Statutory or “compulsory” licenses are, in practice, not very different from collective licenses. Both are hybrids of statutory benchmarks with private bargaining; both involve significant government oversight and expensive negotiation; both are better at collecting royalties than disbursing them.<sup>229</sup> Together, the various statutory licenses form a patchwork of irreconcilable terms, inconsistent prices and procedures, and the expensive necessity for many-stop shopping for innovative uses.<sup>230</sup>

The music performance collecting societies, meanwhile, are hardly poster children for unregulated private market transactions. Both ASCAP and BMI operate within the constraints of detailed antitrust decrees, limiting their acquisition and control of copyright rights, defining the class of members they must agree to admit, restricting the scope and terms of the licenses they may grant, forbidding them from discriminating in license price among similarly situated licensees or interfering with their members’ ability to offer competing licenses, obliging them to make a list of works they are entitled to license available to the public, and instructing them how to

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Internet webcasters. *See id.* §§ 114, 115; *United States v. Am. Soc’y of Composers, Authors & Publishers*, 485 F. Supp. 2d 438 (S.D.N.Y. 2007).

226. *See* Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253, 275–77 (2009); Loren, *supra* note 88.

227. *See generally Licensing Information*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/licensing/> (last visited Sept. 17, 2010) (providing information and forms related to licensing).

228. *See, e.g.*, GOLDSTEIN, *supra* note 29, at 218–36; Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217; William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

229. The performing rights organizations divide royalties among their members according to each organization’s secret formula. Most of the compulsory license royalties are, in theory, allocated among claimants by copyright royalty judges. The statutory sections that call for license fees to be paid into a common fund and then divided among claimants don’t include provisions that would assist the copyright royalty judges charged with disbursing the royalties to allocate the funds in the pot. Rather, the statute encourages claimants to negotiate among themselves to arrive at both the royalty rates and a division that they find satisfactory. *See* 17 U.S.C. §§ 111(d), 112(e)(2), 114(e), 118(b)(2), 119(c), 803(b)(3), 805, 1007. In the three decades since the 1976 act took effect, copyright owner claimants have pursued a strategy of driving the cost of claiming a share up to levels that discourage claimants unless they are represented by collecting societies or big trade associations, and then negotiating with the remaining big fish to divide the spoils.

230. *See Music Licensing Reform*, *supra* note 78, at 106–44 (testimony of Mary Beth Peters); Loren, *supra* note 88.

divide up and distribute the royalties they collect.<sup>231</sup> The pricing of ASCAP and BMI licenses, moreover, is subject to review by a federal court. Thus both compulsory licenses and collective licenses are extensively cabined by government regulation, and both feature terms derived through private negotiation. Recent efforts to replace complicated compulsory or collective license procedures with something more streamlined have foundered on each entrenched intermediary's efforts to preserve its particular slice of the pie. The Creative Commons has devised forms and procedures to simplify licensing of uncompensated uses of copyrighted material.<sup>232</sup> Its efforts to field comparable commercial licenses have thus far been less successful.<sup>233</sup>

With that background, one approach to the problems of licensing suggests itself. De-trenching current intermediaries would serve both simplification and disintermediation goals. If we forget about politics, the easiest way to get there is to junk all of the statutory licenses, return licensing authority to the individual authors of each work, and see whether those who rely on the licenses find it worthwhile to devise voluntary collective licenses to replace them. Any new collective licenses would of course beget new intransigent intermediaries to administer them. To limit the damage from re-trenching intermediaries, therefore, the law should allow these collecting agents to operate without heightened antitrust scrutiny only to the extent that they meet significant statutory conditions derived from what we've learned in seventy years of antitrust scrutiny of ASCAP and BMI, crafted to ensure transparency and competition, and designed to make retrenchment difficult.<sup>234</sup> To ensure that, at least as an initial matter, these agents represent the creators whose works they license, it might be wise to require the collecting agents to pay creators' shares of the royalties directly to the creators, as ASCAP, BMI, and SoundExchange do today, rather than funneling the payments through the copyright owners.<sup>235</sup>

A law adopting the reforms suggested thus far would represent a shift from a model based on concentrating the ownership of copyright rights into the hands of a single entity whenever possible, to a model encouraging non-

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231. *United States v. Am. Soc'y of Composers*, 2001 WL 1589999, at \*6–8 (S.D.N.Y. June 11, 2001); *United States v. Broad. Music, Inc.*, 1966 Trade Cas. (CCH) ¶ 71,941 (S.D.N.Y. 1966), *modified*, 1996-1 Trade Cas. (CCH) ¶ 71,378 (S.D.N.Y. 1994); *see Crane*, *supra* note 226.

232. *See License Your Work*, CREATIVE COMMONS, <http://creativecommons.org/choose/> (last visited Sept. 17, 2010).

233. *See CCPlus*, CREATIVE COMMONS, <http://wiki.creativecommons.org/Ccplus> (last visited Sept. 17, 2010); *Metadata Lab*, CREATIVE COMMONS, <http://labs.creativecommons.org/demos/metadata/> (last visited Sept. 17, 2010).

234. Such conditions might include provisions that collecting agents may administer only nonexclusive rights, must accept as members anyone who seeks membership and allow any current member to defect to a competitor, must offer per use as well as blanket licenses, must make lists of works they license readily available to public, and must make the terms of division and payment readily available to both members and licensees.

235. *See Litman*, *supra* note 88, at 43–44.

exclusive exploitation by multiple entities. In many ways, U.S. copyright law began to move in that direction when Congress adopted divisibility of copyright, but was stymied by the problems attending licensing. If we can solve the licensing snafus without concentrating all copyright control in a small number of hands, we can build a system that is friendlier to creators, friendlier to readers, and friendlier to a wide swathe of different intermediaries, without giving current players excessive incentives to elbow new entrants out of the picture frame.

#### E. SUMMARY

My proposals are modest. I've suggested that we limit copyright's exclusive rights to uses that involve commercial exploitation. I've proposed that we subject copyright assignments to an author's residual authority to grant licenses, subject to a duty to account, and that we treat uses incidental to licensed uses as impliedly authorized. I have recommended that we reinvigorate termination of transfers, and expressly recognize reader liberties. Finally, I've proposed that we abolish the current statutory licenses. These proposals leave the broad outlines of copyright law in place. They don't seek to "turn copyright on its head,"<sup>236</sup> limit its duration to the span envisioned by the framers,<sup>237</sup> or require the United States to withdraw from or seek to rewrite international copyright treaties.<sup>238</sup> Because my goals reinforce one another, it is possible to accomplish a fair amount of improvement with relatively small adjustments. Getting rid of more than 200 pages full of complicated and historically contingent limitations, restrictions, exceptions, conditions, provisos, and complexities does much of the heavy lifting. It makes the law shorter, simpler, and easier to explain. I don't pretend that it will be possible to keep a new statute short and simple. In time, even a spanking-clean copyright law will acquire its own set of historically contingent complexities. But, at least we will have started from the conditions that plague us in the twenty-first century rather than carrying forward the ones we adopted to address the ills of the eighteenth, nineteenth, or twentieth.

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236. Keith Kupferschmid, *Are Authors and Publishers Getting Scroogled?*, INFORMATION TODAY, Dec. 1, 2005, 2005 WLNR 22457424; see Edward Wyatt, *Google Library Database Is Delayed*, N.Y. TIMES, Aug. 13, 2005, at B9 (quoting Patricia Schroeder, President of the Association of American Publishers).

237. See LAWRENCE LESSIG, FREE CULTURE 133-35 (2004); see also Rufus Pollock, *Forever Minus a Day? Calculating Optimal Copyright Term* (June 15, 2009) (unpublished working paper), available at [http://www.rufuspollock.org/economics/papers/optimal\\_copyright\\_term.pdf](http://www.rufuspollock.org/economics/papers/optimal_copyright_term.pdf).

238. See FISHER, *supra* note 114, at 248-49.

## V. GETTING THERE FROM HERE

I boasted earlier that the conventions of legal scholarship allow me to propose copyright reforms that I cannot realistically imagine Congress's enacting. That permitted me to put off, until now, the question of the prudence of entrusting control of copyright reform to the owners of twentieth-century copyrights, and the related question of whether it is possible to dislodge them.

In the previous Part, I made a series of suggestions for reforming the copyright law to address the most troubling problems of the current copyright system. The reforms I outlined were more in the nature of copyright repairs than copyright revolt. They seek to improve the operation of the copyright system for creators and for readers, listeners, and viewers without wholesale demolition. They also seek to diminish the incentives of vested intermediaries, but to make licensing easier. Finally, they are crafted to improve the system's legitimacy. They join a large collection of thoughtful proposals by proponents of copyright reform across the spectrum of copyright politics.<sup>239</sup> None of these proposals is likely to attract serious attention from Congress or copyright lobbyists.

Right now the copyright-legislation playing field is completely controlled by its beneficiaries. They have persuaded Congress that it is pointless to try to enact copyright laws without their assent. They are unlikely to countenance a statute that disempowers them in meaningful ways. Even if copyright lobbyists are privately persuaded of the wisdom of a reform proposal, they are unlikely to agree to it if it leaves their clients worse off than before. To accomplish real copyright reform, then, we will need to change the way that copyright laws are made.<sup>240</sup> That may be an impossible task, at least in the near term. Members of Congress are unlikely to consider untried approaches unless they believe that their constituents expect it of them, will pay attention, and may take it into account when they vote. The first step in that direction, though, is to encourage a broader conversation about why the copyright system isn't working and what kinds of changes might be possible.

We can't trust the copyright clergy to initiate that conversation on our behalf. They don't need to. They can rely on rhetoric that brands any

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239. *E.g., id.*; KWALL, *supra* note 184; Gervais, *supra* note 23; Ginsburg, *supra* note 64; LESSIG, *supra* note 237; Netanel, *supra* note 114; Reichman, Dinwoodie & Samuelson, *supra* note 114; Samuelson, *supra* note 114; Sprigman, *supra* note 184.

240. Accord Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation To Shape Copyright Protection*, 69 LA. L. REV. 1 (2008); Samuelson, *supra* note 114; Lawrence Lessig, *Required Reading: The Next 10 Years*, LESSIG 2.0 (June 19, 2007, 2:07 AM), [http://lessig.org/blog/2007/06/required\\_reading\\_the\\_next\\_10\\_y\\_1.html](http://lessig.org/blog/2007/06/required_reading_the_next_10_y_1.html).

copyright critique as “anti-copyright,”<sup>241</sup> “anti-author,”<sup>242</sup> anti-property,<sup>243</sup> and an attack on creators’ livelihoods.<sup>244</sup> Copyright reformers who make proposals that won’t inure to the benefit of extant copyright owners are said to pursue the religion of “information wants to be free.”<sup>245</sup> Copyright owners warn that rebalancing the law to limit copyright owners’ control will kill the goose that lays the golden egg.<sup>246</sup> Authors’ advocates go along, pinning their hopes on the promise that if copyright owners can only persuade Congress to strengthen their hands sufficiently, some of the benefits of enhanced copyright will trickle down to creators.

That seems improbable. If Congress’s repeated copyright enhancements have not yet manifested themselves in greater creator wealth, it might be that even very large increases in the scope and value of copyright are unlikely to have a perceptible effect on creators because the structure of the current U.S. copyright system allows creators to capture so small a slice of copyright. It would take massive additional copyright protection before any measurable improvement for creators would show up. So long as the advocates for copyright expansion are permitted to claim the pro-author mantle, however, the idea that creators might be better off if distributors’ rights were narrower is a difficult sell.

Rebutting the notion that copyright owners speak for authors, or that their interests are usually aligned, then, may be a crucial strategic move. The recent polarization of copyright discourse makes the approach trickier than it might have been ten or twenty years ago. We’ve been arguing for so long that advocates have grown immune to reason and example.<sup>247</sup> Even if the

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241. Turkewitz, *supra* note 222; *see, e.g.*, HELPRIN, *supra* note 65, at xiv–xv, 33–39; James V. Delong, *Defending Intellectual Property*, in *COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 17, 17–18 (Adam Thierer & Clyde Wayne Crews, Jr. eds., 2002).

242. *See, e.g.*, HELPRIN, *supra* note 65, at xiv, 99–100, 216–17; Marci A. Hamilton, *The Distant Drumbeat: Why the Law Still Matters in the Information Era*, in *THE MARKETPLACE OF IDEAS: TWENTY YEARS OF CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL* (Peter K. Yu ed., 2002).

243. *See, e.g.*, Thomas D. Sydnor II, *Tragedy and Farce: An Analysis of the Book Free Culture*, PROGRESS ON POINT (Progress & Freedom Found., Wash, D.C.) Apr. 2008, available at <http://www.pff.org/issues-pubs/pops/pop15.5freecultureanalysis.pdf>.

244. *See, e.g.*, *Net Neutrality and Free Speech on the Internet: Hearing Before the Task Force on Competition Policy and Antitrust Laws of the H. Comm. on the Judiciary*, 110th Cong. 23–26 (2008), available at <http://judiciary.house.gov/hearings/pdf/Carneso80311.pdf> (testimony of Rick Carnes, President, Songwriters Guild of America).

245. *E.g.*, HELPRIN, *supra* note 65, at xii–xiii, 33–39, 51–55; Koenigsberg, *supra* note 132, at 679. The phrase, attributed by Wikipedia to Stewart Brand, author of the *Whole Earth Catalog*, took on new meaning as a challenge to copyright when John Perry Barlow repurposed it in his essay, *The Economy of Ideas: A Framework for Patents and Copyrights in the Digital Age*. (*Everything You Know About Intellectual Property Is Wrong*), WIRED, Mar. 1994, at 84, 89.

246. HELPRIN, *supra* note 65, at 214; Koenigsberg, *supra* note 132, at 689.

247. A single example that I think is more sad than offensive: Noted novelist Mark Helprin published a book-length hysterical screed last year that purports to expose an anti-copyright conspiracy, but is primarily an ad hominem attack on Larry Lessig and the Creative Commons. HELPRIN, *supra* note 65. Lessig responded with an anguished book review posted to the

benefits of a simpler, shorter, more legitimate law were obvious to all copyright-affected interests, the current climate would make such proposals controversial. Focusing on specific reforms that might make copyright law more creator-friendly as well as more reader-friendly may give us a small wedge that will allow further conversation. One of copyright's most important functions should be to facilitate connections between creators and readers, listeners, and viewers. If creators and readers examine the ways the current copyright system fails to do this, both groups may question whether continuing to cede copyright lawmaking to copyright owners is wise.

## VI. CONCLUSION

Our copyright system still bears the imprint of its original design. In 1790, reproduction and distribution were expensive, and Congress chose to give authors narrow, short-lived, alienable rights in the works they created and to encourage them to transfer those rights to distributors in return for publication and, sometimes, a little money. Distribution is no longer so expensive. Copyright rights are no longer so narrow. Copyright terms are no longer short. Copyrights are still, however, alienable, and the system still encourages creators to convey all of their rights to distributors in return for dissemination and, sometimes, a little money. The justifications for concentrating copyrights in distributors' hands make less sense today, when copyrights last lifetimes and cover myriad uses that might intrigue different sorts of distributors at different times, and when mass distribution no longer requires massive capital investment.

The opportunities offered by inexpensive digital distribution allow us to think seriously about enhancing copyright's legitimacy by building the copyright system so that it better meets the needs of creators and of readers, viewers, and listeners. That's a conversation that all of us need to be having, now, while copyright revision is still just beginning.

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Huffington Post. See Lawrence Lessig, *The Solipsist and the Internet (A Review of Helprin's Digital Barbarism)*, HUFFINGTON POST (May 20, 2009, 05:18 PM), [http://www.huffingtonpost.com/lawrence-lessig/the-solipsist-and-the-int\\_b\\_206021.html](http://www.huffingtonpost.com/lawrence-lessig/the-solipsist-and-the-int_b_206021.html). From my vantage point as a copyright criticizer and Lessig friend, Helprin's book seems delusional; from Helprin's viewpoint though, I and other scholars like me are either communist conspirators or thralls.