

# BROADCAST COPYRIGHT AND THE BUREAUCRATIZATION OF PROPERTY

THOMAS STREETER\*

## I. INTRODUCTION

Television as we know it is in several senses authorless. Many of its most conspicuous formal textual features are determined by the impersonal bureaucratic demands of the industrial system of which television is part. Stories are dramatically structured to be conducive to the insertion of commercials, for example, and rigidly restricted to half- or hour-long blocks; one can accurately predict whether or not the hero will get the bad guy at the end of a scene by looking at one's watch. Television ("TV") scriptwriters typically work in teams, according to strict formulae and production schedules, not isolated in moonlit towers and freezing garrets. They recognize the sharp contrast between what they do and the traditional model of the creative process associated with the literary ideal of the author. As one experienced television writer put it, "'You don't have to have a talent to write for television . . . I thought it was writing, but it's not. It's a craft. It's like a tailor. You want cuffs? You've got cuffs.'"<sup>1</sup> When TV entertainment does produce moments of insight and originality—and it has many such moments—they are often the product of TV's anonymous assembly line nature, such as the juxtaposing of unrelated images that results from inserting strings of commercials into the middle of programs.<sup>2</sup>

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\* Assistant Professor of Sociology, University of Vermont. A.B., 1977, Brown University; M.A., 1982, Ph.D., 1986, University of Illinois at U-C. The author thanks Peter Jaszi for his helpful comments on a draft of this paper.

<sup>1</sup> TODD GITLIN, *INSIDE PRIME TIME* 71 (1985). The use of the word "writer" in this quote illustrates the continued presence of the Romantic construct of authorship—writing is not putting words on paper, but is an act of highly individual unique expression—even in conditions that contrast sharply with that construct.

<sup>2</sup> Raymond Williams was one of the first to call attention to the centrality of juxtaposition to television aesthetics with his concept of "flow." RAYMOND WILLIAMS, *TELEVISION: TECHNOLOGY AND CULTURAL FORM* (1977). For a further discussion of this phenomenon, see Jane Caputi, *Charting the Flow: The Construction of Meaning through Juxtaposition in Media Texts*, 15 *J. OF COMM. INQUIRY* 32 (1991). It is not just television texts that differ from the traditional model of a linear, coherent book. For reasons linked, but not reducible, to the bureaucratic structures of the television industry, television audiences also use and experience the medium in a thoroughly non-book-like way. As every network executive knows only too well, the bulk of the audience turns on the set to watch television itself, not programs; their channel choice is simply a matter of finding the least objectionable of what's available at the time. People seldom turn to television to watch a particular program; even less often do they seek out the "work" of the televi-

In spite of its relatively authorless character, commercial television could not be what it is without copyright law, a legal institution that rests solidly on the principle of authorship as individual creation of unique works. As Martha Woodmansee,<sup>3</sup> Peter Jaszi,<sup>4</sup> and several of the contributors to this issue of the *Cardozo Arts & Entertainment Law Journal* have pointed out, since the eighteenth century, authors have been generally thought of as individuals who are solely responsible for originating unique works. The conceptual system of copyright relies heavily on this construct.<sup>5</sup> Although the individuality of the author seems obscured by the commercial concerns of Anglo-American copyright law, the categories associated with this law, such as originality and the distinction between an idea and its expression, are derived from the romantic image of authorship as an act of original creation whose uniqueness springs from, and is defined in terms of, the irreducible individuality of the writer.<sup>6</sup>

Ever since the publication of Michel Foucault's *What is an Author?*, the principal question for the institution of authorship has been "What matter who's speaking?"—the query that concludes Foucault's essay.<sup>7</sup> In radio and television, on one level, it seems to matter no longer who's speaking, and yet on the level of legal discourse, it most certainly does. This Article seeks to contribute

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sion equivalent of an "auteur," such as a TV producer or writer. The evidence suggests, furthermore, that many, perhaps most, of the audience uses television as an accompaniment to other activities; thus, the attention the audience gives to television is selective, idiosyncratic and deliberately divided. For the classic description of this pattern, see Paul L. Klein, *Why You Watch What You Watch When You Watch*, in TELEVISION TODAY: A CLOSE-UP VIEW—READINGS FROM TV GUIDE 214 (Barry G. Cole ed., 1981). See also JOHN FISKE, TELEVISION CULTURE 66-83 (1987)(discussing television audiences).

<sup>3</sup> See Martha Woodmansee, *On The Author Effect: Recovering Collectivity*, 10 CARDOZO ARTS & ENT. L.J. 279 (1992).

<sup>4</sup> See Peter Jaszi, *On the Author Effect: Contemporary Copyright and Collective Creativity*, 10 CARDOZO ARTS & ENT. L.J. 293 (1992).

<sup>5</sup> See Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author,"* 17 EIGHTEENTH-CENTURY STUD. 425 (1984); Peter Jaszi, *Towards a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455 (1991).

<sup>6</sup> John Frow, *Repetition and Limitation: Computer Software and Copyright Law*, SCREEN, Winter 1988, at 4.

<sup>7</sup> Michel Foucault, *What is an Author?*, in LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 138 (Donald F. Bouchard et al. trans., 1977). Foucault's question can be interpreted two ways. Most obviously, the question nicely summarizes Foucault's challenge to the traditional literary and legal obsession with the author-creator; in response to all the worrying about who is the real author of a work, who deserves credit for it, what are the sources of his or her genius, and so on, Foucault cavalierly replies, "Who cares?" But the question is also a serious one. If the answer to "What matter who's speaking?" is no longer "because the author-genius is the source of originality," then the issue is still open: Foucault is asking "Why, in what circumstances, and how does it matter to us who's speaking?" This Article is informed by this second sense of Foucault's query.

to an understanding of how, in our day and age, it does and does not matter to us "who's speaking" by exploring copyright and the commercial broadcast media, focusing particularly on the mixture of indifference and obsession with "authorship" that media such as television embody.

## II. AUTHORSHIP, COPYRIGHT, AND BUREAUCRATIC CULTURE

What is to be made of the fact that the relatively authorless medium of television is constituted in part by a set of legal practices that nominally rest on a romantic notion of literary authorship? It need not suggest, as does the Frankfurt School, that the genuine individual autonomy and creativity of authors has been perversely supplanted by a nightmarish, depersonalized and undifferentiated culture.<sup>8</sup> The belief that television has eliminated individuality and creativity is no more true than the belief that the creations of nineteenth century authors had nothing to do with the social and economic conditions under which they were produced. There were institutional and structural constraints then, and there is individuality, and creativity now.<sup>9</sup> The relations, however, between individuality, creativity and their institutional contexts have undergone conceptual transformations since the time the modern institution of authorship first appeared.

Certainly, part of the explanation for those transformations must come from the labyrinthine history of copyright itself. The experience of a tension between the romantic image of creativity in copyright and the un-romantic results of copyright's application is by no means unique to television and radio. It has been pointed out, for example, that the author-associated concept of the work in nineteenth-century copyright law served paradoxically

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<sup>8</sup> For the classic statement of this dystopian view of mass media and modern society, see Theodor W. Adorno & Max Horkheimer, *The Culture Industry: Enlightenment as Mass Deception*, in *DIALECTIC OF ENLIGHTENMENT* 120-67 (1972).

<sup>9</sup> Some viewers, such as certain kinds of media-literate fans or industry insiders, take genuine pleasure in the undeniable personal stamp of particular living, unique human beings—usually executive producer-writers—on TV programs. Some TV producers such as Norman Lear are fond of pointing out the personal visions and experiences they bring to their television creations. Recent scholarship has begun to capitalize on these possibilities by advancing an "auteur theory of television." See, e.g., ROBERT J. THOMPSON, *ADVENTURES ON PRIME TIME: THE TELEVISION PROGRAMS OF STEPHEN J. CANNELL* (forthcoming 1992); ROBERT J. THOMPSON & DAVID MARC, *ARCHITECTS OF THE AIR: THE MAKERS OF AMERICAN TELEVISION* (forthcoming 1992). These approaches are limited, not because the personal stamp of individual "authors" is an illusion—the stamp is quite real—but because it cannot begin to explain either the character of television texts or the full range of cultural experiences associated with those texts, both of which are only minimally shaped by the peculiarities of individual producer-writers.

cally to transfer power away from authors.<sup>10</sup> This trend was enhanced by the extension of copyright to non-artistic works and reached an extreme in the doctrine of works-for-hire.<sup>11</sup> In view of these and related trends, it can be argued that copyright as a whole serves the interests of publishers and distributors more closely than it serves the interests of either authors or users of copyrighted works. Yet these apparently anti-authorial effects are born of a legal regime that nominally exists to reward individual authors. The dependence of authorless television on authored legal constructs, therefore, may be simply an acute example of tendencies that are as old as copyright itself.

This Article cannot solve the entire riddle of copyright's obtuse relation to the ideal of authorship, but it can perhaps shed a little light on the matter by focusing on a related trend: the tendency of liberalism to rely on and, over time, engender bureaucracy.<sup>12</sup> Copyright law matured in the classical era of liberalism, which formally enshrined the ideal of the abstract individual freely exercising his or her creative capacity protected by a neutral system of natural rights, the most important of which was the right of property. The figure of the romantic author-genius was, to an extent, an offshoot of the figure of the free, property-holding, individual capitalist entrepreneur (even if the former figure embodies a criticism of the latter's calculating rationality). The development of authorship and copyright is intertwined with the complex historical career of liberalism.<sup>13</sup>

Liberalism expects to enable individual freedoms, yet it produces bureaucratic culture. Roberto M. Unger describes bureaucracy "as the characteristic institution that is the visible face of

<sup>10</sup> See Jaszi, *supra* note 4, at 471-80.

<sup>11</sup> *Id.* at 485-91.

<sup>12</sup> I am using the term *liberalism* here in the sense developed by Roberto Unger, where liberalism is not just a philosophy or an attitude, but one of the dominant forms of Western social consciousness. ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 18 (1975).

<sup>13</sup> Liberalism is not just a preference for things like individual freedom, a market economy, or the rule of law. It is the dream that such things can be happily integrated; that, for example, individual freedom can be reconciled with a market economy by recourse to formal procedures like the rule of law. This hope of transcending tensions between apparently opposed tendencies is what I assume Unger is describing when he writes that liberal consciousness "represents the religiosity of transcendence in secular garb." *Id.* at 163. Copyright law, in this light, is not intended solely to protect the authors' freedom, nor simply to encourage the public distribution of culture and information. It is not intended to turn intellectual products into marketplace commodities, nor to serve the interests of corporate publishers and distributors; it is the enactment of the dream that all of these disparate goals and values can be reconciled in law. Copyright expresses the hope that the freedoms of individual authors can be protected in a way that simultaneously ensures the open distribution of ideas and the healthy functioning of a marketplace in reproduced texts.

liberalism's hidden modes of consciousness and order."<sup>14</sup> In a sense, bureaucracy is an unexpected outcome of the enactment of liberal hopes. Largely because of liberalism's reliance on formal rules and procedures, the effort to reconcile disparate goals in legal and political structures tends over time to breed burgeoning bureaucratic institutions and logics.

The turn to bureaucracy in the name of liberal goals is a characteristic trend of the last hundred years. The historian Robert Wiebe has pointed out that "[b]ureaucratic thought filled the interior" of our dominant social consciousness beginning in the early decades of this century.<sup>15</sup> As bureaucratic terms and procedures repeatedly have been invoked in the service of classical values, bureaucracy has come to fill a shell of traditional liberal ideals.

What Unger describes theoretically and Weibe recounts historically, radio and television illustrate in the concrete. This Article's central argument is, in brief, that the effort to make broadcasting commercial, to turn the electronic dissemination of disembodied sounds and pictures into something that can be bought, owned and sold, has occasioned a pronounced bureaucratization of intellectual property. More precisely, throughout the institutional and legal history of broadcasting and copyright law from the 1920s to the present, the legal, business and political communities have repeatedly turned to twentieth century bureaucratic terms, institutions and procedures as a means to enact the nineteenth century liberal values associated with traditional private property rights and free markets.<sup>16</sup>

This Article suggests that the bureaucratization of broadcast copyright has taken three principle forms. First, the legal fiction of the corporate individual has turned industrial bureaucracies into legal stand-ins for the individual author.<sup>17</sup> Second, property has been simulated in the statistical formulae of blanket licensing organizations.<sup>18</sup> Third, ownership boundaries have been attenu-

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<sup>14</sup> *Id.* at 20. See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984).

<sup>15</sup> ROBERT H. WIEBE, *THE SEARCH FOR ORDER: 1877-1920*, at 162-63 (1967).

<sup>16</sup> An important issue here is technology. John Frow, Bernard Edelman, and others have explored how the rise and institutionalization of new technologies of reproduction such as photography, video tape, digital sampling and computer software have brought to the surface contradictions in copyright that were present but institutionally hidden in the medium of print on which copyright was based. See, e.g., BERNARD EDELMAN, *OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW* (Elizabeth Kingdom trans., 1979).

<sup>17</sup> See *infra* at Part III.

<sup>18</sup> See *infra* at Part IV.

ated by an elaborate labyrinth of industry-inspired federal regulations that shape and channel the production and distribution of television programs.<sup>19</sup> In each case, it could be said that depersonalizing bureaucratic relations have been created in the name of personalizing legal institutions. This pattern is symptomatic of a general trend in twentieth century American laws and institutions identified by a variety of historians and legal scholars: a shift from classical, formal liberalism towards a revisionist, corporate liberalism.

### III. FROM CLASSICAL TO CORPORATE LIBERALISM

An emerging consensus among historians suggests that United States society underwent a major transformation around the turn of the twentieth century, resulting in new patterns of legal and political thought called "revisionist" or "corporate" liberalism.<sup>20</sup> Due to changes in society and the economy in the late 1800s, the classical legal regime became increasingly awkward. Repeatedly, classical liberal principles such as the abstract individual and natural property rights have conflicted with contemporary institutions and social relations such as corporations or electronic reproduction of texts. In this century, the characteristic response to such dilemmas has been not to abandon classical liberal principles, but to qualify them by turning to quasi-scientific tools such as bureaucracy, expertise, and statistics.

The modern industrial corporation has been at the center of this transformation. The corporations or trusts that began to appear in the last decades of the 1800s were complex social organizations that interwove the interests and decision-making activities of numerous individuals such as stockholders, managers, and boards of trustees.<sup>21</sup> The conflict between the liberal ideal of the entrepreneurial individual and the impersonal, collective nature of corporations was obvious, and generated considerable de-

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<sup>19</sup> See *infra* at Part VII.

<sup>20</sup> See, e.g., MARTIN SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916: THE MARKET, THE LAW, AND POLITICS* (1988); WIEBE, *supra* note 15; R. JEFFREY LUSTIG, *CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY 1890-1920* (1982). For a summary of the change in legal logic in particular, see Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 13, 18-39 (David Kairys ed., 1982). See also James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985).

<sup>21</sup> ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

bate.<sup>22</sup> The efforts towards reconciliation of the corporation with liberal laws and ideologies have centered on two legal innovations: the legal fiction of the corporate individual, and a legal rationale that rests on a social-engineering vision of general standards flexibly applied according to questions of efficiency and fact as determined by experts. The key role of the fiction of the corporate individual in the production of broadcasting is fairly obvious. In the framework of copyright, giving corporations the status of persons under the law grants them the ability to stand in for authors, thus transferring the bulk of control over media works from individual creators to large bureaucratic institutions. TV programs are thus created, produced, owned, and exchanged by corporate bureaucracies. The television industry's notorious penchant for crassly formulaic thinking in broadcast programming is largely the product of this bureaucratic organization.<sup>23</sup>

In a very real sense, the classical discourse of unique individual creativity is not abandoned in this framework, but rearticulated within a new economic form. The authorless character of broadcast programs, a by-product of the bureaucratic social organization of broadcast corporations, is thus maintained by, and, at least symbolically, reconciled with copyright and the notion of authorship that underlies it. To a large degree, the bureaucratization of intellectual property in broadcasting is a product of the simple fact that large industrial bureaucracies have taken the place of individuals both in law and in the process of cultural production.

The fact that the legal construct of the corporation has taken the place of the individual in Anglo-American law, however, need not mean that faceless, impersonal structures have taken the place of living human beings in controlling cultural production, or that the Romantic notion of true creativity of individual authorship has been replaced by mindless imitation. The institution of authorship and the corporate form are both ways of organizing complex human activities. They differ only in the particular configurations of human activity, the habits of thought and practice, that give them their distinctiveness. The corporate form, in other words, is less a replacement of the individual than

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<sup>22</sup> Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 173-224 (1985).

<sup>23</sup> The corporate character of the television industry is discussed at some length in Thomas Streeter, *Beyond the Free Market: The Corporate Liberal Character of U.S. Commercial Broadcasting*, 11 WIDE ANGLE 4, 4-17 (1989).

a different way for individuals to think and act in relation to one another.

The remainder of this Article, therefore, will focus not on reified institutions but on the patterns of thought and action, the imaginative workings, that help constitute those institutions in the corporate era. Central to the corporate imagination is the legal logic of corporate liberalism. Under classical liberalism, legal thought rested on a rigid, formal model, based on a geometric ideal of axiomatic deduction from rules and unequivocal, bright-line legal distinctions. Corporate liberalism, on the other hand, rests on a social-engineering vision of general standards flexibly applied according to questions of efficiency and fact. In twentieth century law, notions of property, individual autonomy, and rights, once thought of as absolute rules, have been increasingly interpreted as guidelines that can be qualified by the complexities of individual cases.<sup>24</sup> As a result, questions about the legal status of corporations and corporate activity can be treated as matters of degree: corporations can be private in many circumstances but public in others, and control can be defined in a number of different ways depending on context. Decisions about specific instances can be deferred to bodies of experts, independent regulatory commissions and other administrative bodies.

The legal rationale of corporate liberalism is particularly evident in two related practices associated with broadcast copyright: the blanket copyright license<sup>25</sup> and the use of federal administrative agencies to manage relations within industrial systems and mediate industrial disputes. The technique of the blanket license erects a bureaucratic system such as the American Society of Composers, Authors and Publishers ("ASCAP") that statistically approximates a system of market exchanges of copyrighted goods in situations where such exchanges are unworkable. The use of federal agencies to mediate relations within industries, on the other hand, displaces classical notions of ownership with standards such as industry profitability and the public interest. Adjudicating the distribution of control between, for example, cable operators and over-the-air broadcasters, therefore, is not a

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<sup>24</sup> See, e.g., *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), where the Supreme Court rejected the "agreement-in-principle as to price and structure" as the bright-line rule for materiality in cases involving the Securities and Exchange Commission Rule 10b-5, 17 CFR § 240.10b-5 (1991). Although the Court noted the ease of applying a bright-line rule, it noted that "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding such as materiality, must necessarily be overinclusive or underinclusive." *Id.* at 236.

<sup>25</sup> Blanket licensing is discussed at length, *infra* at Part IV.



matter of determining, once and for all, who owns what. Rather, the problem becomes a short term practical matter of negotiating a workable arrangement between competing parties or a series of tradeoffs that keep the various businesses happily involved and profitable without fully resolving the question of who, in the last instance, has proprietorship of the programs that reach home television sets.

#### IV. STATISTICAL SIMULATION OF PROPERTY AND THE BLANKET LICENSE

The property status of broadcast material was first raised by the question of radio and recorded music. In 1914, sheet music publishers founded ASCAP largely to effectuate the right granted composers by the 1909 Copyright Act to demand payment for public, for-profit performances of their compositions.<sup>26</sup> In the 1917 case of *Herbert v. Stanley*,<sup>27</sup> the Supreme Court decided that payments could be demanded, not just in cases of actual commercial concerts, but in the case of any performance that was part of a profit-making operation, such as musicians hired by a restaurant to entertain its diners. This decision created a potentially vast field for ASCAP to comb for royalties. ASCAP thus was faced with the simultaneously tantalizing and daunting task of trying to collect royalties from huge numbers of often small and casual performances of copyrighted works in nightclubs, restaurants and other commercial establishments across the nation.

Actually collecting payments for each individual performance of copyrighted works from, for instance, every piano player in every bar in the United States was thoroughly impractical. Instead, ASCAP turned to the device of the blanket license, which has since become a central feature of contemporary cultural production. Each establishment would pay a fee akin to an annual subscription, determined by things like the size of the establishment but not by the specific content of the performances. The money thus collected would then be distributed to copyright holders according to a statistical formula designed to approximate the actual, but unknown, number of performances of each work.

The blanket license is set up to maintain a system of market relations in copyrighted works, to ensure that composers and other artists get paid for the use of their property. At first glance,

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<sup>26</sup> 17 U.S.C. §§ 1-215 (1909).

<sup>27</sup> 242 U.S. 591 (1917).

this appears to be its function. Money flows from users of copyrighted works to copyright holders, and works—in the form of sheet music or recordings—flow the other way. At second glance, however, certain constituent features of market relations are missing. Goods, even intangible goods, are not actually exchanged. Copyright holders do not get paid and users of those works do not pay for individual performances of works. Both parties deal primarily with a bureaucracy. On a day-to-day basis, both copyright holders and users experience a process more like paying taxes or procuring welfare: amounts are determined by formulae and bureaucratic procedure. The technique of the blanket license, therefore, does not so much enable a full-fledged market exchange of goods as it creates a statistically grounded, bureaucratically implemented abstraction of that exchange.

The blanket license thus illustrates the tendency of corporate liberal institutions to turn to bureaucracy, statistics, and expertise as an abstract means to uphold liberal standards of property and individualism in conditions that would seem to conflict with those standards. When faced with dilemmas, in other words, our corporate liberal imagination often turns to bureaucratic institutions and statistical abstractions as a means to uphold the general principles—not the full concrete reality—of a system of property rights and market exchange.

#### V. CENTRAL TENSIONS: EXPANSION VS. CONTROL

In a general way, techniques such as the fiction of the corporate individual and revisionist legal reasoning have quite successfully served to keep alive the liberal ideal of autonomous, individual creator-entrepreneurs. Simultaneously, that ideal is safely adapting to apparently conflicting twentieth-century economic and technological circumstances. Corporations have taken the place of individual authors and thus generally control program production and distribution and mold programming to internal bureaucratic requirements. Conflicts or contradictions that might emerge from this system can be dealt with on a case-by-case basis by various private and public bodies of experts, such as ASCAP, the National Association of Broadcasters (“NAB”) or the Federal Communication Commission (“FCC”).

As with most ideological structures, however, the fit has been neither seamless nor frictionless; maintaining it has required considerable institutional and ideological effort. Much of the activity surrounding broadcast copyright in this century has

involved a kind of negotiation of the tensions and contradictions inherent to corporate liberal thought and legal institutions.

Concerns specific to corporate, economic, and social organization have had an important impact on the implementation of copyright in the broadcast field. In contrast to nineteenth-century entrepreneurial businesses, corporations are structures, not isolated elements. They are administrative systems that coordinate and rationalize the activities of numerous units of production and distribution.<sup>28</sup> The concerns that dominate corporate decision-making, therefore, typically involve ensuring the smooth coordination of the different parts of complex vertically integrated industrial systems. The desire for system-maintenance, for stability and the smooth coordination of different parts of the processes of production and distribution, permeates corporate decision-making.

At the same time, however, corporations desire autonomy from other institutions—such as other corporations or the state—and the growth and profits that such autonomy can enable. They are thus constantly negotiating tensions between a drive towards stability and coordination, and a drive towards growth and autonomy. Furthermore, as creatures of capitalism in a politically liberal society, corporations are limited in their drive towards stability by concerns about political legitimacy and by the need to conform to antitrust principles.

ASCAP was, in a sense, the sheet music industry's response to this tension. The use of a bureaucratic organization and statistical approximation of market exchange was a means of encouraging wide dissemination and sales of sheet music while, at the same time, maintaining control, that is; maintaining the ability to recoup profits.

## VI. RADIO AND RECORDED MUSIC: THE HISTORY OF BMI

The tensions between stability, coordination, growth and autonomy are particularly evident in the case of broadcasting. When broadcasting first appeared as an industrially-backed fad in the early 1920s, it presented both an opportunity for outward expansion and serious problems of maintaining control. From a corporate point of view, broadcasting's ability to cast broadly, to instantly disseminate messages to vast but unseen audiences, is a two-edged sword. On the one hand, broadcasting seems a corporate manager's dream: it can help proliferate both consumer

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<sup>28</sup> See Streeter, *supra* note 23.

products and advertising-laden messages to potentially enormous audiences, thus expanding markets, sales, and the general penetration of consumer habits into the everyday life of the population. On the other hand, that very same tendency towards indiscriminate proliferation of products and messages poses a very real threat to general corporate stability and coordination. If messages and products are freely disseminated, the corporate system can succumb to problems of low profits, competition from small entrepreneurs, or a simple loss of control. New legal and institutional arrangements are necessary in order both to tame and to exploit broadcasting, to negotiate the tension between an expansionary, centrifugal push outwards and a centripetal pull towards limitation and control.

ASCAP helped inaugurate the search for a stable solution. In 1922, prominent commercial and government radio interests held a gathering, the first Washington Radio Conference, to develop procedures for coordinating their rapidly expanding but as yet untamed industry. ASCAP sent the Conference a message urging the creation of a blanket license system for radio performances of music.<sup>29</sup> When a response from the broadcast industry was not forthcoming, ASCAP began demanding royalties from several broadcast stations for the live and recorded musical performances that were beginning to be heard over the airwaves.<sup>30</sup> While at least one prominent station privately worked out a blanket license deal with ASCAP,<sup>31</sup> most broadcasters balked at the prospect of yet another expense in a field that was largely unprofitable. ASCAP then helped to secure its position with the court decision of *Witmark & Sons v. L. Bamberger & Co.*<sup>32</sup> that declared that an over-the-air performance of "Mother Macree" during a program sponsored by L. Bamberger and Company ("One of America's greatest stores") was not eleemosynary.<sup>33</sup>

The music copyright problem led to the formation of the National Association of Broadcasters (NAB) in April of 1923.<sup>34</sup> The

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<sup>29</sup> ERIK BARNOUW, *A TOWER IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES TO 1933*, at 119 (1966).

<sup>30</sup> CHRISTOPHER H. STERLING & JOHN M. KITROSS, *STAY TUNED: A CONCISE HISTORY OF AMERICAN BROADCASTING* 88 (2d ed. 1990).

<sup>31</sup> AT&T's pioneer station WEAf quickly negotiated an arrangement to pay ASCAP \$500 annually, largely for public relations reasons. AT&T was at the time struggling to enforce radio patents over the objections of much of the rest of the radio industry, and could hardly afford to appear insensitive to intellectual property rights. See BARNOUW, *supra* note 29, at 120.

<sup>32</sup> 291 F. 776 (3d Cir. 1923)

<sup>33</sup> *Id.* at 779; see also BARNOUW, *supra* note 29, at 120.

<sup>34</sup> STERLING & KITROSS, *supra* note 30, at 88-89.

NAB quickly became the commercial broadcast industry's principal tool for exerting the centripetal pull towards coordination, both within the industry and in relations with other industries. An immediate solution to the copyright problem, however, was not forthcoming from the April meeting. Instead, as broadcasting quickly evolved from an experimental fad into a central component of the consumer economy and as profits rose, broadcasters acquiesced to ASCAP's annual blanket licensing fees. ASCAP, in turn, became increasingly dependent on the broadcast industry for its revenues: in 1930, forty percent of ASCAP's income was from radio music performance fees; in 1937, sixty percent, and in 1939, sixty-six percent.<sup>35</sup>

For most of the decade of the 1930s, this relatively happy arrangement between ASCAP and the broadcasters satisfactorily negotiated the tension between expansion and control felt by both industries; profits and the proliferation of electronically-reproduced music expanded annually, but control was maintained. The only problem was a by-product of the fact that the relation between copyright holders and broadcasters was a bureaucratic stand-in for market exchange, not an actual market. In a classical market, when people raise their prices too high, competition either forces them to lower prices or causes them to go out of business. In the case of ASCAP's blanket license, market regulation was absent. What was to prevent ASCAP from raising its prices? The problem was not one of monopoly: there were plenty of buyers and sellers—in a sense, too many of them. The problem was that prices were being set according to a theoretical model of a market where no real market existed against which to test the theoretical model's accuracy.

Thus, it was predictable that ASCAP would raise its fees. Early in 1932, ASCAP asked for a royalty increase of "an estimated 300 percent."<sup>36</sup> In spite of a struggle from the NAB, the increase stuck, perhaps because the initial rates had been low and broadcast profits were at the time growing dramatically. However, when ASCAP in 1937 announced a further increase of seventy percent to be implemented in 1939, the NAB responded by organizing a competing licensing organization, Broadcast Music Incorporated ("BMI"). A large fund was established to attract copyright holders to sign on with the new organization. BMI also neatly exploited the indeterminacy of the process of distributing

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<sup>35</sup> *Id.* at 193.

<sup>36</sup> *Id.* at 132.

fees by statistical approximation. ASCAP's formula for fee distribution favored older, established composers; BMI sought to attract disaffected newer song writers by adopting a formula favoring new entrants into the business.<sup>37</sup>

In spite of these efforts, BMI's library of licensed music remained slim at first. Between January and October of 1941, BMI's first year, broadcast listeners were treated to the unending repetition of the few available BMI and public domain songs. During this time, for example, the BMI-licensed "Jeannie with the Light Brown Hair" was forever engraved on American popular memory.<sup>38</sup> Control and limitation were being exerted at the expense of expansion. Instability ensued as listeners grew weary and various broadcast organizations considered defecting to ASCAP. To further complicate matters, the Department of Justice filed suit against both ASCAP and the broadcast networks for antitrust violations. Stability did not return until a compromise with ASCAP was reached in conjunction with an antitrust consent decree that caused license fees to return to old rates and allowed BMI to remain in existence and share the business of blanket licensing with ASCAP.<sup>39</sup> With small modifications, the arrangement the Justice Department and ASCAP reached in 1941 has survived to this day.

What happened to the categories of property and copyright in this process? At first glance, it seems that copyright was enforced, property rights in broadcast music created, and capitalist market relations successfully extended into the sphere of broadcast culture. At second glance, however, the situation appears more complicated. The struggles between ASCAP and the NAB were not manifestations of straightforward marketplace competition. Rather, they were more like the political struggles that often occur within or between rival bureaucratic institutions: the rivalry was expressed in terms of statistical formulae, membership lists, and general legitimacy. Profits were certainly at stake in the struggle, but profit was determined by the relative political strength of the institutions in question, not by buying more cheaply or selling more dearly. The blanket licensing organizations are bureaucratic, political entities and they behave accordingly.

Copyright, in this light, has taken on a new role in relation to

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<sup>37</sup> 2 ERIK BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES* 110 (1968).

<sup>38</sup> STERLING & KITROSS, *supra* note 30, at 193.

<sup>39</sup> *Id.*

the process of cultural production. In classical liberal legal practice, copyright's role was formal. It was used to draw boundaries in a marketplace: one person's property rights, vis-a-vis a book or an article, began and ended at a certain specific point, determined by the criteria of originality, expression, etc. In the corporate technique of blanket licensing, copyright's role is less formal and more like a functional standard: copyright acts as a general bureaucratic guideline, signifying the general goals of the system (capitalist profitability and expansion) to those inside it. The specific implementation of those goals depends less on boundary-setting than on bureaucratic arrangements that keep the system running, even if boundaries are allowed to grow quite blurry in the process. The question of who in the final instance authored a broadcast song, or more importantly who owes whom what for it, is often left open, but this is unproblematic as long as the general goals of the system are served and as long as the industries involved are profitable, expanding, and relatively stable.

#### VII. FCC REGULATION OF PROGRAM OWNERSHIP AND CONTROL

Another transformation in the role of intellectual property is evident in the elaborate role of federal broadcast regulation in shaping the control and ownership of broadcast programs. The common sense view of private property suggests that ownership confers a kind of sovereignty, the right to do whatever one wishes with the thing owned. This notion was reflected in nineteenth-century industrial disputes, which were most often treated as a matter of locating the formal boundary between the property rights of the parties involved. If the effluent from a coal mine spilled into a neighboring farmer's field, for example, the courts would set out to find the line between the farmer's and the mine's property rights. Were the farmer's property rights being violated by the spill or would forcing the mine to limit operations violate its property rights?

Today, in contrast, blurry boundaries are often treated as a natural part of doing business. Network executives regularly force changes in plots and lines of dialogue in programs owned by nominally independent program producers. And producers, via the FCC, prohibit networks from owning properties that are available to anyone else on the open market. Television corporations, in fact, face an elaborate labyrinth of regulations that shape and channel the production and distribution of program property. Television stations, for example, cannot broadcast network

entertainment programs between 7:30 and 8:00 pm; networks cannot contractually obligate their affiliates to broadcast network programs; program producers and distributors cannot grant networks distribution rights for program reruns; cable operators must blank out certain cablecast programs that duplicate local over-the-air offerings. All of these rules have generated vociferous debate over the rules' fairness and efficiency, yet few object to them on the grounds that they violate property rights.

In the day-to-day workings of the television industry, the concepts of ownership, property, and copyright have become increasingly residual categories, supplanted by considerations of efficiency, fairness, and the overall functionality of the system. Although broadcast executives and lobbyists are fond of publicly bemoaning their second class status under the First Amendment, implicit in this system of regulation, at regular intervals throughout the system's history, they also have embraced it with quiet enthusiasm. Most of the existing regulations, in fact, originated in suggestions or complaints from industry members.

Both this maze of regulations and the industry's deeply ambivalent attitude towards it can be best understood in terms of the highly bureaucratic nature of broadcasting, particularly broadcast television, as a system of production and distribution.<sup>40</sup> Before the networks can compete with each other, an elaborate smoothly flowing system of program production and distribution first must be in place. Relations between networks and affiliates, advertisers and broadcasters, and independent producers and broadcasters all need to become formalized and regularized, and the values of stability and predictability prevail. For example, it is extremely rare for a broadcast station to change its network affiliation; however, when a station does jump ship, the event prompts the question: "What went wrong?" It is treated, in other words, as an exceptional matter for concern throughout the industry, not as normal marketplace behavior. The concerns that dominate decision-making in the industry tend to involve, not just short-term profits, but ensuring the smooth coordination of the different parts of a complex, vertically integrated industrial system. This internal focus on system-maintenance helps to ac-

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<sup>40</sup> See Streeter, *supra* note 23. The main economic and structural causes of television's corporate character are: 1) extremely high capital intensity and the resulting problem of overcapacity, 2) the social structures associated with the presence of professionalism and a "managerial class" in television management, and 3) the linked decline of classical economic competitive relations and their replacement with oligopoly relations.



count for what Bernard Miego has characterized as television's "flow culture," the character of a system where "programming must be uninterrupted, constantly renewed and therefore produced on an unbroken conveyer belt."<sup>41</sup>

Government regulation of broadcast program production and distribution has proven useful as a means for system-maintenance and coordination, and dates back to the beginning of broadcasting. When hobbyists, entrepreneurs, and corporations first began using radio to send news, music, and entertainment to mass audiences in 1920, there was considerable confusion—both technical and institutional. Not only was the interference between transmitters growing, but there were a broad variety of competing visions about what this new practice was for. Was broadcasting for hobbyists, religious groups, schools, entrepreneurs or corporations? Was it for serious discussions, music, proselytizing, propagandizing, or advertising?

The Department of Commerce ("DOC") was initially responsible for regulating the airwaves. The DOC helped resolve the institutional questions in the process of solving the interference problem. Then Secretary of Commerce Herbert Hoover firmly established broadcasting as a commercial, corporate activity by directly and indirectly determining what kinds of materials could be sent over different channels. One of his first regulatory acts was to forbid radio amateurs—hobbyists operating on a non-profit basis who had done much to develop and popularize the technology—from "broadcast[ing] weather reports, market reports, music, concerts, speeches, news or similar information or entertainment."<sup>42</sup> Later commercial broadcasters themselves were located on separate zones of the spectrum so as to favor larger, well funded organizations, particularly electronics corporations.<sup>43</sup> By limiting the participants in broadcasting and the rules under which they operated, the government cleared the ter-

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<sup>41</sup> Bernard Miego, *The Logics at Work in the New Cultural Industries*, 9 MEDIA, CULTURE, AND SOC'Y 276 (1987).

<sup>42</sup> Marvin R. Bensman, *Regulation of Broadcasting by the Department of Commerce, 1921-1927*, in AMERICAN BROADCASTING: A SOURCEBOOK FOR THE HISTORY OF RADIO AND TELEVISION 548 (Lawrence W. Lichty & Malachi C. Topping eds., 1975).

<sup>43</sup> In August of 1922, a distinction between A and B broadcast licenses was created, where A stations at 360 meters had less power, and B stations at 400 meters had more power and were expected to broadcast original programming. See *id.* at 550; *Radio Control Hearings on S. 1 and S. 1754 Before the U.S. Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 42 (1926). On March 21, 1923, the Department of Commerce created a third category, a "C" class of stations which were under 500 watts of power and were assigned to (and thus forced to share) a single frequency. Class A and B stations, on the other hand, began to receive exclusive frequencies, giving them prominent places in the broadcast world. That same year, the Westinghouse Corporation proposed and re-

rain and provided a stable foundation on which commercial corporations could work out the network-dominated, advertising-supported system of broadcast entertainment that survives to this day. The 1927 Radio Act, the legislation which laid out the basic terms and principles that have governed broadcasting ever since, served to legitimize and formalize this arrangement.

Since the 1920s, U.S. Government involvement in regulating programming generally has concerned the linked flows of program goods and profits among the principal institutional elements in the system: program producers, networks, and network affiliated stations. Predictable and relatively stable relations among these three different elements are necessary to the profitable operation of the system, and yet, given the numerous players and interests involved, difficult to maintain. Over the years, as minor disputes among participants in the system have erupted, the industry has become accustomed to turning to the FCC to serve as a moderator.

This process began to assume its contemporary form during an FCC investigation of network broadcasting that began in 1939. During the 1930s, the two largest radio networks, NBC and CBS, established an overwhelmingly dominant position in the broadcast business, controlling the lion's share of program production, station ownership, and advertising revenue.<sup>44</sup> Unable to break the network stranglehold and eager to gain a share of the broadcast profit pie, fledgling networks, such as Mutual, complained to the FCC. In response to these complaints (and to Congressional trustbusting sentiments) the FCC held hearings and promulgated rules designed to limit network power. Although the rules that had the most impact focused on station and network ownership, some were directed at the flow of programming and profits as well. Networks were prohibited from controlling an affiliate's advertising rates and from contractually obligating affiliates to broadcast network programs. Affiliates, in turn, were required to allow other stations to broadcast network

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ceived its own exclusive, interference-free classification, class D, for its flagship station. Bensman, *supra* note 42, at 551-52.

<sup>44</sup> By 1938, the total number of radio stations was no larger than it had been shortly after the beginning of broadcasting in 1927. The percentage of existing stations affiliated with the major networks had climbed to 52 percent, up from 32 percent in 1934. Moreover, all but two of the thirty very profitable high-power broadcast stations in the country were owned by either NBC or CBS; about half of the industry's net income went to the networks and their twenty-three controlled stations, leaving the other half to be divided among 637 independent and affiliated radio stations. See STERLING & KITROSS, *supra* note 30, at 634-35; FCC, REPORT ON CHAIN BROADCASTING, Docket No. 5060, Commission Order No. 37, 99 (1941).

programs that the affiliates refused to air. Control and profits would thus remain, not evenly distributed among affiliates and networks, but adequately distributed to maintain a steady flow of programming through the system.

After a brief confrontation between the FCC and the networks reflecting the waning New Deal political climate, FCC regulation of program and profit flow among industry participants settled into a relatively quiet, ongoing, and routine pattern. Industry leaders and lobbyists for broadcast industry factions became accustomed to using the FCC as a forum for settling factional disputes and pie-sharing struggles. In the late 1950s, for example, squabbles between Hollywood program producers and the networks set off hearings and rulemakings that eventually led to a series of regulations governing ownership and distribution of programs. The producers' complaint was that the networks, as sole buyers of prime time programming, exploited their power unfairly. To redress this perceived imbalance, in 1970 the FCC enacted two rules: first, it forbade networks from syndicating independently produced programs (the syndication rule); second, it forbade networks from obtaining any financial or proprietary rights in independently produced programming beyond the right for first-run network broadcast (the financial interest rule). That same year, networks were prohibited from broadcasting more than three hours of entertainment programming during prime time (the prime time access rule), which effectively created a half-hour slot between 7:30 and 8:00 pm reserved for non-network, syndicated programs.<sup>45</sup>

The 1970 rules did not dramatically change the character of the system. Networks continued to dominate the system long after the rules were in place, and to this day network executives exert detailed, line-by-line control over the scripting and production of television programs. The rules did, however, shift some of the profits to the Hollywood producers, and create space for low budget independent programs such as *Wheel of Fortune* and *PM Magazine* in the prime time access slot. The rules, in sum, helped maintain equilibrium in the system.

The rise in this century of the use of federal administrative bodies as inter-industry dispute resolution mechanisms is a long and elaborate story. What is significant is the transformed role of

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<sup>45</sup> FCC, NETWORK INQUIRY SPECIAL STAFF, *Evolution of Rules Regarding Network Practices*, in FINAL REPORT, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP, AND REGULATION 451 (Oct. 1980).

copyright and the principle of intellectual property. Through blanket licensing, bureaucracies simulate intellectual property principles. In FCC regulation of program flows among industry subdivisions, on the other hand, the question of property is very nearly abandoned and replaced by the goal of a smoothly functioning and profitable system for program production and distribution, measured by standards such as efficiency and the "public interest."

#### VII. COMBINING FEDERAL REGULATORY MANAGEMENT WITH THE BLANKET LICENSE: CABLE TELEVISION AND THE COPYRIGHT ROYALTY TRIBUNAL

The television industry's biggest equilibrium-upsetting event in the last twenty years has been the appearance of cable television as a fourth element of the system.<sup>46</sup> When cable first began to grow in small markets in the 1960s, the FCC, under pressure from over-the-air broadcasters, put a halt to cable's expansion: at the time, the new technology seemed too threatening to the existing system's stability. As the FCC began to reverse itself in the early 1970s, and cable began to expand again, numerous questions of program and profit flow arose: if a cable system carries a local TV station, is some form of payment called for, and if so, should the cable system pay the TV station for the signal, or does the local station owe the cable system for the privilege of being retransmitted? What if a cable system imports a distant signal to compete with local TV channels, perhaps with some of the same programs that local stations contracted for an exclusive right to broadcast? The history and nature of the regulations dealing with these issues is too complex to detail here, and they are, in any case, still developing. The important point is that the underlying regulatory patterns (if not always the official rhetoric) followed the general principle of negotiating differences and maintaining overall profitable functioning within the television industry.

In cable, however, the question of copyright has resurfaced as a central issue, with the more traditional questions of system maintenance. The programs that appear on a local cable system typically have had multiple owners and have passed through many hands along the way. Syndicators, sports and music inter-

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<sup>46</sup> For a history and analysis of the growth of cable, see Thomas Streeter, *The Cable Fable Revisited: Discourse, Policy, and the Making of Cable Television*, in 4 CRITICAL STUD. IN MASS COMM. 174-200 (1987).

ests, local stations, and others all can be thought to have property rights associated with the material distributed on cable systems. Given the huge volume of programming that fills a typical cable system, however, most seem to feel that regular direct payments to the thousands of individual copyright owners would be a practical impossibility.

As a result, when Congress rewrote the Copyright Act in 1976, they created the Copyright Royalty Tribunal ("CRT"), one of whose functions is to operate a blanket licensing system for cable television.<sup>47</sup> The CRT, a part of the Library of Congress, collects money from cable operators, puts that money into a pot, and then redistributes it to program copyright holders. Cable operators pay an amount set by a formula based on their subscriber rate, and program copyright holders receive payments according to a similar formula. The CRT, in sum, combines the strategy of the blanket license with the use of Federal regulation as a form of system-maintenance.

As with ASCAP and BMI, the CRT is set up to maintain a system of property rights and market exchange relations for the ephemeral, electronically reproducible good of television programming. And as with the music licensing agencies, in a general way, this appears to be what it does. Money flows from cable operators to program producers, and programs flow the other way. Again, however, many of the constituent features of classical market relations are absent. Costs and payments are set, not by supply and demand, but by politically established bureaucratic formulae. Entry into this particular market involves having the appropriate qualifications and filling out the appropriate forms, not offering to buy or sell a product. Increasing one's profit is a matter of lobbying Congress, not of buying more cheaply or selling more dearly. The CRT, furthermore, has numerous "side effects" uncharacteristic of markets but characteristic of bureaucracies. First, nonmarket rationale often play a crucial role in the process. In a frank, if modest, redistributive effort, for example, Congress allocated an extra-large percentage of the CRT pot to the Public Broadcasting System and none to the three networks. Even when market criteria are used to make decisions, the formulae used to calculate payments inevitably favor some at the expense of others, and thus become matters for intra-industry

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<sup>47</sup> The cable television compulsory licensing scheme has been described as "undoubtedly the most complicated provision of the new [1976] Copyright Act." EDWARD W. PLOMAN & L. CLARK HAMILTON, COPYRIGHT: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 104 (1980).

political disputes. The CRT is a bureaucratic, political entity and behaves like one; it just so happens that one of its directives, one of its administrative functions, is to simulate a system of private property and market exchange.

The CRT has been heavily criticized from a number of angles. Copyright holding organizations have predictably lobbied and litigated for higher rates and higher shares of the distributed royalties. These efforts, in turn, have made the workings of the CRT convoluted and lumbering. Between 1979 and 1982, for example, squabbles between industry groups and the CRT's ensuing tinkering with distribution formulae postponed finalized distributions for this period until 1986, in spite of the fact that the amounts involved were often relatively small.<sup>48</sup> As of 1989 the CRT had not yet completed its distribution proceedings for 1987.<sup>49</sup> Noting the perhaps predictable tendency of the CRT's bureaucratic machinery to generate an ever burgeoning and, on the surface, inefficient series of proceedings and hearings, some critics have called for the creation of a more "pristine" form of property relations based on simple direct contractual relations between copyright owners and cable operators.<sup>50</sup>

Alternatives to the CRT could undoubtedly be developed that are more fair or efficient, according to one or another definition of those words. What seems unlikely to change in the foreseeable future, however, is the habit of turning to bureaucratic practices as a means of achieving goals such as fairness, efficiency, and "free" markets.

## IX. CONCLUSION: THE BUREAUCRATIC SIMULATION OF PROPERTY

In concluding this Article, I review a hypothesis that I have developed in another context.<sup>51</sup> It has been said that we live in a time in which "all that is solid melts into air," in a "postmodern condition" in which life seems to be characterized more by the dizzying manipulation of words, signs, and symbols than by the iron necessities characteristic of nineteenth-century industrial society.<sup>52</sup> We no longer deal with things themselves, the consensus

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<sup>48</sup> Fred H. Cate, *Cable Television and the Compulsory Copyright License*, 42 FED. COMM. L.J. 191, 211-12 (1990).

<sup>49</sup> *Id.* at 214.

<sup>50</sup> *Id.* at 222 *passim*.

<sup>51</sup> See Streeter, *supra* note 23.

<sup>52</sup> MARSHALL BERMAN, *ALL THAT IS SOLID MELTS INTO AIR: THE EXPERIENCE OF MODERNITY* (1982); JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (1984).

seems to be, but with what Baudrillard calls simulations.<sup>53</sup>

The postmodern experience might be historically related to the sometimes tense relations between the liberal exterior and bureaucratic interior of our political economic system. This relation can be usefully illuminated by way of a modified version of Baudrillard's notion of "simulation," where simulation is taken to mean, more or less, a representation once removed, a representation that has taken on a life of its own, divorced from its referent. Without subscribing to Baudrillard's entire intellectual framework, I would like to suggest that intellectual property, and the ideology of individual creation that goes with it, is not so much eliminated by contemporary conditions as it is simulated.

The rapprochement between bureaucratic practice and liberal thought expressed in institutions like the FCC and the CRT has not been frictionless; the incongruity of authorless television being made possible by the authored legal construct of copyright is an example of the friction that results. The notion of the bureaucratic simulation of property helps specify the character and historical context of that friction. Bureaucracies invariably define themselves as neutral and transparent, as simply the most rational means to collective ends. Alternatively, bureaucracies might be understood as systems of signification or representation, as means of *simulating* aggregate goals or purposes. This would then dislodge bureaucracy's self-definition by loosening the mechanistic link between the bureaucratic "signifier" (administrative means) and the bureaucratic "signified" (collective goals). The current state of property might then be understood by combining the notion of bureaucracy as a means for simulating goals with the nominally liberal political system whose legitimacy rests on an ideology of private property and free markets. The creation of intellectual property in broadcasting, in this view, is neither a matter of simply extending property relations into the sphere of culture, nor replacing it with monopolies. Rather, property and markets can be seen as bureaucratically simulated.

When faced with the absence or breakdown of traditional market relations, our bureaucratically structured business world sometimes sets out to establish an administrative counterpart to property, a *simulation* of property using the language and procedures of bureaucracy. The discourse of the corporate individual allows a simulation of the individual author-owner. The practice

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<sup>53</sup> Jean Baudrillard, *Simulacra and Simulations*, in *SELECTED WRITINGS 1966-84* (Mark Poster ed., 1988).

of blanket licensing in its various forms erects, in lieu of a system of actual market exchange for goods, a bureaucracy (ASCAP or BMI) whose function is to simulate the ownership and exchange of goods. Federal administrative mediation of industry disputes similarly inserts bureaucracies (the FCC and the CRT) into the middle of the processes of program exchange and distribution, supplanting market mechanisms with bureaucratic regulatory procedures, all in the name of upholding free enterprise.

The point here is not that commercial broadcasting is merely a colossal ruse, that corporations essentially dupe themselves and the general populace into falsely believing they are engaged in market relations when they are not. The corporate environment is complexly structured in a way that encourages some procedures and strategies, discourages others, and generally sets boundaries to what can and cannot be done. Mastering the structure of that environment, its grammars and codes, its pressures and limits, is a large part of what managerial skill is all about. The structure of that environment, its discursive economy, is such that bureaucratic practices are favored in day-to-day procedures, and yet on a broader level pressures are exerted and limits are set by the basic terms of liberal capitalism. The bureaucratic simulation of property, in other words, is the product of intelligent and skilled managers, lawyers, and politicians steering a course through the treacherous shoals of the corporate capitalist political environment. It is an accomplishment, not a falsehood.

Much more research would need to be done to substantiate the notion of the bureaucratic simulation of property. Here I can only offer it as a heuristic that provides a way of making sense of some eccentricities of the legal framework surrounding contemporary cultural production. Current discussions of property tend to oscillate between naive acceptance of the dominant discourse (*e.g.*, the CRT upholds property relations) and a sweeping dismissal (the CRT represents the disintegration and meaninglessness of property). The notion of bureaucratic simulation, I hope, suggests a more fruitful approach to the problem of intellectual property.