

MEDIA & MONOPOLY IN THE INFORMATION AGE: SLOWING THE CONVERGENCE AT THE MARKETPLACE OF IDEAS

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When a man, by the exertion of his rational powers, has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it appears to be an invasion of that right.

—Blackstone's *Commentaries*¹

The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—became, after voluntary communication to others, free as the air to common use.

—Justice Louis Brandeis²

¹ R. R. BOWKER, *COPYRIGHT, ITS HISTORY AND ITS LAW* 2 (1912) (quoting BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (1766)).

² *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

Of course, the law is not the place for the artist or poet.
—Oliver Wendell Holmes³

I. INTRODUCTION

In 1710, the Statute of Anne established the protection of books and radically altered the monopoly on book publishing in England.⁴ Under the title “An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors of Purchasers of such Copies, during the Times therein mentioned,”⁵ the English government established protections from copying by unauthorized publishers. The Statute of Anne was not limited to copyright, however, but also set a mechanism whereby any member of the public could complain of the price of a book and seek to have the price lowered.⁶ With foresight that foreshadowed the battle between the Department of Justice and Microsoft,⁷ the Statute of Anne reserved to the government the power to limit the sales price of protected books, to fine booksellers and publishers for charging excessive fees, and to allow for private recovery.⁸

Despite the transition from the industrial age into the information age, the underlying issues identified in the Statute of Anne still loom large. The law protects the interest that an author, inventor, or creator⁹ has in his intellectual property, recognizes ownership, and provides a mechanism for economic reward. Abuse of

³ OLIVER WENDELL HOLMES, *The Profession of the Law*, in COLLECTED LEGAL PAPERS 29 (William S. Hein 1985) (1920).

⁴ An Act for the Encouragement of Learning, 1710, 8 Anne, ch. 19 (Eng.), reprinted in ROBERT GORMAN & JANE GINSBURG, *COPYRIGHT FOR THE NINETIES* 2 (4th ed. 1993) [hereinafter Statute of Anne]. Protection of literary works traces its origins back to Roman law and is mentioned in writings by Cicero, Horace, and the Roman playwright Terence. See BOWKER, *supra* note 1, at 8.

⁵ Statute of Anne, *supra* note 4.

⁶ *Id.* (“[I]f upon such Enquiry and Examination it shall be found, that the price of such Book or Books is Inhaunced, or any wise too High or Unreasonable, Then and in such case the [Lord Chancellor or other empowered officials] have hereby full Power and Authority to Reform and Redress the same, and to Limit and Settle the Price of every such Printed Book and Books, from time to time, according to the best of their Judgments, and as to them shall seem Just and Reasonable. . . .”).

⁷ *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. filed May 18, 1998).

⁸ See Statute of Anne, *supra* note 4.

⁹ The personification of the person whose rights are the subject of protection takes on significant importance. The distinction between authors and inventors signifies the distinction between copyright and patent under Article I, Section 8, Clause 8 of the U.S. Constitution. Other intellectual property creators may produce works that are not recognized under copyright or patent doctrine and yet have significant economic or social value. See generally Stewart Sterk, *Rhetoric and Reality In Copyright Law*, 96 MICH. L. REV. 1197 (1996). For purposes of breadth, this Article will use the term “creator” broadly to encompass authors, inventors, and others who have contributed something of economic or aesthetic value, without regard to the particular legal regime that creates exclusivity for that creation.

this protection, though, may still subject the creator to their loss.¹⁰ As the third century of copyright protection draws to a close, however, the fundamental balance embodied in the Statute of Anne is once again at the heart of the debate over the future of intellectual property protection. The monopoly granted by state and federal law grows larger with each legislative act,¹¹ vesting ever-greater control in the hands of monopoly-oriented entertainment empires. Increasingly, the protection of the consuming public needs to reappear as a consideration in restructuring the public policy of intellectual property.

The dramatic economic restructuring of the global economy explains much of the upheaval in intellectual property regulation. The quaint notions of the artist toiling at her easel, the author at his Underwood,¹² or a team of songwriters at the piano have given way to a multi-billion dollar global economy in digital information. The rapid technological change has created new industries in computing and communications. It has transformed traditional industries such as film, music, and visual art. The National Information Infrastructure Task Force ("NII Task Force") formed by President Clinton in 1993, reviewed the technological changes affecting the economy and assessed the intellectual property law changes needed to accommodate technological growth.¹³ The NII Task Force reported that the last complete revision to the Copyright Act "was enacted in response to 'significant changes in technology [that had] affected the operation of the copyright law.'"¹⁴

The legislative history of the 1976 Act notes that those changes had "generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users [had] evolved new patterns."

We are once again faced with significant changes in technology that upset the balance that currently exists under the Copyright Act. Our goal is to maintain the existing balance.¹⁵

¹⁰ See, e.g., *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990); *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 214 U.S.P.Q. 409 (7th Cir. 1982); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979); *Mazer v. Stein*, 347 U.S. 201 (1954). See also William Thomson Jr. & Margaret Chu, *Overstepping the Bounds: Copyright Misuse*, *COMPUTER LAW.*, Nov. 1998, at 15.

¹¹ See *infra* Part II.B.

¹² A trade name for a portable typewriter—an analog mechanical predecessor of the laptop computer.

¹³ See THE INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 2-14 (1995) [hereinafter NII REPORT].

¹⁴ *Id.* at 13 (quoting H.R. REP. NO. 94-1476, at 47 (1976)).

¹⁵ *Id.* at 13-14 (quoting H.R. REP. NO. 94-1476, at 47).

This goal is contrasted with the work of the National Conference of Commissioners on Uniform State Laws and the American Law Institute, which have drafted a new provision for the Uniform Commercial Code—Article 2B governing licensing of information.¹⁶ The Introduction to the draft Article 2B explains that the new Article “provides a framework for contractual relationships among industries at the forefront of the information era. . . . Article 2B distributes benefits among the various parties.”¹⁷ Unlike the NII Report, which sets the status quo as its goal, the drafters of Article 2B explicitly set out to restructure the legal landscape upon which the new information industries will form.

Congress has taken both approaches, favoring the status quo with the passage of section 509 of the Communications Decency Act,¹⁸ but promoting an aggressive ownership paradigm by extending the monopoly in copyright for an additional twenty years.¹⁹ The dichotomy between these two approaches may explain much of the tension that currently pervades the academic and legal communities over the growth of information-property regulation.²⁰

At the heart of the tension between these two approaches is a fundamental disagreement over the role of regulation in the man-

¹⁶ U.C.C. Article 2B—Software Contracts and Licenses of Information (Discussion Draft of August 1, 1998). At the time of publication of this Article, Article 2B has undergone a number of changes. In April 1999, the American Law Institute and the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) agreed to remove the proposal from the codification of the U.C.C. and as a result, the American Law Institute did not participate in the final drafting of the proposal. See *NCCUSL to Promulgate Freestanding Uniform Computer Information Transactions Act ALI and NCCUSL Announce that Legal Rules for Computer Information Will Not Be Part of UCC* (Apr. 7, 1999), <<http://www.nccusl.org/pressrel/2brel.html>> (press release). Renamed the Uniform Computer Information Transaction Act (“UCITA”), the draft was approved by NCCUSL on July 29, 1999, and the NCCUSL has forwarded the recommendation to the States for adoption. See Jack McCarthy et al., *Users Lose Under New Law; UCITA Software Legislation Sent to States*, INFOWORLD, August 2, 1999, at 1; <<http://www.NCCUSL.org>>. Despite the procedural changes to the draft, the provisions discussed herein have remained substantially unchanged since the drafting of this Article. Unless otherwise stated, citations and references to Article 2B will be to the draft of August 1, 1998.

¹⁷ U.C.C. art. 2B at Introduction.

¹⁸ See, e.g., Communications Decency Act of 1996 § 509, 47 U.S.C. § 230 (Supp. III 1997).

¹⁹ See Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 1125 Stat. 2827 (1998).

²⁰ See Raymond T. Nimmer, *Breaking Barriers: The Relation Between Contract and Intellectual Property Law*, 13 BERKELEY TECH. L.J. 827, 855 (1998). As Professor Nimmer notes, “[t]he range of rights associated with the five fundamental rights enumerated in 17 U.S.C. 106(1-5) have dramatically grown since the promulgation of the 1976 Act.” *Id.* “Some might view this expansion unwarranted, but regardless of the characterization, these developments clearly indicate an on-going policy judgment that the contours of the digital information era will be shaped, at least in part, by an expanded and different set of rights in information than existed during the industrial era. The pattern of expansion in the United States has international parallels.” *Id.* at 855 n.51.

agement of information-property. The NII Report implicitly assumes that the balance achieved in the Copyright Act of 1976 was the correct balance and must therefore be maintained. The congressional findings and statements of policy in the Communications Decency Act set out a mandate to reduce regulation and allow the new electronic markets to develop without regulation or intrusion, except where necessary to eliminate barriers to the market.

- (a) Findings. The Congress finds the following:
 - (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
 - (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
 - (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
 - (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
 - (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.
- (b) Policy. It is the policy of the United States—
 - (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
 - (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
 - (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
 - (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
 - (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking,

and harassment by means of computer. . . .²¹

Despite the expansive language in this "Findings" section, Congress appears to have retreated from its prior position of promoting the competitive free market "unfettered by Federal or State regulation." Rather, Congress actively sought to add barriers to marketplace entry by expanding the ownership rights of copyright holders.²²

The drafters of Article 2B have also repudiated any approach based on the status quo. The origins of Article 2B as an addition to Article 2 designed exclusively for software transactions suggests that the drafters believed the balance of copyright was inappropriate for this industry, which was only in its infancy in 1976.²³ Critics of Article 2B suggest that the balance achieved has emphasized the role of the software distributor over either the consumer²⁴ or the software developer who is the author.²⁵ Few, if any, of the provisions in Article 2B encourage the active interchange of free ideas.²⁶ Instead, the emphasis is on ownership and control of the information,²⁷ whether or not the information is otherwise protectable under federal law.

Constitutional constraints impose limitations on the Congress when regulating and promoting the information age. Under the Copyright Clause, Congress has the power "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,"²⁸ but under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech, or of the press"²⁹ These two provisions should provide a framework on which to build the balance between increased protections

²¹ 47 U.S.C. § 230.

²² See *id.*; see also Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

²³ See Orrin Hatch, Essay, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium* 59 U. PITT. L. REV. 719, 720 (1998).

²⁴ See Cem Kaner, *In My Opinion: Restricting Competition in the Software Industry—the Impact of Pending Revisions to the UCC*, CYBERSPACE LAWYER, May, 1998, at 11.

²⁵ See Jane Ginsburg, *Authors as "Licensors" of "Informational Rights" under U.C.C. Article 2B*, 13 BERKELEY TECH. L.J. 945, 965 (1998).

²⁶ See Peter Lyman, *The Article 2B Debate and the Sociology of the Information Age*, 13 BERKELEY TECH. L.J. 1063, 1081 (1998).

²⁷ For purposes of this Article, the term "information" should properly be "information-property." Information, as denoted here, is often treated as a commodity or chattel over which traditional property rights may be asserted. Significant disagreement exists as to the extent of property rights in information, which is the subject of this Article.

²⁸ U.S. CONST., art. I, § 8, cl. 8. This clause is referred to throughout as the Copyright Clause. It is also commonly referred to as the Patent Clause, depending on which statutory scheme—copyright or patent—is being reviewed under its constitutional scope.

²⁹ U.S. CONST. amend. I.

for information and increased access to information, unfettered by regulation or property right. Unfortunately, these constitutional considerations play little role in the present copyright debates or the decisions to protect the economy by granting increased ownership to the copyright holders.

Like the Statute of Anne, these constitutional provisions create an economic and social framework designed to expand access of information and authorship to the general public by encouraging its creation and limiting restraints on dissemination. Increasingly, the debate over intellectual property rights has become an economic battle by the producers of computer software and entertainment media waged to determine who will govern the world economy in the first half of the next century.³⁰ The economic demands have altered the constitutional framework and changed the goals from creation and dissemination to ownership and remuneration. The net result of this change has been to misdirect the current regulatory schemes in a manner that undermines the original social objectives of intellectual property jurisprudence and to limit access to content and public debate. Ironically, the closure of the marketplace of ideas comes at a time when technology affords the greatest public access to the marketplace of ideas in history.

Part II of this article provides a review and critique of the constitutional framework provided by the Copyright Clause and First Amendment and the federal and state regulatory systems that have arisen to govern the information economy. The discussion tracks the growth of protection for intellectual property at both the state and federal level and the erosion of limitations placed on that growth by the Constitution. Part III identifies the major segments of the information industries and tracks the growth of these industries under the existing regulatory structure. It demonstrates the success of the computer software, Internet, and entertainment industries, even without the assistance of new federal and state laws designed to increase ownership and profits on the part of these industries. Part IV discusses the interrelationship between the economic success of the information providers and the potentially dangerous limitations on information content available to the public as a result of the economic concentration taking place in the information industries. Finally, Part V introduces a legislative and policy framework for state and federal regulation designed to promote both the decentralization of the information age's economic base and a more competitive marketplace. Specifically, the article

³⁰ See *infra* Part III.

identifies changes to the Copyright Act drafted to reduce its expansion, including a repeal of the copyright term extension and increased judicial deference to the doctrine of Fair Use. The article also recommends repeal of certain provisions of the Telecommunications Act of 1996 related to the cross-ownership of television stations and networks, advocates federal preemption of Article 2B, and suggests that Congress grant limited protection for copyright in database information in lieu of blanket commercial license agreements. Taken as a whole, these proposals suggest a model of regulation that allows the information market to determine the successes and encourages market discipline rather than the use of property rights to promote innovation.

II. BUILDING MONOPOLIES: A NEW APPROACH TO REGULATION

Despite constitutional limitations, century-old legislation,³¹ and broad public distrust, the U.S. Congress has often used regulatory policy to increase rather than limit monopoly power. Increased protection for copyrighted works and deregulation of the telecommunications industry combine to allow ever-greater concentrations of market dominance in the leading providers of the public information that is the heart of the burgeoning information society. At the state level, the Article 2B drafters' proposals to amend the U.C.C. would further accelerate the growing oligopoly enjoyed by the dominant market holders of the software, entertainment, cable and telephone industries. Even the courts—traditionally the least protective arm of government—have begun to enforce ownership rights where none had previously existed.³² The reordering of the state, federal and judicial regulation of the information society will dictate the shape of the developing information society at the dawn of the information age.

A. *Constitutional Touchstones*

The Copyright Clause and the First Amendment set out the fundamental criteria for governance of the information age in the United States and should set the tone in the debate over the extent to which government should regulate the information transactions. The Copyright Clause states that Congress has the power "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their

³¹ See, e.g., Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2 (1994).

³² See, e.g., ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

respective writings and discoveries.”³³ The First Amendment provides a blanket prohibition on Congress and, by extension, on the States. “Congress shall make no law . . . abridging the freedom of speech, or of the press”³⁴ Taken separately, each of these constitutional provisions sets an outer boundary on the role of the government. Taken together, they should provide an outline of the appropriate regulatory structure governing intellectual property. Neither of these constitutional provisions, however, appears to be a significant component of the current regulatory structure and little emphasis has been placed on the limitations suggested by these provisions.

1. First Amendment

Although the courts rarely need to invoke the First Amendment when addressing copyright or intellectual property issues, First Amendment doctrine and tradition stand as the ultimate statement on information rights and regulation.³⁵ The First Amendment and copyright generally coexist without conflict, in part because of the fair use provisions that grant non-owners of the protected work limited access to use the work without the copyright holder’s permission.³⁶

The language of the First Amendment suggests a broad prohibition against government regulation of media or content. Despite this broad language, the jurisprudential history is far more circumspect. At its heart, the First Amendment provides a strong barrier against direct content regulation by the government of printed media,³⁷ live demonstrations,³⁸ film,³⁹ theater,⁴⁰ music,⁴¹ and the Internet.⁴² Nonetheless, the Court has allowed content regulation in broadcast media such as radio,⁴³ television,⁴⁴ and cable.⁴⁵ In *Red*

³³ U.S. CONST., art. I, § 8, cl. 8.

³⁴ U.S. CONST. amend. I.

³⁵ Cf. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 445-46 (1984); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

³⁶ See *Regan v. Time, Inc.* 468 U.S. 641, 698 n.1 (1984).

³⁷ See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974). Cf. *Near v. Minnesota*, 283 U.S. 697 (1931).

³⁸ See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).

³⁹ See, e.g., *Jenkins v. Georgia*, 418 U.S. 153 (1974) (reversing criminal conviction for exhibition of film *Carnal Knowledge*).

⁴⁰ See, e.g., *Barnes v. Glen Theater, Inc.*, 501 U.S. 310 (1990) (nude dancing).

⁴¹ See, e.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. (1975) (holding that refusal to allow production of the rock opera *Hair* without review of the music or production was an unconstitutional prior restraint on expression).

⁴² See, e.g., *Reno v. ACLU*, 117 S. Ct. 2329 (1997).

⁴³ See *NBC v. United States*, 319 U.S. 190, 210-14 (1943); *FCC v. Pacifica Found.*, 483 U.S. 726 (1978).

Lion Broadcasting Co. v. F.C.C., the Court explained that this content regulation was based in part on the theory that “[b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.”⁴⁶ The Court gave Congress wide latitude to treat each broadcaster “as a proxy or fiduciary with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves.”⁴⁷ The Court placed the First Amendment emphasis on the listeners rather than the broadcasters, holding the broadcast industry to a quasi-fiduciary standard that required it to approximate a fair marketplace of ideas by providing access to a variety of speakers. The Court’s emphasis was explicit. “[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”⁴⁸

The Court has not fully repudiated *Red Lion*, although it has struggled to balance its First Amendment objectives with governmental control of the content offered by media providers. In *Turner Broadcasting System, Inc. v. F.C.C.*,⁴⁹ the Court twice addressed issues regarding the must-carry provisions of the Cable Television Consumer Protection and Competition Act of 1992.⁵⁰ The Court held that cable was entitled to greater First Amendment protection than broadcast television.

[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation. The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium.⁵¹

⁴⁴ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the fairness doctrine which required broadcasters to provide free air time for opposing candidates to rebut endorsements or personal attacks).

⁴⁵ See *Turner Broad. Sys., Inc. v. FCC*, 137 L. Ed.2d 369 (1997) (upholding the must-carry provisions which required cable system operators to provide bandwidth or channel availability to local broadcasters).

⁴⁶ *Red Lion*, 395 U.S. at 390.

⁴⁷ *Id.* at 389.

⁴⁸ *Id.* at 390.

⁴⁹ (*Turner I*) 512 U.S. 622 (1994); (*Turner II*) 137 L. Ed.2d 369 (1997).

⁵⁰ Pub. L. No. 102-385, 106 Stat. 1460 (1992).

⁵¹ *Turner I*, 512 U.S. at 637. The Court nonetheless applied intermediate level scrutiny. See *Turner II*, 137 L. Ed. at 388.

By distinguishing broadcast from cable, the Court has created a tiered structure of regulation for media. The Court has struggled with the distinctions that come from basing the standard of review on the medium. It has stated that "each medium of expression . . . may present its own problems."⁵² The Court places print media in the position of full First Amendment protection, treating virtually all regulation as content regulation subject to strict scrutiny.⁵³ The Court places cable at an intermediate level of regulation⁵⁴ and, for now, has left broadcast radio and television at the most liberal level of media regulation, not only because of the scarcity of broadcast, but also because of the potential for listeners to be accosted by unwanted and inappropriate broadcast content.⁵⁵

This continuum approach, which bases the degree of scrutiny on the nature of the medium, leaves open the regulatory scheme that will be applied to new technologies as they are invented. Internet websites,⁵⁶ for example, have neither the danger of scarcity of bandwidth nor the risk of intrusive broadcasting.⁵⁷ In *Reno v.*

⁵² *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

⁵³ *See, e.g., Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254 (1974); *Minneapolis Star & Trib. Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down a tax differential on newsprint).

⁵⁴ *Turner I*, 512 U.S. at 661-62.

⁵⁵ *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978). The Court did not find the potential of unwanted images from a drive-in movie theater to be as objectionable. *See Erznoznik v. Jacksonville*, 422 U.S. 205 (1975). The Court in part bases these distinctions on the compelling interest in protection of minors and the rights of parents to supervise their children. *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."). While this is a different protected interest which impacts the interpretation of the First Amendment, the natures of various media often result in different determinations because each medium is unique on the amount of access afforded to minors and the amount of control available to parents. *See, e.g., Sable Comms. of Cal., Inc. v. FCC*, 492 U.S. 115, 128-29 (1989) (striking down anti-indecency amendments to the Communications Act of 1934, 47 U.S.C. § 223(b) (1982 & Supp. 1988), because "credit card, access code, and scrambling rules [provided] a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors.").

⁵⁶ The Internet is an international network of interconnected computers. It is the outgrowth of what began in 1969 as a military program called "ARPANET," which was designed to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war. While the ARPANET no longer exists, it provided an example for the development of a number of civilian networks that, eventually linking with each other, now enable tens of millions of people to communicate with one another and to access vast amounts of information from around the world.

Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997) (citation omitted).

⁵⁷ "Push technology" creates website broadcasting that could, in fact, result in the broadcast of material. The user must first select software and content before the broadcasting can begin. Unlike radio, the broadcast of Internet content does not currently occur to crowds in public places. Broadcasting to captive listeners—like riders on a bus—is not yet a practice common to the Internet.

A.C.L.U.,⁵⁸ the Court held that “the Internet is not as ‘invasive’ as radio or television,”⁵⁹ and that “communications over the Internet do not ‘invade’ an individual’s home or appear on one’s computer screen unbidden.”⁶⁰ Therefore, based on the technology as it had evolved by 1997, the Court upheld the lower court’s finding that there was “no reason to employ a less than strict scrutiny standard of review” to the Internet.⁶¹

E-mail, unlike Internet websites, gives the sender or broadcaster the power to post content to any computer user who has an account, and the receipt of unwanted e-mail has been viewed by the public as highly intrusive.⁶² Attempts to regulate the unwanted dissemination of e-mail have been only partially successful.⁶³ Courts have used trespass to chattels, trademark law, and the Computer Fraud and Abuse Act as ways to deal with unwanted mass e-mail, but they have not addressed general rights to broadcast e-mail.⁶⁴

Despite this continuum of regulatory scrutiny based on the medium of speech, the Court still espouses a First Amendment doctrine that seeks to allow an unfettered exchange of ideas.

At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that stifles speech on account of its message, or

⁵⁸ 117 S. Ct. 2329.

⁵⁹ *Id.* at 869.

⁶⁰ *Id.* (citing *ACLU v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

⁶¹ *ACLU v. Reno*, 929 F. Supp. at 844. See also *Reno v. ACLU*, 117 S. Ct. at 2344 (“We agree with [the lower court’s] conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium.”).

⁶² E-mail may be factually different, but the Court did not distinguish it when striking down the Communications Decency Act. In the traditional mail setting, the Court has not found unsolicited mail to be an unacceptable intrusion. “[T]he ‘short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.’” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983) (quoting *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (S.D.N.Y.), *summarily aff’d*, 386 F.2d 449 (2d Cir. 1967)).

⁶³ See *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp.2d 444 (E.D. Va. 1998) (finding that the sending of spam e-mail constituted a violation of 18 U.S.C. § 1030(a)(5)(C) (Supp. 1998) and other federal statutes because the large amounts of e-mail interfered with American Online’s computer system). “The undisputed facts establish that defendants violated 18 U.S.C. § 1030(a)(5)(C) of the Computer Fraud and Abuse Act, which prohibits anyone from ‘intentionally access[ing] a protected computer without authorization, and as a result of such conduct, causes damage.’” *Id.* at 450-51. See also *America Online, Inc. v. IMS*, 24 F. Supp.2d 548 (E.D. Va. 1998); *Hotmail Corp. v. Van\$ Money Pie Inc.*, 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998); *Griswold v. Fresenius USA, Inc.*, 978 F. Supp. 718 (N.D. Ohio 1997); *CompuServe Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015 (S.D. Ohio 1997).

⁶⁴ See *LCGM, Inc.*, 46 F. Supp.2d 444; see also *CompuServe Inc.*, 962 F. Supp. at 1022-24; *Griswold*, 978 F. Supp. 718.

that requires the utterance of a particular message favored by the Government, contravenes this essential right. Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. . . . For these reasons, the First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals.⁶⁵

With regard to content regulation, this constitutional mandate continues to be upheld by the Court. For example, within the Telecommunications Act of 1996, Congress attempted to create content restrictions on the Internet with the Communications Decency Act (“CDA”).⁶⁶ This component of the legislation was never enforced⁶⁷ and has done little other than to create a publicity campaign for elected officials asserting that serious media regulation has been taking place while at the same time scaring website owners—the very chilling effect the First Amendment is designed to guard against. As the Court stated:

Title V—known as the “Communications Decency Act of 1996” (CDA)—contains provisions that were either added in executive committee after the [Telecommunications Act] hearings were concluded or as amendments offered during floor debate on the legislation. An amendment offered in the Senate was the source of the two statutory provisions challenged in this case. They are informally described as the “indecent transmission” provision and the “patently offensive display” provision.⁶⁸

Neither the indecent transmission provision nor the patently offensive display provision seriously tested the limits of congressional power to regulate content on the Internet. The indecent transmission provision prohibited “the knowing transmission of obscene or indecent messages to any recipient under 18 years of age.”⁶⁹ The patently offensive display provision prohibited “the

⁶⁵ Turner I, 512 U.S. 622, 641 (1994).

⁶⁶ Pub. L. No. 104-104, tit. V, 110 Stat. 133 (1996) (codified in scattered sections of Title 47, U.S. Code).

⁶⁷ See *Reno v. ACLU*, 117 S. Ct. 2329, 2339 (1997).

⁶⁸ *Id.* at 2338 (internal footnotes omitted).

⁶⁹ *Id.* The text of the CDA provides the following:

(a) Whoever—

(1) in interstate or foreign communications— . . .

(B) by means of a telecommunications device knowingly—

(i) makes, creates, or solicits, and

(ii) initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene

knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age."⁷⁰ These hastily-cobbled provisions took a shotgun approach to regulation of the Internet, shooting at vague, ill-defined targets including protected and unprotected speech alike. As the Court stated:

[T]he CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.⁷¹

The CDA did not limit content regulation with the specificity that would distinguish serious discussions of sexuality from even the most graphic of obscene images. Based on the hurried legislative process, poor drafting, and vague language of the CDA, a strong inference can be drawn that Congress never intended to regulate pornography on the Internet. Instead, Congress took the political posture of enacting legislation destined to be struck down as unconstitutional.

Congress has responded to the defeat of the CDA with an-

or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;

....
 (2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

47 U.S.C. § 223(a) (1994 & Supp. 1998).

⁷⁰ *Id.*

(d) Whoever—

(1) in interstate or foreign communications knowingly—

(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or

(B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or

(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under Title 18, or imprisoned not more than two years, or both.

Id. § 223(d).

⁷¹ *Reno v. ACLU*, 117 S. Ct. at 2346.

other regulatory attempt, the Child Online Protection Act.⁷² However, like the CDA, the statute met with an immediate injunction against enforcement.⁷³ Congress has not used the guidelines provided by the Court in *Ginsberg* to narrowly craft the statute to protect the Court-recognized interests of protecting children and protecting a parent's interest in raising the child.⁷⁴ Instead, the history of the CDA suggests that Congress does not wish seriously to structure legislation narrowly tailored to the various media in a manner that could withstand the strict scrutiny applied to content regulation.⁷⁵

For regulation of the media that is not based on content, the standards are based on a three-prong test that results in an intermediate level of scrutiny.⁷⁶ "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to

⁷² Section 231, Title 47, U.S. Code, provides that:

(1) PROHIBITED CONDUCT. Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than \$50,000, imprisoned not more than 6 months, or both.

47 U.S.C. § 231(a).

Congress defined material that is harmful to minors as:

[A]ny communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

- (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
- (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
- (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. § 231(e)(6).

(2) INTENTIONAL VIOLATIONS.—In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) CIVIL PENALTY.—In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than \$50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

Id. § 231(a)(2)-(3).

⁷³ See *ACLU v. Reno*, No. 98-5591 (E.D. Pa. 1999) (memorandum and order granting preliminary injunction).

⁷⁴ See *Ginsberg v. New York*, 390 U.S. 629, 639 (1968).

⁷⁵ See *id.* Compare *Reno v. ACLU*, 117 S. Ct. at 2329, with *Turner I*, 512 U.S. 622, 637-38 (1994).

⁷⁶ See *Turner II*, 137 L. Ed. 2d 369, 388 (1997); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

further those interests.”⁷⁷ In *Ward v. Rock Against Racism*,⁷⁸ the Court found that New York could lawfully control the sound volume on a public stage.⁷⁹ The Court has explained that content neutral regulation poses “a less substantial risk of excising certain ideas or viewpoints from the public dialogue.”⁸⁰

The Court’s rhetoric has emphasized that the First Amendment is designed to protect the marketplace of ideas, and that the balance of rights between speakers and listeners may properly be maintained to promote this end. “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.”⁸¹ Nonetheless, despite the differing standards of scrutiny for the different media, the cumulative effect of the Court’s First Amendment jurisprudence provides the speaker tremendous protection from government regulation or intervention. Rarely does the Court emphasize the rights of the audience.⁸²

The impact of the First Amendment’s emphasis in speaker’s rights serves to protect the interests of the most powerful speakers—the corporations that both create and distribute content. Although antitrust laws do apply to media companies to the extent that they “advance[] important governmental interests unrelated to the suppression of free speech and [do] not burden substantially more speech than necessary to further those interests,”⁸³ the First Amendment necessarily limits the role the government can take in regulating media companies. While media companies have

⁷⁷ *Turner II*, 137 L. Ed.2d at 388 (citing *O’Brien*, 391 U.S. at 377). Compare this standard, *id.*, with the test as articulated in *Clark*, 468 U.S. at 292 (“We have often noted that restrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”). The positive statement that the regulation leave open channels of communication has been replaced by the negative prohibition that the regulation does not substantially burden more speech than necessary. Arguably, this is a somewhat higher standard of scrutiny because more regulations may fail to meet the test as provided in *Turner*. Whether there is any practical difference is not certain.

⁷⁸ 491 U.S. 781 (1989).

⁷⁹ *Id.* at 803.

⁸⁰ *Turner I*, 512 U.S. at 517.

⁸¹ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

⁸² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1973). In *Turner II*, the Court upheld the must-carry provisions, but the analysis was based on the need to protect one set of speakers—local broadcasters—from another set of speakers—cable operators and national broadcasters. The Court did not allow for the audience to decide by relying upon the marketplace for the programming. See *Turner II*, 137 L. Ed.2d at 390. But see *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978) (protecting audience from unwanted speech, patently offensive speech).

⁸³ *Turner II*, 137 L. Ed.2d at 388 (citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

been found to have violated antitrust laws,⁸⁴ the regulation of market power tends only to occur in the ownership and transfer of broadcasting licenses—the area in which the Court imposes less judicial scrutiny.⁸⁵ The Court did not look to the impact or influence of the newspaper in *Miami Herald* to address whether the readers of the newspaper had actual access to multiple points of view from general circulation newspapers. Instead, the Court took a traditional view of the press as immune from any orthodoxy embodied in government-approved standards of fairness. The speaker's rights are paramount; the impact on the listener is not an appropriate consideration. Although broadcast is treated differently, the underpinning of the scarcity doctrine will limit its impact and may erode entirely as broadcast media becomes increasingly less significant in the information marketplace.⁸⁶

This is not to say that the Court erred in its analytical framework or its results. *Miami Herald* properly identifies the newspaper rather than the general public as the speaker that has a First Amendment right to speak.⁸⁷ Those subscribers or members of the public who wish to write to the newspaper in reply should be allowed to do so solely at the discretion of the newspaper—regardless of whether they have any meaningful alternative to expressing their views. The First Amendment protects the speaker's interest. The marketplace of ideas is left open by empowering the speakers,

⁸⁴ See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) (affirming finding of significant violations of the Sherman Act and ordering divestiture of theater ownership and sweeping changes in the studios' distribution practices).

⁸⁵ The Telecommunications Act includes a series of restrictions on the number of outlets a broadcaster may own in any given market and the total amount of national penetration a company may have. See 47 C.F.R. § 73.3555 (1998). The regulations provide limits on the number of radio licenses a broadcaster may have in any given market; limits on cross-ownership of both radio and television licenses in any given market; and a bar on cross-ownership of either radio or television licenses with ownership of a newspaper in any given market. The regulations also limit national network ownership to 35% of the national market. See *id.* § 73.3555(e)(1).

⁸⁶ To the extent that the scarcity doctrine results in regulations that require a broadcaster to provide the forum, these attempts have traditionally failed. The fairness doctrine required a broadcaster to allow a reply for political endorsements or statements of a controversial nature. The result was not more robust debate. Rather, it merely discouraged the broadcasters from addressing issues that would trigger the obligation. As the F.C.C. acknowledged, "we find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogative of broadcast journalists." General Fairness Doctrine of Broadcast Licensees, 50 Fed. Reg. 35,418, 35,419 (1985).

⁸⁷ See also *Harper & Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 559 (1985) ("The essential thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.") (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (N.Y. 1968)) (internal quotations omitted).

not by creating arbitrary rules of fair play. Similarly, the Court's decision in *Reno v. A.C.L.U.*, treating the Internet as analogous to print rather than broadcast, leaves the most dynamic market ever to be created to be regulated under a common law tradition.⁸⁸

The Court's decisions in *Turner I* and *Turner II*, on the other hand, have not been decided in a manner consistent with other First Amendment decisions. Cable broadcasting represents an actual marketplace of ideas. Cable operators provide the public with ideas, information, and entertainment based on what the public is willing to purchase and watch. There should be no better model for a theoretical marketplace than an actual marketplace.⁸⁹ Cable operators select which signals to carry based on the profits generated by that signal. The Court, however, recognizes that interests other than the rights of the speakers are at stake. The Court explained that the must-carry provisions were to provide "three inter-related interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."⁹⁰

To require that some programming have priority over others, based on the geographic location of the speaker, continues the inconsistent approach the Court has adopted with regard to the differing media. The Court will not allow the government or private parties to make a compelling argument that newspapers should promote a multiplicity of sources, but the Court does allow the government to make that case in the broadcast arena. Further, the Court recognizes the government's interest in promoting broadcast television.⁹¹

The Court provided a partial explanation that the must-carry provision was a content-neutral regulation, which had little actual impact on most broadcasters.⁹² Ironically, this argument shows the weakness in the Court's decision. The Court was willing to impose

⁸⁸ Libel law, for example, is modified by First Amendment jurisprudence, but is not eliminated as a cause of action. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998); *Blumenthal v. Drudge*, 992 F. Supp 44, 52 (D.D.C. 1998).

⁸⁹ The analysis may have been different if local broadcasters were suing because suppliers of multiple-channel content were receiving an unfair financial advantage or otherwise complaining that the marketplace was rigged. This, however, was not a question of requiring all participants at the marketplace to play by the same rules.

⁹⁰ *Turner I*, 512 U.S. 622, 662 (1994).

⁹¹ See *id.*

⁹² See *Turner II*, 137 L. Ed.2d 369, 403 (1997) ("Significant evidence indicates the vast majority of cable operators have not been affected in a significant manner by must-carry.").

a regulation on the marketplace precisely because the marketplace did not need it. Had the must-carry provisions created a substantial burden, they may not have survived even the intermediate scrutiny applied by the Court. The result is to replace a market-driven solution with a legal solution that closely mirrors the market as it stood at the time when the findings of fact were made. The market conditions may change dramatically over time, but the legal solution upheld by the Court will be far less able to adapt to the economic and social change.

The freedom granted by the First Amendment must be recognized to provide a powerful tool to the largest and most effective speakers—the media conglomerates and information content providers. The First Amendment creates the framework for the information age marketplace that significantly limits the government’s power to regulate that market.

To the extent that the standard of review governs the reach of Congress in regulating media, the differences will dictate Congress’ ongoing efforts. Currently, only cable and broadcast television regulations provide for the intermediate level of scrutiny that is necessary to allow some government intervention.⁹³ For cable, Court support for this level of scrutiny is stated in strong terms, but is weaker in total given the multitude of opinions on the Court and the rapid change in technology.⁹⁴ Nonetheless, the Court recognized the “‘important or substantial governmental interest’ necessary to regulate cable.”⁹⁵ Specifically, the Court upheld Congress’ interests in protecting local broadcast television. As the Court stated,

[w]e have identified a corresponding ‘governmental purpose of the highest order’ in ensuring public access to ‘a multiplicity of information sources,’ . . . and it is undisputed the Government has an interest in ‘eliminating restraints on fair competition . . . , even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment.’⁹⁶

This concern will not change soon. If the Court, however, elects to apply a strict scrutiny standard to the regulation of cable, it is

⁹³ See, e.g., *Turner I*, 512 U.S. at 662; *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

⁹⁴ *Turner I* was decided by a 5-4 vote with five separate opinions; *Turner II* was again decided 5-4, but with a majority adopting the standard of intermediate scrutiny. “We begin where the plurality ended in *Turner*, applying the standards for intermediate scrutiny enunciated in *O’Brien*.” *Turner II*, 137 L. Ed.2d 369, 387-88 (1997).

⁹⁵ *Turner I*, 512 U.S. at 662 (quoting *O’Brien*, 391 U.S. at 377).

⁹⁶ *Turner II*, L. Ed.2d at 388 (quoting *Turner I*, 512 U.S. at 663).

highly unlikely that any regulations aimed at providing access to certain speakers will be sufficiently narrow to meet constitutional muster. Because every marketplace operates more efficiently with some basic rules of access, it is essential that the Court continue to provide Congress some latitude in fashioning these rules.⁹⁷

2. Copyright Clause

The most direct constitutional power granted to Congress to regulate the information age is the Copyright Clause, which affords Congress monopoly power over patents and copyrights. As embodied in the Constitution and Supreme Court jurisprudence, this congressional power has been limited in scope. At its heart, the power is granted to provide economic stimulus for authors and inventors, and an economic model that provides authors broad monopoly over their works may ultimately undermine this economic growth.⁹⁸

a. Copyright's History of Limited Monopoly

Just as the First Amendment mandates governmental non-intervention and embodies a doctrine of restraint on the federal government, the Copyright Clause historically played this same role. The constitutional power to create exclusive rights in patents and copyrights is, by its terms, limited in scope. In his 1912 treatise on copyright law, R. R. Bowker lamented that the courts and Constitution of the United States had adopted the English precedent, which had limited an ancient *copy-right* with a much more limited *copy-privilege*.⁹⁹ In the 1774 case of *Donaldson v. Becket*, the British House of Lords held that the Statute of Anne eliminated the prior common law perpetual rights of an author to publish his work.¹⁰⁰ This interpretation of the Statute of Anne was the basis of the U.S. Constitution, the governing precedent that was explicitly incorporated into the U.S. Constitution by the phrase "for limited times."¹⁰¹ Following the pattern, Congress recommended that the

⁹⁷ The Court has provided mixed guidance on this issue. The Court did not find this argument persuasive in *Miami Herald*. "An enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

⁹⁸ See *infra* note 133 and accompanying text.

⁹⁹ See BOWKER, *supra* note 1, at 7.

¹⁰⁰ See *id.* at 26.

¹⁰¹ U.S. CONST., art. I, § 8, cl. 8. ("[Congress has the power] to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. . . ."). Compare the copyright

states pass copyright legislation in 1783, which generally “followed the precedent of the English act of 1710 [the Statute of Anne]”.¹⁰² Congress then passed the first national copyright act in 1790, entitled An Act for the Encouragement of Learning.¹⁰³

The history of copyright protection under the U.S. Constitution suggests that the limits placed by the Constitution should be an integral part of any regulatory scheme and a substantial limitation on Congress’ power to act. The Supreme Court recognized the importance of these limitations in *Sony Corp. v. Universal City Studios, Inc.*,¹⁰⁴ wherein the Court explained:

The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.¹⁰⁵

If the Court is to be believed, then the U.S. Constitution limits congressional authority to passage of copyright statutes that motivate creation of new works and place those works into the public domain as soon as that motivational objective has been achieved:

Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and other arts. The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is by this incentive, to stimulate artistic creativity for the general public good.¹⁰⁶

Any congressional scheme that attempts to achieve unrelated purposes or seeks to infringe upon the rights of the public to have access to the work may be beyond the power of Congress. The objective cannot be to create property interests in authors or inventors. The monopoly granted is necessarily limited to the extent it

statutory term, 17 U.S.C. §§ 301-305 (1994 & Supp. III 1997), as amended by Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, §§ 102-103, 1125 Stat. 2827, 2827-29 (1998), with the patent term, 35 U.S.C. § 154, which lasts twenty years from the date of filing.

¹⁰² BOWKER, *supra* note 1, at 34.

¹⁰³ See Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1831).

¹⁰⁴ 464 U.S. 417, 429 (1984).

¹⁰⁵ *Id.*

¹⁰⁶ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

achieves the goal stated in the Constitution. The Supreme Court has often articulated this distinction:

The copyright law, like the patent statutes, makes reward to the owner a secondary consideration. . . . Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress, "The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.¹⁰⁷

One view of copyright is that the goal of copyright is to expand the public domain for works of authorship and inventions as rapidly as possible, so long as that expansion does not unduly burden the continued creation of new works. At a minimum, the federal government could not, under this view, gain the benefit of copyright in any work created by it.¹⁰⁸ This provision placed many great projects into the public domain during the 1930s (such as the Federal Theater Project), because they were created under the auspices of the Work Projects Administration, a federal program.¹⁰⁹

All copyright legislation from 1790 through the 1909 Copyright Act adopted an approach that encouraged rapid expansion of the public domain. The regulatory scheme divested the author of ownership rights for failure to reserve expressly the rights of authorship with the statute.¹¹⁰ This was based on a presumption of the Copyright Act that most work did not need federal protection and upon publication was free for all. Only those works that the author deemed worth protecting would be covered by the act, as-

¹⁰⁷ *Id.* (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948)).

¹⁰⁸ See 17 U.S.C. § 105 (1994) (prohibiting copyright protection "for any work of the United States Government," but not limiting the government from holding copyrights transferred to it).

¹⁰⁹ See *The New Deal Stage: Selections from the Federal Theatre Project 1935-1939* (last modified Oct. 19, 1998) <<http://memory.loc.gov/ammem/fedtp/fthome.html>> ("The Library of Congress is not aware of any copyright in the materials in this collection. Generally speaking, works created by U.S. Government employees are not eligible for copyright protection in the United States."). The Federal Theatre Project was directed by Hallie Davis and featured directors such as John Houseman and Orson Welles, who left to create the Mercury Theater. The Library of Congress houses an extensive collection (free of copyright restrictions) including thousands of scripts and designs. See *The Library of Congress Federal Theatre Project Collection* (visited Aug. 10, 1999) <<http://memory.loc.gov/ammem/fedtp/ftabout.html>>. See also OSCAR BROCKETT, *HISTORY OF THE THEATER* 629-30 (4th Ed. 1982). Today, copyright would have vested in the authors of the works and the government would have received a license for the payment.

¹¹⁰ See, e.g., 17 U.S.C. § 10 (1909) (notice requirement), §§ 19-20 (form and placement of notice), § 21 (accidental omission of notice), *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

suming the author fully complied with the statute.¹¹¹ In addition, the length of the protection would be modest, unless the author remained diligent and renewed the right to the monopoly at the proper time.¹¹²

With the adoption of the Copyright Act of 1976,¹¹³ and entry into the Berne Convention¹¹⁴ in 1988,¹¹⁵ these presumptions have dramatically changed. Copyright now protects a work as soon as it is embodied in a tangible medium of expression,¹¹⁶ whether published or unpublished, without regard to the formalities followed by the author.¹¹⁷

The original Berne Convention document established two main principles: the concept of a union, composed of the nations adhering to the Convention; and the national treatment rule. . . . Members of the Union agree to maintain a certain minimum level of copyright protection and to treat nationals of other member countries like their own nationals for purposes of copyrights. The rule of national treatment required by the Berne Convention provides that authors enjoy the same protection for their works in other nations as the protection those nations confer to their own authors.¹¹⁸

In addition to national treatment, the Berne Convention requires minimum standards of protection of works that must be protected, which include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression."¹¹⁹ Subject to some limitations, the exclusive rights of copyright owners include the right to translate; the right to perform in public dramatic, dramatic-musical, and musical works; the right to recite in public literary works; the right to communicate to the public the performance of such works; the right to broadcast;

¹¹¹ See, e.g., 17 U.S.C. §§ 13, 14 (1909) (deposit requirement and forfeiture of copyright for failure to comply), *repealed by* Copyright Act of 1976, 90 Stat. 2541.

¹¹² See, e.g., 17 U.S.C. § 24 (1909) (renewal), *repealed by* Copyright Act of 1976, 90 Stat. 2541. Prior to the adoption of the Copyright Act of 1976, the term of the renewal provision was extended nine times, beginning in 1962 while Congress drafted the modern statute. See Copyright Act, Pub. L. No. 93-573, 88 Stat 1873 (1974).

¹¹³ 90 Stat. 2541.

¹¹⁴ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 168 Consol T.S. 185, revised Nov. 13, 1908, 1 L.N.T.S. 218, revised June 2, 1920, 123 L.N.T.S. 233, revised June 26, 1948, 331 U.N.T.S. 217, revised July 14, 1967, 828 U.N.T.S. 221 [hereinafter Berne Convention].

¹¹⁵ Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

¹¹⁶ See 17 U.S.C. § 102(a) (1994).

¹¹⁷ See Jane Ginsburg & John Kernochan, *One Hundred and Two Years Later: The U.S. Joins the Berne Convention*, 13 COLUM.-VLA J.L. & ARTS 1 (1988).

¹¹⁸ Laurinda L. Hicks & James R. Holbein, *Convergence of National Intellectual Property Norms in International Trading Agreements*, 12 AM. U. J. INT'L L. & POL'Y 769, 780 (1997).

¹¹⁹ Berne Convention, *supra* note 114, art. 2(1).

the right to make reproductions; and the right to make adaptations and arrangements of the work.¹²⁰

The Berne Convention completed the transformation of the U.S. copyright system from a paradigm that required authors to weave through procedural hurdles in order to avail themselves of statutory protection to one in which all barriers to copyright protection had been eliminated.¹²¹ “Formalities such as the notice requirement, manufacturing clause, copyright renewal, and registration requirements—as a condition for suit and for the collection of statutory damages and attorneys fees—distinguished U.S. copyright law from the myriad of copyright laws under which American texts are protected around the world.”¹²² The implementing legislation eliminated these barriers to copyright protection and brought the United States into compliance with the leading nations in intellectual property law.¹²³ “[O]ne of the most significant requirements of the Berne Convention is that no member country may condition enjoyment of copyright protection on formalities. Thus, the United States’ admission to Berne required elimination of the formalities present in U.S. copyright law.”¹²⁴

The Berne Convention did more than merely eliminate the barriers to copyright protection. The Berne Convention’s broad protection is not founded in an economic analysis, but rather a protection of the author’s progeny.¹²⁵ To that end, the Berne Convention also includes protections to protect the integrity of the work and the attribution of the work to the author.¹²⁶ Although Congress elected to amend domestic law the least amount necessary to comply with the Berne Convention,¹²⁷ the non-economic

¹²⁰ See Hicks & Holbein, *supra* note 118, at 780.

¹²¹ See generally Ginsburg & Kernochan, *supra* note 117.

¹²² Irwin Karp, *A Future Without Formalities*, 13 CARDOZO ARTS & ENT. L.J., 521, 522 (1993). See 17 U.S.C. §§ 401-404 (1994) (notice); Act of Mar. 3, 1891, ch. 565, § 3, 26 Stat. 1106 (repealed 1909); 17 U.S.C. § 16 (1909) (repealed 1976); 17 U.S.C. §§ 601-603 (manufacturing clause); 17 U.S.C. § 304 (copyright renewal); 17 U.S.C. § 409 (registration); 17 U.S.C. § 411 (1994) (conditions for filing of suit).

¹²³ See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853; Copyright Amendments Act of 1992, Pub. L. No. 102-307, 106 Stat. 264.

¹²⁴ Karp, *supra* note 122, at 522.

¹²⁵ Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2 (1994).

¹²⁶ Berne Convention, *supra* note 114, art. 6bis. See generally John Kernochan, *Moral Rights In U.S. Theatrical Productions: A Possible Paradigm*, 17 COLUM.-VLA J.L. & ARTS 385, 385 (1993) (“There is still heated debate in the United States (to say nothing of such debate in other Berne nations) as to whether United States law adequately complies with Article 6bis of the Berne Convention which requires that member nations give effect to the so-called “droits moraux,” or moral rights, of integrity and attribution.”). See also *Gilliam v. American Broad. Co.*, 538 F.2d 14, 24 (2d Cir. 1976) (finding that breach of contract limitations and the Lanl Act create analogous rights).

¹²⁷ For example, the Berne implementing legislation states

moral rights embodied in the Berne Convention began to appear in the U.S. Copyright Act with the adoption of section 106A, protecting the rights of attribution and integrity for certain narrowly defined works of visual art.¹²⁸ “Authors of qualifying works of visual art enjoy attribution rights consisting of both the right to require authorship attribution for the author’s work and the right to those of prevent the misattribution of works that the author did not create.”¹²⁹ While these rights are severely limited in comparison to European authors, they nonetheless represent a significant expansion of statutory copyright law in the United States and are further evidence that the trend toward the broad European model of intellectual property rights is gaining ascendancy.¹³⁰

The transition from an economic statute with severe limitations to an all-expansive rubric for protection of the creation of the author’s mind may go well beyond the constitutional power of Congress under the Copyright Clause. Admittedly, Congress may elect to provide this protection under the Commerce Clause, at

(b) Certain Rights Not Affected. The provisions of the Berne Convention, the adherence of the United States, thereto, and satisfaction of the United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law -

(1) to claim authorship of the work; or

(2) to object to any distortion, mutilation, or other modifications of, or other derogatory action in relation to, the work, that would prejudice the author’s honor or reputation.

Berne Convention Implementation Act of 1988, 102 Stat 2853.

¹²⁸ See 17 U.S.C. § 106A (1994). A “work of visual art” is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author. A work of visual art does not include—

(A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

17 U.S.C. § 101 (1994) (definition of “work of visual art”).

¹²⁹ Netanel, *supra* note 125, at 46; see also *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 83 (2d Cir. 1995) (discussing application of Berne Convention Article 6*bis* on domestic law).

¹³⁰ See *id.* at 47. Non-statutory protection has sometimes been afforded to copyright holders in the United States using trademark law, publicity rights and other similar doctrines. See, e.g., *Gilliam*, 538 F.2d at 24 (breach of contract limitations and Lanham Act violation); *Rich v. RCA Corp.*, 390 F. Supp. 530, 531 (S.D.N.Y. 1975) (use of recent photograph in republication of authorized work may violate Lanham Act).

least for all works that are involved in interstate commerce, but even that minor jurisdictional limitation might slow the growth of copyright protection to a limited degree. The change of copyright's focus from the public to the author grants authors tremendous leverage in the marketplace of ideas. This slow transformation of emphasis under the Copyright Clause is not consistent with the early development of the constitutional provision. Instead of the Copyright Clause and the First Amendment working together to provide a balanced approach to speaker and listener (or author and public), the new copyright regimen radically alters the balance in favor of the speaker.

b. Economics of the Copyright Monopoly

As the Court has repeatedly noted, the value of the monopoly it grants through the creation of copyright is the public benefit—public access to the works, both because the reward serves as an incentive for the creation of the work and because the work becomes free for all uses after the monopoly period has run.¹³¹ The scope of the grant will determine the public's rights. If the scope is broad, individuals will need to engage in a greater amount of private bargaining for access to the rights. If the scope is narrow, individuals may use the unprotected aspects of the work without regard to the copyright holder.¹³² The bargain between the parties in the shadow of the Copyright Act will measure the value of the rights, based on the scope—and a copyright about to expire will be worth significantly less than the same copyright with a greater period of economic protection. Economist Ronald Coase aptly described the economic model underlying the upcoming information age.

[A]lmost all resources used in the economic system (and not simply radio and television frequencies) are limited in amount and scarce, in that people would like to use more than exists. Land, labor, and capital are all scarce, but this, of itself, does not call for government regulation. It is true that some mechanism has to be employed to decide who, out of the many claimants, should be allowed to use the scarce resources. But the way this is usually done in the American economic system is to employ the price mechanism, and this allocates users without the need

¹³¹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

¹³² An example of this is the first sale doctrine, codified at 17 U.S.C. § 109 (1994), in which the lawful owner of a copy of a work, such as a book, may dispose of that copy as he or she pleases. This includes the re-sale of the work in competition with the copyright holder, as well as destruction or mutilation of the work. See *Quality King Distribs., Inc., v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125, 1133 (1998).

for government regulation A private-enterprise system cannot function properly unless property rights are created in resources, and, when this is done, someone wishing to use a resource has to pay the owner to obtain it. Chaos disappears; and so does the government except that a legal system to define property rights and to arbitrate disputes is, of course, necessary.¹³³

Coase's statement describes the structure of the marketplace for intellectual property, that is, property rights in information and expression. His statement also identifies the inherent limitation that government has the exclusive role in structuring the property rights. The Constitution placed the emphasis on a system designed to promote innovation by providing limited property rights. Nonetheless, Congress has repeatedly extended the breadth and scope of copyright protection, straining the meaning of the phrase "for limited times" well beyond any historical recognition.

Nothing in the economic model of private transactions suggests that the rights created cannot end as soon as they have fulfilled their primary role of promoting innovation. Although there is no empirical research, one can hardly imagine that authors would cease to write, painters to paint, or software designers to design works if the copyright term were reduced—even to the fifty-six years (twenty-eight year term plus twenty-eight year renewal) afforded to authors prior to January 1, 1978.¹³⁴ Indeed, software may

¹³³ Ronald Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 14 (1959).

¹³⁴ See Copyright Act of 1909, 17 U.S.C. § 24 (1976) (repealed 1976).

Hal R. Varian, Dean, School of Information Management and Systems, University of California, Berkeley, provided an affidavit in the lawsuit challenging the constitutionality of the Sonny Bono Copyright Term Extension Act. See *Eldred v. Reno*, No. 1:99CV00065 (filed D.D.C. Jan. 11, 1999). Dean Varian explained the lack of economic incentive provided by the additional twenty years of copyright protection. He analyzed the economic impact of the copyright term extension on both new works and pre-existing works. For new works he stated the following:

The decision to invest in producing a creative work is influenced in part by economic considerations. Investing time and money now produces a cash flow in the future, so one must trade off the time and money invested now with the potential returns in the future In my opinion, extending current copyright terms by 20 years for new works has a tiny effect on the present value of cash flows from creative works and will therefore have an insignificant effect on the incentives to produce such works. . . . I base these opinions on the following At a 10% rate of interest, the present value of the cash flows 51-75 years in the future is .08 cents—or about 0.8% of the value of the cash flow in the first 50 years (since $.08/9.92=0.0081$). The present value of the cash flows from 76-95 years is about 1 cent today—or one tenth of a percent of the value of the cash flow in the first 50 years. . . . The above calculations show that the value of investment returns after 50 years in the future has a minuscule present value compared to the early returns. Hence the value of the cash flows during these later periods has a tiny effect on the present economic incentives to invest in creative works.

Id. (affidavit Hal R. Varian). Dean Varian's analysis for copyright extension for pre-existing

become commercially obsolete after less than six months.¹³⁵ A few works survive the test of time and remain a valuable commodity throughout the term of the copyright. Most works, however, never make it into circulation, and of those that do, only a tiny fraction have a residual value that continues throughout the life of work.¹³⁶

The economics favor only the most valuable works. To the cost of the works, add the transaction costs involved in identifying the holder of the rights and privately negotiating the terms for use and the economic model would predict that more works will disappear under a scheme of robust protection. For example, if a short story has a reprint value of \$100 but it will cost \$50 to locate the author and \$200 to arrange the fees, the total cost of republication rises to \$350. The publisher can invest any amount in a new work, up to \$350, without incurring additional costs. The author of the short story is already accepting less than one third of the \$350 payment, and lowering her fee will not greatly enhance the chances of reprinting the work. The short story does not become reprinted. The transaction costs also increase the costs to the publisher, so fewer works may be published or the costs to the consumer may rise.

If the short story were in the public domain, the costs to the publisher, exclusive of the production costs, would be minimal. One consequence of this scheme would be that the author of the new work would be at a comparative financial disadvantage because she would be competing with less expensive, free works. The consumers, on the other hand, would benefit from the less expensive reprints (or possibly free electronic versions on the Internet)¹³⁷ and a lower price for original works. Unless this model forced new authors out of the marketplace, the public would benefit from greater access to more works at a lower cost. Given the

works is more explicit. "In my opinion, there is no economic rationale for applying copyright extension to pre-existing works. The incentives to produce these works are those that existed at the time of creation. If these incentives were deemed adequate at the time, there is no additional social benefit from extending them retrospectively." *Id.*

¹³⁵ See Charles Piller, *The Cutting Edge; Innovation; Latest Is Not Always Greatest In Cyber World*, L.A. TIMES, Nov. 2, 1998, at 1. This statement, however, overstates the obsolescence of software, because the rights to the derivative work—subsequent versions of the software—generally have significant long-term economic value.

¹³⁶ According to Librarian of Congress James H. Billington, "[d]espite the heroic efforts of archives, the motion picture industry and others, America's film heritage, by any measure, is an endangered species. Fifty percent of the films produced before 1950 and at least 90 percent made before 1920 have disappeared forever." James Billington, *quoted in Librarian Names 25 More Films to National Film Registry* (last modified Nov. 17, 1998) <gopher://marvel.loc.gov:70/00/loc/announce/prs/98/98-181/> (press release).

¹³⁷ See *Eldritch Press* (last modified Apr. 20, 1999) <<http://eldred.ne.mediaone.net>>; *Project Bartleby Archive* (visited Aug. 10, 1999) <<http://www.columbia.edu/acis/bartleby/>>; *Bartleby Library* (visited Aug. 10, 1999) <<http://www.bartleby.com>>.

number of film re-makes, recordings of the same musical score, and published anthologies, it appears that reprints and original works do not compete in most media markets, and therefore the danger of eliminating the new works should not be significant. Further, in many media such as film, the additional costs for storage and maintenance of older works add costs to the “free” works and reduce the financial advantage of public domain works against new works.¹³⁸

Bantam Books conducted a study on so-called classics. They determined the following: more than 23 million classics are sold each year; over half of all classics to high schools and colleges. Now, assume royalties are about ten percent of the cover price, assume the price of those books is \$15, and assume all works are copyrighted (which is unlikely since many are public domain works). If these facts remain constant for twenty years, that means the public pays out \$345,000,000 in royalties, just for these books just in high school and college, over a twenty year period. That is \$345 million that could go elsewhere in education. Saving valuable resources or allocating more for education is the value of the public domain.¹³⁹

The cost of limiting the public domain is not a theoretical expense. The theoretical model described above distributes this expense as a baseline cost for education. More troubling is that these costs will have a disproportionate impact on those households that have not built a reading library over time. Even as the government continues to recognize illiteracy as one of the most significant social costs, Congress adds millions of dollars in costs for those who are most in need of inexpensive, quality literature.

The cost to the public also includes the inability to create derivative works.

“Corporate copyright is increasingly enforced so vehemently that it enormously hinders artists who are trying to use what has come before as building blocks for the future,” says Steve Zeitlin, director of City Lore, a New York based center to promote urban folk culture. “Even tracking down the copyrights for the materials you are using is an enormously expensive task.”¹⁴⁰

In music, for example, free popular music would be unavailable for a great period of time. The transaction costs would discourage pri-

¹³⁸ See *National Film Preservation Foundation* (last modified Aug. 3, 1999) <<http://www.filmpreservation.com/>>.

¹³⁹ Hon. Hank Brown & David Miller, *Copyright Term Extension: Sapping American Creativity*, 44 J. COPYRIGHT SOC'Y 94, 100-01 (1996).

¹⁴⁰ Gail Chaddock, *When Is Art Free?*, CHRISTIAN SCI. MONITOR, June 11, 1998, at B1.

vate bargaining for use of the music—even if the author were willing to allow others to use the music for free.¹⁴¹ Since music is a component of many types of entertainment, the costs of film, television, and theater would also be increased.

[The copyright term extension] would be the current term-life of the author plus fifty years plus an additional twenty years. Put another way, the monopoly grant could extend over seven generations. After the author's life, he would likely have children and grandchildren. Fifty years after that, the author's children or grandchildren would be grandparents. Adding another twenty years to that would likely mean that the children or grandchildren of the author's grandchildren would have children of high school or college age.

Irving Berlin. He wrote "Alexander's Ragtime Band" in 1915. He lived until 1989. If the proposed standard of life-plus-seventy years applied to Berlin, his song, "Alexander's Ragtime Band" would not be freely available to the public until 2059. The length of Berlin's copyright term or monopoly grant would be from 1915 to 2059, or one-hundred and forty-four years from creation. We would thus be denying seven generations of Americans the right to freely use the song.

Duke Ellington's works from 1921 and later would not be freely available to the public until 2016 or later. "East St. Louis Toodle-O," written in 1927, would not come out until 2022. "Mood Indigo," written in 1930, would not see the light of day, so to speak, until 2025. George Gershwin's "Rhapsody in Blue," written in 1924, would not come out until 2019. "I Got Rhythm," written in 1930, would not come out until 2025.¹⁴²

Despite an economic model that suggests the public would benefit from more limited protection of intellectual property, the trend in Congress and in the states is to increase the scope of protection. Congress has focused on the economic success of the most dominant providers of media content. For those providers, greater protection improves their ability to bargain with the property they own, while increased transaction costs tend to increase the economic barriers to competition.

B. *Eliminating the Statutory Barriers to Monopoly*

Congress has acted generously for the holders of copyrighted

¹⁴¹ Music is subject to a compulsory license. See 17 U.S.C. § 115 (1994). The compulsory license does not extend to synchronization rights necessary to use the music in a film or multimedia work, nor does it apply to grand performing rights necessary to use the music in a stage musical.

¹⁴² Brown & Miller, *supra* note 139, at 94-95.

works while trying to strike a balance between the interests involved in the creation and consumption of copyrighted works. The legislative history of the Digital Millennium Copyright Act ("DMCA")¹⁴³ suggests that the balance was a fair one.

Through this legislation, we extend new protections to copyright owners to help them guard against the theft of their works in the digital era. At the same time, we preserve the critical balance in the copyright law between the rights of copyright owners and users by also including strong fair use and other provisions for the benefits of libraries, universities, and information consumers generally.¹⁴⁴

The Copyright Clause balances the interests of authors against those of the public; however, the DMCA places this balance between the for-profit corporations who own copyrights and the non-profit universities and libraries that provide access to information. "The case for extending copyright protection is anchored in corporate profit. The so-called copyright industries (including television, movies, music, books, and computer software) are the nation's No. 1 exporters and contributed \$60 billion in foreign sales in 1996, according to the Washington-based International Intellectual Property Alliance."¹⁴⁵ Left out of the balance is the public, the beneficiary of the public domain and broad fair-use provisions.¹⁴⁶

1. The Sonny Bono Copyright Term Extension Act

Congress created the greatest boon to monopoly power with the Sonny Bono Copyright Term Extension Act, which added twenty years to the term of all existing copyrights.¹⁴⁷ Under the

¹⁴³ Pub. L. No. 105-304, 112 Stat. 2860 (1998).

¹⁴⁴ 105 CONG. REC. E2166 (daily ed. Oct. 14, 1998) (statement of Rep. Boucher regarding passage of the DMCA).

¹⁴⁵ Chaddock, *supra* note 140.

¹⁴⁶ Even before the DMCA, Congress was strengthening and expanding provisions of the Copyright Act. For example, Congress enacted the No Electronic Theft Act ("NET Act"), which added criminal liability for copyright infringement even when committed without any financial gain to the copyright infringer. *See* No Electronic Theft Act, Pub. L. No. 105-147, 111 Stat. 2678 (1997). The purpose of the NET Act as well as the WIPO implementation legislation included in the DMCA was, in part, to reduce copyright piracy by increasing penalties. A discussion of the extent to which piracy affects commercial sales of copyrighted works and the extent to which additional criminal statutes reduces this piracy is beyond the scope of this Article. *But cf.* John Dvorak, *I Take it Personally*, *BILL*, P.C. MAG., Mar. 23, 1999, at 87 ("[M]ost piracy is really a marketing tool. The first dominant word processor, WordStar, was largely a phenomenon of piracy. People would pass it around and then eventually buy a copy if they found it useful. The lost sales attributed to piracy never account for these conversions.").

¹⁴⁷ *See* Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 1125 Stat. 2827 (1998) (codified in scattered sections of Title 17, U.S. Code).

new statute, any work that would otherwise have fallen into the public domain on December 21, 1998, will now continue to have copyright protection until 2018.¹⁴⁸ For the advocates of the copyright term extension, the more important extension is the addition of twenty years for all work-for-hire projects, extending the term to ninety-five years for such works.¹⁴⁹

The Walt Disney Company is among the biggest beneficiaries of this congressional largesse. Disney had made a large financial investment for additional rights in "classic" Pooh, the works originally created by A. A. Milne.¹⁵⁰ The purchase of these rights was contingent on the passage of the copyright term extension because the work was soon to fall into the public domain.

The passage of the copyright term extension suggests that Congress believed the public would benefit more from Disney's marketing of products and novelties based on the A. A. Milne characters than from the free access to the books published on the Internet, new stories using the characters created by aspiring authors, and the obligation of Disney to create original work to generate new profits. Twenty years of additional protection is particularly important for Disney. Steamboat Willie, the first appearance of the character now known as Mickey Mouse, debuted in 1928.¹⁵¹ Any threat to the continued economic globalization of the Mickey Mouse franchise could disrupt the Disney empire.¹⁵² With only five years before the first Mickey fell into the public domain, the public's interest in free access to great works of fiction and non-fiction would necessarily take second place to the government's interest in Disney's continued economic health.¹⁵³ Congress has clearly cho-

¹⁴⁸ 17 U.S.C. §§ 301-304, as amended by Sonny Bono Copyright Term Extension Act §§ 101-103.

¹⁴⁹ See *id.*

A work made for hire is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

17 U.S.C. § 101 (1994) (definition of "work made for hire").

¹⁵⁰ See *Pandora*, THE INDEPENDENT, Nov. 13, 1998, at 4.

¹⁵¹ STEAMBOAT WILLIE (Walt Disney 1928).

¹⁵² Disney chairman Michael Eisner lobbied Senate majority leader Trent Lott directly and gave campaign contributions to 10 of the 13 original sponsors of the legislation. See *Disney Lobbying for Copyright Extension no Mickey Mouse Effort; Congress OKs Bill Granting Creators 20 More Years*, CHIC. TRIB., Oct. 17, 1998, at 22.

¹⁵³ See Dennis S. Karjala, *Letter to the Editor, Rush to Extend Copyright Shield will Impoverish Public Domain*, CHICAGO DAILY LAW BULL., Jan. 19, 1998, at 2 ("The proposed legislation is no more than a welfare measure to those persons who own copyrights on old works—a wealth transfer imposed on the American public for the benefit of large entertainment and

sen how to set the balance between the rights of the copyright creators and the public's interest.

[I]n recent years two irritating things have happened. First, the copyright industry . . . has become less and less concerned with providing income for authors and their families, and more and more about supplying huge companies with never-ending income streams [T]he copyright law—far from being on the side of creative artists—can often be turned against them, trapping them into lifetime servitude to some faceless corporation. Secondly, copyright terms have got [sic] longer and longer.¹⁵⁴

Disney is not the only copyright holder to benefit from the copyright term extension. “[H]eirs like the Gershwin Family Trust, large corporations like Disney and Time Warner, and organizations like the Motion Picture Association of America and the American Society of Composers, Authors and Publishers began lobbying for a change in Federal law.”¹⁵⁵ Any large corporation or estate with substantial holdings in an existing body of copyrighted works benefits from the change. The less likely the company or group will be to create new works, the more likely they favored the term extension. The passage of the legislation also figured prominently in the relationship established between the Republican party and the ties former House Speaker Newt Gingrich established with the media and entertainment industries.¹⁵⁶

Ironically, the balance struck by Congress actually stripped

publishing corporations (like Disney, whose copyright on Mickey Mouse has only five years or so to run)”).

¹⁵⁴ Richard Morrison, *The Rights That Don't Smell Quite Right*, THE TIMES (London), Oct. 23, 1998, at Features. The *London Times* has taken a decidedly anti-European and anti-U.S. approach to the copyright extension.

While most of the world set its copyright term at life plus 50 years, the Germans opted for 70—apparently to compensate their authors for “loss of earnings” during the two world wars (well, whose fault was that?). Three years ago the European Union decided to “harmonise” copyright—and of course the German view prevailed: a 70-year term was fixed throughout the EU. . . . “This is a good a year as we have ever had,” gloated Jack Valenti, the Motion Picture Association’s boss, after his Congress victory. Quite. The rest of humanity may be forgiven for thinking that it is being surreptitiously screwed.

Id.

¹⁵⁵ Sabra Chartrand, *Congress has extended its Protection for Goofy, Gershwin and Some Moguls of the Internet*, N.Y. TIMES, Oct. 19, 1998, at C2.

¹⁵⁶ See Juliet Eilperin, *GOP Members' Loyalty Helps Land Plum Committee Seats* WASH. POST, Nov. 24, 1998, at A4, available in 1998 WL 22536925. Another discussion regarding the relationship between the film studios and the Republican leadership has been relayed as follows:

Representing a wealthy district that includes Palm Beach and serving as chairman of the GOP's Entertainment Task Force, [House Representative Mark] Foley made a point of targeting such companies as Time Warner and Disney for campaign contributions. Six months ago he brokered a meeting between entertainment executives and House leaders in which Gingrich pledged to pass

some rights of the copyright holders—but not in favor of the general public. Title II to the Sonny Bono Copyright Term Extension Act provided expanded access to free music and television broadcasts for restaurants and retail stores.¹⁵⁷ Entitled “Fairness in Music Licensing Act of 1998,”¹⁵⁸ the provision expands the exemption for restaurants and retail outlets that play radio music or television broadcasts of sporting and other events.¹⁵⁹ Retailers, other than bars and restaurants, that occupy less than 2000 square feet are exempt from the licensing of performance rights societies such as ASCAP and BMI.¹⁶⁰ Bars and restaurants can occupy as much as 3750 square feet and maintain their exemption from licensing.¹⁶¹

Under the newly adopted provisions, a retailer larger than the specified square feet allowance may still be exempt from licensing if “the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space.”¹⁶² Televisions must be fifty-five inches or smaller, diagonally with the same speaker limitations as listed for the audio.¹⁶³ This is true for both retail stores and bars and restaurants.¹⁶⁴

These changes represent a significant victory for the stores and restaurants, which had previously been limited to modest, home-style speaker systems.¹⁶⁵ The Fairness in Music Licensing Act changed the legal balance between the performing rights societies and the restaurant owners in favor of the restaurateurs and publi-

a copyright extension bill and legislation enacting intellectual property rights agreements, two measures that made it through Congress in its final days.

Id. See also *infra* Part IV.B.

¹⁵⁷ See Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298 tit. II, 112 Stat. 2830 (1998) (to be codified in scattered sections of Title 17, U.S. Code).

¹⁵⁸ *Id.*

¹⁵⁹ Congress first codified this exemption in the Copyright Act of 1976. Section 110(5) of Title 17, U.S. Code, exempted from copyright infringement,

communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless—(A) a direct charge is made to see or hear the transmission; or (B) the transmission thus received is further transmitted to the public.

17 U.S.C. § 110(5) (1994) (amended 1998).

¹⁶⁰ See Fairness In Music Licensing Act of 1998 §§ 202-206.

¹⁶¹ See *id.*

¹⁶² *Id.* § 202(a)(1)(B) (to be codified at 17 U.S.C. § 110(5)(B)).

¹⁶³ See *id.*

¹⁶⁴ See *id.*

¹⁶⁵ See 17 U.S.C. § 110(5) (1994) (amended 1998). See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (decided prior to effective date of Copyright Act of 1976 and codification of exemption); *Cass County Music Co. v. Muedini*, 55 F.3d 263 (7th Cir. 1995); *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482 (7th Cir. 1991); *Sailor Music v. Gap Stores, Inc.*, 668 F.2d 84 (2d Cir. 1981).

cans. Although the president of the Recording Industry Association of America (“RIAA”)¹⁶⁶ expressed pleasure and relief at the passage of the World Intellectual Property Organization (“WIPO”) implementation legislation, representatives of ASCAP and BMI were much less enthusiastic.¹⁶⁷

Hilary Rosen, RIAA’s president, was ecstatic at the passage of the copyright legislation. “I’m incredibly grateful that a very hard-working group of members of Congress, music industry advocates, and our copyright allies have worked together to produce this outcome. It’s tremendous. This legislation will really promote the next generation of progress of music on the Internet.”¹⁶⁸ In contrast, the presidents of the two leading performing rights societies issued a joint statement condemning the passage of the act’s “fairness” provisions. ASCAP president and board chairman Marilyn Bergman expressed her disappointment. “In one sweeping legislative action, the House and Senate have passed copyright-term extension with one hand yet severely curtailed copyright protection with the other.”¹⁶⁹ BMI president and chief executive officer Frances Preston echoed Bergman’s sentiment. “It is a sad day for all creators of music in America and intellectual property rights owners.”¹⁷⁰

Given that the original purpose of the copyright changes was to promote creation by authors, Congress chose to balance the interests of the large music publishers represented by the RIAA against those of the restaurant associations with little interest in the representatives of the composers or songwriters. Representative Bart Gordon, when criticizing the provision’s passage, made this statement: “Although some characterize this provision as a ‘compromise,’ this provision is entirely unfair to American songwriters. . . . I believe it is hypocritical of the leadership of this body to pass this lop-sided provision . . . [T]his music licensing exemption weakens copyright protection for songwriters and their creative

¹⁶⁶ *Copyright Treaties Implementation Act: Hearings Before the Subcomm. On Telecommunications, Trade and Consumer Protection of the House Commerce Comm.*, 105th Cong. (1998), available in 1998 WL 300231 (Federal Document Clearing House) (statement of Hilary B. Rosen, Pres. & C.E.O., RIAA) (“The RIAA is a trade association that represents the interests of the copyright owners of more than 90% of the sound recordings distributed in the United States—from small independent companies like One Little Indian and Jim Henson Records, to the major labels such as Epic, RCA, Capitol, Motown, Warner Brothers and Universal Studios.”) [hereinafter *Rosen Statement*].

¹⁶⁷ See Bill Holland, *Congress Extends C’right Term; WIPO Passage Seen*, BILLBOARD, Oct. 17, 1998, available in 1998 WL 10915345.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

works.”¹⁷¹ Interestingly, Representative Mary Bono, Sonny Bono’s widow and successor, also objected to the passage of this provision.¹⁷²

The choice to provide restaurants greater power over the intellectual property they exploit may be the economically and socially sound public policy. The ‘compromise’ strips the performing rights societies of significant ownership against the small restaurants and retailers. The legislation also reflects a social custom that a free radio or television broadcast should not have to be purchased by the recipient, since the broadcaster was already compensated by the advertising revenue.

Nonetheless, the hypocrisy to which Representative Gordon alluded remains part of the new copyright legislation. The same concerns which led Congress to protect small business owners over the copyright holders remains true for the owner of small theater producers, small website operators and all individuals. The restaurants reflect one small sub-population of consumers of intellectual property. Rather than denying them access to the intellectual property, Congress should have seen them as an illustration of the problems caused by excess protection for the copyright holders. The local 3750 square foot ice cream parlor will now be able to play the Mickey Mouse Club Theme over its four-speaker stereo without paying royalties, but it cannot display the Steamboat Willie poster for twenty-five more years, lest the owner face a criminal sentence.

Because of a challenge to the copyright extension, the courts are forced to review the limitations on the power of Congress to extend the copyright act. In *Eldred v. Reno*,¹⁷³ Eric Eldred filed suit on his own behalf and on behalf of his unincorporated nonprofit association, the Eldritch Press, requesting injunctive relief against the 1998 extension of copyright protection, alleging that the extension is unconstitutional, if not to all copyrighted works, at least as to those works that have already been created.¹⁷⁴ Eldred founded the Eldritch Press in 1995 to demonstrate how the Internet could be used to present books in the public domain and add features to those printed texts.¹⁷⁵ “The site features early editions of poetry collections and novels, including Nathaniel Hawthorne’s *The Scarlet*

¹⁷¹ 144 CONG. REC. E2070-04 (daily ed. Aug. 4, 1998) (statement of Rep. Gordon).

¹⁷² See *id.*

¹⁷³ No. 1:99CV00065 (filed D.D.C. Jan. 11, 1999).

¹⁷⁴ See *id.* (complaint at 35.a.).

¹⁷⁵ See *id.* (complaint at 31).

Letter and Ford Madox Ford's *The Good Soldier*.¹⁷⁶

The lawsuit challenges Congress' ability to enact a statute that does not realistically increase the incentive to create new works prospectively, and cannot in any manner increase the incentive to create new work retroactively.

The [Copyright Term Extension Act ("CTEA")] confers benefits retroactively. This can have no rational basis, since no incentive to future individual creativity is provided by conferring an economic reward upon someone who has already created the work in question or upon someone to whom the creator of the work transferred or sold the rights in the work in a transaction that contemplated a shorter copyright term. This is equally true when the author is dead. However, this is exactly what the CTEA does, since it extends the copyright term for existing copyrighted works by another 20 years.¹⁷⁷

The legal challenge to the copyright extension will give the courts the opportunity to re-examine the constitutional limits placed on the fundamental federal powers afforded to Congress. It does not, however, address the questions of the appropriateness of the legislation. Absent a broadening of the lawsuit by other interested parties, the courts will not review the lack of concern for the public's interest in a robust public domain. This aspect of the debate does not appear to have survived the development of the copyright extension.

2. Balancing the Interests for the Internet Service Providers: Protections Against Vicarious Liability

Congress was concerned that a balance be maintained between the copyright holders and the Internet Service Providers ("ISPs") who provide the infrastructure for the flow of information, protected intellectual property, personal e-mails, and software across the Internet. The goal was to provide a mechanism that en-

¹⁷⁶ Jeffrey R. Young, *An On-Line Publisher Files Court Challenge to Copyright-Extension Law*, CHRON. OF HIGHER ED., Jan. 22, 1999, at A20.

¹⁷⁷ *Eldred v. Reno* (complaint at 35.a.). The lawsuit has since been joined by a number of other plaintiffs, including American Film Heritage Association, a non-profit film preservation group established to represent film preservationists; Luck's Music Library, Inc., which supplies classical orchestral sheet music; Dover Publications, Inc., a commercial book publisher; Moviecraft, Inc., an incorporated commercial film archive; and Copyright's Commons, a non-profit coalition operated out of Harvard University's Berkman Center for Internet & Society. *See id.* (First Amended Complaint at 1-11.) Professor Lawrence Lessig, once special master in the antitrust suit against Microsoft, is the Berkman Professor of Law, Harvard Law School, a professor with the Berkman Center, and of counsel for the plaintiffs.

couraged the use of the Internet while providing a system to stop unwanted traffic—whether it be pirated software or libelous e-mail.

At the heart of the balance was a choice by Congress not to place the ISPs in a position of criminal or civil liability for the content transmitted by other parties.¹⁷⁸ Congress recognized this tension in Title II of the DMCA.¹⁷⁹ Representative Frank explained the goal of the provision in his comments on the introduction of the legislation. “If you are an on-line service provider, if you are responsible for the production of all this out to the public, you will not be held automatically responsible if someone misuses the electronic airway you provide to steal other people’s property.”¹⁸⁰

Unfortunately, Representative Frank placed his emphasis on the need to exempt ISPs from liability as part of two broader issues: the protection of free speech and the elimination of governmental standards that lessen the rights of speakers who use electronic media rather than the rights of those who used print media. One focus of his remarks dealt with the historical difference between the print and electronic media in the context of First Amendment protection.¹⁸¹ The other focus of his remarks dealt with the limitations provided to ISPs from civil liability for copyright violations.

There is a balance here. We want to protect property, but we do not want to deter people from making this widely available. We have a problem here of making sure that intellectual property is protected, but we do not want freedom of expression impinged upon. Madam Speaker, I found that particularly important for this reason, and I think this is a point that I want very much to stress: We live in as free a society from the standpoint of expres-

¹⁷⁸ See Communications Decency Act of 1996 § 502, 47 U.S.C. § 223 (a)-(e) (1994 & Supp. III 1997). See also *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

¹⁷⁹ Online Copyright Infringement Liability Limitation Act, tit. II, Pub. L. No. 105-304, 112 Stat. 2877 (1998) (to be codified at 17 U.S.C. § 512).

¹⁸⁰ 105 CONG. REC. H7092 (daily ed. Aug. 4, 1998) (statement of Rep. Frank).

¹⁸¹ Representative Frank’s comments included the following statement.

The problem is we have had two doctrines of freedom of expression. We have had one which covered all speech and written speech, newspapers, magazines, theater, billboards; that has been very free. Beginning in the 1930s when radio came into play, we started a new form of speech, and that was speech electronically transmitted. And because we started with a limited spectrum, because we started with physical limitations on the amount of speech that could go out, we began with electronically-communicated speech in the 1930s to develop a parallel doctrine which gave less protection to speech electronically transmitted. Over time we had a tradition of constitutionally very protected speech, and then speech transmitted electronically that was less protected.

Id. This discussion goes to the changing approach taken by the courts in scrutinizing legislation designed to regulate the content of speech on the Internet—particularly the CDA—rather than any of the provisions included in the DMCA. See *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996), and *supra* text accompanying note 61.

sion as I believe has ever existed in the world. The level of freedom of expression which Americans enjoy is very, very profound, and that is very important to us. . . . But one of the things that was a potential danger here was that by protecting intellectual property, a very important job, we would have imposed on the on-line service providers such a degree of liability as, in fact, to diminish to some extent the freedom they felt in presenting things. What I am most happy about in this bill is I think we have hit about the right balance. We have hit a balance which fully protects intellectual property, which is essential to the creative life of America, to the quality of our life, because if we do not protect the creators, there will be less creation. But at the same time we have done this in a way that will not give to the people in the business of running the on-line service entities and running Internet, it will not give them either an incentive or an excuse to censor.¹⁸²

Representative Frank places his emphasis on the balance between extending copyright protection so that authors can earn a livelihood, against the free expression of the ISPs. Although his first remark acknowledged that the protection afforded the ISP was a limitation on liability from contributory copyright infringement,¹⁸³ he couched the discussion of balance as one of protection versus expression. Representative Frank captures the need to balance the goals of protection for copyright holders, freedom from strangling lawsuits for innocent copyright violations, and protection for the ISPs from claims of defamation based on content posted by other users of the Internet. His statement, however, conflates the issue of copyright protection and immunity from defamation lawsuits. By blurring the distinction between these three distinct objectives, Congress misconstrued the balance achieved in the legislation.

Under the provisions of Title II to the DMCA—the Online Copyright Infringement Liability Limitation Act—an ISP will be immune from civil liability for transmission of messages,¹⁸⁴ caching of content that infringes another party’s copyright,¹⁸⁵ storage of

¹⁸² 105 CONG. REC. H7092 (daily ed. Aug. 4, 1998) (statement of Rep. Frank).

¹⁸³ Contributory infringement is liability for “[o]ne who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another. . . .” *Gershwin Publ’g Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). See also *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 435-36 (1984); GORMAN & GINSBURG, *supra* note 4, at 654-58.

¹⁸⁴ See Online Copyright Infringement Liability Limitation Act § 202(a) (to be codified at 17 U.S.C. § 512(a)).

¹⁸⁵ See *id.* Caching is “the intermediate and temporary storage of material on a system or network controlled or operated by or for the service provider . . . for the purpose of mak-

content that infringes another party's copyright,¹⁸⁶ or hypertext linking to other parties' materials.¹⁸⁷ Although each provision is somewhat unique, they all have the same essential components as those that serve as the prerequisites for immunity for transmission of infringing material:

(1) the transmission of the material was initiated by or at the direction of a person other than the service provider; (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person; (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and (5) the material is transmitted through the system or network without modification of its content.¹⁸⁸

The safe harbor provisions immunize an ISP from copyright infringement of copyrighted works traveling between third parties, whether the material is transmitted through the ISP's routing system or copied into memory, so long as the ISP has no knowledge of the infringement, makes no financial gain from the infringement and acts to remedy the situation once notice has been given.

A service provider shall not be liable if . . . the service provider

. . .

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing; (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in

ing the material available to users of the system or network who . . . request access to [another person's] material . . ." *Id.* (to be codified at 17 U.S.C. § 512(b)).

¹⁸⁶ *See id.* (to be codified at 17 U.S.C. § 512(c)).

¹⁸⁷ *See id.* (to be codified at 17 U.S.C. § 512(d)).

¹⁸⁸ *Id.* (to be codified at 17 U.S.C. § 512(a)).

paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.¹⁸⁹

The balance achieved for the ISPs was not a controversial one. Major software companies such as Microsoft have no economic incentive to sue companies such as Earthlink or America Online for the trafficking of pirated software on the Internet. The cases in which large institutional copyright holders have sued are almost always against small bulletin-board operators who are actively encouraging the copyright piracy.¹⁹⁰ Generally, the ISPs find that litigation stems from small copyright holders.¹⁹¹ While the possibility exists that ISPs would have started to refuse to post material based on the fear of potential lawsuits, this form of self-censorship had not been showing signs of developing. Self-censorship would only develop in the wake of significant actual liability and none had yet been found. The safe harbor provision was not a response to any existing threat to the ISPs. Potentially, this threat could materialize under the expanded scope of the WIPO implementation provisions or more widespread use of the digital formats, such as the MP3 digital compression format for music.

When direct conflict arises between significant industry companies, the economic consequences are too great not to find a common ground. For example, shortly after Lycos Inc., one of the leading portal companies, elected to provide search engine capabilities for digitized music on the MP3 format, the company quickly agreed to work with the RIAA to reduce copyright piracy.¹⁹² "Lycos said it will take down links to sites that house illegal material, but it is up to the [RIAA] and other copyright holders to alert the company to the copyright violation. 'We're in the business of locating things, not policing the Net,' explained a company spokesperson."¹⁹³ The strategy brings Lycos into compliance with the statute while not losing sight of the economic reality that the MP3 digital music format could develop into a significant market segment. Ongoing disputes between the RIAA and the companies involved in the MP3 hardware and software industry will result in some liti-

¹⁸⁹ *Id.* (to be codified at 17 U.S.C. § 512 (d)).

¹⁹⁰ *See, e.g.,* *Playboy Enters. Inc. v. WebbWorld Inc.*, 991 F. Supp. 543 (N.D. Tex. 1997); *Playboy Enters. Inc. v. Russ Hardenburgh Inc.*, 1997 U.S. Dist. LEXIS 19310 (N.D. Ohio, Nov. 25, 1997); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923 (N.D. Cal. 1996).

¹⁹¹ The notable exception to this is *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995).

¹⁹² *See* P. J. Huffstutter, *Lycos Says It Won't Link to Pirated-Music Sites*, L.A. TIMES, Feb. 3, 1999, at C9.

¹⁹³ *Id.*

gation, but changes to the business practices will also need to occur.¹⁹⁴ The RIAA has started to suggest that it will bring the copyright fight to the infringers, particularly the students on college campuses.¹⁹⁵ The strategy of the RIAA reflects the impact of the safe harbor available under the Online Copyright Infringement Liability Limitation Act. Without a large target for strategic litigation, the music industry will be forced to rely on changes in technology and business practice to control the threat of piracy.¹⁹⁶ The act deflects the initial lawsuits against the ISPs until the actual infringement has been identified.

The greater threat to the ISPs stemmed from the danger of civil liability for defamation in their role as publishers of their subscriber's e-mails and websites. Arguably, this is the threat to which Representative Frank could have been alluding with his comments that the balance struck "will not give [the ISPs] either an incentive or an excuse to censor."¹⁹⁷ If the ISPs were treated as publishers for purposes of defamation litigation, they would be obligated to censor the material on the websites hosted by them to avoid third party liability.¹⁹⁸ Such cases exposed the ISPs to significant liability. Congress acted to change this balance strongly in favor of the ISPs. In a portion of the CDA upheld by the courts, Congress exempted the ISPs from civil liability arising out of their client's defamatory acts.¹⁹⁹ Under the terms of the 1996 legislation, Congress provided that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."²⁰⁰ This simple definitional section removes ISPs from the chain of liability that would otherwise attach to every publisher in the chain of republication of

¹⁹⁴ See P. J. Huffstutter, *A Musical Free-for-All on the Net*, L.A. TIMES, Feb. 8, 1999, at A1.

¹⁹⁵ See *id.* ("This month, the group plans to alert colleges and commercial Internet service providers that, if the association serves them with a subpoena, they will have to hand over the name of students operating pirate Web sites.")

¹⁹⁶ See Collin Levey, *New Technology Calls the Tunes*, WALL ST. J., Mar. 8, 1999, at A18. ("In an effort to counter online piracy, the Recording Industry Association of America and its overseas counterparts enlisted Italian researcher Leonardo Chiariglione to head its Secure Digital Music Initiative. . . . Part of the industry's solution will have to be . . . by making music cheap enough that it's not worth stealing and easy enough to access that it's worth the average consumer's time. And by hiring Mr. Chiariglione, it looks like the industry has finally realized that it's better to embrace new technology than to fight it.")

¹⁹⁷ 105 CONG. REC. H7092 (daily ed. Aug. 4, 1998) (statement of Rep. Frank).

¹⁹⁸ *Zeran v. America Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998). See also *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

¹⁹⁹ Communications Decency Act of 1996 § 502, 47 U.S.C. § 223 (1994 & Supp. III 1997). See also *Zeran*, 129 F.3d at 333.

²⁰⁰ 47 U.S.C. § 223(c)(1).

a defamatory statement.²⁰¹ Historically, courts have distinguished between publishers that have the power to control content²⁰² and book-sellers or other distributors who merely transmit pre-printed materials.²⁰³ The statute places ISPs into the latter category for liability purposes.

In *Zeran v. America Online Inc.*,²⁰⁴ the first appellate case interpreting section 230, the court followed the broad mandate of the statute. Zeran, a subscriber, sued America Online after another subscriber posted a message falsely accusing Zeran of selling offensive tee-shirts that made light of the terrorist attack on the Alfred P. Murrah Federal Building in Oklahoma City.²⁰⁵ The postings continued, and a local radio station reported the ads, asking listeners to call and respond.²⁰⁶ “By April 30, Zeran was receiving an abusive phone call approximately every two minutes,” that included harassing language and death threats.²⁰⁷ Despite the clear, immediate impact of the defamatory conduct and an allegedly complete lack of response by America Online, the court affirmed a summary judgment dismissing the complaint. “[Section] 230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.”²⁰⁸

The *Zeran* court recognized the congressional mandate to open the Internet to robust debate and to eliminate those barriers which might have a tendency to chill speech through the medium.

²⁰¹ See *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (“[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.”) (quoting RESTATEMENT (SECOND) OF TORTS § 578 (1977)). See also *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

²⁰² See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (allegations of libel stemmed from a paid advertisement).

²⁰³ *Cubby, Inc.* 776 F. Supp. at 139 (citing *Smith v. California*, 361 U.S. 147 (1959), which held that criminal liability for ownership of an obscene book required knowledge of the book’s contents).

²⁰⁴ 129 F.3d 327 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 2341 (1998).

²⁰⁵ *Id.* at 329 (“On April 25, 1995, an unidentified person posted a message on an AOL bulletin board advertising ‘Naughty Oklahoma T-Shirts.’ . . . On April 26, the next day, an unknown person posted another message advertising additional shirts with new tasteless slogans related to the Oklahoma City bombing. Again, interested buyers were told to call Zeran’s phone number, to ask for ‘Ken,’ and to ‘please call back if busy’ due to high demand. Over the next four days, an unidentified party continued to post messages on AOL’s bulletin board, advertising additional items including bumper stickers and key chains with still more offensive slogans.”).

²⁰⁶ See *id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 330.

Mindful of the potential chilling effect libel actions can have on free speech,²⁰⁹ the court did not equivocate in its disposition.

The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.²¹⁰

The *Zeran* court also addressed the potential for liability as a distributor, eliminating this potential exposure as well.²¹¹

If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement — from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.²¹²

Other courts have shared the Fourth Circuit's broad assessment of tort immunity. "Any attempt to distinguish between 'publisher' liability and notice-based 'distributor' liability and to argue that Section 230 was only intended to immunize the former would be unavailing. Congress made no distinction between publishers and distributors in providing immunity from liability."²¹³ ISPs are under no obligation to screen what is posted or to remove defamatory material. ISPs do have a somewhat greater affirmative obligation to remove material that is allegedly infringing on a third party's copyright, but only once notice has been given of the infringement.

The cumulative effect of the two statutes passed by Congress to

²⁰⁹ See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²¹⁰ *Zeran*, 129 F.3d at 330.

²¹¹ See *id.* at 333.

²¹² *Id.*

²¹³ *Blumenthal v. Drudge*, 992 F. Supp 44, 52 (D.D.C. 1998) (citing *Zeran*, 129 F.3d at 333).

shield ISPs from liability should place ISPs outside the inevitable litigation stemming from the content of the material passing through the Internet. These changes are beneficial for all interested parties, since the liability eliminated is vicarious in nature. The case that best exemplifies the type of liability now eliminated is *Sony Corp. of America v. Universal City Studios, Inc.*,²¹⁴ in which the major film studios tried to hold Sony vicariously liable for selling video cassette recorders which were used by individuals who were illegally pirating software. Ultimately, the Supreme Court said that Sony was not obligated to take affirmative steps to stop people from using its products in an infringing manner.²¹⁵ Congress has now made a similar statement regarding ISPs, legislating that an ISP is not automatically responsible for the misconduct of its subscriber's use of its service.

The evils of copyright infringement and defamation can still be addressed by action against the perpetrator of the misconduct. The victims of the abuse will still have a remedy available; what they lose is a broad target for financial recovery. While such a large corporate defendant is easier to identify, the lawsuit will tend to focus on the actual misconduct.

3. WIPO Implementation

Most of the provisions involved in the WIPO implementation are uncontroversial, technical changes, designed to replace references to the Berne Convention with corresponding references to the WIPO treaty. There are, however, a few provisions that may change the balance between creators and consumers of copyrighted works.²¹⁶ Most notably is the clause creating anti-circumvention protection for works that are protected.

Under the new provision, "[n]o person shall circumvent a technological measure that effectively controls access to a work protected by copyright."²¹⁷ Congress is attempting to add civil and criminal penalties for anyone who overcomes the encryption technology used in the transmission or delivery of digital media content. The technology may be very robust or very simple. "[A] technological measure 'effectively controls access to a work' if the measure, in the ordinary course of its operation, requires the appli-

²¹⁴ 464 U.S. 417 (1984).

²¹⁵ See *id.* at 455-56.

²¹⁶ For a thorough and thoughtful discussion, see Pamela Samuelson, *The Digital Agenda of the World Intellectual Property Organization*, 37 VA. J. INT'L L. 369 (1997).

²¹⁷ See WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998, Pub. L. No. 105-304, tit. I, § 103(a), 112 Stat. 2861, 2863-76 (1998) (to be codified at 17 U.S.C. § 1201(a)(1)(A)).

cation of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.”²¹⁸ The effect of this provision is to move the battle between encryption and hacking from the technological arena into the legal arena. The statute does not address the adequacy of the technology, only its existence. Anyone violating the copyright will be subject to civil damages, attorneys’ fees and costs.²¹⁹ Willful violations are subject to criminal liability.²²⁰ This will deter code breaking of computer games and add additional criminal penalties against hackers. This will also discourage game enthusiasts from sharing computer game passwords by making all the parties liable for copyright infringement.²²¹ Taking the law only a small step further, this will also give each twelve-year-old legal redress against anyone reading his or her diary without permission, so long as it has a lock or a password.

The statute also prohibits the manufacture of equipment that could circumvent encryption technology. “No person shall manufacture, import, offer to the public, provide or otherwise traffic in any technology, product, service, device component or part thereof that . . . is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title.”²²² The purpose of this section of the provision is to eliminate traffic in ‘black boxes,’ electronic descrambling devices. Under the new act,

‘to circumvent a technological measure’ means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.²²³

Tightening the restrictions on manufacture and sale of devices designed to descramble and steal cable signals or to decrypt encoded CD-Roms should promote efficiency in the marketplace. Black boxes result in revenue losses for the cable systems and video rental stores. Powerful, effective encryption will allow software manufacturers to sell software using the Internet or CD-Roms. CD-Roms can contain multiple programs, and purchasers pay for the program or version they like. At any later date, the purchaser may

²¹⁸ *Id.* (to be codified at 17 U.S.C. § 1201 (a)(1)(B)).

²¹⁹ *See id.* (to be codified at 17 U.S.C. § 1203)

²²⁰ *See id.* (to be codified at 17 U.S.C. § 1204).

²²¹ *See, e.g.,* Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923 (N.D. Cal. 1996).

²²² WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 § 103(a) (to be codified at 17 U.S.C. § 1201(a)(2)(A)).

²²³ *Id.* (to be codified at 17 U.S.C. § 1201(a)(3)(B)).

upgrade or purchase additional programs off the disk simply by contacting the company and paying for the additional password.

Dangers exist in providing excessively robust protection against decryption. Congress attempted to balance this issue by allowing for "reverse engineering," but the language of the exception is narrowly crafted.²²⁴ Until the courts begin to interpret these sections, it will be difficult to assess whether the exception was drawn too narrowly to protect legitimate competition in the marketplace.²²⁵

4. Regulation of Cable Ownership

Congress has varied its regulatory approach to the cable industry on a regular basis for the last two decades. Initially, to promote its development, Congress has tried to shield each of the cable and television industries from unfair competition by the other while keeping both separate from the telecommunications industry.²²⁶ The Cable Communications Policy Act of 1984, for example, prohibited a local telephone company from owning the cable system in the area served by that local telephone company.²²⁷ These regulations kept the various components of the telecommunications and media industries segmented and apart.

Keeping with this earlier tradition, in 1992 Congress enacted the Cable Television Consumer Protection and Competition Act, which attempted to regulate cable fees while creating controls on the size of cable operators' subscriber base.²²⁸ Among the objectives of the legislation was an attempt to create statutory requirements that provide access to cable systems for a portion of the local

²²⁴ *Id.* (to be codified at 17 U.S.C. § 1201(f)).

²²⁵ Reverse engineering to learn the structure of a software program as a precursor to developing a compatible product is allowed under the provision. This may be too narrow, however, because it limits the use of reverse engineering for educational purposes, such as learning how to build better code. *See Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1527-28 (9th Cir. 1992); *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832, 842-44 (Fed. Cir. 1992). A full discussion of reverse engineering and its implications is beyond the scope of this Article.

²²⁶ *See City of Dallas v. FCC*, 1999 U.S. App. LEXIS 563 (5th Cir. Jan. 19, 1999). In 1970, the F.C.C., concerned with preventing the expansion of local monopolies, adopted rules prohibiting telephone companies from providing cable service in their telephone service areas (the "cable-telephone company cross-ownership ban").

²²⁷ *See* 47 U.S.C. § 533(b)(1) (1984); 47 U.S.C. § 533(b) (1985), both repealed by Telecommunications Act of 1996, Pub. L. No. 104-104, § 302(b)(1), 110 Stat. 56, 124 (1996). Prior to repeal, the limitations were challenged on First Amendment and other grounds. *See United States v. Western Elec. Co.*, 673 F. Supp. 525, 585-86 (D.D.C. 1987), *affirmed in part, reversed in part*, 900 F.2d 283 (D.C. Cir. 1990); *United States v. Western Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991), *affirmed*, 993 F.2d 1572 (D.C. Cir. 1993).

²²⁸ *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of Title 47, U.S. Code). The attempt to control cable size was not successful.

broadcasters. In reviewing the legislation, the Supreme Court identified three goals: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."²²⁹ The 1992 regulations also included many controls on ownership and cross-ownership of television and cable media.²³⁰

"With the stated purpose of encouraging a diversity of speakers in the electronic media, the 1984 Cable Act taken together with existing FCC regulations limited (with some exceptions) the ownership of cable television systems by those parties who own co-located television stations and telephone companies in their service areas."²³¹ The model of increasing regulation and differentiating among the various media began to break down as technology continued to advance throughout the decade. These limitations were reduced or eliminated by the Telecommunications Act of 1996 in order to create the opportunity for competition between different media.²³²

Responding to what has been described as "technological convergence" and "legal Balkanization,"²³³ Congress substantially amended the Communications Act of 1934 with the Telecommunications Act of 1996 ("1996 Act" or "Telecommunications Act").²³⁴ The Telecommunications Act was sweeping in scope. It liberalized regulations on multimedia empires for broadcast, cable, and telephone. The effect was to wave the green flag at the convergence race—the race to amass the largest information company—by reducing or eliminating ownership barriers. "The premise of the drafters of congressional telecommunications reform was to let 'everyone get into everyone else's business.'"²³⁵

Congress, for example, eliminated the national limitations on

²²⁹ Turner I, 512 U.S. 622, 662 (1994).

²³⁰ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385.

²³¹ 1 DANIEL BRENNER, ET. AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO LAW & POLICY § 4.02 at 4-5 (1998).

²³² See *id.* § 4.03 at 4-10.

²³³ THOMAS KRATTENMAKER, TELECOMMUNICATIONS LAW & POLICY 23 (2d ed. 1998) ("Technological convergence refers to the fact that we have witnessed, since 1934, an extraordinary explosion in the types of devices used for various forms of telecommunications as well as a plethora of transmission paths. . . . Legal Balkanization refers to the fact that, notwithstanding increased technological convergence, the law often treated similar technologies differently.")

²³⁴ Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133 (codified in scattered sections of Title 47, U.S. Code).

²³⁵ BRENNER, ET. AL., *supra* note 231, at 4-2. See generally Michael I. Meyerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251 (1997).

the common ownership of television networks and cable systems²³⁶ and liberalized the ownership restrictions to allow ownership of multiple radio stations in the same market.²³⁷ Similarly, the Telecommunications Act increased the amount of television coverage up to a national audience reach of thirty-five percent rather than twenty-five percent, and eliminated the restriction on the number of stations that could be owned by a single party or entity.²³⁸

Although the explanation for the Telecommunications Act was broad deregulation, rapid technology growth and reduced consumer cost, the actual legislation created a new structure for regulation.²³⁹

[T]he Telecommunications Act establishes a very different legal framework from the one that prevailed before. But it does not represent the end of regulation - rather, it is a system of regulation transformed. . . . [T]he changes taking place in regulated industries law [are] not in terms of "regulation" versus "deregulation," but in terms of a transformation from the "original paradigm" of regulation to a "new paradigm" of regulation.²⁴⁰

The traditional goal of the cross-ownership restrictions was to increase the diversity of viewpoints in the broadcast media so as to promote the marketplace of ideas in a physical and regulatory framework.²⁴¹ As the Supreme Court stated when reviewing the

²³⁶ See Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(f), 110 Stat. 56, 111. Prior to the enactment of the 1996 Act, the Commission's rules limited the extent to which cross ownership was permitted between cable television systems and television broadcast networks. Network-cable cross ownership was allowed if the combinations did not exceed 10 percent of the homes passed by cable nationwide, and did not exceed 50 percent of homes passed by cable within an area of dominant influence.

Norman Sinel et. al., *Recent Developments in Cable Law Regarding Franchising and Franchise Renewals, Transfers and Modifications*, 535 PLI/PAT 343, 400 (1998).

²³⁷ See Telecommunications Act of 1996 § 202(b)(2).

²³⁸ See 47 C.F.R. § 73.3555(e) (1998). The F.C.C. also regulates the cross-ownership between cable, broadcast television and radio, and newspapers. Prior to the 1996 Act, significant barriers existed to cross-ownership or co-ownership of telephone services, cable, or number of radio licenses. The statute and F.C.C. regulations also prohibited the dual ownership of a local newspaper and local television license in the same market. As the F.C.C. stated, "[l]ike all of our multiple ownership rules, the newspaper/broadcast cross-ownership rule rests on the twin goals of promoting diversity of viewpoint and economic competition." F.C.C. Notice of Inquiry, Waiver of the Newspaper/Broadcast Cross-Ownership Restriction, 61 Fed. Reg. 53,694 (1996).

²³⁹ *Reno v. ACLU*, 117 S. Ct. 2329, 2338 (1997) ("As stated on the first of its 103 pages, its primary purpose was to reduce regulation and encourage 'the rapid deployment of new telecommunications technologies.' The major components of the statute have nothing to do with the Internet; they were designed to promote competition in the local telephone service market, the multichannel video market, and the market for over-the-air broadcasting.").

²⁴⁰ Joseph Kearney & Thomas Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1235 (1998).

²⁴¹ *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) ("In setting its

cross-ownership restrictions, "the greater the number of owners in a market, the greater the possibility of achieving diversity of program and service viewpoints."²⁴² While this principle has not been abandoned, the combination of new media for programming and greater scrutiny for F.C.C. regulations has led Congress to place far less emphasis on the need for diversity.

After the 1996 Act, only a few of the regulations were maintained. The statute and regulations limiting cross-ownership by telephone companies and cable operators were almost completely eliminated,²⁴³ as were limits on the number of radio stations that could be owned in a single market.²⁴⁴ The F.C.C. is reviewing the elimination of the television "duopoly" rule, which limits an owner of broadcast television stations to two in any given market,²⁴⁵ and the "one-to-a-market" rule, which generally prohibits the common ownership of a television and a radio station in the same market.²⁴⁶ Similarly, the 1996 Act eliminated a prohibition on a television network from owning a cable system, but it did not lift the ban on the owner of a local television station from owning a cable system, making the statutory change ineffective.²⁴⁷ The F.C.C. is reviewing the remaining limitations so that it can allow television networks into the cable industry.²⁴⁸

While the limitations on cross-ownership of local newspapers and local television stations in the same market is prohibited,²⁴⁹ the F.C.C. has been reviewing this policy for radio stations with the possibility of eliminating the restriction or granting waivers on a

licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power."). See also Mark D. Schneider, *Reevaluating The Ban On The Cross-Ownership Of Newspapers And Broadcast Stations*, 16 COMM. LAW. 7 (1998).

²⁴² *National Citizens Comm. for Broad.*, 436 U.S. at 814.

²⁴³ See 47 U.S.C. § 573 (Supp. III 1997). See also *id.* § 573(c)(2) (Implementation [of Section 302 of the Telecommunications Act of 1996]); F.C.C. Final Rule, Open Video Systems, 61 Fed. Reg. 28,698 (1996); F.C.C. Final Rule, Open Video Systems, 61 Fed. Reg. 43,160 (Third Report and Order released Aug. 8, 1996); *City of Dallas v. FCC*, 1999 U.S. App. LEXIS 563 (5th Cir. Jan. 19, 1999).

²⁴⁴ See 47 C.F.R. § 73.3555 (1998). The number of local radio stations that could be commonly owned was increased to eight and limitations on national ownership was eliminated entirely. See Order, *In re Implementation of Sections 202(a) and 202(b) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 F.C.C. Rec. 12,368 (1996).

²⁴⁵ See 47 C.F.R. § 73.3555(b).

²⁴⁶ See *id.* § 73.3555(c).

²⁴⁷ See 47 U.S.C. § 533 (1994 & Supp. III 1997). See F.C.C. Notice of Inquiry, 63 Fed. Reg. 15,353, 15,359 (1998). Because each of the broadcast networks also owns a number of broadcast stations, the networks cannot avail themselves of the cross-ownership opportunities for cable without divesting the local television stations.

²⁴⁸ See 63 Fed. Reg. 15,353, 15,359.

²⁴⁹ See 47 C.F.R. § 73.3555(d).

more regular basis.²⁵⁰ The debate over the continuation of this cross-ownership provision captures the essence of all the conflicts regarding cross-ownership. Specifically, the question is whether there is any actual benefit to the public as a result of the ownership ban. Organizations opposing the cross-ownership limitations emphasize that the limitations are inconsistent with the First Amendment and unfairly single out selected media.

[The Newspaper Association of America (“NAA”)] argues that in adopting the rule there never was a record of evidence that cross-owned stations engaged in anti-competitive practices. NAA further argues that, whatever the FCC’s original reasons for the rule were, “[i]n the abundantly diverse and highly competitive mass media marketplace of the late 1990s, maintenance of these selective cross-ownership restrictions is unnecessary, discriminatory, and unjustifiable.” NAA points to relaxation in other Commission ownership rules and argues that the newspaper/broadcast cross-ownership rule unfairly singles out newspaper publishers, denying them the ability to realize efficiencies and synergies while leaving their competitors free to do so. NAA also argues that relaxation of the newspaper/broadcast cross-ownership rule will help preserve newspapers and broadcast stations as viable media outlets and enhance diversity. Finally, NAA asserts that the rule is inconsistent with the First Amendment and that courts today would require a far stronger showing than was made in 1975 to support such a direct limitation on the free speech rights of a particular class of citizens.²⁵¹

In contrast, those who support a continuation or extension of the cross-ownership limitations raise concerns over the homogenization of local media. They also point to the control that an undifferentiated voice can have in local opinion, or that the effect will be to further nationalize news and information, eliminating the local community’s ability to carry on public debate.

Supporters also contend that newspaper/broadcast combinations would give a single entity too much of a voice with respect to forming opinion on public issues. The new media pointed to by opponents of the rule, they state, do not add significant local viewpoints, are not locally based, and do not provide news or information on local issues. Although supporters of the rule agree that cable television and the Internet have the potential to facilitate debate on local issues, they dispute that they yet serve that purpose to any significant degree and argue that these me-

²⁵⁰ See F.C.C. Notice of Inquiry, 63 Fed. Reg. 15,353.

²⁵¹ *Id.* at 15,358 (citations omitted).

dia are costly and do not reach large segments of the community.²⁵²

The debate between supporters and opponents of the cross-ownership ban focus on the same underlying issue—access to information by local consumers of media. Both sides are emphasizing access to a variety of information and greater diversity of viewpoints. The F.C.C. has approached diversity from a number of different perspectives.

[The FCC] diversity analysis focuses upon the ability of broadcast and non-broadcast media to advance the three types of diversity (i.e., viewpoint, outlet and source) [its] broadcast ownership rules have attempted to foster. Viewpoint diversity refers to helping to ensure that the material presented by the media reflect a wide range of diverse and antagonistic opinions and interpretations. Outlet diversity refers to a variety of delivery services (e.g., broadcast stations, newspapers, cable and DBS) that select and present programming directly to the public. Source diversity refers to promoting a variety of program or information producers and owners.²⁵³

The traditional assumptions that the existing, dominant technology would stifle the growth of new technology has faded in the face of transformative technological innovation. To the extent that the cross-ownership provisions were designed to stop an established technology (such as broadcast television) from purchasing and destroying a developing technology (such as cable television, direct broadcast satellite, or Internet broadcasting), the speed of technological innovation appears to have reduced the likelihood of success.²⁵⁴ The relationship between viewpoint diversity and source diversity remains at the heart of the controversy. The ultimate goal of diversity is to provide a range of “antagonistic” or alternative views that will compete with one another for public attention and support. Unless the public allows the government to moderate the public discourse—an extraordinary step under the

²⁵² *Id.* (citing comments of David E. Hoxeng d/b/a ADX Communications, MM Docket No. 96-197 at 2). “Hoxeng provides as an example San Antonio, TX, where, he states, the cost-per-thousand to newspaper advertisers skyrocketed following the buyout and closure of one San Antonio daily by the other.” *Id.* n.51 (citing MM Docket No. 96-197 at 2-3).

²⁵³ *Id.*; see also *id.* at 15,355.

²⁵⁴ *But see* United States v. Microsoft Corp., No. 98-1232 (D.D.C. filed May 18, 1998) (alleging that Microsoft has used its monopoly power to control access to the Internet); *In re* Time Warner, Inc., No. C-3709 (Feb. 3, 1997) (1997 FTC Lexis 13) (decision and order) (requiring some divestiture of assets following the merger of Time Warner, Turner Broadcasting, and Tele-Communications Inc. because of cable subscriber and cable content dominance).

First Amendment—any public policy must rely on a surrogate to achieve the goal of viewpoint diversity. The F.C.C. has used source diversity to expand the range of speakers, hoping to increase the number of different viewpoints without directly controlling which viewpoints are supported or rejected. Of the three goals of the F.C.C. regulations, outlet diversity is controlled by technological change, viewpoint diversity is limited by the First Amendment, and only source diversity is within the realm of governmental regulation.

Whether source diversity serves as a proper surrogate for viewpoint diversity remains an unanswered question. The issue must be addressed both in the abstract and the particular. The F.C.C. must review the extent to which the cross-ownership limitations reduce the potential for market dominance and the extent to which communities have a truly diverse media experience. If the result is to have one of the same few corporations own each of the newspapers while the television networks control the content of the broadcast television (with all cable television being national content), then the idealized model of robust local debate is illusory in any event and the issue is not particularly compelling. Alternatively, if the effect of the cross-ownership limitation is to keep the national television networks from owning the nation's newspapers and thereby maintaining an additional source for news reporting on both the local and national level, then the limitation does provide the value of increased economic competition and diversity of viewpoints.

Because the dangers inherent in the possible compression of news and media outlets raises the specter of increased oligopoly or cartel behavior, however, any regulatory change that would reduce barriers to common ownership should be suspect and tested using a waiver process, rather than repealed outright.²⁵⁵ The rapid change of technology will result in a convergence of industries, but this convergence need not eliminate the number of participants. Even if the Balkanization is reduced and the regulations made more consistent across media, there is no obvious reason not to encourage source diversity by limiting the reach of each media conglomerate and thereby opening the market to a greater number of participants.

²⁵⁵ See *infra* Part IV.A (discussing oligopoly and media orthodoxy).

C. *The Demise of Shared Culture—The Public Domain, Fair Use, & Over-reaching Contracts*

The economic rationale underlying the U.S. copyright scheme actually contains within it an implicit social paradigm which may create an inherent assumption that every work is created by a sole author working alone. The myth of the rugged individual has expanded to include the lone artist and fuels a regulatory model that assumes each work is new and novel. Unfortunately, this model

sometimes fails to account for the raw material that all authors use. This tendency can distort our understanding of the interaction between copyright law and authorship. Specifically, it can lead us to give short shrift to the importance of the public domain and of the fair use doctrine by failing to appreciate that the public domain is the law's primary safeguard of the raw material that makes authorship possible.²⁵⁶

1. The Public Domain

The public domain represents all works or components of work that are not protected by copyright. This includes works, or components thereof, that are not eligible for copyright,²⁵⁷ works that were created before copyright existed,²⁵⁸ works that have had their copyrights expire,²⁵⁹ and intellectual property that is defined by the Copyright Act to fall outside the scope of its protection.²⁶⁰ The true importance of the public domain and fair use are to provide the necessary grist for the creative mill to churn.

²⁵⁶ Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 967 (1990).

²⁵⁷ See 17 U.S.C. § 102(b) (1994) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work."); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991) (factual compilations); *Baker v. Seldon* 101 U.S. 99 (1879) (blank forms); *Publications Int'l, Ltd. v. Meredith Corp.*, 88 F.3d 473 (7th Cir. 1996) (recipes). Components may include design elements such as layout, structure, or operations. See *Lotus Dev. Corp. v. Borland Int'l Inc.*, 49 F.3d 807 (1st Cir. 1995) (finding command pull down menus to be unprotectable "method of operation"), *affirmed by an equally divided Court*, 516 U.S. 233, *reh'g denied*, 516 U.S. 1167 (1996).

²⁵⁸ Litman, *supra* note 256, at 975-76. ("Works created before the enactment of copyright statutes, such as Shakespeare's *Macbeth* or Pachelbel's *Canon*, are available for fourth grade classes across the nation to use for school assemblies without permission from any publisher or payment of any royalties.")

²⁵⁹ See, e.g., *Stewart v. Abend*, 495 U.S. 207, 243 (1990) (Stevens, J., dissenting) ("[T]he original author's right to 'consent' to the copyright of a derivative work terminates when the statutory term of the copyright in the underlying work expires.")

²⁶⁰ See, e.g., 17 U.S.C. § 105 (works of the United States Government); *Twin Books Corp. v. Walt Disney Co.*, 83 F.3d 1162, 1167 (9th Cir. 1996) (works that did not meet statutory compliance with the notice and registration provisions of the Copyright Act of 1909); *Lotus Dev.*, 49 F.3d 807.

The role of public domain material in the creative process may contradict accepted paradigms of creative development. The principle that public domain material is necessary for creative development, for example, is inconsistent with the model which presupposes that the author, toiling alone and shut off from society, independently creates all original work.

An author transforms her memories, experiences, inspirations, and influences into a new work. That work inevitably echoes expressive elements of prior works. Whether it infringes the copyrights in the prior works depends upon the conscious and subconscious processes within the author's mind. We cannot verify them; neither can she. If this author's work lands in a copyright suit, the legal conclusions that will be drawn will depend in the first instance on facts (such as whether she is suing or being sued and whether she is holding a certificate of registration) that have nothing to do with the nature of the authorship process.²⁶¹

Even under this model of creative isolation, the mental process does not track the legal model of copyright. Instead, the author builds a new work from social events, from personal memories, from experiences which include viewing or hearing other works, whether copyrighted or in the public domain.²⁶² Although sometimes invoked,²⁶³ this model was never fully accepted by the courts. As Judge Learned Hand explained in the copyright dispute between the author of *Abie's Irish Rose* (once the longest running play on Broadway) and Universal Pictures over the film *The Cohens and the Kelleys*, common elements are necessarily part of the fabric upon which creation begins.

We assume that the plaintiff's play is altogether original, even to an extent that in fact it is hard to believe. We assume further that, so far as it has been anticipated by earlier plays of which

²⁶¹ Litman, *supra* note 256, at 1007-08.

²⁶² The phenomenon of unconscious infringement has been used to account for an author copying the work of another without any direct recollection of the act. See *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976), *aff'd sub nom.* *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983) (finding George Harrison's "My Sweet Lord" to have infringed on "He's So Fine").

²⁶³ *Cf.* *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 54 (2d Cir. 1936) (L. Hand, J.) ("But we understand by this no more than that in its broader outline a plot [regarding a play, *Letty Lynton*,] is never copyrightable, for it is plain beyond peradventure that anticipation as such cannot invalidate a copyright. Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an 'author'; but if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.") (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903)), *affirmed*, 309 U.S. 390 (1940).

she knew nothing, that fact is immaterial. Still, as we have already said, her copyright did not cover everything that might be drawn from her play; its content went to some extent into the public domain.²⁶⁴

Apply this model to the work-for-hire context of a film or multimedia work and the amount of pre-existing work expands exponentially as each member of the development team—perhaps hundreds of individuals on large projects—adds his or her personal experience. The issue is not whether there is some copying that occurs in the creation of each work, but the extent to which copying is allowed before it is actionable.²⁶⁵ Even in the theater—where individual artists are highly protected by contract and copyright law—the process remains highly collaborative.²⁶⁶

Sports and pageantry are examples of yet another paradigm of authorship, but in this case it is authorship outside the scope of the Copyright Act.²⁶⁷ The broadcast of a sports event is protected because the broadcast is simultaneously fixed on videotape.²⁶⁸ Apart from the broadcasts, courts have not recognized the performance of the athletes or event planners as falling within the range of copyrighted works.

Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script. Preparation may even cause mistakes to succeed, like the broken play in football that gains yardage because the opposition could not expect it. . . . What “authorship” there is in a sports event, moreover, must be open to copying by competitors if fans are to be attracted. If the inventor of the T-formation in football had been able to copyright it, the sport might have come to an end

²⁶⁴ Nichols v. Universal Pictures Corp., 45 F.2d 119, 122 (2d Cir. 1930).

²⁶⁵ Reviewing the amount of copying allowed rather than attempting to identify infringement might alter the paradigm for so-called “thin copyrights,” those of factual compilations, innovative theories, or simple designs. See Jane Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1902-03 (1990) (“For low authorship informational works, one may posit three different kinds of copying: 1) close copying of all or substantial portions of the work in the creation of a competing work; 2) use of the work as a “starting point” to save a competitor time, money, and effort; and 3) reproduction of substantial elements of information in the creation of a different, not directly competing work.”).

²⁶⁶ See Kernochan, *supra* note 126, at 385-87. Cf. Childress v. Taylor, 945 F.2d 500 (2d Cir. 1991) (rejecting actor’s claim of joint authorship in playwright’s work).

²⁶⁷ See, e.g., Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n, 805 F.2d 663, 669 n.7 (7th Cir. 1986); Production Contractors, Inc. v. WGN Continental Broad. Co., 622 F. Supp. 1500 (N.D. Ill. 1985) (holding that parades are not protectable works of authorship).

²⁶⁸ See 17 U.S.C. § 102(a) (1994). The definition of fixation has incorporated this distinction. “A work consisting of sounds, images, or both, that are being transmitted, is ‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.” *Id.* § 101 (definition of “fixed”). See also *Baltimore Orioles*, 805 F.2d at 668.

instead of prospering. Even where athletic preparation most resembles authorship—figure skating, gymnastics, and, some would uncharitably say, professional wrestling—a performer who conceives and executes a particularly graceful and difficult—or, in the case of wrestling, seemingly painful—acrobatic feat cannot copyright it without impairing the underlying competition in the future. A claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try.²⁶⁹

The limits placed by a broad public domain protect the other participants in the endeavor. As the court correctly noted, the ability to copyright the work or movement is not the only issue; also at stake is the underlying competition. This is as true in the marketplace as on the field of play.

Neither the model of the sports program nor the model of the isolated author bears any relation to the current digital environment in which technology is redefining accepted norms. Large-scale lawsuits between software giants such as *Apple Computer, Inc., v. Microsoft Corp.*²⁷⁰ and *Lotus Development Corp. v. Borland International Inc.*²⁷¹ create a very different paradigm. In the computer software arena, the very culture of the computer software-based information has developed in a matter of a few years. Regardless of either the merits of an individual claim or the language of the Copyright Act, courts are properly reluctant to extend monopoly power over this burgeoning electronic community. Instead, the courts define the essential elements of the copyrighted works as processes outside the scope of copyright protection,²⁷² or rely upon the fair use doctrine to categorize the conduct as appropriate under the circumstances, notwithstanding the infringing conduct.²⁷³

2. Public Domain Data, *ProCD*, & Contracts to Eliminate the Limitations of Copyright

Also outside the works of authorship are those that would pro-

²⁶⁹ *National Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 846 (2d. Cir. 1997).

²⁷⁰ 35 F.3d 1435 (9th Cir. 1994).

²⁷¹ 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided Court*, 516 U.S. 233, *reh'g denied*, 516 U.S. 1167 (1996).

²⁷² *See, e.g., id.* at 815 ("We hold that the Lotus menu command hierarchy is an uncopyrightable 'method of operation.' The Lotus menu command hierarchy provides the means by which users control and operate Lotus 1-2-3."); *Computer Assocs. Int'l v. Altai, Inc.*, 982 F.2d 693, 705 (2d Cir. 1992) ("Those elements of a computer program that are necessarily incidental to its function are similarly unprotectable.").

²⁷³ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (analogous situation during development of home recording industry).

tect ideas, procedures, or processes.²⁷⁴ This longstanding limitation on copyright includes the factual information contained in databases. Although these databases may be very expensive to compile, the data they contain remains in the public domain. While this result was not necessarily the only reasonable interpretation of the history of copyright,²⁷⁵ the Supreme Court adopted this approach in *Feist Publications, Inc. v. Rural Telephone Service Co.*,²⁷⁶ where it held that the copying of alphabetized telephone information was not a copyright violation because the data was not subject to copyright and the organization was not sufficiently original to grant even modest copyright protection.²⁷⁷ Like the computer interface cases, the courts have been reluctant to provide the potential monopolistic control over data that a contrary result might engender.

Perhaps the most noticeable single exception to this judicial reluctance to extend copyright's monopolistic control is *ProCD, Inc. v. Zeidenberg*,²⁷⁸ in which Judge Easterbrook wrote that the contract governing the sale of a database would govern the use of the public domain data contained in the software program. Judge Easterbrook's opinion was noteworthy on each of the two issues addressed: whether the "shrinkwrap" license was binding and whether copyright law precluded the enforcement of the entire agreement. The *ProCD* court explained that a shrinkwrap license is a contract or license agreement in which the terms and conditions are included inside the packaging and a notice exists on the outside of the package alerting the purchaser of the terms inside.²⁷⁹ Despite some authority to the contrary,²⁸⁰ Judge Easterbrook had little difficulty finding authority to enforce the shrinkwrap license under the U.C.C.²⁸¹ Nor, despite a tremendous amount of legal hand-wringing to the contrary, is he wrong—as far

²⁷⁴ See 17 U.S.C. § 102 (1994).

²⁷⁵ Professor Ginsburg provides an illuminating history which tends to undermine the historical basis of the Court's opinion. See Ginsburg, *supra* note 265, at 1895-97.

²⁷⁶ 499 U.S. 340 (1991).

²⁷⁷ See *id.* at 357. "[T]here is nothing remotely creative about arranging names alphabetically in a white pages directory. . . . It is not only unoriginal, it is practically inevitable." *Id.* at 363.

²⁷⁸ 86 F.3d 1447 (7th Cir. 1996).

²⁷⁹ See *id.* at 1453.

²⁸⁰ See, e.g., *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268-70 (5th Cir. 1988).

²⁸¹ See *id.* at 1452 ("A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance.") (citing U.C.C. § 2-204(1)).

as the analysis goes.²⁸² A contract provision that appears on the computer screen in normal-sized type and requires the user to actively acknowledge consent by pressing a button falls well within the accepted range of conduct courts have enforced in other contexts.²⁸³

More troubling is Judge Easterbrook's discussion of the power to draft non-negotiable, mass produced contracts that limit the scope of the material that is otherwise in the public domain.²⁸⁴ The opinion states that "[s]omeone who found a copy of SelectPhone on the street would not be affected by the shrinkwrap license. . . ."²⁸⁵ Yet, if the user is required to indicate that she agrees to the limits of the software license as a condition of the software loading into the computer, that user is bound.²⁸⁶ "Properly" drafted, the clickwrap license will cover every instance of the software's use.²⁸⁷ For all practical purposes, such a construction of the shrinkwrap provisions could effectively end the right to the public domain for material that is commercially sold.²⁸⁸ The opinion places a great deal of weight on the myth of the bargained-for exchange. "A copyright is a right against the world. Contracts, by contrast, generally affect only their parties; strangers may do as they please, so contracts do not create 'exclusive rights.'"²⁸⁹ The fallacy is that if every user is subject to the same contract, regardless of the manner in which the software is acquired, then the contract

²⁸² See generally Apik Minassian, *The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA L. REV. 569 (1997); Maureen O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53 (1997); Mark Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239 (1995).

²⁸³ ProCD suggests examples from insurance policy binders, cruise tickets, concert tickets, and consumer goods. See ProCD, 86 F.3d at 1451-52.

²⁸⁴ See Dennis Karjala, *Federal Preemption of Shrinkwrap and On-Line Licenses*, 22 U. DAYTON L. REV. 511, 523 (1997).

²⁸⁵ ProCD, 86 F.3d at 1454.

²⁸⁶ This form of assent is now known as "clickwrap," a variation on the shrinkwrap because the "I Agree" button appears at the installation of the software. See Zachary M. Harrison, *Just Click Here: Article 2B's Failure to Guarantee Adequate Manifestation of Assent in Click-Wrap Contracts*, 8 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 907 (1998); *Hotmail Corp. v. Van\$ Money Pie Inc.*, 47 U.S.P.Q.2d 1020 (N.D. Cal. 1998).

²⁸⁷ Perhaps the purchase by a second user of the computer itself, with the software loaded, would avoid the license and the limitation. A well drafted license, however, will include a provision that prohibits the transfer of the software to a user who does not agree to its terms. It may go further and require indemnification by the original purchaser for any breach by subsequent users or bind the user of the software with an on-screen reminder at start-up.

²⁸⁸ See Julie Cohen, Lochner in Cyberspace: *The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 485 n.79 (1998) ("Scholars within the fields of both law and economics have characterized the standard form contracts that the UCC enables as 'private legislation'—de facto legislation produced by private firms pursuant to a delegation of authority from the state, via the legal rules governing the formation and enforceability of such contracts.")

²⁸⁹ ProCD, 86 F.3d at 1454-55.

becomes a right against the world. The analysis of *ProCD* would be entirely reasonable for a truly negotiated contract, but not for such a universal right. The court should acknowledge the consequences of its decision as applied in the case before it rather than relying upon theoretical limitations that it can expound. No facts in *ProCD* suggest that there were any users of the data who were not bound by the license agreement, so in making its determination the court should not have relied on their theoretical existence.

The distinction is important because the Copyright Act will pre-empt a state law claim unless such state law claim has an extra element not found in the copyright claim.²⁹⁰ “Some courts have held that breach of contract claims necessarily contain an ‘extra element’ insofar as contracts involve specific promises between two parties, rather than obligations which arise by operation of law.”²⁹¹ While many contracts will meet the threshold criteria of an extra element, not every contract does so.²⁹² A clickwrap license that controls every and all uses of the work subsumes the copyright. It essentially provides “all rights reserved—including those otherwise limited by sections 107 through 120 of the Copyright Act.”

Judge Easterbrook analogized to the law of trade secrets to suggest that a finding of preemption would threaten other areas of the law, such as trade secret law, particularly as it relates to patent law.²⁹³ The secrecy necessary to maintain a trade secret should serve as the extra element necessary to take it outside the preemption discussion, and therefore it provides a poor analogy to the shrinkwrap license.²⁹⁴ To the extent that the analogy provides

²⁹⁰ See 17 U.S.C. § 301(a) (1994) (“[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.”).

²⁹¹ *Frontline Test Equip. v. Greenleaf Software*, 10 F. Supp.2d 583, 592 (W. D. Va. 1998).

²⁹² See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.01[B][1][a] (1997). *But see* *Raymond Nimmer*, *supra* note 20, at 863-64. *See also* *National Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 119 F.2d 426, 434 n.6 (8th Cir.) (“According to [Melville & David] Nimmer, then, if a license agreement contains a provision prohibiting the licensee from copying the program, the licensor could sue for breach of contract rather than for copyright infringement. Other courts have concluded, however, that breach of contract actions in which the alleged breach consists of the exercise of one of the exclusive copyright rights are preempted.”).

²⁹³ *ProCD*, 86 F.3d at 1454.

²⁹⁴ A close reading of the opinion reveals poor, ill-fitting analogies to medical disclaimers and instructions, and consumer products. A discussion of these parallels, however, is beyond the scope of this Article. Moreover, in an exhaustive opinion, the Supreme Court explained that allowing states to afford trade secret protection to inventions would not undermine the objectives of patent law, the objectives of which are to provide new innovation for the public by fostering and rewarding invention and, in exchange, requiring disclosure of invention. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 481 (1974).

some guidance, the reliance is misplaced.

A state law that substantially interferes with the enjoyment of an unpatented utilitarian or design conception which has been freely disclosed by its author to the public at large impermissibly contravenes the ultimate goal of public disclosure and use which is the centerpiece of federal patent policy. Moreover, through the creation of patent-like rights, the States could essentially redirect inventive efforts away from the careful criteria of patentability developed by Congress over the last 200 years.²⁹⁵

The appropriate analogy here is that the enforcement of a state statute such as the UCC in a manner that contractually eliminates some or all of the exceptions to exclusivity in copyright also redirects creative efforts away from the Congressional goals to balance the rights of the author with those of the public.

The difficulty in the *ProCD* decision is that, despite the flawed legal analysis and negative policy implications, the decision to hold Zeidenberg liable is most likely the correct result as a matter of fairness and of protection for the software industry.²⁹⁶ The defendant knowingly violated the license agreement in order to compete directly with the plaintiff's product.²⁹⁷ Unfortunately, there is no method of statutory construction that will allow the court to find liability once the contract claim is properly preempted because under copyright law the material sold by ProCD was unprotectable data.²⁹⁸ To avoid confusion in the courts and to open the marketplace to an appropriate competitive regime, federal law must explicitly preempt the shrinkwrap or clickwrap licenses and at the same time provide limited protection for compilations of data.²⁹⁹

3. Fair Use

The reason the *ProCD* decision is potentially so dangerous is that it allows distributors of mass-produced media content contractually to expand the scope of copyright to unprotected works and

"Trade secret law provides far weaker protection in many respects than the patent law. While trade secret law does not forbid the discovery of the trade secret by fair and honest means, e. g., independent creation or reverse engineering, patent law operates 'against the world,' forbidding any use of the invention for whatever purpose for a significant length of time." *Id.* at 489-90.

²⁹⁵ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 156-57 (1989).

²⁹⁶ See Cohen, *supra* note 288, at 497.

²⁹⁷ See *ProCD*, 86 F.3d at 1449. Fairness, however, is not necessarily the issue before the court. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

²⁹⁸ The software also included database software which was protected by copyright, but Zeidenberg did not reproduce the copyrighted software, only the unprotected data.

²⁹⁹ See *infra* Part V.C (providing suggestions for a legislative model for limited protection).

to opt out of the limitations Congress placed on copyrights in sections 107 through 120 of the Copyright Act.³⁰⁰ These provisions provide the important balance to the Copyright Act, limiting the monopoly power granted to the copyright holder. Among the most important of these limits is the doctrine of fair use, which allows anyone a limited privilege to copy the protected work without consent.³⁰¹

An essential component to a free marketplace of ideas is that even those works that are protected under copyright are still available to the public for comment or criticism. Copyright law has traditionally allowed other authors and commentators a limited right to incorporate the protected material into new works without the original copyright holder's permission.³⁰² The origins of fair use stem from the longstanding judicial tradition that the monopoly granted by the copyright should not unduly limit or interfere with other authors' creativity. The tradition of the fair use doctrine has consistently been reasserted by the Supreme Court. "Justice Story distilled the essence of law and methodology [for the application of fair use] from the earlier cases: 'look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.'"³⁰³

The original basis for the doctrine was entirely consistent with the constitutional mandate of promoting science and the useful arts. The rationale "was that the second work, had, in effect, created a new, original work which would itself promote the progress of science and thereby benefit the public."³⁰⁴ Since the value was in creating an opportunity for the second work, the monopoly

³⁰⁰ See 17 U.S.C. §§ 107 (Fair use) (1994 & Supp. III 1997); 108 (Reproduction by libraries and archives); 109 (Effect of transfer of particular copy or phonorecord); 110 (Exemption of certain performances and displays); 111 (Secondary transmissions); 112 (Ephemeral recordings); 113 (Scope of exclusive rights in pictorial, graphic, and sculptural works); 114 (Scope of exclusive rights in sound recordings); 115 (Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords); 116 (Negotiated licenses for public performances by means of coin-operated phonorecord players); 117 (Computer programs); 118 (Use of certain works in connection with noncommercial broadcasting); 119 (Secondary transmissions of superstations and network stations for private home viewing); 120 (Scope of exclusive rights in architectural works); 121 (Reproduction for blind or other people with disabilities).

³⁰¹ *Id.* § 107.

³⁰² See generally *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

³⁰³ *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 576 (1994) (quoting *Folsom v. Marsh*, 9 F.Cas. 342, 348 (No. 4,901) (C.C.D. Mass. 1841)).

³⁰⁴ See WILLIAM PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 3 (1985).

power granted by copyright had to be limited so as to allow the second work to be produced.

Increasingly over time, fair use served as a safety valve for overly-rigorous enforcement of the statute³⁰⁵ and was codified in the 1976 Copyright Act (with minor updating) as follows:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.³⁰⁶

The enactment was intended to memorialize the existing judicial doctrine rather than to re-write the traditional, historical gloss courts had placed on the copyright monopoly.³⁰⁷ The first and fourth factors stress the importance of commercial competition to a finding of fair use.³⁰⁸ This emphasis places a substantial burden on mounting a successful fair use defense. Two of the four prongs support a finding of an unfair use if the defendant that appropriated the material has significant market power and influence.³⁰⁹

³⁰⁵ *Quality King Distribs., Inc. v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125, 1133 (1998); *Campbell*, 510 U.S. at 577 (“The fair use doctrine thus ‘permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.’”) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

³⁰⁶ 17 U.S.C. § 107.

³⁰⁷ The purpose of section 107 was “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. . . .” H.R. REP. NO. 94-1476, at 66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5680.

³⁰⁸ See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448-50 (1984).

³⁰⁹ See *Harper & Row*, 471 U.S. at 562. But see *Leibovitz v. Paramount Pictures Corp.*, 137

The second prong focuses on the nature of the work, suggesting, for example, that a factual work can be more readily copied than a fictional work. Finally, the third prong focuses on the amount of the original work that was copied, both quantitatively and qualitatively. An insubstantial taking should not be actionable; a substantial taking will be prohibited whether the taking was a significant amount of material or a significant component of the material.³¹⁰ While all four prongs must be considered, ultimately the balancing is intended to be qualitative, with the four prongs serving as guides for an appropriate result rather than trip-wires for automatic liability.³¹¹

The balancing of interests in any particular fair use case is difficult objectively to analyze, factually unique, and closely tied to the context in which the case is decided.³¹² As the Supreme Court discussed in *Harper & Row, Inc. v. Nation Enterprises*, it is not merely a question of quantity, but whether or not the essence of the work has been lifted.³¹³ Mechanical analysis of the taking is insufficient to make the determination. This issue is not new. "The quintessence of a work may be piratically extracted, so as to leave a mere caput mortuum, by a selection of all the most important passages in a comparatively moderate space."³¹⁴

The importance of the fair use doctrine continues to be reinforced by the Supreme Court in theory, but limited in practice. In its decision holding that the first sale doctrine allows an importer to sell lawfully manufactured goods in the United States without the copyright holder's permission, the Court stressed the importance of such a construction as a means of protecting fair use.

Of even greater importance is the fact that the § 106 rights are subject not only to the first sale defense in § 109(a), but also to all of the other provisions of "sections 107 through 120." If § 602(a) functioned independently, none of those sections would limit its coverage. For example, the "fair use" defense

F.3d 109 (2d Cir. 1998) (holding that parody of Anne Leibovitz photograph used in advertisement of motion picture was fair use despite the commercial nature of the parody).

³¹⁰ See *Harper & Row*, 471 U.S. at 565 ("[T]he Nation took what was essentially the heart of the book.") (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 557 F. Supp. 1067, 1072 (1983)).

³¹¹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) ("Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.")

³¹² See *id.* at 577. ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.")

³¹³ See *Harper & Row*, 471 U.S. at 564-65.

³¹⁴ *Gray v. Russell*, 10 F.Cas. 1035, 1038-39 (C.C.D Mass. 1839). See *PATRY*, supra note 304, at 18.

embodied in § 107 would be unavailable to importers if § 602(a) created a separate right not subject to the limitations on the § 106(3) distribution right. Under L'anza's interpretation of the Act, it presumably would be unlawful for a distributor to import copies of a British newspaper that contained a book review quoting excerpts from an American novel protected by a United States copyright.³¹⁵

The Court continues to support a statutory construction that stresses the exemptions to the exclusive rights granted under copyright. Nonetheless, in *Campbell v. Acuff-Rose Music, Inc.*,³¹⁶ even as the Court upheld the right of the defendant, rap group 2 Live Crew, to create a parody of the plaintiff's song, it added an additional gloss that limited the nature of fair use.

The central purpose of this investigation is to see . . . whether the new work merely supersedes the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, . . . and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.³¹⁷

Justice Souter's opinion in *Campbell*, however, went on to limit parody to those works that focused on the source material itself rather than satire which "can stand on its own two feet and so requires justification for the very act of borrowing."³¹⁸ This analysis of fair use has the effect of reducing the scope of the doctrine by potentially excluding satirical works from the range of protected uses. Since the Court does not use parody as an expansion of the four-prong test, the exclusion of satire is wholly unsupported by case law or logic. Nonetheless, the precedent has been set.³¹⁹

The *Campbell* decision missed the importance of the social

³¹⁵ *Quality King Distribs., Inc., v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125, 1133 (1998) (footnotes omitted).

³¹⁶ *See Campbell*, 510 U.S. 569.

³¹⁷ *Id.* at 579 (internal quotations and footnotes omitted).

³¹⁸ *Id.* at 580-81.

³¹⁹ *See Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394 (9th Cir.) (finding satire of O. J. Simpson trial not a fair use, presumably because parents could become

fabric upon which satire—as used by the Court—is based. Satire works precisely because it evokes other materials. For example, the use of *The Cat in the Hat* to critique the judicial system is successful precisely because of the juxtaposition of the two “characters”—O.J. Simpson and the Cat.³²⁰ To suggest that this is not worthy of fair use protection misses an essential purpose of fair use. This is the type of mischaracterization which, along with the extension of the copyright term, will reduce satire—and the shared cultural associations—from the communal dialogue in society. Nonetheless, despite the sometimes misplaced rhetoric of the Souter opinion, the opinions in *L’Anza*, *Sony*, and *Harper & Row*, and the results in *Campbell*, continue to indicate strong support for a vibrant fair use defense.

The greatest limitation on fair use as a component of a broad-based regimen for an open marketplace is that the doctrine is an affirmative defense. As such, it makes for a weak bulwark as a planning device. “Fair use does not assist parties, or industries, in making *ex ante* determinations whether or not to copy, and if so, how much. It is a highly fact-specific defense usually deemed inappropriate for resolution at the summary judgment stage.”³²¹ The more predictable the result, the more effective the planning. The highly case-specific balancing of the fair use doctrine and the inconsistent application of the doctrine provide insufficient guidance and predictability. If the Supreme Court recognizes the importance of the doctrine as a planning device, it can shape its opinions to provide better guidance rather than adding new glosses to the doctrine Justice Story clearly explained.

D. *State Protectionism & the Article 2B/UCITA Powerball*

In addition to the constitutional parameters on all state conduct and the regulation at the federal level, the National Conference of Commissioners on Uniform State Laws and the American Law Institute have led a public dialogue on the need for and scope of a uniform state law designed to deal in transactions involving electronic commerce.³²² The resulting proposal is designed to pro-

confused and read the book—which did not have illustrations—as a bedtime story), *cert. dismissed*, 118 S. Ct. 27 (1997).

³²⁰ See *id.* at 1399-1400 (applying fair use factors).

³²¹ Ginsburg, *supra* note 265, at 1926 n.226.

³²² See David McGowan, *Free Contracting, Fair Competition, and Article 2B: Some Reflections on Federal Competition Policy, Information Transactions, and “Aggressive Neutrality,”* 13 BERKELEY TECH. L.J. 1173, 1190 (1998). Article 2B has been renamed the Uniform Computer Information Act (“UCITA”) and recommended for adoption by the States. See *supra* note 16. A discussion of the individual provisions of Article 2B is beyond the scope of this Article.

vide gap-fillers and default provisions for private contracts involving the digital industries and provide uniform state regulation of contracts governing information transactions.³²³ The preamble to the Draft Article 2B explains:

Article 2B deals with transactions in information; it focuses on a subgroup of transactions in the "copyright industries" associated with transactions involving software, on-line and internet commerce in information and licenses involving data, text, images and similar information. It . . . covers transactions in digital and related industries. In the digital economy, information industries are rapidly converging into a multi-faceted industry with common concerns. That converged industry exceeds in importance the goods manufacturing sector. It is growing rapidly.

Article 2B concerns transactions that largely have never been covered by the U.C.C. The industries and transactions affected by Article 2B involve subject matter unlike the traditional U.C.C. focus on goods. In Article 2B transactions, the value lies in the intangibles: the information and rights to use information.³²⁴

Article 2B does not purport to be neutral in structuring the law to enforce the status quo. Rather, it attempts to create a new balance between the interests in the information age.³²⁵ At the core of the development for Article 2B were two uncontested underlying assumptions: First, that transactions involving software and data are conceptually distinct from sales of goods because of the ability digitally to recreate the item without any practical limitations, and second, that the information industries have such a commercial significance so as to warrant the attention and legal protection.³²⁶

From this rather benign starting point, Article 2B developed into a decidedly different regime. The drafters of Article 2B elected not to utilize the existing structure of copyright law to achieve their results. Instead, they created a regime that attempts to reorder the marketplace of ideas by over-emphasizing the property rights in the ideas, facts, information and expression of the dominant media providers. Although unwilling to accept the con-

³²³ U.C.C. art. 2B at Introduction (Discussion Draft of August 1, 1998) ("Article 2B provides a framework for contractual relationships at the center of the information era. This proposal is in effect a cyberspace contract statute.")

³²⁴ *Id.* (footnotes omitted).

³²⁵ *See id.* ("Evaluating the balance hinges on one's perspective, yet, as the following indicates, Article 2B distributes benefits among the various parties.")

³²⁶ *See id.* at Project History.

sequences of their regulations, the drafters of Article 2B are cognizant of the social implications of their endeavor.

[B]asic First Amendment and related policies must remain central. Even as informational content becomes a significant commercial commodity, we must not forget that informational content and its communication in a marketplace of ideas remains equally relevant to political and social norms in this country. What law does here affects not only the commercialization of information, but also the social values its distribution has always had in society.³²⁷

At one level, Article 2B does provide a true First Amendment paradigm for dealing with information. By placing all transfers of information into private hands, it eliminates Congress' role of interference in the marketplace of ideas. Under this rubric, the influence of Congress' attempts to balance the interests of authors with those of the public would be reduced, and the private ordering of the marketplace would occur. Just as the Supreme Court intervened in *Miami Herald* to say "[i]f it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years,"³²⁸ so can the use of private licenses—in essence, a private regulatory regimen—eliminate the last vestiges of regulations that are inconsistent with the First Amendment.

Arguably, under such a licensing scheme, a licensee of cable systems (the viewer) could agree under the subscriber license not to view the local broadcasters for which Congress provided cable bandwidth, thereby negating the must-carry provisions by private agreement.³²⁹ This model of private ordering does break down

³²⁷ *Id.* at Nature of a Commercial Statute.

³²⁸ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254 (1974).

³²⁹ See *Turner I*, 512 U.S. 622, 641 (1994); *Turner II*, 137 L. Ed. 2d 369, 388 (1997). This approach leaves the local network operators out of the analysis. Courts would have a difficult time upholding the regulation, however, if the license agreement precluded the subscribers from viewing the stations even if available. If Congress required broadcast of a program that could not be watched by the licensee, then it would hardly meet the intermediate level of scrutiny. In addition, section 2B-104(6) excludes coverage of cable broadcasts. The Reporter's notes suggest that this is a transitional exclusion.

Broadcast, Movies and Cable. Subsections (6) and (8) excludes traditional licensing in the motion picture, broadcast and cable industries. The exclusion reflects various considerations, including both the existence of a regulatory overlay (cable and broadcast) and the different nature of liability and other concerns involved. The exclusion is limited to *traditional* activities and, as with reference to financial systems, is not an exclusion of the industry. As companies move into on-line systems, software, multi-media and similar licensing, Article 2B applies.

U.C.C. § 2B-104 at Reporter's Notes (7).

somewhat, however, since the First Amendment is interpreted to provide protections for the speaker and does not generally protect the interests of the audience member.³³⁰ If this form of heightened non-interventionism is not the type of First Amendment protection identified by the drafters of Article 2B, then despite the acknowledgment of the need for deference to First Amendment ideals and the similar balancing provisions contained in the Copyright Act, few of the provisions contained in Article 2B are designed to address these concerns.

By creating a new transactional approach to intellectual property regulation, Article 2B introduces unnecessary variables that add to the unpredictability of transactions in intellectual property. Among these is that the licensing paradigm of Article 2B is inappropriate and that the reliance on state law will lead to inconsistencies with federal law, and invariably will develop differences among the states.³³¹

1. Improper Application of the License Paradigm

Given the difficulty in developing true uniformity among the fifty states, the choice to forgo an existing federal regulatory structure would seem counter-intuitive. Goals of predictability and uniformity should be easier to achieve under a single statutory framework than under a state-by-state framework. The drafters of Article 2B readily acknowledged the role of copyright in the licensing of computer software and information content. "In areas covered by Article 2B, copyright law is a dominant (but not sole) source of intellectual property rights. Copyright law gives the copyright owner the exclusive right to *make copies* of its work, to *distribute* copies, to make *derivative* works, to *publicly display or perform* the work, and other rights."³³² Copyright, however, is fundamentally different from the structure proposed by Article 2B. The exclusive rights of copyright are limited by sections 107 through 121 of the Copyright Act, limiting the broad monopoly power of the copy-

³³⁰ This may not eliminate the rights of the local broadcasters to have their signals retransmitted, but it might render any action moot. *See Turner II*, 137 L. Ed.2d at 388. The broadcasters could not, however, claim to protect the rights of the audience. *See Boos v. Barry*, 485 U.S. 312, 321(1988) ("The emotive impact of speech on its audience is not a 'secondary effect.' Because the display clause regulates speech due to its potential primary impact, we conclude it must be considered content-based."). *See also Reno v. ACLU*, 117 S. Ct. 2329, 2342-43 (1997).

³³¹ Additional concerns also exist. Among those are the definitional problems inherent in the scope of Article 2B and its creation of a new category of transaction for "mass-market" licenses. Both these discussions are beyond the coverage of this Article.

³³² U.C.C. art. 2B at Transactional Context.

right holder.³³³ Article 2B, then, provides another gap-filling function. It contractually eliminates the gaps or exclusions created by the Copyright Act. The explanation of the difference between a sale and the licensing protocol advocated under Article 2B serves as a productive example. "A sale relinquishes some rights *with respect to the copy*. A license tailors what rights are granted."³³⁴ This simple phrase captures the essence of the Article 2B architecture and emphasizes the flaws of that approach as it effects the growth of the information age. Recast, the sentence explains that the "seller relinquishes some rights with respect to the copy of the work sold that the seller would rather keep." By recasting the transaction as a license, however, "the licensor is under no statutory mandate to grant any rights not explicitly included in the agreement."³³⁵ The introductory provisions to Article 2B provide examples of the distinction the proposal would like to develop. The explanation given by Article 2B details the intended goal of the licensing scheme and highlights its fundamental flaws.

In both [sale and license] formats, the information product eventually reaches an end user. If it does so in an ordinary chain complying with the distribution license, the end user is in rightful possession of a copy. If the authorized distribution involved sales of copies, no more is required to give the end user the very limited rights of the owner of a copy spelled out in copyright law (e.g., to transfer it, make a back-up if it is software, make some changes essential to use if it is software). If, however, the copyright owner elected a licensing framework, the end user's right to "use" (e.g., copy) the software depends on the end user license.³³⁶

As this article has already detailed, Congress has been inclined to promote the interests of copyright holders over those of the general public in developing its balance between the monopoly granted and the limits placed in the law for the public good. Nonetheless, both Congress and the courts have repeatedly

³³³ See 17 U.S.C. §§ 107-121 (1994 & Supp. III 1997).

³³⁴ U.C.C. art. 2B at Transactional Context.

³³⁵ A license is

a contract that authorizes access to or use of information or informational rights and expressly limits the contractual rights or permissions granted, expressly prohibits, limits, or controls uses, or expressly grants less than all informational rights in the information. A contract may be a license whether the information or informational rights exist at the time of contract or are to be developed, created, or compiled thereafter, and whether or not the contract transfers title to a copy.

U.C.C. § 2B-102(a)(28).

³³⁶ *Id.*

stressed the importance of the exceptions to the exclusive rights granted copyright holders.³³⁷ If the copyright holder can elect to opt out of the copyright system by declaring the transaction a license, then the terms provided by the copyright holder govern rather than the terms defined under the Copyright Act. The carefully crafted exclusions become meaningless for a wide arrange of transactions.

The Federal Trade Commission, though arguably favorable to the codification project, expressed a number of concerns regarding the draft.³³⁸

The staff [of the Federal Trade Commission] is concerned that Article 2B, as currently drafted, is inconsistent with existing intellectual property and antitrust laws and policies. Some provisions in Article 2B implicitly endorse a contracting/licensing structure that allows software and other information to be distributed with significant restrictions on users' rights to compete. Those restrictions could be contract/license terms that explicitly forbid competition with the seller/licensor of the good or terms that restrict in some manner "reverse engineering," i.e. The detailed analysis by one firm of another firm's product in order to produce a related good. Both types of restrictions could unreasonably restrain trade in violation of the antitrust laws, constitute misuse of intellectual property, and/or violate state trade secret statutes.³³⁹

The concerns the Federal Trade Commission raised on this issue stem from the concerns that use of the license will slow competition and increase barriers to entry in what are currently competitive fields. Copyright law excludes ideas, processes, and facts from statutory protection precisely so that they will be freely disseminated among the public. Patent law allows for the exclusive ownership of such processes and inventions, but only for a signifi-

³³⁷ *Quality King Distribs., Inc., v. L'anza Research Int'l, Inc.*, 118 S. Ct. 1125, 1133 (1998) ("Given the importance of the fair use defense to publishers of scholarly works, as well as to publishers of periodicals, it is difficult to believe that Congress intended to impose an absolute ban on the importation of all such works containing any copying of material protected by a United States copyright.")

³³⁸ Letter from Representatives of the Bureau of Consumer Protection and Competition and of the Policy Planning office of the Federal Trade Commission, to Article 2B Drafting Committee, Oct. 30, 1998, *reprinted in CYBERSPACE LAW.*, Dec., 1998 ("We support the efforts of NCCUSL and ALI to draft uniform rules for the enforceability of contracts related to sales of software and on-line access.") [hereinafter Letter to 2B Drafting Committee].

³³⁹ *Id.* The FTC expanded on the concern in a footnote: "The risk that restrictions on reverse engineering will damage competition is heightened in information industries, because interoperability is often fundamental to both the incentive and ability of firms in those industries to compete." *Id.*

cantly shorter period of time, and only with a heightened showing of novelty.³⁴⁰ If the work seeking patent protection is not sufficiently novel, it is not deserving of the monopoly the federal law affords. The patent application requires full public disclosure so that the public can get immediate benefit from any ideas which will not be subject to patent protection and eventual benefit of those ideas which are deserving of the patent.³⁴¹ A broadly enforced private license reverses this paradigm and provides essentially perpetual grants of ownership to the licensor. The result is to add barriers and expense to competition, slow the growth of technology, and raise the costs to consumers.

The licensing paradigm has also come under attack as being a misapplication of prior doctrine.³⁴² Many of the arguments against the enforceability of the licensing regime rest on the absence of bargaining between the licensor (the software manufacturer) and the purchaser (a consumer). Essentially, this complaint stems from the concern that the licenses are euphemisms for contracts of adhesion.

Contracts of adhesion—those drafted entirely by one party and offered on a take-it-or-leave-it basis—deserve separate treatment. If one party cannot bargain over contract terms, adhesion contracts will likely standardize around terms favorable to the drafting party. Indeed, since the only means of “bargaining” available to non-drafting parties is the threat to go to a competitor offering better terms, drafting parties may have a strong incentive to standardize their terms to squelch competition. Rob Merges has referred to such uniform, cartel-like terms within an industry as “private legislation.”³⁴³

This practical complaint of the licensing structure identifies that a standardized, non-negotiated license agreement will become the private law governing all software transactions. With Microsoft controlling ninety-five percent of all new operating systems for computer software,³⁴⁴ it already has the leverage to create such a standard.

³⁴⁰ See 35 U.S.C. §§ 101-102 (1994).

³⁴¹ See *id.* § 112.

³⁴² See, e.g., Karjala, *supra* note 284, at 529; Lemley, *supra* note 282, at 1277-79; David Rice, *Licensing the Use of Computer Program Copies and the Copyright Act First Sale Doctrine*, 30 JURIMETRICS J. 157, 175-76 (1990).

³⁴³ Mark Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CAL. L. REV. 479, 588-89 (1998) (quoting Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 118-22 (1995)). The theme of cartel behavior and oligopoly policies reemerges in every component of intellectual property regulation.

³⁴⁴ See *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. filed May 18, 1998).

Beyond concerns that the so-called license agreements are actually contracts of adhesion, other distinctions exist between the software licensing model and traditional leasing arrangements of property.³⁴⁵ Under the traditional lease, the lessee makes periodic payments, both parties have ongoing obligations to continue to perform throughout the term, and the lessor who retained title throughout the term of the lease repossesses the property upon the expiration of the lease.³⁴⁶ The paradigm of the software "license" actually amounts to an outright sale of less than all the property. At the consumer level, it is typically a single fee for an unlimited use of a copy of the protected work. The limits of the license generally prohibit activities that are already limited under the exclusive rights of copyright. A purchaser of software cannot create multiple copies of the software, nor can she rewrite the software and sell the new product because that would be a derivative work. The agreement has no limits on duration, geographic use or non-interference with the ongoing obligations of the lessor/seller. This is a fundamentally different transaction than the copyright license referred to by the drafters of Article 2B, where "an [sic] contract is a license if it grants greater privileges than in a first sale, restricts what use privileges might otherwise apply, or deals with issues that are not explicit results of a first sale. Whether terms are enforceable is determined under this Article and otherwise applicable federal and state law."³⁴⁷ Under this definition, a license is every relationship other than a warranty-free, "as is" transaction, such as a used book sale.³⁴⁸

This use of a licensing rubric is fundamentally different than that which has gone on in intellectual property transactions before. Under a traditional copyright licensing scheme, the license provides for limited grants of the exclusive rights under copyright. The grant of rights was closely analogous to that of agency principles. The licensee is an agent in a particular market or medium for the copyright holder which retains the bundle of exclusive rights. Film distributors would license territories throughout the world by which a local distributor would have exclusive rights within that jurisdiction to act as the copyright holder. That license would have

³⁴⁵ See David Rice, *Digital Information as Property and Product: U.C.C. Article 2B*, 22 U. DAYTON L. REV. 621, 644-45 (1997).

³⁴⁶ See Karjala, *supra* note 284, at 529.

³⁴⁷ U.C.C. § 2B-102 Reporter's Notes (Discussion Draft of August 1, 1998).

³⁴⁸ Note that there is one limitation. "'License' includes an access contract and, for purposes of [the U.C.C.], a consignment of a copy, but does not include a reservation or creation of a financier's interest." U.C.C. § 2B-102. A financier has an interest that must not be as great as the other parties at the bargaining table.

further limitations, providing, for example, that the licensee could not alter the picture except to the extent necessary to comply with local censorship laws. The licensing of film prints to exhibitors was a traditional, personal property lease. The distributor loaned the print to the exhibitor for the length of the run in exchange for weekly payments. At the end of the run, the distributor would reclaim the print and ship it to another exhibitor. The lease of the print was distinct from the rights to public performance or display purchased by the exhibitor. The public performance rights were not affected even if the leased copy of the film was destroyed. A license to the end-user of a commercially available software product has none of these characteristics.

The license rubric proposed by Article 2B may be limited by its terms to the computer industries, but the potential for extending the licensing regime in the manner provided for under Article 2B, whether directly or by court analogy, would be quite likely.³⁴⁹ The Supreme Court decision in *Sony* allowing home videotaping of television could be reversed, at least for all cable broadcasters. Media producers (including the original plaintiffs in *Sony*) could require cable system operators to impose a license on cable subscribers that prohibited the right to time-shift as allowed by the Supreme Court. Using the entrance ticket as an acceptable license agreement,³⁵⁰ all attendees at sporting events could be required to treat the scores and dispositions of the game as proprietary information until at least fifteen minutes following the end of the sporting event, effectively reversing the decision in *National Basketball Association v. Motorola, Inc.* All free passes would, of course, need the same restriction. Indeed, even political events could place this restriction on entrance and use it to require permission before any

³⁴⁹ The distinction is not clearly drawn from the drafting, nor can it be made more distinct, because the underlying impetus for creating new legislation comes from the growth and convergence of information technologies. See U.C.C. §§ 2B-103, 104. The Reporter's comments are illustrative.

Broadcast, Movies and Cable. Subsections (6) and (8) [of 2B-104] excludes traditional licensing in the motion picture, broadcast and cable industries. . . . The exclusion is limited to *traditional* activities and, as with reference to financial systems, is not an exclusion of the industry. As companies move into on-line systems, software, multi-media and similar licensing, Article 2B applies.

Id. Reporter's Notes. See also *Scope of UCC Reforms Trimmed While FTC Proposes Further Adjustments*, 57 PAT. TRADEMARK & COPYRIGHT J. (BNA) 78 (Nov. 26, 1998).

³⁵⁰ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

[C]onsider the purchase of an airline ticket. The traveler calls the carrier or an agent, is quoted a price, reserves a seat, pays, and gets a ticket, in that order. The ticket contains elaborate terms, which the traveler can reject by canceling the reservation. To use the ticket is to accept the terms, even terms that in retrospect are disadvantageous.

Id. (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991)).

press coverage of the event was allowed.³⁵¹ Under the licensing regime, no First Amendment restrictions are implicated; private parties have freely ordered access to information.

Because this result is not merely apocryphal, careful scrutiny should be given to any regulations codifying the proposition that mere description of a license paradigm, without more, should be enforced as a license rather than as a sale. Whether or not current federal and constitutional law allows for the choice to be made is ultimately not the issue. The broader concern is whether Congress, the courts, and the states recognize the dangers of where the licensing paradigm may lead.

2. Preemption & Confusion between State & Federal Law

Article 2B does attempt to show that it cannot entirely replace federal law through its private ordering of the parties. Section 105(a) provides that any provision “preempted by federal law is unenforceable to the extent of such preemption.”³⁵² The Reporter’s notes try to explain why Article 2B restates this federal preemption doctrine.

Subsection (a) states a rule that applies to all state law. If federal law invalidates a state contract law or contract term in a particular setting, federal law rule controls. Subsection (a) refers to preemptive federal rules, but other doctrines grounded in First Amendment, copyright misuse and other federal law may limit enforcement of some contract terms in some cases. . . . State laws, including the UCC, cannot alter or create federal law.³⁵³

The Reporter’s Notes expand on this notion that Article 2B is a complement to the federal laws, and that the Copyright Act preempts state laws to the extent the state laws create rights equivalent to copyright.³⁵⁴

There are many sources of federal preemption. Some stem from intellectual property law. Section 301 of the Copyright Act

³⁵¹ *Cf. id.* (“Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit.”). Here, Judge Easterbrook confuses a true license agreement with a notice provision on the ticket not to interfere with the exclusive rights of the copyright holder.

³⁵² U.C.C. § 2B-105(a). To provide some meaning to the otherwise superfluous provision, the last phrase of the section, “to the extent of such preemption,” may be read as a savings clause intended to apply Article 2B to the greatest extent possible and as limiting the preemption as narrowly as a court can construe it.

³⁵³ *Id.* at Reporter’s Notes.

³⁵⁴ *See* 17 U.S.C. § 301 (1994).

preempts any state law that creates rights equivalent to copyright. That rule will seldom apply to contracts since a contract deals with the relationship between parties to an agreement, while property law in the Copyright Act deals with interests good against persons with whom the property owner has not dealt.³⁵⁵

The analysis supplied by the Reporter draws heavily on Judge Easterbrook's *ProCD* opinion.³⁵⁶ The parties to the agreement have privately arranged a license whereby certain uses of the product can be made. An educational, interactive CD-Rom covering material such as American history may contain textual material, notes, questions, sound clips and short video animation and will serve as a good example of the Article 2B licensing rubric. The student licensing the CD-Rom can read or play the content, but despite the first sale doctrine of the Copyright Act, the student cannot transfer the CD-Rom or any of its content at the end of the semester.³⁵⁷ Even modest portions of the CD-Rom cannot be copied for purposes of comment or criticism,³⁵⁸ and the ideas and facts it contains cannot be transferred.³⁵⁹ The license agreement could be drafted to re-incorporate these exceptions to the Copyright Act, but without such a broadening of the license, the student licensee would violate the terms of the agreement by writing "book reports"³⁶⁰ or by discussing the facts described in the materials in class. If the license expanded the uses, for example, to "educational purposes only,"³⁶¹ the proposed narrow reading of the license under Article 2B would result in a breach of the agreement if the student who learned her American history from that CD-Rom went on to incorporate the facts into a short story, poem, or song lyric that eventually resulted in commercial sale. A student who later commercially published her doctoral thesis would be liable for breach of the CD-Rom license.

Proponents of Article 2B characterize such examples as scare tactics intended to frighten legislators and the public. No licensors would create such an anomalous and ridiculous situation. Nonetheless, examples abound. On the 1998 Homewood Alumni Directory for Johns Hopkins University,³⁶² the following license appears on the back of the CD-Rom case.

³⁵⁵ U.C.C. § 2B-105(a) at Reporter's Notes.

³⁵⁶ See *ProCD*, 86 F.3d at 1449; *supra* Part II.C.2.

³⁵⁷ See 17 U.S.C. § 109(a) (first sale doctrine).

³⁵⁸ See *id.* § 107 (fair use doctrine).

³⁵⁹ See *id.* § 102 (scope of copyright); *ProCD*, 86 F.3d at 1455-56.

³⁶⁰ This is a term that may become idiomatic of a bygone age.

³⁶¹ The limitation posted on Westlaw resources, for example.

³⁶² © 1998 Johns Hopkins University. All rights reserved.

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This example of a license provision (from a highly esteemed institution) illustrates the fundamental problems of a privately ordered regulatory system in an age of rapid change and highly complex issues. While common sense might suggest that the provision is intended to stop the type of abuse promulgated by the defendant in *ProCD*, this license does not differentiate between copying a few names to update a Rolodex and posting the entire CD-Rom to the Internet. Both acts are banned without prior written consent. The statement that only Johns Hopkins University and its alumni can use the CD-Rom suggests that these are the only classes of individuals who can make the written request to the school for use of the data contained in the CD-Rom. Finally, the statement that use of the data is “in direct violation of copyright” seems to indicate lack of understanding of both *Feist* and *ProCD*. *ProCD* would suggest that use of the CD-Rom in violation of the license was a breach of contract. Both opinions would maintain the premise that the data contained on the CD-Rom is probably not sufficiently original to be protected under copyright.³⁶⁴

The proposed neutral stance of Article 2B on preemption is inappropriate from the perspective of the U.C.C. as a planning device and inconsistent with the goals of promoting the information industry as a whole. Instead, the purported neutrality will favor the existing industry players who need not avail themselves of the development made possible by the fair use doctrine and the ability to use reverse engineering techniques. “The [Federal Trade Commission] staff notes that it might be impossible for Article 2B to assert

³⁶³ *Id.*

³⁶⁴ The author of this Article is not an alumnus of Johns Hopkins University and therefore has no rights to play the CD and discover its contents. Nonetheless, the author may have community property rights in the CD to the extent it was purchased by the author's spouse with community property assets.

a “neutral” position on competition policy, and believes that the draft could be substantially improved by affirmatively reconciling it with federal antitrust and intellectual property laws.”³⁶⁵ To the extent that antitrust and intellectual property laws balance the interests of the property owners with that of the public, including current and future competitors, any system that eliminates this balancing will reduce competition. An analysis of the specific provisions of Article 2B is beyond the scope of this article.³⁶⁶ Nonetheless, an analysis of the project’s objectives is appropriate. If the true goals of Article 2B are greater uniformity and predictability, an amendment to the U.C.C. may not be the correct solution. To begin with, the Reporter acknowledges that the task is extremely difficult.

“The principal objects of draftsmen of general commercial legislation . . . are to be accurate and not to be original. Their intention is to assure that if a given transaction . . . is initiated, it shall have a specified result; they attempt to state as a matter of law the conclusion which the business community apart from statute . . . gives to the transaction in any case. But achievement of those modest goals is a task of considerable difficulty.”³⁶⁷

The difficulties in effectively crafting Article 2B to meet the goals of uniformity and predictability may be insurmountable. First, the preemption of many of its provisions creates “traps for the unwary” who draft agreements relying on the language of Article 2B without an understanding of the necessary limitations of the Copyright Act and other federal legislation. Second, as described above, Article 2B adds a layer of complexity to commercial transactions and attempts to invent a new licensing paradigm that has not been widely accepted by the courts or the public.³⁶⁸ Despite the

³⁶⁵ Letter to 2B Drafting Committee, *supra* note 338.

³⁶⁶ See generally Pamela Samuelson, *Intellectual Property and Contract Law for the Information Age: Forward to a Symposium*, 87 CAL. L. REV. 1 (1999); Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025 (1998); Fred Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707 (1998); Rice, *supra* note 345, at 621.

³⁶⁷ U.C.C. art. 2B at Default Rules (Discussion Draft of August 1, 1998) (quoting Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341 (1957)).

³⁶⁸ See Karjala, *supra* note 284, at 529; Rice, *supra* note 342, at 175-76. Both arguments rest on the absence of bargaining and the distinctions between traditional leasing arrangements of property—periodic payments, ongoing obligations of both parties to continue to perform throughout the term, and return of the property upon the expiration of the lease—with the paradigm of the software “license” which actually amounts to an outright sale of less than all the property. This license paradigm works for limited grants of the exclusive rights under copyright because it amounts to an extension of agency principles. A licensee is an agent in a market or medium for the copyright holder and the ultimate exclusive rights remain with the licensor. An end-user of a commercially available software product has none of these characteristics of the property lessee or the copyright holder’s

academic criticisms regarding Article 2B, the most significant concerns regarding the draft's ability to meet its goals come from the draft's own introductory comments.

A default rule that ignores this preemptive provision creates true traps for the unwary. In Article 2B, state contract law is made parallel to such specific preemptive rules, although in several situations, provisions push against explicit federal rules insofar as reasonably possible. This interaction of state law and specific federal yields (sic) default rules that, in some cases, do not correspond to the treatment of analogous issues in other parts of the UCC. These provisions reflect a policy of correspondence of rules in addition to simple recognition that federal law preempts contrary state law.³⁶⁹

This statement suggests that the goals of predictability and consistency identified by Professor Gilmore will not be achieved by adoption of Article 2B. The proposal introduces new layers of confusion into the regulatory mix; it adds a claim of preemption to every state law action thereby blurring the role of federal and state jurisdiction; it provides different default provisions than does U.C.C. Article 2 (sale of goods), thereby adding a second trap for those attorneys who are familiar with goods but not information goods (assuming that the parties to the contract correctly anticipated and documented the provision of the U.C.C. by which their contract was to be governed); and it attempts to "push against explicit federal law," thereby creating intentional conflicts between state and federal regulation for which businesses will risk liability if they fail to comply with conflict law and high costs (including not insignificant transaction costs and legal costs) as they try to anticipate their statutory and contractual obligations in this highly unsettled area of law.

In effect, Article 2B would reduce the public's interest in the marketplace of ideas by creating a paradigm that might allow content providers to contractually eliminate fair use and the other protected limitations of the Copyright Act while at the same time increasing the uncertainty for transactions governed by the UCC involving information.

agent. As a result, the license paradigm is an ill-fitting analogy for the software purchaser and an inappropriate regulatory scheme.

³⁶⁹ U.C.C. art. 2B at Intellectual Property Overlay.

III. THE EXISTING "INFORMATION" INDUSTRIAL STRUCTURE— SUCCESS WITHOUT PROTECTION

Many of the assumptions driving the growth of intellectual property protection stem from an assumption that, to better promote the industry, greater protection of the industry's products are necessary. Despite suggestions that deregulation and greater market-based controls are the more effective manner of promoting an industry, there has been a systemic movement towards greater intellectual property protection. The DMCA and proposed Article 2B are just two U.S. examples of this trend.

Without addressing the economic model assumptions that underlie either a pro-regulatory posture or a pro-market based regulatory system, this Part attempts briefly to summarize the current information industry and show, by example, why additional protection is irrelevant at best and may be harmful if extended as far as currently contemplated.

The study of information-property economics is made difficult by the rate of expansion and change in the converging industries. The NII Report states that "U.S. copyright industries are significant contributors to the United States' current trade accounts, reducing our balance of payments deficit by some \$45.8 billion in 1993."³⁷⁰ *Cybernation*, a joint report by the American Electronics Association ("AEA") and NASDAQ, is more explicit. "America's electronics and information technology industry is driving national economic growth . . . and is fundamentally changing the way Americans live and work."³⁷¹

The definition of high-technology remains somewhat vague, leading to an imprecise amalgam of data from one source to another. The AEA used the Standard Industrial Classification system of the Office of Management and Budget to define the list of high-technology components.³⁷² *Cybernation* grouped forty-five classification codes into three categories: "high-tech manufacturing, communications services, and software and computer-related services."³⁷³ These categories include both computer hardware and software, for example, but exclude other entertainment and

³⁷⁰ NII Report, *supra* note 13, at 131.

³⁷¹ AMERICAN ELECTRONICS ASSOCIATION AND NASDAQ, *CYBERNATION 9* (1997) [hereinafter *CYBERNATION*].

³⁷² *See id.* at 128. The Standard Industrial Classification ("SIC") code system is used as a method of extracting Office of Management and Budget data, but these codes are not categorized by specific technologies. Aircraft and automobile manufacturing, for example, are dependent on high-technology, are not considered "core" to the industry, and are not included by the AEA. *See id.*

³⁷³ *Id.* at 128.

digital information sold or licensed through the Internet or CD-Rom.³⁷⁴

The range of industries suddenly covered by esoteric changes in copyright law and licensing protocols foreshadows the true coming of the information age. The analysis below illustrates some of the more pronounced short-term effects of the information age, but only hints at its true scope. Over the next decade or two, the growth of both computing and content will be exponential. Moore's Law states that the capacity of a computer chip doubles every eighteen months.³⁷⁵ Further, according to Bill Gates, "Moore's Law is likely to hold for another twenty years. If it does, a computation that now takes a day will be more than 10,000 times faster and thus take fewer than ten seconds."³⁷⁶ What such expansion will mean in terms of commerce, communications, entertainment, and education is truly unimaginable. Small examples abound. In 1998, the United States reached the point where over half the households owned a personal computer, up from twenty-seven percent in 1995.³⁷⁷ Commercial transactions using either checks or cash comprised only 75% of all transactions in the United States in 1996, a 5% drop from the previous year.³⁷⁸ The percentage is expected to drop to below 46% within a decade.³⁷⁹ The ubiquitous role of the computer and the slow demise of the cash economy will usher in changes to many societal exchanges and social activities.³⁸⁰

Society may be so profoundly changed that the suggestions in articles such as this will serve as no more than historical curiosities. On the other hand, the changes may be only in form, such that the substance of the issues will remain constant: When does legal protection begin for an item of commercially marketable information;³⁸¹ how far does it extend;³⁸² and what can a party other than

³⁷⁴ See *id.* at 128-29. The SIC code system is being replaced by the North American Industrial Classification System ("NAICS") to meet the requirements of the North American Free Trade Association ("NAFTA"). "The NAICS also will include a new "information" sector that will cover the software publishing industry and online services. . . ." *Id.* at 129.

³⁷⁵ BILL GATES, *THE ROAD AHEAD* 34 (2d ed. 1996). Gordon Moore first made the statement in 1965. Moore went on to co-found Intel with Bob Noyce. See *id.*

³⁷⁶ *Id.* at 36.

³⁷⁷ See *PC Ownership Reaches Half of U.S. Homes*, L.A. TIMES, Feb. 10, 1999, at C3.

³⁷⁸ See Patricia Lamiell, *Electronic Commerce Increasingly Zaps Cash from Consumers' Wallets*, O.C. REG., July 13, 1998, at Bus. 4 (citing The Nilson Report).

³⁷⁹ See *id.*

³⁸⁰ This Article cannot begin to speculate what form those changes will take, but undoubtedly, a profound impact will be felt.

³⁸¹ See, e.g., 17 U.S.C. § 102 (1994).

³⁸² See, e.g., *id.* § 106.

the “owner” do without the owner’s permission?³⁸³ Ironically, although not all these issues are directly covered in modern copyright codes across the globe, they were all covered by the Statute of Anne, and they are still being addressed by much of the recent or proposed legislation governing intellectual property. The convergence of high-technology and telecommunications is a matter of technical innovation, but the public response depends on the quality and affordability of the services offered, not the mere existence of technological innovation.³⁸⁴ The convergence of news and entertainment—and arguably education—into the same high-technology/telecommunications industry may profoundly alter the shape of society in the twenty-first century. The regulatory structure discussed in Part II must be designed not only to anticipate the technological changes, but to craft the regulations in a manner which best serves the societal goals embodied in the First Amendment and Copyright Clause of the Constitution.

A. *Computer Software & Hardware Industries*

The computer software industry has led the digital revolution and shepherded in the information age. The modern age of computing can be traced to either 1972 with Intel’s release of the 8008 microprocessor³⁸⁵ or to 1981 with the marketing of the IBM-XT personal computer.³⁸⁶ Since that time, the growth of the computer industry has outpaced all other business expenses and economies.³⁸⁷

Computer hardware and software have led the growth of the information age. The impact of annual hardware sales totaling hundreds of billions of dollars has transformed the United States economy. In 1998, the gross domestic product attributable to computing and communications rose to 8.2 percent of the total U.S. economy.³⁸⁸

[T]he United States [information technology] industry is the key to this nation’s technological leadership and a primary engine for national economic growth, with the production of computers and semiconductors accounting for 45% of U.S.

³⁸³ See, e.g., *id.* §§ 107-121 (1994 & Supp. III 1997).

³⁸⁴ Compare, for example, the growth of the Internet with the growth of high definition television.

³⁸⁵ See GATES, *supra* note 375, at 13.

³⁸⁶ See *id.* at 53.

³⁸⁷ See John P. Freeman, *A Business Lawyer Looks at the Internet*, 49 S.C. L. REV. 903-05 (1998).

³⁸⁸ See U.S. DEPARTMENT OF COMMERCE, *THE EMERGING DIGITAL ECONOMY* 4 (Apr. 1998), available at <<http://www.ecommerce.gov/emerging.htm>> [hereinafter DIGITAL ECONOMY].

industrial growth in the past five years. The technology component of America's GNP currently exceeds 10%, and is expected to reach 15-20% by the year 2000. Information technology will soon become America's largest industry, and the one where it leads the rest of the world by the greatest margin.³⁸⁹

Computer usage is omnipresent and growing. In 1996, sales of software reached \$102.8 billion.³⁹⁰ "Revenues for the broader U.S. [information technology] industry exceeded \$747 billion and have grown at over 7% per year since 1986. That level of growth is expected to continue for the foreseeable future, with revenues reaching \$1.572 trillion in the year 2007."³⁹¹

In 1996, the United States had 403 computers for every 1000 people.³⁹² Although the United States led the world in computer access, China, Russia, Brazil, and Indonesia evidenced the greatest computer increases from 1991 to 1996.³⁹³ By the year 2000, the United States will have 161 million computers in use and the European Union will be second with 132 million.³⁹⁴ As a result, commerce in intellectual property will become part of the common daily rituals of organized society.

Job growth reflects the success of the computer industry. By 1996 computer software had become the third largest segment of the U.S. economy, behind only the automotive industry and electronic manufacturing.³⁹⁵ Software's leading position in the economy came as the result of fourteen percent job growth during the 1995-96 period, a rate approximately 2.6 times that of the national economy.³⁹⁶ The trend is expected to continue. According to the National Software Alliance, "[c]omputer software occupations are projected to grow five times faster than the economy as a whole between 1996 and 2006"³⁹⁷

Based on the industry reports, the largest job and industrial

³⁸⁹ *Copyright Treaties Implementation Act: Hearings Before the Subcomm. On Telecommunications, Trade and Consumer Protection of the House Commerce Comm.*, 105th Cong. (1998), available in 1998 WL 296458 (Federal Document Clearing House) (statement of Chris Byrne, Silicon Graphics, Inc, on behalf of the Information Technology Industry Council NTM).

³⁹⁰ See Ronald Rosenberg, *Software fastest growing industry*, BOSTON GLOBE, June 5, 1997, at D2.

³⁹¹ *Id.*

³⁹² See CYBERNATION, *supra* note 371, at 105.

³⁹³ See *id.* at 104. For the period of 1991-96, China had a growth of 528%, Russia increased 460%, Brazil increased 408%, and India increased 393%. See *id.*

³⁹⁴ See *id.*

³⁹⁵ Rosenberg, *supra* note 390.

³⁹⁶ See *id.*

³⁹⁷ *One Million New Positions Seen by 2006—Software Sets Pace for Future Job Growth*, ELECTRONIC ENGINEERING TIMES, Jan. 5, 1998, at 1-2. The numbers are staggering. The Business Software Alliance reports that by 1996, there were 619,438 jobs in the software industry with an annual growth of approximately 45,700 additional positions. See PRICE-

growth will come from the software industry over the next decade, dwarfing other aspects of the information and media arenas and setting an economic agenda for the global economy. "Few sectors of the global economy can expect to exceed the performance of the software industry. The software industry is the heart of the 'Information Society'—that culmination of information technology and communications developments now heralding a new industrial revolution."³⁹⁸ "According to the American Electronics Association, jobs in the total IT [information technology] industry increased 7.5% between 1990 and 1996. Whereas, there was a 57% increase in new jobs in the software and software-related services segments."³⁹⁹ To the extent that regulation of software will have an impact on the growth rates for the products, any changes made will directly affect the largest growing segment of employment in the United States and have the potential to expand the economy or disrupt its growth.

B. *Internet & the Online Economy*

As impressive as is the growth in high-technology hardware and software, both are quickly being outpaced by the growing impact of the Internet. The Internet has served as gasoline on an information fire that had been threatening to burn out of control. The expansion of the Internet has had an unparalleled growth and economic impact. "Radio was in existence 38 years before 50 million people tuned in; TV took 13 years to reach that benchmark. Sixteen years after the first PC kit came out, 50 million people were using one. Once it was opened to the general public, the Internet crossed that line in four years."⁴⁰⁰ The overwhelming success of the Internet has led to both economic and social consequences. Electronic commerce revenue reached \$8 billion in 1997 and is projected to have increased to \$18 billion in 1998, with projections reaching \$108 billion by 2003.⁴⁰¹ An estimated 100 million subscribers now use the service.⁴⁰²

WATERHOUSECOOPERS, CONTRIBUTIONS OF THE PACKAGED SOFTWARE INDUSTRY TO THE GLOBAL ECONOMY 4 (Oct. 1998), available at <<http://www.bsa.org>>.

³⁹⁸ See PRICEWATERHOUSECOOPERS, *supra* note 397, at 4.

³⁹⁹ NATIONAL SOFTWARE ALLIANCE, SOFTWARE WORKERS FOR THE NEW MILLENNIUM: GLOBAL COMPETITIVENESS HANGS IN THE BALANCE v (1998).

⁴⁰⁰ DIGITAL ECONOMY, *supra* note 388, at 4 (citing MEEKER, MARY AND PEARSON, SHARON, MORGAN STANLEY U.S. INVESTMENT RESEARCH: INTERNET RETAIL 2-6 (May 28, 1997). See also NATIONAL SCIENCE FOUNDATION, THE INTERNET PHENOMENON, available at <<http://www.cise.nsf.gov/general/compsci/net/cerf.html>>.

⁴⁰¹ See Lorrie Grant, *Net Retailers Face Momentum Swing*, USA TODAY, Jan. 19, 1999, at B2 (citing research by Forrester Research).

⁴⁰² See DIGITAL ECONOMY, *supra* note 388, at 4.

To reposition themselves in the changing media marketplace, traditional television networks are expanding into areas such as cable and online services to offset the decline in broadcast viewership.⁴⁰³ NBC and its parent company, General Electric Co., for example, have been integrating the television network into an Internet media outlet, illustrating a new transition in the entertainment industry. Networks are beginning to reposition themselves as content providers for various media. Broadcast television is one of many outlets, but no longer the most profitable one.

NBC President and CEO Bob Wright is not just waiting for the next hit series to reverse what he concedes has been a swifter and deeper than expected decline in his network's prime-time fortunes. He is leveraging NBC's fledgling cable and Internet pursuits to help offset a network-induced \$100 million shortfall. NBC executives are working overtime on several major deals that will tap the company's \$9 billion cable and Internet portfolio and will go a long way in determining NBC's future far beyond the scope of broadcast network television.⁴⁰⁴

NBC, the leading television network has moved aggressively into both cable broadcasting (where it is the third largest cable supplier with programming such as CNBC and MSNBC) and into the Internet with its acquisition of Snap! and ownership in C—NET, Intertainer, and iVillage.⁴⁰⁵ The ownership and expansion plans illustrate the need for traditional media to diversify among the media and to leverage the value of the television brand into the other markets. NBC is not alone. ABC/Disney has followed the same path as have Fox/News Corp. and CBS, which is in a joint venture with AOL.⁴⁰⁶

The transformation taking place at the television networks is one example of the changes that will re-order the news and entertainment structure. The broadcast-dominated media structure that has been in place for the last half century is coming to an end. Within a year, the television viewership of the traditional top three networks (ABC, CBS and NBC) will be below that of cable broadcasting, which may also become the more profitable medium even for the top broadcast networks.⁴⁰⁷ Noted journalist Robert Samuel-

⁴⁰³ See Richard Katz, *Peacock Snaps! up C/NET Internet Stake*, DAILY VARIETY, at 8, June 10, 1998.

⁴⁰⁴ Diane Mermigas, *The Web Looms Large In Wright NBC Plan*, ELECTRONIC MEDIA, Jan. 25, 1999, at 1A.

⁴⁰⁵ See *id.*

⁴⁰⁶ See Michael Krantz, *Star Wars; The Gravitational Pull of a Handful of Big Web "Portals" is Reshaping Cyberspace*, TIME, Feb. 15, 1999, at 46.

⁴⁰⁷ See Mermigas, *supra* note 404.

son articulated some of the reactions to these changes by professional journalists:

Until now I doubted that the new media much menaced the old. Cable, computers and fiber optics delivered specialized information — on everything from stocks to diseases — that wouldn't displace general news and entertainment. Perhaps. But two events have shaken my confidence. The first is a survey from the Pew Research Center for the People and the Press showing big changes in our media habits. Most startling is the eclipse of the TV networks' nightly news programs. In 1993, 60 percent of Americans over 18 "regularly" watched; by 1998 this was 38 percent. Some of the loss reflected less interest in news, but much of it stemmed from more viewing—during the day—of cable news. Similarly, Internet use has soared. In 1995, 4 percent of adults went online to get news once a week; now that's 20 percent.

My second jarring event was a chat with my brother Richard. He runs a small inn in Cape May, N.J. In the past year, he started advertising with his own Web site. He's never seen anything like it; almost a fifth of his customers found the inn online. No magazine or newspaper ad ever showed remotely similar results.⁴⁰⁸

The response of Samuelson—a combination of fear and awe—captures the essence of the new technologies and the impact of convergence. Implicit in the statement, of course, is a reaction that assumes the current status quo. Television itself has been the traditional source of American society's news and information for only the last half century. In a prior era of technological transformation, television usurped this role from the daily newspaper.⁴⁰⁹

The lessons of the newspaper industry and their decline due to television are not lost on the television producers today. As a result, every content supplier—in every media—wants to find a way to participate in the Internet revolution. The motion picture companies and the television networks traditionally have dominated the creation of media content. They are now coming together and moving towards the Internet as the platform of the future.

[Disney Chairman Michael] Eisner argued that as the Internet

⁴⁰⁸ Robert Samuelson, *No More Media Elite*, WASH. POST, July 8, 1998, at A19.

⁴⁰⁹ See PHYLLIS KANISS, *MAKING LOCAL NEWS* 241 (1991). The impact of the Internet has reduced both readership and viewership, though not to the same degree. See Oliver Jones, *Web Hurts Mags Most, Report Sez*, DAILY VARIETY, Feb. 26, 1999, at 72 ("Since fall 1996, magazine readership has dropped 5%, with a 2% dropoff for newspapers and 3% fall in TV viewership. Radio usage dropped 1%, while primetime TV watching declined only marginally.").

matured, Disney's strengths would be more important. "As technology becomes comfortable, the product takes over," he said, comparing the Internet now to cable television in its early days. "At first, the point was to improve the picture on your broadcast channels. Now it has turned into a product play: How good is the Disney Channel or the Discovery Channel?"⁴¹⁰

The actual ownership relationships of the motion picture-broadcast television-cable-Internet portal alliances are beyond the scope of this Article or any publication that has more than a daily turn-around schedule. The transactions are occurring too fast for anything other than a broadcaster or newspaper to cover. Some examples, though hopelessly out of date, may still be illustrative of the industries' restructuring. ABC, through its parent, The Walt Disney Company,⁴¹¹ has a very large Internet presence, and Disney has used strategic alliances to build its Internet presence.⁴¹² Disney had been in discussions to purchase Excite, the second search engine and website organization company,⁴¹³ but chose to restructure Infoseek, another search engine and portal company in which it already had invested heavily, creating GO.com as its portal for the non-youth market.⁴¹⁴ NBC is moving to become the second major network with an Internet presence by purchasing a five percent stake in C/Net (an online content provider) and approximately \$11 million for a nineteen percent stake in Snap!, an online search engine.⁴¹⁵

Websites like Yahoo, Excite, Lycos, or Snap! are referred to as "portals" because they represent the first Internet page a viewer sees when the viewer connects to the Internet. Market dominance of the portals will dictate which corporations dominate the Internet consumer content. While the portals give users access to search engines, and theoretically all information on the Internet, each portal organizes the material in a manner that emphasizes

⁴¹⁰ Glyn Moody, *Old Media Gets Cosy with New for Mutual Benefit*, COMPUTER WKLY., Feb. 4, 1999, at 38.

⁴¹¹ Disney, Inc.'s purchase of ABC was a significant realignment of the entertainment industry. See Geraldine Fabrikant, *Walt Disney to Acquire ABC in \$19 Billion Deal to Build a Giant for Entertainment*, N.Y. TIMES, Aug. 1, 1995, at A1.

⁴¹² See, e.g., *Go Network* (visited Aug. 10, 1999) <<http://www.go.com>>; *infra* note 414 and accompanying text.

⁴¹³ ELECTRONIC MEDIA, June 8, 1998, at 4.

⁴¹⁴ Moody, *supra* note 410, at 38. The Disney/Infoseek portal has been renamed "Go." Disney owns 43% of Infoseek with options to acquire a majority stake. See *Disney and Infoseek Launch Go Network at www.GO.com* (visited Aug. 10, 1999) <<http://info.infoseek.com/press/golaunchrel.html>> (press release).

⁴¹⁵ Katz, *supra* note 403.

some content over others.⁴¹⁶ Portals may also include advertising or links to sites controlled by the portal's parent company. The hierarchy, advertising and structure of the portals may dictate a consumer's use of the Internet in a manner far more profound than the placement of a station on the television or radio dial.⁴¹⁷ Excite, for example, uses the channel metaphor to organize the content of its portal.⁴¹⁸ It also offers Excite Online, marketing a service as an ISP through AT&T Worldnet Service.⁴¹⁹ The Excite Online service combines the ISP and portal functions. The portals may grow to provide a significant economic factor in the new information-property economy. The portals are beginning to charge companies for the listings the portals provide.⁴²⁰ This will further segment the portals and lead to a restructuring of the Web. The portal phenomenon was dramatically illustrated by the initial public offering of Broadcast.com on July 17, 1998.⁴²¹ Offered at \$18 per share, the stock reached \$68 per share on its opening day and instantly created a billion-dollar portal company offering audio,

⁴¹⁶ See, e.g., <<http://www.yahoo.com>>; <<http://www.excite.com/>>; <<http://www.lycos.com/>>; <<http://www.altavista.digital.com/>>; <<http://www.go.com/>>.

⁴¹⁷ Yahoo, for example, has a partnership with AT&T, as well as agreements with Microsoft, Compaq, Gateway 2000, Ticketmaster, and E-Trade among others. "As a network, its sites are the most common destinations for Web users at work and second only to AOL in home user visits." Dwayne Fatherree, *Tracking Who's Who In Portal Sites Is Getting Harder*, SARASOTA HERALD-TRIB., Jan. 25, 1999, at 16.

⁴¹⁸ See <http://corp.excite.com/Company/what.html> (visited June 15, 1998) (on file with author) ("Excite Channels delivers information to you the way you're used to getting it: in topic-based sections like in the newspaper or on TV. Each channel contains similar features such as topical news, a directory of relevant sites, bulletin boards, chat, and the ever-present search box. You'll also find features and information unique to each channel that make it the best resource for its particular subject area. Our channels are produced by web-savvy people with expertise in their channel's subject area, so you always know you're getting the best information available on the Web today.")

⁴¹⁹ See *Excite Online* (visited Aug. 10, 1999) <<http://get.excite.com/>>. The ISP service of Excite Online essentially bundles Excite with the pre-existing AT&T Worldnet Service—rebranding AT&T's package with that of Excite.

⁴²⁰ See *The Great Portal Race; Internet Companies Compete for Viewers*, FORTUNE SPECIAL, Nov. 16, 1998, at 232 ("Companies that want to be linked to a portal site now pay for the exposure, giving portals a steady stream of revenue independent of banner advertising.")

⁴²¹ Broadcast.com describes itself as follows:

Broadcast.com is the leading broadcast network on the Internet. Just like any other broadcast network, we make a wide variety of programs available to our audience. Unlike TV networks, we have no limit as to the amount of shows we can broadcast at one time. We also archive programs and make them available to you on demand just in case you missed the live broadcast! On broadcast.com we offer more than 50,000 hours of programming every week! Our programming choices include live play-by-play broadcasts of more than 350 sports teams, more than 360 live radio and TV stations, and our AudioBook Channel and CD Jukebox where you can listen to more than 2100 full length CDs and over 360 full-length audiobooks. In addition there are hundreds of political, business and special events every week! All you have to do is pick what you want and enjoy it.

What is broadcast.com? (visited Aug. 10, 1999) <<http://www.broadcast.com/faq/introduction.stm>>.

video channels, and content aggregation.⁴²²

This issue is one of the key elements in the Department of Justice anti-trust action against Microsoft. In its complaint, the Department of Justice accused Microsoft of entering into anti-competitive agreements with content providers such as Disney and CBS under which the content providers would get preferential placement on the Windows desktop.⁴²³ The government contended that Internet content providers agreed to stop promoting Netscape and browsers competitive with Microsoft's Internet Explorer and were even obligated to add Internet Explorer features so that Netscape and other browser software would not operate as effectively on those web pages.⁴²⁴ The lawsuit illustrates the value assigned to placement on the computer desktop and access to consumers when they first connect to the Internet.

The Internet is an instantaneous medium for communicating information of all types. While news and entertainment industries are the first beneficiaries of the new medium—and victims to its competition—other industries are also participating in the growth. A prime example is the impact the Internet is having on the capital markets. For example, the online investing company Charles Schwab & Co. has become the largest company in this very young, highly competitive market. By 1997, it managed 908,000 on-line accounts and held \$66.6 billion in assets, with almost five million hits to its Internet site daily.⁴²⁵ Schwab leads an industry of significant projected growth. In 1998, the total number of investor accounts doubled from the previous year to 7.3 million, representing at least \$420 billion in assets.⁴²⁶ According to a study by Forrester Research, by 2002 the number of online accounts will grow to 14

⁴²² See Robert Hertzberg, *Mistaking the Shadow for the Tree*, INTERNET WORLD, July 27, 1998, at 12.

⁴²³ See *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. filed May 18, 1998).

⁴²⁴ Under Microsoft's Internet Explorer 4.0 channel agreements, beginning in mid-1997, [Internet Content Providers ("ICPs")] who desired "platinum" placement (and even some seeking lower-level placement) were required to agree: a) not to compensate in any manner the manufacturer of an "Other Browser" (defined as either of the top two non-Microsoft browsers), including by distributing its browser, for the distribution, marketing, or promotion of the ICP's content; (b) not to promote any browser produced by any manufacturer of an "Other Browser"; (c) not to allow any manufacturer of an "Other Browser" to promote and highlight the ICP's "channel" content on or for its browsers; and (d) to design its web sites using Microsoft-specific, proprietary programming extensions so that those sites look better when viewed with Internet Explorer than when viewed through a competing browser.

Id.

⁴²⁵ See Carol Power, *Schwab's Webmaster Taking on the World; Discount Brokerage Building Internet Annex for Foreign Customers*, THE AM. BANKER, Sept. 19, 1997, at 12.

⁴²⁶ See Neal St. Anthony, *Piper Report Shows Rapid Growth in Online Brokerage*, STAR TRIB., Feb. 12, 1999, at D1.

million households with almost \$700 billion in assets, representing approximately five percent of the investment industry.⁴²⁷ The projected growth comes in an industry that only began in 1994 when companies first began to accommodate online trading.⁴²⁸ Online trading has grown because Internet brokerage websites provide deep discounts to investors and offer customers greater access to information regarding the securities traded. Computer software has automated many of the tasks involved in securities trading, further reducing the cost. The Internet has increased the availability of corporate and financial information, producing a much more savvy investor who relies on her own research rather than on, or in addition to, the broker's reports.

Underlying the rapid growth of the online investment industry is the marketing of significant copyrightable and non-copyrightable information. Brokerage reports and other analytical documents are protectable by copyright. Perhaps more importantly, non-protectable data such as price quotes are highly marketable. NASDAQ, for example, provides market professionals with "real-time" quotes (less than 15-minute delays for access to the data) for \$20.00 per month.⁴²⁹ Nonprofessionals pay \$4.00 per month for the same service.⁴³⁰ Together, this service is offered to more than 338,000 computers in 59 countries.⁴³¹ For 1997, the revenue generated from the distribution of this market data to computers as well as transaction-based fees was \$267.8 million.⁴³²

The underlying tension in the decisions of *Feist* and *ProCD* is the incalculable value of data sold or licensed without the benefit of copyright protection.⁴³³ The lack of protection by copyright has not reduced the value of the data, but it has put greater emphasis on contractual protection as the means to reap economic reward. The user license, rather than federal law, serves to control public access to the information. The pricing differentials used by NASDAQ illustrate additional difficulties in regulating the market. NASDAQ and other content providers set the price based upon the value to the user, not upon the provider's cost. Nonetheless, de-

⁴²⁷ See David Whitford, *Trade Fast, Trade Cheap; Internet brokerages are out to turn America into a land of traders. But can investors make money that way, even when commissions are as low as \$8?* FORTUNE, Feb. 2, 1998, at 108.

⁴²⁸ See *id.* at 109.

⁴²⁹ See Joel Rothstein Wolfson, *Contracts and Copyright Are Not at War: A Reply to the Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 79, 89 (1999).

⁴³⁰ See *id.*

⁴³¹ See *id.*

⁴³² See NASD ANNUAL REPORT 46 (1997).

⁴³³ See also *BellSouth Adver. & Publ'g Corp. v. Donnelley Info. Publ'g, Inc.*, 999 F.2d 1436 (11th Cir. 1993) (en banc).

spite the regulatory confusion and lack of legislative oversight, the business of the information economy has hardly been stifled.

C. *Entertainment & Broadcast*

While the Internet has rapidly grown as a new medium for entertainment content, the content is not limited to any single medium. The motion picture industry has long been considered to be an engine for growth in intellectual property and the economy.⁴³⁴ The growth in new digital hardware and new technological platforms has allowed for increased expansion of the content side of the high-technology boom. The annual growth of traditional entertainment and news industries such as newspapers, magazines, movies, and advertisements (including computer software), ran at a compounded rate of more than 6.2%, as compared to a 2.4% growth rate for the rest of the economy.⁴³⁵ The combined domestic consumer spending for films at theaters, and on home video and television totaled \$32.3 billion.⁴³⁶ This amount reflected a 29% increase from 1992 to 1996.⁴³⁷ During this same period, the industry payrolls in California increased by 62%, from \$7.4 billion to \$12.0 billion.⁴³⁸ The entertainment industry has a profound economic impact, not only in Hollywood but throughout California and the other areas where film production takes place.⁴³⁹ The music industry, another significant segment of the entertainment industry, reports that 1997 sales of recorded music exceeded \$40 billion.⁴⁴⁰

The entertainment industry may be categorized by either the format in which the content is created or the medium in which it is made available to the public. The entertainment industries are comprised of a mix of film, video, cable, television, radio, music, publishing, theater, and visual arts.⁴⁴¹ These industries combine to

⁴³⁴ See LOUIS FROHLICH & CHARLES SCHWARTZ, *THE LAW OF MOTION PICTURES AND THE THEATER* 487 (1917) ("In the year 1908, the motion picture business had reached a point where it was regarded as one of the leading industries of the country.").

⁴³⁵ STEPHEN SIWEK & HAROLD FURCHTGOTT-ROTH, *COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: 1977-1990* 7 (1992).

⁴³⁶ See DAVID FRIEDMAN, *MOTION PICTURE ASSOCIATION OF AMERICA, STATE OF THE INDUSTRY, THE ECONOMIC IMPACT OF THE ENTERTAINMENT INDUSTRY ON CALIFORNIA* 12 (1998) [hereinafter *MPAA REPORT*].

⁴³⁷ See *id.*

⁴³⁸ See *id.*

⁴³⁹ See Jon Garon, *Star Wars: Film Permitting, Prior Restraint & Government's Role in the Entertainment Industry*, 17 *LOY. L.A. ENT. L.J.* 1, 23-32 (1996).

⁴⁴⁰ See *Rosen Statement*, *supra* note 166.

⁴⁴¹ See generally DONALD BIEDERMAN ET. AL., *LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES* (2d ed. 1992); PAUL WEILER, *ENTERTAINMENT, MEDIA, AND THE LAW* (1997). The Court also discussed this issue in *Sony*.

The two respondents in this action, Universal City Studios, Inc., and Walt Dis-

create the content that goes on to the Internet and CD-Roms as well as into theaters and video rental stores, and on to television. Many entertainment projects derive from literary works, primarily novels and short stories.⁴⁴² The short story is a popular source for motion pictures and is particularly well suited to adaptation.⁴⁴³

A single short story, for example, may result in a number of different projects. The story may initially be published in a magazine and later anthologized into a collection. Either of these may be recorded on audio-tape. While somewhat rare, the story could be adapted for the stage. The short story (or the play) may be optioned, adapted as a screenplay, and eventually turned into a motion picture. As a successful motion picture, there are as many as six different methods by which it is released to the public. In the most common order of events, these are: (1) theatrical release in first run motion picture theaters throughout the world; (2) pay-per-view, in which the film is shown on home television sets on a per screening charge to the viewer; (3) home video sale and rental; (4) premiere cable television which is subscriber funded rather than advertiser funded; (5) broadcast network television; and (6) syndicated television which is advertiser supported and may be accessed either by broadcast or cable.⁴⁴⁴ The sale of the short story to cable generally eliminates steps (1) through (3), above, and the sale to broadcast television eliminates steps (1) through (4), although video sales are growing as a market even for shows that have already aired on television and cable.⁴⁴⁵

ney Productions, produce and hold the copyrights on a substantial number of motion pictures and other audiovisual works. In the current marketplace, they can exploit their rights in these works in a number of ways: by authorizing theatrical exhibitions, by licensing limited showings on cable and network television, by selling syndication rights for repeated airings on local television stations, and by marketing programs on prerecorded videotapes or videodiscs. Some works are suitable for exploitation through all of these avenues, while the market for other works is more limited.

Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 422 (1984).

⁴⁴² BIEDERMAN, *supra* note 441, at 515 n.416 ("Typically, the prospective producer of a film begins by acquiring the rights to a book, a play, a screenplay, or other basic material.")

⁴⁴³ See, e.g., Stewart v. Abend, 495 U.S. 207 (1990) (concerning Cornell Woolrich's *It Had to be Murder* as adapted into Alfred Hitchcock's *Rear Window*); King v. Allied Vision, Ltd., 65 F.3d 1051 (2d Cir. 1995) (involving Stephen King's *Lawnmower Man* as adapted into *Stephen King's Lawnmower Man* and King's objection to use of his name in title); Warner Bros. Pictures v. CBS, 102 F. Supp. 141 (S.D.N.Y. 1951) (regarding dispute over radio rights to Dashiell Hammett's *The Maltese Falcon* arising from sale of overlapping rights to both parties); Goodis v. United Artists Television, Inc. 425 F.2d 397 (2d Cir. 1970) (concerning Davis Goodis's serialized *Dark Passage*, its adaptation into film of same title, and whether scope of that license included a television series, *The Fugitive*).

⁴⁴⁴ See Garon, *supra* note 439, at 15-16.

⁴⁴⁵ See *id.* The pattern of releases has begun to change somewhat as viewing patterns change. NBC created a direct-sale video release of its television production of *Merlin*.

To these other media, the advance of technology has now added the publication of the short story and the broadcast of the audio-book on the Internet in either streaming media or MP3, the Internet broadcast of either the play or film, and the computer game possible on disk, CD-Rom, the Internet, and dedicated game cartridge. Each of these can also be on the digital video disk and played on either computer or television. The itemization above excludes merchandising rights, sequels, remakes, character licensing, spin-offs, and ever-finer slices of the bundle of rights that originated with the short story.

As the Motion Picture Association of America Report ("MPAA Report") indicates, some of the fundamental restructuring taking place is perhaps being masked by the widespread growth in the entertainment industry.⁴⁴⁶ Theatrical motion picture revenues and attendance have both hit record numbers, but costs are rising even faster.⁴⁴⁷ Even as the traditional three television networks expanded first to four and then to six, the total broadcast television viewership has declined.⁴⁴⁸ Nonetheless, the advertising revenue continues to be quite significant for cable, television, and newspapers.⁴⁴⁹

Because the life-cycle for a new work is so tightly integrated, the original format of the project often matters little. Whether the project originates as a short story, a news event, or a motion picture, the project may eventually be developed in each entertainment medium. Licensing schemes, such as that contemplated under Article 2B, that differentiate the contractual default provisions based on a project's medium, may create significant uncertainty regarding the meaning of the contract.

Together, the computer/telecommunications industry and the entertainment industry (both broadly defined) make up the

"*Merlin*, an NBC miniseries about the wizard of Arthurian legend, sold more than 100,000 boxed sets at \$29.95 each in one week after it aired in April [1998]." David Zurawik, *Out Of The Box: Video Sets Are Proving Popular*, STAR TRIB., June 16, 1998, at 8E.

⁴⁴⁶ See MPAA REPORT, *supra* note 436.

⁴⁴⁷ See Amy Wallace, *Company Town; High Costs Could Torpedo Films, Valenti Warns*, L.A. TIMES, Mar. 11, 1998, at D1. According to Jack Valenti, President of the MPAA, in 1997 1.4 billion tickets sold for a reported \$6.4 billion—but estimated as \$5.8 billion by *Daily Variety*. Costs rose during a one year period by 34% to an average \$75.6 million per film. See *id.*

⁴⁴⁸ By 1996, primetime network viewership had dropped from 90% to approximately 50%. See Bob Ingram & Michael Kubin, *The Challenge at The Networks: Broadcasters Must Adjust in Face of a Changing Media Landscape*, INSIDE MEDIA, Nov. 13, 1996, at 46.

⁴⁴⁹ F.C.C. Notice of Inquiry, 63 Fed. Reg. 15,353, 15,358 (1998). ("Total local advertising revenue for radio, television, newspaper, and cable was \$68 billion in 1996. Local radio accounted for \$12 billion (17.2 percent of the total), television accounted for \$21 billion (30.3 percent), newspapers accounted for \$34 billion (49.7 percent), and cable accounted for \$2 billion (2.9 percent).").

new information society. Each key segment represents half the formula for twenty-first century growth. The entertainment industry provides the content—the news, information, and diversion sought after by the public. The computer industry provides the hardware, software and infrastructure to deliver the content literally anywhere the public wishes, whether to business, home, or (through wireless technology) the beach. Ultimately, any regulatory paradigm must recognize the expectations of the public, or else the regulations will fail. Here, the public is interested in a system that delivers the content they want on the equipment they now or soon will own.

IV. SOCIAL IMPACT OF THE INFORMATION ECONOMY— THE ERA OF CONVERGENCE

The economic impact discussed in Part III illustrates the magnitude of the information age's effect on the U.S. and world economies, but the social and societal impact is equally important in determining the shape of future regulation. The current structure of the information economy is one of empire building. Companies like AT&T, Microsoft, Intel, Time Warner, Disney, News Corp. and Sony are each engaged in strategies to own as large a portion as possible of the components that make up the information economy, to monopolize a portion of it and to maximize profits within that domain.

The idea of a growing media monopoly is neither novel nor paranoid. At the 1998 Global Convergence Summit, Sumner Redstone declared “[t]he area of great big acquisitions is over. There isn’t that much that’s still out there.”⁴⁵⁰ This Article is not suggesting that a dozen men are sitting in the ubiquitous smoke-filled room carving the globe. Nonetheless, Redstone made those comments while sitting alongside Ted Turner, Vice Chairman of Time Warner—a direct competitor in every one of Viacom’s divisions.⁴⁵¹ Previous attempts at cornering the information markets are well documented. The Department of Justice has repeatedly intervened in these industries in the past.⁴⁵² Nor is the irony lost. Only

⁴⁵⁰ *Viacom’s Redstone Declares Era of Media Megamergers is Over*, ORANGE COUNTY REG., Oct. 31, 1998, at B3. (“Since acquiring Viacom in 1987 Redstone has assembled an empire that includes Paramount Pictures, the Blockbuster video store chain and the MTV, Nickelodeon and Showtime cable networks.”).

⁴⁵¹ *See id.*

⁴⁵² *See, e.g.*, *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. filed May 18, 1998); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (prohibiting film distribution practices and leading to divestiture of the studios’ ownership of film theaters); *United States v. IBM*, 163 F.3d 737 (2d Cir. 1998) (affirming termination of antitrust con-

a few months after the declaration of the end of "great big acquisitions," AT&T purchased Tele-Communications Inc. and moved to join with Turner's Time Warner in an effort to consolidate cable operations and integrate telephone service into the cable infrastructure.⁴⁵³

The oligopoly model for economic monopoly is too compelling for the parties to overcome. "A successful oligopoly must accomplish two main tasks: (1) establish a mutual understanding or consensus regarding the correct price and division of output, and (2) promote mutual confidence that there will be adherence to these decisions."⁴⁵⁴ Indirect collusion through price information and parallel conduct is common in the entertainment industry.⁴⁵⁵ Because talent and other costs of production are essentially the same for each company in the market, there is little opportunity for price competition.⁴⁵⁶ Distribution of feature films, for example, though highly competitive on a title-by-title basis in the U.S. market, is subject to the common lobbying and marketing effort of the Motion Picture Association, which is allowed to operate in a concerted manner for all the member studios in many areas outside of the United States.

The oligopoly model describes the motion picture or media industries more effectively than a cartel model. The oligopoly model provides that "[a]lthough anticompetitive, there is no evidence that it resulted from explicit agreement among competitors. Nor is it the unilateral conduct of a firm that has or threatens to have monopoly power."⁴⁵⁷ The distinction between the cartel, which will conspire to restrain trade in violation of section 1 of the Sherman Antitrust Act,⁴⁵⁸ and the oligopoly, which uses parallel

sent decree entered in 1956 regarding sale of computers and computer parts); *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (resulting in divestiture of local telephone companies from long distance provider), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *Motion Picture Patents Co. v. Film Mfg. Co.*, 243 U.S. 502 (1917) (invalidating the tying of Edison's film projector patents to the motion pictures licensed and produced).

⁴⁵³ See 3 *Cable Companies Talking With AT&T*, N.Y. TIMES, Feb. 9, 1999, at C14.

⁴⁵⁴ George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 445 (1982).

⁴⁵⁵ The cost of movie tickets, for example, is the same regardless of the cost of a film's production or the studio producing the film, and production agreements are strikingly similar at all the major studios. See *Buchwald v. Paramount*, 13 U.S.P.Q.2D 1497 (Cal. Super. Ct. 1990).

⁴⁵⁶ This was not always the case. During the era of the studio system, the exclusive rights to certain performers could create widespread disparity. The elimination of the studio system may be another example of the studios choosing to eliminate one aspect of competition.

⁴⁵⁷ HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 151 (1994).

⁴⁵⁸ 15 U.S.C. § 1 (1994) ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.").

conduct and information sharing “without expressly communicating with one another,”⁴⁵⁹ tends to describe the corporations that make up the information oligopoly. The motion picture studios, broadcasters, cable systems, and software companies each use the very same information technology to compare pricing and business practice information with each other. These companies are generally too sophisticated to act in any concerted conspiratorial manner, while understanding at all times that parallel conduct is more profitable than any attempt to challenge the status quo. To the extent that there is a meaningful distinction between the oligopoly and the cartel, the practical distinction, then, is that the oligopoly is cartel behavior for which there is no Sherman Act remedy.⁴⁶⁰

Over the past ten years, the production costs in the entertainment industry have continued to escalate, increasing by 166% over the decade⁴⁶¹ and 27% in the last year alone.⁴⁶² As the costs of production for media content escalate and the promotional costs to operate a profitable media concern continue to grow, the economic barriers to entry into the market increase.⁴⁶³ Add to the tremendous overhead of media production, the control exhibited by Microsoft involving access to the Internet,⁴⁶⁴ and the continued pattern of corporate mergers among the media and technology companies such as Netscape and America Online, and the moves by the long distance companies to cross into the cable and Internet markets, and two patterns emerge: the vertical integration of the modern information company and the oligopoly-structured marketplace.⁴⁶⁵

In addition to the economic aspects of monopoly concentration described above, there is also a social aspect that raises concerns. The entertainment economics are somewhat less direct than are the economics of other forms of manufacturing. Monopoly power is generally expected to raise prices to consumers and slow competition.⁴⁶⁶ Ticket prices for films, however, do not vary based on the cost of production. The cost of television programming to consumers, radio, music CDs, and other entertainment are all affected by production costs, but these costs do not directly re-

⁴⁵⁹ HOVENKAMP, *supra* note 457, at 151.

⁴⁶⁰ *See id.* at 154-55.

⁴⁶¹ *See* Gary Dretzka, *Southbound*, CHIC. TRIB., Apr. 5, 1998, at C16.

⁴⁶² *See* Peter Waal, *Why Mega-Movies Make Sense*, CANADIAN BUS., May 8, 1998, at 71.

⁴⁶³ *See* RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 274-75 (1992).

⁴⁶⁴ *See* *United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. filed May 18, 1998); discussion *infra* Part V.D.

⁴⁶⁵ *See* William Sheppard, *Causes of Increased Competition in the U.S. Economy 1939-1980*, in *ECONOMIC ANALYSIS AND ANTITRUST LAW* 125 (Terry Calvani & John Siegfried eds., 1988).

⁴⁶⁶ *See* POSNER, *supra* note 463, at 271.

late to the cost to the consumers. Instead, the increase in costs would tend to reduce the number of titles produced by a company each year. In the advertising supported media, increased costs will pass through to the advertisers and consumers will pay higher prices for those products, while the media content will continue to be “free”—with free being defined as costs are not incurred at the time of consumption of the media, but transferred through to the consumers as advertising overhead.

Assuming ticket prices and advertising revenue remain constant, the profit margin on each project would also be reduced as production costs would increase.⁴⁶⁷ For production companies deciding whether or not to produce a particular project—a film, music CD or television series—the decision to approve each project assumes an ever-increasing margin of profitability. In other words, as the production costs increase, the degree of risk that the producers of the project are willing to accept will decrease. This economic model forecasts the blockbuster phenomenon in which the studios produce fewer and fewer movies that are expected to hit the market as larger and larger blockbusters.⁴⁶⁸ The same pattern is true of newsgathering. As costs of production rise at a rate higher than that of advertising, the viability of marginal news desks erodes and coverage becomes more limited.

A. *Oligopoly's Orthodoxy of Information*

The reduction in output by the cartel members spurred by rising costs and decreased competition has a social impact which is more troubling than the mere increase in costs of entertainment content. The confluence of economic advantage, decreased risk-taking, and social custom will set an international agenda for information content that dampens the range of content and marginalizes most debate.

“At any given moment,” wrote George Orwell, “there is a sort of all pervading orthodoxy, a general tacit agreement not to discuss large and uncomfortable facts.” Today, dazzled by technology, we are being led into what we are told is an information society, but is really a media society in which those ‘large and uncomfortable facts’ are eliminated or pass unremembered on a

⁴⁶⁷ See Waal, *supra* note 462, at 71.

⁴⁶⁸ See Dretzka, *supra* note 461. *Godzilla* opened on more than 7000 screens and managed to become financially successful despite being a critical disappointment. *Titanic*, a film more critically well-respected, opened on 3000 screens, but that number increased, as did advertising costs, as the film achieved record-breaking box office returns. See Corie Brown & David Ansen, *Rough Waters*, NEWSWEEK, Dec. 15, 1997, at 64.

moving belt of images shot and edited to the rhythms of a Coca-Cola advertisement.⁴⁶⁹

The movement to an information oligopoly controlled by a few film studios, software companies, and telephone services appears to fall within this structure of less content production, lower risk taking, and less opportunity for controversial content to be presented.⁴⁷⁰ Although new technology is increasing the number of media outlets, these new outlets are emphasizing re-packaging of content rather than the development of new material. The companies making up the media cartel are diverse and highly competitive. They are quite unlikely to agree to broad content or other limitations. Nonetheless, the economic and social concerns will result in an ever-diminishing range of content. Any regulatory policy that further increases monopoly power will exacerbate this trend.

Although once idealized as the perfect democratic medium, the Internet and the "portal" metaphor return once again to a format of content-controlled safe zones that are predetermined by demographic trends and dictated by millions of dollars in advertising designed to lure viewers. The portals provide the primary access to the Internet and control the content that is most readily available to consumers. Only with concerted effort can a viewer find material that has not been designed by one of these companies. The flow of information leads to economic power which leads to the control of the flow of information. "The information age may well pose unprecedented monopoly problems if the control of information flows is privatized because today the basic 'know how' about code is concentrated in a few corporations."⁴⁷¹

In the antitrust action against Microsoft, the Department of Justice recognized the importance of such content control.

Microsoft has entered into anticompetitive agreements with Internet Content Providers ("ICPs"). Prominent "channel buttons" advertising and providing direct Internet access to select ICPs appear on the "Active Desktop" feature that is shipped with the Windows operating system. . . . Microsoft's agreements condition an ICP's placement on one of these buttons on the ICP's agreement to not pay or otherwise compensate Microsoft's primary Internet browser competitors (including by distributing their browsers) for the distribution, marketing, or promotion of the ICP's content; to not promote any browser produced by any

⁴⁶⁹ John Pilger, *What a Carve Up!*, THE GUARDIAN (London), Mar. 16, 1998, at Media Page 4.

⁴⁷⁰ See Degen Pender, *What Price 'Happiness'?*, ENT. WKLY, Oct. 30, 1998, at 20-21.

⁴⁷¹ Lyman, *supra* note 26, at 1081.

of Microsoft's primary browser competitors; to not allow any of Microsoft's primary browser competitors to promote and highlight the ICP's "channel" content on or for their browsers; and to design its web sites using Microsoft-specific, proprietary programming extensions so that those sites look better when viewed with Internet Explorer than when viewed through a competing browser.⁴⁷²

Although the Justice Department concern focused on the value Microsoft received through these anti-competitive practices of granting exclusive desktop channels in exchange for Microsoft-exclusive software promotion, the societal impact is equally damaging in terms of the control Microsoft has over the desktop channels. Microsoft writes the operating software for ninety-five percent of all new personal computers sold in the United States and has an exclusive agreement with Apple regarding the other five percent.⁴⁷³ Essentially, Microsoft sets the Internet channels for every new computer sold in the United States. Although Microsoft does not limit the individual user's ability to find material away from these channels, this nearly absolute control will have a substantial and long-lasting impact on the usage patterns of the public.

The social implications of the portal trend bears out the prophecy of George Orwell. The information, entertainment, and education available to the public blends and homogenizes as fewer and fewer media outlets provide the content. With each corporate merger, the overhead increases and the number of consumers necessary to make a broadcast successful or a network/portal profitable increases. To achieve the necessary audience, the content must be sanitized to minimize the risk of offending any significant segment of the audience.

B. *Power of the Editor*

The problems regarding content homogenization that Orwell identified have already been exhibited in the traditional media of television and publishing. Rupert Murdoch, one of the leading media barons,⁴⁷⁴ created an embarrassing public display regarding his control of the content made accessible to the public. Murdoch personally intervened after one of his publishing concerns, HarperCollins, agreed to publish "East and West," the memoirs of

⁴⁷² United States v. Microsoft Corp., No. 98-1232 (D.D.C. filed May 18, 1998).

⁴⁷³ *Id.*

⁴⁷⁴ See Robert La Franco, *The World's Working Rich*, FORBES, July 6, 1998, at 182. ("[Murdoch is] a throwback to the press lords and movie moguls of old.")

Chris Patten, the last British Governor of Hong Kong.⁴⁷⁵ Concerned about the impression the book would leave with Chinese officials with whom he was in an ongoing commercial relationship, Murdoch ordered the book canceled and then fired the senior editor on the project, Stuart Proffitt. Proffitt was removed for refusing to lie about the reason for the cancellation.⁴⁷⁶ Murdoch's direct and inelegant approach to content control served as a reminder that each of the media empires that make up the media oligopoly have direct control over the content produced and often couple this control with social or political agendas.

HarperCollins ultimately apologized publicly for the incident and paid Patten an undisclosed settlement amount.⁴⁷⁷ Murdoch, who has significant satellite interests in China, has had a history of appeasement toward the Chinese leaders.⁴⁷⁸ At the request of the Chinese government, he removed the BBC World Service from his Satellite broadcasts, and he gave the daughter of Deng Xiaoping a million dollar book contract for a "loving portrait" of her father.⁴⁷⁹

Murdoch attempted to develop a similar level of political influence in the United States when he gave former House Speaker Newt Gingrich a \$4.5 million advance for his agreement to author a book.⁴⁸⁰ Once disclosed, that arrangement created such a public backlash that Gingrich was forced to restructure the deal and take only a \$1 advance.⁴⁸¹ Part of the criticism over the Gingrich arrangement stemmed from the timing. At the time of the book advance, Murdoch's Fox Network was heavily involved in F.C.C. regulatory matters and the Republican-led Congress was engaged in significant reform of the Telecommunications Act.⁴⁸² More precisely, Congress was considering whether or not to allow television networks such as Murdoch's Fox network to increase their market ownership from twenty-five percent to thirty-five percent, an important change for Fox because it had the largest ownership of any of the networks.⁴⁸³ These practices provide a glimpse into the man-

⁴⁷⁵ See Johnnie Roberts, *Rupert's Black Eye*, NEWSWEEK, Mar. 16, 1998, at 44.

⁴⁷⁶ *Id.* HarperCollins originally told Governor Patten that the book was too boring to be published. *See id.*

⁴⁷⁷ *See id.*

⁴⁷⁸ See Russ Baker, *Murdoch's Mean Machine*, COLUM. JOURNALISM REV., May-June, 1998, at 51.

⁴⁷⁹ *Id.*

⁴⁸⁰ See Kevin Merida & Serge F. Kovaleski, *Democrats Attack Gingrich for Meeting Murdoch Before \$ 4.5 Million Book Deal*, WASH. POST, Jan. 13, 1995, at A11.

⁴⁸¹ *See id.*

⁴⁸² This process resulted in significant changes to the Telecommunications Act. *See* Communications Decency Act, Pub. L. No. 104-104, tit. V, 110 Stat. 133 (1996).

⁴⁸³ *See* 47 C.F.R. § 73.3555(e) (1998). *See also* F.C.C. Notice of Inquiry, 63 Fed. Reg. 15,353 (1998).

ner in which the power to dominate world news and entertainment naturally impacts governmental policy and social custom.

The social and political structure employed by the participants in the media oligopoly are neither subtle nor novel. In ancient Rome, the phrase *panem et circenses*⁴⁸⁴ was used to refer to the manner in which the Caesars would control the citizenry through public spectacle and entertainment.⁴⁸⁵ While Murdoch (and his News Corp.) is among the most notorious of the media barons in the world to follow this model into the modern age, other media giants act to develop similar synergies.⁴⁸⁶ Just as Murdoch has attempted to monopolize rugby in Australia,⁴⁸⁷ he has begun to move into American sports.⁴⁸⁸ The mogul who pioneered this approach is Ted Turner, vice chairman of Time Warner, who used his ownership of the Atlanta Braves to propel WTBS from an insignificant

⁴⁸⁴ JUVENAL A.D. c.60—c.130. "Of the citizenry Juvenal said 'Duas tantum res anxius optat, Panem et circenses' ('Only two things does he worry about or long for—bread and circuses')."

⁴⁸⁵ BROCKETT, *supra* note 109, at 68-69 ("The theater had to compete with several other kinds of entertainments. The oldest and most popular of these was chariot racing . . . [Others] included horseracing (sometimes with trick riding), mock cavalry battles, foot-races, acrobatics, prizefighting, wrestling, exhibitions of wild and trained animals, and fights between animals or between animals and men. . . . Perhaps the most spectacular of all the entertainments were the *naumachiae*, or sea battles. The first was given by Julius Caesar on a lake dug for the occasion; it featured a battle involving 2,000 marines and 6,000 oarsmen. . . . Such spectacles frequently were presented in festivals alongside plays, and actors often had to compete with them. Thus it is often said that the necessity of holding an audience's attention under such circumstances led to the general coarsening of the theatrical fare during the empire.").

⁴⁸⁶ See Dean Bonham, *Sports As An Arsenal; Media Tycoons Use Games To Capture Enormous Audiences*, DENVER ROCKY MTN. NEWS, Aug. 16, 1998, at 11G ("Murdoch owns the Los Angeles Dodgers and a partial interest in the New York Rangers and Knicks, as well as Madison Square Garden. He also has an option to buy an interest in the Los Angeles Lakers and Kings and he owns more regional sports networks in this country than any other company, by far. Turner's Time Warner owns the Atlanta Braves and Hawks as well as TBS and TNT, both of which broadcast sports, including games of the National Basketball Association and Major League Baseball.").

⁴⁸⁷ See Jacqueline Lee Lewes, *Murdoch Soccer League Scores Controversial Super League is Cleared to Compete Next Year*, HOLLYWOOD REP., Oct. 7, 1996, at 4 ("Rupert Murdoch's break-away Super League competition has been given the go-ahead for next year by the full bench of the Federal Court, which reversed an earlier court decision banning it until the turn of the century. With Murdoch owning all of the rugby league internationally and now half of it in Australia, Super League's domestic and global premierships will start next year. Friday's decision gives Murdoch's cable television operation Foxtel, a joint venture with telecommunications company Telstra, a powerful boost by providing it a much-needed major sport for its Fox Sports channel. It also deals a major blow to Kerry Packer's Nine Network and rival cabler Optus Vision, which backed the mainstream Australian Rugby League that took the legal action to keep out Super League.").

⁴⁸⁸ Arguably, the purchase of football television rights in 1994 was the true beginning of this movement. That move, however, was merely to control programming and acquire station affiliates. See Jim Benson, *TV's Traumatic Times*, WKLY. VARIETY, July 18-24, 1994, at 1. Because of the NFL investment, Fox was able to shift station affiliates away from CBS (and ABC to a lesser extent) because the local station needed football coverage. That resulted in greater marketing for all other Fox programming and made Fox a dominant supplier of both broadcast and cable television.

local independent station to the center of the Time Warner media empire.⁴⁸⁹ Disney also saw the wisdom of this strategy, and purchased the California Angels,⁴⁹⁰ renaming the team the Anaheim Angels.⁴⁹¹ (Interestingly, Paul Allen, the second largest shareholder in Microsoft, has also followed the strategy, becoming the owner of both the Seattle Seahawks, a professional football team, and the Portland Trail Blazers, a professional basketball team.⁴⁹² His holdings, however, do not currently include baseball.)

Unlike football broadcasts and hockey interests, baseball has two key factors that serve to make it a unique vehicle for the creation of media empires. First, it remains America's game. Although football is more popular, baseball holds the historical mantle as a cultural icon. In the quest to sell the amorphous brand of a network or portal, there is a high value in the cultural identity that baseball brings to the network. Since the goal is to motivate each viewer to turn on the network or portal before that consumer knows what is being broadcast, affiliation is critical.⁴⁹³ Baseball has a similar affiliation need that makes baseball an excellent fit for the emotional connection needed to promote the network.

Second, baseball has a long season involving a large number of lengthy games. Football has a relatively short broadcast season and the fewest number of games played of any televised sport. Baseball creates a large amount of content to broadcast. Based on a cost per broadcast hour, baseball is an excellent production value. Add to this the relatively low cost of creating sports news content, and the total investment can be very cost effective. Disney controls ABC, ESPN and ESPN2.⁴⁹⁴ Fox has Foxsports, Foxsports

⁴⁸⁹ See STANLEY BESEN ET AL., MISREGULATING TELEVISION 11 (1984); Charles Haddad, *TBS unit fuels turnaround at Time Warner*, ATLANTA J. AND CONST., Feb. 4, 1999, at 1B.

⁴⁹⁰ Bonham, *supra* note 486 ("Disney owns the Anaheim Angels and Mighty Ducks as well as the premiere sports network, ESPN. [Disney Chairman Michael] Eisner recently orchestrated the purchase of ABC, which earlier this year signed a multibillion-dollar contract to air NFL games along with its sister station ESPN.").

⁴⁹¹ The renaming of the team as the Anaheim Angels serves as a nice example of cross-over marketing. By promoting Anaheim rather than California, Disney reminds hundreds of millions of potential visitors about the happiest place on earth. This choice might actually hurt the team's marketing efforts in Southern California, where the communities of Los Angeles dismiss those of Orange County (where Anaheim is located). Presumably, the corporate decision to promote the location and the neighboring Disney products (including Disneyland and Arrowhead Pond, home of the Mighty Ducks, Disney's hockey team) outweighs the negative impact on the baseball franchise.

⁴⁹² See Richard Sandomir, *Sports Business; Cablevision Lines Up to be Sports Leader*, N.Y. TIMES, Nov. 22, 1998, § 8 at 4.

⁴⁹³ See Bonham, *supra* note 486.

⁴⁹⁴ See *id.* Disney's major holdings include Walt Disney Co.; Walt Disney Pictures; Touchstone Pictures; Hollywood Pictures; Miramax; Buena Vista Int'l; Buena Vista Home Entertainment; Walt Disney World; Disneyland; Tokyo Disneyland; Disneyland Paris; Hollywood Records; Mammoth Records; ABC Television Network; ABC Radio; ESPN;

West and Foxsports 2.⁴⁹⁵ Warner has not been as expansive, but it does have WTBS and increasing amounts of coverage on CNN.⁴⁹⁶

Based on the importance of baseball for the three largest and most diversified media kingdoms, few should have been surprised by the furor which erupted when Murdoch moved to purchase the Los Angeles Dodgers.⁴⁹⁷ While Disney should have been the more aggrieved due to the proximity of the Dodgers and the Angels, it was Ted Turner who undertook a personal crusade to stop Murdoch.⁴⁹⁸ The intrusion of Murdoch into Turner's personal domain was too much for the Southern gentleman to bear. Despite his outcry, Murdoch purchased his baseball team and moved one step closer to domination of American entertainment.

Returning to Orwell's prophecy, the media giants' use of sports to fill broadcast time serves as another mechanism whereby the pervading orthodoxy of silence can be filled with an innocuous circus of sport. Like the Roman emperors, the media giants are building great empires to pay homage to the culture of sports, creating heroes out of sports figures⁴⁹⁹ and focusing the attention of the public on these arenas rather than arenas of politics or culture. The choice to select sports over politics or culture is not rooted in an evil objective to diminish society or a grand conspiracy to silence the enlightened intelligentsia; the choice is economically sound and it helps build a community—here a viewing community—united rather than fragmented.⁵⁰⁰ As described above, the

ESPN2; ESPNEWS; ESPN Int'l; Disney Channel; A&E Network; The History Channel; Lifetime Television; E! Entertainment Television; Major League Baseball Anaheim Angels; NHL Mighty Ducks of Anaheim. *See id.*

⁴⁹⁵ *See id.* Rupert Murdoch's major holdings include News Corp; 20th Century Fox; Fox Broadcasting Network; *New York Post*, *The Times* and *Sunday Times* in London; *Daily Telegraph*, Sydney; Melbourne *Herald Sun*; Harper Collins Publ'g; Major League Baseball Los Angeles Dodgers; NHL New York Rangers; NBA New York Knicks; Madison Square Garden; 22 Regional Sports Networks; option to buy interest in NBA Los Angeles Lakers and NHL Los Angeles Kings. *See id.* "Murdoch is probably best known in Britain as the owner of *The Sun*, the biggest-selling tabloid newspaper." *Newsmakers*, HOUS. CHRON., Jan. 16, 1999, at 3.

⁴⁹⁶ *See Bonham, supra* note 486. Ted Turner serves as Vice-Chairman of Time Warner, Inc. His major holdings include Time Warner, Inc.; Time Inc.; Warner Bros.; HBO; CNN; Turner Entertainment; Time Warner Cable; Major League Baseball Atlanta Braves; NBA Atlanta Hawks. *See id.*

⁴⁹⁷ *See* Dave Cunningham, *Owners Are Staging Clashes of The Titans*, ORLANDO SENTINEL, Apr. 19, 1998, at C9.

⁴⁹⁸ Phil Rogers, *'Stop Murdoch' Bid Looks to be too Late*, CHIC. TRIB., Mar. 19, 1998, at Sports 3.

⁴⁹⁹ *See* Sean Paige, *Sports Gladiators, Bread and Circuses*, INSIGHT ON THE NEWS, Aug. 3, 1998, at 8.

⁵⁰⁰ *See Bonham, supra* note 486 ("Imagine sitting in front of your television set and scrolling through 500 channels. What's going to cause you to select one channel over the other? One major incentive will be sports. If you are a sports fan, you will be familiar with the channels where you can be treated to your favorite offerings. More than that, you are more

united viewing community is the necessary social structure for a successful network or portal. The viewing community, united by popular sport, blockbuster films, or a pervasive orthodoxy, will result in a more homogenous marketplace; a marketplace in which the novel idea will have little opportunity to be heard over the din of the silence.

C. *Dead-Hand Control of Culture*

If the fear of concerted cartel action by the dominant media producers was not sufficient to demand a new regulatory structure, a second social threat exists because of the individuals who have been granted new ownership rights under the copyright term extension. Traditional property doctrine holds that the law dislikes dead-hand control of property ownership because it slows innovation and economic growth.⁵⁰¹ The Copyright Act of 1976 explicitly created dead-hand control of copyrights by adopting a life-plus-50-year term,⁵⁰² and the extension exacerbates this danger by twenty years—an additional generation. The copyright term extension only increases the likelihood that control of copyrights will pass to individuals who had little interaction with the original authors of the work, even in those cases where the current copyright holder was alive at the time of the copyright's creation. This leaves the cultural legacy of the public's intellectual property in the hands of stewards who may or may not share the artistic interests of the authors. Equally problematic is that the original author's interests may not serve the public good decades after a work's creation.

[T]he Gershwin Family Trust points out that the copyright extension is not only about money but also about control of how a work is presented. A co-trustee, Marc G. Gershwin, was quoted in a recent news article as lamenting, "Someone could turn *Porgy and Bess* into rap music." The work of the Gershwin brothers drew on African-American musical traditions. What could be more appropriate?⁵⁰³

[W]hen Washington's Shakespeare Theater decided to cast a white actor, Patrick Stewart, as Othello along with an all-black cast last year, they didn't need permission from Shakespeare's heirs, because the play was already in the public domain. But a

likely to watch other programming that appears on your favorite sports channel because this programming will have been promoted while you were watching sports.").

⁵⁰¹ ROGER CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 29-30 (2d ed. 1993).

⁵⁰² See 17 U.S.C. § 302(a) (1994), amended by Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, tit. I, § 102(b), 1125 Stat. 2827, 2827 (1998).

⁵⁰³ Steve Zeitlin, *Strangling Culture with a Copyright Law*, N. Y. TIMES, Apr. 25, 1998, at A15.

theater group wanting to perform *Porgy and Bess* with an all-white cast could not, because the Gershwin Family Trust stipulates that the work can be performed only with an all-black cast.⁵⁰⁴

For society as a whole, the difference between the situation described in *Othello* and that of *Porgy and Bess* may be the most important aspect of the entire monopoly debate. "The public domain should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use."⁵⁰⁵ The cumulative impact of the copyright extension, the elimination of monopoly barriers in the Telecommunications Act, and the aggressive posture of the media companies to maximize value in their intellectual property assets while minimizing risk will invariably result in fewer and fewer opportunities for new artists to expand on the public's shared cultural icons. Only approved productions, by proven producers with permission of the copyright stewards and media conglomerates will be allowed to create derivative works. Virtually no unauthorized derivative works will be made available to the public from 1999 until 2019, eliminating the steady stream of works that should be expanding the public's shared cultural identity.⁵⁰⁶

This moratorium on the public domain does not mean that authors' rights are being respected. The works of Dr. Seuss, for example, were sparingly licensed during their creator's lifetime, but upon his death his widow has decided that the best strategy is to aggressively market his images.⁵⁰⁷ "Author Theodore Geisel refused to market anything but books, but now his widow has sold dozens of licenses. There's also a new television show, *The Wubbulous World of Dr. Seuss*."⁵⁰⁸

The protection of the author's interests may also be contrary to the public interest. In *Salinger v. Random House, Inc.*,⁵⁰⁹ the reclusive writer sued because his papers and letters were used in an unauthorized biography. The Second Circuit found that the biog-

⁵⁰⁴ Chaddock, *supra* note 140.

⁵⁰⁵ Litman, *supra* note 256, at 967.

⁵⁰⁶ Cultural icons such as Uncle Sam and Santa Claus are examples of characters that devolved into the public domain after their copyrights had expired. Under the current law, these characters would still be protected by copyright. See Zeitlin, *supra* note 503.

⁵⁰⁷ *One Busy Cat*, TIMES UNION (Albany), Apr. 20, 1997, at Life & Leisure 19 ("The Cat in the Hat is busy with new ventures that are taking him beyond the pages of a book: He's on TV. He'll be on CD. He's got a movie contract. He's got a clothing line.").

⁵⁰⁸ See Jodi Duckett, *Toying with Success*, MORNING CALL (Allentown), Mar. 6, 1997, at D1.

⁵⁰⁹ 811 F.2d 90 (2d Cir. 1987).

rapher had infringed the copyrights held by Salinger in his unpublished letters, finding that fair use provided for only a modest amount of quotations and that the biography by Ian Hamilton took an excessive amount of material.⁵¹⁰ The letters in question were written by Salinger from 1931 to 1961 and have now had their removal from the public domain extended by twenty years. A similar issue arose involving a biography of L. Ron Hubbard, in which the Second Circuit again applied a very narrow interpretation of the fair use doctrine to unpublished journals and diaries.⁵¹¹ The copyright extension will grant a powerful veto over academic research to public figures who wish to control their image in history, extending that dead-hand control for an additional twenty years, and greatly diminishing the likelihood that the research will be relevant or timely when finally conducted using the public domain materials.

The problem is not limited to unpublished or even copyrighted works. When CBS attempted to create a documentary on Dr. Martin Luther King, it was sued by his estate for failure to secure a license to Dr. King's famous "I Have a Dream" speech.⁵¹² The Georgia district court determined that the speech is in the public domain and free for CBS.⁵¹³ Dr. King's famous speech is governed by the 1909 Act, so the dissemination without copyright notice resulted in a publication without notice that eliminated the possibility for copyright protection.⁵¹⁴ Such a speech written today would be treated as the author's property and the author—and his estate—would be free to limit access to the speech as they saw appropriate.⁵¹⁵

The balance of copyright is also not limited to the author or the public. Often, there are multiple artists involved in the creative process and the power granted to one comes at a cost to the other. For example, greater power to the author will invariably limit the control available to the director of a play or film. In theater, this

⁵¹⁰ See *id.* at 99-100.

⁵¹¹ See *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir. 1989).

⁵¹² *Estate of Martin Luther King, Jr., Inc. v. CBS*, 13 F. Supp.2d 1347 (N.D. Ga. 1998).

⁵¹³ See *id.* at 1354. The court stated that "publication occurred not because of the public exhibition but largely because of the Commission's lack of restriction on copying and its free allowance of reproduction by the press." *Id.* (citing *Letter Edged In Black Press, Inc. v. Public Bldg. Comm'n of Chicago*, 320 F. Supp. 1303, 1309 (N.D. Ill 1970)).

⁵¹⁴ See *id.* The term "divestiture" is inapposite because it would suggest that King expected copyright ownership. His objective, based on the information presented in the opinions, was to get as broad a republication as possible, not to exercise ownership over the speech.

⁵¹⁵ See 17 U.S.C. § 102(a) (1994).

problem is already an acute issue.⁵¹⁶ Productions like *West Side Story* might never have been mounted if Shakespeare's *Romeo & Juliet* had not fallen into the public domain. The power to withhold from the public any derivative works about which the original author does not approve will only diminish the marketplace of ideas. While respect for the author may be a necessary part of the creative process, providing dead-hand control seventy years after the death of the author cannot be the correct balance between the interests of the original author and the interests of those who follow. The trend toward greater information ownership and longer copyright terms will drive up the social costs of new work and drive down the opportunity for works built on a shared public experience.

V. STOPPING THE FORECLOSURE OF THE MARKETPLACE— AN INTRODUCTION

The dangers of cartel practices and unintended interference in the growth of the information industries described in Parts III and IV, above, must be balanced against the constitutional framework of the First Amendment and the Copyright Clause. The suggestions presented here are necessarily limited in scope because the balancing needed requires a gentle, systemic approach. No single legislative or judicial intervention can successfully maintain the needed balance. Indeed, this inability is at the heart of the Article 2B debate.

Each component of the regulatory framework must be integrated into a fully coordinated regulatory approach. The goal is to reduce regulation that would tend to slow growth in the information, software and technology segments of the economy, increase competition among the corporations in the various industries, expand opportunities for innovation, and slow the convergence of the primary media and content providers by reducing barriers to entry for new competitors. The success of the information society and rapid transition to the information age suggest that the balance for such success is not difficult to grasp. In fact, the U.S. regulatory structure may be far more effective as it existed before the NII recommended any improvements. Nonetheless, this Article does not advocate reversing the clock. Instead, modest changes to the Copyright Act and Telecommunications Act as well as a few

⁵¹⁶ See Jon Garon, Note, *Director's Choice: The Fine Line between Interpretation and Infringement of an Author's Work*, 12 COLUM.-VLA J.L. & ARTS 277 (1988).

other regulatory suggestions may serve to reinstate the balance that may have been lost in the past year.

A. *Copyright Modifications*

1. Repeal the Sonny Bono Term Extension Act

The most glaring mistake made in the regulation of the information economy was the extension of the copyright term by twenty years. The first step to return balance to the regulatory system would be to repeal the copyright extension.⁵¹⁷ This gift by Congress to Disney, the estates of the Gershwins, and thousands of unnamed and unidentified copyright holders cannot increase the incentives to produce new works and will encourage the corporations (or trusts) holding the assets to exploit the works to their greatest economic advantage.

The decision to increase the length of the copyright term does not make economic sense, even when balancing only the interests of the entertainment and content providers against that of the software makers. Comparing the relative importance in the U.S. economy, software represented \$102.8 billion in sales and \$747 billion for the broader IT industry.⁵¹⁸ The software industry is currently generating revenue roughly equivalent to that of the entertainment industry.⁵¹⁹ Although none of the software industry's interests will be enhanced by the copyright extension for decades, if at all, the inability to access public domain music and video in the creation of new products adds significantly to the cost of production. Congress has effectively chosen to reward a stable segment of the information economy at the expense of the growing segment of that economy, raising costs to the public and creating barriers to entry for new software developers who do not have the expertise or financial resources properly to navigate the licensing regimes of the music and film industries.

Economically there is little benefit to the copyright term extension. Disney's Steamboat Willie does not generate significant

⁵¹⁷ As a practical matter, Congress may wish to substitute a two year extension for the twenty year extension for those copyrights that would have expired during the interim. This would ease the transition for all copyright holders except those few who based large transactions on the enactment of the extension.

⁵¹⁸ See *supra* note 390 and accompanying text.

⁵¹⁹ See *supra* Part III.A. The figures include approximately \$32.3 billion for film—including theaters, home video, and television; \$40 billion in recorded music sold throughout the world; and \$68 billion in advertising revenue for radio, television, newspaper, and cable. While the entertainment segment is the greater amount, a portion of the \$21 billion television advertising and \$2 billion cable advertising effectively double-counts the film revenues. See MPAA REPORT, *supra* note 436, at 12; *Rosen Statement*, *supra* note 166; F.C.C. Notice of Inquiry, 63 Fed. Reg. 13,353, 15,358 (1998).

revenue for the company and a combination of trademark law and subsequent design changes will keep Mickey Mouse safe in perpetuity. Protection of family trusts like that of the Gershwins has no underlying social benefit. Congress has simply elected to tax the public for the benefit of the few private families who are capable of collecting the proceeds.

Repealing the copyright extension (or the less efficient alternative of having the extension declared unconstitutional by the Supreme Court after *Eldred v. Reno* wends its way through the courts) would deny little actual protection to authors, but would provide additional content for the software and Internet industries, spurring additional growth and economic development. One of the identified objectives of regulation reform was to expand opportunities for innovation. Allowing the public domain to grow will achieve this goal by providing source material for both the technology industries and the entertainment industries. Derivative works, whether they be modernized versions of songs from the twenties, video projects based on the early talking pictures, multimedia CD-Roms featuring works created in the Hoover era, or Internet sites of free educational materials, all feature the same theme. New products are based on the public domain elements that preceded them. Without the continued, annual growth of the public domain, this type of development cannot occur.

2. A Modest Alternative—Amend the Term Extension Act for Works no Longer in Print

A more modest alternative to repeal of the Sonny Bono Copyright Term Extension Act would be a provision analogous to that of the library exemption which allows libraries to copy the work during the last twenty years if it is no longer commercially available.⁵²⁰ A new statutory provision could operate as a form of renewal clause, providing copyright protection for any work that remained in print or that was registered with the Registrar of Copyrights. Copyright protection would lapse only for those works no longer in print and unregistered, just as it would have terminated under the 1976 Act. This would give Disney and the Gershwin Family Trust the relief sought, while freeing up the vast majority of works that are no longer commercially available and would not be made available unless a new author or publisher stepped in.

The twin mechanisms of registration or remaining in print

⁵²⁰ See 17 U.S.C. § 108 (1994), as amended by Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, tit. I, § 104, 1125 Stat. 2827, 2829 (1998).

should serve the needs of complying with the Berne Convention and protecting any moral rights in the works. Any author who cared about the integrity or attribution of her works could avail herself of the registration, regardless of the work's availability to the public. Authors would not have to comply with registration, however, for any works that were commercially available. The burden on affected authors should be sufficiently low as to avoid complaint by Berne member countries.⁵²¹ This is a far less comprehensive solution than simply repealing the copyright term extension. Nonetheless, it serves as an intermediate solution which may achieve much of the needed balance between the film and music interests and the other information society businesses.

3. Codify the In-Home Copying Privilege

The home is another area under copyright law for which the balance between the copyright holders and the public is sorely lacking. To the extent that the public is supportive of copyright and willing to purchase copyrighted works rather than illegally copy them, the public also needs to be treated with sufficient deference so as to encourage the desired conduct. Put another way, people will not break the law if they both know the law and respect it. If the Copyright Act outlaws conduct that reasonable people believe is appropriate, then not only will that conduct continue, but the entire law will fall into disfavor. The Supreme Court understood this when it analyzed the history of home taping in *Sony*; but Congress has yet to follow this lead.

The growing trend towards electronic distribution of software illustrates the difficulty. A consumer selects software from an Internet website, provides a credit card, and receives software which automatically loads itself on to the consumer's hard drive. That same product is also available in CD-Rom format from a retailer, but the software publisher has created incentives to purchase directly from the website. Six months later, the consumer elects to upgrade the computer hardware and replace the machine. Assuming the consumer can overcome the technological hurdles when the computer prompts the consumer to insert the CD-Rom (even though none was expected or delivered—the software was exactly the same), a legal problem arises. This is not an archive copy. Until the new computer is fully operational, the consumer will not delete any files or programs on the old computer. The consumer will erase software from the old hard drive as a condition of selling

⁵²¹ See Ginsburg & Kernochan, *supra* note 117, at 12.

or donating the machine, but not until she is about to dispose of it. Although this conduct has never resulted in civil or criminal liability, it remains a violation of copyright law.

If the information industries want compliance, they need to set clear expectations for home users. A software manufacturer should be able to specify that a software product may not be simultaneously loaded and used on more than a single computer. Nonetheless, neither the software manufacturer nor the purchaser expects that the license is limited to the life of the computer on which it is first loaded. Making a transfer copy of the software should be lawful, and if the software industry is unwilling to make this accommodation explicit, the Congress should step in.

The same issue is true for home use photocopying, scanning and digitizing printed records, videotaping, and audio-taping. As one commentator pointed out, "Sony Music, a record company, sells mini-disc recorders on the premise that you 'can copy all the CDs to mini-disc' [and] blank cassette tapes with a picture of a compact disc on the wrapper labeled 'for compact disc recording.'⁵²² Presumably, this means that Sony, at least, allows owners of its music CDs to archive the CD by taping it on a cassette tape in the event the CD melts or scratches. More likely, Sony does not object to its CD purchasers making cassette tapes for use in the car, so long as the cassette tape is not transferred to someone other than CD owner. Unlike the response by the RIAA to Sony and the other manufacturers of cassette tapes and mini-discs, the industry appears only to respond to a risk posed by MP3 or other technologies that are not controlled by the industry itself. The \$40 billion generated in recorded music during 1996 was made despite the threat of the cassette tape industry. The law may support the industry's complaints of infringement but their own practices show that a certain amount of infringement is essential to the success of the industry.

Both the law and the public are better served by legislation that differentiates between proper and improper conduct without reliance on a category of misconduct that is silently sanctioned. To accomplish this, a statutory exemption to the exclusive rights is necessary to eliminate the industry-by-industry standards, provide some predictability for consumers, and preempt any attempts to use shrinkwrap or clickwrap licenses to alter the balance. The ex-

⁵²² Matt Fellows, *Letters, Music Industry Turning a Deaf Ear to Consumers?*, L. A. TIMES, Feb. 14, 1999, at C8.

emption would work as an extension of the first sale doctrine. A first draft of the provision would work as follows:

Any owner of a particular copy or phonorecord lawfully made under this title may reproduce that work for personal use; provided however, that such copies must at all times remain the exclusive property of the owner of the particular copy or phonorecord lawfully made and must be destroyed or transferred in the event the particular copy or phonorecord was transferred. Except for the limited right to copy for limited personal use, nothing in this provision shall extend to the owner of a particular copy or phonorecord any of the exclusive rights enumerated in section 106.

This clause gives the owner of a copy of a work the right to make second copies. It takes from the producer of the work the ability to make the work obsolete through the use of inferior materials or (for software) a non-responsive loading program. It does not extend to the individual owner of a copy the right to upload her copy to the Internet, to display, perform, or to distribute the work.⁵²³ It has the effect of codifying existing law as practiced while clarifying for consumers what is and is not permissible. Such a clause will become increasingly important as technology and the media evolve over the next few decades. No actual rights are conceded by the copyright holders, but the effect is to clarify for the public what standard practices are allowed.

B. *Eliminate State Protection—an Argument against Article 2B/UCITA*

1. Article 2B/UCITA is Too Much Too Soon

Another key component in the balance between the public and the information age industries is the manner in which the private transactions are regulated. Article 2B attempts to create a scope that limits it only to software.⁵²⁴ Nonetheless, an opt-in pro-

⁵²³ See 17 U.S.C. § 106.

⁵²⁴ The language defining the scope of UCITA has undergone extensive revision since the August 1998 Article 2B draft. As recommended to the states, the scope of UCITA is as follows:

SECTION 103. SCOPE; EXCLUSIONS; AGREEMENT THAT ACT GOVERNS.

- (a) This [Act] applies to computer information transactions.
- (b) If a computer information transaction includes other subject matter, except as provided in subsections (c), (d), and (e), the following rules apply:
 - (1) If the computer information is the primary subject matter, this [Act] applies to the entire transaction.
 - (2) If the computer information is not the primary subject matter, this [Act] applies only to the part of the transaction pertaining to the computer information.

vision also allows other information providers the option of utiliz-

(c) The following rules apply between this [Act] and [articles of the Uniform Commercial Code]:

(1) If a transaction involves computer information and goods, this [Act] applies to the computer information.

(2) Notwithstanding subsection (1), if a copy of a computer program is contained in and sold or leased as part of other goods, this [Act] applies to the program and the copy only if:

(A) the other goods are a computer or computer peripheral; or

(B) giving the buyer or lessee of the goods access to or use of the program is ordinarily a material purpose of transactions in goods of the type.

(3) To the extent of a conflict between this [Act] and [Article 9], [Article 9] governs.

(4) This [Act] does not apply to subject matter within the scope of [Article 3, 4, 4A, 5, 6, 7, or 8 of the Uniform Commercial Code].

(d) This [Act] does not apply to:

(1) a financial services transaction;

(2) a contract to create, perform or perform in, include information in, acquire, use, distribute, modify, reproduce, have access to, adapt, make available, transmit, license, or display:

(A) audio or visual programming that is provided by broadcast, satellite, or cable as defined or used in the Federal Communications Act and related regulations as they existed on July 1, 1999, or by similar methods of delivering the programming; or

(B) a motion picture, sound recording, musical work, or phonorecord as defined or used in Title 17 of the United States Code as of July 1, 1999, or an enhanced sound recording. "Enhanced sound recording" means a separately identifiable product or service the dominant character of which consists of recorded sounds, but which includes (i) statements or instructions whose purpose is to allow or control the perception, reproduction, or communication of those sounds, or (ii) other information, so long as recorded sounds constitute the dominant character of the product or service despite the inclusion of such other information.

(3) a compulsory license; or

(4) a contract of employment of an individual other than as an independent contractor; or

(5) a contract which does not require that the information be furnished as computer information or in which the form of the information as computer information is otherwise de minimis with respect to the primary subject matter of the transaction.

(e) Except as otherwise provided in subsections (c)(2-4), if a material part of the subject matter of a transaction includes computer information that is within this [Act] or subject matter excluded under subsection (d)(1) or (d)(2), the parties may agree that this [Act], including contract formation rules, governs the transaction in whole or in part or that other law governs the transaction and this [Act] does not apply; however, any agreement to do so is subject to the following rules:

(1) An agreement that this [Act] governs a transaction does not alter an otherwise applicable rule or procedure that may not be varied by agreement or that may be varied only in a manner specified by the otherwise applicable rule or procedure and, in a mass-market transaction, does not alter:

(A) the applicability of a consumer protection statute [or administrative rule]; and

(B) law applicable to a tangible copy of information in print form.

(2) An agreement that this [Act] does not govern a transaction does not alter the applicability of Section 217 or 816 and, in a mass-market transaction, does not alter the applicability of unconscionability, fundamental public policy, or good faith under this [Act].

ing the Article 2B default provisions and remedies.⁵²⁵ Further, treating software differently than other information providers has a number of attendant risks. First, it again creates the Balkanization of law that gave rise to the reforms of the Telecommunications Act of 1996. Second, multiple legal standards generate confusion for the public, attorneys, and content producers. Content producers of software and entertainment products (including CD-Roms, motion picture-based games and software, print and multimedia publishers, and many others) do not differentiate the products based on the medium; rather, they base the product line on the source material or underlying ownership. Article 2B would impose the legal Balkanization of an industry that is rapidly seeing the technological convergence of media expand at an exponential pace. A publisher selling the identical project in different media would be faced with signing a distribution agreement for books, cassette tapes, CD-Roms, and floppy-disk software that would have different interpretative rules depending on which media was at issue. This would immediately generate a significant level of frustration with the regulations.

Third, adoption of Article 2B will lead to greater confusion by the parties and the courts. Contracting parties will be forced to guess, *ex ante*, which transactions will be governed by Article 2B and which will be carved out; which provisions will be enforced by the courts, and which provisions will be preempted by federal law, creating significant uncertainty and unpredictability. Parties will have to be very cautious until the courts have a number of opportunities to interpret the language and scope of the provisions, thereby increasing the costs for any unfortunate parties to the litigation as well as for the industry as a whole.

Fourth, if Article 2B is successful, the doctrines included would invariably be relied upon by parties to other transactions as appropriate analogies. The result would be to include a much broader category of transactions under the rubric of Article 2B and impose the default rules of Article 2B on those transactions, whether or not the parties had anticipated these default rules when planning. Article 2B would creep into the broader information age jurisprudence. As reported earlier, packaged software transactions represent less than one-seventh of the software industry. The statutes drafted to govern this portion of the industry will govern

(3) In a mass-market transaction any term providing that this [Act] does or does not govern must be conspicuous.

UCITA § 103 (Approved Draft of July 29, 1999).

⁵²⁵ See *id.* § 103(e).

the broader software industry and inevitably affect Article 2, electronic commerce transactions, and intellectual property jurisprudence. This is far more than mere freedom to contract.

Article 2B represents a fundamental shift in the information age legal regime. As such it seems poorly timed and ill conceived. The industries affected have grown faster than any others in the U.S. economy using the statutes as currently drafted. One possible consequence of the adoption of Article 2B could be widespread business disruption as all contracts are re-evaluated under a new legal structure.

To maintain a consistent legal basis and increase international uniformity, it is important that Congress not attempt to allow individual states to regulate separately. It would be both ironic and counterproductive to see the states create a new regulatory scheme even as the United States amends domestic law for greater compliance with the Berne Convention and WIPO treaty.

2. Misplaced Regulation—the Need for Preemption of Shrinkwrap Agreements

In keeping with this Article's focus on the balance between the public and the content producer, a troubling aspect of Article 2B is the *ProCD* analysis that the term license agreement should be accepted at face value and enforced without limitations. A seller of information should not be able to restructure the traditional balance between the exclusive rights of a copyright holder and the limitations of those rights merely through the expedient step of re-labeling the sale a license agreement. Ultimately, the issue is not whether Judge Easterbrook's analysis in *ProCD* was the correct one. Congress has the power, and therefore the obligation, to clarify the situation by explicitly defining the term "equivalent to any of the exclusive rights" to include shrinkwrap agreements, clickwrap agreements, conditions of entry at events, and all other situations in which a license has copyrighted material as its primary subject and is not subject to meaningful bargaining by the parties.

Such a clarification by Congress would help to restore the balance between federal and state laws. Doctrines like fair use and first sale would have a single, national meaning and not be subject to product-by-product re-definitions or state-by-state re-interpretations.

3. Fair Use Revisited—Protection & Reformulation of the Fair Use Standard

Re-codification and clarification by Congress regarding the meaning of copyright preemption will become increasingly important as the information industries continue to mature. This will also be necessary for the scope of fair use, one of the primary exemptions under the Copyright Act. The economic pressures and increased value of information have compressed the definition of fair use. Fair use requires a balancing of the nature, purpose, amount, and effect of the copying on the original work.⁵²⁶ Taken as a whole, this balancing seems quite reasonable. Because the first prong focuses on the commercial nature of the use⁵²⁷ and the last prong emphasizes the “potential market for or value of the copyrighted work,”⁵²⁸ however, the economics involved are necessarily emphasized. As the potential for protected works grows with the advent of new media, the balance for finding a fair use when a commercial user utilizes a commercially viable product has become increasingly remote. If instead, the courts were to begin recognizing that the market for copyrighted material is both more robust and more competitive than ever before, the nature of the discussion might change. Arguably, even the most competitive use of a product can do little to affect the market for a work that has an established brand; conversely, the value of a work without a trademark is generally very low.

Although the Supreme Court continues to stress that the fair use test should be applied holistically,⁵²⁹ the codification implicitly gives each of the four prongs equal weight and that weighting makes economic impact fifty percent of the test. To assist with this recodification, all that may be needed is a small amendment to section 107 that would move the clause “including whether such use is of a commercial nature or is for nonprofit educational use” from the first prong to the fourth prong. This would make the first prong “the purpose and character of the use” and eliminate any discussion of economics and commercial uses from that discussion.⁵³⁰ The fourth prong, recast, would become “the effect of the use upon the potential market for or value of the copyrighted work; including whether the use is of a commercial nature or is for

⁵²⁶ See 17 U.S.C. § 107(1)-(4).

⁵²⁷ See *id.* § 107(1).

⁵²⁸ *Id.* § 107(4).

⁵²⁹ See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

⁵³⁰ See 17 U.S.C. § 107(1).

nonprofit educational use.”⁵³¹ The recombination of the same clauses, along with legislative history explaining the prior tendency to over-emphasize the economic prongs, would tend to change the analysis of the courts and bring a more balanced assessment to the fair use cases involving commercial parties. Since comment already exists in the statute that teaching includes “multiple copies for classroom use,”⁵³² the recombination of clauses should not become grounds to narrow the teaching exception. Indeed, strong legislative statements to the contrary could strengthen an exception that may become increasingly difficult to defend.⁵³³

C. *The Need for Balance—Limited Data Protection & Robust Fair Use*

Inherent in the *ProCD* decision was Judge Easterbrook’s recognition that there must be some form of legal recourse for the manufacturer of a large database that can be effectively wiped out with the push of a button.⁵³⁴ When *Feist* was decided, physical and practical barriers still existed to discourage the widespread pirating of commercial products. Today, with the immediacy of copying a CD-Rom or an entire Internet website with a single command, the economic disruption caused by the second user is a significant economic threat to production.

To address this issue, a solution is necessary that balances the need for economic incentives to create expensive database repositories with the need for easy access to data and information for the public (including competitive commercial users). To create the proper balance, Professor Jane Ginsburg has outlined protection based on a number of models, including enforcement of private licenses (as was done in *ProCD*), providing full copyright protection, or providing copyright protection accompanied by a compulsory license.⁵³⁵ As she explains:

Although I ultimately argue that the present copyright law should be amended to extend protection—subject to a compulsory license—against derivative versions of fact compilations, there exist at least two alternative proposals for reform. One possibility would be to forgo copyright relief altogether, and to rely on contract and self-help. Another would be to impose full copyright liability, without the qualification of a compulsory li-

⁵³¹ *Id.* § 107(4).

⁵³² *Id.* § 107.

⁵³³ See *Princeton Univ. Press v. Michigan Document Servs., Inc.* 99 F.3d 1381, 1385 (6th Cir. 1996) (en banc); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1526 (S.D.N.Y. 1991).

⁵³⁴ See *supra* Part II.C.2.

⁵³⁵ See Ginsburg, *supra* note 265, at 1918.

cense [T]he first alternative is unlikely to secure effective protection; the absence of copyright protection would therefore threaten to diminish incentives to information gathering. By contrast, the second alternative may afford ample incentives to production, but too few to dissemination. A derivative rights regime qualified by compelled collective licensing may preserve incentives to information collection, while simultaneously maintaining maximum access and opportunities to make new combinations of the data.⁵³⁶

Implicit in the models identified by Professor Ginsburg is the danger that any model that would give rise to protection of the mere aggregation of information, however costly to compile, would increase the market power and dominance of the provider of that information. This danger compounds the other trends that lead toward an information or media cartel. In fact, the more the compilation cost is protected, the higher the barriers to competition become, and the more likely the compiler of information can dominate the marketplace. Professor Ginsburg's alternative—a compulsory license—would preclude the monopolistic effect that would follow from protection of data under either state or federal law.

Alternatively, federal statutory database protection (whether based on the Copyright Clause, or if that proves inelastic for the purpose, then the Commerce Clause) could be designed to provide a “thin” copyright that would give rise to protection only for the most direct and anti-competitive purposes. Although Congress has not codified the concept of “thin” copyrights into the Copyright Act, the courts have relied on it to protect works with very limited originality from claims of direct copying.⁵³⁷

The difficulty in any such analysis is apparent in situations like that in *Matthew Bender & Co. v. West Publishing Co.*,⁵³⁸ in which West Publishing (“West”) revisited its claim to copyrighted works in the compilations of the court opinions it publishes.⁵³⁹ After briefly claiming copyright in the editorial corrections it makes to the published opinions,⁵⁴⁰ it claimed originality in elements of the opin-

⁵³⁶ *Id.*

⁵³⁷ See, e.g., *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991); *Key Publications, Inc. v. Chinatown Today Publ'g Enters.*, 945 F.2d 509, 514 (2d Cir. 1991) (“[Although] the Court pointed out in *Feist* [that] the ‘copyright in a factual compilation is thin,’ we do not believe it is anorexic.”).

⁵³⁸ 158 F.3d 674 (2d Cir. 1998).

⁵³⁹ See *West Publ'g Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1222 (8th Cir. 1986).

⁵⁴⁰ See *Matthew Bender*, 158 F.3d at 681 n.4 (“West initially claimed some creativity in its corrections to the text of opinions, but it has abandoned this claim, presumably because

ions regarding parallel citation, subsequent case history, and attorney participation.⁵⁴¹ The district court did not find these elements sufficient to establish any originality by West, and the Second Circuit affirmed. The Second Circuit explained the problem.

West's editorial work entails considerable scholarly labor and care, and is of distinct usefulness to legal practitioners. Unfortunately for West, however, creativity in the task of creating a useful case report can only proceed in a narrow groove. Doubtless, that is because for West or any other editor of judicial opinions for legal research, faithfulness to the public-domain original is the dominant editorial value, so that the creative is the enemy of the true.⁵⁴²

West uses a clickwrap license with all of its software. Using legends in the books or the posting of notices at all law libraries, West might be able to extend this power to the printed version of its books. Under a scheme that allowed for no copyright protection but full enforcement of the so-called licensing agreements, West could regain the monopoly it seeks, not only for the editorial comments and added material, but for the entirety of the court opinions. A compulsory license would result in full public access, but probably a financial windfall to West, again paying it for materials that it did not own.

The creation of a thin copyright would make it a violation to copy all or substantially all of a compilation. Under this proposal, the copyright holder would need to establish (1) a valid copyright (or data-right to distinguish it from a full copyright) in the database; (2) that the defendant copied the database; (3) that the defendant's copying was identical or nearly so to the data that was copied; and (4) that the amount taken was all or substantially all of the database. After the copyright holder made this showing, the defendant could still bring any affirmative defenses available in copyright infringement actions. The amount of the copied work in the defendant's derivative work would not be an element (unlike the fair use test), but could be used as part of an affirmative defense.

This test is different from the standard copyright infringement

these corrections either are trivial (i.e., punctuation or spelling), or else (nearly always) approved by the courts by order or informal means.”)

⁵⁴¹ See *id.* at 681. The claims to originality were based on the following: “(i) the arrangement of information specifying the parties, court, and date of decision; (ii) the selection and arrangement of the attorney information; (iii) the arrangement of information relating to subsequent procedural developments such as amendments and denials of rehearing; and (iv) the selection of parallel and alternative citations.” *Id.*

⁵⁴² *Id.* at 688.

case in which only a valid copyright and copying are necessary to prove the claim.⁵⁴³ This test shifts the burden to the holder of the data-right to prove that the work was taken in its entirety and left essentially unaltered.⁵⁴⁴ While a test analogous to the fair use test could focus on the commercial nature of the defendant's copy, such a test misses the point. ProCD would have been injured to the same extent if its CD-Rom was posted to the Internet by a high school student or a direct competitor. It is the dissemination of the data, not the motive of the disseminator that affects the data compiler.

Under this thin copyright model, ProCD would have been able to show it had a valid data-right in its CD-Rom, that the CD-Rom was copied, that the copying was made in an unaltered form (rather than for any transformative or edited use) and that the entire CD-Rom database was taken. The correct result would have been achieved. In *National Basketball Association*, on the other hand, Motorola would not have been liable under such a test, because the scores and statistics from a basketball game comprise such a small portion of the game's over-all information.

West would face similar problems. The thin copyright would not supplant the rest of the Copyright Act, so the exclusion of U.S. Government works would preclude West from claiming any ownership in federal cases.⁵⁴⁵ Assuming West established a data-right in the materials it added to the opinions, the amount of total, protectable information added by West would fall far short of the protection it sought.

Such a thin copyright mechanism has the benefit of reducing the number of litigated cases to only those few where the plaintiff's misconduct was severe, while still providing some remedy for the database companies. The standard creates a near bright-line test of total duplication as the basis of infringement so that both database compilers and the copiers can anticipate the extent of their poten-

⁵⁴³ See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) ("To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.")

⁵⁴⁴ See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir. 1980) ("In works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not bodily appropriate the expression of another.") In *Hoehling*, the Second Circuit found that a motion picture did not infringe a book which attempted to explain the disaster of the Hindenberg. The test suggested above is even more limited, resulting in infringement only when there has been virtually verbatim copying.

⁵⁴⁵ 17 U.S.C. § 105 (1994). While the states could claim copyright in their opinions and transfer those rights to West, any such proposal should be against public policy. West has not claimed copyrights in any state court opinions in any of these modern proceedings.

tial liability and plan accordingly. Further, because the standard is clear (at least initially) and liability is difficult to establish, the costs to society are far less than a compulsory licensing mechanism with its attendant registration, supervision, and governmental involvement. This provides a low cost alternative that is heavily tipped towards the public's right to free access to information while providing some restrictions on wholesale copying.

D. *Re-Regulate the Telecommunications Industries*

1. Cap Cross-Ownership

While copyright may be the most significant component of the information age regulatory scheme, it is not the only one. Content neutral federal regulations involving antitrust and telecommunications can also play a significant role in slowing the growth of the cartel marketplace for information and media content.

In any scheme that relies on greater government regulation, there is the risk that the Supreme Court will apply a strict scrutiny analysis to the regulation and strike it down because it was not tailored narrowly enough to meet the constitutional test. As was discussed in Part II, while the Internet is subject to the strict scrutiny test, cable regulations remain subject to intermediate scrutiny.⁵⁴⁶ As the Court recognized, "the desire to check that perceived power [of the cable operators] supplied the 'important or substantial governmental interest.'"⁵⁴⁷ Because every marketplace operates more efficiently with some basic rules of access it is essential that the Court continue to provide Congress some latitude in fashioning these rules.⁵⁴⁸

⁵⁴⁶ See *Turner I*, 512 U.S. 622, 661 (1994) ("In sum, the must-carry provisions do not pose such inherent dangers to free expression, or present such potential for censorship or manipulation, as to justify application of the most exacting level of First Amendment scrutiny.").

⁵⁴⁷ Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125, 1150 (1996) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). Cable operators occupy a relatively unique position, controlling both a content medium and the physical infrastructure for broadcast. By controlling both, they could have significant power to change the media being presented to the public. This power has been contained by Congress through provisions such as the must-carry rules and has been recognized by the Court in its decisions to uphold those rules. See, e.g., *Turner I*, 512 U.S. 622; *Turner II*, 137 L. Ed.2d 369 (1997).

⁵⁴⁸ The Court has continued this approach regarding the must-carry rules for cable regulation, but only with trepidation. Justice Breyer addressed this point in his concurrence. I do not deny that the compulsory carriage that creates the "guarantee" extracts a serious First Amendment price. . . . But there are important First Amendment interests on the other side as well. The statute's basic noneconomic purpose is to prevent too precipitous a decline in the quality and quantity of programming choice for an ever-shrinking non-cable-subscribing segment of the public. This purpose reflects what "has long been a basic tenet of national communica-

Admittedly, the role of the courts is not to manage or supervise the marketplace of ideas. In a case involving the Equal Protection clause, the Court addressed this central question on its role in the marketplace.

[A]ppellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The "marketplace of ideas" is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge. . . . We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.⁵⁴⁹

Notwithstanding the Court's reluctance to monitor the outcome of the exercise of free expression, it must remain cognizant that failure to provide a minimal opportunity for widespread participation will result in the shrinking and eventual elimination of the marketplace. The strict scrutiny standard will prove too high a threshold for review of questions of cross-ownership provisions or must-carry rules. If the Court continues to apply the degree of scrutiny that it did in *Turner*, then the need to promote broader

tions policy," namely that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

Turner II, 137 L. Ed.2d at 411 (quoting *Turner I*, 512 U.S. at 663 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)) (internal quotation marks omitted)). The Court, however, did not find a marketplace argument persuasive in *Miami Herald*. "An enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). The proposals contained here do not create a right of access, but instead limit the monopoly power of any one speaker to the extent that party wishes to own cable and broadcast licenses.

⁵⁴⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35-36 (1973).

access to the media providers will remain a reasonable regulatory function worthy of congressional intervention.

For the issue involving the constitutionality of the must-carry rules or the cross-ownership provisions of the Telecommunications Act, the appropriate standard of review has again been addressed, this time at the appellate court level.⁵⁵⁰ The D.C. Circuit Court used the intermediate scrutiny applied in *Turner I* and *Turner II* to interpret 47 U.S.C. § 274, as created by Telecommunications Act of 1996,⁵⁵¹ which restricts the “Bell operating companies” from providing electronic publishing.⁵⁵² The Court of Appeals in *BellSouth* emphasized the differences between regulation of the speaker and regulation of the message. Even though section 274 applied to a broad category of electronic publishing, singling out both a particular medium and a wide range of content, the court focused on the underlying purpose of the section. The provision was designed to keep the local bell telephone companies⁵⁵³ out of the new industry in which they could leverage their local monopoly power. The *BellSouth* court relied on the distinctions made by the Supreme Court in *Turner I*. “[H]eightedened scrutiny is unwarranted when the differential treatment is ‘justified by some special characteristic of the particular medium being regulated.’”⁵⁵⁴ Because the purpose was to address monopoly power rather than content, the intermediate standard was applied, and under this standard, the provision was upheld.

Following this logic and this congressional model, Congress

⁵⁵⁰ See *BellSouth Corp. v. FCC*, 144 F.3d 58, 68 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1495 (1999).

⁵⁵¹ Telecommunications Act of 1996 § 151(a), 47 U.S.C. § 274 (Supp. III 1997). Section 274 reinstates portions of the AT&T divestiture consent decree that had ended in 1991. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

⁵⁵² See *id.*

⁵⁵³ Under the Telecommunications Act, the definition of a “Bell operating company” is Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, US West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and (B) includes any successor or assign of any such company that provides wireline telephone exchange service; but (C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B). 47 U.S.C. § 153(4) (Supp. III 1997).

⁵⁵⁴ *BellSouth*, 144 F.3d at 69 (citing *Turner I*, 512 U.S. 622, 660-61 (1994)).

and the courts should review the legislation limiting the national ownership of radio and television networks and the limitations on cross-ownership of newspapers and broadcast licenses in a common market.⁵⁵⁵ To protect a robust and diverse base of speakers, one solution would be to repeal the liberalized cross-ownership rules embodied in the Telecommunications Act of 1996 and return to the limitations that were in effect in 1992, reducing the number of broadcast licenses any corporation could own, reducing the percentage of national television distribution back to twenty-five percent, and retaining the cross-ownership provisions for television station licenses and newspapers in the same market.

One further, although possibly more controversial step, would also be appropriate. Like newspapers, the strength and monopoly power of ISPs is not directly impacted by the broadcast license regulations. Nonetheless, the danger of media concentration is every bit as real in the area of ISPs and Internet portal companies as it is for broadcast. Indeed, the prospect of either AOL/Netscape or Microsoft owning a group of local television stations and local newspapers should raise concerns for the members of those communities over access to differing points of view. The potential exists that such a combination would result in a significant reduction of local coverage and a further homogenization of media content. The F.C.C. should assess the extent to which this potential will result in any actual reduction in diverse viewpoints and local content. Thereafter, Congress should begin a deliberative process to determine whether the ownership of an ISP or Internet portal company should trigger the same cross-ownership concerns as Congress has found with newspapers. As the public increasingly relies on the information piped into the computer (or other Internet-capable device) as a substitute for newspapers, radio, and television, the need to recognize the monopoly potential also increases. Similar treatment of ISPs and Internet portal companies to that of newspapers may be a reasonable step in promoting the diversity of viewpoints inherent in many of the policies of the Telecommunications Act and the decisions of *Turner* and *Red Lion*.

2. Vigorous Enforcement of Antitrust Principles

No discussion of regulations designed to stop cartel behavior or otherwise regulate anti-competitive conduct would be complete without an acknowledgment of the federal antitrust laws. It is axiomatic that aggressive enforcement of antitrust law should help re-

⁵⁵⁵ See *supra* Part II.B.4.

duce the growth of monopoly power. The Department of Justice need not even be successful for this effect to occur. The decades-long antitrust action against IBM resulted in no liability for the company, but it fundamentally changed the way IBM did business and allowed companies other than IBM to dictate the path of the personal computer revolution.⁵⁵⁶ Microsoft is starting to show signs of the same effect. It allows competition and markets to go unchallenged as the antitrust suit against it continues.⁵⁵⁷ Time Warner's acquisition of Turner Broadcasting raised similar regulatory issues.⁵⁵⁸

While strategic litigation aimed at the trade practices of leading companies may be an effective tool for targeting industry leaders that aggregate too much monopoly in any one product or market, as a policy it is necessarily inconsistent and gives far too much latitude to the executive branch regarding the timing and scope of intervention. The Telecommunications Act cross-ownership provisions provide a more concrete set of guidelines than do general antitrust principles and provide better guidance for the companies and the government.

The oligopoly model that defines the information age further frustrates the role of the government in antitrust policy. The oligopoly model presumes widespread access to pricing and strategic information, a hallmark of the information age, and also presumes that the companies see the benefit to non-competitive conduct over directly competitive conduct. In industries where consumer or end-user prices are unrelated to the costs of production, the corporations' pricing strategies tend to have much more to do with competition and the marketplace than with costs. Ticket prices for films are based on the ticket prices in the city rather than on the production costs of the films.⁵⁵⁹ Television and radio distribute their costs to advertisers based primarily on viewership rather than production costs. The public is not directly affected by the cost. The retail price for a software title is highly flexible, depending primarily on the scarcity of competitive products and the number

⁵⁵⁶ See PAUL CARROLL, *BIG BLUES: THE UNMAKING OF IBM* 57-58 (1993).

⁵⁵⁷ See Jube Shiver Jr. & Leslie Helm, *Win Or Lose, Microsoft's Power May Be On the Wane; Technology: As the Antitrust Trial Drags on, the Firm's Rivals, Customers and Even Allies Assert their Independence*, L.A. TIMES, Feb. 12, 1999, at 1.

⁵⁵⁸ See *In re Time Warner, Inc.*, No. C-3709 (Feb. 3, 1997) (1997 FTC Lexis 13) (decision and order).

⁵⁵⁹ The pricing for motion picture tickets at first run theaters is another example of parallel conduct. There is no need for the exhibitors to discuss the ticket prices since they are published. In addition, inconsistent pricing tends to create consumer unrest, but does not appear to significantly change the attendance habits of the public.

of units that can be sold in any given price range.⁵⁶⁰ The net effect of these pricing systems is to create a system where illegal cartel practices are generally unnecessary to accomplish the monopolistic goals of the participants. As a result, even vigorous antitrust enforcement will be of limited effect.

This is not to say that indirect evidence cannot sometimes serve to prove conduct. In *Interstate Circuit, Inc. v. United States*,⁵⁶¹ a letter by a major motion picture exhibitor to the (then) eight primary film distributors suggesting minimum exhibition prices was found to be sufficient to be a violation of the antitrust laws.⁵⁶² Despite the occasional success of this approach (and the longstanding history of antitrust violations in the motion picture industry),⁵⁶³ the success of increasing antitrust activity by the Department of Justice or the F.C.C. should not serve as an alternative to structural changes in the regulations designed to make for a more open marketplace.

E. *Promote a Societal Norm that Values the Free Transfer of Ideas, Entertainment and Information*

In the final analysis, the source for most of the impact on the role of the oligopoly in content will be the social response to the monopolization. The various regulatory solutions identified in this Part may slow the convergence and change the names of a few of the participants, but given the First Amendment limitations on Congress and the willingness of the courts, Congress, and states to provide ever greater protection for copyrighted works, there is little the law can do to stem the tide. More effective than any of the proposals included in this article are simple steps individuals and

⁵⁶⁰ Software must be priced according to the underlying production costs, but most of the costs to create the product are in the research and development of the software rather than in manufacturing and distribution. The manufacturing and distribution costs are relatively minor. As a result, a software manufacturer can set the price of the software at the point that maximizes the cost per unit multiplied by number of units sold—fewer units sold at a high price or many more units sold at a lower price. (This is the same model for pre-recorded videotapes.) Some products are given expensive prices and sold selectively while other products are sold at relatively low prices to a much wider audience. The costs of development play only a small role in the pricing formula.

⁵⁶¹ 306 U.S. 208 (1939).

⁵⁶² See *id.* at 222.

⁵⁶³ The history of antitrust in the motion picture industry stems from its early years. See, e.g., *Motion Picture Patents Co. v. Film Mfg. Co.*, 243 U.S. 502 (1917). See also *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). Despite regular review by the Department of Justice, block-booking and other illegal trade practice continue to occur. "Federal antitrust officials confirmed they have started looking into the methods Hollywood uses in distributing movies to theater chains." James Bates, *Justice Officials Confirm Film Distribution Probe; Antitrust: The Agency Says it is Looking into how Major Hollywood Studios Book their Movies at Theater Chains*, L. A. TIMES, Feb. 6, 1999, at C2.

organizations can take to turn back the clock and return society to a time when only the most valued works were copyrighted, and even fewer were renewed.

The first proposal of this Part called for Congress to return to the copyright term under the Copyright Act of 1976. If Congress will not reduce the copyright term to a more reasonable length, then authors can. Nothing prevents an author from dedicating her work to the public good. By doing so, the author relinquishes the copyright and assigns the work to the public domain. A corollary of dedication to the public good would be to create a “public domain rights society” that collects the copyrights to works that are not yet in the public domain and makes the works available to the public at cost (or free using the Internet). Such a mechanism would allow authors an identifiable source to will their copyrighted works if they have no individuals to whom they wish to bequeath their legacy. Congress could provide at least token support to such an endeavor by providing start-up funds. Because of its artistic or literary purpose, such an organization should readily gain tax exempt status and receive some governmental benefit—even if it is limited to the lack of tax liability⁵⁶⁴ and the ability to accept charitable donations.⁵⁶⁵

A national movement centered around “charitable upload centers” could transform much of the debate. Currently, the vast majority of works do not physically survive to gain the benefit of the copyright extension. Of those that do, few will actually have sufficient economic value to compete effectively in the marketplace. Despite these obstacles, an author will hold onto a work unless there is a reason to transfer the work. A highly recognized charitable upload center (such as the “National Internet Library of the Arts,” “Library of Congress Public (Domain) Collection,” or an extension of an existing institution such as the Kennedy Center, Lincoln Center, Armand Hammer Museum, or the Disney Foundation) could garner the public support necessary to move significant assets into the public domain.

Such a model could also provide limited copyright controls. In theater, for example, it would be appropriate to continue to charge professional companies a royalty while making the same material available for free to amateur companies.⁵⁶⁶ Music rights

⁵⁶⁴ See I.R.C. § 170 (1998)

⁵⁶⁵ See *id.* § 501.

⁵⁶⁶ Under current industry norms, the cost of the public performance rights varies considerably between amateur and professional. Typically, the playwright assigns the amateur rights to the publisher of the plays while reserving the professional rights.

could operate in the same fashion, with publication rights becoming freely available and recordings of works for which the sound recording was not copyrighted freely transferable, while still collecting compulsory license fees for any new recordings or performances of the songs. This model would make the printed music more readily available to the next generation of musicians while distributing the fees that are already collected. Compulsory license fees for the recording of songs on an album are paid for all songs. Differentiating for those songs that are in the public domain would have little effect on commercially produced CDs and cassette tapes, whereas the fees could be used to support the efforts of the organization. (Waiving the compulsory license fees for CDs or cassette tapes that are produced in lots of under 5000 units would relieve the self-published musician from the compliance requirements.)

Poetry has little economic marketplace. The vast majority of black-and-white films are similarly lost or deemed commercially unusable. Providing these as free content for the Internet would give these works another opportunity to be preserved and enjoyed. In both cases, the organization could retain the rights to license the work if another author wished to create a derivative work using the material. The better approach to this would be to add the restriction when requested by the donor of the material.

If such a project was started with some significant lead donations, it could serve to re-orient the current assumptions towards content and public accessibility. Tax incentives, though limited in value for works with limited market opportunities, would provide the motivation for authors to donate their works to the center.

The model borrows from the portal metaphor to create the first public portal—public art, literature, music, culture and commentary. Like public radio and television, it may not transform the media with which it competes, but it does provide a measuring stick to judge the rest and provides an alternative to the orthodoxy that Orwell predicted.

VI. CONCLUSION

With the growth of the information society, the convergence at the marketplace of ideas has already begun. The oligopoly model of information supply and control has supplanted any idealized open bazaar of ideas, political thought, or divergent viewpoints. The modest proposals designed to slow the reach of copyright, retain limits on telecommunications ownership, and stem the licensing of all electronic output are limited to maintain-

ing a status quo that is already dominated by a small number of motion picture studios, broadcasters, and software companies. The proposals do not begin to address the underlying concerns that such convergence brings.

The Copyright Clause and the First Amendment each reflect a fundamental value necessary for a vibrant marketplace. The Copyright Clause protects the expressions that are the primary commodity in the market and the public's interest in maximizing output in that market; the First Amendment protects the producer of the expression from government influence and control regarding the content of the commodity. Together they balance the needs of the author with the needs of the public to maximize value for society and provide for an efficient system of public discourse. The accepted interpretations, however, of both constitutional clauses have changed significantly in the last two hundred years—even in the last twenty years.

The Copyright Clause has taken on obligations to protect far more than the public's interest in promoting authorship. It now protects the private, unpublished works of authors, the name and integrity of artists, the great-grandchildren of composers long since deceased, and corporate investments nearly a century old. The First Amendment has never provided the absolute prohibition against government intervention that its plain language suggests. In the past two decades, the Supreme Court has been asked to monitor the changes to technology, telecommunications, and the birth of the information age. It has responded by treating each new medium as unique and applying the First Amendment with differing standards for different media.

Against this constitutional backdrop, the companies that already dominate much of the marketplace are seeking technological, regulatory, and economic changes that will help cement their control of the new information society. The Internet, briefly noted for its populist structure, has been transformed into an electronic commerce center in which the public is channeled into portals owned by parties to the media oligopoly. The channeling of the public carries with it the need to aggregate the population, focus on content that is non-controversial, and eliminate anything that might lose marketshare. The parallel behavior of the oligopoly extends beyond pricing to the content made and the audience served. Extension of the copyright provides safe, well-tested material for repackaging and re-use from medium to medium. No efficient content producer would decide to forgo the use of this seventy-year-old content in favor of new, untested, potentially risky

content. The parallel behavior is reinforced by identical economic opportunities and significant barriers to non-parallel conduct.

The solution to the problem is to change the marketplace in a manner that once again values the constitutional principles embodied in the Copyright Clause and the First Amendment, that promote the value of free exchange of ideas and expressions, and that select to forgo the potential economic opportunities offered by the members of the oligopoly. The Eldritch Press serves as a prototype for a different type of marketplace. Libraries and information centers dedicated to the free public dissemination of material might serve as an alternative to the controlled content provided for the information society. If truly successful as a competitor to members of the oligopoly, such an information center could serve to reduce the barriers to entry for other content suppliers and eventually change the economic premise upon which the information age was founded.

The legislative proposals described in this article cannot achieve the solution as described. They can serve, however, to reduce somewhat the additional barriers that Article 2B, the DMCA, and the Telecommunications Act of 1996 all add. The solution comes from the free exchange of ideas, the lowering of barriers such as cost and access for the new companies that hope to provide quality content. All of the regulatory changes are irrelevant unless new authors and new voices find ways to overcome the existing barriers to entry and begin to add new material to the marketplace of ideas.

Ironically, the technology that may provide the greatest tool to strengthening the barriers may also be their undoing. The media producers control the Internet through the portals, but no single company is presently in a position to control the content. Mass public distribution is therefore available for anyone; the difficulty is finding the audience. Nonetheless, the marketplace of ideas presumes that the best idea will generate its own currency, grow, and become the dominant idea. Readily available equipment now allows almost anyone to write, film, or record a work that may take center stage in the world's consciousness. Filmmaker Francis Ford Coppola once said he hoped the next great filmmaker would be a thirteen-year-old girl in pigtails.⁵⁶⁷ Today she could be. At thirty-five, she could also be president. Her website could change the world.

⁵⁶⁷ HEARTS OF DARKNESS: A FILMMAKER'S APOCALYPSE (1991) (documentary on the making of *Apocalypse Now*).

