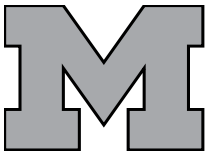

REAL COPYRIGHT REFORM

JESSICA LITMAN

Real Copyright Reform

-- Jessica Litman•

The copyright statute is old, outmoded, inflexible, and beginning to display the symptoms of multiple systems failure. Congress enacted the current law more than 30 years ago. Copyright lobbyists wrote the 1976 Copyright Act[1] in the course of protracted multilateral negotiations. The statute includes a host of provisions that resolve difficult disputes by adopting detailed specifications. It replaced its predecessor statute's statements of general principle with particular language rooted in the technology and markets of the 1960s and early 1970s.[2] The statute was not well-designed to withstand change, and has aged badly. The details of specific solutions have become irrelevant or obsolete in the face of social, cultural and technological change.[3] Copyright-intensive businesses have come to Congress insisting on new specifications to solve new problems.[4] In the ensuing process of inter-industry negotiations to tailor statutory proposals to the quirks and caprice of affected interests, the specifications have attracted a swarm of limitations, qualifications, restrictions and conditions as a compliant Congress inserted them in the extant law.[5] Today, title 17 of the United States Code is a swollen, barnacle-encrusted collection of incomprehensible prose.[6]

Historians and copyright lawyers with long memories know that we've faced this problem before.[7] Copyright law's confrontation with evolving technology has been a near-constant theme since

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• John F. Nickoll Professor of Law, University of Michigan. I'm grateful to Jon Weinberg, Seana Shiffrin, Jane Ginsburg, Tom Cotter, and Kurt Hunt for helpful comments on earlier drafts. I also owe a large debt to Pamela Samuelson for raising the topic of copyright reform and sponsoring ongoing discussions of the shape reform might take. My conversations with many people have influenced my thinking, but I am especially grateful to Jon Baumgarten, Mike Carroll, Julie Cohen, Troy Dow, Laura Gasaway, Daniel Gervais, Terry Illardi, Lydia Loren, Tony Reese, Jule Sigall, Kate Spelman, Chris Sprigman, and Jeremy Williams. I am confident that none of them would agree with the majority of my conclusions, but our conversations helped me to figure out what I really think.

1 1976 Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541, codified as amended at 17 USC §§ 101-1205 (2004)

2 See JESSICA LITMAN, DIGITAL COPYRIGHT 22-34, 54-63, 122-45 (2d ed. 2006). Compare, e.g., 1909 Act § 1(e) with 1976 Act § 110.

3 See Litman, supra note 2, at 57-63, 197-202.

4 See, e.g., S. 2560, Inducing Infringement of Copyrights Act of 2004, 108th Cong., 2d Sess. (2004); S. 2317, Intellectual Property Enforcement Act, 110th Cong., 1st Sess (2007); S. 2913, Shawn Bentley Orphan Works Act, 100th Cong., 2d Sess (2008); H.R. 848, Peformance Rights Act, 111th Cong, 1st Sess. (2009).

5 See, e.g., Satellite Home Viewing Extension and Reauthorization Act, Pub. L. No. 108-447 (2004); Family Entertainment and Copyright Act, Pub. L. No. 109-9 (2005); Prioritizing Resources and Organization for Intellectual Property Act, Pub. L. No. 110-403 (2008).

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

7 See, e.g., REPORT OF THE LIBRARIAN OF CONGRESS FOR THE FISCAL YEAR ENDING JUNE 30, 1902 66 (1902), URL: <http://www.copyright.gov/reports/annual/archive/ar-1902.pdf> ("Our law as it stands is not only inadequate by reason of being based on antiquated models and because its modification has not kept pace with the great material development of the last quarter of a century, but it is difficult of interpretation, application and administration

Congress enacted its first copyright law in 1790.[8] More than once in the past, copyright laws have grown badly outdated before copyright-affected industries could muster the political influence to persuade Congress to enact new ones. The current law may break down in more extreme ways than in the past, and the law's language may be many times longer, more detailed and less comprehensible than in earlier episodes, but this sort of difficulty has plagued copyright history repeatedly.[9] When faced with this problem in the nineteenth and twentieth centuries, lawyers for copyright-intensive interests made several moves to enable them to make do. First, copyright lawyers avoided inconvenient statutory language by persuading courts to interpret the words of the statute to mean one thing in one context, and a very different thing in another.[10] Second, they negotiated a series of band-aid solutions with other copyright interests in which they agreed to behave as if the statute on the books said what they wished it did.[11] Third, they sat down with one another and tried to come up with a revision of the copyright statute that would scratch their respective itches. That process always took much longer than they expected, but, eventually, copyright lobbyists generated the language of a statute that Congress obligingly enacted into law. The resulting statute was, of course, longer, less flexible, and more vulnerable to obsolescence than the one it replaced.[12]

Copyright insiders, having watched (or participated in) some of the early ameliorative moves this time around, are beginning to make noises suggestive of a new round of statutory overhaul.

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because of textual inconsistencies and contradictions."); Zechariah Chafee, *Reflections on the Law of Copyright I*, 45 Colum. L. Rev. 503, 503 (1945) ("A thoroughgoing revision of the Copyright Act is badly needed in view of the vast increase in the pecuniary value of literary and artistic property, and the complex problems concerning its protection which have been raised by the motion-picture, the radio, and other novel methods of creation and infringement.").

8 *An Act for the encouragement of learning*, 1 Stat. 124 (1790)/

9 See Jessica Litman, *Copyright Legislation and Technological Change*, 68 Ore. L. Rev. 275 (1989).

10 Perhaps the best known example is the meaning of the word "publication" under sections 10 and 19 of the 1909 Copyright Act. See American Visuals Corp. v. Holland, 239 F.2d 740, 743-44 (2d Cir. 1956) ("the courts apply different tests of publication depending on whether plaintiff is claiming protection because he did not publish and hence has a common law claim of infringement -- in which case the distribution must be quite large to constitute 'publication' -- or whether he is claiming under the copyright statute -- in which case the requirements for publication are quite narrow"). Compare Continental Casualty v. Beardsley, 253 F.2d 702 (2d Cir. 1958) (holding that distribution of 100 copies without notice to small group constituted general publication and divested copyright), and White v. Kimmell, 193 F.2d 744 (9th Cir. 1952) (holding distribution of 20 copies without notice with a cover letter suggesting recipients pass the copies on constituted divestive general publication) with King v. Mister Maestro, Inc., 224 F. Supp. 101 (SDNY 1963)(holding that distribution of many copies without notice to the press from the press tent was only a limited publication, which did not forfeit copyright). Today we see something similar with computer-mediated uses: copyright owners have persuaded courts that a work is fixed for the purposes of the creation of an infringing copy as soon as it appears in the random access memory of a computer, but do not argue that appearance in RAM is sufficient fixation for the purpose of copyright's vesting. The latter was understood by Congress as a constitutional limitation imposed by the word "writings" in the copyright clause. Similarly, copyright owners have argued that the transmission of a single copy over a network should count as publication for the purposes of infringement, but have denied that transmitting a single copy triggers the Library of Congress deposit obligations that attach to a work upon initial publication. See 17 U.S.C. § 407.

11 See Litman, supra note 2, at 47-50. For a current analogue, compare, e.g., CBS, Inc. et. al, Copyright Principles for User-Generated Services (Oct. 18, 2007), URL: <http://www.ugcprinciples.com/ >.

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

Groups are meeting privately to generate preferred solutions to copyright law problems.[13] Businesses are asking their pet members of Congress to float statutory balloons.[14] Various trade associations are trying to position themselves to claim that the items at the top of their wish lists are already well-established under current law.[15]

There's some queasiness attached to launching a new copyright overhaul. Copyright revision is lengthy and expensive, even in the best of circumstances. The number of interests affected by copyright is huge, and the complaints those interests have with the current regime are diverse. Overhauling the copyright statute took more than twenty years the last time Congress tried it, and there's no reason to think it could happen more quickly today. These are not, moreover, the best of circumstances. The copyright bar, once a cozy sewing circle of plaintiffs' lawyers,[16] has grown intensely polarized over the past twenty years, and copyright discourse has become increasingly strident.[17] That has nourished an atmosphere of profound distrust, which makes it harder to agree on terms.

Interested parties have reason to be nervous about what might go wrong. Because major copyright legislation typically takes many iterations and many years between introduction and enactment, most copyright lawyers are, at least to some degree, experts in copyright legislative history. Students of past legislation know that in the course of any major copyright revision, new copyright-affected players have popped up and demanded that the law be reshaped to accommodate their needs. In the revision process that culminated in the enactment of the 1909 Copyright Act, for example, the manufacturers of phonographs and phonograph records nearly derailed the entire effort until they were satisfied with their treatment under the statute.[18] Multiple attempts to modernize the copyright law during the 1920s and 1930s foundered because new players ASCAP and radio broadcasters could not agree on anything.[19] In the revision process that led to the 1976 Act, broadcast television and then cable television showed up and demanded special treatment; copyright revision ground to a halt until they got

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[13] Hear, e.g., Podcast of Register MaryBethPeters interview at 2008 FMC, Sept. 17, 2007, at URL: http://www.archive.org/details/FMCsummit07.petersconversation.

[14] See, e.g., Ted Johnson, Panel OKs Bill on Royalties, Variety, May 13, 2009, at http://www.variety.com/article/VR1118003592.html?categoryid=16&cs=1;Wendy Davis, Entertainment Industry Pushes for Law Requiring Colleges to Filter Networks, Online Media Daily, March 24, 2008, at <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=79058&Nid=40725&p=918739> (MPAA and HR 4137); Sherwin Siy, Roundtable on Copyright Damages: "What Are We Doing Here?", Public Knowledge, Policy Blog Jan. 28, 2008. at <http://www.publicknowledge.org/node/1369> (RIAA & HR 4279).

[15] See, e.g., Capitol Records v. Bertelsmann, 377 F. Supp. 2d 796 (N.D. Cal. 2005); Viacom International v. YouTube, Inc., No. 07-CV-2103 (S.D.N.Y. *filed* March 13, 2007); Capitol Records, Inc. v. Thomas, No. 06-CV-1497 (D. Minn. 2007); Brief Amicus Curiae Americans for Tax Reform in Cartoon Network, LP v. Cable News Network, LP, No. 07-1480-CV(L) (2d Cir. *filed* July 11, 2007) at 15-16; see generally Litman, supra note 2, at 24.

[16] See Lloyd L Weinreb, Copyright Unbound *in* BENJAMIN KAPLAN ET. AL., AN UNHURRIED VIEW OF COPYRIGHT, REPUBLISHED (AND WITH CONTRIBUTIONS FROM FRIENDS) wein-1, wein-1(2005).

[17] See Jessica Litman, *War and Peace*, 53 J. Copyright Soc'y 1 (2006).

[18] See Litman, supra note 2, at 39-40 and sources there cited.

[19] See id. at 42-45.

it.[20] In the five-year effort that resulted in the Digital Millennium Copyright Act,[21] telephone companies and Internet service providers were able to block the enactment of provisions sought by the entertainment and software industries until liability safe-harbor provisions for ISPs were added to the bill.[22]

The prospect of upstart new copyright interests may be especially scary today because there are tens of millions of ordinary people whose use of YouTube and peer-to-peer file sharing networks gives them a direct, personal stake in the copyright law.[23] Nobody has yet succeeded in mobilizing them into a significant political force, but the majority of them are over 18, and many of them vote. It's entirely possible that over the course of a multi-year, highly publicized copyright reform effort, the interests of ordinary voters could end up playing a more than a nominal role.[24] One can imagine circumstances in which a new awareness on the part of Congress that voters care about copyright could move the law pretty far from where current players would like to see it go.

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

Much of my prior work has chronicled a depressing history of copyright legislation, in which copyright lobbyists engaged in protracted negotiations with one another to arrive at copyright laws that

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[20] See Jessica Litman, *Copyright Legislation and Technological Change*, 68 Ore. L. Rev. 275, 326-332 (1989) and sources there cited.

[21] Public L. No. 105-304, 112 Stat. 2860, 2887 (1998).

[22] See Litman, supra note 2, at 127-45 and sources there cited. During the same five year period, composers, music publishers and motion picture studios pursued an extension of copyright's term from 75 (or life plus 50) years to 95 (or life plus 70) years. Bar and restaurant owners, angry at the cost of performing rights licenses, blocked term extension until proponents agreed to insert a bar and restaurant exemption into the term extension bill.

[23] According to YouTube, "people are watching hundred of millions of videos a day on YouTube." YouTube Fact Sheet, URL: http://www.youtube.com/t/fact_sheet (visited August 24, 2009). The Wall Street Journal reported in August, 2009 that "YouTube has grown into a massive destination, with 428 million unique monthly visitors in June…." Wall Street Journal, Aug. 20, 2009, at B1. Big Champagne, which seeks to measure traffic over P2P networks, says that "There is no strict "headcount" of the total P2P universe in terms of unique users, though there are literally millions of individuals logged on at any particular time." Big Champagne, FAQs, URL: http://www.bigchampagne.com/faqs.html (visited July 2, 2008).

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

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

enriched established copyright industries at the expense of both creators and the general public.[26] There's ample reason to anticipate that the next copyright revision will proceed in similar fashion to similar ends. But what if it didn't? What if we were able to take the opportunity to rethink our copyright system? What sort of copyright law might we craft instead?

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

I. The Weaknesses of the Current Copyright System

A copyright system is designed to produce an ecology that nurtures the creation, dissemination and enjoyment of works of authorship.[27] When it works well, it encourages creators to generate new

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[26] See, e.g., Litman, supra note 2.

[27] A note on terminology: In this article, unless I am referring to specific statutory categories, I use the word "creator" rather than "author," "disseminate" rather than "distribute," and "enjoy" rather than "use." I do that primarily to avoid the baggage that "author," "distribute," and "use" have accumulated over the past few decades. Copyright commentary reveals controversy surrounding the appropriate meaning of the terms "author," "authorship," "distribute," "distribution," "use," and "user." People disagree whether "author" should be understood to include the entity who supplies the funds that enable an individual to create a work. See L Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 Vand. L. Rev. 1, 51-57 (1987); Jane C. Ginsurg, *The Concept of Authorship in Comparative Copyright Law*, 52 DePaul L. Rev. 1063 (2003); F. Jay Dougherty, *Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law*, 49 UCLA L. Rev. 225 (2001); Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 41 Duke L. J. 445 (1991). They dispute whether distribution should be understood as limited to the transfer of physical copies or should extend to making a work available. See, e.g., Thomas F. Cotter, *Toward a Functional Definition of Publication*, 92 Minn. L. Rev. 1724 (2008); Jane C. Ginsburg, *Separating the Sony Sheep from the Grokster Goats*, 50 Ariz L. Rev. 577, 577n.1 (2008); John Horsefield-Bradbury, *Note, Making Available as Distribution: File-Sharing and the Copyright Act*, 22 Harv. J. L. & Tech. 278 (2008). They argue about whether encouraging use of works should be deemed one of copyright's goals, or whether users are entitled to any rights under the copyright law. See Julie Cohen, *The Place of the User in Copyright Law*, 74 Fordham L. Rev. 347 (2005); Justin Hughes, *"Recoding" Intellectual Property and Overlooked Audience Interests*, 77 Tex. L. Rev. 923(1999); David R. Johnstone, *Debunking Fair Use Rights and Copy Duty Under U.S. Copyright Law*, 52 J. Copyright Soc'y USA 345 (2005); I. Fred Koenigsberg, *Humpty Dumpty in Copyrightland: The Fifth Annual Christopher A. Meyer Memorial Lecture*, 51 J. Copyright Soc'y 677 (2004);

works, assists intermediaries in disseminating them widely, and supports readers, listeners and viewers in enjoying them.[28] If the system poses difficult entry barriers to creators, imposes difficult impediments on intermediaries, or inflicts burdensome conditions and hurdles on readers, viewers and listeners, then the system fails to achieve at least some of its purposes. The current U.S. copyright statute is flawed in all three respects.

A. Creators' copyright

Copyright laws, at least in theory, are designed to encourage the creation of new works of authorship by offering creators incentives in the form of control. Those incentives are said to spur creators to author new works and make them available to the public, and to enable creators to earn income from the dissemination of their creations.[29] The law's congruence with the theory, at least in many fields of authorship, is more aspirational than real.[30]

Creators face demoralizing obstacles in searching for opportunities to write, paint, play or film anything the public will see.[31] The chance to reach an audience has been turned into a tantalizing grand prize for aspiring musicians,[32] filmmakers[33] actors,[34] painters[35] and photographers,[36] who are willing to

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Joseph Liu, *Copyright Law's Theory of the Consumer*, 44 Boston College Law Review 397 (2003). I have views on which arguments in those debates are sounder, but it isn't my intention to rehearse them here. By "creator" I intend to name the individuals who make works of authorship, to the exclusion of the entities and employers who finance their work, whether or not those individuals are deemed "authors" in current or past copyright laws. By "disseminate," I intend to encompass any means of making a work available to members of the public, whether or not that behavior is within the exclusive rights granted by copyright law. By "enjoy," I mean reading, listening, viewing, playing, learning from, and any other use short of commercial exploitation, whether or not current law holds that such use requires a license.

[28] See Lyman Ray Patterson & Stanley Birch, *A Unified Theory of Copyright*, 46 Houston L. Rev. 215, 383 (2009) (copyright should serve "the public interest in the creation, transmission and use of knowledge") Patterson and Birch argue that while conventional copyright theory envisioned a bilateral relationship between author and user, it should instead be based on a tripartite relationship among author, publisher and user. Id. They also challenged the conventional analogy of copyright to property interests in land. Patterson and Birch argued that copyright gave rights holders some exclusive use rights but did not give them ownership of the copyrighted works themselves. Therefore, they argued, copyright should be understood as more like an easement in real property than a fee simple interest. Id. at 10.2.

[29] See, e.g., PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY 7 (1994); Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 Colum. L. Rev. 1613, 1613 (2001).

[30] Accord WILLIAM PATRY, MORAL PANICS AND COPYRIGHT WARS 117-19 (2009).

[31] See, e.g., Jon Pareles, 1700 Bands, Rocking as the CD Industry Reels, New York Times, March 15, 2008, at A1, URL: <http://www.nytimes.com/2008/03/15/arts/music/15aust.html>; Michael Cieply, Films Finding a Tougher Market in Toronto, New York Times, Sept 15, 2009, at C1, URL: <http://www.nytimes.com/2009/09/15/movies/15fest.html>.

[32] Watch, e.g., *American Idol* (FOX 2002-2009). See also John Pareles, supra note 6.

[33] Watch, e.g., *On the Lot* (FOX 2007); *Project Greenlight* (HBO 2001-2005).

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

endure the indignities of reality television in the hope of scoring an apprenticeship, patron, or entry-level job creating works of authorship. Even when creators succeed in publishing a book, cutting an album, placing an article, selling a screenplay, moreover, they typically earn only a small share of the proceeds of the copyrights in their works. In most creative spheres, authors' control over their works is short-lived, and the earnings they collect from them are modest.[37] The control of their works and the bulk of the proceeds they earn are held instead by copyright owners who serve as intermediaries between the authors and their audiences.[38]

Only a few creators get rich from copyright royalties. A somewhat larger number are able to make a living from creating works of authorship, but the majority of creators need day jobs to supplement their income.[39] The academy is full of poets, novelists, painters, composers and performers who teach; the waiter who brought your meal the last time you dined in New York or Los Angeles is most likely there awaiting his or her next audition.

Why is authorship so unremunerative? It isn't that people don't value works of authorship enough to spend money for them. Studies of the economic contribution made by copyright industries to the US economy report that they generate more than a trillion dollars annually.[40] Very few of those dollars, however, end up in creators' pockets. The copyright statute incorporates a decided bias in favor of distributors. That bias comes primarily at creators' expense. Although U.S. copyright law vests copyright as an initial matter in authors' hands, the creator is not necessarily the author as a legal matter. All works created by employees within the scope of their employment and many works created by independent contractors are deemed to have been authored by the employer or commissioner as a

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

36 Watch *The Shot* (VHI 2007) (reality show competition among still photographers for "$100,000, the chance to shoot a fashion spread for Marie Claire magazine, and have their shot on the cover of a Victoria Secret catalog").

37 See, e.g., Donald S. Passman, All You Need to Know about the Music Business 68-98, 386-91, 398-404 (5th Ed. 2003); Herman Finkelstein, *Copyright: A Reappraisal*, 104 Penn. L. Rev. 1025, 1051 (1956).

38 See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 75 (1967); Patry, supra note 30, at 117; Graeme W. Austin, *Symposium: Metamorphoses of Artists' Rights in A Digital Age: Keynote Address*, 28 Colum. J. L. & Arts 397 (2005).

39 See U.S. Department of Labor Statistics, Occupational Outlook Handbook, *Musicians, Singers and Related Workers*, at http://www.bls.gov/oco/ocos095.htm; Id., *Artists and Related Workers* at http://www.bls.gov/oco/ocos092.htm.

40 See. e.g., Stephen E. Siwerk, Copyright Industries in the U.S. Economy: The 2003-2007 Report (July 2009), http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf ("By 2007…the value-added to the U.S. GDP by the "total" copyright industries rose to $1.52 trillion … or 11.05% of U.S. GDP."); Stephen E. Siwerk, Copyright Industries in the U.S. Economy: the 2006 Report 2 (November 2006), <http://www.iipa.com/pdf/2006_siwek_full.pdf> ("In 2005, the estimated value added for the total copyright industries rose to $1,388.13 billion ($1.38 trillion) or 11.12% of U.S. GDP."); Thomas Rogers & Andrew Szamosszegi, Fair Use in the US Economy: Economic Controbition of Industries Relying on Fair Use (Sept. 12, 2007), http://www.ccianet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf 1 ("In 2006, fair use industries generated revenue of $4.5 trillion, a 31 percent increase over 2002 revenue of $3.5 trillion.").

matter of law.[41] For other works, the creator is the author and owns the copyright as an initial matter, but the copyright system encourages the author to assign her copyright to a distributor in exchange for exploitation.[42] Once the author transfers her copyright, the law does not make it easy for her to retrieve it. Although the statute contains a mechanism intended to allow authors to reclaim copyrights after 35, 40, 56 or 75 years, the mechanism was designed to make it extremely difficult to do so.[43] Meanwhile, creators of some works cannot as a practical matter navigate the system as individuals. The statutory compulsory licenses, for example, contemplate that claimants to a share of statutory license fees will be represented by corporate or collective entities; those entities operate on the assumption that copyrights have been assigned to distributor intermediaries.[44]

Some people point out that authors have very little bargaining power as compared with publishers,[45] but that isn't inherent in the natural order. Rather, it reflects the fact that the American copyright law tilts, and always has tilted, the playing field in distributors' favor. The disparity of bargaining power is at least partly an artifact of the way the copyright law works.[46] The copyright statute has favored publishers, record labels, motion picture studios, and other distributors, because Congress has, for the past century, encouraged lawyers for publishers, record labels, motion picture studios, and other distributors, to write themselves a law that worked for them.[47] What worked for them was a system that reposed power in copyright owners, and made it easiest for distributors to end up owning the copyrights.

A law favoring distributors at creators' expense made more practical sense in the 19th and 20th

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

42 The law makes copyright assignment easy. See 17 USC § 204. Once the copyright is assigned, the new copyright owner stands in the shoes of the original author, and will be entitled to exercise almost all copyright rights, including the right to sue the original creator for copyright infringement. See, e.g., Fantast v. Fogerty, 510 US 517 (1994).

43 See 17 USC §§ 203, 304; infra notes 161-168 and accompanying text. See generally Howard Abrams, *Who's Sorry Now*? 62 U. Det. L. Rev. 182 (1985); Alison M. Scott, Note: *Oh Bother: Milne, Steinbeck, and an Emerging Circuit Split over the Alienability of Copyright Termination Rights*, 14 J. Intellectual Prop. L. 357 (2007).

44 Explore Library of Congress, Copyright Royalty Board Home Page, http://www.loc.gov/crb/ (visited Sept. 11, 2009); SoundExchange, http://www.soundexchange.com (Visited Sept. 11, 2009).

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

46 See, e.g., Olufunmilayo Arewa, *Borrowing the Blues: Copyright and the Contexts of Robert Johnson*, Northwestern Public Law Research Paper No 08-19 (May 13, 2008), at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1132789>. Recent court rulings reading the copyright statute to require copyright owner permission for even tiny uses of expression from copyrighted works, see, e.g, Bridgeport Music v. Dimension Films (6th Cir 2004), have exacerbated the problem. If creators must seek myriad licenses from multiple sources before releasing their works to the public, they will need to rely on the licensing resources of a major distributor. Watch Copyright Criminals: This is a Sampling Sport (2009), <http://www.copyrightcriminals.com/>. An additional factor in the disparity is the large capital investment once required to engage in mass distribution of an authors' works. See infra text accompanying note 48.

47 See generally Litman, supra note 2.

centuries than it does in the 21st. Until recently, mass distribution of copies of works of authorship required large capital investment. Paper, printing presses, broadcast towers, motion picture and video cameras, stores, trucks and the other incidents of mass distribution networks are very expensive. Before digital networks, it was entirely reasonable to assume that only if distributors could rely on collecting the largest share of proceeds from copyrighted works would the business of mass distribution seem likely to reward their investment.[48] Today, of course, there are many ways of disseminating works to everyone in the world without having to spend much money. One implication is that individuals can transmit copies of works to one another at insignificant expense. That is the one that's received all the attention, as copyright owners indulge in panic over unlicensed dissemination.[49] A second implication strikes me as more interesting: The new economics of digital distribution mean that we no longer need to shape our copyright law in ways that disadvantage creators vis a vis distributors unless we want to.

B. Readers' copyright

If creators are the natural subject of copyright, readers, listeners and viewers are its purpose. The most important reason we encourage creators to make, and distributors to disseminate, works of authorship is so that people will read the books, listen to the music, look at the art, and watch the movies.[50] We want readers, listeners and viewers to enjoy the works, learn from them, interact with them and communicate with one another about them. That is the way that copyright law promotes the Progress of Science.[51] In practical terms, that means we need to make sure there's enough freedom built into the law to ensure that copyright doesn't get in the way of reading, viewing and listening.

Readers, listeners and viewers[52] have, until recently, been the beneficiaries of a law designed to

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48 See, e.g., BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 5-9, 75-78 (1967).

49 See, e.g., *Protecting Copyright and Innovation in a Post-Grokster World, Hearing Before the Senate Judiciary Comm.*, 109th Cong., 1st Sess. (Sept. 28, 2005), at URL: http://judiciary.senate.gov/hearings/hearing.cfm?id=1624; *An Update – Piracy on University Networks: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 110th Cong. (2007); International Intellectual Property Alliance, Copyright Industries' Global Challenges for 2009, http://www.iipa.com/pdf/IIPA2009GlobalChallenges.pdf (visited July 20, 2009).

50 See id at 75-76; L. Ray Patterson, *Fair Use for Teaching and Research: The Folly of Kinko's and Texaco*, *in* LAURA N. GASSWAY, GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION AND SOCIETY 351, 356-63 (1997).

51 See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). See generally Lloyd L. Weinreb, *Copyright for Functional Expression*, 111 Harv. L. Rev. 1149 (1998).

52 The literature discussing the public's interest in copyright is struggling with the issue of just what should we call the folks who read, listen to, look at, watch, play, run and build works of authorship. Popular choices include "users," see L. Ray Patterson, *Free Speech, Copyright and Fair Use*, 40 Vand. L. Rev. 1 (1987); Julie Cohen, *The Place of the User in Copyright Law*, 74 Fordham L. Rev. 347 (2005); "consumers", see Niva Elkin-Koren, *Making Room for Consumers under the DMCA*, 22 Berkeley Tech. L.J. 1119 (2007); Joseph Liu, *Copyright Law's Theory of the Consumer*, 44 Boston College Law Review 397 (2003); and "fans," see Fred Von Lohmann, Is Suing Your Customers A Good Idea, Law.com (Sept. 29, 2004), at URL: <http://www.law.com/jsp/article.jsp?id=1095434496352>. See also Justin Hughes, *"Recoding" Intellectual Property*

allow most people to enjoy copyrighted works without worrying about the copyright law. For most of copyright law's history, it has applied narrowly, directly affecting only individuals and businesses for whom copyright was a central concern. By granting copyright owners control over specified, defined uses and leaving other uses unconstrained, copyright law gave readers, listeners and viewers considerable freedom to enjoy copyrighted works.[53] Copyright law protected only a small number of works, conferring narrow rights for relatively short periods of time. The limited scope of copyright left large free spaces that permitted readers, listeners and viewers to enjoy copyrighted works as they wanted to without attention to what the copyright law said. There weren't many express user rights in the statute; there didn't need to be. Congress or the courts stepped in to add express user rights only in instances in which copyright owners overreached the boundaries of their rights by filing suit over reasonable-seeming practices.[54] The basic architecture of the system respected the rights of readers, listeners and viewers by limiting the reach of copyright rights, rather than by setting out the scope of individual audience interests in explicit terms.

Throughout the 19th and 20th centuries, the idea that copyright law constrained how readers may read books, how listeners may listen to music, or how viewers could watch television programming would have been seen as a radical expansion.[55] As technology has enabled individuals to enjoy works in new ways, however, copyright owners have insisted on greatly enhanced control over their works. Copyright owners have insisted to Congress and the courts that, because copyrights are their property, nobody should be allowed to make a valuable use of a copyrighted work without paying the copyright owner.[56] Those arguments have fueled both statutory and non-statutory expansions in the scope of copyright rights.[57] After persuading Congress to enact a statute prohibiting anyone from

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and Overlooked Audience Interests, 77 Tex. L. Rev. 923(1999)("non-owners"). In this article, I call individuals enjoying copyrighted works "readers" or "readers, listeners and viewers."

53 See BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 25-36 (1967); Jessica Litman, *Lawful Personal Use*, 85 Tex. L. Rev. 1871 (2007).

54 The statute's express user exemptions provisions are idiosyncratic, and most of them trace their origin from ill-considered lawsuits. See, e.g., 17 U.S.C. 109(a) (allowing resale of lawfully made copies); Bobbs Merrill v. Straus, 210 U.S. 339 (1908); 17 U.S.C. § 1105(5)(A) (permitting people to play radio and television broadcasts in public places); Twentieth Century v. Aiken, 422 U.S. 151 (1975); 17 USC § 109(c) (permitting people to play videogames in public places); Red Baron v. Taito, 883 F. 2d 275 (4th Cir. 1989); 17 USC § 110(11) (permitting in-home use of censorware to block the sexual or violent scenes in movies released on DVDs); Cleanflicks v. Soderbergh, 433 F. Supp. 2d 1236 (D. Colo. 2006).

55 See Jessica Litman, *The Sony Paradox*, 55 Case Western L. Rev. 917, 932-42 (2005); L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry into a Need for a Federal Statute of Unfair Competition*, 17 Dayton L. Rev. 385 (1992).

56 See, e.g., *The Performance Rights Act and Parity among Music Delivery Platforms: Hearing before the Senate Judiciary Comm.*, 111th Cong (Aug. 4, 2009) (testimony of Marion Leighton Levy, Founder and Owner of Rounder Records); see also id. (testimony of Ralph Oman, lecturer, George Washington University, and former Register of Copyrights)("It comes down to this: as a matter of property rights, men and women who create and own a copyrighted work should have the right to get paid by the people who use their work. That's the basic premise of copyright protection.")

57 I have explored this expansion in earlier writing. See, e.g., Jessica Litman, *Billowing White Goo*, 31 Colum. J. L. & Arts 587 (2008).

circumventing technological protections that prevent unauthorized access or use,[58] copyright owners have distributed copies of works in incompatible formats, and insisted that purchasers of those copies have and should have no legitimate claim to be able to bypass technological locks.[59] Readers, listeners and viewers today face inconvenience and inflated prices, and a future in which businesses roll out more maddeningly incompatible formats.[60] If an important purpose of copyright law is to encourage reading, listening and viewing, a law that makes those acts less likely is counterproductive.[61] If the copyright system is designed in a way that significantly impairs the reading, listening and viewing of copyrighted works, then it will fail to accomplish one of its core goals.

Copyright laws that make reading, listening and viewing more difficult are problematic for a second reason: the sheer pointlessness of some of these restraints has undermined the perceived legitimacy of the United States copyright system.[62] Copyright law's legitimacy has suffered marked erosion in the public's view.[63] That damage is an independent threat to the health of the copyright system.

The widespread perception of the current copyright system as illegitimate should be unsurprising. Throughout copyright history, established players have sought to hold new players to

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[58] See Digital Millennium Copyright Act, codified at 17 USC §§ 1201-1204; RealNetworks v. DVD-CCA, __ F. Supp. 2d __, http://www.eff.org/files/filenode/RealDVD/Real%20v%20DVD-CCA%2C%20PI%20Order%20081109.pdf (C.D. Cal. 2009).

[59] See, e.g., Reply Comments Relating to Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies Submitted by DVD Copy Control Association, Docket No. Rm. 2008-8 (Feb. 2, 2009), at http://www.copyright.gov/1201/2008/responses/dvd-cca-inc-38.pdf ; Comments on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies Submitted by Motion Picture Association of America, Docket No. Rm 2008-8 (Feb. 2, 2009), at < http://www.copyright.gov/1201/2008/responses/mpaa-46.pdf>; Reply Comments Relating to Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies Submitted by the Software & Information Industry Association to the United States Copyright Office, Docket No. Rm 2008-8 (February 2, 2009) <http://www.copyright.gov/1201/2008/responses/software-information-industry-assoc-17.pdf > .

[60] See, e.g., TARLETON GILLESPIE, WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE 267-81 (2007); Nate Anderson, *DRM still sucks: Yahoo Music Going Dark, taking keys with it*, Ars Technica, July 24, 2008, at URL: http://arstechnica.com/news.ars/post/20080724-drm-still-sucks-yahoo-music-going-dark-taking-keys-with-it.html. There are other problems with current DRM regimes; some of them give publishers more control over purchased content than consumers have any reason to expect. In July of 2009, for example, Amazon.com resolved a copyright dispute with the publisher of George Orwell's *Animal Farm* and *1984*, by automatically deleting purchased copies of both ebooks from purchaser's Kindle e-book readers, and crediting their accounts for a "return." See David Pogue, Pogue's Posts: Some EBooks are More Equal than Others, New York Times, July 17, 2009, at URL: http://pogue.blogs.nytimes.com/2009/07/17/some-e-books-are-more-equal-than-others/.

[61] See Gillespie, supra note 60, at 273-79; John Rothchild, *The Social Costs of Technological Protection Measures*, 34 Fla. State U.L. Rev. 1181 (2007).

[62] See Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 Colum.-VLA J. L & Arts (2002); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 Houston L. Rev. 263, 264 (2004); Patry, supra note 30, at 161-70; John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, Utah L. Rev. (2007).

[63] Accord Paul Edward Gellar, *Beyond the Copyright Crisis: Principles for Change*, 55 J. Copyright Soc'y USA 165, 175 (2008); Patry, supra note 30, at xx-xxiv. See also Helprin, supra note 63, at xiii ("intellectual property rights do not anymore enjoy the presumption either that they are justified or that they will endure").

copyright rules written by and for established groups; the new players have challenged the legitimacy of that move, and by and large have succeeded in persuading Congress to enact new rules crafted to meet the new players' needs.[64] In the early 20th century, music publishers tired to bind piano roll makers to the rules they had set up with music printers; dramatists and novelists tried to force motion picture producers to follow the rules they had worked out with theatrical producers. In the 1920s, composers sought to require business establishments with radios to license music as if they were mounting live performances; in the 1930s, composers and music publishers made the same demands on motion picture theaters showing talkies. In the 1970s, copyright owners and broadcast television stations insisted that cable television operators should need to license every signal they transmitted on the same terms as broadcast television; in the 1980s, they made comparable demands of satellite TV companies. In the 1990s, copyright owners insisted that Internet service providers should seek permission for every computer copy of any work on the same basis that publishers and record labels were required to license printed books and records. In every case, the businesses exploiting the new medium successfully insisted that the new medium required new, medium-specific rules.[65] Today, book publishers, record labels and motion picture studios maintain that the laws they agreed on among themselves to govern their interactions with one another are the rules that should apply to all the ordinary readers, listeners and viewers in their audiences.[66] That seems no easier to justify than the earlier efforts.

Indeed, the dangers of this particular legitimacy crisis may be more significant than attacks by earlier outsider groups, because a public citizenry that believes its copyright law is illegitimate may respond by withdrawing its support from the system. The public, after all, invests in the copyright system both by granting rights to copyright owners through the enactment of copyright laws, and by complying with the laws its Congress enacts.[67] If the public perceives copyright law to give it a poor return on its investment, it may well respond by divesting – either pressing its elected representatives to enact additional limitations and privileges, or simply failing to comply with rules it no longer perceives as legitimate. Millions of citizens use unlicensed peer-to-per file sharing applications to share music with each other, even though they face a highly publicized risk of being sued for hundreds of thousands of dollars. Many, perhaps most of them don't believe they're doing anything wrong. Enforcing copyright law in an atmosphere of public cynicism about the legitimacy of the law is a difficult task. A public that complies with copyright only because it's afraid of the copyright police will soon find ways to evade or restrain the copyright police. The long-term health of the copyright system, thus, requires that members of the public believe that their investment in copyright is well spent.

C. Intermediaries' copyright

The copyright system has traditionally relied on two different sorts of intermediaries whose motivation to further the goals of copyright is primarily economic. Distributors commonly make and

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64 See Litman, supra note 1, at 39-41, 47-48, 58-62, 122-45.

65 See id. at 39-47, 58-60, 127-36.

66 See id. at 114-17.

67 See Joel R. Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 Houston L. Rev. 1073 (2008). Reidenberg deploys this insight to argue that copyright disobedience is a frontal challenge to the rule of law.

distribute copies of works of authorship and authorize other uses. Under the legacy system we have inherited, distributors own the copyright and license reproduction, adaptation, and public distribution, performance and display. Other intermediaries, whom I term "makers," invent and market devices and services for enjoying works of authorship, without themselves engaging in licensed uses. The relationship between distributors and makers has been contested for much of copyright's history.

1. Distributors

Under the conventional law-and-economics view of copyright, distributors are essential.[68] By creating a market for copyrighted works, they both provide the money that acts as an incentive for creators to make new works and move copies or performances of those works to where readers, listeners and viewers can enjoy them.[69] As the entities who buy copyrights from creators, these intermediaries claim to stand in the shoes of the audience for the works;[70] as the interests who sell copies and performances to individual readers, viewers and listeners, they claim to stand in the shoes of creators and collect rents on their behalf.[71] Of course, distributors don't enter into the copyright marketplace solely to promote the "Progress of Science;"[72] their participation in the copyright system is fueled primarily by self-interest.

Distributors find a lot to complain about in their current position in the copyright system. Although distributors were primarily responsible for the design of the current statute, they are discovering that they failed to anticipate and solve many of the problems its architecture poses in the networked digital environment. Part of distributors' difficulty -- the part that has garnered the most attention -- stems from the challenges posed by digital distribution. The ease of unlicensed digital dissemination threatens the model underlying most distributors' businesses.[73]

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[68] See, e.g., Jane C Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1907-16 (1990); 1 PAUL GOLDSTEIN, COPYRIGHT: PRINCIPLES, LAW AND PRACTICE 4-20 (1989). See also American Geophysical v. Texaco, 802 F. Supp. 1, 15 (SDNY 1992) ("copyright protection is essential to finance the publications that distribute" scientific articles, even though authors are not paid for them), aff'd, 60 F.3d 913 (2d Cir. 1994).

[69] See, e.g., Paul Goldstein, *Derivative Rights and Derivative Works*, J. Copyright Soc'y (198); Wendy Gordon, *Fair Use as Market Failure*, 82 Colum. L. Rev. 1600, 1602 (1982).

[70] See. e.g., *Music Licensing Reform: Hearing Before the Senate Judiciary Committee*, 109th Cong (July 12, 2005) (testimony of Rob Glaser, RealNetworks, Inc., for Digital Media Assn), URL: <http://judiciary.senate.gov/testimony.cfm?id=1566&wit_id=4447>; id. at __ (testimony of Ismael Cuebas, TransWorld Entertainment Corp., for National Association of Recording Merchandisers), URL: <http://judiciary.senate.gov/testimony.cfm?id=1566&wit_id=4451>.

[71] See, e.g., id. at __ (testimony of Irwin Z Robinson, Famous Music Publishing, for National Music Publishers Assn.), URL: http://judiciary.senate.gov/testimony.cfm?id=1566&wit_id=4453.

[72] U.S. Const. Art. I, § 8, cl. 8: "Congress shall have the power…To promote the Progress of Science and the useful Arts…"

[73] See, e.g, Jane Ginsburg, *Essay: From Having Copies to Experiencing Works: the Development of an Access Right in U.S. Copyright Law*

A different but equally pressing set of problems derives from the tangled snarls attending licensing of copyrighted works.[74] The law is hospitable for large and well-established players pursuing traditional business models. Lobbyists for copyright-owning businesses have succeeded in persuading Congress to enact copyright laws that allocate much of the benefit of copyright to intermediaries, and that incorporate powerful benefits for incumbents.[75] So long as a distributor is an established large copyright player determined to continue to do whatever brought it success in the past, the current U.S. copyright law is its friend. Control of a large repertoire of copyrighted works or of large media outlets combined with economies of scale in licensing transactions enable established players to license conventional uses with only modest difficulty. A distributor seeking to exploit works in new media, though, faces daunting difficulties in identifying the rightsholders entitled to license its uses and negotiating the terms of the licenses.[76] Even established industry groups have complained that the licensing provisions of the current law are simply unworkable for newer uses.[77] Innovations like copyright divisibility,[78] which seemed like a good idea at the time,[79] have vastly complicated the licensing of copyrighted works by subjecting would-be licensees to multiple and sometimes inconsistent demands.[80] Small businesses that want to pay reasonable royalties for the opportunity to

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74 See Music Licensing Reform, supra note 13 (testimony of Glen Barros, Concord Music Group), URL: http://judiciary.senate.gov/testimony.cfm?id=1566&wit_id=4449; id. (testimony of Rob Glaser, RealNetworks).

75 This advantage comes in two basic flavors. First, when Congress enacts the rules surrounding a new right, license or exception, it defines it in narrow terms that fit the current practice of the incumbents who negotiated the statutory provision, but are not useful for outsiders. The exception in section 117(c) allowing computer maintenance and repair services to turn on computers for the sole purpose of maintaining or repairing them was drafted with sufficient narrowness to make it unavailable to people who wish to turn on their computers for other purposes. See 17 USC § 117(c). Second, Congress commonly gives copyright goodies to the incumbents who request them. Thus, when Congress in 1998 extended copyright terms by 20 years, it vested the extended term in current copyright proprietors rather than authors, subject to a narrow and difficult-to-exercise termination right for a limited class of authors who had not previously sought to recapture their copyrights. See *Sonny Bono Copyright Term Extension Act*, title I of Pub. L. No. 105-298, 112 Stat. 2827 (codified at 17 USC § 304). The termination provisions, like those for the 1976 extension of copyright term, make it more difficult to reassign rights under a terminated copyright grant to anyone other than the original grantee. See 17 USC § 304(c)(6)(C),(D).

76 See *Music Licensing Reform*, supra note 13; *Editorial*: *Orphan Works*, 12 D-Lib magazine #6 (June 2006), at <http://www.dlib.org/dlib/june06/06editorial.html>.

77 See, e.g., *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 108th Cong. 22-37 (July 15, 2004) (testimony of Dan Halyburton for the NAB); *Section 115 of the Copyright Act: In Need of an Update? Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 108th Cong. (March 11, 2004).

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

79 See H.R. Rep. 1476, 94th Cong., 2d Sess. 123 (1976)("[divisibility] has long been sought by authors and their representatives, and … has attracted wide support from other groups").

80 See, e.g., U.S. v. ASCAP, No. 41-1395, <http://www.digmedia.org/docs/DOC3528.PDF> (SDNY April 25, 2007); Mark A. Lemley, *Dealing With Overlapping Copyrights on the Internet*, 22 U. Dayton L. Rev. 547 (1997); Jessica Litman, *Sharing & Stealing*, 26 Hastings Comm./Ent. 1 (2004); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 Case W. Res. L. Rev. 673 (2003).

exploit works in new markets can face insuperable difficulties in arranging to do so.[81] Failing to cross all the t's and dot the right i's, even with the assistance of counsel, is a good way to find your business sued into bankruptcy.[82]

Some erosion in the position of distributors under copyright is probably both natural and desirable. As expensive methods of distribution yield to inexpensive alternatives, the justification for giving distributors the lion's share of the copyright fades.[83] Where the design of the statute introduces unnecessary uncertainty, expense and obstacles into distribution, though, it's simply wasteful.

2. Makers

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

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

Toward the end of the Nineteenth Century, music publishers filed unsuccessful copyright infringement suits against the manufacturers of pianos and piano rolls.[84] Rebuffed by the courts, music publishers persuaded Congress to extend copyright in 1909 to encompass control of "parts of

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[81] See, e.g., 20th Century Fox v. iCrave TV, 53 U.S.P.Q.2D (BNA) 1831 (WD Pa. 2000); Country Rd. Music, Inc. v. MP3.com, Inc., 279 F. Supp. 2d 325 (SDNY 2003); SoundExchange, Important Notice: No Waiver of Rights at URL: http://www.soundexchange.com/ (visited April 2, 2008).

[82] See Paramount Pictures Corp. v. RePlayTV, 298 F. Supp. 2d 921 (C.D. Cal. 2004); Copyright.net Music Publ'g LLC v. MP3.com, 256 F. Supp. 2d 214 (SDNY 2003); John Borland, *iCraveTV.com's exec discusses his start-up's short life*, c|net News.com, Feb. 29, 2000, at http://www.news.com/2100-1033-237450.html.

[83] I am indebted to Michael Carroll for this insight. See Michael Carroll, *Whose Music is it Anyway?,* 72 U. Cinn. L. Rev. 1405, 1471 (2004).

[84] See White-Smith v. Apollo, 209 U.S. 1 (1908); Kennedy v. McTammany, 33 F. 584 (CCD Mass. 1888). See also Stern v. Rosey, 17 App. D.C. 562 (1901)(not copyright infringement to make and sell wax cylinders for phonograph)

instruments serving to reproduce mechanically the musical work."[85]

When radio broadcasts became common, copyright owners sought to enjoin broadcasters from unlicensed broadcast of the works, and establishments from unlicensed use of radios on their premises. The lawsuits generated a confusing array of conflicting decisions.[86] When courts assimilated either the radio broadcast or the use of a radio on commercial premises to a live musical performance, they held for the music publisher;[87] when, instead, they assimilated it to a device or service assisting the listener, they held it non-infringing.[88]

The notion that instrument makers should be held legally responsible for deriving a parasitic benefit from copyrighted works gained traction in the mid-twentieth century with the ubiquity of jukeboxes.[89] Under the 1909 Copyright Act, unlicensed public performances of music using jukeboxes were exempt from copyright liability.[90] Copyright owners insisted that the exemption promoted "legalized piracy of music by jukeboxes,"[91] and urged Congress to close the loophole. A sponsor of an unsuccessful 1959 bill seeking to remove the statutory jukebox exemption explained: "The basic theory behind this legislation is that everybody who makes a profit from the use of musical or literary property should pay his fair share."[92] Despite the Copyright Office's support, that juke box bill and others like it failed to overcome political opposition.[93]

In 1976, motion picture studios relied on the same basic theory in filing suit against Sony for

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85 See An Act to Amend and Consolidate the Acts Respecting Copyright, March 4, 1909, 35 Stat. 1075 [1909 Act] § 1(e).

86 See Buck v. Debaum, , 40 F.2d 734 (1929); Jerome H. Remick Co. v. GE Co., 16 F.2d 829 (SDNY 1926); Jerome H. Remick Co. v. American Auto Accessories, 298 F. 628 (SD Ohio 1924), rev'd 5 F.2d 411 (6th Cir. 1925); M. Witmark & Sons v. Bamberger, 291 F. 776 (DNJ 1923). Early radio broadcaster defendants were often manufacturers or sellers of radio receiving sets who operated broadcast stations to promote the sale of their radios. See, e.g., Jerome H. Remick Co. v. American Auto Accessories, 298 F. at 629.

87 See Buck v. Jewell-La Salle Realty Co., 283 U.S. 191 (1931); Jerome H. Remick Co. v. GE Co., 16 F.2d 829 (SDNY 1926);

88 See Buck v. Debaum, 40 F.2d 734 (SD Cal. 1929); Buck v. Duncan, 32 F.2d 366 (WD Mo 1929) , rev'd sub nom. Buck v. Jewell-La Salle Realty Co., 283 U.S. 191 (1931). See also Aiken, Teleprompter, Fortnightly.

89 See generally *Authorizing Royalties for Musical Compositions on Coin-Operated machines: hearings Before Subcomm. No. 3 of the House Judiciary Comm.*, 86th Cong. (1959).

90 See 1909 Act § 1(e). See generally Jessica Litman, War Stories, 20 Cardozo Arts & Entertainment L.J. 350-54 (2002);

91 Id. at 3.

92 Id. at 6 (remarks of Rep. Emanuel Celler).

93 See Copyright Law Revision Part 6: Supplementary Report ODF th Register of Copyrights on the General Revision of the Copyright Law (House Committee Print) , 80th Cong., 1st Sess. 59-61 (1965).The jukebox exemption remained in the law until 1976, when it was replaced by a lightly enforced compulsory license at a nominal $8 annual rate. Congress replaced the compulsory license with a voluntary blanket license in 1989 when it ratified the Berne Convention. See 17 U.S.C. § 116.

marketing the Betamax home video recorder.[94] The studios argued that Sony's Betamax machines enabled individual consumers to copy the studio's television programs without the studios consent. Any unlicensed copy, they argued, infringed their copyrights. Because it made and sold machines designed to make those copies, Sony should be held liable.[95] The United States Supreme Court rejected the theory: "One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home, or have enacted a flat prohibition against the sale of machines that make such copying possible."[96] In 1991, however, copyright owners filed a suit on a similar theory to enjoin the sale of digital audio tape recorders.[97] To persuade plaintiffs to drop the suit, consumer electronics manufacturers agreed to support legislation obliging the makers and sellers of digital audio recording devices and media to implement copy protection technology and to pay royalties to compensate copyright owners for forgone sales.[98] The 1992 *Audio Home Recording Act* implemented this compromise.[99]

In the ensuing years, statutory and regulatory provisions reaching makers, and suits to hold them liable as contributory infringers, have become familiar. In 1998, the Recording Industry Association of America filed suit to enjoin the sale of the first portable MP3 player.[100] The 1998 Digital Millennium Copyright Act incorporated both narrow requirements that instrument makers implement copy protection technology and broad prohibitions on making, selling, trafficking in or providing instruments that might facilitate infringing acts by defeating copy protection technology.[101] Some copyright owners maintain that Internet service providers should be obliged to redesign their architecture to incorporate infringement-prevention technology.[102] This expansion in the scope of copyright has encouraged copyright owners to insist that making money from copyrighted works should be actionable without regard to whether the entity earning the money is invading the copyright owners' express statutory prerogatives by actually reproducing, publicly distributing or publicly performing their works.

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94 See generally JAMES LARDNER, FAST FORWARD (2002).

95 See Universal Studios v. Sony, 480 F. Supp. 429, 432 (C.D. Cal. 1977), rev'd, 659 F.2d 963 (9th Circ. 1981), rev'd 464 US 417 (1984).

96 Sony v. Universal Studios, 464 US 417, 456 (1984).

97 Cahn v. Sony, 90-CIV-4537 (S.D.N.Y. filed Jul. 10, 1991).

98 See H. R. Rep. No. 873 part 1, 102d Cong. (1992).

99 Public L. No. 102d Cong., 106 Stat. 4237 (1992), codified at 17 USC §§ 1001-1010. One of the law's provisions prohibits copyright infringement suits against consumers for noncommercial copying of musical recordings; the scope of that provision remains controversial.

100 See Recording Indus. Ass'n of America, Inc. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624 (C.D. Cal. 1998), aff'd, 180 F.3d 1072 (1999). The court refused to enter the injunction.

101 Digital Millennium Copyright Act, Pub. L. 105-304, 112 Stat. 2680 (1998), codified in 17 USC § 1201

102 See Saul Hansell, *Bits Debate: Should Internet Service Providers Block Copyrighted Works*, New York Times, January 16, 2008, at < http://bits.blogs.nytimes.com/2008/01/15/bits-debate-should-internet-providers-block-copyrighted-works/>; Mehan Jayasuriya, Jef Pearlman, Robb Topolski, Michael Weinberg, & Sherwin Siy, Forcing the Net Through a Sieve: Why Copyright Filtering is Not a Viable Solution for U.S. ISPs (2009), at <http://www.publicknowledge.org/pdf/pk-filtering-whitepaper-200907.pdf>.

There are a variety of troubling developments associated with this particular trend. First, the effort to hold makers liable as contributory infringers for facilitating enjoyment of works of authorship in unauthorized ways has required copyright owners to claim that the readers, listeners and viewers who make use of the new devices and methods are direct infringers. The alleged direct infringers are not themselves before the court and cannot argue that their uses are within the law, and the defendant makers have only limited incentives to argue on their behalf. That has resulted in inexorable rights creep as courts assume without deciding, or decide without reflecting, that a variety of personal uses violate the copyright law.[103] The legal cloud on profiting from new devices or services that enable enjoyment of works of authorship, meanwhile, deters investment in businesses that might further copyright's core goals by increasing the audience for works of authorship or the value of paying to enjoy them.[104] Those new opportunities may eat into the market share of the businesses that currently dominate the dissemination of works of authorship, but may also encourage greater dissemination and enjoyment of extant works as well as the creation of new ones. It makes little policy sense, then, to give the businesses that currently dominate the market for works of authorship the ability to prevent the development of new instruments, at least absent a persuasive showing that makers were reaping too much and creators or distributors too little under the current allocation of rights, such that a simple wealth transfer would improve the health of the system. We have never given copyright owners the right to control the sale, purchase or use of pencils, crayons, paper, scissors, or glue, despite the near-certainty that some times they will be used to commit infringing acts. The same principle should apply to circuit boards, transistors, and electrons.

D. Summary

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

II. Copyright Reform Realism

The problems I've just raised are not the major focus of current efforts to stake out positions in

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[103] See, e.g., MGM v. Grokster, 545 U.S. 913, 925-27 (2005); A&M v. Napster, 239 F.3d 1004, 1014-19 (9th Cir. 2001); Intellectual Reserve v. Utah Lighthouse Ministry, 75 F. Supp. 2d 1290, 1294 (D. Utah 1999).

[104] See Fred Von Lohmann, *Fair Use as Innovation Policy*, 23 Berkeley Tech. L.J. __ (2008).

connection with future copyright reform.[105] Instead, representatives of major copyright players currently seem to see statutory reform as an opportunity to cement their most heroic (by which I mean least plausible) victories[106] and reverse their unanticipated defeats.[107] There's little serious attention paid to the idea that we may be able to build a cheaper, more efficient and better distribution system for copyrighted works without bribing intermediaries by first endowing and then divesting creators. Most industry proposals to reform copyright law to accommodate networked digital technology are taking the opposite approach: they seek to broaden distributor rights and augment distributor control to compensate for the supposed decrease in copyright owner incentives effected by the threat of cheap and abundant unlicensed copies.[108]

The gist of many of the proposals currently making the rounds is to shore up weaknesses in the positions of established distributors vis a vis makers and other intermediaries as well as readers, listeners and viewers. Thus, some copyright owners support replacing the convoluted and outdated licensing provisions in the statute with language that would streamline licensing when they seek licenses, while requiring their permission when others seek licenses from them.[109] Others seek to enhance copyright-owner control over uses of copyrighted works, to enable owners to monetize, or at

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[105] Copyright scholars have, in fact, made a number of thoughtful proposals for recasting copyright law to give greater benefit to authors or to the public. See, e.g., WILLIAM FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT (2004); Paul Edward Gellar, supra note 11; Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 Houston L. Rev. 263, 286-88 (2004); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 Harv. J.L. & Tech. 1 (2003); Jerome H. Reichman, Graeme B. Dinwoodie, & Pamela Samuelson, *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 Berkeley Tech. L.J. 981 (2007); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, Utah L. Rev (2007). As far as I can discern, none of these proposals seems to have attracted serious legislative attention.

[106] E.g., Hotaling v. Church, 118 F.3d 199 (4th Cir. 1997); American Geophysical Union v. Texaco, 60 F. 3d 913 (2d Cir. 1994); US v. ASCAP, <http://www.digmedia.org/docs/DOC3528.PDF> (SDNY 2007); MAI v. Peak, 991 F.2d 511 (9th Cir 1993).

[107] E.g., US v. ASCAP, <http://www.digmedia.org/docs/DOC3528.PDF> (SDNY 2007). The usual outcome is for the two sides to agree on a provision that accepts the general principle underlying the heroic, implausible victory while rejecting its application in factual situations similar to those presented in the lawsuit. See Jessica Litman, *Billowing White Goo*, 31 Colum. J. L. & Arts 587, 592-3 (2008). Thus, MAI v. Peak, 911 F. 2d 511 (9th Cir 1993), held that a computer maintenance service made infringing copies of software when it turned on computers to service them. The holding was a surprising and controversial reading of the statutory language. See, e.g., Pamela Samuelson, *Legally Speaking: The NII Intellectual Property Report*, Communications of the ACM, December 1994. As part of the Digital Millennium Copyright Act, Congress enacted an express exemption for computer maintenance services to turn on computers to service them, but, bowing to industry pressure, didn't repudiate the surprising general conclusion that turning on a computer, without more, could constitute infringement of the copyright in the computer's operating system software. See 17 USC § 117.

[108] See, e.g., Karen Dearne, *Secrecy Claims on Copyright Treaty*, Australian IT, Aug. 19, 2008, at URL: http://www.australianit.news.com.au/story/0,24897,24202770-5013044,00.html.

[109] This posture has made resolution of the music and sound recording licensing provisions of sections 114 and 115 elusive. The affected businesses are commonly both licensees and licensors for common uses. They seek uncomplicated statutory licenses for their own uses and complete licensor control of the terms when licensing material to someone else. See, e.g., *Internet Streaming of Radio Broadcasts: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 108th Cong. (July 15, 2004); *Section 115 of the Copyright Act: In Need of an Update? Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 108th Cong. (March 11, 2004).

least monitor, any uses that have value.[110] These ideas would extend copyright rights and enforcement to myriad personal uses, including uses that are noncommercial and nonpublic, on the theory that copyright should enable copyright owners to profit from and control all valuable uses of their works.[111]

The story told in support of these efforts is that networked digital technology poses a fundamental threat to the copyright system, by making it easy and cheap for individuals to make multiple perfect copies of works in digital formats and to distribute those copies all over the world.[112] The cheap and easy availability of unlicensed copies is said to have severely undermined the copyright incentive by depriving copyright owners of the control of the mass distribution of their works.[113] Unless we repair the leaks in the copyright dike, some copyright owners claim, authors will be reluctant to create new works and publishers, motion picture companies and record labels will be reluctant to make the investment in distributing them.[114] Thus, it is essential to augment available legal tools to restore their control over the making and distribution of copies of works, and (they continue) we have in fact bound ourselves to do just that in signing intellectual property treaties with our trading partners.[115] At the same time, they insist, copyright owners are entitled to the benefit of new forms of revenue that networked digital technology makes available, and the copyright statute should clarify that control of those new uses belongs, and should belong, to the owners of the copyright.[116]

It's worth questioning the premises that underlie this story, which embodies what I described

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110 See, e.g., *Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 108th Cong.(July 31, 2007); *An Update – Piracy on University Networks: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 110th Cong. (2007); *Content Protection in the Digital Age: The Broadcast Flag, High-Definition Radio, and the Analog Hole: Oversight Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 109th Cong. (2005).

111 See Jessica Litman, *Billowing White Goo*, 31 Colum. J. L. & Arts 587, 595-99 (2008).

112 See Jane C. Ginsburg, *From Having Copies to Experiencing Works: the Development of an Access Right in US Copyright Law*, 50 J. Copyright Soc'y 113 (2003); see, e.g., *Piracy Deterrence and Education Act: Hearing on H.R. 2517 Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 108th Cong. 61-66 (July 17, 2003) (testimony of Maren Christensen, Universal Studios).

113 See, e.g., Stephen Manes, *Full Disclosure: Copyright Law – Ignore at Your Own Peril*, PC World, July 30, 2003, at URL: <http://www.pcworld.com/article/id,111657-page,1-c,copyright/article.html>.

114 See, e.g., Helprin, supra note 63, at 81-86; Henry Horbaczewski, *Copyright Under Siege: Reflections of an In-House Counsel*, 53 J. Copyright Soc'y 387 (2006).

115 See, e.g., *Joint Study on 17 U.S.C. Sections 109 and 117 Required Pursuant to DMCA Section 104: Public* Hearing Before the US Copyright Office and the National telecommunications and Information Administration (November 29, 2000) at URL: <http://www.copyright.gov/reports/studies/dmca/testimony/transcript.pdf> (testimony of Steven Metalitz, on behalf of major trade associations); Brief Amicus Curiae of American for Tax Reform at 15-18, 2007 WL 6101600 (filed July 12, 2007), Cartoon Network v. CSC Holdings, 536 F.3d 121 (2d Cir 2008).

116 See, e.g., *Internet Streaming of Radio Broadcasts: Balancing the Interests of Sound Recording Copyright Owners with Those of Broadcasters: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the House Judiciary Comm.*, 108th Cong. 37-39 (July 15, 2004) (testimony of Steven Marks for the RIAA). See generally Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of Rights Management*, 97 Mich. L. Rev. 462 (1998) (critiquing argument).

earlier as the "conventional law-and-economics view of copyright,"[117] under which distributors are essential copyright actors and their interests simultaneously align with the interests of creators and of readers, listeners and viewers. Whether strong distributor rights benefit either creators or readers is an empirical question that has not yet been subject to empirical testing.[118] It has some intuitive appeal. It is politically convenient if one happens to be a lobbyist for a distributor. This notion has justified a relentless aggrandizement of distributors' copyright rights over the past 100 years. In that period, the scope of copyright has expanded enormously.[119] The bulk of that expansion has enriched copyright intermediaries, rather than creators and readers.[120] If apologists for distributors are right that creators

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[117] See supra text accompanying note 68; Cohen supra note 116; Patry, supra note 30, at 62.

[118] See David McGowan, *Copyright Nonconsequentialism*, 69 Missouri L. Rev. 2, 2-7 (2004); Patry supra note 30, at 62.

[119] See, e.g., NEIL WEINSTOCK NETANEL, COPYRIGHT'S PARADOX 54-80 (2008).

[120] During the 15 to 20 years that digital dissemination has emerged as a viable alternative to distribution of hard copies using factories, store-fronts and trucks, the copyright owner's legal control over potential uses of protected works has grown, rather than ebbed, through a massive, almost entirely non-statutory, expansion of the scope of copyright rights. See Jessica Litman, *Billowing White Goo*, 31 Colum. J. L. & Arts 587, 593-96 (2008). The United States Congress hasn't revisited the basic language of section 106 to redefine the scope of copyright rights in more than 30 years (the exception is subsection 106(6), added to the statute in 1995), but our understanding of the scope of each of the rights has grown much broader than Congress initially intended. As originally understood, copyright owners' exclusive rights were bounded, enabling copyright owners to control particular uses of their works but not others. See James Boyle, *Intellectual Property Policy Online: A Young Person's Guide*, 10 Harv/ J. L. & Tech. 47, 56 (1996); H. R. Rep. 1476, 94th Cong. 61-65 (1976). Those boundaries, though, have in recent years been melting away. Representatives of copyright owners have, for example, persuaded courts that the section 106(1) right "*to reproduce a work in copies or phonorecords*," initially understood as the right to manufacturer the sorts of objects that required copyright notice, extends far beyond the original meaning of the statutory provision to encompass any appearance of a part of a work in the memory of a computer. See, e.g., MAI v. Peak, 911 F.2d 511 (9th Cir. 1993); Ticketmaster L.L.C. v. RMG Techs., Inc., 507 F. Supp. 2d 1096 (C.D. Cal. 2007). Record companies have claimed, with mixed success, that the section 106(3) right to "*distribute copies to the public by sale or other transfer of ownership or by rental, lease or lending*" is broad enough to cover acts that don't necessarily involve distributing any copies to the public, any sale, any transfer of ownership, or any rental, lease or lending. See, e.g., Capitol Records v. Thomas, No. 06-cv-1497 (D. Minn. 2007); In re Napster Copyright Litigation, 377 F. Supp. 2d 796, 802-05 (N.D. Cal. 2005); Atlantic Recording Corporation v. Brennan, No. Civil No. 3:07cv232 (D. Conn. Feb. 13, 2008); Electra Entertainment Group v. Barker, No. 05-CV7430 (KMK)(THK), Plaintiff's Opposition to Defendant's Motion to Dismiss (Jan. 24, 2006), at 15-20. The statute draws a line between public performances and displays, which it subjects to copyright owner control, and private ones, which it does not. That line is gradually disappearing, as copyright owners argue that individual transmissions to people in their homes should always be deemed public. See, e.g., Twentieth Century Fox v. Cablevision Systems Corp, 478 F. Supp. 2d 607 (S.D.N.Y. 2007). Owners of particular statutory rights have insisted on expansive construction of the definitions of those rights in part to grab potential new revenue streams, in part to forestall potential competitors, and in part to establish that new digital uses fall within their part of the statute instead of belonging to the owners of different statutory rights. See, e.g., United States v. ASCAP: In re America Online, 485 F. Supp. 2d 438 (SDNY 2007)(dispute over whether digital download is a "public performance"). Bounded copyright rights are morphing into an all-purpose general use right, and our understanding of copyright is evolving into the view that any use of a copyrighted work that is not authorized by the copyright owner or the statute is infringement. See *Billowing White Goo*, *supra*. In *Lawful Personal Use*, supra note 53, I argued that that construction of the statutory scheme was untenable; both legislative history and case law contradict it. Congress does not appear to have believed at any point that its copyright law empowered copyright owners to control ordinary reading, listening or viewing, or the personal copying, adaptation, performance and display that was incidental to reading, listening or viewing. See id. at 1904-07; accord L. Ray Patterson, *Understanding Fair Use*, 55 L. & Contemp. Probs. 249, 260-63 (1992). Courts, for their part, have repeatedly (if inconsistently) construed the statute narrowly to immunize both public and commercial uses because of the potential impact of copyright owner control on personal reading, listening or viewing. See *Lawful Personal Use*, supra note 10, at 1883-94. Nonetheless, the idea that copyright gives and should give the copyright owner control over all uses that

and readers benefit indirectly from any enhancement in distributors' copyright rights, then enhancing their copyright rights still further should automatically enrich us all. If the realities of the copyright system undermine its resemblance to the simple law-and-economics model, on the other hand, the only thing we may end up enhancing by such a course is what economists refer to as "deadweight loss."[121] The deficiencies of the copyright system I outlined earlier for the creators and readers it is designed to serve may be due at least in part to a misallocation of copyright benefits – giving intermediaries more control over the dissemination and enjoyment of works than makes sense in a networked digital world.

Suggestions that the sticks in the copyright bundle are already thicker than they should be commonly meet an incentive-based objection to any reduction in the scope, depth, strength or duration of copyright rights. Diminishing copyright will decrease authors' incentives to create and distribute new works, leaving readers, listeners and viewers with fewer new works to enjoy. The copyright incentive story turns out to be cloudier than its proponents admit. As David McGowan has succinctly argued, the economic justification for any particular copyright rule rests on instinct and guesswork.[122] The economic rationale for copyright law ascended to the status of an article of faith in the absence of any empirical validation. It may be that in the wake of the 1998 statute increasing the duration of all copyrights by twenty years,[123] publishers increased the advances paid to authors, and motion picture studios gave their screenwriters a raise. It could be that, in response to the 1995 Digital Performance Right in Sound Recordings Act,[124] musicians greatly increased the quality of their musical recordings. As Professor McGowan puts it: "We do not have the data, so we cannot do the math, so we cannot say for sure."[125]

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

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are not expressly exempted is steadily gaining currency. See id. at 1895, 1919-20; Jessica Litman, *Creative Reading*, 70 L. & Contemp. Probs. 175, 180-81 (2007). It seems persuasive to copyright lawyers and scholars today because we have forgotten that readers, listeners and viewers are central to the copyright system.

121 See, e.g., Julie E. Cohen *Copyright and the Perfect Curve*, 53 Vanderbilt L. Rev. 1799, 1801-04 (2000).

122 McGowan, supra note 118; accord Cohen, supra note 116.

123 Sonny Bono Copyright Term Extension Act, title I of Pub. L. No. 105-298, 112 Stat. 2827 (amending chapter 3, title 17, *United States Code,* to extend the term of copyright protection for most works to life plus 70 years), enacted October 27, 1998.

124 Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (amending, *inter alia,* §114 and §115, title 17, *United States Code*), enacted November 1, 1995.

125 McGowan, supra note 118, at 26. If anyone in the copyright lobbying business believed that such an effect could be demonstrated, you'd expect them to try to collect the data, but perhaps they don't believe that Congress needs any persuasion on the point.

If the current, modest share of copyright that creators enjoy suffices to inspire continued authorship, and the current modest degree of reader, listener and viewer liberties suffices to encourage enjoyment of the works that creators produce, one might ask: what work is being done by all that money in the middle? Perhaps the incentives the current copyright system offers for intermediaries to invest in the production and dissemination of works of authorship are simply excessive in a digital world.[126] Maybe the prospect of hefty monopoly rents has encouraged distributors to spend heavily on efforts to constrain the market for competing works or competing channels of distribution. Oversize distributor incentives might be reinforcing impulses to keep less profitable works from the public to enhance the opportunity to market more profitable works. Such a system may be encouraging wasteful investment in digital rights management technology. Indeed, if distributor incentives are excessive, one might expect that to inspire a hideously expensive series of lobbying efforts to craft copyright provisions that will serve as effective entry barriers to competing media. That's as good a description of the current efforts at copyright reform as any. Would the copyright system function as a healthier ecosystem if we just got rid of all that extra incentive?

Instead of asking how to enhance copyright owner control, I suggest, we ought to be asking why.[127] Does a particular proposed enhancement of copyright owner prerogatives seem likely to expand opportunities for creators or improve reader, listener or viewer enjoyment of copyrighted works? Is it likely to make the copyright system simpler, more effective, or more transparent? Does it seem to be designed to shore up copyright's apparent legitimacy? If not, it seems as likely to make the current mess worse instead of better.

All copyright systems gives creators control over some but not all of the opportunities for commercial exploitation of the works they create. The limited nature of the protection is fundamental, because it preserves incentives and opportunities to promote the progress of science in ways other than creating new works. Thus, the actors I described earlier as "makers" help to enhance the opportunities to connect authors and their audiences, giving creators new opportunities to communicate (and earn money) at the same time as they give readers, listeners and viewers new ways to interact with and enjoy works of authorship. Even protectionist copyright lawyers concede the general proposition that copyright should gives authors control over only some valuable uses of their works, but people disagree passionately about where to draw the lines. We have no hard empirical data,[128] so we fall back on models derived from past and present copyright systems. Some make theoretical arguments that if we enhance the scope and duration of copyright rights, distributors will be willing to pay more creators more money for the rights to exploit their distributions. The economic theory underlying these assertions is completely plausible,[129] but repeated attempts to turn theory into practice by expanding the

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126 See Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the DMCA*, 87 Virginia L. Rev. 813, 870-93 (2001).

127 See Sara K. Stadler, *Forging a Truly Utlitarian Copyright*, 61 Iowa L. Rev. 609, 664 (2006); Sara K. Stadler, Incentive and Expectation in Copyright, 58 Hastings L.J. 433 (2007).

128 See McGowan, supra note 118.

129 See Randall C. Picker, *Of Pirates and Puffy Shirts: A Comment on the Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, Virgina L. Rev. __ (200_); Goldstein, supra note 69; Jane Ginsburg, *Creation and Commercial Value*, 90 Colum L. Rev. 1865 (1990) Jane Ginsburg, *Putting "Cars" on the Information Highway*, 95 Colum. L. Rev. 1466 (1995).

scope and duration of copyright have failed to bear it out.[130]

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

III. The Purposes of Copyright Reform

There appears to be a broad consensus among scholars and journalists that what Jane Ginsburg has called "greed" has undermined copyright's legitimacy.[131] Some copyright professionals comfort one another with the assertion that appearances deceive; the alleged illegitimacy is really nothing of the sort. It is instead, they might argue, the combination of the voices of noisy teenage pirates, who think they should get something for nothing, with the misguided critiques of copyright academics.[132] The fact that mainstream media everywhere have recently come to question whether copyright has become unmoored from its constitutional purpose,[133] they suggest, misstates real popular opinion, which supports copyright (or would, if we only exposed our children to their copyright education

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130 See Netanel, supra note 119, at __.

131 Jane C. Ginsburg, *How Copyright Got a Bad Name for Itself*, 26 Colum. J. L & Arts 1, 1 (2002). See, e.g., Editorial, We Aren't All Pirates, L.A. Times, July 10, 2006, at B10.

132 See, e.g., Helprin, supra note 63, at 30-39, 213-14; Henry Horbaczewski, *Copyright Under Siege: Some Thoughts of a Publisher's Counsel: The Sixth Annual Christopher A. Meyer Memorial Lecture*, 53 J. Copyr. Soc'y 387, 393 (2006); National Music Publishers Association, The Engine of Freee Expression: Copyright on the Internet (2005), at http://www.nmpa.org/music101/copyrights.asp.

133 See, e.g., Editorial, Tune in Fairness for Broadcast Music, Detroit Free Press, June 14, 2009, at 28A; Editorial, The genuine article; Appealing to consumers' better nature may be a more effective way to curtail rampant piracy, L.A. Times, Dec. 23, 2007, at M2; Editorial: Grokster and the Information Exchange, N.Y. Times, Aug. 30, 2004, at A18; Editorial: Buyer Beware; Music, Technology Industries Reach Agreement that Neglects Consumers' Rights, Columbus Dispatch, Feb. 4, 2003, at A8; Editorial, Free Mickey Mouse, Washington Post, Jan. 21, 2003, at A16; Music industry fight to block Net access hits new lows, USA Today, Dec. 10, 2002, at 22A; Steven Levy, Info with a Ball and Chain, Newsweek, June 23, 2003.

programs[134]).

My intuition is that Ginsburg was right when she suggested that the Sony Bono Copyright Term extension bill, which added twenty years to the term of all extant copyrights and vested that extended term in the copyright proprietor rather than the author, would paradoxically weaken copyright by undermining public support for the entire enterprise.[135] I suspect that copyright appears most legitimate to the general public when it serves its core goals of encouraging authorship and enjoyment of copyrighted works most transparently and directly. The copyright story that the public is eager to invest in is a story about authors and readers. I can't *prove* this; I have no more data than the conventional copyright economic theorists who suggest that it makes little difference whether the copyright law gives the goodies to creators, readers, or the distributors between them, but I believe it to be true. (Lobbyists for major copyright players appear to believe it to be true as well, since they cast their arguments to Congress for more expansive copyright rights in appealing claims made on authors' and readers' behalf.[136]) If I'm right, recent efforts to persuade Congress and the public that the copyright law has never incorporated "user rights" are short sighted and counter-productive.[137] The public's fascination with "fair use rights," bemoaned by some members of the copyright bar,[138] is in fact a sign of broad public acceptance of and support for copyright laws, when copyright laws are understood as embodying readers' rights as well as authors' rights.

I also believe, but can't prove, that the deterioration in public support for copyright is the gravest of the dangers facing the copyright law in a digital era. Copyright stakeholders have let copyright law's legitimacy crumble (or have undermined it with ill-considered campaigns[139] and

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134 See William Patry, Non-profit, non-partisan education in copyright, <http://williampatry.blogspot.com/2007/09/non-profit-non-partisan-education-in.html> (Sept. 12, 2007).

135 See Symposium: The Constitutionality of Copyright Term Extension: How Long is Too Long?, Cardozo Arts & Entertainment LJ 650, 701 (2000); see also Ginsburg, supra note 131, at 6.

136 See, e.g., The Performance Rights Act and Parity among Music Delivery Platforms: Hearing before the Senate Judiciary Comm., 111th Cong (Aug. 4, 2009) (testimony of Sheila Escovedo for the MusicFirst Coalition); Patterson and Birch, supra note 28, at __.

137 See, e.g., David R. Johnstone, *Debunking Fair Use Rights and Copy Duty Under U.S. Copyright Law*, 52 J. Copyright Soc'y USA 345 (2005); I. Fred Koenigsberg, *Humpty Dumpty in Copyrightland: The Fifth Annual Christopher A. Meyer Memorial Lecture*, 51 J. Copyright Soc'y 677 (2004); Randy Picker, Fair Use v. Fair Access, Colum. J. L & Arts (2008); Patrick Ross, The Remix Culture, Copyright Alliance Blog, July 7, 2008, at http://blog.copyrightalliance.org/2008/07/the-remix-culture/.

138 See, e.g., Johnstone, supra note 137; Koenigsberg, supra note 137, at 679; Patrick Ross, Commentary: Fair Use is not a Consumer Right, c|Net News.com Perspectives, Sept. 6, 2007, at http://news.cnet.com/Fair-use-is-not-a-consumer-right/2010-1030_3-6205977.html.

139 Different scholars have different nominations for which campaigns were the most counterproductive. My own list includes Sony's rootkit, see Sony BMG Settles FTC Charges, http://www.ftc.gov/opa/2007/01/sony.shtm (Jan 30, 2007); the effort to expand the distribution right under section 106(3) to encompass "making available," see Ginsburg, supra note 27, and the "John Doe" lawsuits against individual peer-to-per file sharers, see, e.g., Capitol Records v. Thomas-Rasset, 2009 WL 1664468.

strategic blunders[140]), while comforting themselves with the promise that soon, technology would allow them to actually prevent copyright infringement rather than merely to forbid or deter it.[141] The lack of public support for copyright norms, then, would soon lose much of its bite, as people rushed to the stores to buy devices that would decline to make infringing copies or to play infringing content. I alluded earlier to the costs of such a strategy: burdening reader, listener and viewer enjoyment of works by encasing the works in technology that meters and monitors exposure undermines one of copyright's essential goals. Ten years into the digital rights management [DRM][142] experiment, moreover, it seems clear that it has not yet made a meaningful dent in copyright infringement of works released in DRM-protected forms. DRM has proved so far to be easy enough to hack to function as the sort of speed bump that is no impediment to deliberate infringers but still frustrates legitimate listeners when they try to play the music they bought on iTunes on their Palm Pre.[143] Circumvention tools are widely available, and widely perceived as legitimate, [144] despite the provisions in section 1201 of title 17 making it illegal to "circumvent a technological measure" or to "manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part" designed to help one to do so.[145] We face a real danger that by the time the content industries realize that technological protection measures cannot be effective without public consensus that they work to achieve sensible goals by reasonable means, the public will have decided that much of copyright law is neither sensible nor reasonable.

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

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[140] Here, I would point to the prosecution of Dmitiry Skylarov and the threat to sue Ed Felten and his research team for presenting a scholarly paper on the team's decryption research on SDMI technologies. See United States v. Elcom, Ltd, 203 F. Supp. 2d 1111 (2002); Felten v. RIAA, Case No. CV-01-2669 (filed June 6, 2001).

[141] See Jeffrey Cunard, Technological Protection of Copyrighted Works and Copyright Management Systems: A Brief Survey of the Landscape, ALAI 2001 Congress: Adjuncts and Alternatives to Copyright (June 2001) at URL: http://www.alai-usa.org/2001_conference/pres_cunard.doc; Lionel S. Sobel, DRM as an Enabler of Business Models: ISPs as Digital Retailers, 18 Berkeley Technology L.J. 667 (2003); The Analog Hole: Can Congress Protect Copyright and Promote Innovation?, Hearing Before the Senate Judiciary Comm., June 21, 2006 (testimony of Dan Glickman, MPAA), at <http://judiciary.senate.gov/hearings/testimony.cfm?id=1956&wit_id=5455>.

[142] Copyright owners have used digital rights management technologies since the earliest days of digital distribution. In 1998, Congress added provisions to title 17 prohibiting the circumvention of DRM technologies designed to control access to works and prohibiting the marketing of devices or the provision of services to circumvent a wider category of DRM technologies. See 17 USC § 1201. See generally Pamela Samuelson & Jason Schultz, *Should Copyright Owners Have to Give Notice of the Use of Technical Protection Measures*, 6 J. Telecom. & High Tech L.J. 41 (2007).

[143] See Larry Magid, Apple Cuts off Palm Pre Sync, c|net News.com, July 16, 2009, at URL: http://news.cnet.com/8301-19518_3-10288094-238.html; Charlie Sorrel, Sync Your Palm Pre With iTunes. Again, Gadget Lab, WIRED, July 17, 2009, at URL: http://www.wired.com/gadgetlab/2009/07/sync-your-palm-pre-with-itunes-again/.

[144] See, e.g., Jim Harmening, Sour Note with iPod Trouble, Southtown Star, June 28, 2009, at URL: http://www.southtownstar.com/business/harmening/1641036,062809harmening.article; Sorrel, supra note 114; Gustavus Adophus College, Mac The Ripper, https://gustavus.edu/gts/Mac_the_Ripper (explaining that the college has installed software for ripping DVDs to the hard drive of a computer "so that you can copy it" on machines in its media center) (visited July 17, 2009).

[145] 17 USC §§ 1201 (a)(1)(A), 1201(a)(2), 1201(b)(1).

radical simplification, creator empowerment, reader empowerment, and disintermediation.

A. Radical simplification

I have banged this drum before, repeatedly.[146] The copyright law is long, complex, counterintuitive and packed with traps and pitfalls, some of which were inserted intentionally to trip unwary new entrants, hapless authors, or pesky potential competitors.[147] Market leaders in the entertainment and information businesses have learned to use copyright legislation as an opportunity to erect market barriers to block their nascent competitors.[148] That may be an unavoidable by-product of our copyright lawmaking process, but it's hard to argue that it's an advantage we should try to preserve. Millions of dollars spent by readers, listeners and viewers to pay for opportunities to enjoy copyright works are absorbed by our mechanisms for collection and distribution before more than token amounts make it into creators' pockets. That, too, is a disadvantage rather than an advantage of our legacy copyright system. Finally, the fact that legacy copyright rules bind ordinary people engaging in everyday transactions, but are too complicated to explain to them, is nothing for us to be proud of. If we can find the political will to change these facts of copyright, we should do so; they are artifacts of a 20th and 19th century copyright system whose major raison d'etre is that it has taken copyright lawyers a long time to learn to work with them, and we are loathe to lose our investment in time and intellectual exertion.

Copyright lawyers have great affection for the arcane bits of the current system. Knowing how to navigate distinctions that make no apparent sense proves our membership in a priestly class of copyright-knowers. The arcaneness of the rules is tolerable when the club of copyright rule followers is small. If we are going to insist that the rules apply more broadly, though, we need to make them sensible, and a necessary first step is to make them simpler. We don't actually need seven different copyright rights, each with its own subject matter limitations, scope, and exceptions.[149] If you tell the owner of a sports bar that the copyright statute allows him to install up to six television sets in his sports bar so long as the picture is turned off, but only one television set if the picture is turned on,[150] he will understandably tell you that the law is looney. Nor should we be proud of our bouquet of compulsory licenses, each with its own distinct terms, procedures, rates, conditions, and its own collection and disbursement process.[151]

There are statutory sections so complex that even copyright experts claim not to understand

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[146] See, e.g., Jessica Litman, *The Exclusive Right to Read*, 13 Cardozo Ars & Entertainment L.J. 29, 50-52 (1994).

[147] E.g., 17 U.S.C. §§ 112, 203, 304, 1008.

[148] See Jessica Litman, *Billowing White Goo*, 31 Colum. J. L. & Arts 587, 593-94 (2008).

[149] See 17 USC §§ 106, 106A; 17 USC §§ 107-122.

[150] Compare 17 USC § 110(5)(A) with 17 USC § 110(5)(B).

[151] See 17 USC §§ 111(d), 112(e), 114(d), 115, 118, 119, 122. See also 17 USC § 116 ("negotiated" jukebox license).

them.[152] Unless our goal is to make it impossible for creators, distributors, and readers to navigate the copyright system without representation, there's no excuse for that.

B. Creator empowerment

In section I, I explored some of the problems the current copyright system poses for creators. Using the copyright reform opportunity to remake the copyright system into a more creator-friendly scheme could enhance both its legitimacy and its effectiveness in encouraging the creation and dissemination of works of authorship.

Many European nations cast their copyright law as an "authors' rights" law, and build in a variety of creator-centric rules.[153] In the United States, we've purported to pursue a different model: our law encourages creators who wish to exploit their works commercially to assign all rights to an intermediary in return for some amount of money.[154] In most cases, the intermediary distributor will make the work available to the public within a fairly narrow time window, or will decide not to do so. The work will find its audience, or not; the initial marketing effort will run its course. For the vast majority of creators, the works will then enter a dormant phase that will last for the remainder of the copyright term.[155] Distributors have only modest incentives to invest real money in exploiting their backlist in new media or marking them to new generations.[156] That is one reason why, before Congress made copyright renewal automatic, the overwhelming majority of works with registered copyrights were never renewed.[157]

When new opportunities and new media arise, creators who have assigned their copyrights lack the power to license their works for new uses; the copyright owners, meanwhile, may see little percentage in exploiting the new media themselves or in licensing their back catalogues to potential competitors. A large number of works that people still want to read, hear and see are unavailable

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[152] E.g., 17 U.S.C. § 114.

[153] E.g., Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) §§ 29-39 (German provisions on transfers and licenses of copyright)[Note: get more recent translation than WIPO's, from 1998, at <http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=1034>]; Texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la material, Title II, Chapter III, §§ 14, 15, 16 (Spain's droit morale) [Note: get more recent translation than WIPO's, from 1996, at < http://www.wipo.int/clea/en/text_html.jsp?lang=EN&id=1373>].

[154] See Paul Goldstein, Copyright's Highway 7 (1994).

[155] See, e.g., Future of Music Coalition, Orphan Works Fact Sheet (May 1, 2008), at http://futureofmusic.org/article/orphan-works.

[156] See, e.g, Duke Center for the Study of the Public Domain, Access to Orphan Films 2-5 (March 2005), at <http://www.law.duke.edu/cspd/pdf/cspdorphanfilm.pdf>.

[157] See *Copyright Renewal Provisions: Hearing on S. 756 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm.*, 102d Cong., 1st Sess. 25-31 (June 12, 1991)(Prepared testimony of Ralph Oman, Register of Copyrights).

without regard to whether their creators are eager to exploit them.[158]

Some creators assign their copyrights in contracts that, in retrospect, seem to courts to reserve their rights to exploit their works in new media.[159] Others have express reversion or recapture terms in their contracts.[160] The rest are in theory entitled to reclaim their copyrights under the statute's termination of transfer provisions.[161] The termination provisions are intended to give authors an opportunity to reclaim their copyrights after their assignees have had a reasonable opportunity to exploit the assigned rights.[162] In general, 35 years after any grant, an author may notify the grantee that she is reclaiming her rights. The grantee must receive at least two years notice, and may continue to exploit any derivative works it created even after the grant is terminated.[163] In the negotiations leading to the enactment of the 1976 Copyright Act, author's representatives pressed to protect their opportunity to recapture their copyrights from the demands of publishers that they assign any rights in

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158 See, e.g, Joel Rose, Copyright Laws Severely Limit Availability of Music, National Public Radio, Jan. 9, 2006, at URL: http://www.npr.org/templates/story/story.php?storyId=5139522&ft=1&f=2; Tim Brooks, Survey of Reissues of U.S. Recordings 4-14 (August 2005), at < http://www.clir.org/pubs/reports/pub133/pub133.pdf >.

159 See Random House v. Rosetta Books, 283 F.3d 490 (2d Cir. 2002); Cohen v. Paramount, 845 F.2d 851 (9th Cir. 1988); see also New York Times v. Tasini, 533 US 482 (2001).

160 Express reversion terms are common in trade book publishing contracts, see RICHARD CURTIS, HOW TO BE YOUR OWN LITERARY AGENT 106-113 (2003); but not so common in most other fields, see, e.g., DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 245, 259-61, 392-94, 397 (2006).

161 17 USC §§ 203, 304(c), 304(d). See United States Copyright Office, Termination of Transfers and Licenses Under 17 U.S.C. § 203 http://www.copyright.gov/docs/203.html; Creative Commons, Returning Authors Rights: The CC Termination of Transfer Tool [Beta] Frequently Asked Questions, at http://labs.creativecommons.org/demos/termination/faq.php.

162 U.S. copyright law has since 1831 incorporated provisions designed to allow authors to recapture their copyrights from assignees. See Barbara Ringer, Study No. 31: Renewal of Copyright, *in* 1 Studies on Copyright (1963). Until 1976, copyrights expired after an initial term, and the author or the authors' heirs could apply for a second, "renewal" term, which vested free and clear of initial term assignments. As it became clear that courts would enforce agreements to assign the renewal term, however, publishers adopted a practice of requiring authors to agree to assign their renewal terms at the time of the original copyright assignment. See Miller Music v. Charles Daniels, 362 U.S. 373 (1960); Fred Fisher Music v, M. Witmark & Sons, 318 US 643 (1943). As part of the studies leading up to copyright revision in the 20th century, the copyright office reported to Congress that the renewal provisions were unworkable. The problems, the copyright office explained, were twofold. First, the renewal provisions were technical and complicated, and authors didn't understand them well enough to follow the statutory steps. Second, copyright owners routinely required authors to assign their renewal expectancies at the same time they made their initial copyright assignment, and courts had upheld the validity of these advance grants. That meant that authors as a practical matter were unable to recapture their rights. See Ringer, supra. Authors of older works have a parallel right to terminate at the beginning of the 19 year copyright extension enacted in 1976 and the 20 year copyright extension enacted in 1988. 17 U.S.C. § 304. Ringer's research suggests that the author-recapture provisions in the 1831, 1870 and 1909 Copyright Acts were included because publishers wanted Congress to increase copyright duration but believed that Congress would not go along unless the extended copyright term were given to authors. See id. at 114.

163 In the bargaining that led to the 1976 Copyright Revision, authors insisted on a more durable reversion; intermediaries objected to any feature that might allow authors to take their copyrights back. After protracted negotiation, a compromise emerged. Termination of transfers would give copyright assignees a longer period of exclusivity than the renewal provisions it replaced. After 35 or 40 years, authors would be entitled to recapture any rights they had assigned, and no advance agreement to waive termination rights could be enforced. The rights authors could recapture, though, would be incomplete. Any derivative work that had been created before termination could continue to be exploited without the author's permission. See 17 USC § 203 (b); Jessica D Litman, *Copyright, Compromise and Legislative History*, 72 Cornell L. Rev. 857, 891-93 (1987).

copyright renewal or extension at the time they signed their original publication agreements. Distributors received a longer period of time before termination rights could be executed and express protection for the continued exploitation of derivative works – both significant improvements for them over the renewal provisions of the 1909 Act. In return for making termination inalienable, moreover, publishers and film studios insisted on making it difficult.[164] It is, in fact, sufficiently difficult to be largely illusory for most creators. When Congress extended the duration of copyright in 1976 and 1998, it vested the extended term in the current copyright proprietor, subject to a similar termination right that has proved similarly problematic for authors and their heirs.[165] Court decisions, meanwhile, have narrowed the scope of the rights subject to recapture,[166] and upheld assignee strategies for evading termination by renegotiating the underlying contract before the date termination becomes available.[167]

Thus, we have a system that makes creators' rights easy to assign and exceptionally difficult to recapture. Depending on the terms of their copyright assignments, creators commonly have little control over the exploitation of their works in new markets or media. The detachment of copyrights from the creators who author works enhances the perception of copyright as illegitimate and unconnected with the progress of science.[168] Affording creators a mechanism to regain some control of the exploitation of their works could shore up copyright's legitimacy by strengthening the connection between creators and copyrights throughout the long copyright term. It could also give distributors and makers new opportunities to exploit old works in new ways that older media might deem unprofitable or a poor fit with extant business models. If reversion is a feature that has value to the overall copyright system, wise copyright reform should replace the current largely illusory termination provisions with a recapture mechanism that might actually function as advertised.

C. Reader empowerment

Copyright laws have a special place in our jurisprudence. That special place includes a presumption of first amendment validity.[169] In *Eldred v. Ashcroft*, the Supreme Court dismissed a first amendment challenge to the 1998 Copyright Term Extension Act, noting that so long as "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is

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164 See Litman, supra note 163, at 892; Burroughs v. MGM, 683 F.2d 810 (2d Cir. 1982).

165 See Siegel v. Warner Brothers, 542 F. Supp. 2d 1098 (C.D. Cal. 2008); Burroughs v. MGM, 683 F.2d 810 (2d Cir. 1982).

166 See Mills Music v. Snyder, 469 U.S. 153 (1985); *Copyright Holder Protection Act: Hearing on S. 1384 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Judiciary Comm*., 99th Cong. 40-42 (Nov. 20, 1985)(testimony of Barbara Ringer); Litman, supra note 163, at 901-02.

167 See Penguin Group v. Steinbeck, 537 F.3d 193 (2d Cir. 2008); Alison M. Scott, Note: *Oh Bother: Milne, Steinbeck, and an Emerging Circuit Split over the Alienability of Copyright Termination Rights*, 14 J. Intellectual Prop. L. 357 (2007).

168 See Patry, supra note 30, at 67-96, 171-75.

169 See Harper & Row v. Nation Enterprises, 471 U.S. 539, 560 (1985);

unnecessary."[170] That seems paradoxical: copyright laws regulate expression more directly that most laws that routinely undergo first amendment review. The key to the paradox is that copyright laws have traditionally encouraged expression while preserving the liberty to read, listen and view the expression copyright protects. The importance of reading, listening and viewing is a vital reason that copyright laws get special treatment. The freedom to read, listen and view are essential attributes of human freedom, so much so that we take them for granted. They are inextricable from the freedom to think. The liberties to read, listen and view are crucial foundational liberties on which all copyright systems are built. Without those liberties, no copyright system makes any sense.

If copyright law secures rights for readers, listeners and viewers, where are they? As I discussed in part I, those rights have lived, for the most part, in the white spaces defined by successive copyright statutes. Early copyright statutes limited copyright owners to the exclusive rights to print, reprint, publish and vend – they didn't extend to uses that readers, listeners and viewers might make of copyrighted works. So long as copyright laws left individual readers, listeners and viewers alone, no conflict arose. When copyright laws are narrowly drawn, it is easy to forget that readers' interests have any importance in the copyright scheme. For most of our history, copyright laws were drawn more narrowly than they are today, and this set of issues came up only rarely. Today, of course, copyright rights are broader, and conflicts between copyright-owners and readers, listeners, and viewers abound.[171] Even in the context of today's expansive copyright rights, though, the statute includes significant white spaces in which readers, listeners and viewers are at liberty to enjoy copyright works the way they want to.[172] These white spaces, I would argue, are part of the traditional contours the Supreme Court mentioned in *Eldred* – they advance copyright's goals and the first amendment by securing liberty to read, listen, look at and think. In *Lawful Personal Use*, I called these reader, listener and viewer rights "copyright liberties." They have been embedded in the fabric of US copyright law since its early history and are essential to its design.[173]

As copyright owners have sought to control and monetize individual uses, though, they have increasingly argued that what readers, listeners and viewers think of as user rights are instead contingent privileges extended to users by copyright owners as a matter of grace and good business sense, subject to being withdrawn whenever a business reason for doing so appears.[174] The general

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[170] Eldred v. Ashcroft, 537 U.S. 186, 221 (2003). See also Harper & Row v. Nation Enterprises, 471 U.S. 539, 560 (1985).

[171] See Netanel, supra note 119, at 109-153.

[172] See *Lawful Personal Use*, supra note 53, at 1895-1919.

[173] Id. at 1904-08.

[174] The most notorious example is the question whether the law permits consumer copying of recorded music from a CD to a computer or digital playback device. During oral argument in *MGM v. Grokster*, Petitioner's counsel made the following representation: "The record companies, my clients, have said, for some time now, and it's been on their Website for some time now, that it's perfectly lawful to take a CD that you've purchased, upload it onto our computer, put it onto your iPod." MGM v. Grokster, No. 04-480 Oral Argument at 12 (March 29, 2005). 10 months letter, in a filing opposing exemptions to the anticircumvention provisions of the DMCA, the record companies characterized it somewhat differently: consumers could lawfully copy music to their ipods only because copyright owners had granted them a revocable privilege to do so. See In Re Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Docket No. RM 2005-11, Joint Reply Comments of Association of Amer. Publishers et. al. (Feb. 2, 2006) http://www.copyright.gov/1201/2006/reply/11metalitz_AAP.pdf at 22 ("creating a back-up copy of a music CD is not a non-infringing use"); id. at 22n.46 ("Nor does the fact that permission to make a copy in particular circumstances is often or even "routinely" granted, see C6 at 8, necessarily establish that the copying is a fair use

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

D. Disintermediation

Simplifying the law to the point that one doesn't need a lawyer to be able to play, giving more rights to creators and more freedom to readers, listeners and viewers will necessarily reduce the profusion of incentives currently enjoyed by many distributor intermediaries. As I argued in section I, I believe that distributors' current control of the copyright system is itself a major copyright ill. It derives from an era when distribution was much more expensive than it can be today. It continues in the 21st century because of the political power of copyright lobbies, aided by members of Congress eager to be glamoured by famous entertainers, willing to be persuaded that the only fundamental problem with the United States economy is widespread piracy of American creations.

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

E. Summary

Workable copyright reform should almost certainly be reform that addresses the excesses responsible for copyright law's battered reputation.[175] One important ingredient in such a reform, in my view, is simplicity: as I've argued elsewhere, the public is far more likely to support a law that

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when the copyright owner withholds that authorization. In this regard, the statement attributed to counsel for copyright holders in the *Grokster* case, see id., is simply a statement about authorization, not about fair use.").

[175] Jane C Ginsburg, *Essay: How Copyright Got a Bad Name for Itself*, 26 Colum. J. L. & Arts (2002).

seems to it to be easy to understand, reasonable and fair.[176] Ideally, copyright reform should also shores up the law's legitimacy by strengthening the connections between copyright and authors and copyright and readers, listeners and viewers. To accomplish that, it will need to dislodge many of the currently entrenched intermediaries who have united to block reforms that weaken their control.[177] If that requires changes that end up weakening copyright's current strong incentives for distributors, all to the good: limiting the excesses of distributor rights may have its own salutary effects on copyright law's working. If the rewards of exclusivity are smaller, it may no longer be worth distributors' while to invest large amounts of money and effort in making it more difficult for potentially competing works and competing media to find their audiences.

IV. Real Copyright Reform

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

There are a variety of ways one could embody these goals in statutory reform, and copyright commentators have floated reform proposals that would help to achieve these goals in many different ways.[178] I sketch out my own favorite proposals below. The conventions of legal scholarship offer me an unfair advantage as compared with copyright lawyers, lobbyists and legislative staffers. Because I am fixing my ideas in a law review article, I am allowed to propose reforms that have no realistic

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[176] See Litman, supra note 2, at 116-17.

[177] Hear Peters, supra note 13.

[178] See, e.g., WILLIAM W FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT 199-258 (2004); LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN AN INTERCONNECTED WORLD 250-59 (2001); NEIL NETANEL, COPYRIGHT'S PARADOX 195-217(2008); Michael W. Carroll, *Fixing Fair Use*, 85 N. Carolina L. Rev. (2007); Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 Houston L. Rev. 263, 286-88 (2004); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 Stanford L. Rev. 1345 (2004); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 Case Western L. Rev. 673 (2003); R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 Miami L. Rev. 237, 268-73 (2001); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, Utah L. Rev (2007); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 William & Mary L. Rev. __ (forthcoming 2009); Christopher Sprigman, *ReForm(aliz)ing Copyright*, 57 Stanford L.Rev. 485 (2004).

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

A. Focus on commercial exploitation

Copyright rights should secure to creators the right to exploit their works commercially while assuring that readers, listeners and views have the ability to enjoy the works in ways that don't involve commercial exploitation. L Ray Patterson articulated this distinction as difference between "use of the copyright" (involving licensing of rights to copy and perform) and "use of the work" (reading, listening, personal copying and other consumptive uses).[179] Patterson urged that we should view copyright less as a fee simple ownership interest in a piece of property, and more as an easement to make certain uses (licensing, commercial exploitation) of that property.[180]

The law now on the books divides copyright into reproduction, derivative work, public distribution, public performance, and public display rights,[181] and encourages authors to dispose of them separately and piecemeal.[182] In many copyright industries, it has become conventional for different copyright rights to be separately controlled by different intermediaries.[183] As new opportunities to exploit works have arisen, those intermediaries have insisted that the new uses impinge on the rights they control instead of or as well as the rights controlled by other intermediaries.[184]

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[179] L. Ray Patterson, *Copyright Overextended: A Preliminary Inquiry Into the Need for a Federal Statute of Unfair Competition*, 17 Dayton L. Rev. 385, 389 (1992).

[180] Patterson & Birch, supra note 28, at 385-395.

[181] 17 USC § 106.

[182] 17 USC § 201(d).

[183] The canonical example is music, where the public performance rights are licensed by performing rights societies, like ASCAP, and the reproduction and distribution rights are controlled by music publishers. See Passman, supra note 37, at 206-38; see generally *Music Licensing Reform: Hearing Before the Subcom. On Courts, the Internet, and Intellectual Property of the House Judiciary Comm*., 109th Cong, 1st Sess. (June 21 2005).

[184] To stick with the music example, ASCAP insists that both transmission of a file containing recorded music over the Internet and the playing of a music ring-tone on a cellular phone should be deemed public performances within its purview. Music publishers insist that the transmission of the files and the sales of ring-tones to cell-phone subscribers are not performances but distributions of copies. See USA v. ASCAP: In Re AOL, 485 F. Supp. 2d 438 (SDNY 2007); USA v. ASCAP: In re AT&T, 607 F. Supp. 2d 562 (SDNY 2009). Companies have learned to their

Efforts to find a solution that would permit prospective licensees to obtain necessary licenses in a single transaction have failed because entrenched intermediaries cannot agree on which of them is the appropriate licensor.[185] Congress has been unwilling to characterize the different exclusive rights as exclusive of each other, rather than overlapping;[186] Courts have been unwilling to apply statutory exceptions defined in terms of one exclusive right to the same behavior characterized as impinging on another.[187] Copyright divisibility may have been intended as a reform to empower authors,[188] but it has ended up making more problems than it has solved.[189]

If simplicity, legitimacy and author- and reader-empowerment were our only goals, untempered by past practice, vested rights and international obligations, recasting copyright as an author's right to control commercial exploitation would serve all three goals well.[190] Limiting the scope of copyright to commercial exploitation is simpler than the current array of five, six, seven, or eight[191] distinct but overlapping rights. Copyright defined as control over commercial exploitation accords with what we know of the public's understanding of what copyright law does, and should, reserve to the author.[192] It also preserves for readers, listeners and viewers the liberty to enjoy works in non-exploitative ways without seeking licenses for each. I have argued elsewhere that Congress has on multiple occasions suggested that it views the line between commercial exploitation and reader, listener and viewer consumption as an implicit limit on the scope of copyright rights.[193] Thus, defining copyright as a right to control commercial exploitation seems more likely to give creators meaningful economic rights while preserving their audiences' freedom to enjoy and interact with works in ways that further copyright's core objectives. Eliminating the distinctions between the distinct rights in the copyright bundle, moreover, could give us an opportunity to oust the current vested intermediaries from their control of pieces of copyright, and return that power to the creators.

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peril that licensing the use from one is no defense to a suit for willful copyright infringement by the other. See, e.g., Country Road Music, Inc. v. MP3.com, Inc., 279 F. Supp. 2d 325 (2003).

185 See Music Licensing Reform, supra note 183 (testimony of MaryBeth Peters, Register of Copyrights).

186 See H.R. Rep. 1476, 94th Cong. 61-65 (1976).

187 See, e.g., Kelly v. Arribasoft, 280 F.3d 934, 940-44, 947-48 (9th Cir. 2002), modified, 336 F.3d 811 (9th Cir 2003); A&M v. Napster, 239 F.3d 1004, 1024 (9th Cir 2001).

188 Justice Ginsburg suggested as much in *New York Times v. Tasini*, 533 US 483, 494-96(2001).

189 See Loren, supra note 81.

190 I have argued elsewhere that replacing the current exclusive rights with a right of commercial exploitation would improve the copyright law. See Litman, supra note 2, at 180-86.

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

192 See Jessica Litman, *Lawful Personal Use*, 65 Texas L. Rev. 1871, 1912-13 (2007); Jessica Litman, *Copyright NonCompliance (or Why We Can't "Just Say Yes" to Licensing)*, 29 N.Y.U. J. Int'l L. & Politics 237, 253 (1997).

193 See Jessica Litman, *Lawful Personal Use*, 65 Texas L. Rev. 1871, 1904-07 (2007).

Requiring prospective licensees to seek permission from a work's author, meanwhile, would both empower creators and make life easier for licensees. It may once have been the case that it was easier to track down a work's publisher than to find its author. In a world of media conglomerates who purchase each other's divisions, spin off product lines, and liquidate in bankruptcy at a dizzying rate,[194] an author is now far easier to track down than her assorted assignees, their successors and their respective assignees. It also seems more likely that an author will have kept track of what publisher bought her publisher than that a publisher will know how to find all of the authors whose contracts it assumed when it purchased the company that purchased the company that initially held the authors' contracts.[195]

In a world without magic wands, though, that essential a change would make a mess. It would upset vested expectations, and call into further question our compliance with international treaties that require us to give authors the right to authorize the reproduction, translation, performance or communication to the public of the works they author.[196] To the extent we can capture the benefits of that sort of redefinition without throwing the copyright world into chaos, it seems like a sensible approach. We can do that, I suggest, by adopting a definition of copyright's exclusive rights that includes control over reproduction, adaptation, distribution and public performance insofar as they represent commercial exploitation, but not otherwise;[197] by abandoning the notion that copyright uses require multiple, distinct licenses for each sort of use; by vesting authors with residual rights to license any use, subject to a duty to account to the copyright owners for the proceeds of the license; by reforming our current illusory termination of transfers; and by abolishing the current statutory "compulsory" licenses.

B. Simplicity

A minority of copyright scholars insist that the exclusive rights conferred by copyright are implicitly limited to commercial exploitation. Ray Patterson and Stanley Birch make this point at

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194 See, e.g., ALBERT N GRECO, THE BOOK PUBLISHING INDUSTRY 51-65 (2d Ed. 2005); PATRICK BURKART & TOM MCCOURT, DIGITAL MUSIC WARS: OWNERSHIP AND CONTROL OF THE CELESTIAL JUKEBOX 24-37 (2006).

195 Thus, plaintiff record companies in Napster insisted that it would be difficult or impossible for them to identify the works on whose behalf they brought suit. A&M v. Napster, 114 F. Supp. 2d 896, 925 (N.D. Cal. 2000), aff'd in part, rev'd in part, 239 F. 3d 1004 (9th Cir. 2001). See Jessica Litman, *Sharing & Stealing*, 27 Comm/Ent 1, 21-23 (2004).

196 See Berne Convention arts. 8-9, 11-14. We're already arguably in breach of our treaty obligations because of our failure to grant authors meaningful attribution and integrity rights and our generous exemption for bars and restaurant to play music without getting a license to do so. See Jane C Ginsburg, *The Right to Claim Authorship in US Copyright and Trademarks Law*, 41 Hous. L. Rev. 263, 265-66 (2004); Daniel Gervais, *Towards a New International Copyright Norm: The Reverse Three-Step Test*, 9 Marquette Intellectual Property L. Rev. 1,14-16 (2005).

197 Copyright law's historical focus on generation and transfer of "copies" may be outmoded, and a straight commercial exploitation right might well make better policy sense. See, e.g., Litman, supra note 2, at 177-82. The United States, though, is only one nation in an interdependent word in which copyrights cross national boundaries. Since we are party to international treaties obliging us to protect authors' control of reproduction, adaptation and public performance, See Berne Convention arts. 8, 9, 11, 11bis, 11ter, it makes sense to articulate the exclusive right in terms of copies and performances, but to narrow it to the reproduction and distribution of copies and the performance and transmission of works "in the course of commercial exploitation."

length in their *Unified Theory of Copyright*.[198] Others have argued that uses that are not commercially exploitative should in general be deemed outside of the copyright owner's control, whether under the fair use rubric or otherwise.[199] Still others have argued that whatever rights current law gives copyright owners, Congress should modify the statute to allow a broad swathe of noncommercial uses without the copyright owner's permission, either subject to a new copyright exemption or to a new statutory license.[200] Copyright apologists object that the law has never incorporated a privilege for non-commercial use, broadly defined, and that it should not do so. The line between commercial and non-commercial, they continue, is too elusive to bear so much weight. If a use has no commercial significance, they say, a copyright owner is unlikely to object.

Although I acknowledge that the line drawing difficulties are formidable,[201] I think the difference between commercial exploitation and non-commercial enjoyment captures a distinction that is fundamental to our understanding of how the copyright system works. Non-commercial uses further the copyright interest in encouraging enjoyment of works without unduly burdening the copyright owner's opportunities to earn revenue through commercial exploitation. Major international copyright treaties bind nations to a promise to give copyright owners control of reproductions and public performances, and then permit them broad latitude to exclude noncommercial uses from the scope of control. The public tends to view copyright's legitimate sphere as limited to commercial exploitation. There seems to be broad public support for allowing creators to control commercial exploitation, and very little support for allowing copyright owners to control non-commercial uses. We need not dive into the debate over the scope of current law.[202] Copyright reform should define the scope of copyright's exclusive rights to give copyright owners control over uses that inhabit the core of the commercial exploitation of their work, leaving non-commercial and non-exploitative uses uncontrolled.

If we choose not to discard the idea that copyright is divisible into multiple exclusive rights each capable of separate ownership and control, moreover, we need to do something to address the licensing logjam that divisible copyright has engendered. In earlier work, I suggested that it makes sense under current law to treat as impliedly licensed any reproduction, adaptation, distribution, performance, or display that is incidental to a licensed use.[203] If we are reforming the law, we can go further: First, we can adopt a principle that the creator and initial copyright owner of a work retains residual authority to license any uses even after assignment of her copyright, subject to a duty to account to her assignee(s). Second, we can allow divisible copyright ownership without continuing to insist that each fragment of copyright is distinct and non-overlapping. Any transfer of a part of a copyright should be understood to carry with it any rights necessary to allow the its exercise and

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198 See Patterson & Birch, supra note 28, at 293-96, 335-37, 385-95.

199 See, e.g., Glynn S. Lunney, *Fair Use and Market Failure: Sony Revisited*, 82 BU L. Rev. 975 (2002); Raymond Ku?

200 See Netanel, supra note 105; Fisher, supra note 105.

201 See, e.g., Creative Commons, Defining "Non-Commercial:" A Study of How the Online Population Understands "Non-Commercial Use," (Sept. 2009), at <http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_fullreport.pdf>

202 I expressed my views on this question in Jessica Litman, Lawful Personal Use, 85 Texas L.Rev. 1871, 1904-7, 12-20 (2007).

203 See id. at 1915-18.

license; entities who own copyright fragments should have a duty to account to one another if they grant a license that invades a different owner's turf, but it should not be the responsibility of the user seeking a license to track down and negotiate with all owners.

If copyright's exclusive rights are limited to uses made in the course of commercial exploitation, and if licenses are understood to permit uses of works, rather than of splinters of different exclusive rights, many of the current pages of prose in the succeeding sections of the statute become unnecessary. Others may have made sense once, but function today chiefly to perpetuate the clout of entrenched intermediaries at creators' and readers' expense.[204] Still others distort the copyright system by allowing older media to exploit copyrighted works on more favorable terms than newer media.[205] If copyright's exclusive rights are cast with appropriate narrowness, we can sweep away the current crop of industry-specific exceptions, limitations and complications. We can retain classic general limits like the idea/expression distinction, the first sale doctrine and fair use, while leaving narrow specific exceptions behind.

C. Reconnecting Creators with their Copyrights

In section III, I discussed the problems for copyright's legitimacy that arise when creators are divested of the copyrights in their works. Authors complain that they can no longer exploit or license their work, because they assigned the copyright to an intermediary who refuses to release it.[206] In theory, the termination of transfers right should address it, but the termination right has turned out to be largely illusory. We can reunite creators with their copyrights and achieve significant disintermediation at the same time by replacing our current fake termination right with a real one. [207] Authors should be entitled to terminate any copyright grant they make, on five years notice, at any time beginning 15 years after the date of the grant and continuing for the life of copyright. Termination should continue to be subject, as it is under current law, to an exception allowing grantees to continue to exploit any derivative works created during the grant, but not to make new ones. The combination of a five-year notice period and a derivative works exception should give copyright intermediaries enough protection to make investment in copyrighted works worthwhile without vesting them with excessive control. Meanwhile, the potential for termination at an earlier date may encourage intermediaries to structure their initial agreements for copyright acquisition in more creator-friendly forms.

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204 E.g., 17 USC § 115.

205 E.g., 17 USC §§ 111, 112, 114, 119.

206 See Jonathan Band, Publish and Perish: Protecting Your Copyrights from your Publisher, American Cell Biology Newsletter (May 2008), http://www.policybandwidth.com/doc/20080523-PublishANDPerishFinal.pdf; Future of Music Coalition, Comments of Recording Artist Groups on Orphan Works (March 25, 2005), at <http://futureofmusic.org/filing/comments-recording-artist-groups-orphan-works>; see generally Keep Your Copyrights, http://www.keepyourcopyrights.org.

207 Other scholars have proposed different reforms that would be useful contributions to efforts to strengthen the perceived connection between creators and their copyrights, such as enacting an express attribution right, see Jane C. Ginsburg, *The Right to Claim Authorship in U.S. Copyright and Trademarks Law*, 41 Houston L. Rev. 263, 286-88 (2004).

D. Recognizing readers' rights

Limiting the scope of copyright to commercial exploitation will go a significant way towards reinvigorating copyright law's traditional solicitude for readers, viewers and listeners, and should enable them to enjoy copyrighted works in both consumptive and creative ways without unduly undermining the copyright owners' commercial incentives.[208] I would, however, go further. I believe that it would enhance the legitimacy of the copyright system if the copyright statute included explicit recognition of the core importance of reader, listener, and viewer liberties to enjoy copyrighted works without undue copyright owner interference. If copyright law expressly recognizes that reader, listener and viewer interests must sometimes be protected against overreaching creators and distributors, it is much easier for members of the public to invest in the principle that copyright should protect creators and distributors from exploitative readers, listeners and viewers.

An additional reform that strikes me as useful is to propose the creation of a position, within the Copyright Office but independent of its bureaucracy, for a copyright ombudsman to explain the copyright system to the public and articulate the public's interest to the staff of the Copyright Office and to Congress. I've explored in earlier work some of the reasons why it has been difficult for Congress, the Copyright Office, or a variety of copyright-affected organizations that have purported to speak for the public on particular issues to represent the public in any reliable way.[209] It may not actually achieve much to give the job to a lawyer with instructions to consult his client; different actors' notions of the public interest in copyright are exceptionally diverse.[210] But as innovations go, it's an inexpensive one with the potential to make a difference.

E. Dislodging entrenched intermediaries

Assume a willing licensee who desires to license a copyrighted work on terms that the copyright owner would find acceptable. A functioning copyright system should make it easy to strike that deal. If the licensee cannot identify the appropriate licensor or divine the license terms; if the copyright owner cannot discover who has already exploited her work and who would like to do so, the system will entail tremendous waste. Where the value of an individual use is dwarfed by the transaction costs of negotiating a license, the US copyright system has either completely excused unlicensed uses,[211] or allowed the uses under blanket[212] or statutory[213] licenses. Blanket licenses are

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208 See Jessica Litman, *Creative Reading*, 70 L. & Contemp. Probs. 175, 179-83 (2007).

209 See Litman, *Exclusive Right to Read*, 13 Cardozo Ars & Entertainment L.J. 29, 53-54 (2004); Jessica Litman, *Copyright Law and Technological Change*, 68 Ore L. Rev. 275, 299-301, 311-16 (1989).

210 Compare, e.g., Neil Turkewicz, Copyright, Fair Use and the Public Interest, December 2004, at <http://www.culturalpolicy.org/commons/comment-print.cfm?ID=22>, with, e.g, Patry, supra note 30, at 101-02.

211 E.g., a sports bar publicly performs games broadcast by ABC. The performance of the music accompanying the broadcast is exempt under 17 USC § 110(5).

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

devised by performing rights organizations who operate within constraints imposed by antitrust consent decrees. Compulsory licenses are statutory, although their terms were devised by representatives of copyright owners and the statutory licensees before Congressional enactment.

Although copyright theorists talk about copyright licensing as an individually negotiated transaction between a creator and a distributor,[214] much licensing of copyright works involves statutory or collective licenses. Statutory or "compulsory" licenses are, in practice, not very different from collective licenses. Both are hybrids of statutory benchmarks with private bargaining; both involve significant government oversight and expensive negotiation; both are better at collecting royalties than disbursing them. The mechanical compulsory license is the oldest.[215] First enacted in 1909, it has remained in the Act ever since. An overhaul in 1976 intentionally (and successfully) rendered it unusable, and recordings today are made under non-statutory form licenses pegged to the statutory terms. The cable television, satellite television and public television licenses,[216] and the home audio recording license,[217] for their part, contain no provisions that would assist the copyright royalty judges charged with disbursing the royalties to allocate the funds in the pot. Rather, the statute encourages claimants to negotiate among themselves to arrive at both the royalty rates and a division that they find satisfactory.[218] In the three decades since the '76 act took effect, copyright owner claimants have pursued a strategy of driving the cost of claiming a share up to levels that discourage claimants unless

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213 E.g., Comcast Cablevision transmits the ABC broadcast to its subscribers, having paid a statutory license fee under 17 USC § 111 to permit its retransmission. The fee will be combined with other fees and then divided at the end of the year between motion picture studios, major sports leagues, ASCAP, BMI and SESAC, and others who claim copyright ownership in programming transmitted over cable under the section 111 license. See National Association of Broadcasters v. Librarian of Congress, 146 F.3d 907 (1998); 17 U.S.C. §§ 801-805. A similar regime applies to cable television, see 17 USC § 119. A dissimilar and horribly complex regime covers the digital transmission of recorded music by satellite radio and Internet webcasters. See United States v. ASCAP: In re America Online, 485 F. Supp. 2d 438 (SDNY 2007); 17 USC §§ 115, 116.

214 See, e.g., Paul Goldstein, Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox 218-36 (1994); Trotter Hardy, Property (and Copyright) in Cyberpace, 1996 U. Chi. L. F. 217; William M. Landes & Richard A Posner, An Economic Analysis of Copyright Law, 18 J. Legal Stud. 325 (1989).

215 Once the owner of the copyright in a song has released a recording of the song, the mechanical license allows others to make their own recordings of that song for distribution to the public. See 17 USC § 115. The current version of the license requires the licensee to make monthly statements of account and royalty payments.

216 The cable television and satellite television licenses allow the operators of cable and satellite television systems to make payments into a government-administered fund rather than negotiating individual licenses for retransmission of all of the broadcast programming that they make available to their subscribers. See 17 USC §§ 111, 119. The public broadcasting license calls for the Copyright Office's copyright royalty judges to set rates and terms for non-commercial broadcasting of paintings, sculptures, and music, but not films, books, or video programming.

217 Chapter 10 of title 17 requires manufacturers and importers of digital audio recording devices (other than computers) to ensure that the devices implement a specific serial copy protection scheme that is named by not described in the statute, see 17 USC § 1002, and to pay statutory royalties on each device imported and sold and on blank digital audio media. 17 USC § 1003. The royalties are to be paid into a fund collected and distributed by the Copyright Office. 17 USC §§ 1005, 1007. Section 1008 prohibits copyright owners from suing the makers and sellers of these devices for infringement, or bringing any infringement suit "based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings."

218 See 17 USC §§ 111(d), 112(e)(2), 114(e), 118(b)(2), 119(c), 803(b)(3), 805, 1007.

they are represented by collecting societies or big trade associations,[219] and then negotiating with the remaining big fish to divide the spoils. The latest compulsory license, for sound recordings, reflects successive congressional rubber stamps of terms, conditions and rates reached in private negotiations.[220] The statutory licenses are encumbered with long, complicated, burdensome conditions, sometimes inserted at the behest of industry competitors, to ensure that the availability of a statutory license will not give the recipient a meaningful competitive advantage.[221] Together, the various statutory licenses form a patchwork of irreconcilable terms, inconsistent prices and procedures, and the expensive necessity for many-stop shopping for innovative uses.[222]

The music performance collecting societies, meanwhile, are hardly poster children for unregulated private market transactions. Both ASCAP and BMI operate within the constraints of detailed antitrust decrees, limiting their acquisition and control of copyright rights, defining the class of members they must agree to admit, restricting the scope and terms of the licenses they may grant, forbidding them from discriminating in license price among similarly situated licensees or interfering with their members' ability to offer competing licenses, obliging them to make a list of works they are entitled to license available to the public, and instructing them how to divide up and distribute the royalties they collect.[223] The pricing of ASCAP and BMI licenses, moreover, is subject to review by a federal court. Thus both compulsory licenses and collective licenses are extensively cabined by government regulation, and both feature terms derived through private negotiation. Recent efforts to replace complicated compulsory or collective license procedures with something more streamlined have foundered on each entrenched intermediary's efforts to preserve its particular slice of the pie. The Creative Commons has devised forms and procedures to streamline uncompensated uses of copyrighted material.[224] Its efforts to field simplified commercial licenses have thus far been less successful.[225]

With that background, one approach to the problems of licensing suggests itself. De-trenching these intermediaries would serve both simplification and disintermediation goals. If we forget about politics, the easiest way to get there is to junk all of the statutory licenses, return licensing authority to the individual authors of each work, and see whether those who rely on the licenses find it worthwhile

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219 See Jessica Litman, Sharing and Stealing, at 41&n.158

220 See Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (2002); Copyright Roaylty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (2004); Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974 (2008); Webcaster Settlement Act of 2009, Pub. L. No. 111-36 (2009).

221 See Litman, *Billowing White Goo*, supra note , at 594; Litman, *Sharing & Stealing*, supra note , at 43.

222 See Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Property of the Senate Comm. On the Judiciary, 109th Cong. (July 12, 2005)(testimony of Mary Beth Peters, Register of Copyrights); Loren, supra note .

223 United States v. ASCAP, Civ Action No. 31- 1395 (WCC), 2d Amended Final Judgment, June 11, 2001, at http://www.ascap.com/reference/ascapafj2.pdf; United States v. Broadcast Music, Inc., Amended Final Judgment, 1966 Trade Cas. (CCH) P71,941 (S.D.N.Y. 1966), *modified* 1996-1 Trade Cas. (CCH) P71,378 (S.D.N.Y. 1994).

224 See Creative Commons, License Your Work, URL: < http://creativecommons.org/choose/>.

225 See Creative Commons, CC+, <http://wiki.creativecommons.org/Ccplus>; Creative Commons Labs, Metadata Lab, <http://labs.creativecommons.org/demos/metadata/>.

to devise voluntary collective licenses to replace them. Any new collective licenses would of course beget new intransigent intermediaries to administer them. To limit the damage from re-entrenching intermediaries, therefore, the law should allow these collecting agents to operate without heightened antitrust scrutiny only to the extent that they meet significant statutory conditions derived from what we've learned in 70 years of antitrust scrutiny of ASCAP and BMI, crafted to ensure transparency and competition, and designed to make retrenchment difficult.[226] To ensure that, at least as an initial matter, these agents represent the creators whose works they license, it might be wise to require the collecting agents to pay creators' shares of the royalties directly to the creators, as ASCAP, BMI, and SoundExchange do today, rather than funneling the payments through the copyright owners.[227]

A law adopting the reforms suggested thus far would represent a shift from a model based on concentrating the ownership of copyright rights into the hands of a single entity whenever possible, to a model encouraging non-exclusive exploitation by multiple entities. In many ways, US copyright law began to move in that direction when Congress adopted divisibility of copyright, but was stymied by the problems attending licensing. If we can solve the licensing snafus without concentrating all copyright control in a small number of hands, we can build a system that is friendlier to creators, friendlier to readers, and friendlier to a wide swathe of different intermediaries, without giving current players excessive incentives to elbow new entrants out of the picture frame.

F. Summary

My proposals are modest. I've suggested that we limit each of copyright's exclusive rights to uses that involve commercial exploitation. I've proposed that we subject copyright assignments to an author's residual authority to grant licenses, subject to a duty to account, and that we treating uses incidental to licensed uses as impliedly authorized. I have recommended that we reinvigorate termination of transfers, and expressly recognize reader liberties. Finally, I've proposed that we abolish the current statutory licenses. These proposals leave the broad outlines of copyright law in place. They don't seek to "turn copyright on its head,"[228] limit its duration to the span envisioned by the framers,[229] or require the United States to withdraw from or seek to rewrite international copyright treaties.[230] Because my goals reinforce one another, it is possible to accomplish a fair amount of improvement with relatively small adjustments. Getting rid of more than 200 pages full of complicated and historically contingent limitations, restrictions, exceptions, conditions, provisos and complexities

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

227 See Litman, Sharing & Stealing, supra note , at 43-44.

228 See Edward Wyatt, Google Alters Plan for Serachable Library Databases, New York Times, Aug. 12, 2005, at http://www.nytimes.com/2005/08/12/technology/12cnd-google.html (quoting Patricia Schroeder, President of the Association of American Publishers); Keith Kupferschmid, Are Authors and Publishers Getting Scroogled, Information Today, Dec. 2005, at < http://www.infotoday.com/IT/dec05/Kupferschmid.shtml>;

229 See LAWRENCE LESSIG, FREE CULTURE 133-35 (2004); see also Rufus Pollack, Forever Minus a Day? Calculating Optimal Copyright Term (June 2009), at <http://www.rufuspollock.org/economics/papers/optimal_copyright.pdf>.

230 See Fisher, supra note, at 248-49;

does much of the heavy lifting. It makes the law shorter, simpler, and easier to explain. I don't pretend that it will be possible to keep a new statute short and simple. In time, even a spanking-clean copyright law will acquire its own set of historically contingent complexities. But, at least we will have started from the conditions that plague us in the 21st century rather than carrying forward the ones we adopted to address the ills of the 18th, 19th or 20th.

V. Getting there from here

I boasted earlier that the conventions of legal scholarship allow me to propose copyright reforms that I cannot realistically imagine Congress's enacting. That permitted me to put off, until now, the question of the prudence of entrusting control of copyright reform to the owners of 20th century copyrights, and the related question of whether it is possible to dislodge them.

In the previous section, I made a series of suggestions for reforming the copyright law to address the most troubling problems of the current copyright system. The reforms I outlined were more in the nature of copyright repairs than copyright revolt. They seek to improve the operation of the copyright system for creators and for readers, listeners and viewers without wholesale demolition. They also seek to diminish the incentives of vested intermediaries, but to make licensing easier. Finally, they are crafted to improve the system's legitimacy. They join a large collection of thoughtful proposals by proponents of copyright reform across the spectrum of copyright politics.[231] None of these proposals is likely to attract serious attention from Congress or copyright lobbyists.

Right now the copyright legislation playing field is completely controlled by its beneficiaries. They have persuaded Congress that it is pointless to try to enact copyright laws without their assent. They are unlikely to countenance a statute that disempowers them in meaningful ways. Even if copyright lobbyists are privately persuaded of the wisdom of a reform proposal, they are unlikely to assent to it if it leaves their clients worse off than before. To accomplish real copyright reform, then, we will need to change the way that copyright laws are made.[232] That may be an impossible task, at least in the near term. Members of Congress are unlikely to consider untried approaches unless they believe that their constituents expect it of them, will pay attention, and may take it into account when they vote. The first step in that direction, though, is to encourage a broader conversation about why the copyright system isn't working and what kinds of changes might be possible.

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

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[231] See sources cited supra notes 105, 178.

[232] Accord Lawrence Lessig, Required Reading: The Next Ten Years, June 19, 2007, at <http://lessig.org/blog/2007/06/required_reading_the_next_10_y_1.html> (blog post); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 La. L. Rev. 1 (2008); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, Utah L. Rev. (2007).

to. They can rely on rhetoric that brands any copyright critique as "anti-copyright,"[233] "anti-author,"[234] anti-property, and an attack on creators' livelihoods.[235] Copyright reformers who make proposals that won't inure to the benefit of extant copyright owners are said to pursue the religion of "information wants to be free."[236] Copyright owners warn that rebalancing the law to limit copyright owners' control will kill the goose that lays the golden egg.[237] Authors' advocates go along, pinning their hopes on the promise that if copyright owners can only persuade Congress to strengthen their hands sufficiently, some of the benefits of enhanced copyright will trickle down to authors.

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

Rebutting the notion that copyright owners speak for authors, or that their interests are usually aligned, then, may be a crucial strategic move. The recent polarization of copyright discourse makes the approach trickier than it might have been ten or twenty years ago. We've been arguing for so long that advocates have grown immune to reason and example.[238] Even if the benefits of a simpler, shorter, more legitimate law were obvious to all copyright affected interests, the current climate would make

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233 Neil Turkewicz, Copyright, Fair Use and the Public Interest, December 2004, at <http://www.culturalpolicy.org/commons/comment-print.cfm?ID=22>. See, e.g., Helprin, supra 63, at xiv, xv, 33-39 (2009); James V. Delong, *Defending Intellectual Property*, Adam Thierer & Clyde Wayne Crews, Jr., Copy Fights: The Future of Intellectual Property in the Information Age 17, 17-18 (2002)

234 See, e.g., Helprin, supra note 63; Marci Hamilton, *The Distant Drumbeat: Why the Law Still Matters in an Internet Era*, in PETER K. YU, THE MARKETPLACE OF IDEAS: TWENTY YEARS OF CARDOZO ARTS & ENTERTAINMENT LAW JOURNAL (2002).

235 See, e.g., Net Neutrality and the Internet: Hearing Before the House Judiciary Comm. Task Force on Compeition Policy and the Antitrust Laws, 110th Cong. (March 11, 2008), at http://judiciary.house.gov/hearings/pdf/Carnes080311.pdf (testimony of Rick Carnes, Songwriters Guild of America).

236 E.g., Helprin, supra note, at ; I. Fred Koenigsberg, *Humpty Dumpty in Copyrightland: The Fifth Annual Christopher A. Meyer Memorial Lecture*, 51 J. Copyright Soc'y 677, 679 (2004). The phrase, attributed by Wikipedia to Stewart Brand, author of the Whole Earth catalog, took on new meaning as a challenge to copyright when John Perry Barlow repurposed it in his essay, *The Economy of Ideas: A framework for patents and copyrights in the Digital Age. (Everything you know about intellectual property is wrong.)*, 2 Wired # 3, __ 1994, at __.

237 Helprin, supra note 233, at 214; Koenigsberg, supra note 236, at 689.

238 A single example that I think is more sad than offensive: Noted novelist Mark Helprin published a book-length hysterical screed this past year that purports to expose an anti-copyright conspiracy, but that is primarily an ad hominem attack on Larry Lessig and the Creative Commons. Helprin, supra note 63. Lessig responded with an anguished book review posted to the Huffington Post. See Lawrence Lessig, The Solipsist and the Internet (a Review of Helprin's *Digital Barbarism*), http://www.huffingtonpost.com/lawrence-lessig/the-solipsist-and-the-int_b_206021.html (May 20, 2009). From my vantage point as a copyright criticizer and Lessig friend, Helprin's book seems delusional; from Helprin's viewpoint though, I and other scholars like me are either communist conspirators or thralls.

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

Conclusion

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

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