NORTH CAROLINA LAW REVIEW

Volume 83 | Number 1 Article 5

12-1-2004

Regulatory Copyright

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REGULATORY COPYRIGHT

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This Article explores and examines the implications of the increasingly regulatory nature of U.S. copyright law. For many years, U.S. copyright law operated under a judicially administered, industry-neutral property rights regime. Congress set the scope of the property entitlement, leaving the courts to enforce the entitlement and the markets to organize the production of creative works in light of the entitlement structure. In recent years, however, Congress has shown an increasing willingness to intervene more directly in the structure of copyright markets. Congress's most recent legislative efforts are far more complex and industry-specific, allocate rights and responsibilities in a far more detailed manner, and in some cases directly regulate technology and prices in the market. This Article examines and critically evaluates this trend. It first makes the descriptive claim that this kind of "regulatory copyright" has become increasingly the preferred, and indeed perhaps dominant, mode of copyright lawmaking. It then critically assesses both the strengths and weaknesses of this approach in the copyright law context. Finally, it offers suggestions for both being more selective in deploying this mode of copyright lawmaking and improving the function of such lawmaking in cases where it is deployed.

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INTRODUCTION

Copyright law has become very complicated. Every few years, it seems, Congress enacts another amendment to the copyright law, and each new amendment seems more complicated than the last. The first Copyright Act enacted in 1790 was a model of brevity, weighing in at a scant two or three pages. By 1909, the Act had expanded a bit, now closer to twenty-odd pages, yet retaining a certain conceptual simplicity. By 1976, however, Congress had significantly expanded the Act, reflecting dramatic changes in technology and the increasing complexity of modern copyright markets. Subsequent amendments to the 1976 Act have added only more complexity. Today, the Copyright Act weighs in at more than two hundred

densely packed pages, nearly one hundred times larger than the original Act.[1]

This trend has not gone unnoticed. Indeed, the increasing complexity of the Copyright Act has become the subject of bemusement and concern among copyright scholars and others. Comparisons to the tax code are becoming increasingly frequent.[2] Teaching the subject has required less explication of broad principles in case law and more close reading of detailed statutory provisions. Many commentators have become concerned that the complexity of the code is making it more difficult for individuals to understand and comply with its provisions.[3] Others have lamented the complexity of certain, very detailed, provisions.[4]

Despite widespread recognition of the increasing complexity of U.S. copyright law, until recently relatively little has been written comprehensively addressing the broader implications of this change. Most of the existing literature has focused on isolated aspects of this increased complexity. Jessica Litman, for example, has written about how the complexity of the Copyright Act makes it difficult for individuals to abide by its requirements.[5] Robert Merges has analyzed how some of this complexity is a response to changing technology.[6] Peter Menell has

1. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW 2–4 (2004) (noting the recent expansion of the Copyright Act); David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1320 (2004) (discussing the increased length and frequency of amendments to the 1976 Copyright Act).

2. *See, e.g.*, Dan L. Burk & Mark A. Lemley, *Policy Levers In Patent Law*, 89 VA. L. REV. 1575, 1638 (2003) ("Industry specific rules and exceptions have led to a bloated impenetrable statute that reads like the tax code."); Shubha Ghosh, *The Merits Of Ownership; Or, How I Learned To Stop Worrying And Love Intellectual Property*, 15 HARV. J.L. & TECH. 453, 481–82 (2002) (citing an unpublished speech by Professor Alfred Yen); Nimmer, *supra* note 1 at 1282 (2004) (commenting that, due to recent detailed amendments, the Copyright Act "exceed[s] the tax code as a template for involution"); Jonathan Zittrain, *The Copyright Cage*, LEGAL AFFAIRS, July-Aug. 2003, at 26 (comparing copyright scholars' attitudes towards the Copyright Act to the "benign contempt" with which tax scholars regard the tax code).

3. JESSICA LITMAN, DIGITAL COPYRIGHT 25, 29 (2001) [hereinafter LITMAN, DIGITAL COPYRIGHT]; Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 22–23, 38–40 (1996).

4. *See, e.g.*, David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189 *passim* (2000) (discussing the opacity of recent statutes governing digital audio transmissions).

5. *See, e.g.*, LITMAN, DIGITAL COPYRIGHT, *supra* note 3, at 29 (noting that, because copyright rules are constructed by lawyers for particular contexts, they are often difficult to understand for individuals attempting to apply them to everyday activities); Jessica Litman, *Copyright Legislation and Technological Change*, 69 OR. L. REV. 275, 312–14 (1989) (noting that the public is rarely represented in negotiations concerning the development of copyright law).

6. *See* Robert P. Merges, *Intellectual Property Rights And The New Institutional Economics*, 53 VAND. L. REV. 1857, 1860 (2000) [hereinafter Merges, *New Institutional Economics*]; Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law: 1900–2000*, 88 CAL. L. REV. 2187, 2189–2206 (2000) [hereinafter Merges, *One Hundred Years*]; *see also* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF

suggested that the complexity may result in part from the political landscape surrounding copyright issues.[7] Still others have focused on the complexity of particular provisions[8] or commented in passing on the increasing complexity of copyright law as a whole.[9] Until recently, however, few commentators have focused sustained critical attention on the changing character of copyright law as a whole.

This lack of sustained attention to copyright complexity is beginning to change. Tim Wu, for example, has analyzed many of the recent more complex provisions of the Copyright Act and has concluded that these reflect an unstated and largely unexamined "communications policy."[10] David Nimmer has also carefully examined the complex new provisions of the Act, concluding that the quality of copyright legislation, as measured against certain formal criteria, has declined dramatically in recent years.[11]

This Article contributes to this growing literature by focusing some critical light on the increasingly regulatory nature of U.S. copyright law and the implications of this change for existing legal institutions.[12] In this

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ENTERTAINMENT 82 (2004) (noting the effects of recent technology on copyright law).

7. *See* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 180–91, 194–97 (2002); *see also* LANDES & POSNER, *supra* note 1, at 22–23 (making a similar point).

8. *See* Lydia Pallas Loren, *Untangling The Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673, 687–98 (2003); Nimmer, *supra* note 4 *passim*; *see also* R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 240–50 (2001) (examining the complex rules governing internet music transmissions).

9. *See, e.g.*, CRAIG JOYCE ET AL., COPYRIGHT LAW 28 (5th ed. 2001) (suggesting that the trend toward "Balkanization" in copyright legislation will make it difficult for anyone to understand the overall statutory scheme); Michael W. Carroll, *Disruptive Technology And Common Law Lawmaking: A Brief Analysis Of* A&M Records, Inc. v. Napster, Inc., 9 VILL. SPORTS & ENT. L.J. 5, 5 (2000) ("[C]opyright law has become quite complex and much of the Copyright Act of 1976 reads like a very finely detailed contract."); Kenneth D. Crews, *Looking Ahead and Shaping the Future: Provoking Change in Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 549, 550–63 (2001) (analyzing copyright law's trajectory toward increased complexity); I. Trotter Hardy, *Not So Different: Tangible, Intangible, Digital, and Analog Works and Their Comparison for Copyright Purposes*, 26 U. DAYTON L. REV. 211, 243 n.55 (2001) (stating that the ongoing re-adjustment of the Copyright Act leads to increased costs); F. Gregory Lastowka, *Free Access and the Future of Copyright*, 27 RUTGERS COMPUTER & TECH. L.J. 293, 322–23 (2001) (discussing the complexity of "fair use" and digital copyright law); David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909, 988 n.477 (2002) ("It must be admitted that, of late, the Copyright Act has attracted technically complex amendments even more often than once a year.").

10. Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. (forthcoming Nov. 2004) (arguing that the complexity in copyright reflects copyright's "communications policy").

11. Nimmer, *supra* note 1, at 1307–26.

12. This Article differs from Wu's article, insofar as it is focused less on the reasons for this shift to a more complex copyright law and more on the practical implications of the shift, and specifically how to most effectively administer and implement such a complex law. *See* Wu, *supra* note 10 (forthcoming). Similarly, it differs from Nimmer's article in that it is focused less

Article, I first make the descriptive claim that U.S. copyright law is undergoing a fundamental shift in the way it promotes progress through providing incentives for creation. For many years, U.S. copyright law was based largely on a judicially administered, industry-neutral property rights regime.[13] Congress was responsible for setting the property entitlement. The courts were responsible for defining and enforcing the entitlement. And the markets and private institutions were responsible for organizing the production of creative works in light of the property rights structure. The Copyright Office's role was primarily ministerial, registering and tracking ownership of copyrighted works.[14]

In recent years, however, Congress has been much more willing to intervene in the structure of copyright markets.[15] The 1976 Act departed from the pure property rights view by introducing detailed, industry-specific exemptions and several complex compulsory licenses for certain industries. The Librarian of Congress was, for the first time, charged not only with registering copyrights, but also setting licensing rates, albeit in only a few industries. Since the 1976 Act, amendments to the Act have become increasingly more detailed and industry-specific, relying more on compulsory licenses and, in some cases, mandating adoption of certain technologies and banning others. The Librarian of Congress's duties have similarly expanded beyond mere registration, encompassing not only ratemaking but also substantive rulemaking. Recently proposed legislation, as well as academic proposals for significantly revamping the copyright system, also exhibit similar qualities. The trend is such that this mode of "regulatory copyright"[16] is now the dominant mode of copyright

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on assessing the quality of complex copyright legislation, and more on the institutional implications of copyright complexity. *See* Nimmer, *supra* note 1, at 1237–39.

13. *See infra* Part I.

14. Note that I use the descriptive term "property" in the above sense, to denote a rather broad entitlement enforceable through injunctive relief. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 135, 139–44 (2d ed. 1997); Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089–1115 (1972). The discussion of "property" in this Article thus focuses primarily on the nature of the copyright entitlement, and not on the specific makeup of the entitlement (i.e., whether it should be more expansive or more limited). For discussions about the rhetorical uses (and abuses) of the term "property" in the intellectual property context, see, for example, Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 *passim* (2000); Michael Carrier, *Cabining Intellectual Property Through A Property Paradigm*, 54 DUKE L.J. 1 (forthcoming Nov. 2004); Adam Mosoff, *Is Copyright Property?: A Comment on Richard Epstein's* Liberty vs. Property, *at* http://www.ssrn.com/sol3/papers/cfm?abstract_id=491466 (last visited Nov. 22, 2004) (on file with the North Carolina Law Review); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property, Shamans, Software, and Spleens: Law and the Construction of the Information Society*, 75 TEX. L. REV. 873, 895–903 (1997).

15. *See infra* Part II.

16. This Article defines this term in more detail in Part II. Other commentators have used the term to describe these changes in copyright law. *See, e.g.*, FISHER, *supra* note 6, at 197

lawmaking.

Like the earlier property rights model, this regulatory approach to copyright has strengths and weaknesses.[17] Although the trade-offs between a judicially administered property rights regime versus a more interventionist regulatory regime have been widely recognized in other areas of the law,[18] relatively little attention has been paid to the trade-off in the copyright context.[19] One strength of the regulatory approach to copyright is that it permits far more detailed and precise tailoring of rights and responsibilities in response to specific industry structures. The approach can thus be used to respond to market failures that might exist under a pure property rights approach. It also provides parties with more specificity and clarity. Finally, it often reflects negotiated agreements between the regulated parties, and is thus politically feasible.

At the same time, the regulatory approach, as currently implemented in the copyright context, suffers from a number of weaknesses. The regulatory approach is more complex and therefore more costly to administer. The complexity makes copyright law less coherent and less transparent, which increases both the incentive and opportunities for rent-seeking by the affected industries. Furthermore, unlike other complex areas of federal law, agency involvement in substantive copyright policymaking has been relatively limited, for various historical reasons. As currently implemented, the regulatory approach in copyright lacks flexibility, and thus presents the risk of locking in existing industry structures. The current approach also makes insufficient use of expertise and empirical data in the policymaking process.

A number of suggestions can be gleaned from this critical assessment of regulatory copyright.[20] First, this analysis offers some guidance regarding when a regulatory approach may be preferable to a property rights approach in the copyright context, and vice versa. For example, where there is a clear case of market failure, where there are relatively good data, and where the main participants in that industry are easily identifiable and well-represented, a regulatory approach may have

(sketching out what copyright might look like if treated like a regulated industry); Reza Dibadj, *Regulatory Givings And The Anticommons*, 64 OHIO ST. L.J. 1041, 1055–58 (2003) (analyzing copyright as a "regulatory giving"); Menell, *supra* note 7, at 195 (briefly noting the shift from property rights to regulatory regime).

17. *See infra* Part III.

18. *See* Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1329–64 (1998).

19. *But cf.* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 406–15 (2003) (seeking to explain why copyright protection has been increasing at the same time as other areas of law have been deregulated).

20. *See infra* Part IV.

significant advantages. By contrast, where the case for market failure is not so clear, where there is significant uncertainty about technology and/or the future structure of the market, and where there are new entrants, a property based model may be preferable. This suggests that recent attempts to apply a regulatory model to digital copyright issues are ill-advised.

Second, this assessment suggests ways of improving the function of regulatory copyright in those cases where it is deployed.[21] Express recognition of the regulatory nature of modern copyright law suggests perhaps a greater role on the part of the Copyright Office or some other administrative body in setting copyright policy in response to the changing technological and market environment. If the Copyright Office were to play such a role, significant changes would need to be made to its structure and responsibilities. In particular, greater technical and economic expertise would be essential. In addition, changes would need to be made to ensure broad and effective input, not only from copyright owners, but from other interests such as technology companies and the public at large. Although delegating increased authority to the Copyright Office is not without its drawbacks, such an approach would be superior to the current approach, in which Congress passes inflexible, detailed, technology-specific legislation without adequate expertise.

Part I of this Article begins by examining the property rights approach of the pre-1976 copyright acts. It briefly describes the earlier acts and identifies a number of common features in both the substantive law and how that law was implemented. Part II outlines the competing "regulatory copyright" approach that began to emerge in the 1976 Act and has been increasingly dominant since then.[22] It also identifies the characteristics of this new approach. Part III offers some tentative explanations for why the regulatory approach has become increasingly dominant. It then critically assesses both the strengths and weaknesses of this model as compared to the earlier model. Part IV focuses on some of the implications of the analysis. In particular, it proposes guidelines for determining when a regulatory approach may be more appropriate. Finally, it offers suggestions for improving the function of the regulatory approach in those areas where it is deployed.

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21. *See id.*

22. Nimmer draws a similar (though not identical) distinction between "national copyright legislation" and "D.C. regulation." Nimmer, *supra* note 1, at 1290–92. Wu similarly divides the Copyright Act between provisions directed at authorship and provisions directed at copyright's "communications policy." *See* Wu, *supra* note 10 (forthcoming).

I. THE PROPERTY RIGHTS MODEL

This Part of the Article analyzes the model that characterized the first 150 years of U.S. copyright law. As this Part will show, for much of U.S. history, U.S. copyright law has limited itself to defining a relatively simple, industry-neutral property entitlement. The courts subsequently enforced and elaborated upon the entitlement in a common-law-like manner. The market and private institutions were then primarily responsible for organizing the production of creative works in light of the entitlement structure. The Copyright Office's role was primarily ministerial and involved little or no substantive policymaking. After providing support for this descriptive claim, this Part discusses a number of characteristics of the property rights approach to copyright law.

A. *The Early Copyright Acts*

1. 1790 Act

The very first Copyright Act was a model of brevity and simplicity. Enacted in 1790, the Act contained seven short sections defining the scope of the copyright entitlement.[23] The Act was limited to maps, charts, and books, and gave authors of these works an exclusive right to print, reprint, publish, and sell them.[24] In order to get the benefit of the exclusive right, the author had to record title in the work at the clerk's office of the district court where the author resided.[25] The author also had to deposit a copy with the Secretary of State.[26] The Act indicated that the exclusive right lasted for fourteen years and could be renewed for an additional fourteen years by re-recording the work.[27] The Act also spelled out the penalties that would apply to any person who violated the exclusive right. And that was basically it.[28]

The 1790 Act thus established a rather simple property rights regime as a way of addressing the public goods problem presented by maps, charts and books.[29] The exclusive right enabled authors of these works to exclude direct imitators and recoup their initial investment in creative effort. The entitlement created by the Act was substantively quite straightforward, covering a specific set of works and barring a specific set of actions. The

23. Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1802).
24. *Id.* § 1, 1 Stat. at 124.
25. *Id.* § 3, 1 Stat. at 125.
26. *Id.* § 4, 1 Stat. at 125.
27. *Id.* § 1, 1 Stat. at 124.
28. *Id.* § 2, 1 Stat. at 124–25.
29. *See* Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 355 (1967).

courts were responsible for enforcing the entitlement. The administrative role was handled by the local district courts, and was limited to recording the property interest in much the same way that real property interests might be recorded at a registry of deeds.

2. 1790–1909

From 1790 to 1909, the Copyright Act was amended in a number of ways, although it retained the same basic structure. First, the subject matter of copyright was gradually extended beyond maps, charts, and books, to include prints,[30] musical compositions,[31] photographs,[32] paintings, drawings, chromolithographs, statues, and works of fine art.[33] Exclusive rights were similarly expanded to include a public performance right for dramatic[34] and musical[35] compositions. The original term of copyright protection was extended as well, from fourteen to twenty-eight years.[36] Congress also beefed up the formalities, introducing the notice requirement[37] and deposit with the Library of Congress.[38] During this period, Congress also established the Copyright Office and charged it with the administrative aspects of the Copyright Act, which at this point were limited largely to registering copyrights, renewals, and transfers.[39]

All of these changes were incremental, and none altered the basic structure of the Act. Despite expansions in subject matter, rights, and term, the Copyright Act by and large retained its central focus on defining a relatively industry-neutral property entitlement. And although the Copyright Office was established to administer the Act, its role was largely limited to recordkeeping, again much akin to the role played by a local registry of deeds or other such agency.

3. 1909 Act

These incremental changes eventually led to the substantial revision of

30. Act of April 29, 1802, ch. 36, § 2, 2 Stat. 171, 171 (repealed 1831).

31. Act of February 3, 1831, ch. 16, § 1, 4 Stat. 436, 436 (amended 1870).

32. Act of March 3, 1865, ch. 126, § 1, 13 Stat. 540, 540 (current version at 17 U.S.C. § 102 (2000)).

33. Act of July 8, 1870, ch. 230, § 100, 16 Stat. 198, 214 (codified as amended at 17 U.S.C. § 101 (2000)).

34. Act of August 18, 1856, ch. 169, § 1, 11 Stat. 138, 138–39 (repealed 1870).

35. Act of January 6, 1897, ch. 4, § 4966, 29 Stat. 481, 481–82 (codified as amended at 17 U.S.C. § 106 (2000)).

36. Act of February 3, 1831, ch. 16, §§ 1–2, 4 Stat. 436, 436–37 (amended 1870).

37. Act of April 29, 1802, ch. 36, § 1, 2 Stat. 171, 171 (repealed 1831).

38. Act of August 10, 1846, ch. 178, § 10, 9 Stat. 102, 106 (repealed 1870).

39. U.S. COPYRIGHT OFFICE, UNITED STATES COPYRIGHT OFFICE: A BRIEF HISTORY AND OVERVIEW, *at* http://www.copyright.gov/circs/circ1a.html (last visited Nov. 22, 2004) (on file with the North Carolina Law Review).

the Copyright Act in 1909. The 1909 Act was substantially more complex than its predecessors and initially contained sixty-four sections.[40] The subject matter of copyright expanded to include not just a limited listing of copyrighted works, but "all the writings" of an author.[41] The exclusive rights similarly expanded to include not only the rights to "print, reprint, publish, copy, and vend" the copyrighted work, but also the rights to create certain derivative works and publicly perform certain works.[42] The renewal term was also extended by an additional fourteen years, so that the maximum possible term was now fifty-six years.[43] Copyright protection was, moreover, measured not from the date of the filing of title, but from the date of first publication with notice.[44]

Despite increasing in complexity, the 1909 Act retained the basic property rights structure of the earlier Acts. Many of the additional provisions merely elaborated upon the basic entitlement structure. For example, many of the additional provisions gave more detailed instructions about the notice, deposit, and registration requirements and procedures.[45] Others provided extensive detail about the substantive and procedural requirements for infringement actions.[46] Still others provided additional guidance about initial ownership, assignment, and transfers of the entitlement, along with the attendant recording requirements.[47] Again, all of these were consistent with the basic property rights structure.

The 1909 Act also spelled out, in greater detail, the responsibilities of the Copyright Office. The Act directed the Librarian of Congress to appoint a Register and Assistant Register of Copyrights.[48] The Register was charged with registering copyrights, accepting deposits of copies of works, collecting copyright fees, keeping and making publicly available various records and indices relating to registration, and reporting annually to the Librarian of Congress regarding these activities.[49] The Register was also given the power to issue rules and regulations regarding the registration process.[50] Although the 1909 Act spelled out the administrative role of the Copyright Office in far more detail, its role

40. Act of March 4, 1909, ch. 320, 35 Stat. 1075 (repealed 1976).

41. *Id.* § 4, 35 Stat. at 1076. These writings were classified for purposes of registration. *Id.* § 5, 35 Stat. at 1076–77.

42. *Id.* § 1(a), 35 Stat. at 1075.

43. *Id.* § 23, 35 Stat. at 1080.

44. *Id.*

45. *Id.* §§ 12–13, 18–22, 35 Stat. at 1079–80.

46. *Id.* §§ 25–40, 35 Stat. at 1081–84.

47. *Id.* §§ 6–8, 35 Stat. at 1077; *id.* § 41–46, 35 Stat. at 1084–85; *id.* § 62, 35 Stat. at 1087–88.

48. *Id.* § 48, 35 Stat. at 1085.

49. *Id.* §§ 49, 51, 56, 35 Stat. at 1085–86.

50. *Id.* § 53, 35 Stat. at 1085.

remained focused on keeping and maintaining records regarding ownership of the basic copyright entitlement. Thus, the entire structure of the 1909 Act remained significantly focused upon defining a basic property entitlement.

The 1909 Act did, however, contain a few notable departures from the strict, industry-neutral property rights model. First, the 1909 Act was more industry-specific than previous acts. The exclusive rights varied somewhat according to the type of work.[51] Moreover, certain exceptions and damage limitations were industry- or work-specific. For example, the Act exempted certain public performances of musical works via coin-operated machines.[52] It also specified different damages based on the type of work.[53] Although these provisions represented some tailoring of the Act to respond to certain markets, they constituted very minor exceptions to the broader property rights structure set up by the 1909 Act.

More significantly, the 1909 Act contained the first industry-specific compulsory license scheme, the so called "mechanical license."[54] This license was a direct response to the new technology of player-piano rolls, which posed a threat to the established sheet music industry. Prior to the 1909 Act, the Supreme Court in *White-Smith v. Apollo*[55] had held that piano rolls were not infringing "copies" of the musical work because the piano rolls were not generally intelligible by humans.[56] The 1909 Act legislatively overruled that decision, but at the same time enacted a compulsory license that permitted piano roll manufacturers to create such rolls upon payment of a statutorily set fee of two cents per copy to the original copyright owner of the musical work.[57] The copyright owner could demand a report of such use, due on the twentieth of each month, with the royalty payment due on the twentieth of the following month.[58] Payment of the royalty shielded the piano roll manufacturer from further copyright liability.[59]

The mechanical license is significant because, unlike some of the minor industry-specific parts of the act mentioned above, the license represented a significant departure from the property rights model. Instead

51. *Id.* § 1, 35 Stat. at 1075–76; *see also id.* § 5, 35 Stat. 1076–77 (listing such categorical classifications).

52. *Id.* § 1, 35 Stat. at 1076.

53. *Id.* at § 25(b), 35 Stat. at 1081 (providing fixed damages for the illegal reprinting of photographs in newspapers).

54. *Id.* § 1(e), 35 Stat. at 1075–76.

55. 209 U.S. 1 (1909).

56. *Id.* at 18.

57. Act of March 4, 1909, ch. 320, § 1(e), 35 Stat. at 1076.

58. *Id.*

59. *Id.*

of granting a property entitlement to the original musical work owner and forcing the piano roll manufacturers to bargain for a license, Congress itself set the terms of the license and enacted it into the statute. The statute established the price for the license, the terms of the license, the reporting procedures, and the penalties for failure to comply with the terms. The statute thus singled out a specific industry for special treatment and intervened in that market. The impetus for this special treatment was a desire to ensure robust competition in the burgeoning piano roll industry, in light of the dominance of one particular piano roll company.[60]

At the end of the day, however, this departure from the property rights focus of the Copyright Act was limited to a small slice of the copyright markets. Subsequent amendments to the 1909 Act further departed from industry-neutrality. For example, the Act was amended in 1971 to recognize and provide some special treatment for sound recordings.[61] However, these departures from the basic property rights model were rather limited. In the end, the 1909 Act and its subsequent amendments retained an overall focus on establishing and detailing the contours of the basic property entitlement.

4. 1976 Act

As we will see later in this Article, the next major revision of the Copyright Act in 1976 represented a more significant departure from the property rights model.[62] The 1976 revision of the Copyright Act was a substantial undertaking by any measure. As early as 1955, Congress authorized the Copyright Office to begin studying the possibility of substantially revising the Act in response to dramatic changes in the copyright industries.[63] The Copyright Office submitted a detailed report to Congress in 1961.[64] After a number of drafts, the first revision bill was introduced in 1964, followed by extensive hearings.[65] Bills were passed by the House in 1967 and 1976 and by the Senate in 1974 and 1976.[66]

60. *See* PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 65–67 (1994); Loren, *supra* note 8, at 681; Wu, *supra* note 10 (forthcoming).

61. Act of Oct. 15, 1971, Pub. L. No. 92-140 § 1, 85 Stat. 391, 391–92 (codified as amended at 17 U.S.C. 102 (2000)).

62. Act of Oct. 19, 1976, Pub. L. No. 94-533, 90 Stat. 2541 (codified as amended in scattered sections of U.S.C.).

63. *See* WILLIAM F. PATRY, LATMAN'S THE COPYRIGHT LAW 12 (6th ed. 1986).

64. U.S. COPYRIGHT OFFICE, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961); *see* PATRY, *supra* note 63, at 12.

65. PATRY, *supra* note 63, at 12.

66. *See* H.R. 2512, 90th Cong. (1967); S. 1361, 93rd Cong. (1974); S. 22, 94th Cong (1976); H.R. REP. NO. 94-1476 (1976), *reprinted at* 1976 U.S.C.C.A.N. 5659; PATRY, *supra* note 63, at 12.

Differences in the versions were resolved, and the new Act was signed in 1976.[67] The process of revision thus took more than twenty years. Much of the delay resulted from the complexity of the subject matter (in light of new industries and technologies) and from the need to balance the interests of many competing industry players.[68]

The resulting statute was significantly more complex and detailed than previous copyright acts. The 1976 Act contained several dozen extremely detailed sections and spanned several hundred pages. As will be discussed below, a number of these provisions represented rather significant departures from the property rights model that had, up until this time, been dominant.

Before discussing these departures, however, it is worth noting that the 1976 Act nevertheless retained, at its core, many aspects of the property rights model.[69] The 1976 Act, like the previous acts, defined a basic property entitlement. The subject matter of copyright was broadly consistent with the 1909 Act, covering all "original works of authorship fixed in any tangible medium of expression."[70] The Act also listed the basic rights that entitlement owners could assert, and these too were broadly similar to (though more expansive than) the rights under the 1909 Act.[71] Calculation of the term of protection was changed from a fixed term of years from the date of publication to the life of the author plus fifty years.[72] Many of the formalities under the previous acts were retained, though weakened somewhat. The Copyright Office retained its primary role of registering and keeping records relating to copyrights.[73]

The 1976 Act also expressly recognized the role that courts had been playing in helping to define the contours of the entitlement. The Act did so by codifying the fair use defense,[74] which the courts had independently developed prior to the 1976 Act. Although the earlier copyright acts expressly mentioned no such defense, courts interpreting these acts created the defense for certain limited acts of copying.[75] The 1976 Act attempted

67. *See* Act of October 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.); PATRY, *supra* note 63, at 12–13.

68. *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870–79 (1987).

69. *See* Nimmer, *supra* note 1, at 1256–99 (discussing in detail the basic provisions and structure of the 1976 Act).

70. Pub. L. No. 94-553, § 102(a), 90 Stat. 2541, 2544–45 (1976) (codified at 17 U.S.C. § 102(a) (2000)).

71. *Id.* § 106, 90 Stat. at 2546.

72. *Id.* § 302(a), 90 Stat. at 2572–73.

73. *Id.* §§ 701–10, 90 Stat. at 2591–94.

74. *Id.* § 107, 90 Stat. at 2546.

75. The earliest articulation of the fair use defense in U.S. law is generally considered to be *Folsom v. Marsh*, 9 F. Cas. 342, 344–45 (C.C.D. Mass. 1841) (No. 4901) (Story, J.).

to codify the case law by identifying the factors that courts had been considering, while leaving room for the courts to continue to develop the defense in a case-by-case manner.[76] The 1976 Act thus expressly recognized the role that courts had been playing in tailoring the scope of the property entitlement in a common-law-like manner in response to specific factual situations. This, too, was broadly consistent with a primary focus on defining a property entitlement.

B. Characteristics

The property rights model underlying the early copyright acts has a number of important features from both regulatory and institutional points of view. First, the model is substantively rather simple.[77] That is, the substantive law of copyright, at least as articulated in the statute, is relatively straightforward. Under this model, copyright law defines a basic property entitlement. It sets forth the subject matter covered by copyright (whether a limited list of certain types of works, or more broadly, all writings). It details the basic requirements for protection (whether registration, publication, or fixation). It sets forth the exclusive rights given to copyright owners (whether merely to prevent copying, or also public performances and creation of derivative works), and it sets forth the penalties for violation of these rights. Thus, the underlying entitlement is relatively straightforward and easy to understand.

Second, and relatedly, the property rights model is generally industry- and technology-neutral. Copyright law under this model defines a property entitlement that applies equally to all of the works that are subject to copyright protection. It makes few distinctions between books, music, sculpture, or other types of works. All works are subject to the same requirements for protection. All are given broadly (though not entirely) the same set of exclusive rights.[78] And all are protected for the same length of time, despite potentially significant differences in the nature of the particular markets.[79]

Third, this model relies upon the courts for implementation and further articulation of the property entitlement. The substantive simplicity of the statute does not necessarily mean that the substantive law of copyright is

76. Pub. L. No. 94-553, § 107, 90 Stat. at 2546.

77. *See* Nimmer, *supra* note 1, at 1293–98 (assessing the "coherence" of various portions of the 1976 Act).

78. The main exception to this is the lack of a general public performance right for sound recordings. *See* § 106(4), 90 Stat. at 2546.

79. *See* RALPH BROWN & ROBERT DENICOLA, CASES ON COPYRIGHT: UNFAIR COMPETITION, AND RELATED TOPICS BEARING ON THE PROTECTION OF LITERARY, MUSICAL, AND ARTISTIC WORKS 487 (7th ed. 1998) (suggesting the possibility of varying terms depending on the nature of the work).

simple. Instead, it means that the courts are charged with dealing with any complexities in the application of the statute.[80] The important feature, however, is that these complexities are not detailed in the code, but are developed in a case-by-case manner according to more general principles, quite akin to common law development.[81] Thus, the courts are charged with developing tests and principles for separating protectible expression from unprotectible ideas,[82] for determining when infringement occurs,[83] and for determining when liability should be excused under fair use.[84] While a good deal of substantive complexity can be found in the case law, the case-by-case nature of common law adjudication places a practical limit on the extent of this substantive complexity.

Fourth, this model relies primarily upon private institutions and private ordering to organize the production of creative works. Under this model, copyright law sets the scope of the entitlement and is relatively agnostic about the details and structure of the resulting market.[85] The distribution of rights and responsibilities among various market players is not generally determined by the statute. The terms of the licensing arrangements (including rates and division of rights) are similarly left to the market.[86] Copyright sets the entitlement to solve the public goods problem and then largely gets out of the way. The assumption is that, once the entitlement is set, private ordering will ensure that the entitlement is

80. *See* Nimmer, *supra* note 1, at 1292 (describing a terse "national copyright legislation" with subsequent development by the courts).

81. *See* Pierre N. Leval, *An Assembly of Idiots?*, 34 CONN. L. REV. 1049, 1050–62 (2002) (describing the "highly successful partnership" between Congress and the courts in the development and articulation of copyright law).

82. *See* Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344–51 (1991) (finding only thin protection for databases); Baker v. Selden, 101 U.S. 99, 104 (1880) (developing the idea/expression dichotomy); Nichols v. Universal Pictures Corp., 45 F.2d 119, 120–21 (2d Cir. 1931) (Hand, J.) (developing the "abstractions test").

83. *See, e.g.*, Computer Assoc. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706–12 (2d Cir. 1992) (developing the "abstraction-filtration-comparison" test); Steinberg v. Columbia Pictures Indus., 663 F. Supp. 706, 712 (S.D.N.Y. 1987) (applying infringement analysis to a movie poster mimicking a drawing by Saul Steinberg).

84. *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577–78 (1994) (applying and adapting fair use defense to parody); Harper & Row Publishers v. Nation Enterp., Inc., 471 U.S. 539, 561 (1985) (applying fair use analysis to the publication of excerpts of Gerald Ford's autobiography); Folsom v. Marsh, 9 F. Cas. 342, 349 (D. Mass. 1841) (Story, J.) (crafting a fair use defense to copyright infringement).

85. Though not completely. The specific structure of the rights will, of course, have an impact on the structure of markets. For example, the first sale limitation on the right to publicly distribute copyrighted works means that independent markets for rental and resale can develop free from direct copyright owner control. 17 U.S.C. § 109(a) (2000).

86. Under this vision, collective rights organizations may play a role in reducing potential transactions costs. *See* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CAL. L. REV. 1293, 1295–97 (1996). Note also the role of antitrust law in regulating these organizations. *See id.* at 1340–58.

efficiently allocated.[87]

Fifth and finally, under this model, the administrative role of the Copyright Office is relatively limited. The Copyright Office is charged primarily with recordkeeping.[88] It registers works, registers renewals and transfers, accepts deposits, charges fees, and maintains records.[89] Its policymaking power is limited to regulations involving the mechanics of the above activities.[90] And although in limited circumstances it may refuse to register a work for failure of subject matter,[91] these rejections comprise a relatively small part of the Copyright Office's duties.[92]

II. THE REGULATORY MODEL

This Part of the Article develops a model of copyright law that stands in sharp contrast to the property rights model described in the previous Part. It starts by defining the characteristics of this contrasting model and discussing the differences between this "regulatory" model and the property rights model. It then makes the descriptive claim that Congress has shown an increasing preference for this regulatory model in its recent copyright legislation.[93] This Part ends by assessing the comparative scope of these two models of copyright.

A. *Characteristics*

Before making the descriptive claim, it is necessary to spend some time here at the outset describing some of the characteristics of this competing model of copyright legislation. In other words, exactly what does this Article mean by the term "regulatory copyright?"[94] In some sense, the term is too broad, insofar as all copyright legislation "regulates"

87. *See, e.g.*, Paul Goldstein, *Copyright*, 55 LAW & CONTEMP. PROBS., Spring 1992, at 82–83 (arguing that entitlement allocation should be left to market forces); Merges, *supra* note 86, at 1301–07 (explaining that private bargaining can be a more efficient means of allocating the entitlement); *see also* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 18 (1959) ("The allocation of resources should be determined by the forces of the market rather than as a result of government decisions.").

88. *See* Act of March 4, 1909, ch. 320, §§ 45–61, 35 Stat. 1075, 1087–88.

89. *See id.*

90. *See id.* § 53, 35 Stat. at 1085 (detailing the procedures for filings, etc.).

91. *See, e.g.*, Atari Games Corp. v. Oman, 888 F.2d 878, 880–81 (D.C. Cir. 1989) (recognizing that registration may be refused if the subject matter is not copyrightable); 37 C.F.R. § 202.1 (2003) (listing material not subject to copyright).

92. During fiscal year 2003, the Copyright Office's Board of Appeals met five times and heard sixteen requests for reconsiderations of refusals to register. 2003 ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS 9, *at* http://www.copyright.gov/reports/annual/2003/Annual_Report_2003_Full.pdf (last visited Nov. 22, 2004) [hereinafter 2003 ANNUAL REPORT] (on file with the North Carolina Law Review).

93. *See also* Nimmer, *supra* note 1, at 1320 (describing this shift).

94. For other uses of this term in the context of copyright law, see *supra* note 16.

the copyright markets. Even copyright legislation based on the property rights model described above regulates copyright markets, in the same way that the substantive law of real property regulates real property markets.[95] Moreover, there are many points on the spectrum between a property rights view and a more regulatory view. This Article uses the term, however, to roughly capture the way in which this new model of copyright lawmaking intervenes more dramatically and more extensively in the markets for copyrighted works.

By "regulatory," then, this Article means greater legal intervention in the structure and functioning of a particular market, as illustrated by a number of different, but related characteristics. The first characteristic is increased statutory complexity through detailed codification.[96] Regulatory copyright law contains extremely detailed and complex statutory provisions allocating rights and responsibilities at a very fine-grained and particularized level.[97] Rather than defining a broad property entitlement and leaving the courts to apply the entitlement in a case-by-case manner, the regulatory approach seeks to specify the precise results and lay them out in the statute itself. Thus, regulatory copyright is generally more detailed and complex.[98]

Second, regulatory copyright is far more industry- and technology-specific. The rights and responsibilities of various parties can vary widely according to the particular type of work or industry at issue. In some cases, certain types of works might lack certain rights.[99] In other cases, the basic entitlement structure in a given industry sector might be replaced entirely by a compulsory license.[100] Exemptions also vary substantially depending upon the type of work.[101] In places, regulatory copyright can even dictate the adoption of a technology within certain markets or forbid the distribution of a technology in other markets.[102] Thus, regulatory copyright is far more context-sensitive and aims to tailor its requirements to specific

95. *See* Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387 *passim* (2003) (arguing that copyright has focused on protecting private property and has lost sight of its regulatory function).

96. *Cf.* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 5 (1982) (describing the historical trend toward specificity in codification); Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1123–24 (explaining that many areas of the common law have been codified in the past seventy-five years).

97. *See* Nimmer, *supra* note 1, at 1285–99 (calling these portions "D.C. Regulation").

98. *Cf.* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 12 (1992) (describing a general tendency in the law toward more complexity).

99. For example, sound recordings lack a general public performance right. 17 U.S.C. § 106(4) (2000).

100. *See infra* Parts II.B.2 and II.B.3.

101. *See infra* Part II.B.1.

102. *See infra* Parts II.C.2 and II.C.4.

industries and markets.[103]

Third, regulatory copyright is willing to intervene far more deeply into the actual structure of copyright markets. Instead of setting the property entitlement and largely leaving the market to allocate the distribution of these entitlements, the regulatory approach seeks to dictate in greater detail the precise structure and allocation of rights within the market. For example, in some cases the approach might enact a compulsory license, dictating the terms of the license (including the price) for an entire industry or part of that industry.[104] In other cases, the approach might levy a tax on certain activities and redistribute the proceeds to other parties.[105] In still other cases, the regulatory approach may affect the technology adopted by the players in that industry.[106] In all of these cases, copyright law intervenes far more deeply into the structure of the copyright markets.

Fourth and finally, the approach vests more policymaking power in Congress and, in some cases, the Librarian of Congress, rather than the courts.[107] Exemptions from liability are spelled out in the statute, rather than left to the courts for case-by-case development in light of general principles. These exemptions are often extremely complex and detailed.[108] More generally, the role of the Librarian of Congress (and the Copyright Office within the Library of Congress) under this approach is far greater.[109] The new role not only encompasses recordkeeping, but also involves serving as an expert advisor to Congress on copyright matters (for example, providing technical advice and reports, and reviewing and drafting proposed legislation),[110] rate setting and distribution of funds for certain compulsory licenses,[111] and in some cases even substantive rulemaking.[112]

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103. *See generally* Michael Carroll, *Tailoring Intellectual Property Rights* (May 14, 2004) (unpublished manuscript, on file with the North Carolina Law Review) (arguing in favor of a more industry-specific approach to copyright).

104. *See infra* Parts II.B.2 and II.B.3.

105. *See id. See generally* Tom W. Bell, *Authors' Welfare: Copyright As A Statutory Mechanism For Redistributing Rights*, 69 BROOK. L. REV. 229 (2003) (analogizing copyright to welfare).

106. Thus, although there is much literature on compulsory licensing, compulsory licensing is a subset of a broader group of market interventions with which this Article is concerned.

107. *See infra* Parts II.B.3, II.C.3, and II.C.4.

108. *See infra* Part II.B.1.

109. *See generally* 17 U.S.C. §§ 701–710 (2000) (assigning the Copyright Office more extensive duties than those previously assigned). The Copyright Office currently employs 500 individuals. *See* U.S. COPYRIGHT OFFICE, UNITED STATES COPYRIGHT OFFICE: A BRIEF HISTORY AND OVERVIEW, *at* http://www.copyright.gov/circs/circ1a.html (last visited Nov. 22, 2004) (on file with the North Carolina Law Review). In the fiscal year 2003, the office registered 534,122 copyrighted works and disbursed more than $65 million from compulsory licenses for cable broadcasts, satellite broadcasts, and AHRA. 2003 ANNUAL REPORT, *supra* note 92, at 7, 13.

110. 17 U.S.C. § 701(b)(1). This role predated the 1976 Act, but has increased since then.

111. *See infra* Parts II.B.2 and II.B.3.

Thus, when this Article discusses the regulatory turn in copyright law, it refers broadly to the several related trends described above. Together, these characteristics stand for an increasing willingness on the part of Congress to intervene more substantially into the nature and structure of copyright markets, as opposed to leaving these details to the market. Having sketched out the broad outlines of this more regulatory approach to copyright law, the rest of this Part makes the descriptive claim that more recent copyright legislation has moved toward this model and away from the earlier, property rights model.

B. The 1976 Act

As mentioned above, the 1976 Act retained, at its core, the same property rights model from the preceding copyright acts. However, the 1976 Act also contained a number of notable departures from the property rights model. In some respects, these parts of the 1976 Act represent a tour of the portions that are regularly ignored or glossed over in the standard copyright law course, which still focuses the bulk of its attention on the parts of the Act that correspond to the traditional, property rights view.[113] Most courses, for example, spend much time exploring the broad principles underlying *Baker v. Selden*[114] or *Feist v. Rural Telephone*.[115] Few courses, by contrast, spend sustained time on the cable or satellite broadcast compulsory licenses or on the detailed exemptions for libraries and archives. The lack of sustained focus on these narrower and more detailed provisions of the 1976 Act may explain why this shift to a regulatory approach has not attracted more attention.

1. Industry-Specific Exemptions

As an initial matter, even within the framework of a property rights model, the 1976 Act defined the scope of the basic copyright entitlement in a far more specific and fine-grained manner. This is most clearly evident in the detailed exemptions from copyright liability. Although the 1976 Act retained a broad and straightforward grant of exclusive rights,[116] it immediately followed this with a number of extremely detailed, complex, and industry-specific "limitations."[117] Earlier acts had contained very few express exemptions from copyright liability, leaving the courts to craft

112. *See* 17 U.S.C. § 1201(a)(1)(C) (2000).

113. *See* Wu, *supra* note 10 (forthcoming) (noting the same, and arguing that these provisions represent copyright's unstated "communications policy").

114. 101 U.S. 99 (1880).

115. 499 U.S. 340 (1991).

116. 17 U.S.C. § 106 (2000).

117. *Id.* §§ 108–122.

more via the fair use doctrine. In the 1976 Act, by contrast, these exemptions played a far more central role in setting the scope of the entitlement.

For example, the exemption for libraries and archives contains detailed provisions regarding when libraries can make copies of works in their collections.[118] Rather than setting forth broad standards for the exemption or leaving the issue to fair use, the statute provides a highly detailed and specific set of rules. It defines the types of libraries and archives that can take advantage of the exemption (e.g., libraries or archives open to the public or available to researchers from a particular field).[119] It defines the types of works that may be copied.[120] It sets forth the acceptable purposes for making copies (e.g., for preservation, interlibrary loan, etc.),[121] the number of permissible copies (e.g., only one or a few copies, depending on the purpose),[122] and other specific conditions that must be satisfied (e.g., in the case of damaged works, the inability to find a replacement at a fair price after reasonable effort).[123]

The exemption for certain public performances similarly departs from the industry-neutral, property rights model. This exemption includes a detailed list of specific activities that are expressly shielded from copyright liability.[124] The public performance right thus does not apply to: performances for face-to-face teaching activities of nonprofit educational institutions;[125] performances of certain works in the course of services at a place of worship;[126] certain performances with no commercial advantage;[127] certain receptions of broadcasts in a public place;[128] performances of certain works by "nonprofit agricultural or horticultural organization[s]";[129] performances of musical works by record stores;[130] certain performances for the blind; and performances by veterans or fraternal organizations.[131] These exemptions are highly targeted, singling out specific groups or activities for special treatment. Again, this represents a departure from a

118. *Id.* § 108.
119. *Id.* § 108(a).
120. *Id.* § 108(b).
121. *Id.* § 108(b)–(d).
122. *Id.*
123. *Id.* § 108(c)(1).
124. *Id.* § 110.
125. *Id.* § 110(1).
126. *Id.* § 110(3).
127. *Id.* § 110(4).
128. *Id.* § 110(5).
129. *Id.* § 110(6).
130. *Id.* § 110(7).
131. *Id.* § 110(8).

more industry-neutral, property rights regime.[132]

Not only are the exemptions industry-specific, they also contain detailed requirements defining the conditions under which they apply. The exemption for libraries described above is an example.[133] Another example is the public performance exemption for the reception of radio broadcasts in a public place.[134] This exemption was recently amended in 1998 to resolve a dispute between the owners of copyrights in musical works and owners of retail stores and restaurants, who often played radio broadcasts in their stores.[135] The resultant compromise is an extremely detailed exemption, which sets forth extensive requirements for retail establishments and restaurants. The exemption specifies not only the nature of the permitted uses, but also such details as permissible square footage ("less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose)" for retail stores),[136] the number of speakers and types of receiving equipment ("not more than four loudspeakers . . . located in any one room or adjoining outdoor space"),[137] and other requirements.

These exemptions thus begin to depart from the industry-neutral, property rights model of the earlier acts.[138] The exemptions are far more detailed and complex than the rules that the courts could have crafted under the fair use defense, establishing very specific requirements rather than relying upon broader standards and principles. The exemptions are also far more industry-specific, expressly singling out specific types of works, specific industries, and specific uses of copyrighted works for special treatment. These exemptions are also enacted expressly into the statute itself, rather than left to the courts for case-by-case development. As will be discussed more extensively below, these detailed exemptions resulted from political compromises hammered out by the relevant industries in the

132. Note that some of these performances would have been exempt under the 1909 Act, as that Act limited the public performance right to "for profit" performances. Act of Mar. 4, 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075 (repealed 1976). The 1976 Act expanded the property entitlement to include non-profit performances, then enacted the detailed exemptions listed above.

133. 17 U.S.C. § 108.

134. *Id.* § 110(7).

135. *See* Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298, 112 Stat. 2827 (codified at 17 U.S.C. §§ 301–304 (2000)); Laurence R. Helfer, *World Music on a U.S. Stage: A Berne/TRIPS and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93, 187–90 (2000).

136. Fairness in Musical Licensing Act § 202(a)(1)(B), 112 Stat. at 2830.

137. *Id.*

138. Other exemptions include exemptions for making and transferring copies of computer software, 17 U.S.C. §§ 109, 117; certain limitations on the rights associated with pictorial, graphic, and sculptural works, *id.* § 113; exemptions for noncommercial broadcasters, *id.* § 118; limitations on rights for architectural works, *id.* § 120; exemptions for reproduction for persons with disabilities, *id.* § 121.

drafting of the 1976 Act. They thus represent an attempt to establish clear rules, balancing the interests of the relevant parties.

At the same time, the exemptions standing alone represent a relatively limited departure from the property rights view. To some extent, detailed codification is not necessarily inconsistent with a property rights model. It might be quite possible to have a property entitlement that exhibits a high degree of statutory complexity, leaving the markets to allocate distribution of that entitlement. If the 1976 Act had limited itself solely to defining the exemptions in a more detailed fashion, it might fall more squarely within the traditional property rights model. However, the 1976 Act contained additional provisions that pushed beyond simply greater specificity, and these detailed exemptions should be understood in light of these additional provisions.

2. Mechanical and Jukebox Compulsory Licenses

More significantly, from a regulatory point of view, the 1976 Act made greater use of compulsory licenses and established them more firmly as an alternative to a property entitlement. The mechanical license from the 1909 Act was preserved, largely in the same form (though with greater detail and some slight modifications), in the 1976 Act.[139] By this time, of course, the relevant technology was not piano rolls but sound recordings on record albums and tapes.[140] Thus, once a musical work owner had authorized distribution of a sound recording, other artists could record and distribute copies of that musical work upon payment of a statutorily set licensing fee.[141] It is interesting to note that, despite the compulsory license procedure set forth in the statute, private parties often bargain around the statutory compulsory license, reaching their own terms and conditions.[142] This indicates that, although the 1976 Act intervened in the market by setting up a compulsory licensing scheme, the parties could nevertheless bargain around it.

The 1976 Act also contained a similar compulsory license for jukebox

139. *Id.* § 115.

140. Theresa M. Bevilacqua, Note, *Time to Say Good-Bye to Madonna's American Pie: Why Mechanical Compulsory Licensing Should Be Put to Rest*, 19 CARDOZO ARTS & ENT. L.J. 285, 289 (2001).

141. The rate is currently set at $.085 per work embodied in the phonorecord or $.0165 per minute of playing time or fraction thereof, whichever is greater. *See* 37 C.F.R § 255.3(I) (2003).

142. *See* Loren, *supra* note 8, at 696. *See generally* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1037–38 (1995) (noting that liability rules can sometimes facilitate bargaining); Ralph Oman, *The Compulsory License Redux: Will it Survive in a Changing Marketplace?*, 5 CARDOZO ARTS & ENT. L.J. 37 (1986) (charting the rise of the compulsory license).

operators.[143] Under the original 1909 Act, performances by coin-operated machines were exempted from liability entirely. In the 1976 Act, such performances were subject to a statutory compulsory license.[144] Later amendments to the Act replaced the statutory license with a preference for a negotiated license.[145] However, in the absence of a negotiated license, the license is set through arbitration by the Copyright Royalty Tribunal (later replaced by Copyright Arbitration Royalty Panels) under the supervision of the Librarian of Congress.[146] The function and role of these royalty-setting institutions will be discussed in more detail below, but for present purposes, it is important to note that the Act carved out another compulsory license for coin-operated music-playing devices such as jukeboxes.

3. Cable and Satellite Compulsory Licenses

Although both of the compulsory licenses described above departed from the property rights model, they did so in rather straightforward ways, defining a relatively simple compulsory license structure. The same cannot be said for the cable broadcasting compulsory license.[147] Responding to the advent of a new industry, the 1976 Act contained an exceptionally complex compulsory license provision, which enabled cable television providers to re-transmit broadcast television signals. The provision was the result of a compromise hammered out between the broadcast and cable industries.[148] The compulsory license scheme ultimately ensured that cable companies would be able to provide their customers with access to broadcast

143. 17 U.S.C. § 116. *See generally* Scott M. Martin, *The Berne Convention and the U.S. Compulsory License for Jukeboxes: Why the Song Could Not Remain the Same*, 37 J. COPYRIGHT SOC'Y U.S.A. 262 (1990) (describing the compulsory license requirements for jukebox operators); Marilyn S. Wise, *Trials Of The Tribunal: Toward A Fair Distribution Of Jukebox Royalties*, 16 SW. U. L. REV. 757 (1986) (same).

144. Though apparently this compulsory license was widely disregarded. *See* Loren, *supra* note 8, at 7–11.

145. 17 U.S.C. § 116.

146. *Id.* § 116(b)(2).

147. *Id.* § 111. Note that this provision also exempted certain re-transmissions by non-cable companies, e.g., retransmission via cable by a hotel or apartment building to the residents of the building. § 111(a)(1).

148. See H.R. REP. NO. 94-1476, at 89 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5704, stating:

> The Committee believes that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs. The Committee recognizes, however, that it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system.

Id.

television, while still compensating the broadcast industries.[149]

The resultant legislation was extremely complex and detailed. The compulsory license imposes extensive reporting requirements on cable companies.[150] Every six months, cable companies are required to file a statement of account with the Copyright Office setting forth the number of cable channels rebroadcasting the signals, the names of the broadcast stations they were retransmitting, total number of subscribers, gross amounts paid to the cable companies resulting from retransmission, and any other data the Copyright Office requires.[151] The statute then sets forth the specific royalty rate that the cable companies must pay, based on gross receipts from customers, for various acts of re-transmission.[152] The cable company must deposit any fees due under the compulsory license with the Copyright Office.[153] The statute then sets up a separate procedure for distributing the proceeds to the copyright owners.[154] Copyright owners whose shows were re-transmitted under the compulsory license can file claims for royalties in July of every year.[155] Every August, the Copyright Office determines whether there is any controversy over how the funds should be distributed.[156] If any such controversy exists, the matter is then transferred to a Copyright Arbitration Royalty Panel for resolution.[157] Decisions are then subject to judicial review.[158]

The cable compulsory license thus represented an even more significant departure from the industry-neutral, property rights regime.[159]

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149. *See generally* C. H. Dobal, Note, *A Proposal To Amend The Cable Compulsory License Provisions Of The 1976 Copyright Act*, 61 S. CAL. L. REV. 699 (1988) (detailing the statutory requirements of the 1976 Act that allow cable companies to retransmit television broadcast signals).

150. § 111(d)(1)(A).

151. § 111(d).

152. For example, the royalty rate could be 0.5 of one per centum of gross receipts. *See* § 111(d)(1)(C)–(D). This rate is subject to periodic adjustment. *See* Nat'l Cable Television Ass'n v. Copyright Royalty Tribunal, 689 F.2d 1077, 1080 & n.21 (D.C. Cir. 1982).

153. § 111(d)(1)(B).

154. § 111(d)(4).

155. § 111(d)(4)(A).

156. The statute expressly states that the parties may themselves agree to a distribution of the royalties. § 111(d)(4)(B).

157. *Id.* Under the 1976 Act, these decisions were made by the Copyright Royalty Tribunal, the institutional predecessor of the Copyright Arbitration Royalty Panels. Act of Oct. 19, 1976, Pub. L. No. 94-553, ch. 8, § 801(3), 90 Stat. 2541, 2596.

158. *See generally* Nat'l Broad. Co., Inc. v. Copyright Royalty Tribunal, 848 F.2d 1289 (D.C. Cir. 1988) (reviewing a decision of the Copyright Arbitration Royalty Panel); Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., 836 F.2d 599 (D.C. Cir. 1988) (same); Nat'l Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C. Cir. 1983) (same); Christian Broad. Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983) (same).

159. Oman, *supra* note 142, at 44 ("In examining the history of copyright in the United States over the last twenty years, one might reasonably conclude that the largest *economic* shift in

Here, the statute expressly singled out a particular industry for special treatment. It further dictated the very detailed terms of the compulsory license, including detailed reporting provisions, special definitions, and fee schedules. In many ways, the text of the provision reads like a private licensing agreement struck between private parties (which it in effect was, albeit one enacted into law by Congress).[160] Indeed, much of the terminology in the provision would be entirely opaque to anyone not familiar with the details of the industries at issue.[161] Moreover, unlike some of the previous compulsory licenses, the fees were not paid directly to the copyright owners. Instead, the Copyright Office pooled the receipts and redistributed the amounts to copyright owners in response to specific claims, with disputes being resolved by the Copyright Arbitration Royalty Panels. In all these respects, the provision intervenes much more directly into the details of a particular market.

The 1976 Act was later amended to include similar compulsory licenses for satellite retransmissions of broadcast television.[162] These provisions rival, if not exceed, the cable compulsory license in complexity. The provisions share many of the same characteristics as the cable television compulsory license such as extremely detailed conditions,[163] reporting requirements,[164] rate setting by the Copyright Arbitration Royalty Panels,[165] provisions for redistribution of royalties,[166] and separate definitions.[167] These provisions further contain even more detailed provisions tailored to the specifics of the satellite broadcast industry,

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copyright policy occurred when Congress created this license.").

160. *See* Litman, *supra* note 68, at 869.

161. For example, one section reads, in part:

> Except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows: (i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programming of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv); (ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent; (iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents . . . .

17 U.S.C. § 111(d)(1)(B).

162. *See* 17 U.S.C. § 119 (general satellite retransmission license); § 122 (local-to-local satellite retransmission license).

163. 17 U.S.C. §§ 119(a)(1)-(2), 122(a).

164. *Id.* §§ 119(b)(1)(A), 122(b).

165. *Id.* § 119(c)(3)(B).

166. *Id.* § 119(b)(4).

167. *Id.* §§ 119(d), 122(j).

including: detailed distinctions between types of initial broadcast feeds that are subject to the license;[168] detailed geographical limitations (for "unserved households," along with specific measures to calculate when such households are unserved);[169] separate penalties for violation of certain terms of the license;[170] ways of measuring signal intensity;[171] and even sections governing application to recreational vehicles and commercial trucks.[172] The satellite retransmission compulsory license thus represents an even clearer example of the regulatory approach.

It is worth noting, with all of these compulsory licenses, the increasingly prominent role of the Librarian of Congress and, specifically, the Copyright Office and the Copyright Arbitration Royalty Panels. With any compulsory license, some entity must set the rate, as the market no longer does so (as it would under a pure property rights regime).[173] In some cases, the rate is set by the statute.[174] In other cases, the statute delegates that responsibility to a rate-setting institution under supervision of the Librarian of Congress.[175] Originally, the 1976 Act vested this power in a permanent administrative body, the Copyright Royalty Tribunal.[176] Later, the power was vested in ad hoc Copyright Arbitration Royalty Panels convened by the Librarian of Congress.[177] In either case, the statute gives

168. *Id.* § 119(a)(1)–(2).

169. *Id.* § 119(a)(2)(B).

170. *Id.* § 119(a)(3)–(5).

171. *Id.* § 119(a)(8).

172. *Id.* § 119(a)(11).

173. The general advantages and disadvantages of compulsory licenses have been debated extensively elsewhere, see generally Merges, *supra* note 86; Robert P. Merges, *Of Property Rules, Coase, And Intellectual Property*, 94 COLUM. L. REV. 2655 (1994); Darlene A. Cote, Note, *Chipping Away At The Copyright Owner's Rights: Congress' Continued Reliance On The Compulsory License*, 2 J. INTELL. PROP. L. 219 (1994). For present purposes, I am less interested about the merits of the debate, and more interested in the regulatory implications once the Act recognizes some compulsory licenses.

174. 17 U.S.C. § 115(c)(2) (2000). Note that, although the initial rate for this compulsory license was set in the statute itself, the rate was subject to adjustment by the Librarian of Congress. *See* Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (codified at 17 U.S.C. § 801(b)(1)–(b)(2) (2000)). The current rate can be found at 37 C.F.R. § 255.3(1) (2003).

175. 17 U.S.C. § 801 (2000).

176. The actions of the Copyright Royalty Tribunal were subject to significant criticism and litigation. In particular, the statute provided little guidance regarding how royalties were to be distributed, leading to much litigation. *See, e.g.*, Nat'l Assoc. of Broadcaster v. Copyright Royalty Tribunal, 772 F.2d 922, 940 (D.C. Cir. 1985) (describing how the regulations as published easily confused parties); Christian Broad. Network v. Copyright Royalty Tribunal, 720 F.2d 1295, 1303 (D.C. Cir. 1983) (same); Nat'l Cable Television Assoc. v. Copyright Royalty Tribunal, 689 F.2d 1077, 1080 (D.C. Cir. 1982) (same); Recording Indus. Assoc. of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 6 (D.C. Cir. 1981) (same). Much of this criticism led to the Copyright Royalty Tribunal Reform Act of 1993, Pub. L. No. 103-198, 107 Stat. 2304 (codified in scattered sections of 17 U.S.C.).

177. Pub. L. No. 103-198, § 2, 107 Stat. 2304, 2304–08 (codified at 17 U.S.C. § 802(a)–(b)

an administrative body the power to set prices in a particular market for certain types of licenses. In some cases, the administrative body is also charged with accepting and holding royalty payments in a centralized manner, and then disbursing payments to copyright owners in response to filed claims.[178]

The responsibilities of the Copyright Arbitration Royalty Panels are expressly set forth in a separate chapter of the Copyright Act.[179] The Librarian of Congress is authorized to appoint and convene such panels, upon recommendation of the Register of Copyrights.[180] The panels are then charged with setting "reasonable copyright royalty rates" for the applicable compulsory licenses, and in doing so are asked to further various objectives, such as: maximizing the availability of creative works to the public; affording copyright owners a fair return; and minimizing the disruptive impact on existing industry structures.[181] The panels are also charged with resolving disputes over distribution of royalty proceeds to copyright owners.[182] This section also contains detailed provisions on the selection and payment of arbitrators, as well as procedures for conducting arbitrations. The panels thus act in both a rate setting context and in an adjudicatory context.[183]

The 1976 Act thus set up an ongoing administrative structure to deal with rate setting for compulsory licenses. In so doing, the Act established a clear, alternative structure for dealing with copyright regulation, a structure that Congress would subsequently utilize in regulating other copyright industries.[184] In addition to the compulsory licenses already mentioned above, the 1976 Act contained a compulsory license for public broadcast

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(2000)) (describing the functions and procedures of the copyright arbitration royalty panels).

178. 17 U.S.C. § 801(b)(3).

179. 17 U.S.C. § 801 (2000).

180. *Id.* § 801(b)(1).

181. *Id.*

182. *Id.* § 801(a)(3).

183. Note the pending Copyright Royalty and Distribution Reform Act of 2003, H.R. 1417, 108th Cong. (2003), which seeks to reduce costs and improve administrative efficiencies of the CARPs. *See also Copyright Royalty and Distribution Reform Act of 2003: Hearing on H.R. 1417 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 108th Cong. 59–60 (2003) (statement of Marybeth Peters, Register of Copyrights and Associate Librarian, Library of Congress) (detailing high administrative costs of the existing system, and in particular the institutional burden imposed by the ad hoc nature of the panels); *Copyright Arbitration Royalty Panel (CARP) Structure and Process: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong. 30–37 (2002) (statement of Marybeth Peters, Register of Copyrights and Associate Librarian, Library of Congress) (detailing history of CARPs and suggesting improvements); Stuart M. Maxey, Note, *That CARP Is No Keeper: Copyright Arbitration Royalty Panels—Change Is Needed, Here Is Why, And How*, 10 J. INTELL. PROP. L. 385, 390–92 (2003) (detailing the current CARP structure and process).

184. *See* Oman, *supra* note 142 *passim* (charting rise of the compulsory license).

stations, with rates established by the Copyright Royalty Tribunal.[185] Future amendments to the Act would also take advantage of this alternate structure. So, for example, the Audio Home Recording Act of 1992 made use of the Copyright Royalty Tribunal.[186] More recently, the new digital performance right for sound recordings uses the structure of compulsory licenses.[187] Both of these provisions will be discussed in more detail below.

C. *The 1976 Act Amendments*

In many ways, the 1976 Act was a hybrid act. At its core lay the original property rights model of the earlier copyright acts. On top of this core, however, the Act grafted on more detailed, industry-specific exemptions.[188] More significantly, it displaced the property rights model entirely in parts of a few select industries (e.g., mechanical license, cable television, public broadcasting). Although the substantive coverage of these industries was still relatively limited (certainly as compared to the industries still dominated by the property rights model), the compulsory license structure set up an alternative framework for future legislation.

As we will see below, many of the major amendments since the 1976 Act have taken advantage of this framework and increasingly adopted a regulatory model. Indeed, the size and complexity of the Copyright Act has dramatically increased in the years since 1976, and these amendments are primarily responsible for this trend.[189] Moreover, recent proposals for further amendments to the act have adopted this more regulatory approach.

1. CONTU

First, however, it is worth noting an exception to the trend, namely the amendments to the 1976 Act that were designed to adapt the Act to new computer technologies. During the substantial work that went into the drafting of the 1976 Act, it became increasingly apparent that advances in photocopying and computer technology would have a dramatic impact on the copyright markets, and that the revised Act should take account of these changes. At the same time, the drafters recognized that much of the substantial work that had already been put into the revision might be put in

185. 17 U.S.C. § 118 (2000).

186. *See id.* §§ 1001–1007.

187. *Id.* § 114.

188. *See* Nimmer, *supra* note 1, at 1292. Nimmer calls the simple core "national copyright legislation" and the more complex portions "endless D.C. regulations." *Id.*

189. Note that the following survey of amendments to the 1976 Act is selective, and does not discuss all amendments to the Act. For a more comprehensive survey of amendments to the 1976 Act, see generally Nimmer, *supra* note 1.

jeopardy if it had to be re-opened to take into account the complex issues presented by new technology. As a result, new issues presented by new computer technologies were temporarily tabled and handed over for study by a congressional commission expressly set up to consider the potential impact of technology on copyright: the National Commission on New Technological Uses of Copyrighted Works (CONTU).[190]

Established in 1974, CONTU was charged with the task of studying these new technologies and issuing recommendations to Congress for amending the Copyright Act. The commission consisted of various experts from the relevant fields of law and technology. After four years of study, CONTU issued its final report in 1978, along with specific recommendations for amendments to the 1976 Act.[191] Hearings were held in the House in 1980, and legislation was subsequently passed implementing modified versions of the recommendations.[192]

In its final report, CONTU recommended that only minor changes be made to the Copyright Act to account for new computer technology. The baseline conclusion was that existing copyright laws were up to the task of dealing with new challenges presented by computer technology and in particular computer software. CONTU recommended that the Act be amended to expressly recognize computer software as a "literary work" subject to copyright protection.[193] In addition, CONTU recommended certain minor changes to give owners of copies of software the right to run software on their computers, make backup copies, and transfer copies to third parties.[194] Other than these minor adjustments, however, CONTU concluded that new types of works like software should generally be subject to the same basic structure of copyright protection as other works. The courts, then, would be left with the task of applying existing copyright principles to these new works in a case-by-case fashion.

The CONTU approach is notable here for its reliance on the property rights model of copyright regulation.[195] Rather than propose a complex statutory scheme (complete with detailed provisions) to deal specifically

190. *See* Arthur R. Miller, *Copyright Protection For Computer Programs, Databases, And Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977, 979 (1993); Pamela Samuelson, *CONTU Revisited: The Case Against Copyright Protection For Computer Programs In Machine-Readable Form*, 1984 DUKE L.J. 663, 665.

191. NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT OF THE NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 1–2 (1978) [hereinafter CONTU FINAL REPORT].

192. Computer Software Copyright Act, Pub. L. No. 96-517, § 117, 94 Stat. 3028 (1980) (codified at 17 U.S.C. § 117 (2000)).

193. CONTU FINAL REPORT, *supra* note 191, at 15–16.

194. CONTU FINAL REPORT, *supra* note 191, at 12–15; 17 U.S.C. § 117 (2000).

195. *See* Nimmer, *supra* note 1, at 1326 (citing CONTU as an example of good copyright policymaking).

with computer software, CONTU consciously chose to bring computer software within the general scope of the basic copyright entitlement. In part, this reflected a view that existing copyright principles were sufficient to deal with the challenges presented by computer software. In part, this also reflected an acknowledgement that the commissioners lacked good hard data on how this nascent industry would eventually play out. CONTU thus left the case-by-case application of the law to the courts, which over the next several decades adapted existing copyright principles to the special case of computer software.[196]

Whether this approach was the proper approach is an issue that has generated much discussion and one that is beyond the scope of this Article.[197] It is important to note here, however, that the approach adopted by CONTU in response to new technology reflected, in many ways, an adherence to the property rights model rather than the expressly regulatory model.

2. Audio Home Recording Act of 1992

Congress adopted a very different approach when faced with new digital recording technology. In the late 1980s and early 1990s, after the successful introduction of the compact disc, the consumer electronics industry was about to introduce digital audio tape technology, which would permit consumers for the first time to make digital copies of recorded music. The music industry, fearing the piracy potential presented by a technology that could make perfect copies, filed suit against the consumer electronics manufacturers on grounds of contributory liability.[198] The result

196. *See, e.g.*, Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807, 815 (1st Cir. 1995) (holding that the menu command hierarchy in question was an uncopyrightable method of operation); Computer Assoc. Int'l, Inc. v. Altai, 982 F.2d 693, 699 (2d Cir. 1993) (creating the abstraction-filtration-comparison test for infringement of computer software); Sega Enterp. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1528 (9th Cir. 1992) (using fair use to craft an exemption for certain acts of reverse engineering); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1249 (3d Cir. 1983) (finding copyrightable computer operating systems); *see also* Stacey Dogan & Joseph Liu, *Copyright and Subject-Matter Specificity: The Case of Computer Software*, 61 N.Y.U. ANN. SURV. AM. L. (forthcoming Jan. 2005) (discussing judicial adaptation of copyright law to computer software).

197. *See* CONTU FINAL REPORT (Dissent of Commissioner Hersey), *supra* note 191, at 27–37; Peter S. Menell, *The Challenges of Reforming Intellectual Property Protection for Computer Software*, 94 COLUM. L. REV. 2644, 2644 (1994); Miller, *supra* note 190, at 990–97; Samuelson, *supra* note 190, at 665–69; Pamela Samuelson, et al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2365 (1994).

198. *See* Cahn v. Sony Corp., No. 90 Civ. 4537 (S.D.N.Y. filed July 9, 1990); Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act Of 1992 And The Formation Of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S.A. 497, 449–501 (1998); Gary S. Lutzker, Note, *Dat's All Folks:* Cahn v. Sony *and the Audio Home Recording Act of 1991—Merrie Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 146 (1992).

was to delay introduction of the new technology, as there was much uncertainty surrounding how the courts would apply the rule from *Sony v. Universal City Studios*,[199] the Supreme Court decision that permitted continued sale of the VCR.[200]

In order to break the deadlock, representatives of both industries negotiated a compromise, which Congress subsequently enacted into law as the Audio Home Recording Act of 1992 (AHRA).[201] The Act immunized consumers from direct liability for making personal copies of recorded music and device manufacturers from indirect liability for selling digital audio tape decks.[202] In exchange, the Act required device manufacturers to place in their devices technologies to prevent serial copying of recorded music.[203] This technology would permit consumers to make a digital copy of recorded music, but would prevent consumers from making subsequent digital copies from the initial copy. The Act also imposed a levy on the sale of every digital audio recording device (two percent of the "transfer price" as defined in the statute) and on any blank audio medium (three percent of the transfer price) used to make such recordings.[204] The proceeds from the levy would then be redistributed by the Copyright Office to the owners of copyrights in the sound recordings (66 2/3%) and musical works (33 1/3%), and within those groups according to negotiated settlements or, in the absence of such, by a Copyright Arbitration Royalty Panel.[205]

The AHRA represented a significant extension of the regulatory copyright approach in a number of respects.[206] First, the AHRA's royalty did more than simply set up a compulsory license. In previous compulsory licenses, the Act tied payment of the license directly to actual use of the underlying copyrighted work (whether in a "cover," in a jukebox, or over a cable or satellite broadcast).[207] In the AHRA, by contrast, the royalty was tied, not to direct use of the underlying copyrighted work, but to the sale of devices and products that could be used to engage in copying the underlying copyrighted works. Thus, the AHRA essentially imposed a tax

199. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984).

200. *Id.* at 442–56. A similar unsuccessful attempt was made to impose a compulsory license scheme on the VCR. *See* S. 31, 98th Cong. (1983); H.R. 1030, 98th Cong. (1983).

201. Audio Home Recording Act of 1992, Pub. L. No. 102-563, § 2, 106 Stat. 4237 (codified as amended at 17 U.S.C. §§ 1001–1010 (2000)).

202. 17 U.S.C. § 1008.

203. *Id.* § 1002.

204. *Id.* §§ 1003–1004.

205. *Id.* § 1006.

206. Nimmer, *supra* note 1, at 1331 ("The AHRA is a forbidding jungle of arbitrary specifications; it marks the turning point, in fact, of Title 17 from a potentially comprehensible embodiment of copyright doctrine into the hopeless mishmash that it has become.").

207. *See supra* Parts II.B.3 & II.B.4.

or levy on a separate, though related, market for redistribution to copyright holders.

Second, the distribution provisions were more complex. With the cover license, the royalties were due directly to the owners of the works that were actually used.[208] Similarly, with the satellite and cable licenses, royalties are due to owners of works that were actually used, although in this case, the owners themselves had to file claims against a pool of collected royalties.[209] Under the AHRA, however, no mechanism existed to directly monitor which works were being copied by consumers.[210] Accordingly, distributions to parties within each of the relevant groups of owners were to be made according to certain proxies: sales of recorded music (for both the sound recording and musical work owners) and numbers of broadcasts (for musical work owners).[211] Thus, distribution of the proceeds involved more complexity.

Third, and perhaps most significantly, the AHRA for the first time expressly regulated technology within a particular market. The AHRA essentially contained a technology mandate for digital recording devices, requiring that such devices implement a specific, then existing technology (i.e., "Serial Copyright Management System") or a system that had "the same functional characteristics."[212] Devices that did not contain this technology were essentially banned. Attempts to sell or import non-conforming devices would subject individuals to liability under the AHRA.[213]

In these ways, the AHRA departed dramatically from the property rights model. The AHRA intervened in the structure of not just a copyright industry (i.e., the music industry), but also a related consumer electronics industry. It imposed a royalty not on the use of a copyrighted work, but on the sale of related goods for later redistribution to copyright owners. And it mandated the adoption of a specific technology in that market. In all these ways, the AHRA bore scant resemblance to the industry-neutral, court-administered property rights regime of the earlier Acts. Moreover, the AHRA represented an extension of the regulatory model beyond just a limited slice of the copyright market (as in the case of cable or satellite television), to encompass a greater portion of the copyright market (i.e.,

208. *See supra* Part II.B.2.

209. *See supra* Part II.B.3.

210. In this respect, the problem resembles that faced by collective rights organizations, such as ASCAP and BMI, which must find ways of monitoring and approximating the public performance of a large number of musical works by a large number of companies.

211. That is, unless the parties could reach a more desirable agreement among themselves. 17 U.S.C. § 1006 (2000).

212. *Id.* § 1002.

213. *Id.* § 1008.

recorded music and consumer electronics).

3. Digital Performance Right in Sound Recordings Act of 1995

A short three years after the AHRA, Congress again intervened in the market for music copyrights, this time with the exceptionally complex Digital Performance Right in Sound Recordings Act of 1995 (DPRSRA).[214] Earlier, in 1971, Congress had added sound recordings to the list of works protected by copyright.[215] However, sound recording owners did not obtain the exclusive right to control public performances.[216] This was due largely to the lobbying power of the broadcast industries, which did not want to have to pay an additional royalty (beyond the one due to the owners of the musical works) for broadcasting recorded music.[217] With the advent of digital technology, the sound recording copyright owners voiced concerns that digital delivery of sound recordings via cable, satellite, and the internet might significantly cut into the market for sales of sound recordings. In response, Congress enacted the DPRSRA, granting sound recording owners a limited right to control digital public performances.[218]

The DPRSRA, both in its initial form and as later amended,[219] is quite possibly the most complex copyright provision yet enacted.[220] In size, the provision rivals the entire 1909 Copyright Act. In detail, the terminology and specificity make the provision almost entirely opaque to someone who is not familiar with the relevant industries. As an initial matter, the DPRSRA simply amends the list of exclusive rights to give sound recording owners this additional right to control digital public performances.[221] However, the Act then subjects the new right to a number of extremely complex exemptions and compulsory licenses, encompassing

214. Pub. L. No. 104-39, 109 Stat. 336 (codified as amended in scattered sections of 17 U.S.C.).

215. Act of Oct. 15, 1971, Pub. L. No. 92-140 § 1, 85 Stat. 391, 391–92 (codified as amended at 17 U.S.C. § 102 (2000)).

216. 17 U.S.C. § 114(a).

217. *See* Loren, *supra* note 8, at 686.

218. *See* Jane C. Ginsburg, *Copyright And Control Over New Technologies Of Dissemination*, 101 COLUM. L. REV. 1613, 1630 (2001).

219. This Act was itself later amended by Title IV of the Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, §§ 401–407, 112 Stat. 2860, 2887–2905 (codified as amended in scattered sections of 17 U.S.C.), and by the Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (codified at 17 U.S.C.A. § 114 (2003)). *See* Nimmer, *supra* note 1, at 1336–42. Subsequent references to the DPRSRA in the text above should be read to refer to both the initial enactment and subsequent amendments.

220. *See* Nimmer, *supra* note 1, at 1336 ("The DPRA is a masterpiece of incoherence."); Nimmer, *supra* note 4, at 189 ("When Congress decided to plug the historical anomaly under which sound recordings lacked any performance right, it could have acted very simply. Instead it gave birth to Frankenstein.").

221. 17 U.S.C. § 106(6).

digital performances, temporary digital copies, and digital covers.

A comprehensive description of the DPRSRA is beyond the scope of this Article.[222] However, it is worth highlighting a number of the main provisions to illustrate the complexity of this enactment. First, certain non-interactive, non-subscription digital transmissions are exempted (subject to a number of complex qualifications).[223] Thus, for example, non-interactive digital radio broadcasts of recorded music are not generally subject to the digital public performance right (although they remain subject to the general public performance right for musical works).[224] Second, certain interactive, subscription digital transmissions are fully subject to the digital performance right.[225] Thus, for example, providers of internet music on demand must negotiate directly with the sound recording owners for a license.[226]

Third, and most importantly for the purposes of this Article, certain non-interactive digital transmissions (e.g., through "webcasting") are subject to a complex statutory compulsory license scheme.[227] The statute sets forth a number of highly specific categories of transmissions subject to the compulsory license scheme, with extensive requirements, sub-requirements, and exceptions (covering such details as extent of performances, publication of program information, duration of performances, compliance with copy-protection technologies, etc.).[228] The statute indicates a preference for voluntarily negotiated licensing rates and terms.[229] In the absence of agreement, however, actual licensing rates and

222. For such descriptions, see Loren, *supra* note 8, at 703–05 (advocating that the copyright system be changed with regard to the music industry); Steven M. Marks, *Entering The Sound Recording Performance Right Labyrinth: Defining Interactive Services And The Broadcast Exemption*, 20 LOY. L.A. ENT. L. REV. 309, 309–15 (2000) (arguing that the DPRSRA is inadequate to address problems created by Internet music services); Nimmer, *supra* note 4, at 189–94 (comprehensively analyzing the digital public performance right); Reese, *supra* note 8, at 241–44 (comprehensively examining the legal structure surrounding online music); Les Watkins, *The Digital Performance Right In Sound Recordings Act Of 1995: Delicate Negotiations, Inadequate Protection*, 20 COLUM.-VLA J.L. & ARTS 323, 328–33 (1996) (discussing the asserted shortcomings of the DPRSRA); Derek M. Kroeger, Comment, *Applicability of the Digital Performance Right in Sound Recordings Act of 1995*, 6 UCLA ENT. L. REV. 73, 77–78 (1998) (discussing the applicability of the DPRSRA); A. Dustin Mets, Note, *Did Congress Protect The Recording Industry Into Competition? The Irony Of The Digital Performance Right In Sound Recordings Act*, 22 U. DAYTON L. REV. 371, 372–76 (1997) (describing the DPRSRA as granting the artist a limited right to control public performances and recordings).

223. 17 U.S.C. § 114(d)(1) (2000).

224. *Id.*

225. *Id.* § 114(e)(1). *See* Loren, *supra* note 8, at 692.

226. 17 U.S.C. § 114(e)(1).

227. *Id.* § 114(d)(2); Loren, *supra* note 8, at 692–93.

228. 17 U.S.C. § 114(d)(2).

229. *Id.* § 114(f)(1)(A).

terms are to be set by a Copyright Arbitration Royalty Panel.[230] The statute provides a detailed procedure (including notice in the Federal Register) for the setting of such rates and terms.[231] It also gives the Copyright Office the authority to establish the kinds of reporting requirements necessary to ensure compliance with the licenses.[232] The statute then states that an agent designated to distribute receipts of the licensing revenues shall distribute the receipts according to a statutory formula to owners of the digital performance right (fifty percent), recording artists (forty-five percent), and to various escrow accounts for non-featured musicians (2.5%) and non-featured vocalists (2.5%).[233]

The DPRSRA thus presents perhaps the most dramatic application of the regulatory approach. In this case, the Copyright Act is extensively involved in the shape and structure of a particular copyright market, namely the market for digital performances of recorded music. Rather than leaving the market to be structured according to private agreements (whether individually or by collective rights organizations), the Act steps in and enacts an extremely detailed compulsory license structure, with extremely detailed qualifications and definitions. Although it shows an initial preference for a negotiated license between industry players, it ultimately gives a copyright arbitration panel the power to dictate the terms and conditions (including fees) of the resulting licenses for that industry. Finally, it dictates how the proceeds of the compulsory license are to be split up by various interested parties. Again, this is a significant departure from the original, property rights view.

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230. *Id.* § 114(f)(1)(B).

231. *Id.*

232. *Id.* § 114(f)(4)(A).

233. *Id.* § 114(g)(2). As required by statute, the Librarian of Congress initiated proceedings for setting the terms and rates of the compulsory license. In accordance with the DPRSRA, the Librarian published notice in the *Federal Register* of voluntary negotiations by interested parties. *See* Public Performance of Sound Recordings, 65 Fed. Reg. 77, 292 (Dec. 11, 2000); *see also* Bonneville Int'l Corp. v. Peters, 153 F. Supp. 2d 763, 779–85 (E.D. Pa. 2001) (upholding the Copyright Office's interpretation of the statutory exemption). It then convened a Copyright Arbitration Royalty Panel and charged it with the task of setting licenses. *See* 64 Fed. Reg. 52, 107 (Sept. 27, 1999); Copyright Office Final Rule on New Webcasting Royalties, 67 Fed. Reg. 45, 240 (July 8, 2002). The resulting license terms and rates were subject to much criticism when issued. In particular, many smaller internet radio stations objected that the rates, as set by the Librarian of Congress, would essentially drive them completely out of business. *See* Loren, *supra* note 8, at 696; Evan Hansen, *Webcasters Sound Off on Net Radio Fees*, CNETNews.com, Oct. 1, 2002, *at* http://news.com.com/2100-1023-960336.html (last visited Nov. 22, 2004) (on file with the North Carolina Law Review); Amy Harmon, *Royalties Proposal Casts Shadow Over Webcasters*, N.Y. TIMES, Apr. 1, 2002, at C1. To provide webcasters some relief, Congress enacted the Small Web-Caster Settlement Act of 2002, Pub L. No. 107-321, 116 Stat. 2780 (2002) (codified at 17 U.S.C.A §§ 101 & 114) (2002), which set off a further round of negotiations. More generally, the entire process took substantially longer than anticipated. *See* Karen Fessler, *Webcasting Royalty Rates*, 18 BERKELEY TECH. L.J. 399, 408–10 (2003).

4. Digital Millennium Copyright Act of 1998

Although the DPRSRA probably represents the most extensive example of the regulatory approach, the recent Digital Millennium Copyright Act of 1998 (DMCA)[234] provided a slightly new twist to the approach. Congress enacted the DMCA in an attempt to update copyright law in light of perceived challenges presented by digital technology. The DMCA contained many separate provisions, some of which dealt with liability for intermediaries such as internet service providers (ISPs).[235] These provisions of the DMCA exempted ISPs from direct and indirect liability for certain activities such as system caching and temporary storage and forwarding.[236] The DMCA also enacted a safe harbor, shielding ISPs from liability for storing subscriber content, under certain circumstances.[237] These provisions generally provided more specificity and guidance to ISPs, who had been concerned about potentially extensive liability under the Copyright Act. These provisions are consistent with the regulatory trend in copyright law, insofar as they supplement judge-made doctrines of third party liability[238] by enacting detailed rules and safe harbors for ISPs and other internet intermediaries.

More important for our purposes, the DMCA also contained separate provisions supporting industry attempts to protect copyrighted works through the use of technology.[239] In particular, the DMCA provided a separate cause of action against acts of circumvention of technologies that controlled access to copyrighted materials.[240] The DMCA contained a number of very specific statutory exemptions.[241] It also gave the Librarian of Congress the power to exempt certain classes of works from anti-circumvention liability.[242] The DMCA also banned distribution of technologies with a primary purpose of facilitating circumvention. Finally, the DMCA provided a cause of action for tampering with or removing copyright management information attached to copyrighted works.[243]

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234. Pub. L. No. 105-304, 122 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

235. 17 U.S.C. § 512 (2000).

236. *Id.* § 512(a) & (b).

237. *Id.* § 512(c).

238. *See* Alfred Yen, *Internet Service Provider Liability for Subscriber Copyright Infringement, Enterprise Liability, and the First Amendment*, 88 GEO. L.J. 1833, 1872 (2000).

239. 17 U.S.C. §§ 1201–1202.

240. *Id.* § 1201(a).

241. *Id.* § 1201(d)–(k). *See* Lewis A. Kaplan, *Copyright And The Internet*, 22 TEMP. ENVTL. L. & TECH. J. 1, 7 (2003) ("I think it fair to say that these exemptions are narrow and difficult to satisfy").

242. 17 U.S.C. § 1201(a)(1)(C).

243. *Id.* § 1202.

Although the DMCA has generated much debate,[244] some aspects of its approach are not that different from the older property rights approach. The DMCA can be viewed as creating an additional property entitlement against circumvention, as a way of providing additional support to the underlying copyright entitlement. Indeed, some supporters of the DMCA have argued that, by facilitating enforcement of copyright entitlements, it may facilitate private ordering and promote even more efficient allocation of property entitlements.[245] Thus, whether or not one agrees with the substantive content of the law, its underlying approach does not differ too dramatically from the property rights model.

In other respects, however, the DMCA represents a departure from the property rights model. In particular, the DMCA, taking a page from the AHRA, is more willing to intervene in the technology markets.[246] By banning certain technologies from public distribution, the DMCA again affects the market for technology.[247] More significantly, the DMCA departs from the property rights view insofar as it expressly gives the Librarian of Congress, for the first time, not only power over the terms and conditions of compulsory licenses, but actual substantive rulemaking power.[248] The DMCA delegates to the Librarian of Congress the power, after notice and comment, to exempt classes of works from the anticircumvention provisions entirely.[249] In crafting such exemptions, the Librarian of Congress is directed to consider various statutory factors,

244. *See, e.g.*, LITMAN, DIGITAL COPYRIGHT, *supra* note 3, at 122–54 (sharply criticizing provisions of the DMCA); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 819 (2001) (criticizing the way in which the DMCA has eliminated key limitations on protection of copyrighted work); *cf.* Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 519 (1999) (sharply criticizing the DMCA for its impact on innovation and technology).

245. *See* Tom Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 600 (1998); I. Trotter Hardy, *Property (And Copyright) In Cyberspace*, 1996 U. CHI. LEGAL F. 217, 219 (1996). *But see* Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063, 2070 (2000) (criticizing this view); Julie Cohen, Lochner *in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462, 466 (1998) (same); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 132 (2004) (same).

246. *See* Benton J. Gaffney, *Copyright Statutes That Regulate Technology: A Comparative Analysis Of The Audio Home Recording Act And The Digital Millennium Copyright Act*, 75 WASH. L. REV. 611, 631 (2000).

247. On the other hand, the ban on technology may not be all that different, at least from a regulatory perspective, from the ban that might result from an application of contributory or vicarious liability. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020–27 (9th Cir. 2001). So it is possible to argue that this aspect is not all that different from the property rights view.

248. 17 U.S.C. § 1201(a)(1)(C) (2000).

249. *Id.*

including the availability of the copyrighted works for various nonprofit, archival preservation, and educational purposes; the impact of the anticircumvention provisions on criticism, comment, teaching, news reporting, and scholarship; the effect of circumvention on the market for or value of copyrighted works; and any other factors that the Librarian considers appropriate.[250]

The Librarian of Congress conducted the first such rulemaking two years after enactment of the DMCA and, after extensive notice and comment, exempted four classes of works.[251] Three years later, the Librarian again conducted the rulemaking and exempted four such classes.[252] In each case, the Librarian published notice of the proposed rulemaking. Many proposed exemptions, and even more comments, were submitted. The Librarian of Congress also held hearings, at which parties could testify in support of, or against, various proposed exemptions. And in each case, the Librarian issued its regulations, along with a response to these comments articulating the reasons for its regulations.[253]

Thus, the DMCA very expressly adopts a regulatory approach in vesting the Librarian of Congress with rulemaking authority. Rather than leaving the development of exemptions to the courts, via an equitable defense akin to fair use, the DMCA expressly chose to vest such authority in an administrative body. Moreover, the function of the Librarian of Congress in this capacity appears to differ relatively little from the way similar agencies engage in rulemaking in other substantive areas. Thus, the DMCA is notable for this particular innovation in regulatory approach, and may signal a willingness on the part of Congress to move even further toward a regulatory model.

5. Broadcast Flag

The Copyright Office is not the only administrative agency that has become more involved in setting copyright policy. Recently, the FCC has played an increasing role in setting copyright policy, through its

250. *Id.*

251. Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 68 Fed. Reg. 62,011 (Oct. 31, 2003).

252. The four categories include: (1) compilations of blocked internet sites found in internet filtering software; (2) computer programs protected by physical access control mechanisms, where access is impaired due to malfunction or obsolescence; (3) computer programs and video games distributed in formats that have become obsolete; and (4) literary works distributed in eBook format, where no editions exist that would permit certain types of access by disabled individuals. 37 C.F.R. § 201 (2003).

253. 68 Fed. Reg. 211, 62011 (Oct. 31, 2003). Many of these materials can be found on the copyright office web site. *See* U.S. COPYRIGHT OFFICE, RULEMAKING ON ANTICIRCUMVENTION, *at* http://www.copyright.gov/1201/index.html (last visited Nov. 22, 2004) (on file with the North Carolina Law Review).

jurisdiction over the broadcast industries. The most recent and controversial example of this has been through its broadcast flag rulemaking. As the television broadcast industry has begun shifting from analog to digital broadcasts, it has expressed concern about unauthorized copying and distribution by consumers of high quality digital broadcasts. To address this concern, the FCC promulgated a rule that would require all digital television sets to recognize and respect a "broadcast flag," i.e., a signal embedded in broadcasts that, in conjunction with compliant devices, would control or restrict copying and distribution of broadcast shows.[254]

The broadcast flag rulemaking has been subject to sharp criticism on substantive grounds.[255] Yet whatever the substantive merits of the broadcast flag, it again represents a rather sharp departure from the traditional property rights model of copyright law. Indeed, the broadcast flag goes beyond the DMCA in its regulation of copyright-related technology, insofar as it mandates the adoption of technologies that would protect copyrighted content. Moreover, an agency (rather than Congress or the courts) is involved not only in promulgating the technological requirement, but in specifying the types of technologies that comply with the requirement. The broadcast flag rulemaking thus represents an even more extensive intervention into the structure of the market.

6. Future Proposals

Finally, many recent proposals for further amending or reforming the Copyright Act have also adopted a more regulatory approach. First, at least one recent bill proposed by Senator Ernest Hollings would have intervened even more extensively in technology markets than the DMCA or the broadcast flag. The Hollings bill, proposed in 2002, would have mandated that every device capable of playing digital content contain technology to prevent unauthorized copying.[256] Thus, even general purpose digital devices, such as computers, would have had to implement copy protection or access control technology. This would have intervened far more intrusively into the development of the computer and consumer electronics industries. Those industries successfully banded together with consumers to defeat the proposed legislation.[257]

A number of academics have also advanced very detailed proposals to significantly revamp copyright law in light of the challenges presented by

254. 68 Fed. Reg. 232, 67604 (Dec. 3, 2003).

255. *See, e.g.*, Susan P. Crawford, *The Biology of the Broadcast Flag*, 25 HASTINGS COMM. & ENT. L.J. 603, 606 (2003) (arguing that such codes hinder technological innovation).

256. S. 2048, 107th Cong. (2002).

257. *See* Stacey Dogan, *Code Versus the Common Law*, 2 J. TELECOMM. & HIGH TECH. L. 73, 98–100 & n.106 (2003) (describing in detail the Hollings Bill).

digital technology. Specifically, these scholars have advanced proposals for replacing the existing entitlement structure for digital media with a compulsory license or levy, similar to the levy found in the AHRA.[258] In each case, the proposals would permit certain consumer copying of digital content free from copyright liability. However, a levy would be placed on certain related materials (e.g., computers, media) or activities (e.g., downloading, ISP access) to compensate copyright owners. The basic impetus behind these proposals is a concern that enforcement difficulties are rendering the existing entitlement structure untenable, and a desire to take full advantage of the increased dissemination possibilities provided by digital technology.

These proposals are, in many ways, a logical extension of the regulatory trend in copyright law over the past several years. The proposals expressly adopt aspects of prior amendments, such as the existing compulsory licenses and the levy under the AHRA. They then extend these features to cover not just a limited slice of the copyright markets, but large portions of the copyright markets. They thus replace the property rights approach with a purely regulatory approach. In each of these cases, the government's involvement in the shape and scope of the copyright markets would be far more extensive than with an industry-neutral, property rights model. Indeed, under some of these proposals, a regulatory body would be involved in setting, not only prices, but the overall size and scope of certain copyright markets.[259]

D. Comparative Scope

The regulatory approach to copyright law, as defined in the beginning of this Part, has thus established itself firmly as an alternative to the older, industry-neutral, court-administered property rights model. Although many parts of the 1976 Act still retain, at their core, a property rights model, other parts of the 1976 Act, along with recent amendments, have adopted the competing regulatory approach, with its increased detail, greater industry-specificity, willingness to intervene in market structure (through

258. *See* FISHER, *supra* note 6, at 199–258; Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 312–15 (2002); Glynn Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 854–58 (2001); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J. L. & TECH. 1, 4 (2003); Lionel S. Sobel, *DRM As An Enabler Of Business Models: ISPs As Digital Retailers*, 18 BERKELEY TECH. L.J. 667, 684–87 (2003); Electronic Frontier Foundation, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, *at* http://www.eff.org/share/collective_lic_wp.pdf (last visited Nov. 22, 2004) (on file with the North Carolina Law Review).

259. *See* FISHER, *supra* note 6, at 195–96.

imposition of compulsory licenses and express regulation of technology), and a greater substantive role for the Librarian of Congress.

What this means in practice is that the impact of the copyright laws now varies significantly depending upon the industry. For example, the print publishing (books, newspapers, magazines, etc.) and fine arts (sculpture, painting, etc.) industries remain largely governed by the property rights model. The rights are set forth rather straightforwardly in the statute and the market is responsible for organizing production of creative works in light of the entitlement structure. Other industries, such as the software industry, are somewhat more affected by the regulatory turn, but still operate largely under the basic property entitlement.

By contrast, other industries are subject to far greater regulatory oversight. Thus, the music industry is subject to a complex overlay of multiple regulatory regimes.[260] The exclusive rights are distributed in a non-uniform manner among industry participants (e.g., sound recordings versus musical works). Certain aspects of the industry are subject to relatively straightforward compulsory licenses (e.g., cover and jukebox licenses). Other aspects of the industry are subject to extremely complex statutory licenses (e.g., digital performances of sound recordings). In each of these cases, either Congress or the Librarian of Congress is involved in setting the rates and terms of various licenses. Still other aspects of the industry are subject to regulation in the technology adopted (e.g., AHRA, DMCA).

Although it is probably too early to conclude that the regulatory approach has supplanted the property rights approach, the above analysis indicates that the regulatory approach is no longer a limited exception to the rule.[261] Instead, it is a rather firmly established alternative to the property rights model. Moreover, recent copyright legislation has evinced a pronounced willingness to adopt the regulatory approach. Thus, the clear trend has been to move toward a regulatory model for copyright.

Although many commentators have recognized the increased size and complexity of the Copyright Act,[262] the nature and full scope of the change have not been fully appreciated, at least until recently. Much of the existing literature remains focused on the portions of the Act that are still

260. *See* Loren, *supra* note 8, at 699 (describing the complex regulatory framework governing copyrights in music and sound recordings); Nimmer, *supra* note 1, at 1320 (detailing accelerating shift toward complex copyright law); *see also* 17 U.S.C. §§ 111, 112, 118, 119, 122 (2000) (providing special provisions governing television and cable industries).

261. *See* Leval, *supra* note 81, at 1061 ("The relationship we have observed between the legislature and the courts in fashioning the copyright is one that is no longer in fashion."); Menell, *supra* note 7, at 197 ("Copyright law has entered a new phase in which the government will play a more central and ongoing role in the implementation of copyright protection.").

262. *See supra* notes 1–11 and accompanying text.

governed by the property rights model.[263] Comparatively little literature is devoted to those portions that are governed by the regulatory model. Similarly, most copyright and intellectual property law casebooks still emphasize the property rights regime, and treat the more regulatory portions of the Act, if at all, as exceptions to or limited departures from the property rights model. This is true, despite the fact that copyright practice has increasingly forced practitioners to deal with these more regulatory aspects of the Act.

In part, the failure to fully appreciate this change may be because the shift has been relatively recent. In part, there may also be an understandable reluctance to grapple with the portions of the copyright act that are seen as overly complex, narrow in scope, arcane, and painfully (and in some cases absurdly) detailed. The property rights model, with its judicial opinions and engagement with broad, fundamental copyright principles is far more intellectually and aesthetically satisfying. Reading *Feist v. Rural Telephone* or *Sony v. Universal* is far more enjoyable than reading the intricate provisions of the DPRSRA. Yet the future shape of the Copyright Act will, I believe, resemble the DPRSRA more than *Feist*. In many ways, then, this Article is an attempt to force us to recognize that these portions are no longer the exceptions but a fundamental and important part of the Act.

Recognition of this change leads to a more critical evaluation of its costs and benefits and the potential implications for the various legal institutions that currently administer our copyright laws. Copyright law is experiencing, albeit at a much later date, the same response to complexity that has characterized other areas of federal law.[264] The dramatic rise of the federal administrative state during the first half of this century reflected a recognition of the limits of statutory and common law lawmaking in the face of the complexities of modern society. Accordingly, in many other areas of federal law, Congress recognized the practical need to delegate authority to administrative agencies as a way of injecting both expertise and flexibility into the regulatory process. This same recognition has arrived later in the context of copyright law, due to the relatively recent dramatic changes facing the copyright industries.

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263. *See* Carrier, *supra* note 14 (forthcoming); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN L. REV. 1345, 1351–53 (2004); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 411–13 (2002); Clarisa Long, *Information Costs in Patent and Copyright*, 90 VA. L. REV. 465, 471–74 (2004).

264. *See* 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4 (3d ed. 1994); Menell, *supra* note 197, at 2649 (comparing to environmental law shift).

III. A CRITICAL ASSESSMENT

This Part undertakes a critical assessment of the shift from a property rights approach to a more regulatory approach. It begins by offering a number of possible explanations for the shift. It next discusses a number of benefits of the current regulatory approach, in particular the ability to solve perceived market failures and tailor rights and responsibilities in a far more detailed fashion. It then focuses on some of the costs of the shift to a more regulatory approach. In particular, it focuses on the comparative lack of transparency and the related increased incentive for rent-seeking on the part of the regulated industries. It also focuses on the current system's underutilization of empirical data and expertise in setting copyright policy. These findings form the basis of the recommendations in the following Part.[265]

A. *Why the Shift?*

What explains the shift in copyright law from a property rights approach to a more regulatory approach? Although this Article does not purport to set forth the definitive reason, it suggests a couple of possibilities. First, some of the increased complexity of the copyright code can probably be attributed to the increased complexity of the subject matter. The initial Copyright Act regulated an extremely limited set of works, namely books, charts, and maps. Thus, a simple entitlement was generally sufficient to deal with the relatively simple markets involved. By contrast, today's Copyright Act must regulate the vast subject matter encompassed by modern copyright law, including such diverse types of works as books, newspapers, magazines, fine art, movies, recorded music, and computer software.[266] In addition, many of these industries have been subject to significant challenges as a result of changing technologies. Thus one would reasonably expect the copyright entitlement to become more complex as the subject matter of regulation becomes more complex.[267]

Second, and relatedly, some of the increased complexity may also be attributable to the increased importance and value of these markets. Where

265. It is worth noting expressly here at the outset that, in assessing the potential advantages and disadvantages of a more regulatory approach, this Article is concerned, not directly with substantive copyright policy (for example, whether protection should be "high" or "low" in a particular area), but with the ability of legislation or regulation to effectively reflect and implement such policy. This requires an assessment of the comparative effectiveness of various regulatory techniques and legal institutions in effectuating such policies. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 32 (1994).

266. *See* 17 U.S.C. § 102 (2000).

267. *See* Merges, *One Hundred Years*, *supra* note 6, at 2200–01 (positing this as a possible explanation).

certain property entitlements are of comparatively low value, it may not be cost effective to articulate the scope of such entitlements in a detailed fashion. However, as property entitlements become more valuable, it becomes more worthwhile for the law to define the entitlements in a more particularized fashion, whether through legislation or litigation.[268] The incentive to fine-tune the law increases. By any measure, the copyright industries have become economically far more significant than they were at the turn of the century. Thus, we might expect the corresponding law to articulate these copyright entitlements in a far more detailed manner.

Third, the increasing regulatory turn in copyright law may reflect an increasing desire to cure perceived market failures that might result from a pure property rights approach. Some of the complex compulsory license schemes can be understood as motivated by this concern. With each of the compulsory licenses, the policy question is how this departure from the market baseline (and the attendant, non-trivial administrative costs) can be justified. The argument for the compulsory license is that the market would otherwise fail.[269] For example, in the case of cable re-transmissions, the argument might be that transactions costs, the possibility of holdouts, and other strategic behavior by copyright owners might make it impossible for cable companies to effectively obtain licenses for all of the works that they wish to retransmit.[270] Or, alternatively, that there might be certain public values in access to these materials that would otherwise not be met. Thus, the Act substitutes a compulsory license. Similarly, with the AHRA or many of the new levy proposals, the claim may be that the costs of enforcement with a property rights model are simply too high, and that the model must therefore be replaced by an alternative structure. This alternative structure is inherently more regulatory than a basic, property rights structure. Thus, the increased use of a regulatory format may well indicate both an increased recognition of market failures and a growing desire to cure them.

Fourth, the increasing regulatory nature of copyright law may result in part from the pragmatic need for political compromise on the part of entrenched interests.[271] The 1976 revision of the Copyright Act took more than twenty years, in part due to the need to balance the interests of many competing industries and groups. Given the complexity of the subject matter, Congress expressly invited industry groups to participate in the

268. *See* Carroll, *supra* note 103, at 40–41; Demsetz, *supra* note 29, at 350.

269. *But see* Merges, *supra* note 86, at 1298 (arguing that private collective rights organizations can effectively address the transactions cost problem).

270. *See supra* Part II.B.3.

271. *See* Menell, *supra* note 7, at 197 (suggesting increased delegation results from need to effect political compromise between content industry, technology, and consumers).

drafting of specific provisions of the 1976 Act.[272] This had the advantage of both injecting much needed expertise into the policy discussion and facilitating the kind of political compromise necessary to pass the Act.[273] Some of the resulting statutory provisions, however, resembled the kind of detailed deal-making engaged in by private parties.[274] Subsequent amendments also resulted from the need to balance the interests of competing groups.[275]

Finally, and perhaps most importantly, the increasing complexity of copyright law may result from rent-seeking on the part of the regulated industries. The increased value and importance of the copyright markets make copyright legislation a prime source for rent-seeking by organized interests, such as existing copyright holders. Moreover, competing interests such as consumers or nascent industries are more diffusely organized and under-represented.[276] The predictable result, given this imbalance, is rent-seeking by organized interests.[277] Jessica Litman has written extensively about the way that the copyright industries were involved heavily in the drafting of the 1976 revision to the Act, and how consumers and future industries were not represented.[278] True, rent-seeking does not inevitably lead to more legislative complexity.[279] However, as copyright law becomes more complex, it becomes less understandable to general policymakers and the public at large,[280] and rent-seeking becomes more difficult to detect.[281]

It is hard to say definitively which of these factors is primarily responsible for the shift to a more regulatory copyright law. Clearly, the desire to cure perceived market failures can be used to justify some of the

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272. *See* Litman, *supra* note 68, at 862.

273. *See* Merges, *New Institutional Economics*, *supra* note 6, at 1875–76; Merges, *One Hundred Years*, *supra* note 6, at 2198; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1685–86 (1975).

274. *See, e.g.*, 17 U.S.C. § 111 (2000) (outlining extensive limitations on secondary transmissions).

275. *See, e.g.*, *id.* § 114(d)–(f) (setting forth the scope and limitations of the exclusive rights in transmissions and re-transmissions of sound recordings).

276. *See* Litman, *supra* note 68, at 883–84.

277. *See, e.g.*, Sonny Bono Copyright Term Extension Act, Pub L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. § 302 (1998)) (extending the copyright term to life plus seventy years); Liu, *supra* note 263 *passim* (arguing that courts should adjust the scope of copyright protection to account for the passage of time).

278. *See* Litman, *supra* note 68, at 881.

279. For an example of a relatively simple statute that resulted largely from rent-seeking, see Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827.

280. *See* Nimmer, *supra* note 4, at 246–48 (positing public choice explanation for DPRSRA); Schuck, *supra* note 98, at 39–40.

281. *See* Burk & Lemley, *supra* note 2, at 1637; Nimmer, *supra* note 1, at 1317 (describing recent "stealth amendments" to copyright act); Arti K. Rai, *Engaging Facts And Policy: A Multi-Institutional Approach To Patent System Reform*, 103 COLUM. L. REV. 1035, 1128 (2003).

departures from the property rights baseline. For example, compulsory licenses are often justified as necessary to address potential market failures due to transactions costs or holdouts. This is perhaps most visible in the recent proposals to move toward some kind of compulsory license of digital content.[282] Thus, to some extent, the regulatory turn might reflect the need for more interventionist techniques in achieving a more finely-tuned copyright balance.[283]

At the same time, the market failure explanation does not neatly fit the actual history of these more complex provisions. Even if the cable, satellite, and digital music compulsory licenses can be explained as curing potential market failures, the actual history of those provisions, as Tim Wu has effectively demonstrated, reveals that they were very much the product of industry lobbying and compromise rather than an impartial search for ways to effectively cure market failure.[284] In fact, many of the specific provisions of these enactments, as implemented, bear little or no relevance to any underlying market failure, and can only be explained through the dynamic of competing interest groups.[285] In addition, the market failure rationale does not adequately explain the passage or implementation of the AHRA, DPRSRA or the DMCA, where the case for, and evidence of, market failure was far weaker.

Thus, while the regulatory turn in copyright law is likely the product of many different factors, the explanations based on industry compromise and rent-seeking appear to explain much of this regulatory turn. If this is correct, it will have implications on the proposed responses in the following Part of this Article. In particular, this history may shed light on the practical feasibility of returning to a property rights model, even if such a model offers concrete benefits. This history may also have implications on how a regulatory model might best be structured to minimize the opportunities for future rent-seeking. Before engaging in these more practical discussions, however, it is worth considering, at a more general level, the potential advantages and disadvantages of a regulatory approach versus a property rights approach. That is, even if the current system is largely the product of industry compromise and rent-seeking, we should assess the merits of the system before suggesting any departures or reforms.

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282. *See* sources cited *supra* note 258.

283. *See* Ghosh, *supra* note 2, at 482 ("[T]he family resemblance between intellectual property law and tax law need not be bemoaned .... The resemblance is to be expected and speaks proudly of the instrumental role of intellectual property law.").

284. Tim Wu has persuasively argued that enactment of these compulsory licenses reflected a political compromise driven by a desire on the part of incumbent disseminators to protect their markets from challengers. Wu, *supra* note 10 (forthcoming).

285. *See* Nimmer, *supra* note 1, at 1282.

B. Advantages

Whatever the reasons for the change in copyright law, the shift to a more regulatory approach offers a number of potential advantages in the pursuit and implementation of effective copyright policy. First, it has permitted greater tailoring of the copyright code to the specifics of particular industries. One criticism of the industry-neutral property-based approach has been that it neglects important differences in the copyright markets. For example, the market for computer software is very different from the market for fine art photography, which, in turn, is very different from the market for recorded music.[286] Although the courts have, in application of the law, adapted copyright law doctrines to take some account of these differences,[287] there is a practical limit on the extent to which this is possible. For example, the long term of copyright protection makes little economic sense in the software context, yet courts can do little about this.[288] Industry-specific enactments thus hold out the potential for better tailoring of the Act in order to further the purposes of the Copyright Act. Michael Carroll has recently argued that Congress should, under some circumstances, engage in more such tailoring.[289]

Second, the regulatory approach has, in many instances, provided greater clarity to the regulated parties. The detailed statutory exemptions from liability,[290] for example, provide far more guidance to parties about what they can and cannot do with copyrighted works. Although the fair use defense has played a significant role in setting the copyright balance, it is notoriously fuzzy in application.[291] Outcomes in fair use cases are difficult to predict with any certainty. The detailed exemptions thus provide clear guidance.[292] Similarly, the compulsory license provisions,

286. *See* Crews, *supra* note 9, at 565.

287. *See generally* Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807 (1st Cir. 1995) (holding a program's menu structure an unprotectible method of operation); Computer Assoc. Int'l v. Altai, 982 F.2d 693 (2d Cir. 1992) (creating the abstraction-filtration-comparison test for infringement); Sega Enterp. Ltd. v. Accolade, 977 F.2d 1510 (9th Cir. 1992) (crafting a limited reverse engineering privilege); Dogan & Liu, *supra* note 196 (forthcoming).

288. Lawrence Lessig, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN AN INTERCONNECTED WORLD 252 (2001) ("The current [term of] protection for software . . . is a parody of the Constitution's requirement that copyright be for "limited times . . . . The term for copyright for software is effectively unlimited"); Samuelson et al., *supra* note 197, at 2346–47 (making a similar point). *But see* Liu, *supra* note 263 *passim* (proposing that courts adjust the scope of copyright protection to account for the passage of time).

289. *See* Carroll, *supra* note 103, at 20–60.

290. 17 U.S.C. §§ 108–122 (2000).

291. *Id.* § 107. *See also* Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (calling fair use "the most troublesome [issue] in the whole law of copyright").

292. The legislative history of the 1976 Act also includes detailed provisions, negotiated by the relevant parties, setting forth what constitutes fair use in the context of classroom teaching. H.R. REP. NO. 94-1476, at 69 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5683. These provisions

although extremely complex, provide a very detailed roadmap, which the regulated industries can follow with some certainty. All else being equal, greater clarity encourages legitimate behavior and reduces disputes and costs of enforcement.[293]

Third, despite the potential for capture, the regulatory approach may have cured market failures in particular industries. The possible benefit has already been discussed in the previous Section.[294] The merits of this argument have been extensively debated elsewhere,[295] and this is not the place to revisit that debate, other than simply to note that this is another potential benefit of the regulatory approach.

Fourth and finally, the more detailed regulatory approach may have made it practically easier for changes to be made in the law. As mentioned above, the 1976 revision of the Act took more than twenty years, largely because of the wide array of interests implicated by the revision. In order to secure passage of the Act, Congress sought the direct involvement of the regulated industries in the drafting and negotiating of various parts of the statute.[296] Many of the detailed provisions in the Act were perceived as necessary to secure agreement on the Act. Thus, although this contributed to the complexity of the Act, in some sense the complexity was necessary if there was to be a revision in the first place.[297] Thus, as a pragmatic matter, one benefit of the regulatory approach is that it may facilitate the type of political compromise necessary to make changes to the law. Moreover, as the prospect of another wholesale revision of the Copyright Act grows dimmer, this type of complex political compromise may be the only way to effect change in the future.

C. *Disadvantages*

1. General Disadvantages

Although there are advantages to the regulatory approach, there are also a number of disadvantages. Some of these are general disadvantages associated with the approach as a whole, while others are specific to the

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were an attempt to provide more clarity in the context of fair use.

293. *See* COOTER & ULEN, *supra* note 14, at 125; MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 31–32 (2d ed. 1989).

294. *See supra* Part II.B.3.

295. *See* sources cited *supra* note 173.

296. *See* Litman, *supra* note 68, at 881 (critiquing the absence of the public in these discussions); Merges, *New Institutional Economics*, *supra* note 6, at 2201; Thomas P. Olson, *The Iron Law of Consensus: Congressional Responses to Proposed Copyright Reform Since the 1909 Act*, J. COPYRIGHT SOC'Y U.S.A. 109, 116–17 (1989).

297. *See* Oman, *supra* note 142, at 39 (describing Congress's preference for compromise and how compulsory licenses satisfy that preference).

way it has been implemented. The first and most obvious disadvantage is complexity. The regulatory approach, as implemented in the copyright context, has made copyright law far more complex. For example, the provisions of the DPRSRA are extremely complicated.[298] Although detailed provisions may be clearer and easier to follow in one sense (by reducing legal ambiguity), they may at the same time be more difficult to understand, as industry participants must wade through many detailed (and sometimes contradictory) statutory provisions to find answers.[299] By contrast, a simpler property entitlement is easier to understand, making it easier for parties to avoid infringement and to enter into market transactions.[300]

Another potential cost of complexity is that it may make the underlying policy goals of copyright less transparent.[301] Under a simpler, judicially administered entitlement structure, the policies underlying copyright law are front and center, as courts are required to articulate the reasons for their decisions and are forced to grapple with these underlying policies in applying the broad terms of the statute to particular cases. Whether the basis for protection is the need to preserve incentives or to reward authors for their labor, these rationales are expressed and articulated by the courts as they apply the statute to specific cases. Under the regulatory approach, however, it sometimes becomes more difficult to detect the underlying policies in the thicket of complex provisions. Indeed, in some cases, there may be no underlying policy at all, and the provision may only be explainable as the result of interest group bargaining.[302] Thus, copyright law may become less visibly tethered to underlying policy goals. Courts may also find it easier to defer to Congress or interpret statutory terms literally in the absence of strong signals about the underlying policies.[303] Judge Pierre Leval, for example, has lamented the diminished role of the courts in developing copyright policy.[304]

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298. *See supra* Part II.C.3.

299. *See* Nimmer, *supra* note 1, at 1336–39 (describing process of giving advice on the DPRSRA).

300. *See* COOTER & ULEN, *supra* note 14, at 125; POLINSKY, *supra* note 293, at 15–19 ; Merges, *supra* note 86, at 1306; Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 605–08 (1988). *But see* Dan L. Burk, *Muddy Rules for Cyberspace*, 21 CARDOZO L. REV. 121, 163–78 (1999) (suggesting benefits derived from maintaining ambiguous standards).

301. *See* Nimmer, *supra* note 1, at 1271–73, 1315.

302. For example, the lack of a public performance right for sound recordings finds little if any support in copyright policy, and can only be explained as the result of raw interest group pressure. *See* Loren, *supra* note 8, at 683–85.

303. Compare the approaches adopted by the court in *Sega Enters. Ltd. v. Accolade*, 977 F.2d 1510, 1517–28 (9th Cir. 1992) (interpreting fair use broadly in light of policies) with the approach in *Universal City Studios v. Corley*, 273 F.3d 429, 443–49 (2d Cir. 2001) (interpreting DMCA exemptions very narrowly).

304. *See* Leval, *supra* note 81, at 1061 (stating that under the new approach, "[i]nterpretation

Relatedly, the regulatory approach is subject to more interest group pressure. By vesting more substantive authority in the legislature and in administrative agencies, the regulatory approach makes it easier for interest groups to seek favorable treatment. The added complexity and lack of conceptual coherence further increase the incentive and opportunities for rent-seeking by affected industries. Where the statute is relatively simple, departures from a property-based structure and its underlying principles are more visible. So, for example, when the player piano industry was subject to a compulsory license, this departure from the property rights model was quite clear.[305] In addition, with a simpler entitlement, further details and articulation are provided by the courts, which are relatively more immune from interest group pressure.[306] By contrast, where a statute is far more complex and encumbered by special provisions, it is easier for the regulated parties to seek favorable treatment in the complexities of the code.[307] Thus, it may be more difficult to detect and oppose these examples of favorable treatment.[308]

Finally, and perhaps most problematically, the regulatory approach requires more detailed knowledge about markets and industry structures, knowledge that Congress may lack. One of the virtues of a simpler property rights approach is that, assuming that transactions costs do not get in the way, it permits parties to bargain flexibly in response to market conditions. A simple property entitlement thus may do a better job of efficiently allocating resources in response to changing technology and market conditions, particularly if the entitlement is difficult to value[309] and where future technology is difficult to predict. By contrast, neither Congress nor the courts are well equipped to place specific values on

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must hew as closely as possible to a statute's most literal terms, no matter how senseless such a reading may be"); *see also* Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 209 (1984) (noting his own tendency to interpret complex and specific statutes more literally).

305. *See* Rai, *supra* note 281, at 1130 (suggesting that detailed statutory departures from baseline property rights model reflect rent-seeking, and stating that "[e]ven though Congress has generally avoided fleshing out the open-ended language of the patent statute, those amendments that have been made appear to reflect wealth transfers to particular industries.").

306. *See* Burk & Lemley, *supra* note 2, at 1637; Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 911–15 (1987).

307. *See* Burk & Lemley, *supra* note 2, at 1637–39; Menell, *supra* note 7, at 195–97; *see also* Nimmer, *supra* note 1, at 1317 (describing the failed attempt to surreptitiously include sound recordings as works capable of being works made for hire).

308. This may explain the accelerating trend in the complexity of the act. *See* Menell, *supra* note 7, at 195–97 (positing this as an explanation).

309. Where a particular entitlement is difficult to value, enforcing it via a property rule (as opposed to a liability rule) forces the parties in the market to bargain. Because the parties can more accurately value entitlements such as intellectual property rights, the prices they reach in the market will better reflect the value of these entitlements. *See* COOTER & ULEN, *supra* note 14, at 119–28; Calabresi & Melamed, *supra* note 14, at 1092, 1105–06.

intangible intellectual property rights. For example, Congress may be ill equipped to specify, with any certainty, how much a given compulsory license should be worth or what the ideal terms of such a compulsory license should be. More generally, a simple property rights structure relies upon the market to generate information about prices, technologies, and market structures. Thus, where bargaining is relatively costless, a property entitlement may do a better job of organizing the production of creative works in an efficient manner.

2. Disadvantages as Currently (Partially) Implemented

In addition to the general problems above, there have been problems with the implementation of the regulatory approach in the specific context of copyright law. In other areas of federal law involving complex statutes, Congress often gives an administrative agency the authority to administer the federal statute. Under familiar administrative law theory, delegation of such authority to an agency takes advantage of the agency's greater expertise and flexibility, as compared to Congress.[310] Thus agencies often play a significant role in areas involving complex federal enactments, whether through rulemaking, enforcement, or adjudication.

Unlike these other areas, agency involvement—specifically the Librarian of Congress's involvement—in administering the Copyright Act, though increasing, has historically been more limited and has not kept pace with the complexity of the Copyright Act. As described above, the Copyright Office is an arm of the Library of Congress. It thus sits under Article I of the Constitution, rather than Article II, like the executive branch agencies.[311] Moreover, its historical role has been limited to registering copyrights and looking after primarily ministerial tasks associated with registration.[312] It was never intended to serve all of the functions of a traditional executive branch agency. True, in recent years, Congress has begun to give it more power—some ratemaking, adjudicatory, and limited rulemaking authority. And the Copyright Office has certainly played an important role in advising Congress on issues of copyright policy more generally. However, the Copyright Office's role is comparatively more limited than the role of other agencies. This reflects the fact that we are still in the process of making the transition from a

310. *See, e.g.*, DAVIS & PIERCE, *supra* note 264, at 7–14 (discussing the advantages of agencies).

311. Note, however, that the Librarian is appointed by the President, subject to confirmation by the Senate. Eltra Corp. v. Ringer, 579 F.2d 294, 300 (4th Cir. 1978). For a more extensive discussion of the constitutional implications of the Copyright Office's role, see *infra* note 397.

312. *See supra* Part I.B.

property rights regime to a regulatory regime.[313]

Because of the lack of strong agency involvement, the implementation of the regulatory approach in the context of copyright suffers from additional flaws and fails to take full advantage of the potential benefits of a fully regulatory approach. First, copyright law does not currently take full advantage of the potential expertise offered by an administrative agency. The Copyright Office's role, though increasing, is still limited. The vast bulk of its rulemaking authority relates to non-substantive issues like registration. And although it reports to Congress on issues of policy, these reports are purely advisory.[314] Thus, its ability to directly apply its expertise is limited. Moreover, the Copyright Office does not have as much expertise on this front as it potentially could. Most of the staff of the Office remains concerned with the ministerial tasks with which the Office is charged.[315] The Office thus lacks the economic and technological expertise that would make it an even more effective source for informed copyright policy. One side effect of this lack of expertise is a reliance upon the regulated industries for information about copyright markets and technology.

Second, and even more problematically, regulatory copyright, as currently implemented, lacks sufficient flexibility. Although the Act has increased in complexity and detail, most of these provisions have largely been hardwired into the copyright statute. Thus, these provisions are potentially much more difficult to alter. This is particularly problematic in light of the dynamic nature of current copyright markets, faced as they are with dramatic technological change.[316] Anchoring detailed provisions in a statute risks making these provisions inapplicable. One concrete example is the AHRA, in which Congress assumed that most personal copying of recorded music would be done by dedicated digital audio tape decks.[317] This assumption turned out to be mistaken, as most consumers turned to multi-purpose computer equipment. However, because the AHRA was

313. Indeed, the lack of a strong central regulatory agency has led to a regulatory vacuum, which other agencies are seeking to fill. For example, the FCC has recently begun to play an increasing role in copyright policy with its broadcast flag rulemaking. *See supra* Part II.C.5.

314. *See* 17 U.S.C. § 701(b)(1) (2000).

315. *See* Copyright Office Org. Chart, *at* http://www.copyright.gov/docs/c-711.pdf (last visited Nov. 22, 2004) (on file with the North Carolina Law Review).

316. *See* Merges, *One Hundred Years*, *supra* note 6, at 2191–2206; Rai, *supra* note 281, at 1128 (making similar point about patent law and innovation).

317. *See* Sheldon W. Halpern, *Copyright Law in the Digital Age: Malum In Se and Malum Prohibitum*, 4 MARQ. INTELL. PROP. L. REV. 1, 8 (2000); Niels Schaumann, *Copyright Infringement And Peer-To-Peer Technology*, 28 WM. MITCHELL L. REV. 1001, 1010 (2002); Stephanie Skasko Rosenberg, Note, *Anticipating Technology: A Statute Bytes The Dust In* Recording Industry Ass'n Of America v. Diamond Multimedia Systems, Inc., 45 VILL. L. REV. 483 (2000).

based on the earlier assumption, it was not written to apply to multi-purpose computer equipment (e.g., computers or CD burners),[318] and as a result, the statute is largely irrelevant today. The more recent DPRSRA may be another example of this. Indeed, the DPRSRA has already been amended twice by Congress to address failings in the original enactment.[319]

In many ways, the current situation represents the worst of both worlds. In its most recent enactments, Congress has passed extremely detailed, highly specific provisions without the benefit of the flexibility and expertise that could be provided by an administrative agency. And although Congress is at least in theory more representative and responsive to the public than an administrative agency, its dependence upon regulated industries for expertise and data has made it less responsive to the public at large. Copyright law is caught awkwardly halfway between a judicially administered property rights regime and an agency administered regulatory regime.

IV. SOME IMPLICATIONS

This Part of the Article begins to suggest some directions for reform, in light of the analysis above. First, the strengths and weaknesses analyzed above suggest guidelines for when a regulatory approach might, at least in theory, be preferable to a property rights based approach and vice versa. Applied specifically to existing copyright law, this suggests that the regulatory approach might be appropriate for the cable and satellite industries, but not appropriate for areas involving digital technology. In the latter instance, copyright law would ideally return to a more property rights based approach. Such an approach would give more flexibility for market actors and courts to adapt to changing technologies and market conditions. Given the political pressures that have driven the departure from the property-based approach, it may be difficult to return to a simpler form of regulation. However, some specific reforms in a number of areas would do much to improve the function of copyright law. At the very least, Congress should resist extending this approach to new areas of digital copyright.

This conclusion leads to the second set of proposals. If much of existing copyright law will remain under the regulatory approach, then there are a number of ways to improve this approach. Once we

318. *See* 17 U.S.C. §§ 1001(3), (4)(B)(ii), (5)(B)(ii); A&M Records v. Napster, 239 F.3d 1004, 1024 (9th Cir. 2001); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1075 (9th Cir. 1999).

319. Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780 (codified at 17 U.S.C.A. § 114 (2003)); Digital Millennium Copyright Act of 1998, Title IV, Pub. L. No. 105-304, §§ 401–407, 112 Stat. 2860, 2887–2905 (codified as amended in scattered sections of 17 U.S.C.); *see also* Nimmer, *supra* note 1, at 1336–39 (noting the amendments).

acknowledge that copyright has become more regulatory and that this aspect of copyright law is here to stay, then it behooves us to think more carefully about how to properly administer a complex statutory framework. In particular, more attention needs to be paid to the institutional structure administering the copyright laws. Taking the regulatory approach seriously suggests, among other things: granting the Copyright Office or some other agency greater rulemaking authority in order to flexibly adapt copyright law to changing circumstances; giving the Copyright Office sufficient resources and expertise to undertake this task; and ensuring that the process is open to participation from a wide range of interests.

A. *When to Deploy*

The analysis in the previous Part of the Article suggests some tentative guidelines about when a regulatory approach might be preferred over a property rights approach. For example, where there is good data for a particular industry, where the main participants in that industry are easily identifiable and well-represented, and where a particular market failure is well-defined, a regulatory approach may have significant advantages. It would provide greater guidance and specificity to the regulated industries. The rules would be based on some industry experience and more concrete data. The risks of being locked into a suboptimal regime would be reduced. Furthermore, most of the industry participants would be relatively well-established and able to represent themselves in the political process. Under these conditions, the regulatory approach would permit a more finely tuned copyright balance of access and incentives to create and reflect more accurately the full range of interests.

By contrast, where there is significant doubt over both technology and/or the future structure of the market, where there are new entrants, and where the case for market failure is less clear, a property-based model may be preferable.[320] In such cases, there will be inadequate information about the technology and/or market upon which to base highly detailed legislation. As a result, the risk of locking into a poor regulatory framework will be greater. Moreover, the danger exists that existing market actors may act in ways that harm future potential market participants, who are not yet identified and do not yet have seats at the table. In such cases, it may be preferable to set a simple entitlement and wait for better information before intervening more significantly into the structure of the market.[321]

320. *See* Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1307–08, 1322–28 (2002) (arguing for greater use of flexible standards).

321. *See* Merges, *One Hundred Years*, *supra* note 6, at 2200–06. *But see* Menell, *supra* note

Applying these guidelines to specific portions of the Copyright Act, it seems that some of the detailed, industry-specific statutory exemptions in the act may be relatively unproblematic.[322] Although somewhat complex, the exemptions respond to concrete situations in specific industries, and provide relatively detailed guidelines about what activities do not constitute infringement. They are based on existing practices, rather than future and unanticipated events. They intervene far less deeply into the structure of the markets, insofar as they merely exempt specific activities from liability (rather than trying to regulate prices or technologies in the market). Thus, whether one agrees substantively with the specific content of these provisions, as a matter of regulatory technique, they appear relatively unproblematic, and may in fact offer significant benefits in the form of clarity and certainty to the affected industries. Moreover, they do not preclude flexibility, insofar as courts remain free to craft additional exceptions through the fair use doctrine.

Applying the above analysis more generally to specific copyright industries suggests that a regulatory framework might also be quite appropriate, or at least less damaging, for the cable and satellite industries. In these cases, the theoretical case for market failure was relatively clear.[323] Thus regulation could be targeted specifically to addressing the market failure. In addition, there had already been a history of litigation between the two industries. Legislation could thus be enacted in response to an existing legal baseline. And although both the cable and satellite broadcast industries were relatively new at the time of the legislation, they were large and reasonably well-represented in Congress. Accordingly, less risk existed that legislation might systematically disregard the interests of certain market actors.[324] Finally, both industries had already been subject to extensive regulation under general communications law. Accordingly, the cost of complexity of a regulatory structure was not as burdensome.[325]

197, at 2651–54 (noting the risk that, if Congress waits until there is more information, interests may become entrenched making it more difficult to make changes).

322. 17 U.S.C. § 108 (providing a limited exemption for libraries); *id.* § 109 (exempting sales of legitimate copies); *id.* § 117 (providing a limited exemption for copies of computer programs); *id.* § 120 (exempting photographs of architectural works); *id.* § 121 (exempting copies of literary works for the blind).

323. *See supra* Part II.B.2. *But see* Maureen A. O'Rourke, *Bargaining in the Shadow Of Copyright Law After* Tasini, 53 CASE W. RES. L. REV. 605, 637 (2003) (arguing that cable and satellite "compulsory licenses cannot be explained simply as transaction cost savings devices; they were all intended at least in part to regulate rates of remuneration").

324. Tim Wu has argued that these provisions of the Copyright Act reflect a pattern of legislative settlement between the interests of incumbent and challenger disseminators of copyrighted content. *See* Wu, *supra* note 10 (forthcoming).

325. *But see Congressional Hearings Review Copyright Office Report On Broadcast Licensing*, 9 J. PROPRIETARY RTS. 23, 23–24 (1997) (noting testimony of the Register of Copyrights suggesting that private negotiation would be better).

Conversely, the guidelines suggest that a regulatory approach is quite ill suited to issues involving digital copyright.[326] Here, the case for market failure is not at all clear.[327] Much debate persists over whether the existing property rights structure can accommodate new technology. Will existing legal and technological remedies be sufficient to limit unauthorized copying to a degree sufficient to compensate the music industry? Or will digital copying and distribution technologies so undermine the industry that we need a new approach? Thus far, the empirical evidence is mixed. As a result, we do not currently have enough information even to establish a clear need for intervention.

Furthermore, both the technology and market structure are too ill defined and still too much in flux. No one quite knows how the industry will shake out in response to the dramatic changes in computer and network technology. For example, will digital music be delivered primarily through online sale of copies, internet radio, on demand streaming, or some other as yet unknown method? Participants in the market, both large and small, are still entering and exiting. No good data exists, and Congress is not equipped with the requisite expertise (whether technological or economic) to make informed decisions on this front. Enacting detailed legislation at this point risks locking the law into a structure that may ultimately be undesirable. As already noted above, the AHRA was a clear example of this.[328]

The recent ratemaking proceeding under the DPRSRA concretely illustrates the types of difficulties listed above.[329] As an initial matter, it is unclear whether detailed legislation was even necessary.[330] As others have argued, the Act is not so much directed at curing any market failure as in controlling the terms under which new entrants enter the market.[331] Furthermore, the market is so new and dynamic that we lack any sound

326. *See* Merges, *One Hundred Years*, *supra* note 6, at 2233–40; Lee, *supra* note 320, at 1305–11.

327. *See, e.g.*, Loren, *supra* note 8, at 679–702 (arguing that no good policy reason exists for the way in which music copyrights are currently divided up).

328. *See supra* Part II.C.2; *see also* 17 U.S.C. § 902 (2000) (providing sui generis protection for semiconductor works).

329. *See 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 Comm. on the Judiciary*, 108th Cong. 7–8 (2004) (statement of Marybeth Peters, Register of Copyrights) (detailing concerns with the DPRSRA).

330. *See* Loren, *supra* note 8, at 687–91; Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies": Property Rights, Contracts, and Markets*, 508 POL'Y ANALYSIS, Jan. 15, 2004, 1, 10–12 (arguing that private collective rights organizations could have satisfied licensing concerns); Nimmer, *supra* note 1, at 1375–76. *Cf.* Ginsburg, *supra* note 218, at 1630 (suggesting congressional desire to "split the difference" under some circumstances, when faced with new technology and new markets).

331. *See* Wu, *supra* note 10 (forthcoming).

empirical basis for regulating. To take just one example, the DPRSRA, as subsequently modified by Title IV of the DMCA and the Small Webcaster Settlement Act, charges the Librarian of Congress with the task of setting the compulsory license rate for certain internet webcasts of copyrighted sound recordings in the absence of privately negotiated agreement.[332] The statute required the CARP to set the rate to closely mimic what the market would have set it at, in the absence of the compulsory license.[333] Because the webcasting industry was so new, however, relatively little actual data existed to help the CARP make this determination.[334] The result was a lengthy and extremely costly proceeding.[335]

Similarly, the anti-circumvention provisions of the DMCA exhibited significant misunderstandings about the nature of the technology being regulated.[336] In particular, Congress enacted a ban on acts of circumvention and on the distribution of certain anti-circumvention technologies, at a time when such technologies had yet to be fully developed or marketed.[337] Accordingly, the precise applicability of some of the statutory terms to actual technologies is not at all clear.[338] Commentators have documented other ways in which the DMCA has resulted in unintended consequences.[339] Plaintiffs, moreover, have sought to extend the reach of the DMCA far beyond what Congress could plausibly have intended, to apply to such diverse products as garage door openers[340] and toner cartridges.[341]

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332. 17 U.S.C.A § 114(f)(1)(A) (2004).

333. *Id.* § 114(f)(2)(B).

334. Fessler, *supra* note 233, at 409.

335. *See* Joseph Magri, *New Media—New Rules: The Digital Performance Right and Streaming Media over the Internet*, 6 VAND. J. ENT. L. & PRAC. 55, 60 (2003) (detailing the history of the compulsory license). And in the end, the CARP based the rate on a single negotiated license between the RIAA and Yahoo.com; see, for example, Fessler, *supra* note 233, at 411–12; Loren, *supra* note 8, at 696–97, 701.

336. *See* Lee, *supra* note 320, at 1363–65; Joseph P. Liu, *The DMCA and the Regulation of Scientific Research*, 18 BERK. TECH. L.J. 501, 532–33 (2003); R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERK. TECH. L.J. 619, 642–52 (2003).

337. *See* Nimmer, *supra* note 1, at 1343 ("The DMCA is unique by regulating in 1998 activities that not only had no existence then but which still continue to have no reality today.").

338. *See* Reese, *supra* note 336, at 630–31.

339. *See* Fred von Lohmann, *Unintended Consequences: Five Years Under the DMCA passim* (2003), *at* http://www/eff/org/IP/DMCA/unintended_consequences.pdf (last visited Nov. 22, 2004) (arguing that § 1201 of the DMCA chills free expression and jeopardizes fair use) (on file with the North Carolina Law Review); Nimmer, *supra* note 1, at 1367 ("The sad moral is that ultracomplicated statutory schemes fail to serve the interests of even those who draft them and lobby for their adoption.").

340. Chamberlain Group, Inc. v. Skylink, Inc., 292 F. Supp. 2d 1023, 1026 (N.D. Ill. 2003), *aff'd*, 381 F.3d 1178 (Fed. Cir. 2004).

341. Lexmark Int'l, Inc. v. Static Control Components, Inc., 253 F. Supp. 2d 943, 947 (E.D. Ky. 2003), *rev'd*, No. 03-5400, 2004 WL 2382159 (6th Cir. Oct. 26, 2004).

In the end, the above analysis suggests that a more modest, open-ended entitlement structure would be preferable where an industry is new, and technology and the market are still evolving.[342] In this respect, the experience of patent law may serve as a useful basis for comparison. The subject matter of patent law reflects, if anything, a need for even greater respect for the potential impact of technological change. Yet patent law has thus far largely resisted efforts at greater statutory specification or intervention into the market, relying instead on a relatively industry-neutral property entitlement.[343] Commentators in the field have argued for continued adherence to this model, pointing expressly to copyright as a cautionary tale.[344]

Thus, ideally, Congress would replace the complex regulatory framework found in the area of digital content, and in particular digital music, with a simpler entitlement structure.[345] In the context of digital music, for example, Lydia Loren has suggested scrapping the multiple, overlapping statutory regimes, and replacing them with a far simpler entitlement for both musical works and sound recordings.[346] David Nimmer has noted how these absurdly complex provisions could have been avoided with the insertion of a "few judicious words" into the Act.[347]

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342. *See* Nimmer, *supra* note 1, at 1376 (suggesting that DMCA was not necessary, and that pre-existing copyright law was sufficient to address new challenges).

343. *But see* Burk & Lemley, *supra* note 2, at 1638–40 (suggesting that, while industry-neutral on its face, patent law is industry-specific in application by courts).

344. Arti K. Rai explains that:

> The perils of legislative action in the area of intellectual property can be seen most clearly by looking at copyright law. In copyright law (as contrasted with patent law), Congress has been very active and has created an intricate and dense web of statutory language. The influence of narrowly focused interest groups—primarily content providers of various sorts—has been highly visible. Moreover, with respect to at least some of this legislation, it is difficult to argue that a fair-minded policymaker who had listened to all arguments on how best to promote innovation would have reached the conclusions reached by Congress.

Rai, *supra* note 281, at 1130. *See also* Burk & Lemley, *supra* note 2, at 1637–38 ("The copyright model—in which industry-specific rules and exceptions have led to a bloated, impenetrable statute that reads like the tax code—is hardly one patent law should emulate."); Leval, *supra* note 81, at 1050 (lamenting the decline of copyright's "highly successful partnership of legislative and judicial lawmaking").

345. *See generally* LITMAN, DIGITAL COPYRIGHT, *supra* note 3, at 29 (arguing that the complexity of copyright rules makes them unsuitable); COMM. ON INTELLECTUAL PROP. RIGHTS & THE EMERGING INFO. INFRASTRUCTURE, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 221–23 (2000) (arguing the DMCA needs to be clarified and made more precise), *available at* http://books.nap.edu/books/0309064996/html/221.html#pagetop (last visited Nov. 22, 2004) (on file with the North Carolina Law Review).

346. Loren, *supra* note 8, at 678, 716–19.

347. *See* Nimmer, *supra* note 1, at 1335 (describing how Congress could have avoided creating the DPRSRA mess by simply adding a few words).

Indeed, the Register of Copyright herself has recently suggested the possibility of abolishing certain compulsory licenses for recorded music.[348] Much of the existing regulatory structure is the historical result of various political compromises, largely untethered from underlying substantive support. Other portions, such as the AHRA, have largely been bypassed and rendered irrelevant by changing technology. Replacing the existing, complex statutory structure with a simpler entitlement would give industry participants far more flexibility in structuring the market in response to changes in technology and consumer demand, leaving the courts to adjust the entitlement in a case-by-case fashion in response to changing conditions.[349]

Similarly, the above analysis suggests that Congress should modify the DCMA to bring it more within a property-based regime. Although the structure of the DMCA is not facially inconsistent with a property-based approach, it departs from a property rights model in both its interference in technology markets and the absence of flexibility in adapting the statute to potential changes in the market. Given the lack of a sound empirical basis for the legislation, repealing the DMCA would enable markets to develop and provide specific examples of regulatory need, which could then be targeted and addressed. Absent a repeal, Congress should at least modify the statute to give courts some flexibility to adapt the statute to new and unanticipated circumstances. For example, a fair use defense to circumvention liability would inject some much needed flexibility into the statute.[350] By permitting some flexible, judicial development of the law, such a change would bring the DMCA more firmly into the property rights approach and reduce the risks of lock-in associated with detailed statutory provisions.[351]

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348. *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 Comm. on the Judiciary*, 108th Cong. 13 (2004) (statement of Marybeth Peters, Register of Copyrights) ("I believe that the time has come to again consider whether there is really a need for such a compulsory license."). Robert Merges has long suggested that various compulsory licenses in the music context are unnecessary given the ability of private collective rights organizations to address the problem of transactions costs. *See* Merges, *supra* note 86, at 1295. One could usefully distinguish between relatively simple compulsory licenses, such as the mechanical license, which are relatively easy to administer, and the more complex licenses, for example under the DPRSRA, which are unduly complex, difficult to administer, and of doubtful utility as a matter of copyright policy.

349. *See, e.g.*, Merges, *supra* note 330, at 1 ("The influence costs associated with compulsory licensing schemes make them a more expensive mechanism for setting prices. Private negotiations are much cheaper and more flexible over the long term.").

350. *See, e.g.*, H.R. 1066, 108th Cong. (2003) (proposing codification of the fair use defense in the digital entertainment context).

351. At least one court has attempted to inject such flexibility into the anti-circumvention provisions of the DMCA. *See* Chamberlain Group, Inc. v. Skylink Techs., Inc. 381 F.3d 1178,

Although a return to a more industry-neutral property rights regime in these areas would perhaps be ideal, it may be unrealistic to expect any such return, at least on a broad scale.[352] This is for the very reasons, discussed above, that have led to the increasingly regulatory nature of copyright law in the first place. To the extent that the regulatory turn is the result of industry compromise and rent-seeking,[353] it is highly unlikely that the regulated industries will be willing to revisit and upend settled arrangements.[354] Thus, as a practical matter, many of these complex provisions are probably here to stay[355] absent some significant change in the political landscape.[356]

At the very least, however, Congress should be reluctant to extend the regulatory approach (at least in its current, inflexible form) to other areas involving digital technology. Congress should thus be reluctant to enact the more recently proposed bills, such as the Hollings bill, that would intervene into the structure and details of the digital copyright markets. Similarly, provisions like the broadcast flag should be suspect, as they attempt to impose technological requirements on a nascent market. Again, the basic idea is that we currently do not have sufficient information about future technology or market structures, and a more neutral property entitlement would provide greater flexibility and permit the parties to organize the production of copyrighted works flexibly.

1201–03 (Fed. Cir. 2004).

352. *But see* Nimmer, *supra* note 1, at 1374 (arguing that "[i]t is not too late to turn back").

353. *See supra* Parts II and III.A.

354. *See 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 Comm. on the Judiciary*, 108th Cong. 13–14 (2004) (statement of Marybeth Peters, Register of Coyrights) ("As a matter of principle, I believe that the Section 115 license should be repealed and that licensing of rights should be left to the marketplace, most likely by means of collective administration. But I recognize that many parties with stakes in the current system will resist this proposal and that there would be many practical difficulties in implementing it.").

355. Menell agrees:

> Copyright law has entered a new phase in which the government will play a more central and ongoing role in the implementation of copyright protection. As the broad array of groups interested in copyright law become more politically active and as technology advances, Congress will increasingly delegate authority to regulatory bodies and administrative officials will take on important roles in the implementation of complex standards as technology evolves. Content and technology industry associations will need to learn the art of compromise and copyright lawyers will need to learn a lot more about administrative law as this new era unfolds.

Menell, *supra* note 7, at 197.

356. It is perhaps still possible that the absurdly complex scheme governing music copyrights, combined with increased consumer awareness of and interest in such issues, could lead to a form of regulatory failure and increased pressure for dramatic change. To some extent, some of the more radical proposals for reforming music copyrights may be relying upon this scenario for implementation.

The analysis here also casts doubt on the various levy proposals that some commentators have advanced as a response to the problem of digital copying.[357] As discussed above, these proposals push the degree of intervention to the next level,[358] requiring the government to more extensively regulate both the relevant copyright industries and related consumer electronics and services industries. The informational requirements of this type of legislation are quite high. An extensive discussion of the merits of these proposals is beyond the scope of this Article. At the very least, however, the analysis in this Article suggests that the increasingly regulatory nature of these proposals should be a significant consideration in assessing their merits.

More generally, the analysis suggests that Congress should be more selective in applying and extending the regulatory approach to new situations. Now that the institutional structure to support a regulatory approach has been created, the temptation exists to unthinkingly apply this structure to new situations without adequately assessing the costs and benefits. However, as the analysis above shows, although the regulatory approach may hold advantages for some industries, it may be extremely ill-suited for others. Congress should thus, in the copyright context, be more conscious of the various regulatory tools it has at its disposal and more carefully consider which tools may be appropriate for a given situation, based on the considerations set forth above.

B. How to Improve

If regulatory copyright is here to stay, at least in some form, the next question is how we can improve upon it. As discussed above, the regulatory approach to copyright has been implemented without taking full advantage of its potential benefits. This suggests that an opportunity exists for the function of regulatory copyright to be improved. How might copyright look if we took the regulatory approach seriously and applied insights that have been gleaned from other areas of administrative law? More specifically, how might the function of regulatory copyright be improved to increase the possibility of sound copyright policies and accurately reflect the interests of the full range of participants?

The discussion below attempts to provide some tentative answers to these questions. Some of the suggestions would require a rather dramatic reconfiguration of existing legal structures and might well be unrealistic as

357. *See, e.g.*, FISHER, *supra* note 6 at 199–258 (proposing a similar compulsory license); Netanel, *supra* note 258, at 4 (proposing that a noncommercial use levy be imposed on the sale of any consumer product or service, the value of which is substantially increased by peer-to-peer file sharing).

358. *See supra* Part II.C.6.

a political matter. Moreover, the full implications of these suggestions are not completely worked out. However, the goal of this Section is less to offer specific next steps as to try to expand upon the universe of possible regulatory and institutional responses to the issue of legislative complexity, and to assess whether these would be improvements over the status quo.

1. Substantive Rulemaking Authority

One possible response would be to give the Copyright Office, or some other appropriate agency, greater substantive authority to regulate in areas involving complex and dynamic issues. A traditional justification for agency involvement has been the greater expertise that an agency can bring to bear on a complex issue.[359] Thus, Congress delegates to the EPA the authority to make complex decisions involving environmental policy because it is better equipped to weigh the complex scientific and economic issues involved in such decisions. Another justification has been that regulation is comparatively more flexible than legislation, and can therefore better respond to changing circumstances.[360] Thus, the EPA can subsequently revisit issues if the underlying facts or science have changed in the interim.

The Copyright Office's regulatory authority has historically been limited to issues relating to its ministerial functions, such as registration and deposit. However, the recent trend, as demonstrated above, has been to give the Office, or more accurately the Librarian of Congress with advice from the Office, ever more regulatory authority, and the analysis here suggests that this trend could be formalized and made more express. Since 1976, the Office has exercised rulemaking power in connection with its administration of compulsory licenses.[361] It has also taken on a more robust role conducting studies and advising Congress on copyright policy.[362] And more recently, it has it been given limited substantive rulemaking authority, in crafting exemptions to the DMCA.[363]

These expansions of regulatory authority suggest that the Copyright

359. *See* DAVIS & PIERCE, *supra* note 264, § 1.4.

360. *Id.*; *see also* Menell, *supra* note 7, at 196–97 (suggesting that this also facilitates resolution of conflicting claims by multiple interest groups).

361. Motion Picture Ass'n of Am., Inc. v. Oman, 969 F.2d 1154, 1156 (D.C. Cir. 1992) (affirming the validity of the Copyright Office's rule awarding interest on late payments for cable compulsory license).

362. *See* U.S. COPYRIGHT OFFICE, REPORTS, *at* http://www.copyright.gov/reports/ (last visited Nov. 22, 2004) (providing a list of recent reports and studies) (on file with the North Carolina Law Review).

363. 17 U.S.C. § 1201(a)(1)(C) (2000). Formal authority to issue the regulations rests with the Librarian of Congress, although the Copyright Office plays a significant role in making recommendations and administering the rulemaking procedure.

Office is potentially equipped to take on a more active regulatory role, where warranted. For example, the Copyright Office has conducted two rulemakings under its DMCA authority.[364] It has accepted and responded to public comments and has issued regulations. Although there has been much debate over the specific content of these exemptions,[365] the process itself functioned relatively smoothly.[366] It permitted more public input into the policymaking process, via notice and comment, than parties otherwise would have had before Congress. It permitted the Copyright Office to apply its expertise directly to the issue, rather than indirectly, via a report to Congress. And even though the Copyright Office ultimately rejected many of the comments, it issued a written report responding to each comment and articulating its reasons.[367] Finally, and perhaps most importantly, the process permitted the Copyright Office to adjust the law as conditions in this very dynamic market changed.[368] While far from perfect, the process had these concrete benefits as a way of more flexibly implementing copyright policy in a dynamic environment.

The DMCA rulemaking process thus suggests that Congress might consider increasing and formalizing the level of substantive discretion given to the Copyright Office in certain areas. With specific respect to the DMCA rulemaking, much frustration with the process had to do with the Copyright Office's limited interpretation of the scope of the statutory grant of authority to craft exemptions.[369] The statute stated that the Office could exempt "classes of works" for which access was reduced, and the Office plausibly interpreted this provision to mean that it could not exempt specific uses of works. The Office thus rejected many proposals that were,

364. *See* 37 C.F.R. § 201 (2003).

365. *See* Diane Leenheer Zimmerman, *Adrift in the Digital Millennium Copyright Act: The Sequel*, 26 U. DAYTON L. REV. 279, 282 (2001) ("Short of a decision by Congress to scrap the whole idea of the DMCA, the likelihood that the Copyright Office would see itself as having much freedom to use the exclusion provision prophylactically seems remote.").

366. This is not to say that the substantive results of the process were optimal. Indeed, as later pointed out, both increased discretion and expertise would likely have resulted in a better balance of competing copyright concerns.

367. *See* RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2002–4, RULEMAKING ON EXCEPTIONS FROM PROHIBITION ON CIRCUMVENTION OF COPYRIGHT PROTECTION SYSTEMS FOR ACCESS CONTROL TECHNOLOGIES (2003), *available at* http://www.copyright.gov/1201/docs/registers-recommendations.pdf [hereinafter REGISTER 2003 DMCA RECOMMENDATION] (on file with the North Carolina Law Review).

368. *Compare* 37 C.F.R. § 201.40(b) (2004) (listing exceptions to the prohibition against circumvention of technological measures) *with* 65 Fed. Reg. 64,555 (Oct. 27, 2000) (an earlier list of exceptions).

369. *See* Zimmerman, *supra* note 365, at 284 ("Thus, to provide as the only tool available to the Copyright Office to deal with this set of problems across-the-board exemptions of entire categories of works does look at least a bit like the legislative equivalent of a somewhat ill-tempered practical joke.").

in its view, use-specific.[370] Thus, although Congress replaced case-by-case judicial exemptions (such as would be found under the fair use defense) with a regulatory strategy for dealing with unanticipated changes, it failed to provide enough discretion. Granting the Office greater authority to exempt specific uses would have built in more flexibility and permitted the Office to respond more dynamically to changing technologies.

Similarly, the DMCA would have benefited from extension of rulemaking authority regarding the scope of many of the express statutory exemptions to circumvention liability, such as the exemption for encryption research.[371] Although the statutory exemptions were intended to provide some breathing space for legitimate activities, they have in practice provided less breathing space than initially envisioned.[372] This is not unexpected, given that Congress was legislating in the absence of concrete information about what these technologies would look like. Although the courts may cure some of these problems in the application of the statute, the cases thus far suggest that they will be deferential to congressional findings and reluctant to read in broad changes to the highly specific text of the statute.[373]

Granting the Copyright Office greater authority over these exemptions would have enabled greater flexibility and would have reduced the costs of these unintended consequences. Although Congress quite clearly made the conscious choice not to give courts the wide ranging discretion to craft exemptions, giving such authority to the Copyright Office would have at least built in some flexibility while exerting greater control over discretion. Rulemaking thus presents an intermediate step, between those two extremes.[374]

Giving the Office regulatory authority over exemptions would also have established a mechanism through which the regulated parties could seek clarification of the statute, rather than waiting for judicial decisions, which have been slow in coming. Another complaint frequently leveled at

370. REGISTER 2003 DMCA RECOMMENDATION, *supra* note 367, at 11–13, 82–86.

371. Some drafts of the DMCA would have given even more rulemaking authority to the Department of Commerce. *See, e.g.*, H.R. REP. NO. 105-551 (II) (1998) (giving the Department of Commerce authority to promulgate anti-circumvention regulations).

372. *See* Liu, *supra* note 336, at 509–12 (reviewing the various criticisms of the DMCA's encryption research exception).

373. *See, e.g.*, Universal City Studios v. Corley, 273 F.3d 429, 443–44 (2d Cir. 2001) (rejecting a narrow interpretation of the anti-trafficking and anti-circumvention provisions of the DMCA); Davidson & Assoc., Inc. v. Internet Gateway, 334 F. Supp. 2d 1164, 1184 (E.D. Mo. 2004) (narrowly interpreting reverse engineering privilege). *But see* Chamberlain Group, Inc. v. Skylink Technologies, Inc., 381 F.3d 1178, 1190 (Fed. Cir. 2004) (crafting a "rule of reason" for anti-circumvention liability).

374. Indeed, earlier versions of the DMCA would have given the Department of Commerce a larger regulatory role over circumvention liability. *See supra* note 371.

the exemptions is the vagueness of their terms.[375] In particular, encryption researchers have argued that the exemptions subject them to much uncertainty, thereby chilling legitimate research. A number of threatened cases against researchers indicate that this fear is not illusory.[376] At the same time, clarification from the courts has not been forthcoming. Providing a regulatory mechanism would permit parties to affirmatively seek clarification, rather than wait for a judicial decision.

A similar approach could be extended to other areas involving technological change. For example, had Congress granted the Copyright Office more authority to adapt the AHRA more flexibly to changing technology, it might not have become a dead letter.[377] Similarly, the DPRSRA could have made greater use of the expertise and flexibility of the Copyright Office. Currently, the Copyright Office's role has been largely limited to administering the rate-setting process, which has been a significant undertaking. Congress could, however, have also given the Librarian of Congress greater discretion over the substantive provisions of the DPRSRA itself. This would have reduced the complexity of the act and, at the same time, built a degree of flexibility into the substantive provisions of the DPRSRA, to permit the law to adapt to the dynamic and changing market environment. Indeed, the Register of Copyrights has recently testified regarding her limited regulatory ability to address substantive problems with the Act.[378]

More broadly, we could even imagine extension of regulatory authority over other, more general portions of the Copyright Act. For example, rather than enacting specific industry exemptions to copyright

375. *See* Liu, *supra* note 336, at 509 ("Since passage of the DMCA, many legal and scientific commentators have criticized the exemptions for being both too narrow and too vague, thereby chilling legitimate scientific encryption research.").

376. Felten v. Recording Indus. Ass'n of Am., 01-CV-2669 (Nov. 28, 2001), *at* http://www.eff.org/IP/DMCA?Felten_RIAA (last visited Nov. 22, 2004) (declaratory judgment action brought by computer science professor) (on file with the North Carolina Law Review).

377. Putting aside whether AHRA was good policy from the outset.

378. Marybeth Peters, Register of Copyrights, stated:

> With respect to problems involving the requirement that licensees give notice to copyright owners of their intention to use the compulsory license, I believe that I have exhausted the limits of my regulatory authority with the notice of proposed rulemaking published today. With respect to problems involving the scope and treatment of activities covered by the Section 115 compulsory license, I may soon be able to resolve some of the issues in the pending rulemaking on incidental digital phonorecord deliveries, but it seems clear that legislation will be necessary in order to create a truly workable solution to all of the problems that have been identified.

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 Comm. on the Judiciary, 108th Cong. 13 (2004) (statement of Marybeth Peters, Register of Copyrights).

liability, Congress could delegate to the Copyright Office the authority to promulgate additional exemptions via regulation. Thus, the Copyright Office could issue detailed provisions governing what types of uses of copyrighted works would be exempt from liability. These exemptions could respond to the perceived needs of the market. Rather than relying on the vagaries of fair use or waiting for a judicial decision, parties could petition for rulemakings that would address their specific industries and provide concrete guidance about what uses would be permitted. Alternatively, the Office could be given the power to promulgate safe harbors or issue persuasive interpretive rulings.

Thus, for example, one could imagine regulations for such uses as music sampling, or documentary filmmaking. There could be a threshold level of economic significance before a rulemaking would be warranted, to ensure that agency time was not consumed with relatively small issues. Moreover, fair use would still be necessary to provide a safety valve for new and unanticipated uses, as even a more flexible regulatory regime would be unable to completely specify all of the uses of copyrighted works that should be exempt.[379] However, exemption through regulation could perhaps usefully fill a gap currently left by the relative lack of guidance from fair use doctrine, and provide additional guidance and certainty to industries that routinely encounter difficult fair use issues.

There are some indications that Congress is already moving down the path of delegating more regulatory authority to the Copyright Office and Librarian of Congress. The DMCA rulemaking is one example. Moreover, certain recent bills in Congress have indicated a greater willingness on the part of Congress to delegate such authority to the Copyright Office. For example, in introducing the Musical Licensing Reform Act of 1996, which would have given the Copyright Office discretion to define the terms of an exemption, Senator Orrin Hatch expressly noted that the Copyright Office was better placed to set these terms and to change them over time in response to changing circumstances.[380] Future proposed bills, such as database legislation, might also benefit from the additional flexibility and expertise offered by an administrative approach.[381]

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379. Admittedly, one risk of this approach would be to supplant fair use entirely with a less flexible system, as was effectively done with the DMCA.

380. *See* 142 CONG. REC. S2193 (daily ed. Mar. 15, 1996) (statement of Sen. Hatch) ("The Copyright Office is in a much better position than Congress is to study the business practices that prevail in order to identify improvements that would make these practices fairer and more efficient."); Marybeth Peters, *The Year in Review: Accomplishments and Objectives of the U.S. Copyright Office*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 25, 43–44 (1996) (quoting and approving a similar statement by Senator Hatch).

381. *See, e.g.*, Protecting Intellectual Property Rights Against Theft and Expropriation (PIRATE) Act of 2004, S. 2237, 108th Cong. (2004) (proposing to amend chapter 5 of Title 17 to

At the same time, recent experience also cautions against delegating such authority without making significant changes to the structure of the Copyright Office to ensure that it is equipped to fulfill this increased role. For example, members of the Senate Judiciary Committee recently asked the Copyright Office to assist in the drafting of the proposed Inducing Infringement of Copyrights Act of 2004 (INDUCE Act).[382] The Copyright Office was to provide a forum for various affected interests to discuss their concerns and then offer recommendations for revising the Act.[383] In practice, however, the process offered only a limited window of opportunity for discussion and permitted only relatively limited access to specific industry participants.[384] If the Copyright Office is to take on this increased policymaking role, changes would need to be made to give the Copyright Office needed expertise and to open up the process more fully to a wide range of interests. These structural changes are discussed in more detail below.

In many ways, this trend toward more regulatory authority should not be surprising. As copyright law begins to intervene more deeply into the structure of complex and dynamic markets, we would expect and want more authority to be delegated to an administrative agency, just as is the case in other areas of complex federal law. The history of copyright itself nicely tracks this progression. The first compulsory license set the royalty rate inflexibly in the statute, and left it unchanged for several decades. More recent compulsory licenses have built in flexibility by permitting administrative bodies to adjust and set the rates. The next logical step is to grant increasing discretion not just over rates, but also substantive legal provisions, as these are also subject to many of the same pressures for change. After all, where markets are dynamic, the underlying market failures will also likely be dynamic, and a regulatory regime needs to have the flexibility to adjust over time.

Of course, there would have to be some substantive limit on the amount of discretion granted to the Copyright Office. A blanket authorization to "promote the public interest" would certainly shorten the existing Copyright Act, but would entail tremendous administrative costs and provide little substantive guidance. Thus, extension of increased

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authorize copyright enforcement by the Attorney General).

382. S. 2560, 108th Cong. (2004).

383. Letter from Senators Bill Frist, et al. to Marybeth Peters (Aug. 13, 2004), *at* http://www.corante.com/importance/archives/Letter_to_MaryBeth_Peters.pdf (last visited Nov. 22, 2004) (on file with the North Carolina Law Review).

384. *Id.*; *see also* Letter from Association of American Universities, et al. to Senators Orrin Hatch and Patrick Leahy (Sept. 17, 2004), *at* http://www.corante.com/importance/archives/INDUCE_Letter_Sep_17.pdf (last visited Nov. 22, 2004) (on file with the North Carolina Law Review).

regulatory authority to the Copyright Office should continue to be incremental. However, this type of authority should be expressly acknowledged and formalized within the Office, and policymakers should be on the lookout for other areas where such a flexible approach might usefully be deployed. This change would need to be supported by additional institutional commitments, as discussed more fully below.[385]

2. Adjudicatory and Enforcement Authority

The extension of the regulatory model would not necessarily be limited to rulemaking. Once we take seriously the idea of the Copyright Office as an administrative agency, we open up the possibility of the Office taking on both increased adjudicatory and enforcement functions. The Copyright Office already has some adjudicatory power. Specifically, it hears appeals from denials of registrations.[386] More significantly, the Copyright Arbitration Royalty Panels have the power to resolve disputes between claimants to the proceeds of various compulsory licenses.[387] This latter power has resulted in a number of very involved adjudicatory proceedings.[388] In these proceedings, the CARPs accept evidence, take testimony, rule on motions, and act very much like an adjudicatory body. Thus, the Librarian of Congress, through the Copyright Office and CARPs, already exercises some adjudicatory authority.

Expressly recognizing the regulatory aspects of copyright law would lead to greater attention being paid to this adjudicatory function. More specifically, the CARPs have come under criticism in recent years. Many, including those in the Copyright Office, have criticized the fact that the CARPs are ad hoc, and involve the appointment of generalist arbitrators, who must be educated about the issues.[389] Recent proposals have been made to reform the existing process by returning to more permanent

385. *Compare* Rai, *supra* note 281, at 1133 (arguing against conferring substantive rulemaking authority on PTO, given PTO's lack of institutional resources and economic expertise).

386. *See* 17 U.S.C. § 410(b) (2000); 2003 ANNUAL REPORT, *supra* note 92, at 9.

387. 17 U.S.C. § 801(b)(3).

388. For some examples, see generally In re Distribution of 1993, 1994, 1995, 1996 and 1997 Cable Royalty Funds, Phase II Cable Royalty Distribution Report, No. 2000-2 CARP CD 93–97 (CARP Apr. 6, 2001), *at* http://www.copyright.gov/carp/carp/cable.royalty.pdf (last visited Nov. 22, 2004) (on file with the North Carolina Law Review); In re Distribution of DART Royalty Funds For 1995, 1996, 1997 and 1998, No. 99-3 CARP DD 95–98 (CARP Nov. 17, 2000), *at* http://www. copyright.gov/carp/carp95_98.pdf (last visited Nov. 22, 2004) (on file with the North Carolina Law Review).

389. *See Copyright Royalty and Distribution Reform Act of 2003: Hearing Before the House Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 108th Cong. 7 (Apr. 1, 2003) (statement of Marybeth Peters, Register of Copyrights); Maxey, Note, *supra* note 183, at 397.

tribunals.[390] A more permanent recognition of this regulatory function would be consistent with the analysis in this Article.

Beyond the existing adjudicatory function, there might be additional roles that the Copyright Office could fulfill. For example, Mark Lemley and R. Anthony Reese have recently advanced an interesting proposal to reduce the cost of copyright infringement actions against consumers by giving copyright owners access to a low-cost administrative enforcement proceeding.[391] Lemley and Reese do so by enlisting the involvement of the Copyright Office. Under their proposal, copyright owners would have the option to pursue an action before an administrative law judge against consumers who are clearly violating copyright law by uploading significant numbers of copyrighted works on peer-to-peer networks. Administrative adjudication could thus reduce enforcement costs while providing some check on potential abuse of process. Much work would still need to be done to assess the viability of such a setup, but the basic point is that the Copyright Office could potentially play a role here.

Similarly, the Office could be given investigative and enforcement authority, which it now generally lacks.[392] Although private enforcement of copyright infringement is probably the most efficient mechanism, the Office could play a constructive role in areas where private enforcement falls short. For example, there could be a stronger role for the Copyright Office to deal with foreign or offshore infringement, which is difficult for private actors to reach. This would be a logical extension of its current role interfacing with foreign countries and international institutions regarding copyright policy.[393] The Office could also play a greater role in obtaining information about infringers from internet service providers. In this way, they could reduce the costs of finding infringers while exercising appropriate oversight over the privacy interests of the involved parties.[394]

Some administrative enforcement authority by the Copyright Office could also fill perceived gaps between private civil enforcement and public criminal enforcement. Although criminal copyright enforcement authority can be exercised by local U.S. Attorneys' Offices, such actions are quite

390. *See, e.g.*, Copyright Royalty and Distribution Reform Act, H.R. 1417, 108th Cong. (2003) (proposing to replace the Copyright Arbitration Royalty Panel with a Copyright Royalty Judge).

391. Lemley & Reese, *supra* note 263, at 1413.

392. *Cf.* Protecting Intellectual Rights Against Theft and Expropriation (PIRATE) Act of 2004, S.2237, 108th Cong. (PIRATE Act) (proposing to expand powers of the Attorney General to enforce copyright laws).

393. *See* 17 U.S.C. § 701(b)(3) (2000).

394. *See, e.g.*, Recording Indus. Ass'n of Am. v. Verizon Internet Serv., Inc., 351 F.3d 1229, 1234–35 (D.C. Cir. 2003) (interpreting the DMCA to limit the ability of the record industry to subpoena records of ISP in order to identify peer-to-peer file sharers).

rightly limited to the most egregious cases of copyright piracy.[395] A number of recent legislative initiatives, however, have sought to make greater use of the U.S. Attorneys' Offices in enforcing copyright, by increasing funding and giving them the ability to bring civil suits.[396] As others have pointed out, this seems like a rather inefficient use of government resources. Providing some administrative enforcement authority might be a more cost-effective and centrally coordinated way to bridge the gap.

3. Increasing Expertise and Representation

The proposals above represent a departure from the Copyright Office's historical role, albeit one that is already in progress. Moreover, the advisability of some of these specific proposals depends on the specifics of the particular situation, and much additional work would need to be done before concluding that they should be implemented. The basic point, however, is that once we begin thinking more fully about the regulatory nature of existing copyright law, we open up a broader range of institutional responses to administer our complex copyright law. This Article is less concerned about the specific proposals, and more concerned with opening up this area to further consideration.[397]

In order to fulfill an increased policymaking role, significant changes

395. *But see* PIRATE Act, S.2237 (seeking to expand such powers).

396. *See id.*

397. An interesting and important question arises about the ability of the Copyright Office to constitutionally take on this role. *See* E. Fulton Brylawski, *The Copyright Office: A Constitutional Confrontation*, 44 GEO. WASH. L. REV. 1, 12 (1975); JeanAne Marie Jiles, Comment, *Copyright Protection in the New Millennium: Amending the Digital Millennium Copyright Act to Prevent Constitutional Challenges*, 52 ADMIN. L. REV. 443, 454–55 (2000) (suggesting that DMCA rulemaking authority may be unconstitutional). The Copyright Office is an arm of the Library of Congress, and the Register of Copyrights is appointed by the Librarian of Congress. Although the Library of Congress sits formally within the legislative branch, see, for example, Harry Fox Agency, Inc. v. Mills Music, Inc., 720 F.2d 733, 736 (2d Cir. 1983) (stating that the Copyright Office forms part of the legislative branch), *rev'd on other grounds sub nom.* Mills Music v. Snyder, 469 U.S. 153 (1985); U.S. v. Brooks, 945 F. Supp. 830, 833 (E.D. Pa. 1996) (stating that the Copyright Office is not an executive "agency" for purposes of 18 U.S.C. § 1001), the Librarian of Congress is appointed by the President subject to the advice and consent of the Senate. At least one federal circuit court has held that the Librarian is an "officer of the United States" under Article II, and may therefore exercise rulemaking authority without violating separation of powers concerns. *See* Eltra Corp. v. Ringer, 579 F.2d 294, 300 (4th Cir. 1978); Raffi Zerounian, Bonneville Int'l v. Peters, 17 BERKELEY TECH. L.J. 47, 62 (2002). *But see* C.H. Dobal, Note, *A Proposal to Amend the Cable Compulsory License Provisions of the 1976 Copyright Act*, 61 S. CAL. L. REV. 699, 720 (1988) (arguing that *Eltra* is suspect in light of *Bowsher v. Synar*, 478 U.S. 714 (1986)). A full discussion of this topic is outside the scope of this Article. However, if the Copyright Office were not constitutionally able to take on a more extensive policymaking role, then Congress would clearly have to move both existing and future substantive powers to an independent or executive agency.

would need to be made to the Copyright Office's structure and makeup.[398] The Copyright Office currently does not have sufficient resources or expertise to take on a substantially more robust policymaking role, not to mention the more significant proposals advanced above. A look at the current organizational structure of the Office reveals that most of the individuals working in the Office are dedicated to the historical functions of that office, namely registration, deposit, and other ministerial tasks.[399] Comparatively fewer resources are devoted to policymaking.

If the Office is to be expected to engage in a more robust policymaking role, then the staff would benefit from more expertise. Specifically, increased economic expertise would be vital, given the economic underpinnings of copyright policy. In addition, as copyright law becomes more industry-specific, a greater familiarity with specific regulated industries would be warranted. Thus, we would expect greater specialization within the Copyright Office itself, corresponding to the industries being regulated.

In addition, copyright law generally, like many other areas of intellectual property law, is characterized by insufficient empirical data. Such data would be invaluable both for the Office itself and for Congress more generally. Moreover, objective data would reduce both the Office's and Congress's dependency upon the regulated industries for information about those industries. The Office could thus play a very constructive role in helping to collect and create the kind of empirical data necessary for informed copyright policy. While it is true that the Office has already played this role in various circumstances,[400] additional resources would help it fulfill this role more effectively.

Similarly, the Office would benefit from greater technological expertise. Copyright markets have been characterized by dramatic technological change, and the advent of digital technology has increased

398. *See FY 2004 Budget Request: Hearing on Legislative Branch Appropriations Before the Senate Comm. On Appropriations*, 108th Cong., 65–66 (2003) (statement of Marybeth Peters, Register of Copyrights) ("As such, our policy and regulatory work in this area is both increasingly technical and often contentious.").

399. *See* Marybeth Peters, *The Year In Review: Accomplishments and Objectives of the U.S. Copyright Office*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 25, 25–26 (1996) ("The bulk of what we do is paperwork: we registered over 700,000 claims in works last year, and recorded documents concerning transfers of ownership and security interest, of which there were over 17,000 with several hundred thousand titles."). Note that this role is increasingly automated. *Id.* at 46–47.

400. *See, e.g., Digital Millennium Copyright Act (DMCA) Section 104 Report: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary*, 107th Cong. 8–17 (2001) (statement of Marybeth Peters, Register of Copyrights) (presenting findings on the effects of the DMCA).

the rate of change dramatically.[401] Greater technical expertise is therefore essential for informed policy. For example, much copyright policy depends upon assessments of the efficacy of attempts to protect copyrighted works via technology. Without technical expertise, the risk exists that policy will be made based on faulty assumptions. This Article has already detailed several examples where Congress has regulated based on faulty predictions or assumptions about technology.[402] Having technologists on staff would increase the possibility of informed policymaking.

Finally, and perhaps most importantly, steps would need to be taken to ensure that a wide range of stakeholders has real access to the policymakers. One common critique of the Copyright Office has been the extent to which it has largely backed the interests of copyright holders over the interests of consumers more generally.[403] As discussed in more detail below, the public-regarding nature of the Copyright Office has sometimes been underestimated. At the same time, it is easy to see how the Office might feel particularly attuned to the interests of copyright holders, as copyright holders are the main consumers of the Copyright Office's historic function in registering copyrights and administering compulsory licenses. Given this practical tie, it is perhaps unsurprising that the Office might feel particularly aligned with copyright owners. Moreover, the lack of independent expertise documented above makes the Office even more dependent upon the industries for information about markets and technologies. As Jessica Litman has noted, copyright legislation is generally subject to interest group pressure, and it is easy to see how this could translate into industry capture of a regulatory body.[404]

Given the above, additional steps would need to be taken to ensure that the policymaking process represents the full range of copyright interests. In part, this might naturally occur with an expansion of the Copyright Office's duties, insofar as the range of constituents directly petitioning the Office would expand. Similarly, by including more technologists and economists on the staff, a wider range of perspectives would be introduced. At the same time, affirmative steps should be taken to ensure that other interests representing the public at large (e.g., public interest groups, librarians, educators, academics, etc.) are fully represented. The public charge of the Copyright Office should be expressly directed at

401. *See* Merges, *One Hundred Years*, *supra* note 6, at 2200–01.

402. *See supra* Part II.C.2–.C.4.

403. *See, e.g.*, Jessica Litman, *The Exclusive Right To Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 53–54 (1994) ("The office has, of course, some history of being 'captured' by industry for most of the usual reasons . . . .").

404. *See* Litman, *supra* note 68, at 881.

broader copyright goals, rather than at preserving or encouraging a specific copyright industry. Finally, the appointment of the Register should be subject to the same kinds of political considerations found in the appointment of other administrative agencies with policymaking power.[405]

By increasing the expertise of the Copyright Office, granting it more substantive authority, and ensuring that a wide range of copyright interests are represented, these reforms would ideally place more emphasis on the Copyright Office as a nexus of coherent copyright policymaking. Currently, the existing institutional structure lacks a strong, informed, centralized policymaking body. The complexity of existing copyright markets makes it difficult for courts to grapple with these issues,[406] and has increasingly made it difficult even for Congress to deal with. And although the Copyright Office has at least some expertise, it is, as this Article has argued, underutilized. Thus, the hope would be that, by making these changes, at least one institution would exist with both the institutional competence and authority to make informed, consistent, and rational copyright policy.[407]

The increased substantive responsibilities of the Copyright Office would have the added benefit of fostering public awareness about copyright issues and providing a forum for public debate. Although the Copyright Office currently plays this role to some extent (particularly with respect to education), increasing its authority and making it a more central player in the administration of the copyright scheme would permit it to more effectively educate the public on matters of copyright policy and encourage informed debate about contentious copyright issues.

4. Institutional Alternatives

Although the above discussion has proceeded on the assumption that the Copyright Office would be the agency charged with this increased regulatory role, it is worth exploring alternative institutional structures. One possibility would be to vest these increased duties in a different

405. *See* FISHER, *supra* note 6, at 173–98 (suggesting different mechanisms for avoiding industry capture).

406. Note that there is no specialized court for copyright cases analogous to the Federal Circuit in patent cases. *See* Rai, *supra* note 281, at 1040 (describing the Federal Circuit as a policymaking body).

407. A more centralized and effective focus of copyright policy might also have the added benefit of reducing the opportunities for regulatory arbitrage. The passage of the anti-circumvention provisions of the DMCA, for example, was largely secured, after an initial defeat, by lobbying for similar requirements to be placed in the WIPO treaties. *See* LITMAN, DIGITAL COPYRIGHT, *supra* note 3, at 89–150. Similarly, other bodies such as the Department of Commerce, PTO, and FCC provide alternatives for copyright interests to lobby for favorable regulation.

administrative agency. As noted above, the Library of Congress is not a traditional executive branch agency. The Copyright Office is thus not structured to immediately take on the additional duties of a traditional administrative agency. Moreover, lingering constitutional issues surround the delegation of such authority to an Article I agency.[408] Vesting jurisdiction over copyright matters in an existing executive branch agency might solve both of these problems.

For example, the FCC has recently begun to exercise some influence on copyright issues dealing with the broadcast industries, through its broadcast flag rulemaking.[409] The limited jurisdiction of the FCC, however, makes it an unappealing candidate, as it has no authority over many copyright industries, such as publishing, recorded music, software, fine arts, etc. Moreover, the FCC lacks any existing expertise over copyright issues and has historically focused on a very different set of regulatory concerns. Indeed, some have sharply criticized the FCC's recent foray into copyright concerns on precisely these grounds.[410]

Perhaps a better candidate would be the Patent and Trademark Office (PTO). In the mid-1990s, there was some discussion of possibly bringing the Copyright Office within the ambit of the PTO, in order to consolidate the U.S. government's intellectual property policy function.[411] In the end, this proposal did not get off the ground. Whether such a change would be appealing is difficult to say. On the one hand, it would increase the chance of coherent intellectual property policies, at least to the extent that such policies require coordination among the three different bodies of federal intellectual property law.[412] Moreover, such a change would address, to at least some extent, both the constitutional and institutional competence concerns raised above.

At the same time, such a change might have drawbacks. As discussed in more detail below, the historic, public-regarding function of the Library of Congress makes it an appealing body to regulate information policy.[413] In addition, there may be benefits to dispersing authority over intellectual property matters as a way of making it more difficult for regulated industries to completely capture government regulation of intellectual property matters. In the end, this Article expresses no concrete opinion

408. *See supra* note 397.

409. *See supra* Part II.C.5.

410. *See* Susan Crawford, *Nice Work if You Can Get it: The FCC in the Digital Age* 52–69 (Aug. 17, 2004) (unpublished manuscript, on file with the North Carolina Law Review).

411. *See* Pamela Samuelson, *Will The Copyright Office Be Obsolete In The Twenty-First Century?*, 13 CARDOZO ARTS & ENT. L.J. 55, 61–64 (1994) (considering the creation of an Office of Intellectual Property Policy).

412. *See id.* at 62.

413. *See id.* at 63–64.

over which agency would best be suited for the task. Rather the main point is simply to raise the possibility that some agency could usefully play a more robust role in setting and implementing copyright policy.

A less radical alternative to an administrative agency might be an impartial expert body or commission. To the extent that a significant failure of the current regulatory approach results from the lack of expert input, this could be addressed without the creation of an additional administrative agency. Thus, for example, an expert body like the old Office of Technology Assessment could serve a useful role assessing the implications of technological change.[414] The history of copyright law contains at least one successful example of such an approach, namely CONTU. As discussed above, CONTU was expressly charged with the task of studying the impact of new technologies on copyright markets.[415] It commissioned a number of detailed expert studies on specific copyright issues, and later issued specific recommendations (backed by a report and dissenting opinions).[416] Congress then adopted a number of these specific recommendations.[417] David Nimmer, in particular, has recently argued that CONTU provides a model for more coherent and effective copyright legislation.[418]

An expert, impartial body like CONTU would address some but not all of the above flaws with the existing regulatory approach. Although it would certainly inject much needed expertise into the regulatory process, it would depend very much on Congress's willingness to listen to and implement its suggestions. Interest group pressures may at times outweigh the persuasive authority of such a body's recommendations. In addition, such a body would rely upon legislation for implementation of its recommendations, and thus would not have the ability to flexibly adapt rules to changing circumstances, as might be the case with an administrative agency. At the same time, however, such a body would be more insulated from direct political pressure, and thus its recommendations could more accurately reflect sound (or at least coherent) copyright policy. At the very least, the commission model provides a less intrusive alternative to the administrative agency approach proposed above.[419]

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414. *See* CONGRESSIONAL BUDGET OFFICE, COPYRIGHT ISSUES IN DIGITAL MEDIA (Aug. 2004), *at* http://www.cbo.gov/showdoc.cfm?index=5738&sequence=0 (last visited Nov. 22, 2004) (on file with the North Carolina Law Review).

415. *See supra* Part II.C.1.

416. *See* Nimmer, *supra* note 1, at 1258–59.

417. *Id.* at 1256–66.

418. *Id.* at 1378–81.

419. Yet another alternative would be to try to increase the policymaking competence within Congress itself. For example, in the tax context, much expertise regarding the tax code resides within the congressional committees (such as Ways and Means or the Joint Committee on

5. Objections

The proposals above are, naturally, subject to a number of potential objections. Most seriously, there may be much understandable skepticism about any proposal that gives additional authority to an administrative agency. Agencies are of course subject to their own flaws. They are conventionally viewed as being far less accountable to the public, as administrators are unelected. Thus, there are concerns about both legitimacy and responsiveness to the public. In addition, there exists the risk that the agency may become captured by the industries being regulated.[420] And regulation by an agency normally results in even greater complexity in the structure of regulation, thereby increasing costs and raising barriers to competition. Indeed, for many of these reasons, the tide over the past several years has generally turned against additional delegation of authority to agencies.

Already, there are some examples of Congress using the regulatory process to shield itself from having to make difficult choices. For example, the DMCA exemption rulemaking power could be viewed, not as a praiseworthy attempt to build in flexibility into a new regulatory structure, but as an attempt to give the illusion of flexibility while in fact restricting the discretion given to the Librarian of Congress in order to further the interests of the copyright industries.[421] Similarly, the provision in the DMCA requiring the Copyright Office to study the impact of the DMCA on encryption research[422] is also somewhat suspect, in light of the fact that the report was due before the relevant provisions of the DMCA were to go into effect.[423] Thus, there is a very real danger that increasing regulatory oversight may simply exacerbate existing problems.[424]

Taxation) themselves and their extensive staffs. Although the various Judiciary committees (where most copyright legislation originates) currently have some such expertise, one alternative to the above would be to increase such expertise.

420. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 44 (1991) (discussing the effects of private interests on governmental decisionmaking); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 128 (1971) (stating that politicians remain cognizant of pleasing powerful interest groups to avoid organized protest to an unfavorable regulation); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1565–70 (1992) (describing the mechanism of agency capture); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 9–10 (1971) (stating that many industries are able to circumvent the political process and employ agencies to further industry goals).

421. *See* Zimmerman, *supra* note 365, at 282–89.

422. *See* 17 U.S.C. § 1201(g)(5)(A) (2000).

423. *See* Liu, *supra* note 336, at 517.

424. Diane Leenheer Zimmerman explains that:

> Faced with forcefully expressed objections from the library, research and academic communities to this new form of "paracopyright" protection, Congress added a few

I am quite aware of these drawbacks and therefore make these proposals with some hesitancy. Yet there are, I believe, reasons for thinking that these objections may not be dispositive.[425] While agencies are indeed more shielded from the public, there are reasons to believe that the Copyright Office in particular would be relatively more responsive to the public interest, particularly if modified as discussed in more detail above. Part of this is historical. The Copyright Office sits within the Library of Congress, and the charge of the Library of Congress is rather unique.[426] Its goal is the production and preservation of knowledge for the greater benefit of the public. This charge may have the effect of making the Copyright Office more public-regarding, certainly more so than an agency that is more closely aligned with the industries being regulated.[427] For example, a Copyright Office situated in the Department of Commerce would likely look quite different. If a governmental body were to be entrusted with substantive copyright policy, it is hard to imagine a more public-regarding government body than the Library of Congress.[428]

In addition, the track record of the Copyright Office offers some reason for hope. Although subject to much criticism from all sides, the Copyright Office has at times been public-regarding within the limits in which it is operating, and certainly more so than Congress. While it is true that in certain reports and positions, the Office has expressed some sympathy with claims for strong protection favoring existing copyright interests,[429] in other cases, the Office has recognized the need for weaker

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provisions to the DMCA, ostensibly designed to soften the impact of the statute on these users' reasonable needs for access. Unfortunately, however, the provisions were designed in such a way that made it doubtful from the outset that they would actually be able to deliver much of the relief that was supposedly intended.

Zimmerman, *supra* note 365, at 281.

425. *See generally* Kearney & Merrill, *supra* note 18, at 1406 ("Contrary to the theory popular in the late 1960s and early 1970s, agencies do not always behave as the hopeless captives of their client industries."); David B. Spence, *Getting Beyond Cynicism: New Theories of the Regulatory State: A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397, 436 (2002) (noting that agencies commonly avoid capture).

426. *See* U.S. LIBRARY OF CONGRESS, THE MISSION AND STRATEGIC PRIORITIES OF THE LIBRARY OF CONGRESS, FY 1997–2004, *at* http://www.loc.gov/ndl/mission.html (last visited Nov. 22, 2004) ("The Library's mission is to make its resources available and useful to the Congress and the American people, and to sustain and preserve a universal collection of knowledge and creativity for future generations.") (on file with the North Carolina Law Review).

427. *See* Samuelson, *supra* note 411, at 67–68; Eric Schwartz, *The Role Of The Copyright Office In The Age Of Information*, 13 CARDOZO ARTS & ENT. L.J. 69, 78–79 (1994); *cf.* Rai, *supra* note 281, at 1133 ("[T]he PTO appears to have developed an institutional culture that treats patentees as 'clients' to be served rather than as claimants who must present a case for being entitled to a patent.").

428. *See* Litman, *supra* note 403, at 53–54 (arguing that Copyright Office is best positioned to be the public's copyright lawyer).

429. *See generally Copyright Term Extension Act of 1995: Hearings on H.R. 989 et al.*

protection and more balance in the Copyright Act.[430] In other areas, the Office has proposed reasonable changes that would add to the balance.[431] The Office has certainly expressed a greater concern with overall coherence of the copyright laws. Thus, there may be good reason to believe that the Copyright Office would be somewhat public-regarding. And it could be argued that its ability to be more public-regarding might well be increased with more expertise, resources, and authority.

To that end, concrete steps would need to be taken to ensure sufficient public input into and control over the regulatory process. The Copyright Office should be required to gather public input before engaging in substantive policy making. Notice and comment should be taken very seriously.[432] The full range of checks and balances should be imported from other areas of administrative law. In addition, appointment and confirmation of the Librarian of Congress should be subject to the same kinds of considerations as appointments of other heads of administrative agencies with substantive authority. Additional steps could be taken to ensure a wide representation of viewpoints, as outlined in the preceding

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Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 104th Cong., 158 (1995) (statement of Marybeth Peters, Register of Copyrights) (testifying in support of copyright term extension); *Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks: Hearing Before the Senate Comm. on the Judiciary*, 108th Cong. (2003) (statement of Marybeth Peters, Register of Copyrights) (testifying in support of broadening the power of the Department of Justice to prosecute infringement on peer-to-peer networks); *Protecting Innovation and Art while Preventing Piracy: Hearing on S. 2560 Before the Senate Comm. on the Judiciary*, 108th Cong. (2004) (statement of Marybeth Peters, Register of Copyrights) (testifying in support of the Intentional Inducement of Copyrights Act of 2004).

430. *See, e.g., Database and Collections of Information Misappropriation Act of 2003: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary and the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce*, 108th Cong. 9–10 (Sept. 23, 2003) (statement of David O. Carson, General Counsel, United States Copyright Office) (relaying the Copyright Office's concern about the risk of overprotection and the perceived need to provide incentives for production and disbursement of information databases); *Sound Recordings as Works Made for Hire: Hearing Before the Subcomm. on Courts and Intellectual Prop. of House Comm. on the Judiciary*, 106th Cong. 21, 34, 41 (2000) (statement of Marybeth Peters, Register of Copyrights) (stating that the recent "Works For Hire" amendment did not achieve the proper balance in protecting the right of those involved in creating the work). For a list of official statements and reports by the Register of Copyright, see http://www.copyright.gov/statements.html (last visited Nov. 21, 2004) (on file with the North Carolina Law Review).

431. *See Digital Millennium Copyright Act (DMCA) Section 104 Report: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the House Comm. on the Judiciary*, 107th Cong., 15–16 (2001) (statement of Marybeth Peters, Register of Copyrights) (proposing changes).

432. The activities of the Copyright Office are generally subject to the Administrative Procedure Act, 17 U.S.C. §§ 551–559, 701–706 (2000). Note that an earlier version of the DMCA would have required the exemption rulemaking to be "on the record."

Sections.[433] These steps, combined with the unique history of the Library of Congress, would help insure some responsiveness to public opinion.

More generally, the real question is whether Congress would be any better. The analysis here must be a comparative institutional analysis,[434] and on that front, giving the Copyright Office additional authority, whatever its drawbacks, would be superior to the status quo. The alternative to Copyright Office regulation is not no regulation, but instead regulation by Congress. As demonstrated above, Congress has shown little hesitancy enacting complex, detailed, and industry-specific legislation. It has done so with limited expertise, whether economic or technical. It has locked these provisions inflexibly into the statute. And it has relied heavily upon the industries being regulated for both information and drafting. Moreover, public access to legislators has, if anything, been even more limited than access to the Copyright Office through its rulemaking procedures.[435] Thus, the existing course charted by Congress exhibits all of the same flaws, without any of the offsetting benefits of expertise and flexibility.

Of course, ultimately the course adopted by the Copyright Office will reflect the desires of Congress. Thus, if Congress is not committed to a more public-regarding copyright policy, it is unrealistic to expect that the Copyright Office, or any other kind of institutional restructuring, will be able to serve as a counterweight to that. And the potential admittedly exists that Congress could use the regulatory process to shield itself even further from accountability. However, the argument in this Article is that, at the very least, greater involvement by the Copyright Office would reduce some of the potential costs of a regulatory approach, by injecting more expertise and more flexibility into the legislative process and by providing some more centralized and comprehensive nexus for copyright policy. The hope would be that, whatever the substantive goal pursued by Congress (whether high-protectionist or low-protectionist), increased involvement by an expert Copyright Office would at least ensure that such goals are pursued in a relatively coherent, informed, and flexible manner, and that this benefit would outweigh the risks presented by lack of direct accountability and further capture.

A final objection is that the proposals here would not solve the problem of complexity noted at the start of this Article. Rather, the

433. *See, e.g.*, FISHER, *supra* note 6, at 186–96 (proposing various mechanisms for ensuring greater public accountability).

434. *See* KOMESAR, *supra* note 265, at 3–13.

435. *Cf.* Thomas W. Merrill, *Does Public Choice Theory Justify Judicial Activism After All?*, 21 HARV. J.L. & PUB. POL'Y 219, 223–25 (1997) (comparing costs of seeking legal change from legislatures versus courts).

proposals would merely shift the complexity from the U.S. Code to the Code of Federal Regulations. My response is that reducing complexity is not the goal of this Article. In fact, this Article assumes that the trend toward ever-increasing complexity is too advanced to turn back. Rather, this Article is primarily concerned with the question of how to appropriately manage this complexity. And on this score, there seem few attractive alternatives to increasing agency involvement.

CONCLUSION

Copyright law has become more regulatory, and this trend is here to stay. It is therefore important for us to expressly recognize this fact and begin to think more carefully about its implications. In particular, we need to pay more careful attention to questions of institutional design and support for an increasingly complex and detailed regulatory structure. The aim of this Article has been to highlight this trend and focus increased attention upon it.