Regulatory Copyright

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REGULATORY COPYRIGHT

By Joseph P. Liu*

ABSTRACT

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, applying insights from the broader literature. 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, 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 20-odd pages, yet retaining a certain conceptual simplicity. Both of these Acts were limited primarily to defining the scope of the copyright entitlement. By 1976, however, Congress had significantly expanded the Act, reflecting dramatic changes in technology and the increasing complexity of modern copyright markets. The 1976 Act was more industry-specific and contained a number of extremely complex and detailed provisions. Subsequent amendments to the 1976 Act have added only more complexity. Today, the Copyright Act weighs in at more than 200, densely-packed pages, nearly a 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 bemused humor among copyright scholars and others. Comparisons to the tax code are becoming increasingly frequent.² Teaching the subject has increasingly required less explication of broad principles in case law and more close reading of detailed statutory provisions. Many commentators have become increasingly concerned that the complexity of the code is making it more difficult for individuals to understand and comply with its provisions.³ Others have thrown up their hands at the complexity of certain, very detailed, provisions.

Despite widespread recognition of the increasing complexity of U.S. copyright law, relatively little has been written comprehensively addressing the broader implications of this change in our copyright laws. Most of the existing literature has focused on isolated aspects of this increased complexity. Jessica Litman, for example, has written about

¹ See infra Appendix A for a chart, showing the dramatic increase in the size of U.S. copyright law over time.
³ Jessica Litman, DIGITAL COPYRIGHT 25, 29 (2001); Jessica Litman, Revising Copyright Law for the Information Age, 75 OR. L. REV. 19, 22-23 (1996).
how the complexity of the copyright act makes it difficult for individuals to abide by its requirements.\textsuperscript{4} Robert Merges has analyzed how some of this complexity is a response to changing technology.\textsuperscript{5} Peter Menell has suggested that the complexity may result in part from the political landscape surrounding copyright issues.\textsuperscript{6} Still others have focused on the complexity of certain provisions\textsuperscript{7} or commented in passing on the increasing complexity of copyright law as a whole.\textsuperscript{8} Few commentators, however, have focused sustained critical attention on the changing character of copyright regulation as a whole and the broader implications of this change.

This Article is an attempt to focus some critical light on the increasingly regulatory nature of U.S. copyright law. In this Article, I first make the descriptive claim that U.S. copyright law is undergoing a shift in the way in which it seeks to effectuate its goal of promoting progress through providing incentives for creation.\textsuperscript{9} For many years, U.S. copyright law was based largely on a judicially-administered, industry-neutral property rights regime. Congress was responsible for setting the

\textsuperscript{4} See, e.g., Litman, DIGITAL COPYRIGHT, supra note 3; Jessica Litman, Copyright Legislation and Technological Change, 69 OR. L. REV. 275 (1989).


\textsuperscript{6} See Peter Menell, Envisioning Copyright Law's Digital Future, 46 N.Y.L. SCH. L. REV. 63 (2002-03).


\textsuperscript{8} See Craig Joyce, et al., COPYRIGHT LAW 28 (5th ed. 2001); David Nimmer, Appreciating Legislative History The Sweet And Sour Spots Of The DMCA’s Commentary, 23 CARDozo L. REV. 909 (2002) (“It must be admitted that, of late, the Copyright Act has attracted technically complex amendments even more often than once a year.”); 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 (2000) (“In the Twentieth Century, the story of copyright law has been one featuring a series of business-to-business arrangements worked out among industry representatives and enacted by Congress, with a little fine-tuning along the way. As a result, copyright law has become quite complex and much of the Copyright Act of 1976 (“Copyright Act”) reads like a very finely detailed contract.”); I. Trotter Hardy, Not So Different: Tangible, Intangible, Digital, And Analog Works And Their Comparison For Copyright Purposes, 26 U. DAYTON L. REV. 211 (2001); F. Gregory Lastowka, Free Access And The Future Of Copyright, 27 RUTGERS COMPUTER & TECH. L.J. 293 (2001); Kenneth D. Crews, Looking Ahead And Shaping The Future: Provoking Change In Copyright Law, 49 J. COPYRIGHT SOC’Y U.S.A. 549 (2001).

\textsuperscript{9} See infra Part I.
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.10

In recent years, however, Congress has been much more willing to intervene in the structure of copyright markets.11 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 rate-making 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”12 is now arguably the dominant mode of copyright lawmaking.

Like the earlier, property-rights model of copyright, this regulatory approach to copyright has strengths and weaknesses.13 Although the trade-offs between a judicially-administered property-rights regime

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10 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 125 (2d ed. 1997); Guido Calabresi & Douglas Melamed, Property Rules, Liability Rules, And Inalienability: One View Of The Cathedral, 85 Harv. L. Rev. 1089 (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 a discussion about the rhetorical uses (and abuses) of the term “property” in the intellectual property context, see, e.g., Mark 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 (1997); Dan Burk, The Trouble with Trespass, 4 J. SM. & EMERG. BUS. L. 27 (2000); Michael Carrier, Cabining Intellectual Property Through A Property Paradigm (forthcoming 2004) (do not cite w/out permission); Adam Mosoff, Is Copyright Property?: A Comment on Richard Epstein’s Liberty vs. Property (forthcoming 2004).

11 See infra Part II.

12 The Article defines this term in more detail in Part II, infra. Other commentators have used the term to describe these changes in copyright law. See, e.g., Menell, Envisioning, supra note 6, at 195 (briefly noting the shift from property rights to regulatory regime); Fisher, supra note 5, at Chapter 5 (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 (2003) (analyzing copyright as a “regulatory giving”).

13 See infra Part III.
versus a more interventionist regulatory regime have been widely recognized in other areas of the law, relatively little attention has been paid to the trade-off in the copyright context. The great strength of the regulatory approach in 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. This 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. First, the 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 is good data, where the main participants in that industry are easily-identifiable and well-represented, a regulatory approach may have 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 may be premature.

Second, this assessment suggests ways of improving the function of regulatory copyright in those cases where it is deployed. Express recognition of the regulatory nature of modern copyright law suggests perhaps a greater role on the part of the Copyright Office, as the administrative body best placed to set copyright policy in response to the changing technological and market environment. In order to play this

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14 See id.
15 See infra Part IV.
16 See id.
role, changes would need to be made to the structure and responsibilities of the Copyright Office. In particular, greater technical and economic expertise would be essential. Furthermore, the assessment suggests that there would need to be ways to ensure sufficient public input into the regulatory process. Although delegating increased authority to the Copyright Office is not without its downsides, such an approach would be superior to the current approach, in which Congress passes inflexible, technology-specific legislation without adequate technical expertise.

Part I of this Article begins by examining the property-rights approach of the pre-1976 copyright acts. It 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. This Part 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, drawing from familiar insights from other areas of the law. Part IV then 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.

Ultimately, the primary goal of this Article is to identify and focus attention upon a largely-unexamined, yet powerful, trend in U.S. copyright law. A further goal is to suggest ways in which we can be more conscious about the regulatory process and the underlying institutional structure that administers it, in order to increase the chance that effective copyright policies will result. If this Article succeeds in changing the way we view copyright law and starting a discussion about this change, that will be sufficient. If it can propose ways of improving copyright law at the margin, so much the better.

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 role. After providing support for this descriptive claim, this Part discusses a number of characteristics of this 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. 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. 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. The author also had to deposit a copy with the Secretary of State. The Act indicated that the exclusive right lasted for 14 years and could be renewed for an additional 14 years by re-recording the work. The Act also spelled out the penalties that would apply to any person who violated the exclusive right. And that was basically it.

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. The exclusive right enabled authors of maps, charts, and books 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 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, musical compositions, photographs.
paintings, drawings, chromolithographs, statues, and works of fine art.\textsuperscript{22} Exclusive rights were similarly expanded to include a public performance right for dramatic\textsuperscript{23} and musical\textsuperscript{24} compositions. The original term of copyright protection was extended as well, from 14 to 28 years. Congress also beefed up the formalities, introducing the notice requirement\textsuperscript{25} and deposit with the Library of Congress.\textsuperscript{26} 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.

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 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 a record-keeping role, 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 the copyright act in 1909. The 1909 Act was substantially more complex than its predecessors and initially contained approximately 64 sections.\textsuperscript{27} The subject matter of copyright expanded to include, not just a limited listing of copyrighted works, but “all the writings” of an author.\textsuperscript{28} 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.\textsuperscript{29} The renewal term was also extended by an additional 14 years, so that the maximum possible term was now 56 years.\textsuperscript{30} Copyright protection was, moreover, measured not from the date of filing of title, but from the date of first publication with notice.\textsuperscript{31}

Despite increasing in complexity, the 1909 Act also retained the basic property-rights structure of the earlier Acts. Many of the additional

\textsuperscript{20} Act of February 3, 1831, 21st Cong., 2d Sess., 4 STAT. 436.
\textsuperscript{21} Act of March 3, 1865, 38th Cong., 2d Sess., 13 STAT. 540.
\textsuperscript{22} Act of July 8, 1870, 41st Cong., 2d Sess., 16 STAT. 198.
\textsuperscript{23} Act of August 18, 1856, 34th Cong., 1st Sess., 11 STAT. 138.
\textsuperscript{24} Act of January 6, 1897, 44th Cong., 2d Sess., 29 STAT. 481.
\textsuperscript{25} Act of April 29, 1802, 7th Cong., 1st Sess., 2 STAT. 171.
\textsuperscript{26} Act of August 10, 1846, 29th Cong., 1st Sess., 9 STAT. 106.
\textsuperscript{27} Act of March 4, 1909, 60th Cong., 2d Sess., 35 STAT. 1075.
\textsuperscript{28} Id. § 4. These writings were classified, for purposes of registration, in § 5.
\textsuperscript{29} Id. § 1(a).
\textsuperscript{30} Id. § 23.
\textsuperscript{31} Id.
provisions merely elaborated upon and gave greater detail to the basic entitlement structure. For example, many of the additional provisions gave more detailed instructions about the notice, deposit, and registration requirements and procedures.\textsuperscript{32} Others provided extensive detail about the substantive and procedural requirements for infringement actions.\textsuperscript{33} Still others provided additional guidance about initial ownership, assignment, and transfers of the entitlement, along with the attendant recording requirements.\textsuperscript{34} Again, all of these were consistent with the basic property-rights structure.

The 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.\textsuperscript{35} 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.\textsuperscript{36} The Register was also given the power to issue rules and regulations regarding the registration process.\textsuperscript{37} Although the 1909 Act spelled out the administrative role of the Copyright Office in far more detail, its role 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.\textsuperscript{38} Moreover, certain exceptions and damage limitations were industry or work-specific. For example, the act exempted certain non-profit public performances of musical works by “public schools, church choirs, or vocal societies.”\textsuperscript{39} It also specified different damages based on the type of work. 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.

\begin{itemize}
  \item \textsuperscript{32} \textit{Id.} §§ 12-13, 18-22.
  \item \textsuperscript{33} \textit{Id.} §§ 25-40.
  \item \textsuperscript{34} \textit{Id.} §§ 6-8, 41-46, 62 (work for hire).
  \item \textsuperscript{35} \textit{Id.} § 48.
  \item \textsuperscript{36} \textit{Id.} § 49.
  \item \textsuperscript{37} \textit{Id.} § 53.
  \item \textsuperscript{38} \textit{Id.} § 1. \textit{See also} classification list in § 5.
  \item \textsuperscript{39} \textit{Id.} at §25(b) (damage for specific types of works); 28 (exemption for certain non-profit public performances by “public schools, church choirs, or vocal societies”).
\end{itemize}
More significantly, the 1909 Act contained the first, industry-specific compulsory license scheme, the so-called “mechanical license.” This license was a direct response to the new technology of player-piano rolls, which posed a significant threat to the established sheet music industry. Prior to the 1909 Act, the Supreme Court in *White-Smith v. Apollo* had held that piano-rolls were not infringing “copies” of the musical work, because the piano-rolls were not generally intelligible by humans. 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 statutory set fee of two cents per copy to the original copyright owner of the musical work. The copyright owner could demand a report of such use, due on the 20th of each month, with the royalty payment due on the 20th of the following month. Payment of the royalty shielded the piano-roll manufacturer from further copyright liability.

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 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 (originally two cents per copy), 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 then-dominance of one particular piano-roll company.

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. The 1909 Act retained its 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. The 1976 revision of the Copyright Act was a

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40 Id., § 1(e).
41 209 U.S. 1 (1909).
43 Id.
44 See Loren, supra note 7, at 681; Paul Goldstein, COPYRIGHT’S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX 65-67 (1994).
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.\textsuperscript{45} The Copyright Office submitted a detailed report to Congress in 1961. After a number of drafts, the first revision bill was introduced in 1964, followed by extensive hearings. Bills were passed by the House in 1967 and 1976 and by the Senate in 1974 and 1976. Differences in the versions were resolved, and the new act was signed in 1976.\textsuperscript{46} The process of revision thus took more than 20 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.\textsuperscript{47}

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. 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 a tangible medium of expression.”\textsuperscript{48} The act also listed the basic rights that entitlement owners could assert, and these too were broadly similar to (though slightly more expansive than) the rights under the 1909 Act.\textsuperscript{49} Calculation of the term of protection was changed from the date of publication to the life of the author plus 50 years. 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.\textsuperscript{50}

The 1976 Act also expressly recognized the role that courts had been playing in helping to define the contours of the property entitlement. The Act did so by codifying the fair use defense,\textsuperscript{51} which the courts had independently developed prior to the 1976 Act. Although the earlier copyright acts expressly mentioned no such defense, courts interpreting

\textsuperscript{46} Id.
\textsuperscript{47} See Jessica Litman, Copyright, Compromise, and Legislative History, 72 Cornell L. Rev. 857 (1987).
\textsuperscript{48} 17 U.S.C. § 102(a).
\textsuperscript{49} 17 U.S.C. § 106.
\textsuperscript{50} 17 U.S.C. §§ 701 et seq.
\textsuperscript{51} 17 U.S.C. § 107.
these acts created a defense for certain limited acts of copying. The 1976 Act attempted 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. 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.

Thus in the end, the 1976 Act retained, at its core, the same basic property-rights model underlying the earlier acts. As we will later see, however, the Act also introduced a number of very significant departures from this model, departures that subsequent amendments would build upon.

B. CHARACTERISTICS

The property-rights model underlying the early copyright acts has a number of important features from a regulatory and institutional point of view. First, the model is substantively rather simple. 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 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. And all are protected for the

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52 The earliest articulation of the fair use defense in U.S. law is generally considered to be Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (Story, J.).
54 The main exception to this is the lack of a general public performance right for sound recordings. See 17 U.S.C. § 106(4).
same length of time, this despite potentially significant differences in the nature of the particular markets.\textsuperscript{55}

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 simple. Instead, it means that the courts are charged with dealing with any complexities in the application of the statute. 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.\textsuperscript{56} Thus the courts are charged with developing tests and principles for separating protectible expression from unprotectible ideas,\textsuperscript{57} for determining when infringement occurs,\textsuperscript{58} and for determining when liability should be excused under fair use.\textsuperscript{59} A good deal of substantive complexity can be found in the case law. At the same time, the case-by-case nature of common-law adjudication places a practical limit on the extent of this substantive complexity.

Fourth, this model relies 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. The distribution of rights and responsibilities among various market players is not determined by the statute. The terms of the licensing arrangements (including rates and division of rights) are similarly left to the market.\textsuperscript{60} The basic idea is that copyright sets the entitlement to solve the public goods problem and then largely gets out of the way. The assumption is

\textsuperscript{55} 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 possibility of varying terms depending on nature of the work).


\textsuperscript{60} Collective rights organizations may play a role, under this vision, in reducing potential transactions costs. See Robert Merges, Contracting Into Liability Rules: Intellectual Property Rights and Collective Rights Organizations, 84 CALIF. L. REV. 1293 (1996). Note also the role of antitrust law in regulating these organizations.
that, once the entitlement is set, private ordering will ensure that the entitlement is efficiently allocated.61

Fifth and finally, under this model the administrative role of the Copyright Office is relatively limited. The Copyright Office is charged primarily with record-keeping.62 It registers works, registers renewals and transfers, accepts deposits, charges fees, and maintains records. Its policymaking power is limited to regulations involving the mechanics of the above activities.63 And although in limited circumstances it may refuse to register a work for failure of subject matter,64 these rejections comprise a relatively limited part of the Copyright Office’s duties. Thus, the role here is again akin to the administrative role played by registries of deeds in real property.

The virtues of a relatively simple property rights structure have been extensively discussed in the broader literature on property entitlements more generally, and this model of copyright law shares these virtues.65 Clear and simple property entitlements are easier to understand. Such entitlements make it easier for individuals to avoid infringement. They also reduce both the likelihood and expense of disagreements over entitlement scope. Simpler entitlement structures also reduce the costs of bargaining and facilitate market transactions by providing accurate information about rights.

A simple property entitlement may also do a better job of efficiently allocating resources, particularly if the entitlement is difficult to value.66 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. By contrast,

62 See 1909 Act, §§ 201 et seq.
63 See 1909 Act, § 207; 37 C.F.R. §§ 201 et seq. (detailing procedures for filings, etc.).
64 See, e.g., Atari Games v. Oman, 888 F.2d 878 (D.C. Cir. 1989); 37 C.F.R. § 202.1. (listing material not subject to copyright).
66 See Cooter & Ulen, LAW AND ECONOMICS, supra note 10; Calabresi & Melamed, supra note 10.
neither Congress nor the courts are well-equipped to place specific values on intangible intellectual property rights. More generally, a simple property-rights structure relies upon the market to generate information about efficient 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.

In addition, a simpler property rights model is relatively more transparent from a policy standpoint. That is, the basic principles underlying the entitlement are set forth in relatively broad terms. 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 in a principled manner as they apply the statute to specific cases. Relatedly, the property-rights model is relatively more shielded from interest group pressures. The substantive simplicity of the model makes it more difficult for interested parties to carve out exceptions in an unobtrusive manner. Moreover, development of law in the courts is relatively more shielded (though of course not completely so) from the kinds of interest group pressures that can sometimes dominate in the legislative arena.

Just as the virtues are familiar, so are the costs. A judicially-administered property-rights model cannot be as specific or as detailed as a more complex legislative solution. Although the basic principles underlying the property right may be clear, the application of general principles to specific situations may generate substantial uncertainty. A less detailed property-rights regime also cannot be tailored as carefully to fit particular circumstances or industry structures. Thus, there may be cases where the property entitlement is too broad, too narrow, or simply inappropriate for a given industry. A property-rights approach may also be less able to adapt quickly to changing circumstances, as parties in the market must rely upon case-by-case development of the law, which can often take time. A property-rights model may also pose problems if there are high transactions costs standing in the way of efficient bargaining. Finally, judges do not have the advantage of expertise or the ability to

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69 See supra note 65.
70 See Crews, Looking Ahead, supra note 8, at 565; Michael Carroll, The Uneasy Case Revisited: A Sectoral Approach to Intellectual Property (forthcoming) (do not cite w/out permission).
obtain good detailed data on complex issues presented by changing markets and technologies.72

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. This Part starts by defining the characteristics of this contrasting model and discussing the differences between this “regulatory” model and the property-rights model. This Part then makes the descriptive claim that Congress has shown an increasing preference for this regulatory model in its recent copyright legislation. This Part then ends by discussing some of the possible explanations for this shift from a property-rights model to a regulatory model.

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”?73 In some sense, the term is too broad, insofar as all copyright legislation “regulates” 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. Moreover, there are many points on the spectrum between a property rights view and a more regulatory view. This Article uses the term more generally, however, to roughly capture the way in which this new model of copyright lawmaking intervenes more dramatically 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, related characteristics. The first characteristic is increased statutory complexity through detailed codification.74 Regulatory copyright law contains extremely detailed and complex statutory provisions allocating rights and responsibilities at a very fine-

73 For other uses of this term in the context of copyright law, see supra note 12.
grained and particularized level. 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.\textsuperscript{75}

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 the particular industry at issue. In some cases, certain types of works might lack certain rights.\textsuperscript{76} In other cases, the basic entitlement structure in a given industry-sector might be replaced entirely by a compulsory license.\textsuperscript{77} Exemptions also vary substantially, depending upon the type of work.\textsuperscript{78} In places, regulatory copyright can even dictate the adoption of a technology within certain markets, or forbid the distribution of a technology within other markets.\textsuperscript{79} Thus regulatory copyright is far more context-sensitive and aims to tailor its requirements to specific industries and markets.

Third, regulatory copyright is willing to intervene far more deeply in the actual structure of copyright markets. Instead of merely setting the property entitlement and 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.\textsuperscript{80} In other cases, the approach might levy a tax on certain activities and redistribute the proceeds to other parties.\textsuperscript{81} In still other cases, the regulatory approach may affect the technology adopted by the players in that industry. 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 policy-making power in Congress and, in some cases, the Librarian of Congress, rather than the courts. Exemptions from liability are spelled out in the statute, rather than left to the courts for case-by-case development in light of general


\textsuperscript{76} For example, sound recordings lack a general public performance right. 17 U.S.C. § 106(4).

\textsuperscript{77} See \textit{infra} Part II.B.2 and II.B.3.

\textsuperscript{78} See \textit{infra} Part II.B.1.

\textsuperscript{79} See \textit{infra} Part II.C.2 and II.C.4.

\textsuperscript{80} See \textit{infra} Part II.B.2 and II.B.3.

\textsuperscript{81} See \textit{id.}; see generally Tom W. Bell, \textit{Authors' Welfare: Copyright As A Statutory Mechanism For Redistributing Rights}, 69 BROOK. L. REV. 229 (2003) (analogizing copyright to welfare).
principles. These exemptions are often extremely complex and detailed.\textsuperscript{82} More generally, the role of the Librarian of Congress (and the Copyright Office, within the Library of Congress) under this approach is far greater.\textsuperscript{83} The new role encompasses not only record-keeping, but also serving as an expert advisor to Congress on copyright matters (e.g., providing technical advice and reports, reviewing and drafting proposed legislation),\textsuperscript{84} rate-setting and distribution of funds for certain compulsory licenses,\textsuperscript{85} and in some cases even substantive rulemaking.\textsuperscript{86}

Thus, when this Article discusses this 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.

\textbf{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. Most courses, for example, spend much time exploring the broad principles underlying \textit{Baker v. Selden}\textsuperscript{87} or \textit{Feist v. Rural Telephone}.\textsuperscript{88} 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 in regulatory approach has not attracted more attention.

\textsuperscript{82} \textit{See infra} Part II.B.1.
\textsuperscript{83} \textit{See generally} 17 U.S.C. §§ 701, et seq. According to the Copyright Office web site (http://www.copyright.gov/circs/circ1a.html), the office currently employs 500 individuals. In the fiscal year 2001, the office registered 601,659 copyrighted and mask works. In calendar year 2000, the office collected and disbursed more than $187 million from compulsory licenses for cable broadcasts, satellite broadcasts, and AHRA.
\textsuperscript{84} 17 U.S.C. § 701.
\textsuperscript{85} \textit{See infra} Part II.B.2 and II.B.3.
\textsuperscript{86} \textit{See infra} Part II.B.2 and II.B.3.
\textsuperscript{87} 101 U.S. 99 (1880).
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 finely-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, it immediately followed this with a number of extremely detailed, complex, and industry-specific “limitations.” Earlier acts had contained very few express exemptions from copyright liability, leaving the courts to craft 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. 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). It defines the types of works that may be copied. It sets forth the acceptable purposes for making copies (e.g. for preservation, interlibrary loan, etc.), the number of permissible copies (e.g. only one or a few copies, depending on the purpose), 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). It also sets forth mandatory notice requirements to be printed on copies or posted near photocopiers.

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. The public performance right thus does not apply to: performances for face-to-face teaching activities of nonprofit educational institutions; performances of certain works in the course of services at a place of worship; certain performances with no commercial advantage; certain receptions of broadcasts in a public place; performances of certain works by “nonprofit agricultural or horticultural organization[s]”; performances of musical works by record stores;

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certain performances for the blind; and performances by veterans or fraternal organizations. These exemptions are highly targeted, singling out specific groups or activities for special treatment. Again, this represents a departure from a more industry-neutral, property-rights regime.

The 1976 Act also contains very specific exemptions for the broadcast industries. Under these exemptions, radio and television stations can make certain temporary copies of broadcasts in the course of broadcasting or for purposes of preservation and archiving.\(^93\) Again, the exemption is extremely detailed. It limits the purposes for which such copies can be used and in some cases mandates destruction of copies after a set period of time. This provision also contains separate exemptions for broadcasts by governmental bodies or other nonprofit organizations. The exemption is thus designed to tailor the application of the act to the specific needs of the broadcast industries.

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.\(^94\) Another example is the public performance exemption for the reception of radio broadcasts in a public place.\(^95\) This exemption was recently amended in 1998\(^96\) 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. 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), the number of speakers and types of receiving equipment (“not more than 4 loudspeakers … located in any 1 room or adjoining outdoor space”), and other requirements.

These exemptions thus begin to depart from the industry-neutral, property-rights model of the earlier acts.\(^97\) The exemptions are far more detailed and complex than the rules that the courts could have crafted

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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 below in more detail, these detailed exemptions resulted from political compromises hammered out by the relevant industries in the 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 again the markets to allocate distribution of that entitlement. Thus, 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.98 By this time, of course, the relevant technology was not piano rolls but sound recordings on record albums and tapes.99 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.100 It is interesting to note that, despite the compulsory license procedure set forth in the statute, private parties often bargained around the statutory compulsory license, reaching their own

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100 The rate is currently set at 2 3/4 cents per copy or 1/2 of 1 cent per minute or fraction thereof, whichever is greater. See 37 C.F.R § 255.3.
terms and conditions. This indicates that, although the 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 operators. 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. Later amendments to the Act replaced the statutory license with a preference for a negotiated license. However, in the absence of a negotiated license, the license would be set through arbitration by the Copyright Royalty Tribunal (later replaced by Copyright Arbitration Royalty Panels). 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 could not be said for the cable broadcasting compulsory license. 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 stations. The provision was the result of concerns that the broadcast industries (both broadcast stations and the owners of specific shows) might refuse to license transmission of their on-air broadcasts to cable companies for

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103 Though apparently this compulsory license was widely disregarded. See Loren, supra note 7.


105 See 17 U.S.C. § 116. 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. 17 U.S.C. § 116(A)(1).
re-transmission to their paying customers.\textsuperscript{106} Congress accordingly enacted a compulsory license, which ensured that cable companies would be able to provide their customers with access to broadcast television, while still compensating the broadcast industries.\textsuperscript{107}

The resultant legislation, which was hammered out in detail by the cable and broadcast industries, was extremely complex and detailed. The compulsory license imposes very detailed reporting requirements on cable companies. 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. 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 (e.g. 0.675 of 1 per centum of gross receipts \ldots).\textsuperscript{108}

The cable company must deposit any fees due under the compulsory license with the Copyright Office. The statute then sets up a separate procedure for distributing the proceeds to the copyright owners. Copyright owners whose shows were re-transmitted under the compulsory license can file claims for royalties in July of every year. In August, the Copyright Office will determine if there is any controversy over how the funds should be distributed (the statute expressly states that the parties may themselves agree to a distribution of the royalties). If any such controversy exists, the matter is then transferred to a Copyright Arbitration Royalty Panel\textsuperscript{109} for resolution. Decisions are then subject to judicial review.\textsuperscript{110}

\textsuperscript{106} See H.R. Rep. No. 94-1476 (1976) (“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.”).


\textsuperscript{108} 17 U.S.C. § 116. Subject to adjustment. See National Cable Television Ass'n v. Copyright Royalty Tribunal, 689 F.2d 1077 (D.C. Cir. 1982).

\textsuperscript{109} Under the 1976 Act, these decisions were made by the Copyright Royalty Tribunal, the institutional predecessor of the Copyright Arbitration Royalty Panels.

\textsuperscript{110} See, e.g., National Broadcasting Co., Inc. v. Copyright Royalty Tribunal, 848 F.2d 1289 (D.C. Cir. 1988); Cablevision Systems Development Co. v. Motion Picture Ass'n of Am., 836 F.2d 599 (D.C. Cir. 1988); Cablevision Systems Development Co. v. Motion Picture Ass'n of Am., 808 F.2d 133 (D.C. Cir. 1987); National Cable Television Ass'n, Inc. v. Copyright Royalty Tribunal, 724 F.2d 176 (D.C. Cir. 1983); Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983).
The cable compulsory license thus represented an even more significant departure from the industry-neutral, property rights regime. 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). Indeed, much of the terminology in the provision would be entirely opaque to anyone not familiar with the details of the industries at issue. 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 then later 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. 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, e.g. extremely detailed conditions; reporting requirements; rate setting by the Copyright Arbitration Royalty Panels; provisions for redistribution of royalties; separate definitions. These provisions further contain even more detailed provisions tailored to the specifics of the satellite broadcast industry, including: detailed distinctions between types of initial broadcast feeds that are subject to

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111 Ralph Oman, *The Compulsory License Redux: Will It Survive In A Changing Marketplace?*, 5 CARDOZO ARTS & ENT. L.J. 37, 44 (1986) (“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 copyright policy occurred when Congress created this license.”).

112 See Litman, *Copyright, Compromise, and Legislative History*, supra note 47, at 869.

113 See, e.g., 17 U.S.C. § 111(d)(1)(B), which 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 …”

114 See 17 U.S.C. §§ 119 (general satellite retransmission license); 122 (local-to-local satellite retransmission license).
the license; detailed geographical limitations (for “unserved households,” along with specific measures to calculate when such households are unserved); separate penalties for violation of certain terms of the license; ways of measuring signal intensity; and even sections governing application to recreational vehicles and commercial trucks. The satellite retransmission compulsory license 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).\(^{115}\) In some cases, the rate is set by the statute. In other cases, the statute delegates that responsibility to a rate-setting institution under supervision of the Librarian of Congress. Originally, the 1976 Act vested this power in a permanent administrative body, the Copyright Royalty Tribunal.\(^ {116}\) Later, the power was vested in ad hoc Copyright Arbitration Royalty Panels convened by the Librarian of Congress.\(^ {117}\) In either case, the statute gives an administrative body within the Library of Congress the power to set prices in a particular market for certain types of licenses. Moreover, 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.

The responsibilities of the Copyright Arbitration Royalty Panels are expressly set forth in a separate chapter of the Copyright Act.\(^ {118}\) The Librarian of Congress is authorized to appoint and convene such panels,

\(^{115}\) The general advantages and disadvantages of compulsory licenses have been debated in detail elsewhere. See, e.g., Merges, Contracting, supra note 61; 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.

\(^{116}\) 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. E.g., Recording Industry Assoc. of America v. Copyright Royalty Tribunal, 662 F.2d 1 (D.C. Cir. 1981); National Cable Television Assoc. v. Copyright Royalty Tribunal, 689 F.2d 1077 (D.C. Cir. 1982); Christian Broadcasting Network v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Cir. 1983); National Assoc. of Broadcaster v. Copyright Royalty Tribunal, 772 F.2d 922 (D.C. Cir. 1985). Much of this criticism led to the Copyright Royalty Tribunal Reform Act of 1993.


\(^{118}\) 17 U.S.C. §§ 801, et seq.
upon recommendation of the Register of Copyrights. 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.\textsuperscript{119} The panels are also charged with resolving disputes over distribution of royalty proceeds to copyright owners. 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.\textsuperscript{120}

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.\textsuperscript{121} In addition to the compulsory licenses already mentioned above, the 1976 Act contained a compulsory license for public broadcast stations (with rates established by the Copyright Royalty Tribunal).\textsuperscript{122} 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.\textsuperscript{123} More recently, the new digital performance right for sound recordings uses the structure of compulsory licenses.\textsuperscript{124} Both of these provisions will be discussed in more detail below.

\begin{thebibliography}{99}
\bibitem{119} Id.
\bibitem{120} Note pending Copyright Royalty and Distribution Reform Act (H.R. 1417) (2003), which seeks to reduce costs and improve administrative efficiencies of the CARPs. See also Statement of Marybeth Peters Register of Copyrights before the Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary United States House of Representatives 108th Congress, 1st Session (April 1, 2003) regarding the Copyright Royalty and Distribution Reform Act (H.R. 1417) (detailing high administrative costs of the existing system, and in particular the institutional burden imposed by the ad hoc nature of the panels); Statement of Marybeth Peters The Register of Copyrights before the Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary United States House of Representatives 107th Congress, 2nd Session (June 13, 2002) on CARP (Copyright Arbitration Royalty Panel) Structure and Process (detailing history of CARPs and suggesting improvements). See Maxey, Note, \textit{That Carp Is No Keeper: Copyright Arbitration Royalty Panels--Change Is Needed, Here Is Why, And How}, 10 J. INTell. PROP. L. 385 (2003).
\bibitem{122} 17 U.S.C. § 118.
\bibitem{123} See 17 U.S.C. §§ 1001, et seq.
\bibitem{124} 17 U.S.C. § 114.
\end{thebibliography}
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. 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.\(^\text{125}\) 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 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).\(^\text{126}\)

Established in 1974, CONTU was charged with the task of studying these new technologies and issuing recommendations to Congress for

\(^{125}\) See infra, Appendix A.

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. Hearings were held in the House in 1980, and legislation was subsequently passed implementing modified versions of the recommendations.

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. 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. 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. Rather than propose a complex statutory scheme (complete with detailed provisions) to deal specifically 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 subsequently adapted existing copyright principles to the special case of computer software.

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129 See CONTU Final Report.
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.\textsuperscript{132} 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. \textit{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.\textsuperscript{133} The result was to delay introduction of the new technology, as there was much uncertainty surrounding how the courts would apply the rule from \textit{Sony v. Universal City Studios},\textsuperscript{134} the Supreme Court decision that permitted continued sale of the VCR.

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).\textsuperscript{135} 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.\textsuperscript{136} In exchange, the Act required device manufacturers to place in their devices technologies to prevent serial copying of recorded music.\textsuperscript{137} This technology would permit consumers to make a digital copy of recorded music, but would prevent consumers from making subsequent digital copies from that copy. The Act also

\begin{footnotesize}
\begin{itemize}
\item 17 U.S.C. § 1008.
\item 17 U.S.C. § 1002.
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imposed a levy on the sale of every digital audio recording device (2 percent of the “transfer price” as defined in the statute) and on any blank audio medium (3 percent of the transfer price) used to make such recordings. 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.

The AHRA represented a significant extension of the regulatory copyright approach in a number of respects. 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). 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 of the underlying copyrighted works. Thus, the AHRA essentially imposed a tax or levy on a separate, though related, market, for redistribution to copyright holders.

Second, and relatedly, 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. Similarly, with the satellite and cable licenses, royalties are also 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. Under the AHRA, however, no mechanism existed to directly monitor which works were being copied by consumers. 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). 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. The Act required that such devices implement a specific, then-existing technology (i.e. “Serial Copyright Management System”) or a system that had “the same functional characteristics.” 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.

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In these ways, the AHRA thus 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., recorded music and consumer electronics).

The subsequent history of the AHRA serves to highlight some of the potential limits of the regulatory approach. Today, the AHRA has only limited practical applicability, as the technology markets have largely bypassed it. The AHRA was based on an assumption by the involved parties that consumers would use specialized devices to record music digitally. Instead, however, consumers have increasingly used general-purpose computers to engage in digital music recording. Because of the former assumption, the AHRA’s royalty structure does not apply to multi-purpose computer equipment (e.g., computers or CD burners) or general-purpose recording media such as blank CD-ROMs, which can be used to record both music and data. Because the technology shifted beneath the AHRA in unanticipated ways, the detailed statutory compromise it represents is largely irrelevant today. This Article will discuss some of the implications of this development in more detail below.


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). In 1972, Congress added sound recordings to the list of works protected by copyright. However, sound recording owners did not

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obtain the exclusive right to control public performances. 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. With the advent of the internet, the sound recording copyright owners voiced concerns that digital delivery of sound recordings over 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.

The DPRSRA is quite possibly the most complex copyright provision yet enacted. In size, the provision rivals the entire 1909 Copyright Act. And 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. However, the act then subjects the new right to a number of extremely complex exemptions and compulsory licenses, encompassing digital performances, temporary digital copies, and digital covers.

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

Third, and most importantly for the purposes of this Article, certain non-interactive, subscription digital transmissions (e.g. through “webcasting”) are subject to a complex statutory compulsory license scheme. 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.). The statute indicates a preference for voluntarily-negotiated licensing rates and terms. In the absence of agreement, however, actual licensing rates and terms are to be set by a copyright arbitration royalty panel, in a fashion that mimics what the marketplace would have established. The statute provides a detailed procedure (including notice in the federal register) for the setting of such rates and terms. It also gives the Copyright Office the authority to establish the kinds of reporting requirements necessary to ensure compliance with the licenses. 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 (50%), recording artists (45%), and to various escrow accounts for non-featured musicians (2.5%) and non-featured vocalists (2.5%).

After enactment of the DPRSRA, 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. It then convened a copyright arbitration panel and charged it with the task of setting licenses. 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. [More descriptions of the subsequent history.]

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

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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.

It is noteworthy that, like the AHRA, the DPRSRA deals, not with an established industry, but with a nascent industry, for which little information exists. Moreover, the scope of the Librarian of Congress’s involvement in dictating the terms of the licenses in that industry is even more extensive than in the AHRA. Thus, in many ways, the DPRSRA represents the most significant recent example of the regulatory approach, one that pushes the model even further in the regulatory direction.

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) provided a slightly new twist to the approach. Congress enacted the DMCA in an attempt to update copyright law in light of perceived challenges of the digital environment. The DMCA contained many separate provisions. Some of the provisions dealt with liability for intermediaries such as internet service providers. These provisions of the DMCA exempted ISPs from direct and indirect liability for certain activities such as system caching and temporary storage and forwarding. The DMCA also enacted a safe harbor, shielding ISPs from liability for storing subscriber content, under certain circumstances. These provisions generally provided more specificity and guidance to ISPs, who had been concerned about potentially extensive liability under the copyright act.

More important for our purposes, the DMCA also contained separate provisions supporting industry attempts to protect copyrighted works through use of technology. In particular, the DMCA provided a separate cause of action against acts of circumvention of technologies that controlled access to, or prevented copying of, copyrighted materials. The DMCA contained a number of very specific statutory exemptions. It also gave the Librarian of Congress the power to exempt certain

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152 17 U.S.C. § 1201(d)-(k). See Honorable Lewis A. Kaplan, Copyright And The Internet, 22 TEMP. ENVTL. L. & TECH. J. 1 (2003) (“I think it fair to say that these exemptions are narrow and difficult to satisfy”).
categories of works from anti-circumvention liability. The DMCA also banned distribution of technologies with a primary purpose of facilitating circumvention. Finally, the DMCA also provided a cause of action for tampering with or removing copyright management information attached to copyrighted works.

In some respects, these latter aspects of the DMCA do not depart too much from the property-rights approach. Although the DMCA has generated much debate, some aspects of its regulatory 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. Thus, whether or not one agrees with the substantive content of the law, its underlying regulatory 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. By banning certain technologies from public distribution, the DMCA again affects the market for technology. 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

158 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, e.g., A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). So it is possible to argue that this aspect is not all that different from the property rights view.
and conditions of compulsory licenses, but actual substantive rule-making power.  The DMCA delegates to the Librarian of Congress the power, after notice and comment, to exempt categories of works from the anticircumvention provisions entirely. In crafting such exemptions, the Librarian of Congress is directed to consider various statutory factors, including the availability of the copyrighted works for various nonprofit, preservation, and educational purposes; the impact of the anticircumvention provisions on criticism, comment, teaching, news reporting, scholarship; the effect of circumvention on the market for or value of copyrighted works; and any other factors that the Office considers appropriate.

The Librarian of Congress conducted the first such rulemaking two years after enactment of the DMCA and, after extensive notice and comment, exempted two categories of works. Three years later, the Librarian again conducted the rulemaking and exempted four such categories. 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.

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

160 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.
6. Future Proposals

Finally, many current 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. The Hollings bill, proposed in 2002, would have mandated that every device capable of playing digital content contain technology to prevent unauthorized copying.\footnote{S. 2048, 107th Cong. (2002).} 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.\footnote{Note many past proposed compulsory licenses. E.g. lending, home taping, etc.}

A number of academics have also advanced very detailed proposals to significantly revamp copyright law in light of the challenges presented by 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.\footnote{See Raymond Shih Ray Ku, The Creative Destruction Of Copyright: Napster And The New Economics Of Digital Technology, 69 U. CHI. L. REV. 263 (2002), Glynn Lunney, Jr., The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act, 87 VA. L. REV. 813 (2001); Fisher, PROMISES TO KEEP, supra note 5; Neil Weinstock Netanel, Imposing a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing, 17 Harv. J. L. & Tech. ___ (2003); Lionel S. Sobel, DRM As An Enabler Of Business Models: ISPs As Digital Retailers, 18 BERKELEY TECH. L.J. 667 (2003); EFF Proposal, http://www.eff.org/share/collective_lic_wp.php.} 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.

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

What this means in practice is that the impact of the copyright laws now varies quite a bit depending upon the industry. For example, the publishing (books, newspapers, magazines, etc.) and fine arts 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 software, 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. The exclusive rights are distributed in a non-uniform manner among industry participants (e.g. sound recordings vs. 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 say 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

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165 See Loren, supra note 7. See also broadcast and movie industries.
rule. Instead, it is a rather firmly-established alternative to the property-rights model. Moreover, more recent copyright legislation has evinced a clear willingness to adopt the regulatory approach. Thus, the clear trend has been to move more toward a regulatory model for copyright.

Although many commentators have recognized the increased size and complexity of the copyright act, the nature and full scope of the recent change have not been fully appreciated. Much of the existing literature remains focused on the portions of the act that are still governed by the property-rights model. 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, despite the fact that copyright practice has increasingly forced practitioners to deal with these more regulatory aspects of the act.

In part, this failure to fully appreciate this change may be because the shift has been very 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.

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

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166 See Menell, supra note 6 (“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”); Leval, supra note 56 (“The relationship we have observed between the legislature and the courts in fashioning the copyright is one that is no longer in fashion”).

167 See supra notes 2 through 8.
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.

A. Why the Shift?

It is interesting to speculate about why copyright law has shifted from a property-rights approach to a more regulatory approach. Although this Article does not purport to set forth the definitive reason, here are a couple of possibilities. First, much 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. 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.

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

169 See Merges, One Hundred Years, supra note 5 (positing this as a possible explanation).
170 See Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347, 350 (1967); Carroll, Uneasy Case, supra note 70 (do not cite w/out permission).
expect the corresponding law to articulate these copyright entitlements in a far more detailed manner.

Third, the increasing regulatory turn in copyright law may also reflect an increasing desire to cure perceived market failures that might result from a pure property-rights approach. Many 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.\footnote{But see Merges, Contracting, supra note 61.} 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.\footnote{See supra Part II.B.3.} 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 an increased 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.\footnote{See Menell, supra note 6 (suggesting increased delegation results from need to effect political compromise between content industry, technology, and consumers).} The 1976 revision of the copyright act took more than 20 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 drafting of specific provisions of the 1976 Act.\footnote{See Litman, Legislative History, supra note 47.} 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.\footnote{See Merges, One Hundred Years, supra note 5; Merges, New Institutional Economics, supra note 5; Richard B. Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669, 1685-86 (1975).} Some of the resulting statutory provisions, however, resembled the kind of detailed deal-making that private parties engage in. Subsequent
amendments also resulted from the need to balance the interests of competing groups.

Finally, and relatedly, the increasing complexity of copyright law may also result in part from rent-seeking on the part of the regulated industries. In particular, as copyright law becomes more complex, it becomes less understandable to general policymakers and the public at large.\textsuperscript{176} Thus, rent-seeking becomes less easy to detect.\textsuperscript{177} At the same time, the increased value and importance of the copyright markets make copyright legislation a prime source for rent-seeking by organized interests. This is particularly problematic in cases where consumers or nascent industries are under-represented.\textsuperscript{178} 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.\textsuperscript{179}

It is hard to say which of these factors is primarily responsible for the shift. Clearly, the desire to cure perceived market failures has played a large role, as can be most easily seen in the case of the cable and satellite compulsory licenses. Thus to some extent, the regulatory turn reflects the need for more interventionist techniques in achieving a more finely-tuned copyright balance.\textsuperscript{180} At the same time, this does not completely explain the passage of the AHRA, DPRSRA or the DMCA, where the case for, and evidence of, market failure was far weaker. Nor does this explanation completely account for the specific ways in which some of these provisions were enacted. Thus, in the end, it is probably safe to say that the increasing regulatory turn is the result of a complex mix of factors.

In a broader sense, copyright law is experiencing, albeit at a much later date, the same response to complexity that has characterized other areas of federal law.\textsuperscript{181} 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

\textsuperscript{176} See Schuck, \textit{Legal Complexity}, \textit{supra} note 75; Nimmer, \textit{Ignoring the Public}, \textit{supra} note 7 (positing public choice explanation for DPRSRA).


\textsuperscript{178} See Litman, \textit{Legislative History}, \textit{supra} note 47.

\textsuperscript{179} Id.

\textsuperscript{180} See Ghosh, \textit{supra} note 2 (“the 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”).

\textsuperscript{181} See Kenneth Culp Davis & Richard Pierce, \textit{ADMINISTRATIVE LAW TREATISE} §1.4 (3d ed. 1994); Menell, Menell, \textit{supra} note 6 (comparing to environmental law shift).
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.

B. ADVANTAGES

Whatever the reasons for the change, this shift to a more regulatory approach has had some concrete advantages in the context of copyright law. 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. Although the courts have, in application of the law, adapted copyright law doctrines to take some account of these differences, 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. Industry-specific enactments thus hold out the potential for better tailoring of the act in order to further the purposes of the copyright act.

Second, the regulatory approach has, in many instances, provided greater clarity to the regulated parties. The detailed statutory exemptions from liability, 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. Outcomes in fair use cases are difficult to predict with any certainty. The detailed exemptions thus provide clear guidance. Similarly, the compulsory license provisions,

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182 See, e.g., Sega Enterp. Ltd. v. Accolade, 997 F.2d 1510 (9th Cir. 1992); Computer Assoc. Int'l v. Altai, 982 F.2d 693 (2d Cir. 1993); Lotus Development Corp. v. Borland Int'l, 49 F.3d 807 (1st Cir. 1995).

183 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”); Pamela Samuelston et al., A Manifesto Concerning the Legal Protection of Computer Programs, 94 Colum. L. Rev. 2308 (1994).

184 See Carroll, supra note 70 (do not cite w/out permission).


187 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). These provisions were an attempt to provide more clarity in the context of fair use.
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.188

Third, the regulatory approach may have cured market failures in particular industries. The common justification for compulsory licenses, for example, is that absent such licenses, the market would fail due to transactions costs and other impediments to bargaining. Thus, if we are concerned about curing the market failure, we often must engage in more significant forms of intervention in the market. For example, in the case of the cable broadcast compulsory license, Congress was concerned that it would be practically impossible for the cable companies to secure licenses from all of the copyright owners of the shows that were included on broadcast television.189 The transactions costs and the potential for hold-outs were too great. Thus, the compulsory license permitted cable companies to broadcast those stations (thus ultimately serving the public and increasing competition), while compensating the underlying copyright owners. The merits of this argument have been extensively debated elsewhere,190 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 20 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.191 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 to the Act in the first place.192 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.

188 See Cooter & Ulen, supra note 10; Polinsky, supra note 65.
189 See supra Part II.B.3.
190 See id.
191 See Litman, Legislative History, supra note 47 (critiquing the absence of the public in these discussions); Merges, New Institutional Economics, supra note 5.
192 See Oman, supra note 121, at 13 (describing Congress’s preference for compromise and how compulsory licenses satisfy that preference).
C. DISADVANTAGES

1. General Disadvantages

Although there are clear 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 way it has been implemented in the context of copyright law. The first and most obvious disadvantage is complexity. The regulatory approach has, as implemented in the copyright context, made copyright law far more complex. For example, the provisions of the DPRSRA are extremely complicated.\(^{193}\) Although detailed provisions may be clearer and easier to follow in one sense (thus reducing legal ambiguity), they may at the same time be more difficult to understand, as industry participants must wade through many detailed statutory provisions to find answers. This is especially a problem when the law applies to those who do not have the benefit of legal counsel.\(^{194}\) The regulatory approach may thus operate in some cases as a barrier to entry by new market participants.

Another potential cost of complexity is that it may make the underlying policy goals of copyright less transparent. Under a simpler, judge-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. 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.\(^{195}\) 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.\(^{196}\) Judge Pierre Leval, for

\(^{193}\) See supra, Part II.C.3.

\(^{194}\) For example, small webcasters were forced to deal with the extremely complex provisions of the DPRSRA. See Loren, Untangling, supra note 7.

\(^{195}\) 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, Untangling, supra note 7.

\(^{196}\) Compare the approaches adopted by the courts in Sega Enterp. Ltd. v. Accolade, 997 F.2d 1510 (9th Cir. 1992) (interpreting fair use broadly in light of policies) and Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001) (interpreting DMCA exemptions very narrowly).
example, has lamented the diminished role of the courts in developing copyright policy.197

Increased complexity and lack of conceptual coherence may also increase the incentive and opportunities for rent-seeking by the 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-based model was quite clear.198 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.199 Thus, it may be more difficult to detect and oppose these examples of favorable treatment.200

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.201 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,

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197 See Leval, supra note 56 (under the new approach, “[i]nterpretation must hew as closely as possible to a statute’s most literal terms, no matter how senseless such a reading may be”); Jon O. Newman, Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values, 72 Cal. L. Rev. 200, 209 (1984) (noting own tendency to interpret complex and specific statutes more literally).

198 See Rai, supra note 177, at 1130 (suggesting that detailed statutory departures from baseline property rights model reflect rent-seeking) (“Even 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.”).

199 See Menell, Envisioning, supra note 6; See Burk & Lemley, Policy Levers, supra note 2. But see aborted attempt to make sound recordings works for hire.

200 This may explain accelerating trend in the complexity of the act. See infra Appendix A. See Menell, Envisioning, supra note 6 (positing this as an explanation).

201 See, e.g., Davis, supra note 181.
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. Moreover, its historical role has been limited to registering copyrights and looking after primarily ministerial tasks associated with registration. 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 rate-making, 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 property-rights regime to a regulatory regime.

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. 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 the Office is charged with. The office thus lacks the economic and technological expertise that would make it an even more effective source for informed copyright policy.

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 hard-wired 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.

202 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 262.
203 See supra Part I.B.
206 See Merges, One Hundred Years, supra note 5; Rai, supra note 177, at 1128 (making similar point about patent law and innovation).
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.\textsuperscript{207} This assumption turned out to be mistaken, as most consumers turned to multi-purpose computer equipment. However, because the AHRA was based on the earlier assumption, it was not written to apply to multi-purpose computer equipment,\textsuperscript{208} and as a result, the statute is largely irrelevant today. The more recent DPRSRA may be another example of this.

Thus, even within the regulatory approach, there are significant problems with the way it has been implemented. 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. The result has been legislation that systematically favors the industries being regulated.

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. 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. Thus, ideally, copyright law would return to a more property-rights based approach in the latter instance. As a practical matter, however, it is unlikely that we will see a return to a simpler form of regulation. The most we can hope for is a refusal to keep 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 in which the functioning of this approach can be improved. Once we acknowledge that copyright has become more

\textsuperscript{207} See supra Part II.C.2.

\textsuperscript{208} See Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc. 180 F.3d 1072 (9th Cir. 1999).
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. Taking the regulatory approach seriously suggests, among other things: granting the Copyright Office or some other similar 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 as open to public comment as possible.

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. 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 broad entitlement and wait for better information before intervening more significantly into the structure of the market.


210 See Merges, One Hundred Years, supra note 5. But see Menell, Challenges, supra note 132 (noting the risk that, if Congress waits until there is more information, interests may become entrenched making it more difficult to make changes.)
Applying these guidelines to specific copyright industries, this suggests that a regulatory framework might well be quite appropriate for the cable and satellite industries. In these cases, the theoretical case for market failure was relatively clear.\footnote{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 (2003) (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”).} Thus regulation could be targeted specifically to addressing the market failure. Although these 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. Moreover, 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.\footnote{But see Congressional Hearings Review Copyright Office Report On Broadcast Licensing, 12 J. Proprietar Y Rts. 23 (1997) (noting testimony of Register of Copyrights suggesting that private negotiation better).}

Conversely, the guidelines suggest that a regulatory approach may be quite ill-suited to issues involving digital copyright.\footnote{See Merges, One Hundred Years, supra note 5; Lee, supra note 209.} Here, the case for market failure is not at all clear.\footnote{See, e.g., Loren, supra note 7 (arguing that no good policy reason exists for the way in which music copyrights are currently divided up).} Much debate persists over whether the existing property rights structure can accommodate the new technology. Both the technology and market structure are too ill-defined and are 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. 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 not be desirable. As already noted above, the AHRA was a clear example of this.\footnote{See supra Part II.C.2. See also Semiconductor Act.}

The recent ratemaking proceeding under the DPRSRA illustrates the types of difficulties listed above.\footnote{See Statement Of Marybeth Peters Register Of Copyrights, Before the Subcommittee On Courts, The Internet And Intellectual Property Of The House Committee On The Judiciary, 108th Congress, 2d Session (March 11, 2004) (detailing concerns with the DPRSRA).} As an initial matter, it is unclear whether detailed legislation was even necessary.\footnote{See Loren, supra note 7; Robert Merges, Compulsory Licensing vs. the Three “Golden Oldies”: Property Rights, Contracts, and Markets, 508 POLICY ANALYSIS 1 (Jan. 15,
Librarian of Congress was charged with setting the compulsory license rate for certain internet webcasts of copyrighted sound recordings. The statute required the Librarian to set the rate to closely mimic what the market would have set it at, in the absence of the compulsory license. Because the webcasting industry was so new, however, almost no actual data existed to help the Librarian make this determination. Moreover, an extremely wide range of existing and potential parties (both large and small) were involved in the ratemaking proceeding. The result was a lengthy and extremely costly proceeding. And in the end, the Librarian based its rate on a single negotiated license between the RIAA and Yahoo.com.218

Similarly, the anti-circumvention provisions of the DMCA exhibited misunderstandings about the nature of the technology being regulated.219 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. Accordingly, the precise applicability of some of the statutory terms to actual technologies is not at all clear.220 Commentators have documented other ways in which the DMCA has resulted in unintended consequences.221 In the end, the above analysis suggests that a more modest, open-ended entitlement structure might be preferable where an industry is new, and technology and the market are still evolving.

In this respect, the experience of patent law may serve as a useful basis for comparison. The subject matter of patent law, innovation, 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.222 Moreover, commentators in the field have expressly

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2004) (arguing that private collective rights organizations could have satisfied licensing concerns); cf. Ginsburg, Copyright and Control, supra note 144 (suggesting congressional desire to “split the difference” under some circumstances, when faced with new technology and new markets).
218 See, e.g., Loren, supra note 7; Fessler, supra note 148.
220 See Reese, Merging, supra note 219.
221 See Fred von Lohmann, Unintended Consequences: Three Years Under the DMCA (May 3, 2002).
222 But see Burk & Lemley, Policy Levers, supra note 2 (suggesting that, while industry-neutral on its face, industry-specific in application by courts).
argued for continued adherence to this model, pointing expressly to copyright as a cautionary tale.223

Thus, ideally, Congress would replace the complex regulatory framework found in the area of digital content with a simpler entitlement structure.224 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.225 Indeed, the Register of Copyright herself has recently suggested the possibility of abolishing certain compulsory licenses for recorded music.226 Much of the existing regulatory structure is the historical result of various political compromises, largely untethered from underlying substantive support. Replacing the existing, complex statutory structure would give industry participants far more flexibility in structuring the market in response to changes in technology and consumer demand.227

The chances of this actually happening, however, are rather low. It is rare that Congress reaches out to make legislation simpler. As the analysis in the previous sections has indicated, the trend in copyright law has been in exactly the opposite direction, and there are a number of reasons why that has been the case.228 Given that these detailed provisions were hammered out by the relevant industries, revisiting them would be politically very difficult.229 Thus, these provisions are, for practical purposes, probably here to stay.230

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223 See Rai, supra note 177, 1130 (“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.”); Burk & Lemley, Policy Levers, supra note 2. See also Leval (lamenting the decline in copyright’s “highly successful partnership of legislative and judicial lawmaker”).


225 Loren, supra note 7.

226 Statement Of Marybeth Peters Register Of Copyrights, Before the Subcommittee On Courts, The Internet And Intellectual Property Of The House Committee On The Judiciary, 108th Congress, 2d Session (March 11, 2004) (“I believe that the time has come to again consider whether there is really a need for such a compulsory license.”).

227 See, e.g., Merges, Compulsory Licensing, supra note 217.

228 See supra Parts II and III.A.

229 Id. (“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
At the very least, however, Congress should be reluctant to extend this 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. 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.

The analysis here also casts doubt on the many levy proposals that some commentators have advanced as a response to the problem of digital copying. As discussed above, these proposals push the degree of intervention to the next level, requiring the government to more extensively regulate both the relevant copyright industries and related consumer electronics and services industries. 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. The analysis above suggests that Congress should be more conscious of the various regulatory tools it has at its disposal, and to more carefully consider which tools may be appropriate for a given situation, based on the considerations set forth above.

B. HOW TO IMPROVE

Given that regulatory copyright is here to stay, 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

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230 Despite the fact that it has been more than 30 years since the last revision of the Copyright Act, there is little appetite or political will for a comprehensive revision, given how difficult the last one was.

231 See, e.g., Netanel, Impose, supra note 164; Fisher, PROMISES TO KEEP, supra note 164.

232 See supra Part II.C.6
applied the familiar 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?

1. Substantive Rulemaking Authority

First, the analysis above indicates that the Copyright Office, or some other appropriate agency, should be given greater substantive authority to regulate in areas involving complex and dynamic issues. One traditional justification for agency involvement has been the greater expertise that an agency can bring to bear on a complex issue. 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 arguments involved in such decisions. Another justification has been that regulation is comparatively more flexible than legislation, and can therefore better respond to changing circumstances. 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 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. It has also taken on a more robust role conducting studies and advising Congress on copyright policy. And more recently, it has been given limited substantive rulemaking authority, in crafting exemptions to the DMCA.

These expansions of regulatory authority suggest that the Copyright 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. It has accepted and responded to public comments and has issued regulations. Although there has been

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233 See Davis, supra note 181.
234 Id. See also Menell, Envisioning, supra note 6 (suggesting that this also facilitates resolution of conflicting claims by multiple interest groups).
235 Motion Picture Ass’n of America, Inc. v. Oman, 969 F.2d 1154, 297 (D.C. Cir. 1992) (affirming Copyright Office rule awarding interest on late payments for cable compulsory license).
237 See 37 C.F.R. §§ 201, et seq.
much debate over these exemptions, the process itself functioned relatively well. It permitted more public input into the policymaking process, via its notice and comment proceeding, 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. Finally, and perhaps most importantly, the process permitted the Copyright Office to adjust the law as conditions in this very dynamic market changed. While perhaps not perfect, the process had these concrete benefits.

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. 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, in its view, use-specific. Granting the Office greater authority would have permitted the Office to respond more dynamically to changing technologies.

Similarly, the DMCA would have benefited from extension of rulemaking authority regarding many of the exemptions to anti-circumvention liability. Although the exemptions were intended to provide some breathing space for legitimate activities, they have in practice provided less such breathing space than initially thought. This is not unexpected, given that Congress was legislating here 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

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239 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.
240 See change in exempted categories between first and second rulemaking.
241 See Zimmerman, supra note 238 (“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.”).
242 Note early drafts would have given even more rulemaking authority to Copyright Office.
243 See Liu, Encryption Research, supra note 219.
deferential to Congressional findings and reluctant to read in broad changes to the highly-specific text of the statute. 244

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.

At the same time, 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 the exemptions is the vagueness of their terms.245 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 threat is not illusory.246 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 waiting for a judicial decision.

A similar approach could be extended to other areas. The AHRA, for example, would have benefited from a more flexible approach. Had Congress granted the copyright office more authority to adapt the law more flexibly to changing technology, the AHRA might not have become a dead letter.247 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 CARP 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

244 See, e.g., Universal City Studios v. Corley, 273 F.3d 429 (2d Cir. 2001).
245 See Liu, Encryption Research, supra note 219.
246 Id. Felten v. Recording Industry Association of America, 01-CV-2669 (Nov. 28, 2001) (declaratory judgment action brought by computer science professor).
247 Putting aside whether AHRA was good policy from the outset.
testified regarding her limited regulatory ability to address substantive problems with the Act.248

There are some indications that Congress is already moving down this path. 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.249 Future proposed bills, such as database legislation, might also benefit from the additional flexibility and expertise offered by an administrative approach.250

In many ways, this trend 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.

248 See Statement Of Marybeth Peters Register Of Copyrights, Before the Subcommittee On Courts, The Internet And Intellectual Property Of The House Committee On The Judiciary, 108th Congress, 2d Session (March 11, 2004) (“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 rule making 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.”).


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 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.

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. More significantly, the Copyright Arbitration Royalty Panels have the power to resolve disputes between claimants to the proceeds of various compulsory licenses. This latter power has resulted in a number of very involved adjudicatory proceedings. 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

251 Comparative experience of other countries with respect to agency involvement.
252 Compare Rai, supra note 177, at 1133 (arguing against conferring substantive rulemaking authority on PTO, given PTO’s lack of institutional resources and economic expertise).
253 Cite.
arbitrators, who must be educated about the issues.\textsuperscript{256} Recent proposals have been made to reform the existing process by returning to more permanent tribunals.\textsuperscript{257} 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 Tony 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.\textsuperscript{258} Although they envision a private arbitration-like structure, another possibility might be to enlist the involvement of the Copyright Office. Administrative law judges would be able to issue subpoenas and decide issues in a low-cost fashion, thereby reducing 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.\textsuperscript{259} 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 off-shore 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.\textsuperscript{260} 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. Although criminal copyright enforcement authority can be exercised by local U.S. Attorneys’ Offices, such actions are quite rightly limited to the most egregious cases of copyright piracy.\textsuperscript{261} Some administrative

\textsuperscript{256} See Statement of Marybeth Peters Register of Copyrights before the Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary United States House of Representatives, 108th Cong., 1st Sess. (April 1, 2003); Maxey, Note, supra note 120.

\textsuperscript{257} Copyright Royalty and Distribution Reform Act (H.R. 1417);


\textsuperscript{259} \textit{Cf.} Protecting Intellectual Property Rights Against Theft and Expropriation Act of 2004 (S. 2237) (“PIRATE Act”).

\textsuperscript{260} 17 U.S.C. § 701(b)(3).

\textsuperscript{261} \textit{Cf.} Protecting Intellectual Property Rights Against Theft and Expropriation Act of 2004 (S. 2237) (“PIRATE Act”) (giving federal government civil copyright enforcement authority).
enforcement authority by the Copyright Office could fill some of the gaps.

3. Increasing Expertise

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.262

In order to fulfill an increased policymaking role, some changes would need to be made to the Copyright Office’s structure and makeup.263 The Copyright Office currently does not have sufficient resources or expertise to take on a substantially more robust

262 An interesting and important question arises about the ability of the Copyright Office to constitutionally take on this role. See JeanAne Jiles, Comment, Copyright Protection in the New Millennium: Amending the Digital Millennium Copyright Act to Prevent Constitutional Challenges, 52 ADMIN. L. REV. 443 (2000) (suggesting that DMCA rulemaking authority may be unconstitutional); E. Fulton Brylawski, The Copyright Office: A Constitutional Confrontation, 44 GEO. WASH. L. REV. 1, 12 (1975). 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, e.g., Harry Fox Agency, Inc. v. Mills Music, Inc., 720 F.2d 733, 736 (2d Cir. 1983), 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) (copyright office 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 International V. Peters, 17 BERKELEY TECH. L.J. 47 (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 suspect in light of Bowsher v. Synar). A full discussion of this topic is outside the scope of this paper. 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.

263 See FY 2004 Budget Request, Statement of Marybeth Peters The Register of Copyrights before the Subcommittee on the Legislative Branch Appropriations Committee on Appropriations United States Senate, 108th Cong., 1st Sess. (April 10, 2003) (“As such, our policy and regulatory work in this area is both increasingly technical and often contentious.”)
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.\textsuperscript{264} Comparatively fewer resources are devoted to policymaking. Despite this, the Office has done a reasonably effective job of fulfilling its policymaking role to date.

If the Office is to be expected to engage in a more robust policymaking role, however, 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.

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,\textsuperscript{265} additional resources would help it fulfill this duty 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 the rate of change dramatically.\textsuperscript{266} 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

\textsuperscript{264} 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 (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.

\textsuperscript{265} See, e.g., Digital Millennium Copyright Act (DMCA) Section 104 Report, Statement of Marybeth Peters The Register of Copyrights before the Subcommittee on Courts, the Internet, and Intellectual Property Committee on the Judiciary United States House of Representatives, 107th Cong., 1st Sess. (Dec. 12-13, 2001); VARA waiver study.

\textsuperscript{266} See Merges, One Hundred Years, supra note 5.
based on faulty predictions or assumptions about technology.\textsuperscript{267} Having technologists on staff would increase the possibility of informed policymaking.

By increasing the expertise of the Copyright Office and granting it more substantive authority, 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,\textsuperscript{268} 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.

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. Objections

The proposals above are, naturally, subject to a number of potential objections. Perhaps 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.\textsuperscript{269} And regulation by an agency normally results in even

\textsuperscript{267}See supra Parts II.C.2 – II.C.4.

\textsuperscript{268}Note that there is no specialized court for copyright cases analogous to the Federal Circuit in patent cases. See Rai, supra note 177 (federal circuit as policymaking body).

greater complexity in the structure of regulation, thereby increasing costs and raising barriers to competition.

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. Similarly, the provision in the DMCA requiring the Copyright Office to study the impact of the DMCA on encryption research 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. Thus, there is a very real danger that increasing regulatory oversight may simply exacerbate existing problems.

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. 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. 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. 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

270 See Zimmerman, supra note 238.
272 See Liu, Encryption Research, supra note 219.
273 See Zimmerman, supra note 238 (“Faced with forcefully expressed objections from the library, research and academic communities to this new form of "paracopyright" protection, Congress added a few 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.”).
with the industries being regulated. 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.

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 been reasonably public-regarding within the limits in which it is operating, and certainly more so than Congress. While it is true that in certain of its reports and positions, the Office has expressed some sympathy with claims for strong protection, in other cases, the office has recognized the need for weaker protection and more balance in the Copyright Act. Moreover, in other areas, the Office has proposed reasonable changes that would add to the balance. Thus, there may be good reason to believe that the Copyright Office would be somewhat public regarding.

Finally, 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

276 See Pamela Samuelson, Will The Copyright Office Be Obsolete In The Twenty-First Century?, 13 CARDOZO ARTS AND ENT. L.J. 55 (1994); Eric Schwartz, The Role Of The Copyright Office In The Age Of Information, 13 CARDOZO ARTS & ENT. L.J. 69 (1994). Compare Rai, supra note 177, at 1133 (“the 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”).
277 Note that this argues against combining w/ PTO. See proposals. Comparative analysis w/ other IP agencies.
seriously. 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. 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, 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. Moreover, public access to legislators has, if anything, been even more limited than access to the Copyright Office through its rulemaking procedures. 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 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.

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

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281 The activities of the Copyright Office are generally subject to the Administrative Procedure Act. 17 U.S.C. § 701(e).
282 See, e.g., Fisher, PROMISES TO KEEP, supra note 5 Ch. 5 (proposing various mechanisms for ensuring greater public accountability).
283 See Komesar, supra note 72.
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.
APPENDIX A

This chart was created by … [describe word count methodology].