Texas A&M Law Review

Volume 8 | Issue 2

2-11-2021

Taking Access Seriously

BJ Ard
University of Wisconsin-Madison, bj.ard@wisc.edu

ARTICLES

TAKING ACCESS SERIOUSLY

*by: BJ Ard**

Abstract

Copyright is conventionally understood as serving the dual purposes of providing incentives for the creation of new works and access to the resulting works. In most analysis of copyright, however, creation takes priority. When access is considered, it is often in the context of how access relates back to the creation of new works. Largely missing is an account of the value of access on its own terms.

So what is the place of access in copyright law and policy? A set of cases dealing with copyright owners' attempts to enjoin the markets created by new playback and distribution technologies is instructive. These decisions—where the courts refused to enforce copyright where the owners attempted to shut down a market rather than participate in it—have been criticized for their unclear policy guidance and lack of doctrinal grounding. We can reconcile these cases with copyright policy by focusing on access. These cases provide rich examples showing how expanded access advances copyright's higher-order goals of promoting a more democratic and participatory culture.

Focusing on access also provides a means for bringing doctrinal coherence to these cases through the fair-use defense. The courts permitted the use of copyrighted works in new markets despite the copyright owners' objections because these markets could expand public access without diminishing the copyright industries' creative incentives. Indeed, copyright owners often found the markets profitable after being forced to enter them. Copyright owners' market refusal in these scenarios is a distinct type of market failure, and fair-use doctrine allows courts to correct it.

Table of Contents

I. Introduction 226
II. Market Refusal Litigation 231
A. *New-Market Defendant Prevails* 232
1. Direct Infringement 232

DOI: https://doi.org/10.37419/LR.V8.I2.1

* Assistant Professor, University of Wisconsin Law School. Thanks go out to Clark Asay, Ian Ayres, Jack Balkin, Stephanie Bair, Bruce Boyden, Kiel Brennan-Marquez, Anuj Desai, Patrick Goold, Kali Murray, Christine Jolls, Amy Kapczynski, David Schwartz, and Jacob Victor for helpful comments and suggestions. This Article also benefited from presentations at the Fourteenth Annual Works-in-Progress in IP Colloquium at Boston University School of Law; Sixth Annual Internet Law Works-in-Progress Symposium at New York Law School; Summer 2019 Junior Intellectual Property Scholars Association Workshop at George Washington University Law School; and workshops at BYU Law School, Marquette University Law School, University of Minnesota Law School, University of Wisconsin Law School, and Yale Law School. I thank Ben Jordan for his excellent research assistance. Support for this research was provided by the Office of the Vice Chancellor for Research and Graduate Education at the University of Wisconsin–Madison with funding from the Wisconsin Alumni Research Foundation.

2. Indirect Infringement 236
B. *Copyright-Industry Plaintiff Prevails* 241
III. Copyright Policy 246
A. *Copyright Fundamentals* 247
1. Incentives for Creation 247
2. Access to Works 249
B. *Why Access Matters* 250
1. Diversity 250
2. Autonomy 252
3. Inclusion 253
C. *Copyright's Innovation Policy* 255
1. Industry Conservatism 255
2. Spillovers 257
3. Preference Shaping 258
IV. Fair Use in Access Markets 259
A. *Market Refusal as Market Failure* 259
1. Playback Markets 261
2. Distribution Markets 264
B. *Fair Use as Incentive* 266
V. Conclusion 269

I. Introduction

What is copyright for? The standard answer is that it serves the dual purposes of providing incentives for the creation of new works as well as access to the resulting works.[1] Within this framework—the "incentives–access paradigm"—scholars have devoted substantial attention to the problem of finding the right incentives for creation.[2] Copyright must provide enough protection to protect against free-riding or else too few works will be made; it must not provide too much protection, however, or it may impose unnecessary obstacles on those who would build on the works of others, again resulting in suboptimal production incentives.[3]

Less has been said about access in its own right or the challenges of achieving it.[4] Typically, access is discussed only as a constraint on ex-

1. United States v. Paramount Pictures Inc., 334 U.S. 131, 158 (1948) ("The copyright law . . . makes reward to the owner a secondary consideration. . . . It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.").

2. Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives–Access Paradigm*, 49 Vand. L. Rev. 483, 485–86 (1996).

3. *Id.* at 485–87.

4. Notable exceptions include Jessica Litman's work recounting the importance of works actually reaching the public if copyright is to achieve any public purpose, Jessica Litman, *Readers' Copyright*, 58 J. Copyright Soc'y U.S.A. 325, 339 (2011) ("[A] moment's reflection should reveal that a copyright system with no readers, listeners or viewers to enjoy the copyrighted works that the system produces has no plausible mechanism for promoting the progress of anything."), and Julie Cohen's work documenting how copyright law has become a framework not for providing cre-

tending copyright further; while we might wish to award greater rights to incentivize creation, doing so may reduce access by allowing copyright owners to raise their prices.[5] There is little separate analysis of whether copyright law needs to incentivize copyright owners to provide access to their works, or how it could do so.

Once the work is created, the assumption is that access will take care of itself because the copyright owner will seek to market the work as widely as possible.[6] This assumption has not held up in practice. From the gramophone to streaming video, innovations in playback and distribution technology have given rise to what this Article refers to as new "access markets," or markets for engaging with already-created works in a new medium.[7] The copyright industries—those whose business entails producing and distributing copyrighted content—have repeatedly refused to enter these markets, even though it is clear in retrospect that doing so often would have been profitable. Several of the most high-profile cases in copyright law have accordingly dealt with the copyright industries' attempts to enjoin the use of their works in these markets they had no intent to enter.

The courts' decisions in these cases have drawn criticism for their murky reasoning.[8] One series of opinions—beginning with a dispute over the player piano,[9] and continuing through cable television,[10] the VCR,[11] and the MP3 player[12]—has been particularly controversial. In each of these cases, the court sided against the copyright owner.

---

ative incentives per se, but for regulating and achieving coordination among producers and distributors in the copyright industries, Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 Wis. L. Rev. 141, 142–43 (2011) ("[C]opyright is about the proper industrial policy for the so-called creative industries and other information intermediaries . . . .").

5. *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUDS. 325, 326 (1989) ("Striking the correct balance between access and incentives is the central problem in copyright law."); Lunney, *supra* note 2, at 557–58 ("If we increase a work's protection to increase the chance of its creation, we necessarily increase the price the author will charge for the work and thereby restrict access to the work if and when it is created.").

6. Litman, *supra* note 4, at 339 ("[W]e tend to take that part of the copyright ecosystem for granted.").

7. I use the term "access market" to encompass both distribution markets and the markets for playback devices like the VCR that allow users to engage with works in new ways. These markets for already-existing works present issues distinct from markets for the production of new works (or for the use of existing works as inputs for new works).

8. *See* Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and* Sony*'s De Facto Demise*, 55 UCLA L. REV. 143, 147 (2007) ("[T]he manner in which the courts have achieved this equipoise was neither direct nor candid, resulting in an undesirable muddling of the law.").

9. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908).

10. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); *see also* Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974) (presenting a more difficult set of facts).

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

Scholars have criticized the stated grounds for these decisions as "strained, not to say disingenuous";[13] the courts denied liability even where the alleged infringement was as overt as the unauthorized recording of the plaintiffs' music.[14] These cases do not seem to be driven by doctrine but are instead consistent with an implicit policy of denying copyright protection in scenarios where the plaintiff refuses to enter the market for itself.[15] More recent decisions in favor of copyright owners accentuate the point: several courts have skirted the pro-defendant precedent of these earlier cases as part of a trend of punishing various digital services for competing unfairly with the copyright industries' established markets.[16]

Focusing on access provides a means to resolve the apparent anomaly. Critics are skeptical of these cases because they question whether the cases have anything to do with copyright—while many argue these were appropriate outcomes, they do so not on the basis of copyright policy but instead by reference to communications policy, innovation policy, or competition law.[17] This criticism aligns with the prominent notion among copyright scholars that mere "consumptive uses" of works—whereby readers, listeners, or viewers enjoy the work—generate little to no social value.[18] But this view ignores how these decisions have consistently advanced copyright policy—even as it is conventionally understood—by increasing both creation incentives and access. Each of these access markets increased the copyright industries' profits relative to the status quo, and the standard economic account of copyright predicts that greater profits translate into greater incentives

12. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999).

13. Jane C. Ginsburg, *Copyright and Control Over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1617 (2001); *see also, e.g.*, Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941, 993 (2007) [hereinafter *Unwinding Sony*] (criticizing the *Sony* decision for "post hoc rationalization and questionable interpretation of copyright history and doctrine"); Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278, 302 (2004) (arguing that unspoken policy concerns drove *White-Smith*'s "doctrinal and rather clumsy rationale").

14. *White-Smith Music*, 209 U.S. at 18.

15. Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1391 (2014) ("Perhaps unsurprisingly, courts do not generally announce [this] basis, since it both implies second-guessing business decisions and ascribes sinister motivations to the refusal to license.").

16. *See* Menell & Nimmer, *supra* note 8, at 187 (noting that "courts . . . have contorted their analyses to find liable those whose conduct appears blameworthy").

17. *See, e.g.*, Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 831 (2008) (arguing that the copyright fair-use defense "plays an important and underappreciated role in U.S. technology and innovation policy"); Wu, *supra* note 13, at 279 (exploring copyright's relation to communications, innovation, and competition policy).

18. *See, e.g.*, Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 15–16 (1997); *see also* David Fagundes, *Efficient Copyright Infringement*, 98 IOWA L. REV. 1791, 1809 n.65 (2013) (acknowledging but discounting the social value of consumptive because it "is almost entirely internalized by users").

to create new works; it is also clear to see how the opening of new markets increases access.[19]

These scenarios also demonstrate how the expansion of access markets advances the deeper normative goals of copyright. An increasing number of IP scholars have called for copyright analysis to move beyond the typical, reductionist version of the incentives–access paradigm.[20] One prominent argument is that copyright should promote a more democratic and participatory culture.[21] As with the rest of copyright law, the discussion often centers on the production-side concerns of creators,[22] for example through arguments that copyright should be attentive to the expression of more viewpoints or leave space for users to speak back to mass culture through the creation of derivative

19. *See infra* Section III.A. On the profitability of the markets that copyright owners have sought to enjoin, see Menell & Nimmer, *supra* note 8, at 148 ("Rather than destroy the film industry—as Jack Valenti infamously predicted—the VCR proved a great boon to motion picture studios, consumer electronics makers, and consumers alike.") (citations omitted); von Lohmann, *supra* note 17, at 841 ("[W]idespread deployment of portable digital music players appears to be a factor in the popularity of new digital download services, including most prominently Apple's iTunes Store, which now [as of 2007] sells more than five million songs each day . . . ."); and Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 111 (2020) ("[L]ong experience demonstrates that arguments about the costs of disruptive new technologies to innovation and creativity are nearly always wrong, or at least overstated.").

20. *See, e.g.*, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 14–15 (2012) (criticizing the standard economic account); Madhavi Sunder, *IP*^{3}, 59 STAN. L. REV. 257, 325 (2006) ("A cultural approach . . . would recognize intellectual property's relationship to autonomy, culture, democracy, equality, and development, and would shape intellectual property rights to these ends."); Amy Kapczynski, *The Cost of Price: Why and How To Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 990 (2012) (highlighting the importance of access to copyrighted works for education and socialization).

21. On the role of copyright in promoting democratic discourse, see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 363–64 (1996) ("Copyright's fundamental purpose is to underwrite political competency, with allocative efficiency a secondary consideration."). On the role of copyright in facilitating a more broadly participatory culture, see Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 39 ("Power to the people—democracy—in its broadest, thickest sense, must include our relationship not simply to the state but to culture as a whole, to the processes of meaning-making that constitute us as individuals."); LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 114 (2008) (arguing that music remixing should be legal in order to promote cultural engagement and education); and COHEN, *supra* note 20, at 103 ("Creativity requires breathing room and thrives on play in the system of culture. Copyright law should be judged on how well it advances those goals.").

22. The Copyright Act formally protects the rights of "authors," 17 U.S.C. § 201, but this term applies broadly to include many creators we do not normally think of as "authors," such as recording artists and 3D animators. This Article refers to these parties collectively as "creators" to avoid the limiting connotations of the term "author."

works.[23] The expansion of access markets is consistent with this understanding of copyright's goals because it generates new revenues and lowers the costs of distribution, thereby allowing greater diversity in the production of new works.[24] But these markets also contribute to a more democratic and participatory culture through unique access-side benefits. Specifically, they expand users' autonomy through the introduction of new capabilities for engaging with works and promote social inclusion by bringing access to previously excluded communities.[25]

These policy concerns can be brought to bear on copyright doctrine through the fair-use defense. The stated grounds of the courts' prior decisions concerning new access markets are lacking, but factor four of the fair-use test provides the means for rehabilitating them. Market failure has long been recognized as a justification for fair use,[26] and factor four in particular directs the courts to examine the impact of a given use on the copyright owners' existing and potential markets.[27] These cases share a previously unidentified form of market failure: market refusal. The copyright owner cannot reasonably claim harm for lost sales in a market it has refused to enter, so market refusal would give rise to a presumption of fair use in the absence of demonstrable harm to its existing markets.[28]

The Article proceeds as follows. Part II analyzes a series of cases where the copyright industries rejected an access market created by new technology and then attempted to shut it down, beginning with prominent cases where the courts permitted the market to move forward. It then considers a set of cases involving similar technologies

23. Litman, *supra* note 4, at 329 ("Readers' and listeners' rights get recast as the rights of potential authors, inviting the inference that reading and listening don't merit a lot of protection for their own sake.") (internal citation omitted); *see, e.g.*, LESSIG, *supra* note 21, at 114.

24. *See infra* Section III.B.1.

25. *See infra* Sections III.B.2–III.B.3.

26. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982).

27. 17 U.S.C. § 107(4) ("In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . . the effect of the use upon the potential market for or value of the copyrighted work.").

28. While looking to whether the copyright owner intended to enter a market might seem like an obvious way to assess market harm under factor four, it is not the conventional approach. For recent scholarship arguing the copyright owner's treatment of the market should matter under factor four, see Yafit Lev-Aretz, *The Subtle Incentive Theory of Copyright Licensing*, 80 BROOK. L. REV. 1357, 1363 (2015) (arguing in favor of fair use where the plaintiff fails to provide a licensing option), and Xiyin Tang, *Defining the Relevant Market in Fair Use Determinations*, at 31–32 (Oct. 10, 2018) (unpublished manuscript), https://ssrn.com/abstract=3264238 [https://perma.cc/9T9U-B2BG] (arguing a copyright holder's "negative actions" toward a market should give rise to a presumption of fair use). *See also* Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758–59 (7th Cir. 2014) (finding fair use because the copyright owner had no plans to license).

where the courts reached the opposite conclusion. As prior scholarship has observed, these cases reveal a trend where courts denied copyright enforcement in market refusal cases where the plaintiffs could demonstrate harm to their bottom line. These copyright owners reluctantly entered the new markets after losing in court, and time and again they found that doing so was more profitable than maintaining the status quo. Even though the first of these cases was decided in 1908, copyright experts continue to debate whether these decisions were correct over a century later.

As noted above, one reason commentators have been so ambivalent in assessing these seemingly results-driven decisions is that no one has offered a coherent theory for assessing whether these were actually the right results from the perspective of copyright law. Part III explores how access markets like those at issue in these cases advance copyright policy. These markets advanced both the creation and distribution of new works by providing greater pecuniary rewards to creators and making engagement with these works easier. The nature of this engagement—providing access for those excluded from the prior market, or providing greater freedom for the public to decide which media to consume and their terms for doing so—has also advanced copyright's higher-order goal of fostering a more democratic and participatory society. Historically, however, the copyright industries have been slow to embrace these advances; their refusals stem from a combination of systematic risk aversion in the face of new markets, protectionism for intermediaries in the copyright industries, and sometimes a desire to suppress or monopolize the technologies that facilitate these markets. These concerns fall outside the legitimate scope of copyright protection, and the courts have rightly refused to endorse them in the cases under discussion.

Part IV shows how these policy concerns can be brought to bear on doctrine. Scholars have criticized the ad hoc reasoning of the aforementioned cases for decades, suggesting that existing law—correctly applied—leaves little room for steering copyright owners into new access markets. As this Part explains, however, these cases can be reconceived through fair-use doctrine, which allows courts to factor the lack of market harm to the plaintiff into their decisions. It also explains what is distinct about market refusal as a type of market failure and explains why it requires different solutions than the standard transaction-costs market failure.

II. Market Refusal Litigation

Each of the following cases involves a technology that created a new access market, that is, a market for engaging with or acquiring

copyrighted works in a new medium.[29] The VCR, for example, introduced a potential market for recording programs for later viewing; MP3 downloading technologies like those used by Napster, and later iTunes, introduced a new kind of market for downloading music.

The courts' decisions with respect to these markets may seem too ad hoc to reconcile or predict as a matter of conventional doctrine.[30] The pattern is clearer, however, if one looks to the economic realities. Defendants generally prevailed where the copyright industries refused to participate in the market, while plaintiffs prevailed where they had entered the market or made credible plans to so.[31] Plaintiffs also won without entering the market if they could demonstrate harm to their existing markets.[32]

A. *New-Market Defendant Prevails*

Copyright owners have alleged two distinct theories of infringement in market refusal cases. Direct infringement involves an allegation that the defendant itself has engaged in conduct prohibited by the Copyright Act, for example by recording a composer's song and then selling the recordings to the public. Even though this might seem like a straightforward case of infringement, courts have excused it in certain scenarios where the defendant entered an untapped market. Indirect infringement, by contrast, involves an allegation that the defendant has provided consumers with the means to commit individual acts of infringement that collectively harm the copyright owner's legitimate markets. Courts have rejected these allegations in scenarios where the new market was actually complementary, rather than harmful, to the copyright owner's pre-existing markets.

1. Direct Infringement

The most controversial cases are those where the technology defendant has prevailed despite its direct involvement in copying, distributing, or broadcasting copyrighted works. To commit any one of these acts without authorization would ordinarily be infringing; neither the Copyright Act nor case law explicitly recognizes the plaintiff's refusal

29. Despite the prominence of the technologies in the discussion that follows, I focus on the effects of the markets rather than the technologies per se, because "[w]hat we call the effects of technology are not so much features of *things* as they are features of *social relations* that employ those things." Jack M. Balkin, *The Path of Robotics Law*, 6 CALIF. L. REV. CIR. 45, 49 (2015). Speaking of markets better captures the array of legal and social arrangements at issue in most copyright disputes.

30. *See, e.g.*, Ginsburg, *supra* note 13, at 1617; *Unwinding Sony*, *supra* note 13, at 993; Menell & Nimmer, *supra* note 8, at 187.

31. Ginsburg, *supra* note 13, at 1617.

32. *Cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) ("A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.").

to enter a market as a defense.[33] The Supreme Court has nonetheless denied liability in two foundational cases where the copyright owner refused to enter these markets. The cases followed a similar trajectory—in both, the court rejected the copyright holders' claims on questionable doctrinal reasoning. In both, the plaintiffs' industries subsequently profited after successfully lobbying Congress for a statutory license allowing them to collect royalties in the new market despite their defeat in the courts.

White-Smith Music v. Apollo dealt with the music rolls used in self-playing pianos, or "pianolas."[34] One could play music on a pianola by inserting a roll of paper pre-programmed with music via a series of perforations. Actors in the newly established recording industry had recorded songs to the rolls without obtaining permission or paying royalties, and in response copyright owners sued to enjoin the recording of their sheet music.[35] The plaintiffs asserted a colorable case of infringement under the extant Copyright Act by arguing the pianola roll manufacturers were "publishing," "copying," or "vending" their copyrighted musical compositions.[36]

The Court nonetheless decided the case in favor of the defendant, ruling on counterintuitive technical grounds. Justice Day's majority opinion held that these music rolls—continuous sheets of paper with intermittent perforations—were not "copies" for purposes of the Copyright Act because they were not "intelligible" to the human eye.[37] In other words, even a trained musician could not discern the tune by visually inspecting the roll.[38] Requiring a work to be perceptible to the eye is an odd requirement for a piece of music. As Justice Holmes noted in concurrence, moreover, this ruling would seem to invite other parties to commit de facto infringement so long as they conceal it from the eye through mechanical artifice.[39]

Commentators have hypothesized that the Court's decision was driven not so much by doctrine as by the tacit concern that composers were behaving opportunistically.[40] Pianolas and their accompanying rolls had achieved widespread use by the time of the decision,[41] but composers were not the ones to pioneer these technologies, and they had made little effort to enter the burgeoning market.[42] Some com-

33. *See* 17 U.S.C. § 106.
34. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 8–9 (1908).
35. *See id.* at 9.
36. Rev. Stat. § 4952 (U.S. Comp. Stat. Supp. 1907).
37. *White-Smith Music*, 209 U.S. at 17.
38. *Id.* at 18. While one could effectively reverse engineer the piece through "great skill and patience," the Court dismissed the possibility based on the weight of expert testimony. *Id.*
39. *Id.* at 19–20 (Holmes, J., concurring) ("On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy . . . .").
40. Ginsburg, *supra* note 13, at 1622; Wu, *supra* note 13, at 300, 302.
41. *White-Smith Music*, 209 U.S. at 9.
42. Wu, *supra* note 13, at 297–98.

mentators have suggested this suit was the opening move in the music industry's larger scheme to assert control not only over recordings of their music, but also over the playback devices themselves.[43] The Court's refusal to find infringement thwarted these plans.

After the composers lost in court, the competing interests brokered a compromise in Congress and established what is now known as the "mechanical license."[44] Copyright owners prevailed in obtaining the exclusive right to authorize mechanical reproductions, like the manufacture of music rolls.[45] The recording industry prevailed, however, in obtaining a mandatory licensing scheme that forestalled the composers' attempt at monopolization.[46] Once the copyright owner licensed the composition to be recorded, any other party was authorized to make its own recording upon paying a statutory fee.[47] Commentators have observed the statutory fee was set at a rate below what the copyright owners would have agreed to in the market,[48] which had the effect of prioritizing the public's interest in wider distribution over the copyright owners' interests in compensation and control.[49] Despite their complaints, the composers profited from this arrangement because the proliferation of recorded music created a new revenue stream while also stoking public demand for new music.[50]

The Supreme Court decided *Fortnightly Corp. v. United Artists Television, Inc.* on similarly technical but questionable grounds.[51] The municipalities of Clarksburg and Fairmont, West Virginia, lacked broadcast television service. Until 1957, no local television stations provided a broadcast signal in their area.[52] While two stations had

43. Ginsburg, *supra* note 13, at 1622–23. Congress took up the same concerns in parallel to the litigation. *See* H.R. REP. NO. 60-2222, at 7 (1909) (expressing concern that "some company" might use music copyrights to "monopolize the business of manufacturing the [sic] selling music-producing machines"); *id.* at 8 ("Not only would there be a possibility of a great music trust in this country and abroad, but arrangements are being actively made to bring it about."). *But see* Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 940–41 (2020) (asserting that the monopolization concerns were likely overblown and questioning whether they were sufficient to explain Congress's policy choices).

44. Copyright Act of 1909, chap. 320, sec. 4952, § 1(e), 33 Stat. 1075, 1075–76 (1909).

45. *Id.*

46. *See id.*

47. *See id.* at 1076 (establishing that "any other person may make similar use of the copyrighted work upon the payment" of the statutory fee).

48. *See, e.g.*, Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUT. & HIGH TECH. L.J. 215, 226–41 (2010).

49. *See* Victor, *supra* note 43, at 918–23.

50. *See* Wu, *supra* note 13, at 304 ("[T]oday it is defended both by representatives of composers and by the music industry."); *see also* Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 PENN. L. REV. 441, 495 (2016) (observing how permissive allowances for cover songs has promoted "cumulative creativity [and] expressive freedom").

51. *See* 392 U.S. 390 (1968).

52. *Id.* at 391.

emerged by the time *Fortnightly* was decided in 1968, the local topography rendered it impossible for residents to receive more distant signals with conventional television antennas.[53]

Fortnightly Corporation solved this problem by operating a community antenna television system ("CATV"), i.e., by building a powerful central antenna that could receive more distant stations and then using cable to carry the programming to individual subscribers.[54] The networks that owned copyrights in the television programs sued, but the Court ruled there could be no infringement because cable retransmission was not an actionable "performance" under existing copyright law.[55] The equities of the scenario bolstered the Court's decision: the industry was poised to eliminate a distribution system that filled a genuine need, but it offered no solution of its own. Whatever threat cable might pose in other markets, broadcasters were not harmed if others brought their programming into markets they had refused to enter. The Court's refusal to enforce the broadcasters' copyrights meant that these two communities could continue enjoying the same news and entertainment as the rest of the country. Yet the majority opinion mentioned none of these factors.[56]

Dissenting, Justice Fortas questioned the Court's faithfulness to doctrine and accused the majority of ignoring precedent—that retransmission of a radio broadcast constitutes a performance[57]—in order to protect the nascent CATV industry.[58] While the majority claimed to ground its opinion in the technical definition of "performance," the dissent suggested that what actually motivated the majority was a policy argument: "[I]t is darkly predicted that the imposition of full liability upon all CATV operations could result in the demise of this new, important instrument of mass communications; or in its becoming a tool of the powerful networks."[59]

Fortnightly also illustrates the problems that follow from articulating a holding in doctrinal terms without acknowledging the policy concerns motivating it. In the subsequent *Teleprompter Corp. v. Columbia Broadcasting* litigation, CBS sued a cable service that carried signals from hundreds of miles away to communities already served by local broadcasters.[60] The equities and the economics of the

53. *Id.* at 391–92.

54. Wu, *supra* note 13, at 312 ("The goal of the early deployments was modest: solving the problem of bringing broadcast television to remote or mountainous areas otherwise left in the dark.").

55. *Fortnightly Corp.*, 392 U.S. at 398–401.

56. *Accord* Wu, *supra* note 13, at 318.

57. *See* Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 199–201 (1931). *But see Fortnightly Corp.*, 392 U.S. at 396 n.18 (distinguishing *Jewell-La Salle* as a case where the original radio broadcast had been unauthorized).

58. *Fortnightly Corp.*, 392 U.S. at 404–05 (Fortas, J., dissenting).

59. *Id.* at 403.

60. Teleprompter Corp. v. Columbia Broad., Inc., 415 U.S. 394, 396–97, 400 (1974).

case were distinguishable from those of *Fortnightly*—viewers were not lacking in other viewing options, and this sort of retransmission actually threatened to harm the existing market by diverting local stations' ad revenues.[61] Yet *Fortnightly*'s express holding—that cable retransmission was not a performance—simultaneously deprived the networks of the chance to participate in these markets[62] and removed the economic factors on either side from judicial consideration.[63]

The networks' defeat in these cases did not exclude them from the cable market forever. After they lost in court, they turned to Congress, much like the music industry had after *White-Smith Music*.[64] Congress subsequently expanded "performance" under copyright law to include cable retransmission and enacted another compulsory license.[65] The networks fared well under this arrangement: they could still run their commercials, secured by a statutory guarantee that the cable networks could not alter the transmissions; they received a statutory retransmission fee from the cable service; and their programs ultimately reached a wider audience. Television as a medium also thrived. The existence of a national audience generated the revenues and viewership for a greater number and more diverse range of stations and for programming that served a wider range of tastes and interests.[66]

2. Indirect Infringement

Many copyright suits target technology firms not because the firms themselves committed infringement, but because their devices or services facilitate infringement by consumers. Both of the following cases involve a device that allowed consumers to engage with copyrighted works in new ways. These devices created or stoked the market for works in a compatible format, for example, prerecorded films for the VCR. Rather than entering these markets, the copyright industries sued to enjoin these devices out of a concern that, in addition to facilitating lawful uses, they could promote piracy. Unlike the plaintiffs in the prior Section, these plaintiffs ultimately profited from the sale of these devices without even having to go to Congress to broker a compromise. They simply relented and began selling copies of their works

61. *Id.* at 404–05, 410–14.

62. *But see* Wu, *supra* note 13, at 320 (documenting broadcasters who found a backdoor means of participating by acquiring a share of ownership in the cable systems).

63. *Teleprompter*, 415 U.S. at 413 n.15 ("[S]uch a showing would be of very little relevance to the copyright question we decide here.").

64. *See generally* Copyright Law Revision: Hearings on S. 1361 Before the Subcomm. on Pats., Trademarks, and Copyrights of the S. Comm. on the Judiciary, 93d Cong. at 278–490 (1973).

65. Copyright Act of 1976, 90 Stat. 2541, ch. 1, § 111.

66. *See infra* Section III.B.1.

in the access market that had sprung into existence once consumers had these devices in their homes.

Sony Corp. v. Universal City Studios is the most famous of these cases and it is the first and only case in this Section expressly decided on fair-use grounds.[67] Sony introduced its home VCR—the Betamax—to the U.S. market in November 1975.[68] Universal Studios and Disney sued, alleging that Sony was responsible for the copyright infringement that occurred when home users recorded their copyrighted television programs.[69] By some accounts, Universal's plan was to remove Sony's VCR from the market in order to secure the market for its parent company's "DiscoVision."[70] The DiscoVision was a device that could only play prerecorded discs; consumers could not have used it to record programming from their televisions.[71]

The Supreme Court ruled in favor of Sony.[72] While many commentators concur in the decision, there is some dispute over whether the case stated a doctrinally sound rule.[73] The Court announced a new contributory liability test—the defendant would not be liable so long as its device was "capable of substantial noninfringing uses."[74] This test appears nowhere in the Copyright Act nor in pre-*Sony* copyright precedent. The Court instead borrowed the doctrine from Subsection 271(c) of the Patent Act, asserting a "historic kinship between patent law and copyright law."[75] Leading scholars have questioned both this "kinship" and the resulting test. Peter Menell and David Nimmer, in particular, point out the Court's failure to consider alternatives grounded in broader tort law principles, where courts have long wrestled with manufacturers' liability for products that cause harm.[76] The substantial non-infringing use test has also proven difficult to apply in

67. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984).

68. JAMES LARDNER, FAST FORWARD: HOLLYWOOD, THE JAPANESE, AND THE ONSLAUGHT OF THE VCR 21 (1987); SONY CORP., ANNUAL REPORT 3 (1975).

69. *See Sony*, 464 U.S. at 419–20.

70. WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 150–51 (2009).

71. LARDNER, *supra* note 68, at 28–36. In this sense, the film industry's conduct parallels the early music industry's attempts to monopolize the market for devices to play music. *See supra* note 43 and accompanying text.

72. *Sony*, 464 U.S. at 456.

73. *See, e.g.*, Glynn Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975, 977 (2002); *Unwinding Sony*, *supra* note 13, at 943, 993; Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 424–25 (2002); *see also* Ginsburg, *supra* note 14, at 1391 (criticizing the opinion as "cursory and result-oriented").

74. *Sony*, 464 U.S. at 442.

75. *Id.* at 439.

76. *See* Menell & Nimmer, *supra* note 13, at 1022 ("By applying tort law standards, the Court would have been faithful to congressional intent and would have created a more flexible framework for addressing the challenges of new technology.").

practice, and its indeterminacy has left courts with room to act on policy considerations without confronting them directly.[77]

Proceeding with the test, the Court's assessment of whether the Betamax had substantial non-infringing uses required examining whether consumers' home taping was lawful.[78] The Copyright Act of 1976 defined "copies" more broadly than extant law at the time of *White-Smith*, so there were no grounds for arguing that these recordings were not within the scope of the Act.[79] Sony could avoid liability only if these uses were permitted under the fair-use defense.[80] The Court was unequivocal in holding that it was fair use to "time-shift," that is, to tape programs for viewing at a more convenient time.[81] Accordingly, Sony was absolved of liability.[82]

Despite losing, it seems the studios were better off in a world where VCRs were in practically every home. There was no need for a subsequent, legislatively brokered compromise. Rather, studios benefited because the proliferation of the VCR created a profitable market for the studios to sell videocassettes of their films and programs directly to consumers.[83] It is unclear whether the studios' preferred DiscoVision would have been as successful or as quick in pioneering this market. Consumers were drawn to the VCR by the allure of time-shifting or more dubious uses such as archiving; through time-shifting, consumers had greater autonomy than ever before to decide what they would watch and when they would watch it.[84] These functions were so attractive that literally millions of U.S. customers had already purchased a VCR by the time *Sony* was decided.[85]

---

77. *See infra* Section II.B (discussing cases where the court ruled for the copyright owner despite the existence of substantial non-infringing uses).

78. *Sony*, 464 U.S. at 442–44.

79. As the Copyright Act defines them:

> "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

17 U.S.C. § 101.

80. *Sony*, 464 U.S. at 442.

81. *Id.* at 454–55. This did not mean all uses of the VCR were lawful; the Court declined to decide the related question of whether it was fair for users to record programs indefinitely to build a home library. *Id.* at 483–84 (Blackmun, J., dissenting).

82. *Id.* at 454–56.

83. LARDNER, *supra* note 68, at 325–28; EDWARD SAMUELS, THE ILLUSTRATED STORY OF COPYRIGHT 70 (2000) (noting that the VCR had been "one of the most lucrative inventions" for movie producers since the movie projector); *see* Menell & Nimmer, *supra* note 8, at 148 ("Rather than destroy the film industry—as Jack Valenti infamously predicted—the VCR proved a great boon to motion picture studios, consumer electronics makers, and consumers alike.") (citations omitted).

84. von Lohmann, *supra* note 17, at 841 (arguing that the record function was necessary as startup capital or "bait" to convince American consumers to spend hundreds of dollars on these devices and thereby create this market).

85. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05(F)(5)(b)(i) n.648 (2019) (noting that the number of video tape recorders had

In *Recording Industry Ass'n of America ("RIAA") v. Diamond*, the Ninth Circuit considered another consumer playback device—the MP3 player.[86] This suit was unusual because it was not an infringement suit—*Sony*'s substantial non-infringing use test protected the manufacturer here—but was instead a suit under the Audio Home Recording Act of 1992 ("AHRA").[87]

The AHRA was a milestone in copyright lawmaking because it was the first piece of copyright legislation that mandated the use of specific design features for a class of devices, namely, devices to record and play digital music.[88] The Act was also notable because the music industry had lobbied proactively to regulate this technology before it entered the consumer market.[89] Consumers had long been able to make analog copies, but copying on a medium like the cassette tape had inherent limits due to degradation in quality.[90] A consumer's re-recording of a song from the radio or from an authorized cassette would produce an inferior copy, and any successive copies would be worse still. The looming threat of digital copying was that it could create an unlimited number of crystal-clear copies and thereby threaten lawful markets with unconstrained bootlegging.[91]

The Act required any "digital audio recording device" to implement a serial copy management system, which would allow the making of copies from an original commercial disc but prevent consumers from making any copies of the resulting second-generation discs.[92] Given the eventuality that some illicit copying would take place, the AHRA also awarded the music industry a royalty to be levied on the sale of digital audio recording devices as well as on blank tapes or discs.[93]

Litigation commenced because Diamond's Rio MP3 player did not implement the serial copy management system.[94] Like *White-Smith* nearly a century earlier, the case ultimately turned on a rather techni-

grown from 800,000 in 1978 to over 10 million in 1984); *see also* LARDNER, *supra* note 68, at 9 (finding the number had grown to at least 30 million by 1987).

86. Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys. Inc., 180 F.3d 1072 (9th Cir. 1999).

87. Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (codified as amended at 17 U.S.C. §§ 1001–1010) (2018)). Moreover, if the plaintiff had been correct that the MP3 player qualified as a "digital audio recording device" under the AHRA, a statutory safe harbor would have insulated the defendant from liability for contributory copyright infringement without the need to invoke *Sony*. *See* 17 U.S.C. § 1008.

88. Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 118 (2004).

89. Menell & Nimmer, *supra* note 8, at 161.

90. *RIAA*, 180 F.3d at 1073.

91. *Id.*

92. 17 U.S.C. § 1002.

93. 17 U.S.C. § 1004. In a concession to device makers, the Act also provided immunity from suits for contributory copyright infringement on the basis of the manufacture, importation, or distribution of such devices and media. *Id.* § 1008.

94. *RIAA II*, 180 F.3d at 1075.

cal definition. The question was whether the MP3 player qualified under the AHRA's definition for "digital audio recording device":

> [A]ny machine or device of a type commonly distributed to individuals for use by individuals . . . the digital recording function of which is designed or marketed for the primary purpose of, and that is capable of, making a digital audio copied recording for private use . . . .[95]

The district court held that Rio qualified, reasoning that the Rio makes a "digital audio copied recording" each time the user adds an MP3 to the device.[96]

On appeal, the Ninth Circuit rejected this interpretation.[97] It reached this counterintuitive result—which "effectively eviscerate[s] the AHRA" whenever a computer is involved[98]—because of a statutory exemption. Even though an MP3 might otherwise seem to be a digital recording, the AHRA contains an exemption for "material object[s]," like hard drives, "in which one or more computer programs are fixed."[99] The court found that this exemption precluded songs on a computer hard drive from qualifying as "digital audio copied recordings" and, as such, held that the AHRA did not restrict what an MP3 player or any other device could do with those recordings.[100]

The 1992 Congress had simply not contemplated the involvement of computers in home copying of music and drafted the law with only contemporary digital audiotape systems in mind.[101] One could have imagined the Ninth Circuit engaging in a more purposive construction of the statute to extend the AHRA into the MP3 era.[102] After all, this ruling made a law that was only seven years old functionally obsolete. But the RIAA did not make for a sympathetic plaintiff. Its apparent goal was to take the MP3 player off the market rather than to enter the growing market for MP3 sales.[103]

---

95. 17 U.S.C. § 1001(3).

96. Recording Indus. Ass'n of Am., Inc. v. Diamond Multimedia Sys., Inc., 29 F. Supp. 2d 624, 631 (C.D. Cal. 1998).

97. *RIAA II*, 180 F.3d at 1081.

98. *RIAA I*, 29 F. Supp. 2d at 630; 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8B.02(A)(1)(b) (2019) ("This ruling . . . bears every indication of relegating the AHRA largely to obscurity.").

99. 17 U.S.C. § 1001(5)(B).

100. *RIAA II*, 180 F.3d at 1078, 1081.

101. Bill D. Herman, *A Political History of DRM and Related Copyright Debates, 1987–2012*, 14 YALE J.L. & TECH. 162, 174 (2012); David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233, 1333 (2004) (summarizing Congress's position as such: "no one but a geeky propeller-head would do something as bizarre as to use the instrumentality of a PC to listen to music").

102. *See, e.g.*, *RIAA I*, 29 F. Supp. 2d at 629 (arguing that the RIAA should have prevailed as a matter of "legislative history" and "the spirit and purpose of the AHRA"); *see also* Ginsburg, *supra* note 13, at 1626.

103. *See* Ginsburg, *supra* note 13, at 1625–26.

Whether the MP3 player ultimately helped or harmed the music industry presents a harder question than the VCR had.[104] On its own, the MP3 expanded the usefulness of music tracks by making them more portable. While the Rio could only store an hour's worth of music, slightly less than a CD, later MP3 players would hold many times that.[105] Consumers might be willing to purchase more music CDs in a world where they could carry a variety at all times. Conversely, the MP3 player also had the potential to facilitate the sort of harm that concerned the RIAA—imagine a college dorm where one resident purchased a CD and then circulated it so everyone on the floor could copy ("rip") the tracks to their own computers or MP3 players.[106] Less than a year after the launch of the Rio, the problem was compounded by the emergence of services like Napster that allowed for the unlawful distribution of MP3 files on a scale that was previously unfathomable.[107]

MP3 players did, however, benefit the wider public by expanding each individual's capability to engage with creative works. In dicta, the Ninth Circuit likened the "space-shifting" permitted by carrying MP3s on the Rio player to the time-shifting endorsed in *Sony*.[108] Advances in storage, as mentioned above, would enhance these space-shifting capabilities by making it possible for consumers to carry an entire library's worth of CDs on one pocket-sized device, and with the rise of smartphones many consumers now carry this library with them at all times.

B. *Copyright-Industry Plaintiff Prevails*

The prior cases notwithstanding, the copyright industries often prevail when they sue to enjoin new technologies for playback or distribution. This holds true even where the technologies, or the new markets opened by these technologies, are substantively similar to those found non-infringing in the cases discussed above. The key difference has been the new markets' impact on the copyright owners' pre-existing markets. If the copyright owner has actually entered the new market or made credible plans to do so, it is easy to see how third

104. *But see* Lemley & McKenna, *supra* note 19, at 92 ("The Internet hasn't killed the music industry, which, by most accounts, is as profitable now as it's ever been.").

105. *See RIAA II*, 180 F.3d at 1074–75.

106. Admittedly, even the AHRA's serial copy management software would not help in this scenario given that each college student would be making a first-generation copy from the original CD. *See supra* note 90 and accompanying text.

107. The Rio entered the U.S. market in September 1998. Tony Smith, *Ten Years Old: The World's First MP3 Player,* REGISTER (Mar. 10, 2008, 12:33), https://www.theregister.com/2008/03/10/ft_first_mp3_player/ [https://perma.cc/5YAP-4W4T]. Napster launched in June 1999. Tom Lamont, *Napster: The Day the Music Was Set Free*, GUARDIAN (Feb. 23, 2013, 7:05), https://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing [https://perma.cc/8X5U-LVPT]; *see* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014–15, 1025 (9th Cir. 2001).

108. *RIAA II*, 180 F.3d at 1079.

parties competing in that market could harm the copyright owner's interests. Even if the copyright owner has not entered the market, the new market may pose a threat to existing markets to the extent that consumers treat the defendant's offerings as substitutes.

Radio broadcasting of music provides an early example. Composers could have dug in their heels, as they had with the recording of music in *White-Smith*, and refused to allow radio stations to air their songs. Instead, they formed the American Society of Composers, Authors, and Publishers ("ASCAP") to license their compositions for public performances, including radio broadcasts.[109] Because they had already entered the market, there was no need for a court to compel them to do so. Likewise, unauthorized broadcasts resulted in a concrete harm to ASCAP's established licensing business. It was thus no surprise that the composers won when they sued radio broadcasters who refused to pay the licensing fee.[110]

Napster and subsequent file-sharing platforms further demonstrate this point. The music industry in the late 1990s was reluctant to authorize the sale and download of MP3s for several years after the technology became viable. It had legitimate concerns that putting MP3s into wide circulation would facilitate piracy.[111] At the same time, the music industry's refusal to enter the market meant consumers could not benefit from the convenience of digital sales. Likewise, it meant that the industry could still push the sale of full CD albums even though many consumers would have preferred to purchase singles.[112] Services like Napster, Aimster, and Grokster entered this void by providing consumers with the means to download MP3s, but they did so without compensating the copyright holders.[113]

When the industry sued to shut these sites down, the industry won even though the sites arguably fell within *Sony*'s safe harbor for services with substantial non-infringing uses.[114] Napster was the first of these services to invoke *Sony*'s safe harbor as a defense.[115] The Ninth Circuit acknowledged Napster's non-infringing capabilities: A small fraction of music downloads on the service were lawful because they

109. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1329 (1996).

110. *See* Jerome H. Remick & Co. v. Am. Auto. Accessories Co., 5 F.2d 411, 411–12 (6th Cir. 1925).

111. *See* Robert T. Baker, *Finding a Winning Strategy Against the MP3 Invasion: Supplemental Measures the Recording Industry Must Take to Curb Online Piracy*, 8 UCLA ENT. L. REV. 1, 1–3, 6–7, 10–11 (2000).

112. *See id.* at 2–3, 13.

113. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011, 1014 (9th Cir. 2001); *In re* Aimster Copyright Litig., 334 F.3d 643, 645 (7th Cir. 2003); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 920–21 (2005).

114. *See Napster*, 239 F.3d at 1020; *Aimster*, 334 F.3d at 652; *Grokster*, 545 U.S. at 927–28.

115. *Napster*, 239 F.3d at 1020.

involved tracks that artists had released for promotional purposes.[116] The court nonetheless rejected the defense because Napster, unlike Sony, had "*actual* knowledge that *specific* infringing material [was] available using its system."[117] After all, it structured its entire service around a centralized directory listing all the songs available, making the infringing activity plain to its operators.[118]

Aimster's developers attempted to sidestep this problem by encrypting all user communications so that Aimster itself would be unable to witness any specific instances of infringement.[119] To be sure, there are many legitimate reasons for a service to encrypt users' communications.[120] Aimster's problem was that encryption added no apparent value to the file-sharing program, making it transparent to the court that it added the feature only in an attempt to evade copyright liability.[121] The Seventh Circuit ruled against Aimster, finding that "willful blindness" made it just as culpable as Napster had been.[122]

Grokster followed a similar but less convoluted path: Rather than encrypting communications, it utilized a direct, peer-to-peer design that was different than Napster's because it did not require a central directory.[123] This meant Grokster had no knowledge of infringement. Grokster also had a more legitimate explanation than Aimster for why it designed the service this way: The peer-to-peer architecture eliminated the overhead expenses of maintaining a central server.[124] This argument convinced the Ninth Circuit, but not the Supreme Court.[125] Without getting into the particulars of the technology, the Court found Grokster could be held liable because it expressly advertised its own services as a replacement for Napster's and therefore faced liability for *inducing* infringement.[126]

---

116. *See id.* at 1019.

117. *Id.* at 1021–22.

118. *See id.* at 1011–12.

119. *See Aimster*, 334 F.3d at 646, 650.

120. *See id.* at 650.

121. *See id.* at 653.

122. *Id.* at 650.

123. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 921–22 (2005).

124. *Id.* at 920.

125. *Id.* at 927–28 (discussing the Ninth Circuit opinion, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004)). Indeed, the Ninth Circuit analogized the case to the prior disputes over the player piano, VC3, and MP3 player. *Grokster*, 380 F.3d at 1167.

126. *Grokster*, 545 U.S. at 938–41. Napster and Aimster would likely also have been liable under this test. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 n.5 (9th Cir. 2001) ("[T]hey have promoted the site with 'screen shots listing infringing files.'"); *Aimster*, 334 F.3d at 651 ("In explaining how to use the Aimster software, the tutorial gives as its *only* examples of file sharing the sharing of copyrighted music . . . .").

Doctrinally, it may seem like the courts repeatedly moved the goalposts beyond the test announced in *Sony*.[127] They were focused not on the technical particulars of each service's design but instead on their economic impact, specifically the substitutionary harms that arose when these services poached customers who may otherwise have paid for music.[128] Unlike the VCR and MP3 player, these services' primary use was not to engage with works the users had already accessed or acquired in a lawful manner. Instead, each service created an unauthorized distribution network that competed with the existing CD market. In this regard, the file-sharing defendants were doing something very different than the defendants in *White-Smith* or *Fortnightly*, who also engaged in distribution but aimed their activities at an independent market.[129]

The file-sharing defendants faced additional problems because the music industry could argue it had not actually rejected the market for digital downloads; it simply needed time to implement adequate precautions against potential piracy. Apple struck a deal with the recording industry and launched the iTunes music store in March 2003, ahead of the *Aimster* and *Grokster* decisions.[130] Even though the iTunes store did not launch until after *Napster* was decided, the record labels could explain their delay up to that point by referencing their longstanding concern that selling MP3s would facilitate piracy. Even if the labels placed copy protections on the files, hackers would inevitably release tools to circumvent these protections. Congress legitimated this concern when it passed the Digital Millennium Copyright Act ("DMCA"), which made distributing such tools illegal as of October 1998.[131] Napster launched one year later, during a window when the industry had only just secured legal protection and could credibly claim that it simply needed a bit more time to prepare for entry.[132]

127. *See* Menell & Nimmer, *supra* note 8, at 187 ("Instead of applying the staple article of commerce doctrine as formulated [in *Sony*], courts . . . have contorted their analyses to find liable those whose conduct appears blameworthy, even if that behavior nominally would fall within *Sony*'s safe harbor.").

128. *But see id.* (suggesting that any consideration of economic impact was the inadvertent effect of assessing the parties' blameworthiness).

129. *See infra* Section IV.A.1.

130. *See* Jon Healey, *Labels Think Apple Has Perfect Pitch*, L.A. TIMES (Mar. 4, 2003, 12:00 AM), https://www.latimes.com/archives/la-xpm-2003-mar-04-fi-music4-story.html [https://perma.cc/Z6PB-XGVA].

131. *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

132. It is possible that conservative forces in the music industry would have resisted the move toward commercial distribution of digital downloads through sites like iTunes if they had not faced the threat of Napster. *See infra* Section III.C (exploring the reasons behind the copyright industries' reluctance). Sites like Napster simultaneously undermined the existing market and demonstrated the existence of consumer demand for the convenience of purchasing music without going to the store and of purchasing tracks a la carte rather than full albums. *See* von Lohmann, *supra* note 17, at 854–55 ("In several instances, new markets formed only after disruptive technolo-

My.MP3.com tested the limits of the time-shifting and space-shifting arguments previously asserted in *Sony* and *Diamond*.[133] Defendant MP3.com advertised its My.MP3.com service as one that would allow the user to store and listen to one's CDs from any internet-connected computer.[134] So far as the user could see, the service provided functionality similar to a modern cloud-storage system like Dropbox; the consumer could add CDs to a personalized virtual "storage locker" of MP3 files to access from any internet-connected computer. There was nonetheless one key difference between My.MP3.com's operations and cloud storage. The user did not actually copy or upload music files to My.MP3.com. Instead, the user submitted proof of ownership of the CD and then My.MP3.com granted access to the corresponding tracks the site had saved to a central database.[135] Several music studios sued, alleging that creating and streaming from this library constituted infringement, while MP3.com argued it merely provided a new form of "space-shifting" for consumers who had lawfully purchased the CDs.[136]

The district court rejected the space-shifting arguments and treated this as a straightforward case of infringement.[137] Once again, examining the service's effect on the market is instructive. A major failing of MP3.com's system was that its proof-of-purchase system did not actually guarantee the user paid for the music; the system required the user to insert the CD into his or her computer in order to verify it, but it could not actually distinguish between retail and bootleg CDs.[138] Likewise, it had no means of tracking any given CD copy, so a group of acquaintances could easily purchase one disc and pass it around to obtain digital access without even the hassle of actually burning a CD. These were exactly the sorts of harms that the industry had been trying to avert through the implementation of copy protections, and Congress had legitimated these concerns through both the AHRA and DMCA.[139] Even though iTunes and other comparable space-shifting services would not arrive until a few years after the decision, the court accepted the industry's claim that negotiations were underway. MP3.com was a more sympathetic defendant than Napster, but the

gies forced copyright owners to adjust their behavior, triggering the complementary relationship between the products."). The potential "market-forcing" effect of piracy is beyond the scope of the present article.

133. *See supra* notes 81–83, 106 and accompanying text.

134. UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000).

135. *Id.*

136. *Id.* at 351.

137. *Id.* at 350 ("The complex marvels of cyberspatial communication may create difficult legal issues; but not in this case.").

138. 4 NIMMER & NIMMER, *supra* note 85, at § 13.05(G); *see also UMG Recordings*, 92 F. Supp. 2d at 350 (expressing doubt regarding what MP3.com required the user to "prove").

139. *See supra* notes 85–92, 129–130 and accompanying text.

credible threat of harm to the copyright owners' existing markets, along with the owners' stated plans to enter the new market, were once again fatal.

* * *

Viewing these cases as plain instances of legal realism is tempting.[140] Descriptively, the characterization is accurate.[141] Copyright cases—especially those involving new technologies—can be exceedingly technical both factually and as a matter of doctrine, yet the courts are remarkably consistent in favoring the party that seems to be acting more reasonably. There is good reason to be wary of this trend, which invites judges to decide copyright cases according to their subjective evaluation of fairness. Not all copying constitutes infringement, and equating copying with wrongdoing is all too easy without careful attention to the Copyright Act. Likewise, it is not categorically unreasonable for a copyright owner to refuse to grant a license for a use, or a market, no matter how bad this looks for an owner who has no intention of exploiting that use.

Our legal system nonetheless relies on courts to effectuate copyright's policy goals. It is both legitimate and necessary for courts to consider these objectives for illumination in interpreting and applying the Copyright Act. The reasonableness or commercial morality of either party is beside the point. What matters from the perspective of copyright is the impact of the parties' market decisions on the creation of new works and consumers' access to both existing and future works. As the following Part shows, the courts' tendency to deny relief to copyright plaintiffs who refuse to enter a new access market is sound policy for advancing these concerns.

III. Copyright Policy

The access markets made possible by new playback and distribution technologies advance copyright policy in several distinct ways. To be sure, they advance both creation incentives and access as those terms are conventionally understood. But examining these markets also reveals the role that access to existing works plays in advancing copyright's deeper normative goals of promoting a more democratic and participatory society: It enhances the availability of diverse works, allows for more autonomous engagement with works, and includes previously marginalized groups within a larger, shared culture. The

140. *See* Menell & Nimmer, *supra* note 8, at 187 (opining that *Sony*'s "legacy speaks more to the precepts of legal realism than the vitality of copyright's staple article of commerce doctrine").

141. *See* Ginsburg, *supra* note 13, at 1617; Wu, *supra* note 13, at 334–35 ("As Jane Ginsburg has argued, many of the pro-challenger Supreme Court decisions, from *White-Smith* to *Fortnightly*, can be impossible to understand without some idea that the Court feared that the incumbent wanted copyright for the wrong reasons.").

following discussion draws on the cases unpacked in Part II to explain how new access markets can secure these benefits. Having established why copyright law should promote these markets, it then addresses the reasons why the copyright industries resist them.

A. *Copyright Fundamentals*

1. Incentives for Creation

Copyright is generally understood as a means of providing financial incentives for creative production.[142] Today's Hollywood blockbusters cost as much as $500 million to produce and market.[143] The studios produce these films expecting to make all that back, plus profits, through the sale of movie tickets, DVD and Blu-ray Discs, streaming rights, tie-in merchandising, and the like. Copyright is a crucial part of this business strategy because it allows the studio to stop third parties from undercutting it by selling bootleg DVDs or posting the film online.

So far as creation incentives are concerned, the key question in market refusal cases is whether denying copyright protection will impair the production of new works. Recent scholarship has shown that some individual creators would continue to produce even with diminished financial rewards.[144] While this holds true for individual creators who have reputational, intrinsic, or social reasons to create, it does not for investors whose goal is to maximize profit. In the Hollywood example, those backers who view films as investments would redirect their capital toward other types of projects or even other industries if the expected returns dipped below an acceptable threshold.[145]

142. *See, e.g.*, Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1031 (2005) ("Intellectual property protection in the United States has always been about generating incentives to create.").

143. *See, e.g.*, Kirsten Acuna, *The 30 Most Expensive Movies Ever Made*, INSIDER (July 2, 2020, 7:04 PM), https://www.insider.com/most-expensive-movies-ever-made [https://perma.cc/EE57-WK6N] (collecting publicly available data on production and marketing costs).

144. *See, e.g.*, GLYNN LUNNEY, COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE U.S. RECORDING INDUSTRY 128–56 (2018) (finding that recording artists have actually produced a greater number of high-quality albums when revenues were lower); Amy Kapczynski, *Order Without Intellectual Property Law: Open Science in Influenza*, 102 CORNELL L. REV. 1539, 1543–44 (2017) (assessing case studies on "intellectual production without intellectual property" across creative fields such as French cuisine, comedy, stage magic, tattooing, high fashion, and even the selection of roller derby pseudonyms); *see also* Yochai Benkler, *Coase's Penguin, or, Linux and* The Nature of the Firm, 112 YALE L.J. 369, 426–27 (2002) (cataloging the sorts of direct and indirect pecuniary rewards, intrinsic hedonic rewards, and social-psychological rewards that move people to create).

145. *See* Cohen, *supra* note 4, at 143 ("Copyright creates a foundation for predictability in the organization of cultural production, something particularly important in capital-intensive industries like film production . . . .").

New access markets can enhance these incentives by bringing in additional profits. This occurred in the cases described above, where the courts pushed the copyright industries into markets they refused to enter voluntarily.[146] Advocates for new technologies often point to Hollywood: Once VCRs became widespread, revenues from video sales quickly outpaced those of theater tickets.[147] The studios were dogged in their opposition, yet their total profits increased once they relented and began selling films for home video.[148] As discussed above, the music and broadcast-television industries also grew and profited after adverse copyright decisions forced them to enter new markets.[149] It may be that intermediaries or older ways of doing business were displaced, but these concerns are separate from production incentives.[150] So long as more profits ultimately reach the creators—the authors, the producers, and the investors—the production of new works is encouraged. By the same logic, the copyright industries' production incentives would be enhanced even if they did suffer harm in an existing market so long as their profits in the new market outweighed their losses. Ultimately, what matters is the net result.[151]

Even if copyright owners did not affirmatively profit from a new market, their production incentives would not be diminished so long as they suffered no net loss. While the copyright industries might prefer to capture the full value of their works across time, economists and copyright experts generally agree that complete internalization of the value of one's work goes beyond the level of compensation necessary to incentivize production.[152] As Shyamkrishna Balganesh has explained, creators' pecuniary interests are satisfied so long as they recoup all the profits they expected at the time they made the decision to invest time and money in the work.[153] If creators can expect compa-

146. *Supra* Part II.

147. *See* LARDNER, *supra* note 68, at 325–28.

148. *See supra* notes 80–83 and accompanying text.

149. *See supra* notes 43–48, 62–64 and accompanying text.

150. *See infra* Section III.C.1.

151. *See* Jeanne C. Fromer, *Market Effects Bearing on Fair Use*, 90 WASH. L. REV. 615, 632 (2015) ("A full-bodied assessment of market effects fits better with the policies underpinning copyright law and fair use than an assessment that looks to market harms alone."); Edward Lee, *Technological Fair Use*, 83 S. CAL. L. REV. 797, 853 (2010) (arguing "court[s] should consider the technology's possible positive effects" when assessing market impact) (emphasis omitted).

152. *See, e.g.*, Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 258 (2007) ("[T]here is no reason to think that complete internalization of externalities is necessary to optimize investment incentives . . . ."); Oren Bracha & Talha Syed, *Beyond the Incentive–Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1855 (2014) ("[A]t any given level of IP protection, some innovations or informational works will enjoy more protection than is needed for their generation, meaning that the revenues enabled by the IP-conferred pricing power will exceed the capitalized costs of development.").

153. *See* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1615 (2009). One might raise non-pecuniary concerns—what if an author objected to the new technological uses as a matter of artistic integrity? To

rable net returns, there is no economic reason for the copyright industries to reduce their investment in production.[154] A new market could be neutral for production incentives and still advance copyright's objectives if it led to greater access.

2. Access to Works

The other piece of the traditional incentives-access paradigm is access; the public benefits from the creation of new works only once it obtains access to them. It is clear to see how the markets opened by new playback and distribution technologies advance this objective. Such access is often achieved by permitting a third party to bring the work into a market that the copyright owner refused. As the preceding Section explained, sometimes this expansion is also beneficial to the copyright owner because it generates greater total revenues. Even if the copyright owner were harmed, however, these harms could be justified within the incentives-access paradigm if there were a sufficiently large increase in access to offset the reduction in incentives.[155] As the following Section explains, these markets also have the potential to promote copyright objectives by providing the sorts of rich access that support a more democratic and participatory culture.

---

be clear, the market-entry policy advanced by the courts and by this Article is not one that second guesses authors' creative decisions; it is an argument that copyright owners should not have absolute control over the format in which their published works may be enjoyed, not one for depriving authors of creative control over the authorization of sequels, film adaptations, or even remastering of their older works, nor for compelling any author to release unpublished work.

Still, one might be concerned if authors objected to the formats themselves. Copyright policy would not be well-served if composers stopped writing songs because they objected to the possibility that those songs would one day be encoded in the MP3 format. While interesting as a possibility, authors' preferences, as revealed by their behavior, suggest it is not a major concern. Composers like John Philip Sousa had dire predictions regarding the implications of recorded music, yet continued composing for over twenty years after the decision in *White-Smith*. *See Arguments Before the Comms. on Patents of the S. & H.R., Conjointly, on the Bills S. 6330 and H.R. 19,853, to Amend and Consolidate the Acts Respecting Copyright*, 59th Cong. 23 (1906) (statement of John Philip Sousa). Directors like Woody Allen objected to the sorts of modifications that had to be made to his films to fit the square television screens of the 1980s, but these were objections to the Hollywood production model rather than any unauthorized market; directors continue to shoot films even though the studios hold the copyright, and even though these studios have authorized extensive edits for television broadcast and later home video. *See Legal Issues That Arise When Color Is Added to Films Originally Produced, Sold, and Distributed in Black and White: Hearing Before the Subcomm. on Tech. & the Law, S. Judiciary Comm.*, 100th Cong., 44 (1987) (testimony of Woody Allen).

154. There may be non-economic reasons for resentment: If actors in the creative industries are as well off as they were before, but they perceive others who profit from their works as free-riding, it may have a demoralizing effect. *Cf.* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214–18 (1967) (treating eminent domain as a problem of compensating property owners sufficiently to avoid demoralization and the ensuing reduction of investment in property).

155. *See* Landes & Posner, *supra* note 5, at 326.

B. *Why Access Matters*

The reigning paradigm in IP scholarship—indeed most legal scholarship—reflects a style of economic analysis where the primary goal is to increase social utility in the aggregate.[156] Within this paradigm, the ideal copyright regime is typically the one that allows consumers to most efficiently satisfy their media preferences. The proliferation of new access markets can and does advance this objective by expanding both creative incentives and access, as described above. But the analysis need not end there.

Growing numbers of IP scholars argue for a richer account of what copyright is and ought to be doing. Neil Netanel has argued that we should use copyright law to advance a democratic civil society; the balance of incentives and access matters in this view because it can determine which viewpoints find expression in the media and shape public discourse.[157] Scholars like Jack Balkin, Julie Cohen, and Larry Lessig have shown how similar concerns arise with culture; our collective engagement with creative works has important implications for how we make meaning of the world and ourselves.[158] Amy Kapczynski and Madhavi Sunder have enriched the economic account of intellectual property by asking whether it promotes human flourishing and what it means for underserved communities in the United States and throughout the world.[159]

The contributions that new playback and distribution technologies can offer in the face of these demands on the copyright system are modest but important. History has shown that the expansion of these markets made it easier for any given work to reach a wide audience, contributing to greater diversity in media. The public also has gained more autonomy in choosing which works to engage with and on what terms. And wider viewership has supported the rise of a more inclusive media culture.

1. Diversity

Greater diversity in media offerings—the availability of more works in both sheer number and breadth of perspectives—facilitates the sort of participatory culture that copyright strives to achieve.[160] The role of

156. *See* COHEN, *supra* note 20, at 21.

157. *See* Netanel, *supra* note 21, at 364 ("Copyright's fundamental purpose is to underwrite political competency, with allocative efficiency a secondary consideration.").

158. *See, e.g.*, Balkin, *supra* note 21, at 39; LESSIG, *supra* note 21, at 114; COHEN, *supra* note 21, at 103.

159. *See, e.g.*, Kapczynski, *supra* note 20, at 990; Sunder, *supra* note 20, at 325.

160. Netanel, *supra* note 21, at 341; *see* Sunder, *supra* note 20, at 269 ("Intellectual property is increasingly understood as a legal vehicle for facilitating (or thwarting) recognition of diverse contributors to cultural and scientific discourse.").

new access markets in promoting this diversity stems from two distinct but overlapping effects on creators.

First, new markets often create new revenue streams as described above with respect to sound recordings, cable retransmission, and VCRs.[161] Standard economic analysis of copyright predicts that this increase in revenue will motivate the production of more or higher-quality works,[162] and the emergent effect of this increase in production is to provide consumers more variety.

Second, the expansion of access markets reduces intermediaries' power to decide which creators will be permitted to reach an audience.[163] This change arises partly due to technology-related reductions in the economic costs of distribution. In a media environment where only trained musicians could translate sheet music into an aural performance, it was costly to assemble a group of professional musicians to play a piece. Relatively few songs could make it into wide circulation. With the advent of sound recordings, composers and performers obtained a much more cost-effective means for distributing songs, and a greater variety could circulate. The costs have dropped further still with digital distribution, allowing artists to reach their audiences without the need to win the approval of a studio or other intermediary.[164] Scholars have expressed optimism that these capabilities will lead to a flourishing of independent writers, bands, and visual artists.[165]

The increased likelihood of reaching an audience is also a function of competition between the old intermediaries and the new distributors. When only three broadcast television networks were available, network executives had broad discretion to choose which programs to feature and could systematically favor works coming from affiliated studios to the exclusion of any creators working outside that system.[166] When cable television introduced more channels, each new

161. *See supra* notes 48, 64, 80–83, 102–106 and accompanying text.

162. *See supra* Section III.A.1. Such revenues are, of course, not uniformly distributed, and incumbents will inevitably lose sales or potential sales to the newcomers. *See* Lemley & McKenna, *supra* note 19, at 104. The losers in this process often assert copyright claims in an attempt to stave off this competition. *Id.* at 104–05; von Lohmann, *supra* note 17, at 851; *see also* Christopher Jensen, *The More Things Change, the More They Stay the Same: Copyright, Digital Technology, and Social Norms*, 56 STAN. L. REV. 531, 552 (2003). These copyright suits are misplaced. This Article returns to these and related concerns in Section III.C.1, *infra*.

163. *See also infra* Section III.C (describing how removal of intermediaries also advances innovation).

164. Netanel, *supra* note 21, at 361 ("Expressive content broadcast over the air is . . . less diverse and creator autonomy far more constrained than in sectors where consumers buy creative works directly.").

165. *See, e.g.*, Ginsburg, *supra* note 13, at 1646–47; Netanel, *supra* note 21, at 364–65.

166. *See* Netanel, *supra* note 21, at 360 ("[C]orporate patrons are notorious for supporting expression that furthers their own objectives at the expense of artistic autonomy and diversity."); *id.* at 362 (describing problems that media conglomerates pose for democratic public discourse).

channel became an outlet for featuring other works or catering to more particularized tastes. In addition, competition among channels penalized the networks if they chose based on mere affiliation rather than audience demand. Greater market competition by no means guarantees quality, but it makes for more diverse programming than the alternative.

2. Autonomy

New access markets have also enhanced consumers' autonomy. Part of this autonomy comes from an increased capability to choose which works to consume as a function of the greater diversity of works described in the preceding Section. The proliferation of new works increases the likelihood that people will be able to find content consistent with their values as well as content that challenges them to confront viewpoints outside the mainstream.

These markets have also utilized technologies that enhance users' capabilities to engage with those works that would have been produced under the prior status quo. Through time-shifting, the humble VCR gave consumers greater autonomy to decide what they would watch and when they would watch it.[167] Fred Rogers, of *Mr. Rogers' Neighborhood*, stated the point provocatively:

> *I think that it's a real service to families to be able to record such programs and show them at appropriate times. . . . Very frankly, I am opposed to people being programmed by others.*[168]

We do not ordinarily describe people being "programmed" except in science fiction. But what we watch and listen to shapes us.[169] This may be especially true for children, though contemporary observations on the effects of "fake news" on politics remind us that adults, too, bear the imprint of their media diet.[170] Devices like the VCR and the MP3 player allow consumers to take greater control of their own programming. The autonomy to decide what to consume on the basis of its content, rather than the time it airs or which of our media devices we happen to be carrying, is one step toward a more democratic and participatory culture.

The potential for new access capabilities to advance autonomy is also evident when we consider needs that have not been satisfied. When Amazon released the Kindle 2 e-reader tablet in 2009, it included text-to-speech ("TTS"), a feature that allowed users to engage

167. *See supra* notes 79–83 and accompanying text.

168. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 445 n.27 (1984).

169. COHEN, *supra* note 20, at 25.

170. Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 850 (2018) ("[B]ecause of the way we process information, once a story is heard, even retractions are ill equipped to change our minds.").

a computerized voice to read e-books aloud.[171] While this struck many readers as a novelty, TTS was transformative for people with blindness, visual impairment, or learning disorders that interfere with reading because they could purchase or borrow e-books like any other reader and engage with the text on their own terms.[172] People with disabilities also gained the benefits of greater inclusion—the subject of the next Section. But these gains were short-lived, as Amazon disabled the feature later the same year in response to complaints from the Authors' Guild.[173] The copyright owners now have the power to decide whether or not to enable TTS for any given title.[174]

3. Inclusion

Another important consequence of cheaper, more widespread distribution is that it has brought access to news and popular culture to previously excluded communities. This effect is most obvious in a scenario like *Fortnightly Corp. v. United Artists Television*, where broadcasters effectively refused to build broadcast antennas that could reach communities in the mountainous regions of West Virginia.[175] Cable retransmission made it economically feasible for these communities to gain access even without further investment from the networks. A similar effect has also followed advances in sound and video recording technologies. People who have historically lacked the ability to attend performance venues—like rural communities too far from a theater, or low-income residents even in a culturally rich metropolitan area—have gained the capacity to hear the same music and see the same films with less travel and at lower cost.

This expansion of access has emergent effects. Beyond allowing more people to engage with a wider range of works, it also promotes informed democratic participation and fosters social cohesion. Commentators look back to the 1960s and 1970s as a time when the entire nation, despite their differences, tuned in to the CBS Evening News with Walter Cronkite: "And that's the way it [was]."[176] Yet millions of

171. Kyle Wiens, *E-Book Legal Restrictions Are Screwing Over Blind People*, WIRED (Dec. 15, 2014, 6:40 AM), https://www.wired.com/2014/12/e-books-for-the-blind-should-be-legal/ [https://perma.cc/9N8D-SA6T].

172. *See* Lee, *supra* note 151, at 801. This is just one episode in the much larger conflict between copyright law and adaptation of works into accessible formats. *See* Blake E. Reid, Copyright and Disability 1, 30, 54 (Aug. 29, 2020) (unpublished manuscript), https://ssrn.com/abstract=3381201 [https://perma.cc/C73W-GRNV].

173. Lee, *supra* note 151, at 865.

174. *Id.* at 865–66.

175. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 391 (1968); *see supra* notes 49–52 and accompanying text.

176. Dan Rottenberg, *And That's the Way It Is*, AM. JOURNALISM REV. (May 1994), https://ajrarchive.org/Article.asp?id=3612&id=3612 [https://perma.cc/Q6BZ-EPW7] ("Walter Cronkite's consistency and integrity transformed television from a novelty into the primary news source for millions of Americans."). *See also* Paul Schiff Berman et al., *A Law Faculty Listens to* Serial, 48 CONN. L. REV. 1593, 1598

Americans lived in regions where CBS did not broadcast.[177] Without local cable providers, these people would have been excluded from that national conversation. Cable retransmission and similar technologies have allowed more communities to participate in shared political discourse.

The diffusion of culture has followed a similar pattern. Technologies like the radio took sporting events outside the arena to become regional and ultimately national affairs. Mass culture arose from people's common exposure to the same media and gave people who otherwise had very different life experiences new ways to relate to one another.[178] While much of popular entertainment might be derided as mindless, even "bad" entertainment can provide a valuable springboard for parody and other criticism because so many people are familiar with it.[179] In one of the leading fair-use cases, for example, the Supreme Court observed that the popularity of Roy Orbison's 1964 rock ballad "Oh, Pretty Woman" set the stage for a bawdy rap parody that mocked "the white-bread original" as not only "bland and banal," but also ignorant of women's experiences in the way it romanticized a man catcalling a woman on the street.[180] Works like these that criticize popular works and expose their unexamined values are among the most celebrated in both copyright and First Amendment theory.[181] But the criticism is only effective because distribution markets have allowed for mass recognition of the original.

* * *

The expansion of access markets may advance copyright policy, but that observation alone does not tell us how courts ought to treat market refusal. Admittedly, the equities were not on the copyright industries' side in several of the cases discussed in Part II; they repeatedly tried to shut down or monopolize new markets rather than participate

(2016) ("Once upon a time, there was Walter Cronkite, the voice of authority and truth.").

177. *See* CABLE TELEVISION IN THE CITIES: COMMUNITY CONTROL, PUBLIC ACCESS, AND MINORITY OWNERSHIP 12 (Charles Tate ed., 1971) (documenting 850,000 household subscriptions across 800 local cable operators by 1962).

178. *See* Cohen, *supra* note 4, at 148 ("Mass culture has a value that goes beyond the merely economic; it is what gives us things to talk about with one another, to celebrate or criticize, and to define ourselves against.").

179. COHEN, *supra* note 20, at 97 ("Mass culture . . . forms the substrate for much that is proudly labeled alternative culture."); Netanel, *supra* note 21, at 350 ("It is part entertainment, but as it entertains, it often reveals contested issues and deep fissures within our society, just as it may reinforce widely held beliefs and values.").

180. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 573, 582 (1994).

181. *See* Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 549 (2004) ("Critical, transformative uses of copyrighted works against their owners' wills are analogous to the speech of political protestors attacking received wisdom, whose actions are generally thought to be at the heart of the First Amendment's protections.").

in them.[182] It is nonetheless plausible that a rule guaranteeing control of these markets to the copyright owner—rather than leaving the matter uncertain prior to litigation—would lead to more innovations in playback and distribution. In other words, perhaps the copyright industries would be the ones introducing VCRs and cable television if only they could rely on the promise of exclusive control over the resulting markets. The following Section explains why that result seems unlikely.

C. *Copyright's Innovation Policy*

A legal regime where third parties are allowed to introduce new playback and distribution technologies is more likely to produce new and valuable access markets than a system where all such development must come from the copyright industries. As a general matter, experts have long disputed whether competition is good for innovation.[183] Those arguing against competition point to historical examples where firms, freed from the pressures of market competition, directed their resources toward research and development;[184] those on the other side point to the creativity unleashed when innovators are free to enter a market without needing the permission of incumbent firms.[185] This Article stakes no position in that larger debate and instead focuses on the dynamics of access markets. Three features of these markets suggest that open competition is superior in this particular context.

1. Industry Conservatism

First, the copyright industries have historically resisted entering access markets.[186] This is due partly to a myopic failure to predict new

182. *See supra* notes 138–139 and accompanying text (arguing that the courts may have ruled against the copyright industries because they viewed these industries' behavior as unreasonable or opportunistic).

183. Lemley, *supra* note 142, at 1060.

184. *See, e.g.*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 100–02 (3d ed. 1962); Wu, *supra* note 13, at 329–30; *see also* Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 276 (1977) (arguing that the goal of attaining monopoly profits is a productive incentive in IP); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 215–16 (arguing the same).

185. *See, e.g.*, BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 320–28 (2010) (explaining why new entrants to a market may introduce innovations that established firms would not); Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. REV. 925, 945 (2001) ("Innovators are likely to be cautious about how they spend their research efforts if they know that one company has the power to control whether that innovation will ever be deployed."); *see also* Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 619 (1962) (arguing the monopoly power of incumbents discourages further innovation).

186. *See supra* Section II.A.

markets' profitability and partly to a knee-jerk threat response with respect to existing delivery channels. In the absence of outside competition, these factors would impede innovation from the industry players.

In retrospect, the copyright industries' attempts to eliminate sound recordings, cable television, and VCRs are puzzling. Why did the plaintiffs fight so hard against technologies that would prove to be wildly profitable for them?[187] One possibility is that they simply did not contemplate this sort of success. Fred von Lohmann traces this failure of prediction to the "innovator's dilemma," the late Clayton Christensen's explanation for why incumbent firms refuse to invest in disruptive technologies and instead treat them as threats.[188] Studios tend not to be the initial developers of the technologies because, even assuming that research and development expenses are small, the payoff is too speculative to justify diverting funds away from producing new content or making incremental improvements in existing technologies.[189]

The explanation for why the copyright industries treat these technologies as a threat even *after* they are developed requires more unpacking. Disruptive technologies, within Christensen's framework, are those that substantially displace what came before.[190] This is the trajectory of something like the telephone, which displaced the telegraph, or the cellphone camera, which has practically eliminated consumer demand for low- and mid-range stand-alone cameras. Creators—artists and their financial backers—are not threatened in this sense. They will not be displaced simply because their work is distributed in one medium versus another; their concern is only that they continue to be paid when the audience moves from one way of consuming media to another.

The true threat of displacement arises for *distributors* within the copyright industries.[191] Executives who are in charge of licensing films

187. *See supra* notes 48, 64, 80–83, 102–106 and accompanying text.

188. von Lohmann, *supra* note 17, at 844–53. *See generally* CLAYTON CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN NEW TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (1997).

189. CHRISTENSEN, *supra* note 188, at xx–xxi, 125, 132–38; von Lohmann, *supra* note 17, at 846–47.

190. CHRISTENSEN, *supra* note 188, at xiv–xvii. Christensen also restricts the definition of "disruptive technology" to include only those technologies that initially appeal to a niche market rather than mainstream customers. *Id.* at 42–48. This helps further explain why incumbent firms fail to see the value of the technologies and therefore fail to invest in them at the outset. *See id.* at 104–05 (suggesting that incumbent firms counter these trends by forming smaller subsidiaries to pursue these opportunities).

191. Lemley & McKenna, *supra* note 19, at 93 ("Content owners get paid—and in many cases significantly more—but existing intermediaries might not."); *see also* Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 20–21 (2010) ("As expensive methods of distribution yield to inexpensive alternatives, the justification for giving distributors the lion's share of the copyright fades.").

for television broadcast, or pressing CDs, may worry that the VCR or MP3 will upend their existing distribution networks. Even if creators continue to claim the same royalties, losses among distributors may trigger industry-wide concern because of extensive relationships or co-ownership of both creative and distributive operations within the copyright industries.[192] Sony—the defendant in the famous Betamax case—now produces both electronics and copyrighted media, including films and video games.[193]

In hindsight, it is clear that only some playback and distribution technologies have actually displaced incumbent distributors; movie ticket sales and licensure for TV continued to be profitable after the introduction of the VCR, for example, while sales of physical CDs have fallen as consumers have moved to digital downloads and streaming.[194] The copyright industries have nonetheless erred on the side of caution in resisting many of these technologies, perhaps because they were simply mistaken in their predictions or perhaps because risk-aversion or some set of cognitive biases has led them to favor the status quo.[195]

2. Spillovers

Second, innovations in playback and distribution technologies generate many positive externalities, or "spillovers," that enrich the public without a commensurate reward to those who develop the innovation.[196] This means the financial incentives for the innovator are less than the total social value of the invention. While this may limit the appeal for any party to develop the technology, this is especially problematic for the copyright industries because they already discount the value of new playback and distribution markets for the reasons described in the preceding Section.

192. *See* Cohen, *supra* note 4, at 161 ("[W]e might posit that the intermediary copyright industries are prone to favoring their own interests over those of authors and that this tendency requires appropriate structural correction."); Lemley & McKenna, *supra* note 19, at 93.

193. *Who We Are*, SONY, https://www.sony.com/en_us/SCA/who-we-are/overview.html [https://perma.cc/9BP2-TLBF].

194. Lemley & McKenna, *supra* note 19, at 93.

195. While most scholars now accept the argument that individual consumers systematically deviate from strictly rational decision-making, there is some resistance to the notion that firms are also subject to cognitive bias. Yet the reasoning behind this resistance is unclear. True, in their interactions with consumers, firms have better information and are more likely to be deliberative rather than impulsive. Mark Armstrong & Steffen Huck, *Behavioral Economics and Antitrust*, *in* 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 205, 205–06 (Roger D. Blair & D. Daniel Sokol eds., 2015). Firms' leadership nonetheless consists of individual people, and recent research has identified many cognitive biases and heuristics at work in their behavior, including a tendency to simply do what has worked in the past in the face of a difficult decision, *id.* at 223, and to "punish" other firms they perceive as behaving unfairly, *id.* at 212–13.

196. *See generally* Frischmann & Lemley, *supra* note 152, at 258, 268.

Consider the VCR wars. Hollywood preferred a device without a recording function.[197] This made sense from their perspective because their profits in the home-video market came from selling pre-recorded tapes.[198] Recording was at best neutral for them, since it was not feasible with extant technology to charge consumers for the privilege of recording.[199] To the extent it threatened their distribution model, as they alleged in *Sony*,[200] the recording feature was a negative. The new freedoms afforded by the recording function were irrelevant to Hollywood's economic calculus because the benefits accrued to the public without any additional reward to the copyright holder.[201] The copyright industries' inability to internalize these benefits—and their desire to utilize systems that would capture more of these benefits—has restricted the range of innovations they are likely to pursue.

3. Preference Shaping

Third, the copyright industries may resist technologies that give consumers more freedom over programming decisions because they would rather retain a greater role in shaping consumers' tastes and preferences.[202] This observation is the mirror image of the discussion of autonomy above.[203] While this may sound sinister, the motive is not (necessarily) social control so much as it is profit: intermediaries can make more money when they drive consumers toward their sponsors or other affiliates. But copyright exists to promote access to and creation of works, as well as greater engagement with works, not to protect distributors and certainly not to give specific distributors the power to control public discourse. Third-party innovators are often in a better position than the copyright industries to introduce new communications technologies because they are not beholden to the same interest in maintaining control.

* * *

Industry incumbents have many incentives to resist entering new access markets. It would be bad copyright policy—and bad innovation policy—to allow them to leverage copyright ownership into monopolistic control over these markets.

Fortunately, the courts have already identified a strategy for correcting the copyright industries' incentives. The decisions detailed in

197. LARDNER, *supra* note 68, at 33–35; PATRY, *supra* note 70, at 150–51.

198. *See* Menell & Nimmer, *supra* note 8, at 148.

199. *See infra* Section IV.A (describing this as a market failure due to prohibitive transaction costs).

200. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 483 (1984).

201. *See supra* Section III.B.2 (describing these benefits); Frischmann & Lemley, *supra* note 152, at 279 & n.80 (analyzing copyright owners' incentives).

202. *See, e.g.*, Balkin, *supra* note 21, at 28–31 (explaining how these concerns are traditional justifications for the regulation of the mass media).

203. *See supra* Section III.B.2.

Part II effectively implement a use-it or lose-it requirement for control of their works in new access markets, with an exception for cases of demonstrable substitutionary harm.[204] The implicit goal of this regime is not to deprive copyright owners of control, but instead to channel them toward entering the markets. The next Part describes how courts could expressly adopt this approach as a matter of doctrine.

IV. Fair Use in Access Markets

The foregoing policy analysis delves into factually dense and normatively contestable subject matter. The expansion of access markets offers a range of benefits to the public and even copyright holders themselves, yet several factors compel the copyright industries to resist them. Ideally, Congress or the Copyright Office would exercise their fact-finding capabilities to probe these issues and then update copyright law to secure the public benefits of these markets while also advancing creators' interests. In the meantime, however, courts must also play a role in shaping copyright policy. This is especially so with fair use, as a defense originally devised by the courts and ultimately codified in a manner that preserves the courts' discretion.

Courts can exercise this discretion through fair use. The fair-use defense requires the court to balance four factors; the fourth and arguably most important is the impact of the use on the plaintiff's market.[205] Defendants whose use poses no threat to the copyright owner's profits would seem to have a valid argument that their use was fair by reference to this factor. To develop this point fully, it is necessary to explain how the copyright industries' refusal to enter these markets constitutes a form of market failure.

A. *Market Refusal as Market Failure*

The primary economic justification for fair use is the correction of market failure: the systemic failure of private parties to coordinate with one another.[206] Ordinarily, the legal system trusts the market to

204. *See* Ginsburg, *supra* note 15, at 1389 (dubbing it a "license it or lose it" regime).

205. The four factors include (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion of the work used; and (4) the effect of the use upon the potential market for or value of the work. 17 U.S.C. § 107.

206. *See* Gordon, *supra* note 26, at 1615 ("[O]ne of the necessary preconditions for premising fair use on economic grounds is that market failure must be present."); Lunney, *supra* note 73, at 987 ("[B]ecause private markets are presumptively efficient, government intervention is justified only in cases of market failure."). While the "market failure" test is sometimes treated as though it were separate from the statutory four-factor test for fair use, it belongs conceptually with the factor-four analysis of "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4).

allocate resources such as copyrighted works to their highest-value uses—if the use actually generates more value than the status quo, then the user should be able to pay the copyright owner for the use.[207] Judicial intervention becomes necessary only where a market failure prevents such uses from taking place.[208]

This Article identifies a form of market failure that has not previously been identified: market refusal. Market refusal presents an obstacle to coordination when the plaintiff attempts to reject and enjoin a market without evidence of harm to its bottom line. This problem is distinct from the classic "transaction-costs" market failure that predominates fair-use scholarship.[209] *Transaction-costs* market failures arise where payment is simply not feasible with current technology; *market-refusal* scenarios are those where the copyright owner refuses to participate in the market independent of whether payment would be feasible. *Sony* provides an example of both.[210] It is the paradigmatic example of transaction-costs market failure—even if Hollywood wished to charge users for the privilege of recording their programs on the Betamax VCR, there was no cost-effective way to track and bill for this particular use of their copyrighted works.[211] Market refusal was also present. Even if such billing had been feasible, it seems that Hollywood would have resisted the Betamax because it wished to promote a competing video player that could not record from the television and wished to maintain greater control over the scheduling of programs.[212] Its refusal in this case stood in the way of an economically and socially productive use. It was also counterproductive, given that the film industry itself profited from the market for home video.[213]

Fortnightly provides another helpful illustration because it involves market refusal in the absence of prohibitive transaction costs.[214] In the years leading up to the *Fortnightly* decision, there were three major broadcast television networks (ABC, CBS, and NBC) and 800 local

207. Gordon, *supra* note 26, at 1612–13; *see also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 8 (2003).

208. Gordon, *supra* note 26, at 1614–15 ("Fair use is one label courts use when they approve a user's departure from the market.").

209. *See id.* at 1618; *see also* Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been* Part *of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 150–51 (2002–2003) (emphasizing that transaction costs are only one source of market failure).

210. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984); *see supra* notes 65–83 and accompanying text.

211. *See* Gordon, *supra* note 26, at 1655 ("[T]he economic cost to the copyright owners of identifying potential violators and bringing them to justice might be greater than any profits likely to be generated by deterrence of unauthorized taping.").

212. LARDNER, *supra* note 68, at 28, 33–34, 36; PATRY, *supra* note 70, at 150–51; *see supra* Section III.C.3.

213. *See* Menell & Nimmer, *supra* note 8, at 148.

214. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

cable providers.[215] While the cable providers were numerous, the networks were few enough in number that negotiations would have been feasible; the networks could have simplified the process further by offering a standard rate or by coming together, like the music industry had for radio, to offer a blanket license covering all their programming.[216] Yet the networks did not pursue a licensing strategy in earnest until after they lost in court. The networks had engaged in market refusal even though licensing was feasible and would have been profitable; the compulsory license subsequently brokered through Congress enriched the networks through both licensing fees and the expansion of their audience.[217]

Of course, not all refusals to enter a new access market are market failures.[218] Wendy Gordon's classic statement of market failure in copyright requires the use to be one that serves the public interest and one that does not substantially impair the copyright owner's own creation incentives.[219] Accordingly, the market refusal scenarios that qualify as market failures are those that advance copyright's normative goals as described in Part III while also leaving the copyright owner unharmed or providing an opportunity for profit through participation in the market. Identifying these scenarios requires confronting the distinct issues posed in new playback markets and new distribution markets, respectively.

1. Playback Markets

Playback markets raise distinct issues in terms of both potential market harms and public benefits. Playback markets, as distinguished from distribution markets, arise around devices or services that allow customers to view, listen to, or otherwise engage with copyrighted works. In a true playback market, these devices or services do not come bundled with copies of the works, and users must obtain their own copies or broadcasts through a separate distribution market. In practice, the dividing line between playback markets and distribution markets is blurred because many playback devices and services also facilitate distribution to some degree.

Market refusal is often unwarranted in playback markets because the devices or services in question actually benefit copyright owners rather than threaten them.[220] This occurs when the new uses complement existing, authorized markets. For example, the MP3 player in-

215. *See* CABLE TELEVISION IN THE CITIES, *supra* note 177, at 12.

216. *See supra* notes 107–108 and accompanying text.

217. *See supra* notes 49–64 and accompanying text.

218. Additionally, this Article is concerned only with licensing decisions involving markets for access to already-existing works. The issues are distinct from those that arise from licensing decisions involving the use of an existing work as an input to the creation of a new one. *See supra* note 158.

219. Gordon, *supra* note 26, at 1601.

220. *See supra* notes 48, 64, 80–83, 102–104 and accompanying text.

creased the number of songs a user could carry relative to a portable CD player, giving consumers reason to purchase more CDs.[221]

The growth of a playback market may also provide copyright owners a lucrative opportunity to sell copies to consumers in a compatible format. Consumers initially flocked to the VCR due to the appeal of taping television programs, but the film industry profited handsomely once they began selling pre-recorded tapes to the millions of households who owned these devices.[222] Similarly, the early music industry profited once they began collecting royalties on the sale of recorded music for pianolas and other playback devices.[223] Copyright owners can profit in these playback markets so long as they exercise the right to sell copies in these markets; they do not need to control the devices or services that make the market possible.

Copyright owners may nonetheless have sound arguments to enjoin these markets in two scenarios. First are the scenarios where the copyright owner can demonstrate harm. A true playback market requires users to obtain copies elsewhere, such as through the copyright owners' authorized distribution channels. These pure forms seldom exist, however, because many playback technologies have the potential to facilitate unauthorized distribution as well. This was true even for the VCR, where copyright owners complained about unauthorized taping.[224] The ultimate question is whether the harms of potential piracy are great enough to outweigh the gains through legitimate sales.[225]

My.MP3.com illustrates a service where the harm exceeded this threshold.[226] While its proprietors advertised the service as a way to upload one's CDs for ease of listening from any internet-connected computer, the system could be abused to provide access to those who had not paid.[227] Through the DMCA, Congress had already endorsed the industry's position that digital distribution would harm sales in the absence of effective copy-protection measures, which My.MP3.com lacked.[228] It was straightforward for the court to find infringement in light of this recognized harm.

Second, the playback market may not be justified if it does not meaningfully enhance users' capabilities. Market failure requires that

221. *See supra* notes 102–105 and accompanying text.
222. *See supra* notes 80–83 and accompanying text.
223. *See supra* note 48 and accompanying text.
224. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 420 (1984).
225. *See* Fromer, *supra* note 151, at 632 (arguing that what matters for fair use is the net effect, not the harm measured in isolation); Tang, *supra* note 28, at 8 (discounting any self-inflicted loss for failure to enter a market).
226. *See* UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).
227. 4 NIMMER & NIMMER, *supra* note 85, at § 13.05(G) n.697; *see UMG Recordings*, 92 F. Supp. 2d at 352.
228. Pub. L. No. 105-304, 112 Stat. 2860 (1998); *see supra* notes 129–130 and accompanying text.

the copyright owner's refusal actually deprive the public of a substantial benefit relative to the status quo.[229] The range of autonomy-enhancing capabilities is vast and spans a range of time-, space-, or device-shifting features as well as more specific innovations, such as e-readers that allow full-text search, annotation, or text-to-speech functionalities.[230] If the new market merely duplicates capabilities that users already possess, however, its value from the perspective of copyright policy is limited.

The Supreme Court's most recent copyright market refusal decision underscores this point. The defendant in *Aereo* utilized a warehouse filled with thousands of dime-sized antennas to offer a streaming service.[231] Subscribers could virtually "tune in" to one of these antennas to relay local television signals from the airwaves to the computer, tablet, or phone of their choice.[232] The programming was already available to users free and over the air; Aereo's service spared the user from having to acquire home antennas to tune in and allowed for "device-shifting" by those who would prefer not to be tethered to the television.[233]

While the networks had not provided the specific convenience of relaying broadcast television signals to one's computer or handheld device, they had arguably provided these capabilities in a different way. What was valuable about Aereo was its capacity to enhance the autonomy of those who wished to view the network's programs via a computer or handheld device and its inclusion of those who have made the decision to "cut the cord."[234] Rather than creating a convo-

229. Gordon, *supra* note 26, at 1601 (limiting fair use to cases where correcting the market failure serves the public interest).

230. *See supra* Section III.B.2 (explaining the value of this sort of autonomy for the advancement of copyright's normative goals).

231. Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 431 (2014).

232. The defendant provided separate antennas for each subscriber because it believed (correctly) that utilizing a single antenna for each channel and then relaying the signal for multiple subscribers would have made it liable for retransmission. *Id*. at 436–48, 445; *see* Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008). This in itself did not bode well for the defendant given the Court's history in penalizing those, like Aimster or Grokster, that attempted to exploit legal loopholes. *See In re* Aimster Copyright Litigation, 334 F.3d 643, 650 (7th Cir. 2003); MGM Inc. v. Grokster, Ltd., 545 U.S. 913, 936 (2005). *See supra* notes 106–119 and accompanying text.

233. *Aereo*, 573 U.S. at 431, 436–48, 445.

234. *See* Brief of Competition Law Professors as Amici Curiae Supporting Respondent at 16–17, Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431 (2014) (No. 13-46) (describing how "cord-cutters" and "cord-nevers" had been excluded). These obstacles are in addition to those that users faced in the transition from analog to digital broadcast signals, which required users to trade in their traditional "rabbit ears" antennas for digital versions. *See* Marguerite Reardon, *DTV Converter Boxes Aplenty, but Good Luck Finding an Antenna*, CNET (June 12, 2009, 6:25 PM), https://www.cnet.com/news/dtv-converter-boxes-aplenty-but-good-luck-finding-an-antenna/ [https://perma.cc/A7W7-WEPX] (observing that even the preliminary step of "figuring out exactly which antenna to use can be a big challenge").

luted system for intercepting broadcast signals, the networks provided similar capabilities through direct streaming on their own apps and websites as well as joint efforts like Hulu.[235] One could thus argue that Aereo was not justified in entering the market because it did not meaningfully increase access to network television relative to the status quo.[236]

2. Distribution Markets

Copyright owners have an easier time arguing that they should have the right to control distribution markets. The economics are simple: if a consumer obtains access to a copyrighted work from a new, unauthorized market, that consumer is unlikely to pay the copyright holder for access in the pre-existing authorized market. Market refusal nonetheless gives rise to market failure when the third-party serves an independent consumer base or the profits available in the new market could make up for any substitutionary harms.

Fortnightly exemplifies the independent audience scenario.[237] Broadcasters had not expanded their coverage into Clarksburg or Fairmont, West Virginia, or for that matter hundreds of other communities in the United States.[238] Community access cable television services used specialized antennas to intercept distant signals and retransmit them to viewers in these neglected communities.[239] It is difficult to see how the networks were harmed in the absence of any plan to extend their reach into these areas. Meanwhile, the public benefits of greater inclusiveness and diversity of programming are clear,[240] and even the networks stood to benefit to the extent that an increase in viewership translated into greater advertising revenues.[241]

---

235. *See, e.g.*, Brad Stone & Bryan Stetler, *ABC to Add Its Shows to Videos on Hulu*, N.Y. TIMES (April 30, 2009), https://www.nytimes.com/2009/05/01/business/media/01hulu.html [https://perma.cc/HR2M-YGMZ] (reporting that three out of the big four broadcast networks offered content on Hulu, specifically ABC, Fox, and NBC); Tim Moynihan, *How to Stream TV Shows Now that Aereo's Dead*, WIRED (June 27, 2014, 6:30 AM), https://www.wired.com/2014/06/aereo-alternatives-streaming/ [https://perma.cc/W2PC-5JM3] (describing non-cable streaming options for ABC, NBC, CBS, Fox, and Comedy Central).

236. As a counterpoint, sports and news programs are sometimes difficult to stream despite their availability on broadcast television, so if Aereo expanded access to these programs it may have served an unmet need. Aereo did not focus on this point, however, and it would still have faced liability for going beyond serving this need. *Cf.* Menell & Nimmer, *supra* note 8, at 149, 154–55, 157 (proposing copyright liability for device manufacturers where a reasonable alternative design could curtail infringement).

237. Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); *see also supra* notes 49–64 (discussing the case).

238. *See Fortnightly*, 392 U.S. at 390; CABLE TELEVISION IN THE CITIES, *supra* note 177, at 12.

239. *Fortnightly*, 392 U.S. at 390.

240. *See supra* Sections III.B.1 & III.B.3 (explaining how diversity and inclusion advance the goals of copyright).

241. *See supra* notes 62–66 and accompanying text.

There are limits to this example because truly independent audiences are rare. Consumers are especially difficult to isolate from one another in the present era of globalization. Copyright owners who sell cheaper textbooks in developing countries, for example, have complained of domestic losses because they cannot, as a practical or legal matter, block the import of these books into wealthier markets like the United States.[242] The difficulty is even greater for digital copies, which can be transmitted almost instantaneously around the globe. Consider video streaming. A third-party might provide access to a television program in a foreign country that the U.S. copyright owner has declined to serve.[243] Even though this would be valuable for foreign viewers, the copyright owner's existing market would be harmed if members of the domestic audience could obtain the show from that foreign website rather than through authorized channels.[244] This substitutionary harm would be enough to show that the new distribution market was not truly independent.

The presence of substitutionary harm is not fatal, however, to the market failure claim so long as the copyright owner's potential (or actual) profits in the new market are greater than its losses.[245] *White-Smith* provides an early example.[246] History suggests that the plaintiff composers correctly predicted that the sale of pre-recorded music would ultimately drive down the per-capita sales of sheet music; hardly anyone who buys a popular music album today, or any time in the past several decades, purchases the sheet music to accompany it. Yet market failure was still present in the composers' refusal because the royalties to be had in selling pre-recorded music were significantly greater than what they made selling sheet music alone.

Teleprompter demonstrates the same point.[247] For the sake of argument, let us assume the networks were correct in arguing they stood to lose advertising revenues when cable providers carried competing stations from hundreds of miles away.[248] Their complaints about lack of compensation would be legitimate, but it would still be market failure for them to refuse to participate in the cable-television market. Re-

242. *See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 525–27, 553 (2013) (finding this practice lawful under U.S. copyright law).

243. As a point of reference, consider the recent decision in *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904 (D.C. Cir. 2018), in which a Polish company infringed by supplying copyrighted television programming to U.S. consumers. *Spanski* presented an especially strong case for infringement because the copyright owner had in fact entered the market in both countries.

244. The proprietors of video streaming services attempt to keep these markets separate through the practice of "geoblocking," or restricting the availability of content based on location. *See id.* at 907.

245. *See* Fromer, *supra* note 151, at 632; Lev-Aretz, *supra* note 28, at 1416; Tang, *supra* note 28, at 8.

246. White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908).

247. Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974).

248. *See id.* at 411–12.

transmission fees and increased overall viewership made the networks far more profitable than they had been before.[249] As in *White-Smith*, the new market benefitted the public while also generating sufficient revenues for both the copyright owners and the new distributors to profit. The core problem was that the parties had not devised a satisfactory arrangement to split the newfound economic gains.

The optimal outcome in these scenarios is not one where the defendant reaps all the benefits of the new market and the plaintiff gets nothing. It would be better if the parties devised a licensing regime to share in the profits. As discussed above, however, the copyright industries are often resistant to new access markets.[250] The threat that a court will find fair use in the event of market refusal helps to counterbalance the copyright industries' resistance and pushes the parties toward working out an appropriate arrangement.

B. *Fair Use as Incentive*

Fair use is an appropriate response to market refusal not only because it is within the scope of the courts' power, but also because it counterbalances copyright owners' conservatism, produces important information on market effects, and allocates error costs to parties that may be better equipped to bear them.

Some scholars have argued against fair use in markets like these.[251] The commercial success of any market where consumers enjoy creative works is due in large part to those who created the works. Because it is a complete defense to infringement,[252] a finding of fair use denies the copyright owner any compensation and effectively disregards its contributions. Critics have also expressed concerns that the all-or-nothing nature of the defense distorts courts' decisions.[253] As an alternative, commentators have argued in favor of compulsory licenses or other state-imposed strategies for splitting the gains.[254]

These strategies are poorly tailored to market refusal cases. If these were cases where high transaction costs made it infeasible for the parties to coordinate, compulsory licensing might make sense. It could

249. *See supra* notes 62–64 and accompanying text.

250. *See supra* Section III.C.

251. *See, e.g.*, Ginsburg, *supra* note 15, at 1386–87; *see also* Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 J. COPYRIGHT SOC'Y U.S.A. 513, 525–27 (1999) (arguing for compulsory licenses even in "traditional" fair-use cases where one author builds on the work of another).

252. 17 U.S.C. § 107 ("[T]he fair use of a copyrighted work . . . is not an infringement of copyright.").

253. *See* Ginsburg, *supra* note 15, at 1385.

254. *See, e.g.*, Ginsburg, *supra* note 14, at 1391; *see also* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 41, 144–45 (2004); PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 15 (2003) (advancing a similar proposal); Kozinski & Newman, *supra* note 251, at 526–67 (proposing compulsory licenses in lieu of fair use for derivative works).

approximate the deal the parties would have struck if bargaining were possible. But market refusal is a different sort of market failure, one where the copyright owner declines to participate in a market even in the absence of transaction-cost barriers. These refusals are at odds with copyright's access policy, and they occur even in situations where the copyright owner itself could reap greater profits by entering the new market rather than fighting to maintain the status quo.

Fair use plays a productive role against this backdrop: awarding fair use in the face of market refusal effectively imposes a zero-royalty license on a plaintiff who sues without first attempting to actually negotiate a license or substantiate the claim that the market harms its interests.[255] The goal with structuring the rule this way is not to penalize the copyright owner. Copyright owners often deserve compensation and a degree of control over their works. Rather, the goal is to counter the copyright industries' conservatism in the face of new technologies where that conservatism is unwarranted. To truly make an impact, however, courts would need to expressly announce this rule so copyright owners could respond to the incentives it creates.

This approach would also produce better information to guide the courts' fair-use determinations. The plaintiff is likely to be better informed than the defendant regarding the impact of a particular market on its financial interests; requiring it to substantiate any claims of harm compels it to share that information. Requiring the plaintiff to provide evidence of any harms also creates a window for market testing. If copyright owners could prevail without making any substantial showing of market harm, they would be able to enjoin new markets in their infancy. These markets might ultimately be complementary to the copyright owners' existing markets or their alleged harms might be overstated, but we would never find out. By denying relief until the plaintiff can show that it is harmed, the courts would provide a window for the facts to emerge.

One potential objection to this approach is that the delay imposes costs on copyright owners in those cases where the new market ulti-

255. Another way to describe how fair use structures incentives in this context is that it operates as a "penalty default" rule. *See generally* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91–94 (1989). Penalty default rules compel a party to engage in a particular form of conduct by imposing an undesirable outcome if it refuses to do so. *See, e.g.*, Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1962 n.305 (2002) (describing an EU interoperability requirement as a penalty default that reduces the copyright owner's protection against reverse engineering for failure to comply); Katherine Nolan-Stevaux, *Inequitable Conduct Claims in the 21st Century: Combating the Plague*, 20 BERKELEY TECH. L.J. 147, 159–60 (2005) (describing the inequitable conduct defense as a penalty default for "playing strategic games" with the USPTO). As explained in the text, another advantage of the proposed approach is that it compels parties to share information; this is another recognized benefit of penalty default rules. *See generally* Ayres & Gertner, *supra* note 255.

mately proves harmful. The longer the infringement continues, the greater the damages are likely to be. The delay may also give the technology the chance to become popular among consumers, leaving the courts and Congress hesitant to alienate the public by enjoining it.[256] Copyright owners would accordingly bear the costs of the courts' error whenever the courts failed to recognize market harm in a timely fashion.

This objection is not fatal, however, because the copyright industries have historically been well-positioned to correct such errors. Incumbents in the copyright industries have repeatedly turned to Congress for relief after adverse decisions in the courts.[257] After the courts denied them royalties in extremely lucrative markets like those for sound recordings and cable television, they obtained licensing revenues through legislation.[258] They could seek similar relief in future cases if the courts struck the wrong balance. Technology pioneers, by contrast, have generally lacked the same sort of financial clout or legislative backing. This dynamic has become more complicated, however, as technology companies have grown increasingly prominent: Sony had the backing of the consumer-electronics industry in its day, and there is no disputing that tech-giants like Google and Amazon have the resources to engage in extensive litigation and lobbying. A different approach may be more appropriate for the scrappy tech start-up than a tech powerhouse.

All that being said, the need for such incentives can be avoided so long as the copyright industries have actually entered the market. Once they have done so, there is no market-refusal basis for refusing to enforce copyright. This is not to say that the copyright owner's willingness to license should be the sole criterion in determining whether to allow fair use; far from it. Prior scholars have identified the perils of

256. *Cf.* Gaia Bernstein, *When New Technologies Are Still New: Windows of Opportunity for Privacy Protection*, 51 VILL. L. REV. 921, 933 (2006) (explaining why regulation of new technology must occur while social and economic responses to the technology are still flexible).

257. *See supra* Section II.A.1 (detailing composers' and broadcasters' failed litigation and subsequent lobbying efforts).

258. *See supra* notes 43–48, 62–64 and accompanying text. Their success is no surprise from the perspective of public-choice theory, a theory of collective action that predicts concentrated interest groups will be more effective in advancing their interests through legislation than the general public. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 1 (1991). Even though the cumulative social value of deciding a policy issue in favor of the public may be greater than the private value of deciding it in favor of the interest group, the smaller individual stakes of each citizen and the temptation to "free ride" off the efforts of others make it difficult for the general public to organize. *See* MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 128 (1965). This is especially likely when part of the value of the use in question comes from spillovers that provide diffuse benefits to the public at large, which is often the case with access markets. *See supra* Section III.C.2.

replacing "fair use" with "fared use,"[259] particularly for traditional fair-use cases where an author builds or comments on a prior work.[260] Market refusal is just one form of market failure, not a catch-all or replacement for other approaches to fair use.

V. CONCLUSION

When copyright owners seek to shut down access markets, their objective goes beyond bad competition policy, bad communications policy, or bad innovation policy. Enjoining these markets would be bad copyright policy. The access afforded by new playback and distribution markets is instrumental to achieving copyright's goal of a more democratic and participatory culture. By bringing this point to light, this Article gives voice to a policy concern that has been latent in the courts' market refusal cases for over a century and provides guidance on how the courts can effectuate this policy going forward.

259. *See, e.g.*, Wendy J. Gordon & Daniel Bahls, *The Public's Right to Fair Use: Amending Section 107 To Avoid the "Fared Use" Fallacy*, 2007 UTAH L. REV. 619, 621–28 (2007); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 46–47 (1997).

260. *See* Ginsburg, *supra* note 15, at 1389–90.