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REGULATORY AND POLITICAL ECONOMIC PERSPECTIVES ON  
INTERNET INTELLECTUAL PROPERTY

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## **ABSTRACT**

Increased use of the Internet and social media has facilitated the arrival of a new set of challenges facing the current media environment, particularly in regards to intellectual property rights. The purpose of this critical analysis is to investigate the problems brought about by the Digital Age, focusing on the effects of social media and Internet use on intellectual property infringement and the factors at play behind legislation and litigation. The study begins with an overview of the historical development of intellectual property law and the Internet in the United States, as well as important Supreme Court cases concerning copyright infringement and recent telecommunications policies, including the Digital Millennium Copyright Act, the Stop Online Privacy Act, and the PROTECT Intellectual Property Act. These forces are then evaluated using the political economy approach to mass communications. Finally, this thesis analyzes current media challenges in terms of both policy and political economy.

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## Chapter 1

### Historical Context

#### Historical Development of Intellectual Property Law

Intellectual property is distinct from other forms of property due to the intangibility of the property it was created to protect. The field of intellectual property law encompasses three domains: patents, trademarks, and copyrights. Each one of these fields affords distinct protections to different categories of intellectual property. Copyrights provide protection for artists, authors, and others involved in the arts. Patents concern innovations associated with the sciences, including technological inventions and advancements in the field of medicine. The third prong of intellectual property law, trademarks, encompasses intellectual property in the commercial realm, protecting branding elements.

Like the United States themselves, American copyright law can trace roots to the English legal system. The invention of the printing press made the production of books much cheaper and more efficient, and the technology reached England in 1476. Nearly a century later in 1557, the Stationers' Company ruled printing and publishing as a monopoly. The Stationers were responsible for the registration of all printed titles and for issuing copyrights (Bettig, 1996, pp. 17-18). Monopoly ownership of publishing in England provided the Stationers' Company with the authority to consent to demolish any work that had not been approved by the Company or published by a member printer (Goldstein, 2003, p. 32).

British philosopher John Locke published his *Two Treatises of Civil Government* in 1690. His chapter on property in the second treatise is commonly looked upon as a foundation for

justifying copyright protection. Locke asserted that while all men share the earth, any creation that arises as a result of a man's labor was to become his property. In other words, a man has a natural right to anything he creates through his own work. Additionally, the second treatise included the right to exclude others from the use of personal property (Locke, 1690, Section 27). Locke's political theory is commonly used by supporters of copyright to argue for authors' natural right to protect their own works despite the fact that it is not clear whether Locke intended this natural right to extend to literary works. The philosopher was also one of the first to propose that works be granted public access after a number of years under the author's control (Bettig, 1996, p. 21). While Locke's theory provided a philosophical basis for copyright law, American copyright law favors a justification based on economic incentives for creation.

The first modern copyright law was established in England in 1710. The Statute of Anne—also known as “An Act for the Encouragement of Learning and for Securing the Property of Copies of Books to the Rightful Owners Thereof”—awarded all works in the Stationers' Company register copyright protection for twenty-one years. Any works created after the law's passage in April 1710 were to be granted protection for fourteen years, with the possibility to extend the copyright for an additional fourteen years (Bettig, 1996, p. 23). The Statute of Anne is not only notable for being the first form of copyright law; its passage also marked the end of a nearly two-century monopoly on publishing and ushered in a phase of free market exchange of ideas (Goldstein, 2003, p. 34).

While the original American colonies were still under British rule in 1672, John Usher received the first recorded copyright. Usher's copyright protected a legal document for the Massachusetts Bay Colony. Though the British system governed this particular copyright, it is “the only [copyright] recorded during the first hundred years of the colonial era” (Bettig, 1996, p.

24). Noah Webster, who is most commonly known for his work on the first American dictionary, was also an important figure in the field of copyright development in the United States. When Webster sought to publish an English textbook, he and other intellectuals lobbied the Connecticut legislature for literary property rights. America's first state copyright statute was established in 1783 as a result (Bettig, 1996, pp. 24-25).

Article 1, Section 8, Clause 8 of the United States Constitution granted Congress the power "To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The phraseology used in the clause creates a link between copyrights to protect science and patents as a form of protecting the useful arts. Congress passed the first national copyright statute in May 1790 to protect the authors of maps, charts, and books for a fourteen-year period with the potential for extension for an additional fourteen years. Throughout the nineteenth century, the statute afforded protection to musical compositions, engravings, plays, and sculptures as well (Khan & Sokoloff, 2001, p. 236). An amendment to the Copyright Act in 1865 declared photographic prints and negatives copyrightable (Goldstein, 2003, p. 46).

Congress revised the Copyright Act again in 1870, this time relocating copyright registration from the federal court system to the Library of Congress. The revision also required that those seeking to register a work had to provide two deposit copies; one copy was held as proof of registration, and the second was used to build the Library of Congress. Also included in the 1870 revision was the obligation for translators and dramatists of a work to acquire permission from the copyright owner (Goldstein, 2003, pp. 44-46).

More changes were brought about with the enactment of the Copyright Act of 1909. The Act maintained state copyright protection—also known as common-law copyright—for

unpublished works; federal protection took over once the work was disseminated. Published works were guaranteed federal copyright protection for twenty-eight years, again with the potential to double the period of protection with proper registration. The Copyright Act of 1909 brought with it new rights for authors and creators—the exclusive rights to sell, to print or copy, to publicly perform works for profit, and to make adaptations or derivative versions of their works. While the 1909 Act ushered in several significant developments in the field of copyright law, its passage before the full exploitation of such commercial inventions such as the phonograph, motion pictures, radios, televisions, and the computer meant that it would eventually need to be constantly updated (Gorman, 1991, p. 2). In fact, motion pictures were afforded protection by Congress in 1912 (Goldstein, 2003, p. 50).

Copyright law faced even more changes in 1976, when Congress chose to study and revise the 1909 Act. Notably, the new Act abolished the common-law copyright protection that had been created by the previous Act and codified it as statutory law. Federal copyrights became the exclusive form of protection for all works; additionally, works were given protection from the moment of creation, when it had been “fixed in a tangible medium of expression.” Creators were granted the right to public display as well, which was brought about with the development and use of televisions and computers. Additionally, the Act officially codified the fair use doctrine as part of statutory law, which allows the public to use copyrighted works for the purposes of criticism, comment, news reporting, teaching, scholarship, and research without infringing the original work (Pike, 2002, p. 15). The new Copyright Act of 1976 also changed the periods of protection for copyrighted works. “Works then in their first term or the renewal term of copyright had their term of protection potentially extended to seventy-five years, and

works created on or after January 1, 1978, are protected for fifty years after the death of the author” (Gorman, 1991, p. 3).

In 1998, the Sonny Bono Copyright Term Extension Act was signed by President Clinton. The Act extended copyright protection an additional twenty years (Netanel, 1999, p. 340). Rather than creating an incentive for future creators, the Extension Act helped those who already had copyright works; the Walt Disney Company was a player in lobbying for this particular piece of legislation (Merges, 2000, p. 2236).

Patent and trademark laws went through significant developments during this time period as well. Historically, the patent system was used as a mechanism through which monarchs could exert monopolies over specific areas of trade, earn revenue, or reward those who completed important work on behalf of the monarch. As patent law developed, it became a way to apparently incentivize scientists and inventors to create new technologies and scientific advancements. Patent laws were intended to provide protection for “the first and true inventor” for a limited time before the invention would become available to the public. The Patent Act of 1863 was responsible for the requirement that each patent application be reviewed by a qualified examiner, a system that is still in place today (Khan & Sokoloff, 2001, pp. 235-236). In his 1889 novel *A Connecticut Yankee in King Arthur’s Court*, Mark Twain describes the importance of an effective patent system:

That reminds me to remark, in passing, that the very first official thing I did, in my administration—and it was on the very first day of it, too—was to start a patent office; for I knew that a country without a patent office and good patent laws was just a crab, and couldn’t travel any way but sideways or backwards.  
(p. 68)



Mark Twain—legally named Samuel L. Clemens—was also progressive in the field of trademarks, becoming the “first writer to incorporate and register his pseudonym as a trademark (Khan & Sokoloff, 2001, p. 233).

The field of patent law necessarily changed with the growing prevalence of teams devoted to the development of new inventions. In the early 1990s, large organizations began to create research laboratories within their own facilities to promote the proficient development of technological advancements (Khan & Sokoloff, 2001, p. 242). Expanding on this model of efficient production of patentable technologies, corporations began to employ research and development teams—groups of people who were employed solely for their inventive capacities. Contracts between the corporation and the research team employees generally transfer all intellectual property ownership rights from the creator to the employer. Another change stemming from the emergence of research and development teams involved the naming of inventors on patent registrations. Original statutes declared that any patent that misidentified an inventor was to be declared invalid. However, the size of research and development teams increased the frequency with which such mistakes could be made; as a result, incorrectly identifying an inventor is no longer a reason to nullify the patent (Merges, 2000, pp. 2217-2218).

The third prong of the intellectual property law triumvirate, trademarks, developed with the nineteenth-century consumer economy. During this time such common brand names as Heinz, Quaker, Colgate, and Pabst became rampant in American consumer culture. Originally developing out of laws related to fraud, a national trademark law was established in 1905 using the logic of interstate commerce regulations (Merges, 2000, pp. 2207-2208). Trademarks are perhaps most unique because they are not a result of the creation itself; they are a result of consumer association of a particular product with the words and pictures developed by the

corporation to promote its product. Ownership rights of these branding elements “begin when the mark is used in commerce...[and] they last so long as the mark is used and retains its secondary meaning” (Gorman, 1991, pp. 5-6). The secondary meanings associated with the use of trademarks in the consumer marketplace encourage brand loyalty.

## **Historical Development of the Internet**

Amidst the progress of intellectual property law in the United States, the Internet—a technology that would eventually become one of the greatest challenges to the field of intellectual property—was also in its earliest stages of development. “[T]he Advanced Research Projects Agency (ARPA) was established in 1957 to respond to the perceived scientific and technological advantage the then-Soviet Union displayed in launching the Sputnik satellite” (FCC, 2007, p. 35). During this period, the Cold War and the potential for a nuclear attack were driving forces for the creation of new technologies. In fact, the first computer network “was modeled on a system developed to manage the distant early warning system of radar stations erected during the 1950s and 1960s in the Canadian arctic as a shield against possible Soviet attack” (Murphy, 2002, pp. 29-30).

Researchers in both the academic and defense fields played a key role in the development of the Internet. In 1962, Massachusetts Institute of Technology (MIT) scholar J. C. R. Licklider wrote the first description of such an infrastructure, entitling it the “Galactic Network.” His vision included globally located computers that could connect to one another through a highly developed infrastructure for the purpose of data sharing and access (Leiner et al., 2009, p. 23). In an effort to develop a telecommunications system that could survive a nuclear attack, the United States Air Force contracted researcher Paul Baran to identify potential methods to

strengthen the existing military infrastructure (FCC, 2007, p. 35). At the same time, MIT Ph.D. candidate Leonard Kleinrock published his dissertation, which was the first paper to introduce the theory of packet switching to replace circuit switching. Packet switching is the process used in Internet communications today (Kleinrock, 2010, pp. 26-28). The Information Process Techniques Office (IPTO) was also established in 1962 in order to build a link between universities and researchers (FCC, 2007, p. 35).

Another MIT scholar, Larry Roberts, was responsible for the creation of a dial-up connection that crossed the United States in 1965. The same year, Robert Taylor, associate director of the IPTO, was awarded a \$1 million contract to connect various research computers across the country to the ARPA researchers. With these advances, the previously independent work of researchers and ARPA developers fused to become the ARPANET (Kleinrock, 2010, p. 29). Just two years later, “the Department of Defense (DOD) issued a \$19,800 contract...for the purpose of studying the ‘design and specification of a computer network’” (FCC, 2007, p. 35).

Within the two years that followed, four host computers were added to the ARPANET as nodes, connecting research computers at UCLA, the Stanford Research Center, UC Santa Barbara, and the University of Utah (Leiner et al., 2009, pp. 23-24). The first host-to-host message was sent in October 1969, an event which marked an important achievement in the development of the Internet (Kleinrock, 2010, p. 32). Robert Kahn, an important architectural designer for the new system, introduced the ARPANET at the International Computer Communication Conference in 1972. Electronic mail was also introduced that year (Leiner et al., 2009, pp. 23-24). In 1973 Kahn worked with Vint Cerf to develop the Transmission Control Program (TCP) protocol, which would allow different network types to connect with one another. TCP allowed “computers to exchange information end-to-end across these

interconnected networks.” The fourth version of the protocol added the Internet Protocol (IP) component; TCP/IP became the DOD standard in 1980 (Kleinrock, 2010, pp. 34-35).

While the earliest networks were intended for closed scholar communities, the newly developed Internet system has since undergone a shift in purpose (Leiner et al., 2009, p. 27). The National Science Foundation achieved control of the national computer network from the government in the late 1970s, at which time it became known as the NSFNet. Connecting over 1,000 separate systems by 1984, NSFNet’s acceptable use policy limited connections to use in research and education. In the early 1990s, NSFNet changed the acceptable use policy to include commercial activity (Murphy, 2002, pp. 30-31).

The introduction of microcomputers into the market in 1978-1979 also propelled the popularity of Internet connection. “By 1984, 10 percent of U.S. homes had microcomputers, and a fifth of them were equipped with modems. Six years later in 1990, 22 percent of U.S. households had computers, more than half of which were capable of telecommunications” (Murphy, 2002, p. 32). Growing use of microcomputers prompted the development of Internet commodities and commercialism. Online gaming and entertainment became popular in the late 1970s, opening the door for a new kind of consumer product in the electronic realm.

Some activists such as computer programmer Tom Jennings opposed the creation of an online consumer culture. He developed a bulletin board system called Fidonet to allow users to exchange files without a profit motive. Jennings based the network “around the principle of the right of ordinary people to self-regulate their computer-communications relationships without any reference to state or commercial entities” (Murphy, 2002, pp. 33-37). Despite the work of such believers in a non-profit communications system, the Internet system in today’s media environment is largely commercialized. The Internet creates a great potential for the selling and

sharing of information within a society, but it also presents many new challenges in relation to media regulations and intellectual property law.

## Chapter 2

### Telecommunications Policy and Litigation

#### Overview of the Fair Use Doctrine

The addition of the fair use doctrine to the Copyright Act of 1976 afforded the public the right to use copyrighted works without acquiring liability in certain instances such as when a work is used for criticism, comment, news reporting, teaching, scholarship, or research (Pike, 2002, p. 15). While this list provides a decent guideline for evaluating liability, there are many circumstances in which the distinction between fair use and infringement are not clear. For this reason, courts are required to evaluate four primary factors when considering cases of potential fair use: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.

In regards to the purpose and character of the use of a protected work, courts evaluate whether the copier intends to take advantage of the work for commercial value, whether the work is transformative, and whether the use was in good faith. The exploitation itself—rather than the venue in which the copy appears—must produce a commercial gain for the copier in order for the commercialism component to apply. For example, using copyrighted images in a commercial medium such as a magazine could be considered a noncommercial use if the images themselves were not used to promote the sale of the magazine (Gray, 2012, pp. 9-10). Courts generally favor educational or non-profit uses to commercial uses (Pike, 2002, p. 15). However, there are still many copyright-related restrictions placed on academic uses of protected works. Another important aspect in determining fair use is the distinction between transformative and

derivative uses of a copyrighted work. Derivative rights are granted to the original creators and cover new works based on the original; for example, developing a screenplay based on a novel would be considered a derivative use, and anyone wishing to create a derivative work must purchase a license from the original creator. On the other hand, transformative works change or add to the meaning of the “original” product, becoming so different that they must be considered new works. Courts also consider whether the fair use involved good faith, though this is a less frequently evaluated factor (Gray, 2012, pp. 11, 13).

In the 2007 case *Perfect 10 v. Amazon*, Perfect 10, Inc. filed actions against Google and Amazon for using thumbnail images to provide a link to the company’s website. Perfect 10 earned revenues in part through the marketing of copyright adult images to those willing to pay a subscription fee for access to the site. The company argued that Google’s use of thumbnails constituted an infringement of Perfect 10’s rights to display and distribute their copyrighted images. The Court of Appeals for the Ninth Circuit held that thumbnail versions of Perfect 10’s copyrighted images constituted a transformative use when displayed on a search engine. The court also determined that Google’s actions were compatible with good faith (*Perfect 10 v. Amazon*, 2007).

The second component in a fair use case is the nature of the copyrighted work. Generally, a finding of fair use is more likely to stem from a primarily informational work than one that serves a merely creative purpose. The use of informational sources is more likely to serve the purposes of accepted fair uses such as education and research. “The scope of protection also is greater with respect to works that have not already been published, because the author has an interest in controlling the work’s first publication” (Gray, 2012, p. 14). The

*Perfect 10* case (2007) involved creative images that had previously been published. Evaluation of this part of the fair use test therefore weighed slightly in favor of Perfect 10, Inc.

Determining the amount and substantiality of the portion used requires both quantitative and qualitative analysis. As intuition would suggest, a fair use defense becomes more difficult to argue as the amount of the original work taken increases. However, it is possible that a small portion of the original is so true to the fundamental nature of the work as a whole that it cannot be considered a fair use. For example, when *The Nation* magazine published about 400 words verbatim from the unpublished memoirs of President Ford, the Court determined that they were not protected under fair use, noting: “[a]lthough the verbatim quotes in question were an insubstantial portion of the Ford manuscript, they qualitatively embodied Mr. Ford’s distinctive expression and played a key role in the infringing article” (*Harper & Row v. Nation Enterprises*, 1985). In this instance, the Court upheld the notion that the unpublished memoirs as intellectual property constituted a type of private property that must be protected.

The final factor in determining a fair use case hinges on the effects of the copying. Courts specifically consider the market in which the original copyright owner would enter. If the copied work would effectually provide a replacement for the original within that market, then it will likely violate fair use principles; transformative works would, however, be less likely to interfere with the copyright holder’s place in the market (Gray, 2012, p. 15). In evaluating the *Perfect 10* case, the Ninth Circuit affirmed the district court ruling that “Google’s use of thumbnails did not hurt Perfect 10’s market for full-size images.” Despite the district court’s holding that thumbnail images would likely harm the potential market for Perfect 10’s cell phone image downloads, the Ninth Circuit held that the potential harm remained purely hypothetical, and that without proof of harm, this factor would not favor either party (*Perfect 10 v. Amazon*,



2007). Perfect 10 tried to argue that consumers who accessed free thumbnails would have otherwise purchased smaller versions of the same picture for their cell phones, though there is no way to prove that this behavior would occur. Lost profits, or the mere potential of lost profits, are the industry's main complaint.

Proponents of the fair use doctrine argue that it is a necessary element in maintaining a balance between the need to incentivize new creations and a public right to access information. This balance manifests itself in a dichotomy between private and public information. Private information restricts access through costs and provides benefits to a relatively small number of individuals; in terms of copyright law, private information includes all works that are covered under a copyright. Public information, on the other hand, includes works in the public domain that are widely accessible and have the potential to benefit everyone in a society. Opponents of the fair use doctrine argue that this distinction is harmful and suggest that cases of copyright infringement should be evaluated in the context of commercial and contract law, and by studying the social utility of copying. The focus in copyright cases should shift from the users of a resource to the resource itself (Campbell, 2010, pp. 322, 327).

### **Significant Court Cases**

Two important cases relating to copyright infringement in a new media environment are the Supreme Court case *Sony Corporation of America v. Universal City Studios, Inc.* (1984), which involved the fair use test, and direct infringement case *Cartoon Network LP and Cable News Network v. CSC Holdings, Inc. and Cablevision Systems Corporation*, which was evaluated by the Court of Appeals for the Second Circuit (2008). Both of these cases dealt with

devices used to record television that were met with legal challenges from broadcasters. In each case, the respective courts ruled in favor of the company in control of the recording technology.

Sony's Betamax video recording technology allowed customers to tape copyrighted television content and replay that programming at a later time. As creators of television content that could potentially be recorded by Betamax users, Universal City Studios and Walt Disney Studios sued Sony Corporation for copyright infringement. In addition to infringement issues, the two corporations were also concerned that the Betamax technology would lead to consumer "librarying," which would reduce their profits in the home video market. The Supreme Court ultimately held that Betamax technology would not incur liability because its primary purpose of personal time-shifting constituted a non-infringing fair use. The Court noted that Sony effectively demonstrated that since broadcast television is free to the public, licensees would not object to time-shifting in a private setting. Additionally, "respondents failed to demonstrate that time-shifting would cause any likelihood of nonminimal harm to the potential market for, or the value of, their copyrighted works" (*Sony Corporation of America v. Universal City Studios, Inc.*, 1984). The issue of "librarying" was not formally resolved in the Court's decision.

In question in *Cablevision* was a Remote Storage DVR System (RS-DVR) that allowed customers to record cable programming, which was saved on Cablevision's hard drives. The plaintiffs in this case own copyrights to programming that could be recorded by Cablevision customers. Cartoon Network and Cable News Network, owned by Time Warner, sued for copyright infringement, "[alleging] that Cablevision's proposed operation of the RS-DVR would directly infringe [plaintiffs'] exclusive rights to both reproduce and publicly perform their copyrighted works" (*Cartoon Network LP v. CSC Holdings, Inc.*, 2008).

The RS-DVR system aggregates and transmits programming through a coaxial cable. The system sends the data stream through a buffer, after which point the data is reformatted and sent to the Arroyo server, which contains two additional buffers and hard disks. Consumers use a remote control to direct the recording of video programming. The Second Circuit did not hold Cablevision directly liable for infringement of plaintiffs' copyrights, noting that the company could not control which programs were made available on each channel. Additionally, the court held that the district court incorrectly concluded that Cablevision rather than its customers was responsible for the copying (*Cartoon Network LP v. CSC Holdings, Inc.*, 2008).

The court also studied the operation of the RS-DVR system in relation to the Copyright Act's transmit clause to determine whether use of the technology constituted a public performance. 17 U.S.C. § 106(4) codifies the copyright owner's right to publicly perform the work. The Act's definitional section defines the public performance right:

To perform or display a work "publicly" means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times. (17 U.S.C. § 101)

In regards to the "transmit clause," the court ruled that Cablevision was not in violation of plaintiffs' rights because the RS-DVR system was designed to transmit to only to one subscriber using a copy made solely by that individual. Therefore, a transmission made through the RS-DVR system could not be considered a public performance (*Cartoon Network LP v. CSC Holdings, Inc.*, 2008).

## **Recent Telecommunications Regulations and Debate**

President Clinton signed the Digital Millennium Copyright Act (DMCA) into law on October 28, 1998. The DMCA was the first piece of legislation designed specifically to address intellectual property rights in the digital environment, and was developed using two 1996 World Intellectual Property Organization treaties: the Copyright Treaty and the Performances and Phonograms Treaty (Netanel, 1999, p. 332). The DMCA is most well-known for its addition of the Copyright Protection and Management Systems chapter to the Copyright Act, which states that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title” (17 U.S.C. § 1201). Section 1201(3)(A) states that to circumvent a technological measure means “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner.” Additionally, the DMCA prohibits the development or sale of any device that could be used to circumvent copyright protections. However, these restrictions also effectively deny access to circumvention technologies to those wishing to make non-infringing copies of a work (Netanel, 1999, pp. 333-4).

In addition to circumvention restrictions, the DMCA was responsible for the creation of four safe harbors for online service providers in Title II—Online Copyright Infringement Liability Limitation Act—codified in Section 512 of the Copyright Act (Netanel, 1999, p. 336). The first safe harbor involves transitory digital network communications. Service providers may avoid liability by acting as a common carrier: this means that the transmission of the copyrighted work must have been directed by another party, that this party was also responsible for choosing the recipient, that the service provider had no role in content selection, that no part of the content

was modified, and that any copies made for purposes of transmission were not held in the system (17 U.S.C. § 512(a)).

The second safe harbor involves system caching, the temporary storage of material on a system or network operated by the service provider. Service providers may avoid liability for temporarily storing copyrighted material within their systems when another party is responsible for making this information available. This party must also direct the transmission to another individual. Storage of infringing material must be made by the service provider only through an automatic process to make it available to subscribers. The service provider must also meet several conditions to avoid liability: no content may be modified during transmission, the service provider must comply with accepted industry rules when the originator directs updating processes, the service provider may not interfere with material returned to the originator that would be available if it had been sent directly from the recipient, and system users must be able to access the material if they meet conditions to access put in place by the originator. Finally, and perhaps most importantly, the service provider must remove infringing material within a timely manner after receiving notification that the material is, in fact, infringing (17 U.S.C. § 512(b)).

Regulations regarding information residing on systems or networks comprise the third safe harbor. Generally, this safe harbor provides protection to service providers for holding infringing material in their systems if it was directed by the user. More specifically, this protection is provided only if the service provider has no “actual knowledge that the material or an activity using the material on the system or network is infringing,” if the service provider receives no financial benefit from the infringing activity, and if the provider removes infringing

material after notification. The service provider must have also “designated an agent to receive notifications of claimed infringement” (17 U.S.C. § 512(c)).

The fourth safe harbor concerns information location tools such as hyperlinks. Service providers are not liable for providing links to infringing material under certain conditions. First, the service provider must not have actual knowledge of the infringing activity. No financial gain can result from the infringing activity “in a case in which the service provider has the right and ability to control such activity.” Again, the service provider must remove infringing material after being informed of its presence as defined in subsection (c) (17 U.S.C. § 512(d)).

The DMCA was the last Internet intellectual property legislation to be passed into law, but a new round of legislation surfaced in late 2011. The Stop Online Piracy Act (SOPA) was introduced in the House of Representatives, and PIPA, the PROTECT (Preventing Real Online Threats to Economic Creativity and Theft of) Intellectual Property Act was introduced in the United States Senate (Stanton, 2012, p. 7). These bills were proposed due to the ease with which intellectual property can be copied and transmitted in the digital age. The effect has been a battle between Hollywood and Silicon Valley (Potter, 2012).

Broadly, the bills would have allowed for government power to monitor online intellectual property infringement. If the bills had passed, the Justice Department would have been able to obtain court orders to prohibit search engines from providing results for infringing websites and to order service providers to restrict users from entering blacklisted sites. Additionally, SOPA “[would have barred] the distribution of tools and services designed to get around such blacklists.” Rights holders would have been given the ability to force ad networks and financial institutions to stop doing business with infringing sites. These agencies would

have been granted legal immunity if they chose to stop working with infringing sites without being prompted (Kravets, 2012).

News of the proposed legislation prompted arguments from many major website operators, who claimed that the passage of these proposed bills would result in a form of Internet censorship. Many Internet companies argued that they would in effect become “online police,” and that liability for linking to infringing material would fall on the companies themselves (Potter, 2012). In response, major companies such as Wikipedia, Reddit, MoveOn.org, and Tumblr participated in a blackout on January 18, 2012. According to Wikipedia co-founder Jimmy Wales, more than 162 million people saw the anti-SOPA/PIPA message displayed on the site that day (Peckham, 2012). Chairman and CEO of the Motion Picture Association of America (MPAA) and former senator Chris Dodd were both against the blackouts that took place in January 2012. Dodd said of the blackout participants: “it is an irresponsible response and a disservice to people who rely on them for information and use their services...It is also an abuse of power” (Molina, 2012). Congress cancelled voting on the bills after receiving opposition, and the proposed legislation was shelved. However, the struggle between Hollywood intellectual property interests and the Internet is far from over (Brodsky, 2012).

### **New Challenges in the Digital Age**

One important aspect of the Internet is the ease with which users can share information; however, in many ways, this is also one of the biggest problems. Many communications scholars have remarked on the ways the Internet and new technologies change the very nature of copies. In many ways, copyright law is much better suited to protect earlier methods of copying, which took much more time and effort than digital copying. Technology can now be used to

make multiple perfect copies of an original work in a very short period of time; as a result, copyright owners have more difficulty exercising control over their works (Samuelson, 1990, pp. 324-326). Additionally, the technologies themselves are often responsible for automatically creating copies to be used during transmission. Because of this process, copies can be made unintentionally by users directing a transmission (Hayes, 2000, p. 368). The ease of transmission afforded by the Internet also allows pirated works to spread quickly, creating yet another dilemma because “copyright law does not give the copyright owner the right to seize pirate copies that have found their way into the hands of consumers” (Samuelson, 1990, p. 327).

In addition to increased ease of transmission, the ease of manipulation of digital works is another issue facing the role of copyright on the Internet. With programs such as Photoshop and digital sampling software, individuals are now able to edit copyrighted works easily using technology. One recent trend brought about by new technologies is the layering of multiple songs to create a mash-up; this practice has sparked a great deal of debate about whether this constitutes copyright infringement, or whether mash-ups should be considered transformative works. Digital works are much easier to steal than print copies, and they take up much less space, which makes infringement a more effortless task. Another problem stems from regulatory classifications. When copyright laws were first enacted, works existed only in the form in which they were created; now a print novel can also appear in an online edition for devices such as Kindles, on Google Books, or as audio books recorded on CDs. New digital media technologies make the classification of works more difficult (Samuelson, 1990, pp. 329, 332-334).



## Chapter 3

### Political Economy of Mass Communications

#### Introduction to Political Economy

Ideally, media systems in a democratic society should serve a few very basic functions in order to promote and maintain democracy. The first normative goal of a democratic media system is to keep citizens informed because “a free people can govern themselves only if they have access to independent information about the issues of the day and the excesses of the powerful” (Nichols & McChesney, 2010, p. 12). Since informing the citizenry is the first step in self-government, journalism should be a public rather than private good, available to all members of society and invested in public rather than commercial interests. Additionally, media should be responsible for monitoring those who hold the most power in a society; this is the classic watchdog function of democratic journalism. Following from the first function, keeping the public informed of wrongdoings within government and Big Business allows citizens to have a stronger hand in their own self governance. Only a journalistic structure committed to accurate reporting can produce the kind of informed citizenry that is necessary for democracy (Nichols & McChesney, 2010, p. 13). Another important aspect of a democratic media is the recognition and encouragement of diversity (Herman, 1992, p. 24). Minority groups are often ignored within a commercial media system; a democratic media would serve the entire public by including the views of traditionally under-represented groups in a society.

Unfortunately, the ideal of a democratic society comes into conflict with commerce, largely due to the fact that mass media outlets are owned and controlled by some of the most wealthy and powerful people in the country, who make up the ruling capitalist class. Though the

Occupy Wall Street movement that began in fall 2011 classifies the richest members of society as “the 1%,” the true ruling capitalist class falls within one-tenth of that percent. The average income of this group nearly quadrupled between 1979 and 2007, a statistic that stands in stark contrast to the mere 18 percent increase for the poorest members of society during the same time period (Moberg, 2012, p. 20). Income disparity in America has not been this pronounced since 1928, just before the Great Depression (University of California, Berkeley, 2007). In addition to income, these individuals and families hold vast amounts of wealth, which includes stock holdings, bonds, retirement funds, trust funds, and real estate holdings. The richest ten percent of Americans controlled almost three-quarters of the nation’s wealth in 2010 (Center on Budget and Policy Priorities, 2010). American society is characteristically capitalist in which “social cohesion is largely due to the existence in all of its elements of a desire to be in the ruling class above it and to avoid being in the working class below it.” This ruling class maintains power by either occupying powerful positions themselves or by using their influence to ensure that only those with similar principles are hired and those who fight the system are fired (Sweezy, 2007, pp. 129, 134).

One relative measure of the ruling capitalist class is the *Forbes* 400 Richest Americans list, which is published each year. In 2012, media executives accounted for thirty-five of those coveted spots. Rupert Murdoch—Australian-born media mogul and owner of News Corporation—is ranked as the thirty-sixth richest man in America, worth \$9.4 billion last year. Also occupying the 2012 list are notable movie industry players George Lucas (ranked 120 and worth \$3.3 billion) and Steven Spielberg (ranked 125 and worth \$3.2 billion) and several heirs to the Hearst Corporation fortune. These vast fortunes place these individuals safely in positions of power in capitalist America. *Forbes* also publishes a list of America’s highest-paid chief

executive officers. Walt Disney Company's Robert A. Iger appears at number seventeen, with an annual salary of \$39.8 million. Rupert Murdoch appears on this list as well, this time appearing at position forty-two. He received a salary of almost \$25 million dollars in 2012. In comparison to many other CEOs appearing on this list, Murdoch's salary seems small; however, he and his family also control more than \$6.6 billion in company shares, significantly more than most others on the list. This specific form of compensation further solidifies Murdoch's power over the company. Murdoch owns roughly 40 percent of News Corporation's stocks, likely more than any other single shareholder, so even in the event that he would step down as CEO, he would still maintain a significant amount of control over the company. Also of note in both lists is the fact that a striking majority of these power figures are men.

Due to the severe concentration within the media industry, the normative goals of the media system stand in stark contrast to the goals that are actually put into play because media executives are motivated by external forces. The ruling capitalist class utilizes the mass media to enforce its ideology through trade publications and "solid" newspapers (Sweezy, 2007, p. 133). According to the consciousness industry theory of communications, the primary goal of the capitalist-owned media is to gain the consent of the dominated classes by teaching the public that the existing power structure is natural and necessary to gain their consent. "The media here are literally an industry which attempts to produce a form of consciousness in the audience that benefits the class that controls the media and industry in general" (Jhally, 1989, pp. 67-68).

The immense power held by the richest members of society results in many other factors that negatively influence the media's ability to serve a democratic function. In general industry terms, the dual economic structure of a given market includes core and periphery firms. Core firms are the largest and most powerful corporations in a market, including the top 1200 or so

businesses in America. In the media industry, the core firms would be the corporations owned and operated by the members of the *Forbes* 400 Richest American's list, as well as those managed by highest-paid CEOs. The periphery contains the remaining 18 million small and medium-sized businesses that have less market power (Bowles & Edwards, 1993, p. 229).

Within the core of the media industry, five companies can be identified as the most influential in the market: Comcast/NBC; National Amusements, which includes both Viacom and CBS; Walt Disney Company; Time Warner; and News Corporation (Advertising Age, 2011). These companies can use multiple tactics to maintain and earn more power within the market, including mergers, joint ventures, cross-ownership, and alliances (Bettig, 1997, p. 141).

Another common method companies employ to maintain their power positions is integration both horizontally to gain access to several types of markets, and vertically to control modes of production, distribution, and exhibition. Between World War II and about 1970, large firms "branched out from their core activities to a wide range of related and unrelated sectors... in order to diversify their holdings and stabilize income and revenue flows in spite of business cycles" (Bettig, 1996, p. 37). Concentration tends to override competition in the 20th century. For example, News Corporation controls television and film production through Twentieth Century Fox Television, Fox Broadcasting Company, and various other stations; television programming distribution is controlled through Fox News Channel, Fox Movie Channel, FUEL TV, and various other channels. The media giant also owns various satellite television stations, Internet sites such as hulu.com, and publishers such as HarperCollins. Owner Rupert Murdoch is perhaps most well-known for his involvement with the newspaper industry. News Corporation controls prominent American newspapers *New York Post* and *The Wall Street Journal*, as well as many international papers. In addition to the traditional categories of ownership, some media

corporations—most notably Walt Disney Company—also use theme parks, cruise lines, and resorts to promote a corporate ideology. Disney also developed a line of consumer products such as apparel, house wares, and toys for sale at those parks and in retail stores throughout the country (Columbia Journalism Review, 2013).

Core companies can also assert and increase their power by creating ties to the core firms in other industries. Informal ties are developed among the big industry players through corporate interest groups, interlocking directorates, and trade associations. Corporate interest groups form with allied stock ownerships and other financial ties. Historically, such groups have formed around banking and family interests. During 1935, an interest group grew around J. P. Morgan and Co., the First National Bank of New York, and an addition thirty-nine prominent firms in the investment banking industry. Family interests formed around the powerhouse families of that period: the Rockefellers, the Mellons, and the Du Ponts (Fusfeld, 1988, p. 415). Such corporate interest groups were allowed to evolve until they became so large that the failure of one could create a domino effect in the market; this behavior led to the Great Recession in late 2007.

A second form of informal ties involves making use of interlocking boards of directors. Interlocking directorates are formed when members of a company use their positions on other companies' boards of directors to influence the market. While it is illegal for competitors to sit on one another's board of directors, these interlocks are formed indirectly when board members from separate firms sit on the board of a third company together. While the use of interlocking directorates benefits the firms involved, the practice can have negative effects on the market, and ultimately, consumers. The Federal Trade Commission listed several influences that interlocking directorates could potentially have on the market: limited competition, preferential treatment for interlock members and access to the market, and several more (Fusfeld, 1988, pp. 416-417). For

example, News Corporation maintains interlocks with several renowned American universities, financial services firm Morgan Stanley, Hewlett-Packard Company, the U.S. Justice Department, the Motion Picture Association of America, and dozens of other companies (Bettig & Hall, 2012, pp. 82-84). The Walt Disney Company also has ties to prominent American universities and the Motion Picture Association of America, as well as banking and financial interests Bank of America and Morgan Stanley (Bettig & Hall, 2012, pp. 70-71).

Lastly, trade associations connect firms within similar lines of business. The objective of these groups is to promote collective interests within a particular economic sector. Members of trade associations generally use similar cost-accounting methods and report prices in order to create a method for pricing comparable products. Another common activity is the reporting of sales and inventory to restrict output, thereby increasing demand and raising prices. These practices are technically legal, but may lead to tacit collusion such as price fixing. Trade associations also commonly work as political lobbyists to promote or interfere with legislation and administrative rulings (Fusfeld, 1988, p. 417).

Important media industry trade associations include the Association of American Publishers, the Motion Picture Association of America, the National Association of Broadcasters, the Newspaper Association of America, and several others (Mondo Times, 2012). In the media industry, trade associations often lobby for the protection of intellectual property rights to protect their financial interests in making their products artificially scarce. Comcast Corporation, National Amusements, and News Corporation are all members of the Big Five, and all of them have deep pockets to lobby for their own interests. In the 2012 cycle, Comcast spent over \$14 million, National Amusements spent more than \$7 million, and News Corporation spent over \$6 million on lobbying. These three media giants have a few spending motivations in

common: Telecommunications and Copyright, Patent & Trademark issues both appeared on each company's top five lobbying issues, and all three most frequently lobbied the PIPA bill in the Senate (OpenSecrets.org, 2012).

The importance of advertising revenues in media production also changes the content creation process. Media corporations rely on the income brought in by advertisers—a mere one-point decrease in Nielsen ratings can result in a loss of \$80 to \$100 million a year. In the first financial quarter of 2012 alone, global advertising spending reached \$128 billion (Peterson, 2012). In 2012, search engine behemoth Google's total revenues surpassed \$50 billion, and advertising contributed to about 95 percent of that total (Peterson, 2013). News Corporation earned \$1.95 billion from advertisers just during the television season beginning in September 2012, an estimated 40 percent of the company's total value (Trefis.com, 2012). These figures and percentages are so large that media companies need the support of advertisers in order to compete in the marketplace.

This type of dependence on advertising puts pressure on the company to sell the target audience as a product to advertisers. Advertisers choose which programs best correspond with their principles to create the largest possible audience with the ideal demographic, forcing the media content developers to consider advertisers' rather than consumers' wishes when creating new programs (Herman & Chomsky, 1988, pp. 16-17). The focus of content creation shifts from pure entertainment to programs that will keep audiences in the buying mood. Media outlets also tend to shy away from any advertisement that could be deemed controversial, for fear of alienating audiences. With such significant yearly revenues at stake, media corporations cannot afford to defy advertiser requests in a profit-centered media environment.

## **Applications to the Media Industry and Copyright Law**

The logic of capitalism creates “the driving need to extract wealth from the productive activities of society in the form of capital” (Heillbroner, 1985, p. 33). Intellectual property law is just one example of the profound effects of political economic factors in the media industry as a result of capitalist ideology. Specifically, copyright law, fair use assessments, and important court cases operate within a capitalist media system. Law, including intellectual property law, works within the American capitalist system as “a vehicle for gaining the consent or acquiescence of dominated groups and classes to the existing economic order while helping legitimize the dominance of the capitalist class as part and parcel of ruling-class hegemony” (Bettig, 1996, p. 156). A significant aspect of maintaining this hegemony is the ability to convince the rest of society that inherently intangible creative works should naturally be controlled by the system of private property.

Copyright law as it was originally conceived was used to create incentives for the generation of new cultural content—though humans generally do not need an incentive to be creative unless creativity becomes a way to make a living. However, copyrights have more recently been used to privatize the public domain (Barron, 2006, pp. 279, 281). Copyrights protect the specific expression of ideas, though ideas themselves remain public. The privatization trend forces intellectual goods to take their place in the market as resources for which consumers must pay a price. The first versions of the Copyright Act required rights holders to apply for a renewal of their rights for an additional number of years, and because most works only experience commercial success for a few years, most authors chose not to extend the term of their copyright protection. The Copyright Act of 1976 suspended this requirement, extending the term of all copyrights without allowing the rights holder to determine whether or



not an extension was necessary. This change meant that all works were kept from entering the public domain for free use regardless of whether they were still being commercially exploited (Lessig, 2004, pp. 133-135).

Enclosure forces potential consumers to prove that they value a work by paying for access (Barron, 2006, p. 281). In this sense, the market determines whether or not a work has an exchange value, or profit potential. Works that are deemed to have a market value must be bought and sold within that market, and the owners of copyright reap the rewards. Laws, then, provide rights holders—generally the owners of the means of communication—with almost unlimited control, removing freedom of use from other consumers in the market (Goldstein, 2003, p. 4).

Since copyright allows creators and publishers of literary and artistic works to charge a price for gaining access to these works, the inescapable effect is to withhold the work from people who will not or cannot pay that price, even though giving them free access would harm no one else. (Goldstein, 2003, p. 144)

Copyright ownership in American society is a valuable tool for authors and creators, but media owners stand to make the most profit from this form of ownership. The exclusive rights afforded by law allow a form of monopolization on distribution in a cultural market for many years after the work would succeed in the commercial market on its own. The fair use aspect of copyright law also works on a political economic level by allowing use of a work when parties are unable to negotiate a licensing fee due to costs (Goldstein, 2003, p. 139). The fair use test itself is biased toward the copyright owners and their interests in controlling the economic potential of their works (Bettig, 1996, pp. 154-155).

Another aspect of modern intellectual property law is the transference of ownership rights from individual owners to corporations. Corporate research and development teams are able to produce copyrightable and patentable innovations at faster rates, but the developers themselves

usually sign contracts to relinquish their rights to the corporation. Corporate control of large quantities of intellectual property rights allows them to maintain significant market power and create barriers against smaller businesses trying to enter the market. In many cases, the concentration of patents in the hands of a small number of core firms discourages smaller companies or individual inventors from producing their own innovations (Bettig, 1997, p. 143).

Core firms have a substantial economic interest in maintaining power through intellectual property ownership and control, and that interest often results in litigation. In fact, Walt Disney Company is one of the most well-known and frequent intellectual property litigators in the country. In *Sony Corporation of America, Inc. v. Universal City Studios, Inc.* (1984), Disney joined the copyright infringement lawsuit against Sony's Betamax recording technology. Universal had an interest in promoting its own version of video recording technology and the profits that would undoubtedly come from commercial sale of DiscoVision. Because the core firms in the filmed entertainment industry rely on intellectual property holdings to make money, Disney and other filmed entertainment companies feared that their copyrights would diminish in value if consumers could record content for personal use. Eventually, the studios realized they could also capitalize on formatting content for use in a VCR. Video sales and rentals also opened the market to tie-ins with other consumer goods such as candy, toys, and cosmetics (Bettig, 1996, pp. 179-180).

These political economic forces also play a critical role in the more recent and quickly-developing Internet environment. The expansion of capitalist theory and practice into the realm of technology is known as technocapitalism, in which intellectual property rights are the driving force (Bettig, 1996, p. 49). The Internet is integral to the spread of knowledge and cultural capital, but its use also creates a new medium through which intellectual property can be

exploited. The Internet's transition from a primarily educational to a primarily commercial entity has changed the way consumers are able to access information. Technologies such as iTunes and online databases allow rights holders to charge for individual uses, such as purchasing one song or gaining access to a research article. Corporations can also incorporate branding elements into the online environment rather easily, enforcing brand loyalty in a new setting (Bettig, 1997, p. 148).

Many media platforms rely on subscription and advertising income in order to maintain their online presence (Bettig, 1997, p. 152). Users can subscribe to online versions of magazines, journals, and almost all major daily newspapers. Websites also use advertising incomes to keep their costs low, which in many cases can make the use of websites such as Facebook and search engines such as Google "free" to consumers. The true consumer cost for using such services is granting access to personal information. This method of producing revenue has brought rise to online privacy debates, particularly in the context of social media platforms. For example, the Facebook Statement of Rights and Responsibilities clearly states that the company may share users' names and profile pictures with advertisers. The section "About Advertisements and Other Commercial Content Served or Enhanced by Facebook" also states that Facebook will not share information without the consent of the user (Facebook, 2012). However, much of the debate centers on whether user compliance should be considered under an opt-in or an opt-out format. The current system requires users to change their privacy settings specifically to keep Facebook from sharing information with advertisers. A majority of Facebook users do not realize that this is the case, and therefore do not know to opt out of this process.

Two-way communication via Internet sites also allows advertisers to use the information they gather to find the appropriate demographics for their products, and they can choose where to place ads according to that information (Bettig, 1997, p. 153). For instance, if a Facebook user's profile indicates that she is engaged, she will likely notice advertisements for engagement rings, wedding photographers, and dress shops; another user who indicates an interest in basketball may be provided with advertisements for sneakers and sporting goods stores. In theory, the Internet should provide a wider range of commercial products and information than would be available in the traditional context. However, advertisers' ability to focus products toward a specific audience can actually narrow the diversity of cultural goods and information (Bettig, 1997, p. 153). The Internet is certainly still developing, but a political economic analysis of other media industries already suggest that similar patterns of concentration, commodification, and commercialization will evolve in the online context.

## Chapter 4

### Regulatory and Political Economic Applications to Recent Debates

#### The SOPA and PIPA Debate

Heated debates broke out over the potential enactment of the Stop Online Privacy Act and the PROTECT Intellectual Property Act between the content creators in Hollywood and the Internet innovators in Silicon Valley because the two sectors have very different interests in the online environment. Creators and innovators are financially invested in different aspects of online media. The proposed SOPA and PIPA laws would inevitably help one and harm the other, depending on which way Congress voted on the issue. These two bills never went through a Congressional vote due to resistance, but it is entirely possible they—or an edited version—will reappear in the near future.

The Big Five media players are primarily concerned with protecting their existing intellectual property and making sure they remain profitable, hence they often turn to Congress for help. These companies are well aware of the challenges presented by the Internet, such as ease of replication and transmission; each one of these companies also owns Internet sites. Copyrighted and trademarked material can be spread across the Internet with little effort by consumers, especially with such prominent use of social media platforms that provide users with a “share” option. These companies also know that any type of copyrighted or trademarked material can also be converted into a digital version; for example, Disney’s trademarked characters can be displayed in a Google search or on the Pinterest website, illegal music downloading services can provide consumers with digital versions of copyrighted songs, and users can find bootlegged version of their favorite movies or television series. Stricter control

over trademark and copyright usage online would allow the Big Five to continue building their media empires and ensure that they are the sole distributors and beneficiaries of their products. For example, both News Corporation and the Walt Disney Company own a portion of hulu.com, a website that allows consumers to view television shows after their initial appearance on the regular television schedule (Columbia Journalism Review, 2013). Hulu also began producing original content, giving its Big Five owners a hand in online production, distribution, and exhibition.

In addition to providing another media market to exploit, the Internet gives content creators another means through which to attract even more advertising revenue. Online advertising is unique because the two-way communication characteristic of the Internet allows potential advertisers to isolate and target very specific demographic without having to create the content to attract an audience. If producers and distributors cannot maintain their control, they lose out on huge profits. From the Hollywood perspective, the SOPA and PIPA legislation is about defending profit and power.

On the anti-SOPA and PIPA side of the argument, industry players in Silicon Valley maintain that the Internet should be “free” in the sense that its contents should be non-profit and available to the public, and argue against legislation that could theoretically force them to police themselves. Internet innovators also have economic interests in the legislation. The acts could limit a search engine’s ability to provide links to websites that contain infringing material, and ultimately result in a loss of profits due to the predominant business model. Search engines provide a link to other websites at the request of the user. Website operators can pay search engines to provide a link near the top of the page to increase the number of viewers they receive. In other cases, search engines can charge websites a fee based on the number of times consumers

have used a specific hyperlink. In either scenario, a search engine would be forced to reject income from a website that held some infringing content. The basic Silicon Valley argument points to a central issue regarding the Internet that has been debated for decades. That is, in addition to commercial materials, the Internet can be used to share non-commercial, non-copyrighted content. Placing restrictions on Internet sites, and the search engines that provide links to those sites, could therefore unintentionally restrict materials that are not infringing in addition to those that are, unduly burdening information to which public access should not be limited.

The debate pinning the Hollywood film industry and the U.S. music industry against Silicon Valley has essentially been a power struggle between two very different sectors of the media environment, both seeking to protect their own economic interests. While the struggle for control over Internet intellectual property holdings will probably continue, it is likely that the two sectors will continue a pattern of convergence. Just as all mass media outlets have in the past, both ultimately want to make money from a new medium. The following case study reflects the initial tensions that emerge with the introduction of a new technology.

### ***Case Study: American Broadcasting Companies, Inc. Et al. v. Aereo, Inc.***

In March 2012, a legal debate broke out when a request for a preliminary injunction was filed against a New York City-based company seeking to develop a new method of television programming delivery in a media environment ruled by smart phones, tablets, and laptops. Aereo is owned by Barry Diller, the creator of the Fox Broadcasting Company and America's 271<sup>st</sup> richest man according to *Forbes*—Diller was worth \$1.8 billion in 2012. Aereo delivers live television 24 hours a day using an Internet connection; the service also allows consumers to

record television content, which in terms of consumer use is “like a DVR without the box” (Aereo.com, 2012). Aereo’s basic recording design is an Internet-based spin-off of an existing technology that has proved to be successful in the media market. The company charges \$12 per month in exchange for the service. A group of broadcasters—CBS, NBC, Fox, ABC, Univision, and PBS—filed for a preliminary injunction, arguing that Aereo failed to obtain permission to transmit copyrighted content to subscribers (Flint, 2012). Broadcasters only assert that Aereo is directly liable for copyright infringement through public performance of their live broadcasts; they did not challenge users’ ability to record the content (*American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2012).

From the audience perspective, Aereo is the functional equivalent of a digital video recorder that is able to store up to 40 hours of content depending on the chosen plan (Aereo.com, 2012; Flint, 2012). Subscribers can access broadcast television programming and view that programming on laptops, desktop computers, and supported mobile devices in real time, or they may choose to record content for later viewing. The recording feature provides users with the options to pause or rewind the program, much like a traditional DVR. All recorded data is housed in antennas and hard discs at Aereo’s facilities (*American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2012).

The process through which Aereo receives and transmits programming to users is critical to this case. In order to transmit users’ requested content, the Application Server receives a request from the subscriber’s web browser, and the information is sent to the Antenna Server. Each one of Aereo’s antennas must function separately, as no antenna can be used for two different purposes at the same time. The subscriber’s antenna receives direction from the Antenna Server signaling which program to obtain; the Streaming Server then creates a directory



in which to store the user's programming. "Once this directory is created, an electrical signal is sent from the antenna, processed and converted into data packets, and then sent to the transcoder, which encodes it in a form to be transmitted over the [I]nternet." The Streaming Server saves this data onto a hard disk in the directory, after which it is read into the "RAM memory buffer;" the buffer transmits the data to the user over the Internet as it is gathered by the hard disk. If the user chooses the "Watch" function, the hard disk retains the data only until it is transmitted and replaced in the RAM memory buffer. However, the "Record" function directs the data to be retained within the hard disk at Aereo's facility (*American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2012).

Plaintiffs argued that *Cablevision* could not be applied to the present case due to the fact that *Cablevision* addressed making copies for time-shifting purposes, whereas the broadcasters' concern is the live transmissions. However, the U.S. District Court for the Second District of New York rejected this claim, noting that the Court of Appeals for the Second Circuit's decision in *Cablevision* was not based on a time-shifting argument (*American Broadcasting Companies, Inc. v. Aereo*, 2012). In terms of a critical legal evaluation, the real issue at hand is whether Aereo's transmissions should be considered public performances as defined in the Copyright Act (see Chapter 2 for the Act's full definition of a public performance). The transmit clause was also used in *Cartoon Network LP v. CSC Holdings, Inc.* (2008). Aereo argues that their transmissions should not be considered public performances on the basis that each antenna is individually rented and controlled by the subscriber, and that each antenna creates a distinct transmission. The district court ultimately determined that the copies made by Aereo are not significantly distinct from the copies made in *Cablevision*, which hinged on the determination that transmissions directed by one subscriber and intended only for that subscriber could not

violate the Copyright Act's definition of a public performance (*American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2012).

Of course, the district court's insight into Aereo's application to *Cablevision* can only provide a clue as to what might happen in trial. The standard for a preliminary injunction hearing includes a consideration for the balance of hardships between plaintiff and defendant, which largely take into account the economic positions of both sides. Broadcasters indicated widespread use of Aereo's service would split their audience and reduce their Nielson ratings, which would ultimately affect annual advertising revenues; an additional concern is potential damage to relationships with content providers, licensees, or advertisers. On the other hand, Aereo's entire business would likely be destroyed following the enforcement of a preliminary injunction. An injunction could destroy intangible resources such as a loss of employees and a reduced ability to attract new capital. Further, an injunction would decrease Aereo's goodwill with customers and harm its competitive advantage. For these reasons, the district court decided that the balance of hardships did not tip in the plaintiffs' favor, and therefore denied the request for preliminary injunction (*American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2012).

From an economic standpoint, the broadcasters could lose money as a result of Aereo's business model, but probably not as much as they will try to claim. In the preliminary injunction request, broadcasters argued that the Aereo system would detract from Nielson ratings, and ultimately, income. However, Aereo is only available to customers with an address in the New York metropolitan area; while this is a large media market, the number of users would still be relatively low. Additionally, broadcast television consumers are able to receive content for free, while the Aereo system requires a monthly payment of up to \$12 depending on the chosen plan. There would be no reason for consumers to spend an additional monthly fee unless they

otherwise would not be able to access that content, which would indicate that those particular consumers would not be included in Nielson ratings anyway.

It is more likely that broadcasters are concerned about maintaining their positions as the sole providers of broadcast television content. The four major networks such as ABC, CBS, NBC, and Fox likely fear that allowing Aereo into the market would create a slippery slope by which many other similar businesses could enter into the primary media markets. From an economic perspective, the networks care most about the effects of Aereo's services at the owned and operated level, as they are owned by media giants Walt Disney Company, National Amusements, Comcast, and News Corporation, respectively. A company such as Aereo could also threaten broadcasters' potential to move into an online media market themselves. If the major media companies chose to make content available on the company website for a subscription fee, consumers would choose to pay for one service that is capable of transmitting content from all major distributors rather than paying separately for multiple different channels. It is much more likely that the request for a preliminary injunction against Aereo was a preemptive measure highlighting the classic power struggle between the major media leaders and the smaller companies hoping to break into the market. The preliminary injunction attempt was simply a bullying tactic: the copyright-holding powerhouses flexed their muscles in court in hopes that the smaller company would back out of the market.

After the denial of preliminary injunction, plaintiffs indicated that they would likely seek an appeal to the Second Circuit. In strictly legal terms, Aereo should be able to make a good case for legality during trial. The district court already indicated that the *Cablevision* case could provide a basis for evaluation in regards to Aereo's retransmission of broadcasters' content. The Second Circuit in that case noted that Cablevision's buffers did not hold data for much longer

than one second, after which it was overwritten (*Cartoon Network LP v. CSC Holdings*, 2008). This particular process is similar to the procedure used by Aereo's "Watch" function; Aereo does not retain a copy of the data after the buffering process (*American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2012).

In regards to the transmit clause, the court in *Cablevision* determined that "because the RS-DVR system, as designed, only makes transmissions to one subscriber using a copy made by that subscriber, we believe that the universe of people capable of receiving an RS-DVR transmission is the single subscriber whose self-made copy is used to create that transmission" (*Cartoon Network LP v. CSC Holdings*, 2008). Similarly, broadcasters would likely have a difficult time convincing a court that Aereo's transmissions are designed and intended to reach anyone other than the subscriber. The Aereo subscriber directs the transmission and recording of all television programming for viewing on a personal computer or mobile device. In fact, the district court noted that Aereo's copies "are not materially distinguishable from those in *Cablevision*" (*American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2012).

On the other hand, broadcasters could point to a crucial distinction between *Cablevision* and Aereo. *Cablevision* had obtained permission to transmit television content live in its function as a cable provider; the company actually received transmissions directly from television networks (*Cartoon Network LP v. CSC Holdings*, 2008). The primary issue in that case was whether *Cablevision* was legally allowed to operate the RS-DVR function to play recorded content. The Second Circuit ruled in favor of *Cablevision* on the basis of the transmit clause. However, Aereo did not receive permission from broadcasters to transmit live content. In the preliminary injunction, broadcasters only took issue with "Watch" function of the Aereo

system, which retransmitted live broadcasts. Drawing attention to this distinction could undermine the use of *Cablevision* as support for Aereo.

The “Record” function of Aereo’s case, if contested, could conceivably be argued on the basis of *Sony Corporation of America v. Universal City Studios* (1984). The Supreme Court in *Sony* ruled that use of the Betamax technology was not an infringing activity because its primary purpose was time-shifting. Time-shifting is a fair use that should not be withheld from the public merely because the technology could potentially facilitate infringing uses. Certainly Aereo’s “Record” function constitutes a form of time-shifting. The Court also declared “...that time-shifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, that the entire work is reproduced does not have its ordinary effect of mitigating against a finding of fair use” (*Sony Corporation of America v. Universal City Studios*, 1984). As in the Betamax case, Aereo transmits content that was available in its entirety to the public free of charge.

An alternative could be a revisiting of the Betamax case. The Betamax decision was rendered in part due to the respondents’ inability to prove any substantial harm from consumer use of the technology. However, new information suggests that the broadcasters challenging Aereo may be able to prove that the DVR services are actually creating financial harm. Ratings suggest that consumers watch recorded content during the late-night hours, and that ratings for traditional late-night talk shows featuring such as Jay Leno and David Letterman are decreasing as a result (Carter, 2013). If broadcasters can use this data to prove actual damage, it is possible that the court would reconsider the Betamax case and rule against Aereo, forcing the new technology to shut down.

Another possibility is that the parties will make an attempt to settle the dispute outside the courtroom. It is possible that broadcasters would request a licensing fee from Aereo and allow the company to continue retransmitting content. This type of agreement would require a cost-benefit analysis on Aereo's part. Agreeing to a licensing fee would be the most practical alternative for a small company with fewer resources than the combined efforts of well-established media giants, especially if there is a possibility that broadcasters could convince a court to reconsider the Betamax decision. However, this outcome is probably the least likely to occur of the alternatives. Led by Barry Diller, Aereo will hope that courts will continue to side with two of the most significant copyright cases of the technological age. Broadcasters will hope to terminate the Aereo service and make an example of the company for any other similar start-ups considering an entrance into the online television market. Like all new technologies, the two companies will ultimately have to find a way to work within the existing capitalist media structure.

## **Conclusions**

Since the first national copyright statute's enactment in 1790, American copyright law has undergone many changes. Revisions to the Copyright Act provided protection for types of creative works not included in the original statute, changed the registration system, added more rights for authors and creators, and increased the term of protection for copyrighted works. These changes were intended to strike a balance between the public right to access information and a perceived need to incentivize the creation of cultural capital. The law, and intellectual property law more specifically, is an important part of a broader societal context, the capitalist

system through which American society is governed. In this way, intellectual property law is just one mechanism through which society can extract capital.

The development of the Internet and related technologies brought a new set of challenges to the field of copyright law. A study of the political economy of mass communications indicates that historically, all technologies have been forced to find a place within the existing capitalist structure as they were introduced to society. Through an interplay of lobbying efforts from core companies, legislation, and court decisions, all future technologies will ultimately have to find a place within the capitalist system as well. The logic of capitalism dictates that society must extract wealth from productive activities, and in the Digital Age, the information and technology industries can provide a great deal of wealth.

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