

---

---

GOING BACK TO FIRST PRINCIPLES:  
THE EXCLUSIVE RIGHTS OF AUTHORS REBORN

Ralph Oman\*

Cite as 8 J. HIGH TECH. L. 169 (2008)

I. Introduction

Let's go back to the beginning. To explain the development of the law my old boss, Senator Charles Mathias of Maryland, the legendary former chairman of the Senate Subcommittee on Patents, Copyrights and Trademarks, invoked a compelling metaphor. He went back 10,000 years when Europe was emerging from the Ice Age. He explained that without a well-developed concept of real estate law, our cave-dwelling ancestors had to sit in their caves continuously to assert ownership. So there developed the concept of title in real property, and the cave dweller could leave the cave to hunt or fish and then reclaim the cave at the end of the day. That was real property law.

Later, in biblical days, the notion of personal possessions was not well developed. People had to keep their property within their physical control at all times, or they would lose it. A shepherd had to keep his

---

\* Ralph Oman is counsel in the Intellectual Property Group at Dechert LLP. This article is based on his presentation given on Nov. 7, 2007, at Suffolk University Law School's LL.M. in Global Law and Technology & LexisNexis Intellectual Property Lecture Series. Mr. Oman is a graduate of Hamilton College (A.B., 1962) and Georgetown University Law Center (J.D., 1973). Before entering private practice in 1994, Mr. Oman was Register of Copyrights of the United States (1985–1993), the chief government official charged with administering the national copyright law. During his tenure as Register, he helped move the United States into the Berne Convention for the Protection of Literary and Artistic Works, the oldest and most prestigious international copyright treaty — a goal sought by U.S. Registers for 100 years. Before becoming Register, Mr. Oman served in several other government positions including chief counsel of the Subcommittee on Patents, Copyrights, and Trademarks, and Committee on the Judiciary, U.S. Senate (1983–1985). In his total of 10 years (1975–1985) as a senior lawyer on the Senate Judiciary Committee staff, he participated directly in the enactment of every amendment to the U.S. patent, trademark, and copyright laws. In 2002, he received the Jefferson Medal in recognition of his lifelong commitment to strong intellectual property protection.

---

---

herd under his watchful eye. If a ram wandered over the hill and joined the flock of another shepherd, the original owner had no way to reclaim it. So there developed a system of branding, and a legally enforceable right to retrieve the ram that had strayed from the fold. That was personal property law.

Then came the ownership of intangible ideas and artistic and literary creations. Before patents and copyrights, authors and inventors had to keep physical control over their works. They locked them in their desk drawers, and they shared them only with trusted friends or gave them to patrons. Or, like Sir Francis Bacon, they organized secret research societies to allow the select few to pool their collective knowledge and keep their discoveries to themselves, not a good way to promote the progress of science. After we adopted patent laws and copyright laws, authors and inventors could finally take their music and poetry and scientific tracts and breakthrough ideas out of their desks and laboratories and share them with the world at large without fear of losing control of them forever. That was intellectual property law. This legal innovation changed the course of music, science and literature, and triggered the industrial revolution, the mass production of books, and universal literacy.

With this history in mind, the drafters of the Constitution adopted the patent and copyright clause:

The Congress shall have 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.<sup>1</sup>

The clause does not define the scope of protection, but, instead, suggests that Congress can protect whatever it wants, however it wants. Article I, Section 8, Clause 8 doesn't require Congress to enact patent and copyright laws, but it gave Congress the authority to exercise this power and to determine their scope in ways that to them would most likely "promote the Progress of Science."<sup>2</sup>

A key feature of the clause is the "the exclusive right," which provides the constitutional basis for Congress to grant authors and inventors an exclusive property right to the fruits of their intellectual labors.<sup>3</sup> In this context, the phrase "exclusive right," like Clause 8 itself,

---

1. U.S. CONST. art. I, § 8, cl. 8.

2. *Id.*

3. *Id.*

indicates broad authority, rather than a requirement.<sup>4</sup> Congress could grant an absolutely exclusive right under the Constitution if it wanted to, but it is not required to do so. It could give something less if, in its judgment, that would best promote the constitutional purpose.

Let's focus on the copyright side of the equation. In the 1790 Act, Congress used that authority to grant absolute exclusivity to the authors of books, maps and charts.<sup>5</sup> Over the years Congress whittled away at the concept of exclusivity and both the 1909 Copyright Act and, with a vengeance, the 1976 Act, provide for broad compulsory licenses.<sup>6</sup>

At 25 pages in length, the 1909 Copyright Act could comfortably fit in one's pocket without disturbing one's profile.<sup>7</sup> It contained only one explicit limitation on a copyright owner's otherwise exclusive power to grant (or to decline) a license for the use of a copyrighted work.<sup>8</sup> The "mechanical compulsory license"<sup>9</sup> gave all performers and record companies a compulsory license to make a recording of a musical work as soon as the songwriter or music publisher had authorized another performer or record company to make a recording of the music. Congress enacted this restriction on authors' rights out of fear that the few existing record companies would monopolize the market for "mechanical reproduction rights" if it were left unregulated.<sup>10</sup>

This compulsory license and those that followed owed their creation to the *combination* of (1) a desire to capture royalties from new technological uses of copyrighted works, (2) the perception that the marketplace could not cope with private negotiations because of the great number of very small transactions, the so-called market failure rationale, and (3) a fear that a purely private negotiation for those uses would result in a monopolized market, with artificially high prices, restricted output, or reduced public access to works of authorship. As technology has ratcheted forward, we have regularly discovered new

---

4. *Id.*

5. Copyright Act of 1790, 1 Cong. Ch. 15, 1 Stat. 124 (1790).

6. *See* Copyright Act of 1909, 60 Cong. Ch. 320, 35 Stat. 1075 (1909); Copyright Act of 1976, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. §§ 101-810 (1976)).

7. Copyright Act of 1909, 60 Cong. Ch. 320, 35 Stat. 1075 (1909). The Copyright Act of 1909, as revised through 1973, was 25 pages long. The 1976 Act is 68 pages long and gets longer with each amendment. Copyright Act of 1976, Pub. L. No. 92-140, 85 Stat. 391 (codified as amended at 17 U.S.C. §§ 101-810 (1976)).

8. Copyright Act of 1909, 60 Cong. Ch. 320, 35 Stat. 1075 (1909).

9. 17 U.S.C. § 1(e) (1974), *superseded by* 17 U.S.C. § 115 (1982). Under a compulsory license, the copyright owners lose exclusivity because they must grant licenses to users who comply with the statutory requirements for the license. They can't say no.

10. *See* H.R. REP. No. 83, 90th Congress., 1st Sess., 66-67 (1967).

ways to use copyrighted works, and, almost always, we have commercially exploited them. That exploitation has almost always been well underway before Congress got around to updating the law to make clear that copyright would govern the new use.<sup>11</sup>

If one examines the history of United States copyright law in the 20th century, it becomes clear that however long it takes Congress to extend copyright to the new technological use,<sup>12</sup> that relief will likely appear in the form of a limited right to remuneration rather than a “classical” grant of complete copyright rights.

I would like to examine, briefly, why Congress cut back the exclusive right, and why, because it did so, the copyright law has ballooned from 25 pages to 279 pages in less than 100 years. Last, I will discuss what Congress can do about it.

Professor Pam Samuelson, in her recent article advocating top-to-bottom copyright reform,<sup>13</sup> has a few choice words for the current statute: they include “turgid;”<sup>14</sup> “hodgepodge;”<sup>15</sup> “an obese Frankensteinian monster;”<sup>16</sup> and “bloated and ugly.”<sup>17</sup>

I agree with her choice of words.

Somewhere in this favored land a copyright Pooh-bah really understands Section 111<sup>18</sup> (eight pages covering secondary transmissions by cable), Section 114<sup>19</sup> (18 pages covering the scope of exclusive rights in sound recordings and, now, webcasting), Section 115<sup>20</sup> (almost seven pages covering the compulsory license for making and distributing phonorecords, including digital delivery), and Sections 119<sup>21</sup> and 122<sup>22</sup> (almost 17 pages covering secondary transmissions by

---

11. For example, motion pictures were invented in the 19th century but were not included in the copyright law until the 1912 revisions of the 1909 Act. 17 U.S.C. § 5(1)-(m) (1974). Sound recordings were commercially viable long before their inclusion in the federal law in 1971. 17 U.S.C. § 5(n) (1974).

12. It bears noting that it took 67 years in the case of jukeboxes and 10 years in that of cable television. 17 U.S.C. § 1(e) (1974) (jukebox performances exempted outright). Since 1978, 17 U.S.C. § 116 has provided a basis for compensation for such performances under a compulsory license. *Cf. Teleprompter Corp. v. CBS, Inc.* 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (cable retransmissions were held exempt from copyright liability until 1978, when 17 U.S.C. § 111 provided the cable compulsory license).

13. Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551 (2007), archived at <http://www.webcitation.org/5XyBZzLml>.

14. *Id.* at 551 & n.1.

15. *Id.* at 553.

16. *Id.* at 557.

17. *Id.* at 569.

18. Copyright Act of 1976, 17 U.S.C. § 111.

19. *Id.* at § 114.

20. *Id.* at § 115.

21. *Id.* at § 119.

satellite). The current Register of Copyrights, Marybeth Peters, has stated publicly that there are large chunks of Section 114 that are utterly incomprehensible to most people, because over the years Congress has spliced and diced them, and then hemstitched them back together.

What to do?

To streamline and simplify the law, Professor Samuelson urges Congress to deep-six the current statute and draft a completely new one. She proposes that Congress give much greater rulemaking power to the Register of Copyrights and, in that way, avoid all of the industry-specific exceptions that now clutter Title 17 and make it a mare's nest of confusion.<sup>23</sup>

I share her concern and applaud her objective. Even so, I wonder if her solution would work in practice. Marybeth Peters, the current Register, has the full support and respect of key members of Congress. But it is always difficult for an unelected government official to make and enforce major administrative changes. The Register could formulate a just and balanced solution to the music licensing conundrum, for instance, but does she have the political horsepower to make it stick? Will an aggrieved player in the music licensing drama who feels wronged run to allies in Congress to get the Register's carefully balanced compromise overturned legislatively?

Instead, I would propose another path to the same end: a revival of the exclusive right.

## II. Discussion

Let me review the difficult birth of the 1976 law.<sup>24</sup> We all know that a variety of technology-related issues prevented Congress from quickly completing the process of modernizing the copyright law soon after publication of the Copyright Office's initial report recommending revision.<sup>25</sup> The Office prepared that report in 1961, fifteen years before Congress enacted the current law.<sup>26</sup> As time passed, new technologies created new controversies, so that disputes about library photocopying,<sup>27</sup>

---

22. *Id.* at § 122.

23. See Samuelson, *supra* note 13, at 16.

24. See Copyright Act of 1976, 17 U.S.C. § 101-810 (1976).

25. H.R. Rep. No. 1476 (1976); 122 Cong. Record 31,984 (1976) (remarks of Rep. Railsback) *see* National Cable Television Ass'n v. CRT, 689 F.2d 1077 (D.C. Cir. 1982); *see, e.g.,* Greene, *The Cable Television Provisions of the Revised Copyright Act*, 27 Cath. U.L. Rev. 263, 279 (1978).

26. Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1961).

27. *Williams and Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) *aff'd*, 420 U.S. 376 (1975).

cable television,<sup>28</sup> and computer uses<sup>29</sup> crowded the court dockets. These controversies seem almost quaint and manageable compared to today's battles over digital uses over the internet. In any case, while the issues and the protagonists changed, the arguments had a strong family resemblance—a new use of a copyrighted work, of which the 1909 statute made no mention, became a matter of commercial success, then of great dispute, and then of extended litigation.

To most Members of Congress, compromise solutions are almost always the most attractive. During this brief run-through, keep in mind the Paradox of Buridan's Ass. The fourteenth-century French philosopher Jean Buridan described his famous paradox: an ass, standing equidistant between two identical bales of hay, can find no rational basis for choosing one over the other, and, immobilized, it starves to death. Like Buridan's ass, Congress often finds itself standing between two bales of hay. Congress, of course, never starves to death. It can do what the ass could not do; it eats both piles of hay and calls it a compromise. As we learn, politics is the art of the possible, and, especially in intellectual property, Congress seeks balance between competing interests. And "balance" has often meant diluting the exclusive rights of authors.

Thus, when copyright owners asked Congress to reverse the jukebox exemption<sup>30</sup>, and to reverse the Supreme Court's more recent cable television retransmission exemption<sup>31</sup>, Congress looked back to the 1909 compulsory license for its legislative model, which had "solved" the mechanical-monopoly problem.<sup>32</sup> Copyright owners thought that the compromises Congress enacted—a right to remuneration rather than a right to control all uses of their works—left them with the short end of the stick. From the congressional perspective, this outcome was a workable compromise. After all, Congress itself initially had determined that jukebox performances were exempt, and the Supreme Court exempted cable performances from the exclusive right and, at the

---

28. *See, e.g.*, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

29. Questions concerning computer storage of "traditional" works, copyright for computer software, and works created with the assistance of a computer were assigned to the National Commission on New Technological Uses of Copyrighted Works by Pub. L. 93-573, 88 Stat. 1873 (1974). Its recommendations were largely followed and are substantially contained in 17 U.S.C. § 117. Actually, computer programs were unusual, in that the Copyright Office began to register them for copyright in 1964, well before the courts recognized their copyrightability and well before Congress got around to including them in the statute in 1980.

30. Copyright Act of 1976, 17 U.S.C. § 116 (1976).

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

32. *See* Copyright Act of 1909, 60 Cong. Ch. 320, 35 Stat. 1075 (1909).

same time, called on Congress to clarify the law.<sup>33</sup> Only a few Members of Congress felt that a clarification should result in full copyright liability, particularly where Congress brought literally millions of transactions a year within the ambit of copyright for the first time. This was, in their view, a windfall for authors.

The idea that some restraints on the exclusive right for copyrighted works are appropriate is as old as statutory copyright itself. The first copyright law, the Statute of Anne,<sup>34</sup> contained a novel provision: if the Archbishop of Canterbury, or the Lord Bishop of London, or certain other British officials found a book's price "High and Unreasonable," they could reduce the price to one that, to them, seemed "Just and Reasonable."<sup>35</sup> With that history, we can better understand the recurring debates in Congress about the ratemaking decisions of the Copyright Royalty Tribunal (CRT), then the Copyright Arbitration Royalty Panels (CARP), and, now, the Copyright Royalty Judges.<sup>36</sup> We can also understand why Congress frequently jumped in to debate and threatened to overturn the decisions of the CRT and its successors. The CRT, especially, suffered from that political whipsaw. These continuing controversies may at some point prompt Congress to just throw up its hands and declare that it will no longer mediate between the warring parties in the private sector.

What can it do? Perhaps a more literal reading of the Constitution would help solve the current statute's length and inscrutability problems, and it would, at least in theory, keep Congress out of these messy commercial negotiations. Congress would best promote the underlying constitutional purpose for copyright by returning to a true exclusive right—not for reasons of ideology, but simply for reasons of practicality.

Of course, it is great fun debating the ideology of copyright or the theology of copyright—or what Barbara Ringer, the former Register, called the "Demonology of Copyright."<sup>37</sup> Many argue that the Framers of the Constitution really intended to create a private property right for authors in their creations, just as they did for inventors. Over the past

---

33. See *e.g.*, *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

34. Statute of Anne, 8 Anne ch. 19 (1710) (subsequent history omitted), reprinted in R. Gorman & J. Ginsburg, *Copyright Cases and Materials*, xlii (2006).

35. 8 Anne ch. 19.

36. See 139 CONG. REC. S16864 (Nov. 20, 1993) (statement of Sen. Ford); 150 CONG. REC. H769-770 (Mar. 3, 2004) (statements of Rep Sensenbrenner, Rep. Berman); 150 CONG. REC. S10503 (Oct. 6, 2004) (statement of Sen. Hatch).

37. Bowker Memorial Lecture by Barbara Ringer, *The Demonology of Copyright*, in New York City (Oct. 24, 1974), reprinted in *MODERN COPYRIGHT FUNDAMENTALS: KEY WRITINGS ON TECHNOLOGICAL AND OTHER ISSUES* 24 (B. Weil & B. Polansky 1985).

---

---

100 years, to solve controversies involving powerful lobbies and to protect appealing supplicants like veterans, public broadcasters, librarians, small business owners, and teachers, Congress has reached into the wallets of authors and reduced the level of control they have over the use of their works.<sup>38</sup>

Veterans groups get free music.<sup>39</sup> Should Congress require the oil companies to provide free heating oil to the VFW Lodge and have the oil companies charge higher prices to all other consumers to make up the difference? More to the point, why hasn't Congress diluted the exclusive right of the patent owners, and given sympathetic groups free access to the inventor's intellectual property? Pharmaceutical drugs, for instance—which, unlike music, involve life and death—could be made freely available to needy veterans, and the drug companies could simply charge the rest of us a higher price. For reasons that I don't fully understand, Congress has always felt free to expropriate an author's property, as if it is a matter of great national importance that Americans have guaranteed access to a photograph, a song, or a television show. Why not a similar impulse for a life-saving drug?

Nothing is more personal to authors than their books or songs. Shouldn't we fight for their right to use and license their works as they see fit? At the core of copyright are important ideals and basic human values—the dignity of labor, the sanctity of private property, and respect for working men and women, who need copyright to pay the rent and feed their children.

The exclusive right that the First Congress gave to authors is private property.<sup>40</sup> True, it was for a limited time, but, while it existed, it was exclusive. In the copyright context, an exclusive right would mean that the author of a poem or a song had the right to say, "It's mine, and you can't copy it or use it without my permission." The courts built a little wiggle room into that absolute concept by creating the fair use doctrine, which allows for short quotations and other minimal uses that do not interfere with the author's legitimate expectations for the exploitation of the work.<sup>41</sup> Otherwise, for over one hundred years, starting in 1790, both the courts and Congress respected the author's sacred property right

---

38. As already mentioned, we now have a long list of compulsory licenses, or simply uncompensated uses: library photocopying; public performance of music by small businesses, veterans, and fraternal groups; cable and satellite companies; sound recordings used by broadcasters; the mechanical license; jukeboxes; back-up copies of computer programs; public broadcasting; the blind and physically handicapped; home taping; nursing homes; and others.

39. See 17 U.S.C. § 110(10).

40. Copyright Act of 1790, 1 Cong. Ch. 15, 1 Stat. 124 (1790).

41. The "Fair Use Doctrine" was codified in the Copyright Act of 1976, 17 U.S.C. § 107.



---

and enforced the copyright exclusivity that the Constitution permitted and Congress mandated.<sup>42</sup> Then around the turn of the last century, Congress started to lose the courage of its convictions and the vision of the Framers, and began to shrink the notion of exclusivity.

Market failure was the often rationale. A few users convinced Congress that the free market mechanism wouldn't work—that the transactions were too small and too numerous, or the market power of the authors verged on monopolistic, or exclusive licenses for recorded music would create a monopoly for a record company. Or they argued that the timeframe was too short or the poverty of a user too great, and we couldn't rely on traditional arm's-length negotiations and marketplace prices. So in 1909 Congress created the mechanical compulsory license for sound recordings and disrupted the free market mechanism.<sup>43</sup> The composer or publisher could no longer negotiate with the record company over the use of her song on a sound recording, bargain for a market price, and get a higher price for an exclusive license. Congress mandated access and set the fee for the use of music on each record pressed. Based on the same rationale, other compulsory licenses followed in 1976.<sup>44</sup>

Let me mention an important exception to the trend. Back in the early 1950s, when television was just hitting its stride, many Hollywood producers refused to license their movies for television.<sup>45</sup> Congress did not rush in to force them to do so to help the infant television industry. To fill the void, the networks themselves invested great sums to create their own programming, and the Golden Age of Television was the result.<sup>46</sup> The market was allowed to work. By not rushing in and imposing a compulsory license, Congress promoted the "Progress of Science."<sup>47</sup> Its forbearance encouraged the creation of new works.

Fast forward to the 1980's. Some people predicted that if Congress overturned the Supreme Court's *Betamax* decision and allowed the content providers to enforce their reproduction right, the VCR would have died in its infancy.<sup>48</sup> In fact, the opposite is true. The VCR would have flourished more quickly with the active support of Hollywood

---

42. Copyright Act of 1790, 1 Cong. Ch. 15, 1 Stat. 124 (1790).

43. Copyright Act of 1909, 60 Cong. Ch. 320, 35 Stat. 1075 (1909).

44. 17 U.S.C. § 115.

45. Robert W. Cort, Editorial, *Strait to DVD*, N.Y. TIMES, May 6, 2006, § A at 15.

46. *Id.*

47. U.S. Const. art. I, § 8, cl. 8.

48. See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1984). The Supreme Court held that home taping of television programming from over-the-air broadcasts for time-shifting purposes (with one-time viewing, no fast-forwarding through commercials, and no librarying) was a fair use. *Id.*

from the very beginning. All Congress had to do was simply impose copyright liability on the equipment manufacturers. Hollywood producers know how to make money. Sooner or later, most of them would have aggressively marketed their products in the new medium, as long as their product was secure, as long as they could control the timing of its release in the marketplace, and as long as the price was right. I note that at the same time Congress ducked the issue and the Supreme Court winked at contributory infringement with its fair use holding<sup>49</sup>, the Europeans imposed a royalty on blank tapes and machines to compensate the authors.<sup>50</sup> The Japanese and European machine manufacturers quickly adapted to the new economic reality, and an important copyright principle was sustained. The Europeans wisely observed that the machines lack value without the contributions of the authors, and that the authors must be made whole for the use of their works in the machines. It would not have been the end of civilization if Congress had taken it one step further and reaffirmed the exclusive reproduction right, and let the market work.

Could the equipment manufacturers have made video rentals and home taping on the VCR attractive to the movie producers? Yes. Could they have designed the circuitry of the machines to accommodate the security concerns of the producers? Yes. But to do so would have cut into their bottom line, and may have made the machines, at least at the outset, marginally less attractive to consumers. Instead of cutting a deal with Hollywood, the manufacturers hid in the skirts of the consumers, who launched demonstrations and petition drives against the Register of Copyrights to proclaim that they had a god-given "Right to Tape!"<sup>51</sup> Congress heard them, and was secretly relieved when the Supreme Court issued its Betamax decision and got them off the hook.<sup>52</sup>

We faced similar problems with the new digital media. In 1992, Congress dealt with the threat that the newly-minted digital audiotape machine (DAT) posed to the record industry. The DAT machine could make perfect copies of sound recordings, without any degradation from one generation to the next. As Register, I testified before the House Intellectual Property Subcommittee in support of a bill that would implement a very complicated compulsory license—which sanctioned home taping in exchange for an indirect royalty, but prohibited serial

---

49. See, e.g., *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1984).

50. PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 82 (Oxford University Press US, 2001).

51. Clyde H. Farnsworth, *Washington Watch; Right to Tape Battle Forming*, N.Y. TIMES, Feb. 15, 1982, at D2.

52. See *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1984).

---

---

copying.<sup>53</sup> It aimed to balance the interests of all of the parties—namely, the creative community, the Japanese equipment manufacturers, and the home tapers. The Chairman, Bill Hughes of New Jersey, and the ranking Republican, Carlos Moorhead of California, both vented their frustration over the complicated regulatory scheme of the proposed legislation, which had been drafted by the record industry and the consumer electronics industry, and introduced by Mr. Hughes without even changing a comma.

At the hearing, they asked me, almost plaintively, if I were troubled by the length and detail of the draft bill. Mr. Hughes asked: “Are you concerned at all about the detailed and technical nature of the legislation? If we were to follow the approach of this particular bill, is the copyright code going to look more and more like the *Encyclopedia Britannica* as new technologies evolve?” Mr. Moorhead asked: “[T]he bill is so long, 57 pages long, and a tremendous amount of the details deals with the auditing of the books. I wonder as far as litigation is concerned whether that tremendous detail will alleviate potential legal battles in court or will it be something that causes more of them as people argue over more and more terms.”

In responding, I was a good soldier and said what was expected of me—that we faced a technology problem that required a very technical solution. But what I should have said was: “Mr. Chairman, wouldn’t it be much simpler for Congress to say: ‘O.K., songwriters and record companies, it’s your music. You can do what you want with it; you can lock it in a vault for all we care. We will make clear that it can’t be copied without your permission. If you don’t want people to make perfect copies on their digital audio tape machines, you can say no. And, if the manufacturers continue to sell the machines without adequate copy-controls, you can sue them for contributory infringement.’” I should have said that, but I didn’t. If Congress had simply clarified the rights of the copyright owners, they could have negotiated a deal with the equipment manufacturers that would have allowed this new digital technology to reach the public under the rules of the marketplace. If Congress had confirmed the exclusive right of the creators to control the reproduction of their music, the free market would handle the rest. With technological blocks on copying unencoded tapes, with controls on serial copying, and with a negotiated royalty on the machines and blank tape, some composers and record companies would

---

53. Hearing before the Subcomm. On Intellectual Property and Judicial Administration to consider the Audio Home Recording Act of 1991, 102d Cong. (Feb. 19, 1992) (testimony of Ralph Oman, Register of Copyrights, Copyright Office).

---

---

say “yes,” others would say “no.” Eventually, they all would say “yes,” if the price were right. Because that approach failed, the DAT machine never earned its 15 minutes of fame, since prerecorded tapes were never available commercially in the DAT format because of the record companies’ concern about copying.<sup>54</sup> If Congress had recognized that the DAT legislation was really unworkable and turned instead to the exclusive right and the free market, all 57 pages of the AHRA would have been unnecessary, and the DAT technology would have found its market niche immediately.<sup>55</sup>

At this point in history, we should consider giving authors back their exclusive right. The power of digital technology will solve the market failure problem. And it will permit very nuanced marketing applications. The system could be so refined that it would permit scholarly use by university students or library patrons for free or a nominal charge, while assessing full freight to commercial users at a per page, per minute, per word, or per work rate. Or it could note the existence of a blanket license or a paid subscription.

Authors have something to sell. Users want to buy. While compulsory licenses may have been necessary in the Stone Age technologies of the analog world, digital technology will release us from the bondage of market failure. Congress should rethink the compulsory licenses, get out of the regulatory and second-guessing business, and let the parties work out the commercial details. Of course, if the authors or other copyright owners were to abuse their position in the free market, or refused to negotiate, the courts can always find copyright misuse, just as the Archbishop of Canterbury could intervene to correct an abuse of market power. The antitrust laws work well on the patent side, and they should work equally well for copyrights.

Back in the 1970’s, Congress experimented with wage and price controls.<sup>56</sup> Today, we hear cries from time to time for price controls on gasoline and heating oil. But times are changing. We have come to recognize the shortcomings of government rate-setting and the ultimate futility of market manipulation by Congress.

Let’s hope that Congress will have the patience to accept the ups and downs and temporary dislocations in the copyright marketplace. Unless important First Amendment rights are threatened, Congress should not rush in with a legislative correction for every little bump in the road. As

---

54. Hans Fantel, *Barriers to DAT Recorders Are Breaking Down*, N.Y. TIMES, Apr. 24, 1988, at § 2, 31.

55. Audio Home Recording Act of 1992, 17 U.S.C. §§ 1001-1010 (1992).

56. Federal Reserve Bank of San Francisco, FRBSF Economic Letter (Dec. 3, 2004) *archived at* <http://www.webcitation.org/5YFrC6QIA>.

long as the rights are strong and clear, the market will find the proper level of price and access. In the same way, even though the courts are under an obligation to resolve cases or controversies, they should not rush in and engage in legal contortions that create more problems than they solve. When the law is genuinely ambiguous, the courts should do as little damage as possible and call on Congress to clarify the law, as Justice Blackman did in his brilliant *Betamax* dissent.<sup>57</sup>

Some of the compulsory licenses will no doubt survive a sweeping reform. Some of them may introduce convenience and efficiency into the licensing system, and the parties could conceivably retain most of the features of the license as they move from the judge-set rate, based on some vague notion of the public interest, to a private clearinghouse and market-based alternative.

But many of the compulsory licenses are obsolete. In 1976, cable companies were small Mom and Pop operations struggling to make a living in remote valleys in Pennsylvania.<sup>58</sup> How could they negotiate with the giants of Hollywood? Well, times have change. Mom and Pop have since sold out to a cable mogul and they are now living in splendid retirement in a fancy condo high above Miami Beach.<sup>59</sup> The mogul doesn't need the compulsory license to negotiate deals with Hollywood.

The satellite compulsory licenses may also have outlived their usefulness. The Motion Picture Association at a hearing at the Copyright Office on July 23-25, 2007, urged the phase out of cable and satellite compulsory licenses.<sup>60</sup> In the same proceeding, one of the satellite companies, EchoStar Satellite, recognized that the license isn't perfect, or even "an optimal solution," but contended that they are "the only solution available to provide broadcast signals to millions of subscribers nationwide."<sup>61</sup> Congress will have to make that judgment. It may conclude that a simple reinstatement of the basic exclusive property right would be best, rather than trying to divine that elusive and ever-changing balance, one that changes month-to-month and region-to-region.

Politically, it will take some thick skin and nerves of steel. Senator Mathias of Maryland served in the Senate from 1969 to 1987, through

---

57. 464 U.S. 417 at 500. "Like so many problems created by the interaction of copyright law with a new technology, '[t]here can be no really satisfactory solution to the problem presented here, until Congress acts.'" *Id.*

58. *See generally*, Tony Schwartz, Corporations Look to Cable TV, N.Y. TIMES, Oct. 18, 1980, at § 2, 31.

59. *Id.*

60. *See generally* Section 109 Report to Congress, Notice of Inquiry, 37 CFR Part 201, April 16, 2007, *archived at* <http://www.webcitation.org/5YFsd4hen>.

61. Comments of EchoStar Satellite, L.L.C. before the U.S. Copyright Office, July 2, 2007, *archived at* <http://www.webcitation.org/5YFsiUYPK>.

some of the most tumultuous events of the 20<sup>th</sup> Century—the Vietnam War, the Watergate scandal, and the impeachment of President Nixon.<sup>62</sup> The issue that generated the most mail to his office was the cable compulsory license. Even so, it is worth trying. Congress could both simplify the statute and improve the efficiency of copyright commerce by moving back to the first principles that worked well for 100 years. Certainly, the Digital Millennium Copyright Act is a step in the right direction.<sup>63</sup> It introduces an innovative, even revolutionary, concept. It gives the author the right to control access to his or her work.<sup>64</sup> Without that element of control, we will lose security on the internet, and without that security the internet will never reach its full potential as a broad avenue for scholarly discourse, e-commerce, and mass entertainment.

The unseemly political kerfuffle over the government-set rates paid by small webcasters illustrates both sides of the problem.<sup>65</sup> Congress as an institution cannot effectively adjudicate at that level of detail, but it also cannot avoid being drawn into the fray because their constituents are sending them angry emails. If the webcasters were to negotiate these rates with the copyright owners in private sector negotiations, just as the webcasters bargain over prices and wages with suppliers, equipment manufacturers, landlords, and employees (which business people do every day, routinely and effectively, without congressional intervention), Congress could keep its distance and all sides, including the voters, would be, if not happy, at least resigned to their fate and not blaming an interventionist government.

### III. Conclusion

Copyright encourages the creation of works that are a source of pleasure, profit, and intellectual fulfillment. It is also a source of human liberties. Justice O'Connor reminded us that copyright is the engine that drives free speech and gives meaning to the First Amendment.<sup>66</sup> It helps make our lives in the United States, and around the world, rich and exciting and free.

The very best copyright laws have always protected the exclusive

---

62. See Charles McCurdy Mathias, Jr., Biographical Directory of the United States Congress, *archived at* <http://www.webcitation.org/5YFsyWbJX>.

63. The Digital Millennium Copyright Act of 1998, scattered sections of 17 U.S.C.

64. See *Id.* at §1201(a).

65. See generally, Anne Broache, Music Industry offers deal to small Webcasters, CNetNews.com, (May 22, 2007), *archived at* <http://www.webcitation.org/5YFuOpMdK>.

66. Harper & Row Publishers, Inc. v. Nation Enterprises, et al., 471 U.S. 539, 558 (1984).

rights of creators against the power of companies that earn money making machines that exploit the creators' works. This has been so with each new technological development—from the printing press, through radio, television, tape recorders, and photocopying machines, to CD burners and now the internet. The tension between technology and the interests of authors shouldn't surprise us. It is the very essence of copyright thinking—the core that makes copyright law historically unique, socially revolutionary, and worth fighting for. And the exclusive right, reborn and expanded, will give authors the leverage they need to get their creations quickly and cheaply to a public eager to enjoy them.

