

## The Failure of the PRO-IP Act in a Consumer-Empowered Era of Information Production

*"There is no inevitable historical force that drives the technological-economic moment toward an open, diverse, liberal equilibrium. If the transformation . . . actually generalizes and stabilizes, it could lead to substantial redistribution of power and money. The twentieth-century industrial producers of information, culture, and communications—like Hollywood, the recording industry, and some of the telecommunications giants—stand to lose much . . . . None of the industrial giants of yore are taking this threat lying down. Technology will not overcome their resistance through an insurmountable progressive impulse of history. The reorganization of production and the advances it can bring in freedom and justice will emerge only as a result of social practices and political actions that successfully resist efforts . . . to minimize its impact on the incumbents."*<sup>1</sup>

### I. INTRODUCTION

A scholarly movement has built momentum since the early 1980s, writing from the perspective that technological development has shifted cultural norms, economic realities, and political implications of intellectual property production, consumption, and protection.<sup>2</sup> These changes could also be felt in Congress, where they affected the discourse and legislative output through a progeny of ever-growing rights awarded to intellectual property producers.<sup>3</sup> Although mainstream academics remained open-minded about the potential benefits of cautiously embracing these changes, Congress approached the developments as threats and sought to maintain the status quo.<sup>4</sup>

---

1. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 379-80 (2006).

2. See *id.* at 381 (describing academic discussion regarding "new enclosure movement" since 1980s). Throughout this note, the word "to consume" is used to describe the act of enjoying copyrightable material, and the word "to produce" is used to describe the act of creating it. See Niva Elkin-Koren, *Making Room for Consumers Under the DMCA*, 22 BERKELEY TECH. L.J. 1119, 1137 (2007) (using words "consume" and "produc[e]" in copyright context and pointing out limitations of this use).

3. See BENKLER, *supra* note 1, at 380 (explaining how stakeholder interests drove IP rights accumulation since 1990s). See generally James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 889-900 (2007) (positing theory for copyright expansion).

4. Compare Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (codified as amended at 17 U.S.C. 109) (legislating protection of sound recordings against risk of intellectual property theft

Technology has changed what types of intellectual property are produced, as well as how they are produced, stored, transferred, and sold.<sup>5</sup> Inexpensive, non-capital-intensive production and distribution technologies have allowed many individuals—even those who historically could only consume the intellectual property of others—to join in producing new works that rival the productions of industry giants.<sup>6</sup> Many of those same technologies have facilitated massive consumer infringement, threatening the profits of businesses that profit from intellectual property production under an existing legal framework.<sup>7</sup> These technologies have also made international markets more reachable to both legal producers and infringers, creating new opportunities for legitimate business growth while simultaneously increasing levels of risk to the firms generating revenue from intellectual property production.<sup>8</sup>

The federal government reacted in a largely preservationist fashion, seeking

---

from pervasive duplicating technology), with BENKLER, *supra* note 1, at 10 (calling Internet's social benefits "a staple of [academic] writing").

5. See BENKLER, *supra* note 1, at 3 (arguing information technology affordability allows individuals to produce); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 86-87 (2001) (arguing modern derivation blurs idea-expression dichotomy). Benkler contended that this availability of affordable technology increases the role of nonmarket, individual actors and decentralizes the production of information. BENKLER, *supra* note 1, at 3-5. Technology has also enabled the production of new kinds of works, notably rap and dance music, which rely on using technology to copy, sequence, and repeat portions, or "samples," of older, underlying works, a process known as "sampling." See *Tavis Smiley: Kenneth Gamble, Leon Huff* (NPR radio broadcast Feb. 12, 2008) (interviewing Philadelphia International Records heads and addressing sampling). In his interview with Tavis Smiley, Kenneth Gamble, who heads a record label that owns an oft-sampled catalog of Philly Soul recordings, said that "[w]hat [hip hop artists] are doing is a technological . . . miracle, to be able to take those old tracks and write new songs to them." *Id.*; see also PETER SHAPIRO, *TURN THE BEAT AROUND: THE SECRET HISTORY OF DISCO* 40-45 (2005) (describing how Tom Moulton created first remix by overlapping songs on tape). For one recent example in which three artists have, over the course of two decades, sampled serially from each other and from one underlying sound recording of a fourth artist, see *GIRL TALK, LET ME SEE YOU* (Illegal Art 2008) (sampling KANYE WEST, STRONGER (Roc-A-Fella Records 2007) (sampling DAFT PUNK, HARDER, BETTER, FASTER, STRONGER (Virgin Records 2002) (sampling EDWIN BIRDSONG, COLA BOTTLE BABY (Philadelphia International Records 1978))).

6. See BENKLER, *supra* note 1, at 70-74 (comparing accuracy of a volunteer-authored encyclopedia, Wikipedia, with that of Encyclopedia Britannica); DON TAPSCOTT & ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* 93-94 (expanded ed. 2008) (describing volunteer-developed Mozilla Firefox web browser's success compared with Microsoft's professionally developed browser). Although Wikipedia is an encyclopedia to which anyone can contribute and one in which "[a] solar physicist [contributing to an article about the Sun] . . . would have the same status as a contributor without an academic background," a study revealed that its accuracy was comparable to Britannica. Jim Giles, *Internet Encyclopedias Go Head to Head*, 438 NATURE 900, 900-01 (2005), available at <http://www.nature.com/nature/journal/v438/n7070/full/438900a.html> (describing comparison study). According to Giles, "only eight serious errors, such as misinterpretations of important concepts, were detected in the pairs of articles reviewed, four from each encyclopedia. But reviewers also found many factual errors, omissions or misleading statements: 162 and 123 in Wikipedia and Britannica, respectively." *Id.*

7. See *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913, 919-20 (2005) (describing legal and illegal uses of peer-to-peer file sharing software). The Supreme Court noted that "nearly 90% of the files available for download on [one peer-to-peer network] were copyrighted works". *Id.* at 922.

8. See ROGER SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* § 12, at 273 (2003) (noting Internet facilitates speedy, global distribution of works).

to protect the interests of existing stakeholders, while limiting the rights of individual citizens.<sup>9</sup> Congress has passed laws to limit digital copying, to award more significant rights to copyright owners, and to enhance enforcement of intellectual property rights at the expense of privacy.<sup>10</sup> Additionally, the courts have allowed greater intrusion into the digital lives of Americans.<sup>11</sup>

A number of leading intellectual property academics, however, have routinely questioned whether the changing intellectual property environment warrants these measures.<sup>12</sup> These academics have criticized recent intellectual property legislation for failing to embrace new technologies, awarding too many rights to producers at the expense of consumers, going beyond the constitutional mandate for legislating copyright, and infringing upon individual freedoms.<sup>13</sup> The mainstream scholars in the field have raised serious questions

9. See, e.g., Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860, 2863-65 (1998) (codified as amended at 17 U.S.C. § 1201 (2009)) (proscribing circumvention of access-control technology embedded in digital copies of copyrighted works); Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827, 2827-28 (1998) (codified as amended at 17 U.S.C. § 301-304 (2009)) (extending length of exclusive rights under copyright statute); Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336, 336 (1995) (codified as amended at 17 U.S.C. § 106 (2009)) (excluding non-rights holders from digitally transmitting copyrighted audio); Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809, 4974-75 (1994) (codified as amended at 17 U.S.C. § 1101 (2009), 18 U.S.C. § 2319A (2009)) (proscribing unauthorized fixation of live performances—"bootlegging"); Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237, 4240 (1992) (codified as amended at 17 U.S.C. § 1002 (2009)) (requiring digital recording device manufacturers to limit capability of devices to copy digitally); Computer Software Rental Amendments Act of 1990, Pub. L. No. 101-650 § 801, 104 Stat. 5089, 5134-36 (1990) (codified as amended at 17 U.S.C. § 109(b)(1)(A) (2009)) (prohibiting software owner from renting computer program for commercial gain unless copyright owner authorizes); Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (codified as amended at 17 U.S.C. § 109(a) (2009)) (prohibiting rental, lease, or lending of phonorecords for commercial purposes). But see generally Technology, Education, and Copyright Harmonization (TEACH) Act of 2002, Pub. L. No. 107-273, § 13301, 116 Stat. 1758, 1910-13 (2002) (codified as amended in scattered sections of 17 U.S.C.) (enhancing educator rights to use, display, and perform copyrighted works without license or liability); Fairness in Music Licensing Act of 1998, Pub. L. No. 105-298 § 201, 112 Stat. 2827, 2830-34 (1998) (codified as amended in scattered sections 17 U.S.C.) (enhancing fair use rights).

10. See *supra* note 9 (listing recent legislative expansions of copyright law).

11. See Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J. L. & TECH. 222, 271-73 (2005) (arguing Ninth Circuit ruling prompted online surveillance of Internet users by IP owners). See generally A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) (holding Internet service provider must have knowledge of infringing activity to face contributory liability). Katyal argues that *Napster*, which held that Internet service providers (ISPs) must know about infringement in order to face liability under a theory of contributory infringement, prompted online surveillance of peer-to-peer network users because it shifted enforcement responsibility onto copyright holders. Katyal, *supra*, at 271-73 (explaining reason for online surveillance).

12. See, e.g., LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY xx (2008) (questioning whether strengthening copyright protection best approach in light of reality); Elkin-Koren, *supra* note 2, at 1132-36 (exemplifying how anti-circumvention laws restrict freedom beyond extent warranted by technological threat to copyright protection); Katyal, *supra* note 11, at 271, 335 (blaming DMCA contributory liability treatment for online surveillance, and pointing out problems with this approach).

13. See BENKLER, *supra* note 1, at 380 (arguing copyright law stifling social benefits of new technological development); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (2004) (contending copyright's restriction of freedom too high a price to pay to incentivize information production); VAIDHYANATHAN, *supra* note 5, at 133-34 (asserting current copyright protection can prohibit some production).

about Congress's response to a growing tension between producers and consumers of intellectual property.<sup>14</sup>

The tension escalated in 2008, when Congress passed the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008 (the PRO-IP Act and the Act).<sup>15</sup> In response to Congressional recognition that copyright enforcement has become increasingly difficult, it rearranges executive offices to prioritize intellectual property enforcement and coordinates federal enforcement efforts with the efforts of local, state, and foreign governments.<sup>16</sup> Furthermore, the Act clarifies the government's ability to initiate criminal proceedings for infringement.<sup>17</sup>

This Note examines current factors affecting copyright rights, critiques the PRO-IP Act as a response to those factors, and explores recent business strategies for monetizing the production of intellectual property notwithstanding those factors.<sup>18</sup> Part II.A examines the history of copyright law as responsive to technological, cultural, economic, and political changes in the intellectual property environment.<sup>19</sup> Part II.B describes United States copyright law prior to the passage of the PRO-IP Act and examines the prior law's efficacy within the current intellectual property environment.<sup>20</sup> Part II.C explains how the PRO-IP Act amended the copyright statute.<sup>21</sup> Part II.D examines recent effective business strategies to sustain profits.<sup>22</sup> Part III critiques the PRO-IP Act from political, technological, cultural, and economic perspectives.<sup>23</sup> Part III.A argues that, from a political standpoint, while the Act squarely addresses international infringement concerns, it deals with domestic infringement in a highly oppressive manner.<sup>24</sup> Part III.B contends that Congress's difficulty accepting technological development has forced an overemphasis on ensuring fairness to commercial information producers.<sup>25</sup> Part III.C asserts that the Act is problematic from a cultural perspective because it fails to account for access to modern information production technology, inhibits the production of culturally valuable information, and views

---

14. See *supra* notes 12-13 (describing academic criticism of recent copyright legislation).

15. Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (2008) (codified as amended in scattered sections of 15-18, 42 U.S.C.).

16. See *id.* at 4264-66 (creating Intellectual Property Enforcement Coordinator position); *see also infra* notes 75-88 and accompanying text (explaining PRO-IP Act).

17. See PRO-IP Act, 122 Stat. at 4257-59 (clarifying no copyright registration requirement for criminal infringement action).

18. See *infra* Part II (examining factors affecting copyright rights); *infra* Part III (critiquing PRO-IP Act).

19. See *infra* Part II.A (discussing history of copyright law).

20. See *infra* Part II.B (describing state of copyright law prior to PRO-IP Act).

21. See *infra* Part II.C (explaining PRO-IP amendment to copyright statute).

22. See *infra* Part II.D (exploring business strategies to sustain profitability of intellectual property).

23. See *infra* Part III (analyzing PRO-IP Act).

24. See *infra* Part III.A (arguing Act's treatment of international infringement better than Act's treatment of domestic infringement).

25. See *infra* Part III.B (contending Congressional difficulty accepting technology as socially beneficial).

decentralized information production as an evil.<sup>26</sup> Part III.D criticizes the economic reasoning behind the passage of the Act because it stems from an incomplete cost-benefit analysis and ignores the opportunity cost of stifling new business development.<sup>27</sup>

## II. HISTORY

### A. *The Response of Copyright to Politics, Technology, Culture, and Economics*

#### 1. *Producer Control*

Article I, Section 8, Clause 8 of the U.S. Constitution grants 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.”<sup>28</sup> Since the ratification of the Constitution, Congress has derived from this clause the authority to pass copyright legislation.<sup>29</sup> Despite the relative simplicity of this aim, Congress has recognized a need continually to realign copyright law in the wake of historical changes in the technology, politics, culture, and economics of information production.<sup>30</sup>

---

26. See *infra* Part III.C (asserting Act presents three cultural problems).

27. See *infra* Part III.D (characterizing Congress’s economic reasoning as flawed).

28. U.S. CONST. art. I, § 8, cl. 8 (defining legislative branch’s role regarding copyright and patent); see also JAMES MADISON, THE FEDERALIST No. 43 (arguing authors’ exclusive rights exist for public benefit). Although the clause specifies “writings” and “discoveries” only, Congress and the courts have interpreted it broadly to include other kinds of works as well. SCHECHTER & THOMAS, *supra* note 8, § 2.2.3, at 14 (noting expansive interpretation of word “writings”).

29. See SCHECHTER & THOMAS, *supra* note 8, § 2.2.3, at 15 (describing passage of first copyright act under Article I, Section 8). See generally Act of May 31, 1790, 1 Stat. 124 (1790) (providing first exclusive rights to authors). The Act of May 31, 1790, which was the first copyright act, assigned exclusive rights to the author of “any map, chart, [or] book” to “print, reprint, publish or vend” such a work for fourteen years. *Id.* (delineating nature and scope of exclusive rights). Congress has adopted the policy rationale expressly stated in Article I, Section 8, Clause 8, that copyright legislation should promote the progress of the “Science[s].” SCHECHTER & THOMAS, *supra* note 8, § 2.2.3, at 14-15 (noting policy limitation expressed in Article I, Section 8). The Constitution’s framers operated under the notion that without creating an exclusive right as an incentive to produce creative works, society would suffer from a dearth of producers. VAIDHYANATHAN, *supra* note 5, at 21 (explaining rationale of framers in allowing Congress to create exclusive right for authors). The framers nevertheless believed that this “monopoly” on reproducing copyrighted information should be limited in both time and scope because the creation of a marginal cost to consumers to procure copyrighted works constituted a “tax on the public.” See *id.* (internal quotations omitted) (explaining framers’ rationale for limiting exclusive rights granted to copyright owner). From an economic standpoint, copyright’s social benefit can be explained in terms of static and dynamic benefits. WILLIAM LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 12-13 (2003) (explaining dynamic and static social benefits of property rights). Society realizes a dynamic benefit when the possession of a property right incentivizes investment in creating or developing a resource because the investor understands that he can reap the reward of that investment at a later time. *Id.* at 13. Society achieves a static benefit when it structures the interaction between individuals in a way that reduces transaction costs. See *id.* at 12 (exemplifying static benefit).

30. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 n.11 (1984) (following copyright legislation’s progression in response to technological developments); see also VAIDHYANATHAN,

Historically, copyright law has occasionally become inadequate to address the realities of the intellectual property environment.<sup>31</sup> For example, in *White-Smith Music Publishing Co. v. Apollo Co.*,<sup>32</sup> the Supreme Court held that, notwithstanding intuitive unfairness, the Act of May 31, 1790 (Copyright Act of 1790 and the 1790 Act) did not provide a musical composer with the exclusive right to derive a piano roll from his copyrighted sheet music.<sup>33</sup> Around the same time, authors began to argue that adequate copyright protection required international coordination; copyright protection could not stop at a national boundary.<sup>34</sup> These occurrences illuminated the 1790 Act's

---

*supra* note 5, at 82 (chronicling historical addition of new forms of works of authorship to copyright law). Although the 1790 Act covered books, maps, and charts, Congress added engravings, printed musical compositions, photographs, dramatizations, and translations over the subsequent century. *Compare* Act of May 31, 1790, 1 Stat. at 124 (protecting maps, charts, and books), *with* Copyright Act of Mar. 4, 1909, 35 Stat. 1075, 1076-77 (1909) (providing extensive, but non-exhaustive list of works of authorship). In the Copyright Act of 1976, the most recent major copyright overhaul, Congress provided copyright protection to "original works of authorship," a phrase which it intentionally left undefined to prevent limiting copyright protection to modes of expression within "the present stage of communications technology." H.R. REP. NO. 94-1476 (1978), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5664-65 (explaining usage of phrase).

31. See, e.g., *Sony*, 464 U.S. at 456 (deferring copyright law expansion to Congress); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 (1968) (recognizing technological development necessitated looking beyond ordinary meaning and legislative history); *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908) (holding piano roll duplicating sheet music without license not copyright infringement). Congress completely rewrote the copyright laws in 1909, and again in 1976. See generally Act of Jan. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2531 (1976) (drafting more flexible copyright law to accommodate technology and align more closely with international norms); Copyright Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (1909) (amending copyright law after *White-Smith*); H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5802 (statement of Rep. George E. Danielson) (recognizing Court's difficulty deciding contemporary cases under existing, inadequate copyright law).

32. 209 U.S. 1 (1908).

33. *Id.* at 11-12 (noting parties' viewpoints on subject matter of copyright in musical works). The opposing arguments questioned whether copyright protection for a work depended on the type of media on which a work is fixed. *Id.* at 18 (holding piano rolls "parts of a machine . . . produc[ing] musical tones," and not sheet music copies). The Court stated that allowing the manufacturers of piano rolls to avoid liability for infringement enables them to exploit copyrighted material for profit, but the court disclaimed authority to affect an arguably more equitable result. *Id.* (declining to extend copyright law and deferring to Congress). Under the 1790 Act, whether a copy occurred, and thus whether a copyright infringement action could lie, depended on the medium in which the alleged copy was fixed. *Id.* (noting medium-dependent protection). Furthermore, because an unaided human eye could not decipher a piano roll, the *White-Smith* Court held that the defendant had not copied the original work. See *id.* (holding piano roll mechanical part of player-piano machine rather than copy of musical work). As new media types became popular, the courts and Congress struggled to determine what kinds of protection to afford them. See H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660, 5661-63 (noting failed copyright revision and revision resulting in Copyright Act of 1976). See generally *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (holding technological development required Court go beyond statutory protection).

34. See VAIDHYANATHAN, *supra* note 5, at 35-36, 50-51, 55-58 (describing Samuel Langhorne Clemens's efforts for American participation in international copyright protection). But see SCHECHTER & THOMAS, *supra* note 8, § 12.2, at 275 (describing United States' hesitation to join Berne Convention). Only twenty years before *White-Smith*, countries began signing the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), the first treaty to address how the territoriality of copyright law limited its successful enforcement. Berne Convention for the Protection of Literary and Artistic Works, art. 1, Sept. 9, 1986, S. TREATY DOC. NO. 99-27, 1161 U.N.T.S. 3. Although the United States did not join the treaty until over a century later, the treaty marked the start of a multinational recognition that an international view of

inability to apply adequately to new forms of intellectual property.<sup>35</sup>

Congress's passage of the Copyright Act of March 4, 1909 (Copyright Act of 1909 and the 1909 Act) represented a reaction to both the *White-Smith* holding and the growing concern over international copyright infringement.<sup>36</sup> The 1909 Act reflected a recognition that a manufacturer can derive a piano roll from sheet music and that, under certain conditions, such derivation without the copyright holder's permission should allow a civil infringement action.<sup>37</sup> Furthermore, the 1909 Act broadened the scope of protection in international infringement scenarios by providing a framework for reciprocal protection for foreign nations that protected American copyrights.<sup>38</sup> The times reflected changing production of information, both qualitatively and in geographic scope, and the 1909 Act responded to these changes by broadening the law's protection of infringement.<sup>39</sup>

By the middle of the twentieth century, the distribution of copyrightable works had also changed.<sup>40</sup> Broadcast television facilitated instantaneous

---

copyright was necessary to avoid giving infringers immunity for duplicating a copyrighted work outside of the country of copyright. *See H.R. REP. NO. 100-609 (1988), reprinted in 9 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. 32 (Matthew Bender 2008)* (recounting formation of Berne Convention). The report states that the original convention had the following five objectives:

- (1) the development of copyright laws in favor of authors in all civilized countries; (2) the elimination over time of basing rights upon reciprocity; (3) the end of discrimination in rights between domestic and foreign authors in all countries; (4) the abolition of formalities for the recognition and protection of copyright in foreign works; and, (5) ultimately, the promotion of uniform international legislation for the protection of literary and artistic works.

*Id.* These objectives embodied a desire to afford authors copyright protection without limiting such protection based on the country of copyright. *See id.* The committee report stated that "authors should enjoy in other countries the same protection . . . those countries accord their own authors." *Id.* (noting reason for implementing Berne Convention). Although the United States did not join the Berne Convention until 1988, it arguably recognized the importance of international cooperation in securing copyright to the authors of protectable works, even during the time of *White-Smith*. *See generally* Copyright Convention Between the United States and Other American Republics, Aug. 11, 1910, 38 Stat. 1785 (1914) (agreeing to protect copyrights from other party countries).

35. *See SCHECHTER & THOMAS, supra* note 8, §3.2, at 28 (explaining limitation of Copyright Act in force during *White-Smith*); VAIDHYANATHAN, *supra* note 5, at 35-36, 50-51, 55-58 (recounting pressures for United States accession to international copyright treaties).

36. *See* Copyright Act of Mar. 4, 1909, 35 Stat. 1075, 1075-76, 1081 (allowing action against producer of piano roll and legislating reciprocal copyright rights with foreign nations).

37. *Id.* at 1081 (allowing piano roll production to infringe copyright in sheet music).

38. *See id.* (establishing framework for reciprocal rights). Prior to the 1909 Act, the only protection foreign works of authorship received was a proscription on their infringing importation. *See* Act of May 31, 1790, 1 Stat. 124, 124-25 (proscribing infringing importation).

39. *See VAIDHYANATHAN, supra* note 5, at 82 (arguing technological innovation created modes of expression not dealt with prior to 1909 Act). The Copyright Act of 1909 was not a lasting solution, however, because at the time of the Act's passage, inventors began to develop audio and visual recording technology. VAIDHYANATHAN, *supra* note 5, at 12-13. Vaidhyanathan wrote: "At the moment [of] the 1909 revision of the copyright law, American culture and technology rendered it outdated once again. The first two decades of the twentieth century saw the inventions of phonographs and recording machines." *Id.*

40. *See SIG MICKELSON, THE DECADE THAT SHAPED TELEVISION NEWS: CBS IN THE 1950S* xiii-xviii

information delivery into the home, creating a new market for information consumption.<sup>41</sup> Advertisers financed the consumption of new, non-literary works, and consumers enjoyed these works without having to pay for them.<sup>42</sup> Additionally, the marginal cost of producing a new copy of a work became negligibly small.<sup>43</sup>

In the 1970s, Congress overhauled copyright law, broadening the scope of enforcement to cover infringement through new distribution forms, such as broadcast, and new media, including movies.<sup>44</sup> The Act of January 19, 1976 (the Copyright Act of 1976 and the 1976 Act) grappled with novel questions regarding how a work is embodied in tangible media (fixation) and what types of works are copyrightable subject matter.<sup>45</sup> The 1976 Act reflected a flexible approach designed to accommodate both prior technological developments and unknown future developments in expression.<sup>46</sup> When the 1976 Act took effect two years later, Congress was confident that copyright law would withstand future developments by continuing to secure the desired exclusive rights for the authors of copyrightable works.<sup>47</sup>

---

(1998) (retelling early history of commercial broadcast television).

41. *See id.*

42. *See* DAVID WEINSTEIN, THE FORGOTTEN NETWORK: DUMONT AND THE BIRTH OF AMERICAN TELEVISION 13, 15 (noting NBC's television introduction at 1939 World's Fair and DuMont Network's 1943 advertising model experimentation). The DuMont Network, which, despite its collapse, was a pioneer in the broadcast business, first played with the idea of advertiser sponsorship of its programming with a Wednesday special during which sponsors could use the DuMont studio without charge. *Id.* at 15. These sponsors used the Wednesday special to run "fill-ins" between shows, and these were precursors to modern television commercials. *Id.*

43. *See* BENKLER, *supra* note 1, at 4, 31 (arguing need to reach large audiences incentivized inexpensive marginal production).

44. *See* H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (noting attempt to legislate broad, flexible statutory regime). *See generally* Act of Jan. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2531 (rewriting United States copyright law). The committee report stated that "the committee's purpose is to avoid exhausting the constitutional power of Congress to legislate in [the] field [of copyright]." H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 (stating purpose of amendment). The House of Representatives, in this report, recognized that "authors are continually finding new ways of expressing themselves but it is impossible to foresee the forms that these new expressive methods will take." *Id.*

45. *See* Act of Jan. 19, 1976, Pub. L. No. 94-553, 90 Stat. 2541, 2541 (defining fixation, and leaving "work of authorship" undefined); *see also* H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664-65 (setting forth expansion of expressive media as justification for clarifying copyright law's scope).

46. *See* H.R. REP. NO. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665 (stating bill's purpose to resolve status of live broadcasts). The report also pointed out that the bill had "sufficient flexibility to free the courts from rigid or outmoded concepts." *Id.*

47. *See id.* at 5659-60 (reporting favorably on amending copyright law). The Judiciary Committee voted for the Act because it protected works regardless of fixation. *Id.* The new copyright statute defined five exclusive rights of the copyright holder, subject to various exceptions. 17 U.S.C. § 106 (2006) (defining exclusive rights of copyright holder). The statute defined the rights as:

(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other

## 2. Consumer Empowerment

The 1980s, however, marked the development of affordable technology that manufacturers marketed toward a law-abiding consumer, which enabled the duplication of free broadcasts.<sup>48</sup> The obvious problem was that a consumer could receive, retain, and consume any broadcasted work of authorship without compensating the rights holder.<sup>49</sup> The 1984 case, *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>50</sup> demonstrated the resulting tension between consumers and producers.<sup>51</sup> At its core, the *Sony* case was a dispute over secondary liability of broadcast recording device manufacturers, but the Supreme Court considered the necessary intermediate question of whether to permit such consumer recording of broadcast under even limited circumstances.<sup>52</sup> The Court allowed equipment sales for the consumer purpose of “time-shifting,” even if the consumer indefinitely retained a copy of the work in a home library.<sup>53</sup>

After *Sony*, the producers accepted their loss in the legal arena, acknowledging that home recording posed a threat to intellectual property monetization by allowing consumers to create copies of works without paying for them.<sup>54</sup> Instead of continuing the legal fight, producers chose to counter

---

audiovisual works, to perform the copyrighted work publicly; [and] (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly. . . .

*Id.* Congress amended this section in 1995 to include an exclusive right in sound recordings with respect to digital audio transmissions. *See id.* (providing exclusive right in digital audio transmissions); Digital Performance Right in Sound Recording Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995) (codified as amended at 17 U.S.C. § 106(6) (2009)) (adding digital transmission right). Congress awarded various rights to consumers of copyrighted works as well, most notably through codifying the common law principle of fair use. *See* 17 U.S.C. § 107 (2006) (codifying fair use rights); *see also* 17 U.S.C. §§ 108-122 (2006) (defining additional limitations on exclusive rights of copyright holders).

48. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984) (summarizing respondents’ allegations of consumer video recorder use to record broadcast television).

49. *Id.* at 423–24 (describing typical usage of Betamax video recorder). Most consumers bought Betamax to “time-shift[],” that is, to record television during a broadcast and watch it later. *Id.* at 423 (explaining time-shifting practice). Surveys indicated that “a substantial number” of consumers also retained their recordings in libraries. *Id.* at 423-24 (noting results of consumer surveys).

50. 464 U.S. 417 (1984).

51. *See* Richard K. Berger, Comment, *Betamax Meets the Supreme Court: A Judicial Disappointment*, 20 NEW ENG. L. REV. 285, 292-93 (1985) (describing tension as between author’s exclusive rights and individual rights under First Amendment).

52. *See Sony*, 464 U.S. at 420 (considering whether copying equipment sales to general public constitutes contributory copyright infringement). The Court also considered whether time-shifting recording could ever be fair use. *See Berger, supra* note 51, at 293-95 (explaining Supreme Court’s fair use reasoning).

53. *Sony*, 464 U.S. at 456 (holding copyright law allows video recorder sales without infringement liability).

54. *See* Lisa J. Beyer Sims, Comment, *Mutiny on the Net: Ridding P2P Pirates of Their Booty*, 52 EMORY L.J. 1907, 1907-08 (2003) (describing entertainment industry’s reluctant “embrace” of video technology).

this threat in the business arena by selling copies of their works to consumers in formats that home recording equipment could play.<sup>55</sup> The business was wildly successful, and enormous VHS sales reflected the notion that robust enforcement was perhaps just one of many tools for creating an economically viable market for intellectual property consumption.<sup>56</sup>

The dynamic changed again with the advent of digital formats for fixation, which threatened the market viability of derivative sales of works that were also broadcast from time to time.<sup>57</sup> Producers feared that free, flawless copying would swallow the market for works and reacted by creating technologies to secure post-distribution control of their content.<sup>58</sup> As consumer use of the Internet became prevalent, producers saw their works transmitted around the world and copied outside of American copyright law.<sup>59</sup> Additionally, digitization modified the model for distribution of intellectual property from one in which copies of works were traditionally transported on tangible media to one in which transportation took place through digital copying, without the need for additional tangible media.<sup>60</sup> Finally, digitization propagated a

55. *See id.* Producers also attempted to persuade recording technology manufacturers to voluntarily incorporate copy protection systems into their products. S. REP. NO. 102-294 § II (1992) (recounting history of copy protection system development).

56. *See* Damien A. Riehl, Note, *Peer-to-Peer Distribution Systems: Will Napster, Gnutella, and Freenet Create a Copyright Nirvana or Gehenna?*, 27 WM. MITCHELL L. REV. 1761, 1762 n.3 (noting ten billion dollar-per annum market for VHS rentals and sales in 1999).

57. *See* Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1073 (9th Cir. 1999) (naming digital audio recording as threat to copy protection).

58. *See id.* (explaining why digital audio constituted threat to copyright); S. REP. NO. 102-294 § II (1992) (explaining why Congress believed no existed for copy protection measures); *see also* BENKLER, *supra* note 1, at 380 (criticizing digital rights management for effect on consumer access to content). Benkler wrote: "we saw a move to create new legal tools with which information vendors could hermetically seal access to their materials to an extent never before possible." BENKLER, *supra* note 1, at 380.

59. *See* Statement on Signing the Digital Millennium Copyright Act, 34 WEEKLY COMP. PRES. DOC. 2168 (Oct. 28, 1998), *reprinted* in 1998 U.S.C.C.A.N. 671 [hereinafter Clinton Statement] (describing copyright infringement's "global scale"); *see also* Diamond Multimedia, 180 F.3d at 1073-74 (noting, prospectively, potential of Internet to transmit music); Fred H. Cate, *Introduction: Sovereignty and the Globalization of Intellectual Property*, 6 IND. J. GLOBAL LEGAL STUD. 1, 2 (1998) (noting ease of digital information transportation). The accession to two international treaties under the auspices of the World Intellectual Property Organization (WIPO) was a major impetus behind the passage of the Digital Millennium Copyright Act (DMCA). Clinton Statement, *supra*.

60. *See* BRUCE A. LEHMAN, INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 213-14 (1995), available at <http://www.uspto.gov/go/com/ipnii/ipnii.pdf> (explaining transmitting on Internet involves creating copies, and arguing for clarification in copyright law); Lawrence Lessig's "Remix" for the Hybrid Economy (NPR radio broadcast Dec. 22, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=98591002> (describing digital distribution as generation of new copy for each consumption); *see also* David L. Hayes, *Advanced Copyright Issues on the Internet*, 7 TEX. INTELL. PROP. L.J. 1, 34 (1998) (speculating on legal status of transmissions outside of Internet context). Although radio and television broadcast arguably allowed for a similar type of transmission, the courts have viewed digital transmission between computers via the Internet as distinct. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024 (9th Cir. 2001) (holding digital music download not within scope of Audio Home Recording Act); Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1076 (9th Cir. 1999) (holding hard disk not "digital audio recording device" within scope of Audio Home Recording

consumer expectation that information can flow freely and is the consumer's to use and make her own.<sup>61</sup>

Congress reacted with laws designed to control the implications of digitization by prohibiting new consumer behavior that threatened the profits of IP-based industries.<sup>62</sup> Furthermore, in 1988, after 102 years of abstention, the United States agreed to join the international community in a more global approach to copyright enforcement.<sup>63</sup> Ten years later, Congress passed the Digital Millennium Copyright Act (DMCA), bringing American copyright law face-to-face with the modalities of digital intellectual property production and consumption.<sup>64</sup>

### B. Copyright Before PRO-IP

President William Jefferson Clinton signed the DMCA at the beginning of widespread consumer acceptance of the Internet for the distribution and production of both commercial and amateur copyrightable works, ranging from written works to multimedia.<sup>65</sup> Small, affordable, digital technology enabled consumers to author works on a level previously only open to producers with

---

Act); *see also* 17 U.S.C. § 1001 (defining “digital audio recording device”).

61. *See* BENKLER, *supra* note 1, at 15 (describing cultural implications of modern information sharing). Benkler argued that the current system of “cultural” information production is more transparent and more malleable, writing:

Together, these mean that we are seeing the emergence of a new folk culture—a practice that has been largely suppressed in the industrial era of cultural production—where many more of us participate actively in making cultural moves and finding meaning in the world around us. These practices make their practitioners better “readers” of their own culture and . . . also allow[] individuals much greater freedom to participate in tugging and pulling at the cultural creations of others . . . .

*Id.*

62. *See generally* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995); Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (1992) (exemplifying legislation regarding institutional controls upon digitization).

63. *See generally* Berne Convention Implementation Act of 1998, Pub. L. No. 100-568, 102 Stat. 2853.

64. *See* DMCA, Pub. L. No. 105-304, 112 Stat. 2860, 2863-64 (1998) (codified as amended at 17 U.S.C. § 1201 (2006)). The law provided a legal backbone to the use of digital rights management for controlling the distribution of digital content. *Id.* (proscribing circumvention of technological measures used to control access to protected works). The DMCA defined circumvention as “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.” *Id.* at 2865; *see also* Chamberlain Group, Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1203 (Fed. Cir. 2004) (laying out test for violation of DMCA anticircumvention provision). In passing the DMCA, Congress also recognized the need to limit ISP liability when an ISP provides access to Internet-based services without the knowledge that some of those services may include infringing material. *See* 17 U.S.C. § 512 (2006) (providing safe harbor for ISPs). *See generally* ALS Scan, Inc. v. RemarQ Communities, Inc., 239 F.3d 619, 623 (4th Cir. 2001) (interpreting safe harbor provision).

65. *See* Clinton Statement, *supra* note 59. President Clinton said that “[the act] will become effective at a time when technological innovations present us with great opportunities . . . [but also] make it possible to pirate copyrighted works on a global scale with a single keystroke.” *Id.*

large amounts of capital.<sup>66</sup> More people than ever before participated in the creation of intellectual property because of lower financial hurdles that previously limited access to the production and distribution processes.<sup>67</sup> This opening up of production and distribution activities to consumers shifted the structure of intellectual property production away from a hierarchy, in which producers created and sold while consumers bought, to a structure in which every person is a potential producer.<sup>68</sup>

These technological and cultural norms created an environment in which expression flowed more freely, allowing more people to contribute to the production process.<sup>69</sup> Notwithstanding these benefits, technological

66. See BENKLER, *supra* note 1, at 30 (arguing Internet enabled shift away from emphasis on capital-intensive operations to facilitate mass communication); LESSIG, *supra* note 13, at 19-20 (contending emergence of Internet enables more participatory production); see also Rebecca Tushnet, *User-Generated Discontent: Transformation in Practice*, 31 COLUM. J.L. & ARTS 497, 503 (2008) (recounting evolution of consumer production from text, to graphics, to video). One example of this is a rising prevalence of creative works that fans produce in response to popular culture of interest to them. See HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 135-43 (2006) (describing emergence of fan participation in popular culture).

67. See BENKLER, *supra* note 1, at 30-32 (describing transformation in mass communication). Benkler described the Internet as the “first modern communications medium that expands its reach by decentralizing the capital structure of production and distribution of information, culture, and knowledge.” *Id.* at 30. He argued that this decentralization enables new pathways for communication that were previously silenced because of the heavy capital required to communicate. *Id.* at 32 (explaining results of decentralization).

68. See BENKLER, *supra* note 1, at 133 (asserting consumers have come to expect freedom to access and use information). Benkler wrote:

The construction of consumers as passive objects of manipulation that typified television culture has not disappeared overnight, but it is losing its dominance in the information environment . . . [The] increasing passivity of television culture came to be a hallmark of life for most people in the late stages of the industrial information economy. The couch potato, the eyeball bought and sold by Madison Avenue, ha[d] no part in making the information environment he or she occupie[d].

*Id.* at 133, 135; see also *id.* at 138 (elaborating on hierarchical production-consumption structure in industrial economy). Additionally, individuals who historically acted only as consumers are now producing economically valuable information that firms can use for profit. See TAPSCOTT & WILLIAMS *supra* note 6, at 6-8 (recounting example of gold mining company turning to individuals to produce information on gold deposits). Tapscott and Williams related a story of a failing gold mine whose executive decided to post its entire repository of gold mine data on the Internet and offer rewards to individuals who could use the data to locate undiscovered gold deposits on its existing mines. *Id.* Through this approach, the company located sixty-five previously unidentified targets, representing an estimated eight million ounces of new gold. See *id.* at 9 (describing results of new approach); see also JENKINS, *supra* note 66, at 26-50 (providing case study of individual production of valuable intellectual property relating to “Survivor” television series). Some academics and activists argue that with this transition comes a responsibility to embrace the use of new information-production technology as well as to teach ordinary individuals how to use it, the same way American schools teach those individuals how to write. See LESSIG, *supra* note 13, at 36-37 (describing filmmaking ability as form of literacy that “goes beyond text”).

69. See TAPSCOTT & WILLIAMS, *supra* note 6, at 9 (illustrating kinds of individuals involved in Goldcorp effort). Rob McEwan, CEO of Goldcorp said: “We had applied math, advanced physics, intelligent systems, computer graphics, and organic solutions to inorganic problems. There were capabilities I had never seen before in the industry . . . ” *Id.* at 9. Other examples abound. See BENKLER *supra* note 1, at 63-67, 69, 86-89 (providing examples of open-source software, Mars crater identification, and Internet telephone networking); see also *supra* note 66 (describing improved access to information production capabilities).

developments posed challenges to intellectual property-based businesses.<sup>70</sup> Perhaps the most negative consequence of the changing environment was the ease with which consumers could flawlessly copy and distribute works.<sup>71</sup> Additionally, the widespread and pervasive nature of infringement made rights enforcement more expensive and less adequate.<sup>72</sup> This forced producers to rely on controlling access to their works downstream of their first sale.<sup>73</sup>

70. See THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 266 (2006) (describing benefit of globalization). In addition to the benefits, technological development created a number of challenges as well. See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 716–17 (9th Cir. 2007) (upholding “server test” to determine whether use of inline images in HTML document constitutes copying); *A&M Records, Inc. v. Napster, Inc.* 284 F.3d 1091, 1096 (9th Cir. 2002) (affirming district court’s decision that IP-holder responsible for discovering infringing material on file sharing network); *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 44–45 (D.D.C. 2003) (finding Internet connectivity provider must comply with subpoena to release identity of users infringing copyright). In each of these cases, questions arose as to whether the defendant’s business was lawful under the Copyright Act of 1976. See *Perfect 10*, 487 F.3d at 716–17 (putting forth test to determine if inline images on website constitute infringement); *A&M Records*, 284 F.3d at 1096–97 (summarizing complaint); *Verizon*, 240 F. Supp. 2d at 28–29 (recounting defendant’s answer). In *A&M Records*, A&M challenged whether Napster should be allowed to operate, given that this would place a burden on the plaintiff to continually monitor the defendant for infringement. *A&M Records*, 284 F.3d at 1096–97 (laying out plaintiff’s argument). In *Verizon*, Verizon sought to resolve whether it was the kind of ISP the DMCA contemplated in the act’s subpoena clause or whether the clause applied only to an ISP that actually stores infringing materials for its users. *Verizon*, 240 F. Supp. 2d at 28–29 (laying out defendant’s argument). In *Perfect 10*, the court had to resolve whether inline images on the defendant’s website constituted a copy of the image when the defendant did not maintain an independent copy of image on its server. *Perfect 10*, 487 F.3d at 716–17 (laying out “server test”). Despite the best efforts of the drafters to construct a flexible approach to copyright under the 1976 Act, it did not address these and other issues. See H.R. REP. 94–1476 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5664 (recognizing importance of accommodating future technologies).

71. See *Recording Indus. Ass’n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1073 (9th Cir. 1999) (explaining how digital formats enable flawless copying). Before the introduction of digital audio recording, each successive analog copy suffered increasing quality degradation, and aberrations such as “hiss and lack of clarity” would become more pronounced. *Id.* The implication was that consumers would prefer to purchase authorized, high-quality copies of music, rather than suffer the negative aspects of successive analog copies. See *id.* (stating digital copying eliminates quality degradation). The introduction of digital copying technologies, including peer-to-peer file sharing software, lowered the barriers for consumers to create flawless digital copies. See generally *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (adjudicating copyright infringement by Minnesotan single mother); David Kravetz, *RIAA Jury Finds Minnesota Woman Liable for Piracy, Awards \$220,000*, WIRED MAG., <http://blog.wired.com/27bstroke6/2007/10/riaa-jury-finds.html> (October 4, 2007) (reporting jury verdict against Minnesotan single mother for \$220,000 in copyright infringement statutory damages).

72. See *LANDES & POSNER*, *supra* note 29, at 16–21 (explaining costs of conceptualizing intellectual property as property right, including enforcement costs).

73. See BENKLER, *supra* note 1, at 439–56 (describing control of content downstream of first sale, or modern content enclosure). Benkler argued that copyright law’s expansion enclosed content by creating a “right to read,” narrowing fair use, extending copyright terms, and proscribing even de minimis sampling. *Id.* at 440–44 (explaining four areas of recent content enclosure). Additionally, some proponents of enhanced copyright protection have advocated narrowing the scope of the “first sale doctrine.” LEHMAN, *supra* note 60, at 93 (recommending limited applicability of “first sale doctrine”). The first sale doctrine states that “once the copyright owner consents to the sale of particular copies of his work, he may not thereafter exercise the distribution right with respect to those copies.” NIMMER, *supra* note 34, at § 8.12; see also 17 U.S.C. § 109(a) (2006) (allowing owner of particular copy of work to sell or otherwise dispose of it). The recommendation that the first sale doctrine be limited was one of a number of enclosure-style revisions the Information Infrastructure Task Force (IITF) suggested in 1995. See Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS &

Additionally, the expenses and impracticalities of enforcement required that producers create a constant threat that any infringer could face legal action, even if many infringing acts remained undetected.<sup>74</sup>

### C. The Congressional Reaction: The PRO-IP Act

On October 13, 2008, Congress passed the PRO-IP Act, addressing the new challenges to enforcement in four key areas.<sup>75</sup> First, the legislation reflected a strategy of reorganizing positions within the federal executive to better facilitate enforcement efforts.<sup>76</sup> Second, the PRO-IP Act provided for cooperation with local and state governments.<sup>77</sup> Third, the Act brought the international scope of infringement into the federal government's reach.<sup>78</sup> Finally, the Act made the legal consequences of infringement more significant.<sup>79</sup>

The PRO-IP Act prioritized enforcement of intellectual property by placing an Intellectual Property Enforcement Coordinator (IPEC) in the Executive Office of the President and by encouraging state and federal agencies to

---

ENT. L.J. 29, 30-31 (1995) (summarizing IITF recommendations for copyright law revision). Litman suggested that these recommendations enhanced copyright protection "so far as to give the copyright owner the exclusive right to control reading, viewing[,] or listening to any work in digitized form" *Id.* at 31-32 (concluding "right to read" exists). *See generally* RICHARD M. STALLMAN, *The Right to Read*, in FREE SOFTWARE SOCIETY: SELECTED ESSAYS OF RICHARD M. STALLMAN 73 (2002) (narrating dramatic hypothetical scenario with strict right to read). Regardless of future developments of the first sale doctrine, the DMCA's anti-circumvention section amounts to content control downstream of the first sale. *See* 17 U.S.C. § 1201 (2006) (proscribing circumvention of content access control measures); *supra* note 64 (explaining DMCA's anti-circumvention section). *See generally, e.g.*, Lexmark Intern., Inc. v. Static Control Components, Inc., 387 F.3d 522 (6th Cir. 2004) (exemplifying content access control technology through encryption of software); Chamberlain Group, Inc. v. Skylink Technologies, Inc., 381 F.3d 1178 (N.D. Ill. 2004) (explaining legal requirements to prove circumvention of content access control measures); 321 Studios v. Metro-Goldwyn-Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004) (detailing content access control on commercial DVDs).

74. *See* Katyal, *supra* note 11, at 248-49 (explaining "panoptic" surveillance as enforcement mechanism and likening it to Internet intellectual property enforcement). According to Katyal, the Panopticon is a concept developed by Jeremy Bentham, and, later, Michel Foucault, that refers to a prison designed to create in each cell both the feeling of solitariness and the sense of surveillance. *Id.* (detailing construction of Panopticon prison). The result is that "individuals . . . internalize the overseeing gaze of authority figures, and eventually . . . discipline their behavior to comport with expectations of these figures, irrespective of whether or not they were actually present and watching at the time." *Id.* at 249. Katyal argued that the Internet is developing its own panoptic mechanisms. *Id.* at 248-49. Stakeholders took a less invasive approach to conveying the threat, including the distribution of a graphic novel in which a college student faces liability for downloading music from the Internet without a license. NATIONAL CENTER FOR STATE COURTS, JUSTICE CASE FILES: THE CASE OF INTERNET PIRACY (2008), available at [http://www.ncsconline.org/D\\_Comm/Images/justice\\_case\\_files\\_01\\_preview.pdf](http://www.ncsconline.org/D_Comm/Images/justice_case_files_01_preview.pdf).

75. PRO-IP Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256; *see infra* notes 86-87 and accompanying text (explaining provisions of PRO-IP Act).

76. PRO-IP Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256, 4264-70 (2008) (coordinating and strategically planning federal effort against counterfeiting and infringement).

77. *Id.* at 4271-72 (creating IP Theft and Infringement Crimes (IP-TIC) grants to state and local agencies).

78. *Id.* at 4259 (amending copyright law to prohibit exportation of infringing material).

79. *See* H.R. REP. NO. 110-617, at 20 (2008) (stating purpose of legislation).

coordinate enforcement strategies.<sup>80</sup> The Act put the IPEC in charge of developing a Joint Strategic Plan to set the policies for enforcement within the executive branch at the department and agency levels, subject to the guidance of an IPEC-chaired advisory committee.<sup>81</sup> Finally, the Act gave the IPEC the role of reporting intellectual property enforcement issues to the President and Congress.<sup>82</sup>

Title IV of the Act established incentives, in the form of federal grants, for state and local government to use their own law enforcement resources to prevent federal copyright infringement.<sup>83</sup> The grants, called “IP Theft and Infringement Crimes” (IP-TIC) grants, allowed the Department of Justice (DOJ) to grant money to state and local government agencies to accomplish specific objectives named in the Act.<sup>84</sup> In exchange for the grants, state and local government agencies must commit to accomplishing the objectives

---

80. PRO-IP Act of 2008, 122 Stat. at 4265 (creating IPEC position). Congress established the IPEC with the intention of better coordinating the many agencies charged with IP enforcement tasks, including the Department of Justice, the Patent and Trademark Office, and the United States Trade Representative. H.R. REP. NO. 110-617, at 28-29 (2008) (explaining rationale for establishing IPEC).

81. PRO-IP Act of 2008, 122 Stat. 4256, 4264-65 (establishing IPEC’s responsibilities). The Act specified that the IPEC should work with the following departments and agencies: the Department of Justice (DOJ), the United States Patent and Trademark Office, the Office of the United States Trade Representative, the Department of State, the United States Agency for International Development, the Bureau of International Narcotics Law Enforcement, the Department of Homeland Security, the United States Customs and Border Protection, the United States Immigration and Customs Enforcement, the Food and Drug Administration of the Department of Health and Human Services, the Department of Agriculture, and “[a]ny such other agencies as the President determines to be substantially involved in the efforts of the Federal Government to combat counterfeiting and infringement.” *Id.* at 4265.

82. *Id.* (providing for reporting role of IPEC).

83. *Id.* at 4271-73 (authorizing DOJ to issue grants). Congress authorized the DOJ to grant money to “eligible [s]tate or local law enforcement entities, including law enforcement agencies of municipal governments and public educational institutions, for training, prevention, enforcement, and prosecution of intellectual property theft and infringement crimes[.]” *Id.* at 4271 (authorizing grants for intellectual property enforcement).

84. *Id.* (specifying objectives of IP-TIC grants). Specifically, the grants will assist state and local law enforcement agencies:

- (A) . . . in enforcing [intellectual property] laws . . . .
- (B) . . . in educating the public to prevent, deter, and identify violations of those laws.
- (C) [in e]ducat[ing] and train[ing] State and local law enforcement officers and prosecutors to conduct investigations and forensic analyses of evidence and prosecutions in matters involving [intellectual property] laws.
- (D) [in e]stablish[ing] task forces . . . to conduct investigations and forensic analyses of evidence and prosecutions in matters involving [intellectual property] laws.
- (E) . . . in acquiring computer and other equipment to conduct investigations and forensic analyses of evidence and prosecutions in matters involving [intellectual property] laws.
- (F) . . . [in] sharing, with [s]tate and local law enforcement officers and prosecutors, of the expertise and information of Federal law enforcement agencies about the investigation, analysis, and prosecution of matters involving [intellectual property] laws . . . .

enumerated in the Act.<sup>85</sup>

The legislation refocused enforcement on international infringement activities that affect American businesses by adding a prohibition on the exportation of infringing copyrighted works.<sup>86</sup> Additionally, Congress strengthened the penalties for infringement in both the civil and criminal arenas.<sup>87</sup> Finally, Congress amended the copyright statute to clarify that, although copyright registration was a prerequisite to a civil action for infringement, the government could bring criminal proceedings against an alleged infringer notwithstanding a lack of copyright registration.<sup>88</sup> The Congressional Budget Office estimated the legislation would cost \$435 million to implement over a five-year period.<sup>89</sup>

#### *D. The Business Reaction: Alternative Strategies*

Although businesses stand to gain from the PRO-IP Act, primarily because it helps preserve a status quo in which existing IP-based businesses can flourish, a number of market players have employed alternative strategies that do not depend on the preservation of existing intellectual property markets.<sup>90</sup> The evolution in intellectual property production reduced or eliminated entry

---

85. See PRO-IP Act of 2008, 122 Stat. at 4271 (allowing grants only to “eligible” state and local government entities). The Act defined an “eligible” state or local government entity as one that provides the information required by the Office of Justice Programs’ Financial Guide, as well as:

- (A) assurances that the State in which the government entity is located has in effect laws [for intellectual property enforcement, as described in the Act];
- (B) an assessment of the resource needs of the State or local government entity applying for the grant . . .; and
- (C) a plan for coordinating the programs funded under this section with other federally funded technical assistance and training programs . . . .

*Id.* See generally U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FINANCIAL GUIDE 2008 (2008), <http://www.ojp.usdoj.gov/financialguide>.

86. PRO-IP Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256, 4259-60 (adding exportation offense). Although not a part of the final version signed into law, the House version of the bill also directed the Under Secretary of Commerce for Intellectual Property and the Director of the United States Patent and Trademark Office to appoint ten “attachés” to work with foreign countries on enforcement. H.R. 4279, 110th Cong. (2007). Congress would have created the attaché positions “to promote stronger and more effective enforcement of intellectual property laws in key overseas markets . . . [and to] provide U.S. businesses intellectual property-related assistance in securing and protecting their rights in an expanded number of countries.” H.R. REP. NO. 110-617, at 29 (2008).

87. See PRO-IP Act of 2008, 122 Stat. at 4258, 4262–64 (clarifying civil remedies and adding new restitution and forfeiture provisions); see also *id.* at 4262, 4263 (providing for civil forfeiture procedure and legislating criminal forfeiture).

88. See *id.* (moving criminal penalties to Title 18 and designating penalties under Title 17 as “civil”).

89. See H.R. REP. NO. 110-617, at 34 (2008) (noting Congressional Budget Office’s estimate of total cost to implement).

90. See *infra* notes 94-107 and accompanying text (identifying and exemplifying a sample of successful business models that use alternate strategies). What is presented here is by no means an exhaustive list of successful business models.

barriers to the information production process.<sup>91</sup> Businesses that relied on those barriers to maintain a competitive advantage have, to some extent, remained viable by using the law as a substitute for those barriers.<sup>92</sup> Still, other businesses have emerged in this changing environment by recognizing the loss of entry barriers and seeking new routes to profitability.<sup>93</sup>

Some businesses have coped with changes in intellectual property markets by maintaining an eye on consumer behavior in order to continually offer products that consumers will pay for, thus lessening the threat that consumers will escape liability for infringement.<sup>94</sup> In general, this approach has focused on non-monetary reasons for copyright infringement, such as the availability of a work at a given point in time.<sup>95</sup> Businesses taking care to match their products to consumer preferences have, at times, had to break entirely from customary business practices.<sup>96</sup> At other times, these businesses have developed new markets for their copyrightable works to incentivize consumers to pay rather than infringe.<sup>97</sup>

---

91. See BENKLER, *supra* note 1, at 4-5 (chronicling changes in information production from twentieth century onward); LESSIG, *supra* note 13, at 47 (noting inclusive information production architecture).

92. See BENKLER, *supra* note 1, at 384 (arguing increased intellectual property regulation designed to ensure exclusive “commercial party[’] access to production process). Benkler was skeptical about whether the law could possibly “replicate the twentieth-century model of industrial information economy in the new technical-social context,” but argued that recent legislation has attempted to do this by using the law to secure traditional producers the exclusivity that once existed for economic reasons. *See id.* at 384-85 (describing potential obstacles to re-establishing twentieth century intellectual property production model).

93. See, e.g., Nate Anderson, “Functionally Voluntary” Music May Lead to Blanket Licenses, Ars Technica, Aug. 18, 2008, <http://arstechnica.com/news.ars/post/20080818-paying-for-music-has-become-functionally-voluntary.html> (speculating possibility of blanket licensing for music consumers); Tim Arango, Holy Cash Cow, Batman! Content is Back, N.Y. TIMES, Aug. 10, 2008, at BU (describing Internet-to-television distribution channel); New products, DIGITAL LIFE, March 4, 2008, available at 2008 WLNR 4228645 (explaining price structure for Adobe Flex software); *see also infra* notes 94-107 and accompanying text (elaborating and exemplifying some successful business models).

94. See Arango, *supra* note 93 (describing how “seamless distribution of films to television” could alleviate some movie piracy).

95. See *id.* Arango reported on a meeting of computer hackers at the Museum of Television and Radio in Los Angeles, at which a Warner Bros. Entertainment executive learned that at least some movie “pirates” would pay to download movies if they could watch them at home on the same day as a theatrical release. *Id.*

96. See *id.* Although Warner Bros. has been “staunchly and adamantly supportive” of a “theatrical window,” seamless distribution to television using the Internet may be the way of the future. *See id.* (quoting Alan Horn, President and Chief Operating Officer of Warner Bros. Entertainment).

97. See *id.* (noting Sony release of *Hancock* to Sony Bravia owners); Eric Benderoff, Instant Movie Night Blockbuster Launches Internet Movie Downloads to Compete Against Netflix, STAR-LEDGER (Newark, N.J.), Dec. 13, 2008, at 17 (reporting on Blockbuster Internet distribution service); Barbara Ortutay, LG High-Def TVs to Stream Netflix Videos Directly, ASSOCIATED PRESS, Jan. 5, 2009 (describing Netflix instant Internet distribution to LG televisions). In other media, such as music and books, instant Internet-based distribution has been in place for some time and perhaps seems more commonplace. See William Weir, Automation of the Arts; Ever-Evolving Technology Keeps Us Plugged Into Movies, Music, Even Books, HARTFORD COURANT, Jan. 4, 2009, at G1 (discussing books via Amazon Kindle’s wireless instant download service). Amazon sold an estimated 380,000 Amazon Kindle reading devices in 2008, Kindle’s first year. See Olga Kharif, Move Over Kindle; E-Books Hit Cell Phones, BUSINESS WEEK ONLINE, Dec. 31, 2008, [http://www.businessweek.com/technology/content/dec2008/tc20081229\\_937226.htm](http://www.businessweek.com/technology/content/dec2008/tc20081229_937226.htm) (noting Citigroup estimate of Kindle Sales). Apple’s online music shop, iTunes, is now the top music retailer in the United States, with fifty million

Other businesses have offered free, low-quality versions of their products and marketed premium products toward consumers who would choose to pay for intellectual property rather than commit copyright infringement.<sup>98</sup> For example, software companies often sell sophisticated software packages while making the underlying technology freely available.<sup>99</sup> Although sometimes the free software is incorporated into packages that compete directly with the original company's more expensive software, this phenomenon has not had a prohibitive effect on this approach in every case.<sup>100</sup>

Still other businesses have been able to provide content to consumers for free by finding alternative sources of funding or alternative arrangements for charging consumers for production and distribution.<sup>101</sup> The music industry has tried this approach, either by charging consumers a flat fee or by creating ad-supported music services.<sup>102</sup> At least one music service charged universities a subscription fee in exchange for giving students free, unlimited access to its music catalog.<sup>103</sup> Applications of this approach embodied a common belief that

---

customers who bought over four billion songs from the world's largest music catalog since iTunes opened for business. *See* Press Release, Apple, iTunes Store Top Music Retailer in the US (April 3, 2008), *available at* <http://www.apple.com/pr/library/2008/04/03itunes.html> (noting prevalence of music from iTunes via the Internet).

98. *See, e.g.*, Andrew Edgecliffe-Johnson, *Music Industry 'Should Embrace Illegal Websites'*, FIN. TIMES, Aug. 3, 2008 (describing band Radiohead's album release on "pay-what-you-want basis" and increased public exposure); John Fontana, *Ten Open Source Companies to Watch*, NETWORK WORLD, Sept. 2, 2008 (describing free Internet content management software and service business supporting it for profit); *New Products*, DIGITAL LIFE, Mar. 4, 2008 (explaining Adobe Flex software pricing, ranging from free toolkit to \$1236 professional package).

99. *See, e.g.*, *Adobe—Flex 3*, <http://www.adobe.com/products/flex/> (offering free software development toolkit and selling proprietary software to aid development); *Download details: .NET Framework 2.0 Software Development Kit (SDK) (x86)*, <http://www.microsoft.com/downloads/details.aspx?familyid=fe6f2099-b7b4-4f47-a244-c96d69c35dec&displaylang=en#Overview> (offering free software development kit underlying for-sale Microsoft Visual Studio); Malwarebytes.org, <http://www.malwarebytes.org/mbam.php> (offering free spyware removal software and enhanced version for price).

100. *See* Egan Orion, *PDF 1.7 is Approved as ISO 32000*, THE INQUIRER, Dec. 5, 2007, <http://www.theinquirer.net/inquirer/news/411/1030411/pdf-approved-iso-32000> (reporting Adobe Acrobat PDF document format became open standard in 2005); Adobe Systems, Inc., Annual Report (Form 10-K), at 51 (Jan. 23, 2009) (disclosing 11 percent per annum growth since 2006 in "knowledge worker" segment, due to Acrobat licensing).

101. *See* Anderson, *supra* note 93 (speculating extension of collection societies like ASCAP to end music consumers). Collection societies license entire catalogs of music to professionals who wish to perform music publicly, helping them avoid the need to arrange royalty agreements with individual rights-holders. *See id.*

102. *See* Pete Barlas, *For Subscription Music Services, Harmony Finally Set to Arrive; Future Looks Brighter; Napster, RealNetworks, Yahoo Starting to Scale Road Toward Profitability*, INVESTOR'S BUS. DAILY, Sept. 8, 2005, at A04 (noting early success of unlimited-download music subscription services priced per month); Saul Hansell, *Big Labels Offer Free Music to College Students*, N.Y. TIMES, Jan. 22, 2007, at C10 (reporting Ruckus music download service's switch to advertisement-supported model). Ruckus shut down on February 5, 2009 without explanation. *See* Rafat Ali, *College Online Music Service Ruckus Closes Down*, PAIDCONTENT.ORG, Feb. 7, 2009, <http://www.paidcontent.org/entry/419-college-online-music-service-ruckus-closes-down/> (last visited Sept. 9, 2009).

103. *See* Hansell, *supra* note 102 (mentioning Ruckus's early model of charging universities for student access to music catalog); *see also* Ryan Paul, *College Funding Bill Passed with Anti-P2P Provisions Intact*, ARS TECHNICA, Aug. 1, 2008, <http://arstechnica.com/news.ars/post/20080801-college-funding-bill-passed>.

producers can ensure profits by adjusting the payment structure.<sup>104</sup>

Finally, other adapting businesses have produced intellectual property but ultimately depended on revenue streams from related products or services not susceptible to infringement.<sup>105</sup> Here, intellectual property typically has played a supportive role in business operations, and the success of dependent products and services has incentivized its production.<sup>106</sup> Even when a producer chooses to give away its intellectual property under this model, its production is still profitable because of the ancillary benefits that inure to the producer.<sup>107</sup>

### III. ANALYSIS

#### A. Politics

Copyright legislation needed to address the changing scope of infringement.<sup>108</sup> First, an anti-infringement amendment needed to call on the resources best suited to reach the growing number of individuals committing small-scale infringement for personal purposes.<sup>109</sup> Additionally, because of the free flow of information across national boundaries, copyright legislation needed to address the growing scope of infringement at the international level by moving toward global harmonization of copyright law.<sup>110</sup>

---

with-anti-p2p-provisions-intact.html (reporting Higher Education Act requires universities to provide students with commercial music downloading service subscriptions).

104. See Barlas, *supra* note 102 (quoting RealNetworks vice president lauding subscription model). According to Dan Sheeran, Senior Vice President of premium consumer services for RealNetworks, the revenue of Napster, a music subscription service, “validates the subscription market . . . . The category is growing, and it’s not just us that’s growing.” *Id.*

105. See, e.g., Google Inc., Annual Report (Form 10-K), at 44 (Feb. 15, 2008) (disclosing \$16,412.6 million in targeted advertising revenues from free search service, out of \$16,594.0 million in total revenues); BENKLER, *supra* note 1 at 46 (describing IBM’s development of free software to run on its server products); *Facebook / Advertising*, <http://www.facebook.com/advertising/> (last visited Nov. 3, 2009) (selling advertising space targeted to user-generated data Facebook collects).

106. See TAPSCOTT & WILLIAMS, *supra* note 6, at 7-8 (describing free release of proprietary gold-mining data, which led to location of additional gold sources); see also *supra* note 68 (giving background on gold mining operation).

107. See BENKLER, *supra* note 1, at 46 (describing added value to IBM server products as result of free software development IBM financed).

108. See Clinton Statement, *supra* note 59 (describing copyright infringement on “global scale”); see also Mark Stodghill, *Price of downloading: \$1.92 million for 24 songs for Brainerd woman*, DULUTH NEWS TRIBUNE, June 19, 2009 (describing judgment against single-mother who possessed illegal copies of twenty-four songs for personal use). But see LESSIG, *supra* note 13, at 68-69 (arguing peer-to-peer file-sharing does not necessarily implicate need to strengthen enforcement).

109. See LESSIG, *supra* note 13, at 66-67 (documenting historical proliferation of highly individualized infringement activities on Internet); VAIDHYANATHAN, *supra* note 5, at 131 (noting changing focus of mechanical rights infringement suits away from “large-scale pirating” operations); see also Metro Goldwyn Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919-20 (2005) (describing proliferation of peer-to-peer file sharing software).

110. See H.R. REP. NO. 110-617, at 20 (2008) (noting necessity of strengthening international enforcement); Cate, *supra* note 59, at 2 (arguing digital information “ignores national borders, [and] also those of States, territories, and even individual institutions”).

The PRO-IP Act addressed the political implications of this transformation adequately because it both strengthened the focus on international infringement activities that hurt American intellectual property markets and funded cooperation with state and local government agencies that are better equipped to address small-scale infringement activities.<sup>111</sup> By prohibiting the exportation of infringing materials, the Act improved on existing protection of American intellectual property abroad.<sup>112</sup> Additionally, the DOJ programs, particularly the IP-TIC grants, incentivized state and local government agencies to assist the federal government in intellectual property enforcement, thus strengthening the government's ability to prevent common, small-scale infringing activities.<sup>113</sup>

The PRO-IP Act provided needed protection for many businesses that produce intellectual property and seek to protect their copyrighted works from infringement, regardless of where the infringement takes place.<sup>114</sup> A business is only capable of using the laws of a given jurisdiction to enforce the copyrights it owns, and thus legislation helps protect the interests of producers if it strengthens a business's recourse for international infringement.<sup>115</sup> Additionally, protection against international infringement is more important today than it was years ago because more American businesses rely on sales in foreign markets, meaning that international infringement can more directly compete with legal business sales abroad.<sup>116</sup>

By facilitating cooperation between the DOJ and state and local government entities, however, the Act filled a need that private actors already addressed.<sup>117</sup> The IP-TIC grants arguably strengthened enforcement against small-scale infringers, but some businesses have shown that they can either reduce infringement or minimize its harmful effects without strengthening the law.<sup>118</sup>

---

111. See H.R. REP. NO. 110-617, at 20 (2008) (mentioning domestic and international enforcement efforts). The Act provides for "intellectual property enforcement coordinators" and "attachés" to strengthen enforcement efforts in foreign countries and authorizes grant money to assist state and local government enforcement efforts. *Id.*

112. See Pub. L. No. 110-403, 122 Stat 4256, 4259 (2008) (adding prohibition on exportation of infringing works).

113. See *id.* at 4271-73 (legislating DOJ programs to coordinate with state and local governments); H.R. REP. NO. 110-617, at 30-31 (2008) (justifying IP-TIC grants by noting existing heavy enforcement responsibility of state and local entities).

114. See H.R. REP. NO. 110-617, at 29 (2008) (stating domestic efforts not sufficient to protect American intellectual property).

115. See *id.* at 20 (recognizing business reliance on intellectual property laws).

116. See FRIEDMAN, *supra* note 70, at 266 (describing American search for larger markets abroad); see also S. REP. NO. 100-352, reprinted in 1988 U.S.C.C.A.N. 3706, 3707 (1988) (finding piracy abroad threatens United States intellectual property trade). But see LESSIG, *supra* note 13, at 64 (arguing foreign purchasers of pirated American works abroad not part of market in first instance).

117. See Katyal, *supra* note 11, at 248-49 (describing private Internet surveillance efforts to assist copyright holders in serving takedown notices on ISPs).

118. See *supra* notes 90-107 and accompanying text (arguing new business models can limit harmful effects of infringement); see also LESSIG, *supra* note 13, at 72 (describing type of infringing file sharing activity arguably not harmful to copyright owner). Additionally, many aggrieved producers already enforce their own copyrights through Internet surveillance and civil litigation. See Katyal, *supra* note 11, at 248-49

By legislating this narrow focus, the law added protection for producers but ignored current successful, private efforts to curtail infringement or its effect on profit.<sup>119</sup>

Going forward, Congress must continue to look at infringement of American copyrights abroad as an important area to strengthen protection.<sup>120</sup> As Congress has recognized in the past, American businesses increasingly depend on the security of their rights overseas as well as at home and should look to the law to provide that security.<sup>121</sup> Tackling the effects of small-scale infringement, however, may be better left to businesses that can structure their operations in ways that minimize both infringement and its significance.<sup>122</sup> Funding state and local government enforcement could counteract small-scale infringement as well, but is perhaps too oppressive of an option given available alternatives.<sup>123</sup>

### B. Technology

Changes in intellectual property production, distribution, and consumption underscored the need to pass legislation that continues to respect the rights of both producers and consumers.<sup>124</sup> This need was simultaneously an issue of

---

(explaining panoptic Internet surveillance).

119. See generally Pub. L. No. 110-403, 122 Stat. 4256 (increasing penalties for copyright infringement); H.R. REP. NO. 110-617 (2008) (explaining rationale for PRO-IP Act to provide additional protection to copyright owners). Notwithstanding the Congressional understanding that producers need additional protection, private enforcement efforts have caught many infringers and have deterred many others as well. See Katyal, *supra* note 11, at 248 (arguing Internet surveillance creates deterrence by putting potential lawbreakers in fear of discovery).

120. See LESSIG, *supra* note 13, at 63-64 (accounting for loss from international piracy across the world, especially in Asia and Eastern Europe).

121. See S. REP. NO. 100-352, at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3706, 3707 (finding strong United States intellectual property presence in international markets); see also *supra* note 116 and accompanying text (noting American expansion to foreign markets).

122. See *supra* notes 90-93 and accompanying text (describing new business strategies for monetizing intellectual property without strengthening intellectual property enforcement).

123. See H.R. REP. NO. 110-617, at 30-31 (2008) (contending that PRO-IP programs within DOJ, including IP-TIC grants, will help enforcement efforts). Notwithstanding the potential for an improved enforcement mechanism under the Act, scholars contend that strengthening enforcement is oppressive. See BENKLER, *supra* note 1, at 385 (describing what law would need to accomplish to reinforce twentieth century rights); LESSIG, *supra* note 13, at 47 (quoting industry executive contending copyright law “closes down” creative processes and “suppresses . . . natural tendencies”).

124. Compare LEHMAN, *supra* note 60, at 212 (arguing technology altered copyright law balance and advocating for legislative changes to protect producers’ rights), and H.R. REP. NO. 110-617, at 20-21 (conveying need to protect producers’ rights), with BENKLER, *supra* note 1, at 380 (arguing against restrictions on information access because of interference with consumer rights), and JENKINS, *supra* note 66, at 258 (writing generally about identifying obstacles to greater participation in information production), and LESSIG, *supra* note 13, at 184-85 (asserting law must not prevent participation facilitated by digital technologies). If the law fails to strike the proper balance between the rights of producers and those of consumers, it will limit the amount of information produced, or limit its value. Compare H.R. REP. NO. 110-617, at 20-21 (2008) (attributing loss of intellectual property value to weak intellectual property laws), with LESSIG, *supra* note 13, at 189-92 (blaming stringent copyright law for limitation of information applications and providing two examples).

legal fairness, a civil liberties concern, and a problem in the way that Congress has viewed new technologies.<sup>125</sup> Protecting copyrighted works was fair because the law always promised producers protection as an incentive to create.<sup>126</sup> Notwithstanding, the legislation needed to show regard for how existing civil liberties—protected in the physical realm—necessitate analogous protection in the context of new technologies.<sup>127</sup> Finally, the legislation needed to embody a general congressional view of technology as possessing the potential to provide significant social benefit, even though it may also facilitate infringement.<sup>128</sup>

The PRO-IP Act acknowledged the legal fairness issue because it recognized that, from a practical standpoint, existing copyright protection has been at times

---

125. See H.R. REP. NO. 110-617, at 20-21 (2008) (finding economic loss from copyright infringement and expressing congressional view on infringement-facilitating technology); BENKLER, *supra* note 1, at 380-81 (arguing current copyright protection provides unprecedented access restriction); Katyal, *supra* note 11, at 225-28, 263-66, 278 (explaining privacy invasion from private Internet surveillance). The issue of fairness existed between producers and consumers rights. See Clinton Statement, *supra* note 59 (arguing innovation provides “great opportunities [both] for . . . global distribution . . . and pirat[ing] . . . on a global scale”). Compare LEHMAN, *supra* note 60, at 212 (contending that “[t]echnology has altered the balance of the Copyright Act”), with BENKLER, *supra* note 1, at 439 (contending preference for commercial producers over consumer privileges). Copyright law limits consumers’ individual rights, including consumer freedoms, privacy, and the right to read. See Elkin-Koren, *supra* note 2, at 1132-36 (exemplifying how copyright’s anti-circumvention measures control consumer choices); Katyal, *supra* note 11, at 224 (identifying invasion of privacy); Litman, *supra* note 73, at 31-32 (asserting limitation on right to read). In this case, the government’s view of technology within the context of intellectual property has been negative and has mirrored that of existing commercial information producers. Compare LESSIG, *supra* note 13, at 193 (describing how content industry views Internet’s information transmission efficiency as “bug,” rather than virtue), with H.R. REP. NO. 110-617, at 23-24 (2008) (mentioning Internet only in context of “egregious” intellectual property infringement). However, this represents a break from Congress’s historically deferential view of new technology. See LESSIG, *supra* note 13, at 194 (identifying Congressional desire to protect new technology as inspiration for compulsory licenses and free use).

126. See U.S. CONST. art. I, § 8, cl. 8 (allowing copyright laws to promote progress of science); H.R. REP. NO. 110-617, at 20-21 (2008) (finding businesses hurt by infringement activities); THE FEDERALIST, *supra* note 28 (arguing exclusive right to author “fully coincides” with public welfare); LANDES & POSNER, *supra* note 29, at 74-75 (illustrating profit awarded by copyright diminished by infringement); LESSIG, *supra* note 13, at 62-67 (arguing infringement reduces available profit from copyrighted works); see also LEHMAN, *supra* note 60, at 212 (contending copyright law provided authors necessary protection for over 200 years); VAIDHYANATHAN, *supra* note 5, at 21 (describing framers’ purpose in allowing copyright law).

127. See Litman, *supra* note 73, at 31-32 (contending IITF recommendations would have created weaker right to read digital works than printed works); see also LESSIG, *supra* note 13, at 71 (analogizing economics of file sharing for non-commercially available copyrighted content to stores for used content); Katyal, *supra* note 11, at 233-41 (analogizing “real space” to “cyberspace”).

128. See BENKLER, *supra* note 1, at 384-85 (arguing law likely cannot reverse implications of modern technology); LESSIG, *supra* note 13, at 36 (mentioning “growing field of academics” who agree technology “crucial” to culture). Indeed, the authors agree that technology provides an overwhelming social benefit. See BENKLER, *supra* note 1, at 380 (arguing technology can provide enormous social benefit); FRIEDMAN, *supra* note 70, at 266 (explaining social benefit of globalization); LEHMAN, *supra* note 60, at 8 (summarizing benefits of modern communications technology); LESSIG, *supra* note 13, at 127-28 (asserting technology provides social benefit, even if deleterious to existing business methods); TAPSCOTT & WILLIAMS, *supra* note 6, at 93-94 (retelling story of technological social benefit). At times, the Supreme Court has also recognized this benefit. See Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 423, 449 (1984) (noting permissible use of infringement-facilitative technology).

inadequate to provide producers the full value promised them under the law.<sup>129</sup> The past ten years have seen a proliferation of affordable—sometimes free—technology famed for its ability to facilitate infringement and its widespread use for infringement purposes.<sup>130</sup> The Act directly and effectively addressed this concern by strengthening and organizing enforcement efforts in order to catch infringers who often go undetected.<sup>131</sup>

Although Congress focused on the fairness issue, it failed to deal with the extension of civil liberties to new technologies and instead ignored the growing number of threats to consumer privacy and freedom.<sup>132</sup> Because it is often hard to detect individuals who infringe for non-commercial reasons, investigation and enforcement practices have become more invasive as individuals have become more prolific infringers.<sup>133</sup> Additionally, copyright law has taken away much of an individual's freedom to access and use information.<sup>134</sup> Despite constant claims from proponents of recent copyright legislation that these civil liberty losses are an economic necessity, there are intellectual property business models that do not depend on diminished civil liberties to make a healthy profit.<sup>135</sup> Nevertheless, the Act echoed the assertion of entrenched producers that oppressive enforcement is necessary to secure the viability of intellectual property-producing businesses; the notion that any other business model might be more appropriate in today's technological context was absent from the Committee report entirely.<sup>136</sup>

Finally, the Act showed that the general congressional view of relevant technological developments is highly negative.<sup>137</sup> It is impossible to find a reference in the Committee report to technology's social and economic benefits.<sup>138</sup> The business world, however, has been well aware that technology

---

129. See H.R. REP. NO. 110-617, at 29 (2008) (addressing increased levels of infringement).

130. Metro Goldwyn Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 921, 923-24 (2005) (recounting file sharing software's proliferation).

131. See generally PRO-IP Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (legislating various improvements to enforcement organization).

132. See BENKLER, *supra* note 1, at 380 (arguing decreased consumer freedom of access to information); LESSIG, *supra* note 13, at 30 (questioning whether culture becoming less free); Katyal, *supra* note 11, at 250 (arguing collapse of traditional privacy-enhancing structures on Internet); Litman, *supra* note 73, at 31-32 (asserting development of exclusive right to read); Lawrence Lessig's "Remix" for the Hybrid Economy (NPR radio broadcast Dec. 22, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=98591002> (asserting copyright law making typical behavior of young generation criminal).

133. See Katyal, *supra* note 11, at 225-28, 263-66, 278 (chronicling intensifying privacy invasion).

134. See BENKLER, *supra* note 1, at 380 (arguing consumers deprived of unprecedented level of access to information); LESSIG, *supra* note 13, at 53-61 (claiming historical reduction in freedom to use creative works).

135. Compare H.R. REP. NO. 110-617, at 20-21 (2008) (finding economic loss from intellectual property infringement), with *supra* notes 90-107 and accompanying text (describing value creation without strengthening intellectual property enforcement).

136. See H.R. REP. NO. 110-617, at 20-21 (2008) (noting economic necessity to strengthen enforcement measures). See generally LEHMAN, *supra* note 60 (arguing for changes in intellectual property laws to support commercial information production).

137. See H.R. REP. NO. 110-617, at 22 (2008) (criticizing technology as infringement-facilitating).

138. See generally H.R. REP. NO. 110-617 (2008) (omitting any reference to technology's social benefits).

can enhance intellectual property profits by creating new, profitable media such as digital audio; new, high-demand distribution channels, such as online music and streaming video; and new opportunities for content production, such as applications of user-generated data.<sup>139</sup> Therefore, when Congress passed the PRO-IP Act, it seemed to have missed what was apparent to many of the businesses it was hoping to protect—that although technology poses a threat, it can also become an enormous source of profit.<sup>140</sup>

### C. Culture

It is true that there has been a recent cultural acceptance of some kinds of infringement, but in addition to attempting to curtail infringement, legislation should have protected three legitimate and important cultural phenomena.<sup>141</sup> First, the development of affordable tools for the production of copyrightable works dictates the need for legislation to facilitate access to and use of these production tools.<sup>142</sup> Just as the law has not interfered with the teaching of reading and writing, it must not impede literacy through modern expressive technologies.<sup>143</sup> Second, derivative works and compilations, produced by individuals without the ability to navigate the legal system, now constitute a significant number of copyrightable works produced today.<sup>144</sup> In the name of progress, the law should encourage information production, and therefore, the law cannot disregard the enormous, inhibitory legal complexity of producing these culturally desired works.<sup>145</sup> Finally, the world has moved toward a culture of decentralized information production.<sup>146</sup> Legislation should support this movement because it has enabled a larger and more diverse population to

139. See, e.g., Arango, *supra* note 93 (speculating internet-to-television distribution channel could produce profit); Weir, *supra* note 97 (describing Amazon Kindle electronic book wireless delivery service); *supra* note 69 (explaining user-generated content production as source of profit); *supra* notes 90-93 and accompanying text (describing value creation in absence of intensified intellectual property enforcement).

140. See *supra* notes 90-93 and accompanying text (describing new opportunities for profit).

141. See LESSIG, *supra* note 13, at 67 (detailing consumer acceptance of file-sharing software).

142. See *id.* at 36 (arguing law must encourage access to expressive usage of new technologies).

143. See *id.* at 47 (reporting advantages of modern technologies and cultural norms in innovation). Lessig quoted John Seely Brown, Chief Scientist of the Xerox Corporation, as saying that “we are building a legal system that completely suppresses the natural tendencies of today’s digital kids . . . . We’re building an architecture that unleashes [sixty] percent of the brain [and] a legal system that closes down that part of the brain.” *Id.*

144. See LESSIG, *supra* note 12, at 13-15 (demonstrating prevalence of amateur works through quotations of one currently prominent mixer, Gregg Gillis).

145. See U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress to use copyright to encourage information production); LESSIG, *supra* note 13, at 130-31 (interpreting constitutional clause to promote progress through copyright legislation); VAIDHYANATHAN, *supra* note 5, at 45 (locating purpose of copyright in public benefit of incentivizing information production). Copyright law has the ability both to incentivize and to inhibit information production. See LESSIG, *supra* note 13, at 185 (arguing copyright law’s legal uncertainty will chill creativity); VAIDHYANATHAN, *supra* note 5, at 21 (noting framers limited copyright because of concern for “use, criticism, supplementation, and consideration of previous works”).

146. See BENKLER, *supra* note 1, at 3, 30-32 (premising shift toward decentralization, enabling greater levels of participation among more diverse groups of people).

participate in the production of information.<sup>147</sup>

The Act failed to recognize that non-legally savvy individuals now produce a large bulk of information, and that those new producers traditionally have only consumed the products of capital-intensive business operations.<sup>148</sup> In passing legislation that restricts the flow of information and oppresses the use of the technology that produces it, Congress should have taken care to ensure egalitarian access to the production process.<sup>149</sup> Although restricting or otherwise impeding access to information production protected authors' works, it also barred a good deal of legal activity.<sup>150</sup> The PRO-IP Act took a copyright system that arguably already protected works by restricting access to information production and made it more powerful and oppressive.<sup>151</sup> Even conceding that Congress had the good intention of protecting producer rights, it failed to acknowledge this concern as even an unfortunate side-effect of strengthening existing protection.<sup>152</sup>

Additionally, although Congress recognized that protecting the rights of authors is important to incentivize the production of artistic works, the PRO-IP

---

147. See BENKLER, *supra* note 1, at 133-35 (contending information consumer no longer a passive "eyeball," but a participant); JENKINS, *supra* note 66, at 135-36 (calling Internet "a powerful new distribution channel for amateur cultural production"); LESSIG, *supra* note 13, at 184-85 (explaining how digital technology empowers "almost anyone" to produce information).

148. See BENKLER, *supra* note 1, at 3 (retelling history of information production and noting prohibitive cost).

149. See LEHMAN, *supra* note 60, at 13 (noting consumer access to copyrighted materials important aspect of effective intellectual property regime); see also LESSIG, *supra* note 13, at 35-36 (emphasizing importance of free access to information production technology as form of literacy).

150. See LANDES & POSNER, *supra* note 29, at 24 (arguing high cost to duplicate renders intellectual property protection irrelevant); see also *id.* at 71-72 (underscoring importance of assuming copier's marginal cost increase to prevent copyright protection from becoming irrelevant). Landes and Posner endeavored to create an economic model of copyright and, in doing so, established a single variable in which the entire "level of copyright protection" is simplified. *Id.* at 71 (defining economic model's variables). The authors abstracted the "level of copyright protection" from such factors as "how alike two works must be before infringement will be found, the elements in a work that are protected, the duration of protection, and the efficacy and cost of enforcement." *Id.* The model assumed a constant marginal cost of production to the author, and this is indeed consistent with most justifications for copyright law, which predicate copyright's necessity on a consistent zero, or close-to-zero, marginal cost. See, e.g., BENKLER, *supra* note 1, at 36 (noting zero marginal cost to reproduce information); LANDES & POSNER, *supra* note 29, at 11 (recounting copyright justification that freedom to copy undermines incentive to create); VAIDHYANATHAN, *supra* note 5, at 21 (explaining disallowing producers to charge above the marginal cost prevents information production).

151. See PRO-IP Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256, 4259, 4264-66, 4271-73 (fortifying copyright law, reorganizing copyright enforcement efforts, and organizing federal grant program for enforcement efforts). Even before PRO-IP, the effectiveness of copyright law was premised on restricted access to information production technologies. See BENKLER, *supra* note 1, at 439-46 (contending copyright prior to PRO-IP Act restricted access to information on unprecedented level); LESSIG, *supra* note 13, at 47 (arguing copyright law closes down access to information production); LESSIG, *supra* note 13, at 185-86 (claiming presumptive illegality in non-commercial information production creates large legal and prohibitive expenses to produce); see also Litman, *supra* note 73, at 30-32 (identifying exclusive right to read emerging under modern copyright law).

152. See H.R. REP. NO. 110-617, at 20-31 (2008) (failing to acknowledge restricted access to information production).

Act failed to account for the likelihood that stronger copyright protection qualitatively and quantitatively inhibits production.<sup>153</sup> It is true that the House Judiciary Committee praised the Act for the dynamic benefit of improving incentives to produce information.<sup>154</sup> The Committee did not, however, recognize the growing concern over a static inefficiency that restricts artistic expression.<sup>155</sup>

As an example, rap music, one predominant form of cultural expression, is the product of numerous sampled, underlying copyrighted works.<sup>156</sup> Each underlying work not in the public domain must be licensed and each license, in turn, requires negotiation, compensation for the copyright holder, and transaction costs such as legal fees and agency commissions.<sup>157</sup> This is an expensive process that a rap artist must follow in order to produce music legally.<sup>158</sup> For an established artist, backed by a major record label, the costs are likely not prohibitive, but for a newcomer or an amateur, the practical decision is between not producing music or doing so through infringement.<sup>159</sup> As the consequences of the latter choice become as prohibitive as the cost of legal production, the newcomer may be left only with the option to not produce at all.<sup>160</sup> Even if this is not the only possible effect on the newcomer, this example illustrates the potential for copyright legislation to create a static inefficiency that actually stifles, rather than incentivizes, information

---

153. *See id.* at 20 (recognizing role of intellectual property law as incentive to create). Still, thick copyright protection runs the risk of actually deterring production in some instances. *See* LANDES & POSNER, *supra* note 29, at 72-73 (providing formulas for explaining how copyright stimulates production for rational author); VAIDHYANATHAN, *supra* note 5, at 133 (asserting copyright law creates entry barriers for new producers who could create innovative works). Landes and Posner suggest that the supply curve for new works will react to the level of copyright protection by both a positive movement on the supply curve—as gross profits increase—and an upward shift of the curve—as the level of copyright protection drives up the cost to produce. LANDES & POSNER, *supra* note 29, at 73 (explaining supply curve for new works). Benkler recognized that increasing copyright protection actually has, to some extent, a negative effect on information production because “information is both input and output of its own production process.” BENKLER, *supra* note 1, at 37 (explaining how copyright creates disincentive to produce information). For copyright to incentivize information production, there must be a more significant positive effect on profit than negative effect on cost to produce. LANDES & POSNER, *supra* note 29, at 73 (arguing number of works produced function of profit and protection level).

154. *See H.R. REP. NO. 110-617*, at 20 (2008) (finding Act will help incentivize production).

155. *See id.* (failing to recognize static inefficiency); LANDES & POSNER, *supra* note 29, at 12-13 (explaining static and dynamic factors in economic policymaking).

156. *See* VAIDHYANATHAN, *supra* note 5, at 131 (describing rap music sampling technique of borrowing recordings of other works). To a large extent, although not through direct “sampling,” rhythm and blues music also results from a complex pattern of building on the work of others. *See id.* at 120 (describing creation of Muddy Waters’ first national rhythm and blues hit, “Feel Like Goin’ Home”). Sometimes, in other genres as well, this kind of complexity can elude the artist. *See id.* at 126-131, 135 (retelling background of George Harrison’s, John Fogerty’s, Dizzy Gillespie’s, and Charlie Parker’s creative borrowing).

157. *See id.* at 133-34 (illustrating complexity of licensing underlying works for rap music compositions).

158. *See id.* at 133-34 (mentioning costs from license fees, lawsuits, and settlements).

159. *See id.* at 133 (describing struggle between “established entities in the music business and those trying to get established”).

160. *See* VAIDHYANATHAN, *supra* note 5, at 134 (describing prohibitive production costs).

production.<sup>161</sup>

Furthermore, it is not clear that Congress addressed the potential of this legislation to be a negative force on culturally desired information production.<sup>162</sup> The legislative history suggests that Congress has typically overlooked the possibility that strengthening copyright enforcement can do anything other than create incentives to produce.<sup>163</sup> The history behind the PRO-IP Act is no exception, and therefore, even if this Act did positively affect information production, it only did so by accident because Congress failed to account for the entire cultural picture.<sup>164</sup>

Lastly, Congress passed the Act without regard for decentralized information production and consumer participation except insofar as such phenomena represent a threat to traditional producers.<sup>165</sup> For example, although the House Committee on the Judiciary reported decentralization as an impetus behind its favorable recommendation of the Act, the report only discussed it in terms of “decentralized multinational networks to facilitate the movement of illegal goods.”<sup>166</sup> From a business standpoint, however, decentralized information production can present opportunities for growth.<sup>167</sup> Some businesses have actually gained from decentralized information production by using user-generated information for profit.<sup>168</sup> Still, because Congress only addressed the negative consequences of decentralization, the Act missed the opportunity to promote a more open, participatory, and perhaps profitable information-production culture.<sup>169</sup>

#### D. Economics

Two related economic considerations emerge from the Act’s history.<sup>170</sup>

---

161. See *id.*; see also LANDES & POSNER, *supra* note 29, at 24 (providing historical example with respect to high marginal cost to copy).

162. See H.R. REP. NO. 110-617, at 20-23 (2008) (failing to address copyright law’s potential to stifle production).

163. See H.R. REP. NO. 110-617, at 20 (2008) (recognizing need to strengthen enforcement to protect incentive to produce); H.R. REP. NO. 94-1476, at 47 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5660 (finding need to overhaul copyright legislation to protect production incentive).

164. See H.R. REP. NO. 110-617, at 20-23 (2008) (failing to address static inefficiency).

165. See H.R. REP. NO. 110-617, at 22 (2008) (framing decentralized information production as threat to value of intellectual property). However, decentralization can also present a social benefit. See generally BENKLER, *supra* note 1, at 3 (arguing affordable information technology allows individuals without significant capital to produce).

166. H.R. REP. NO. 110-617, at 22 (2008) (framing decentralized information production as threat to value of intellectual property).

167. See *supra* note 69 (noting examples of decentralization).

168. See BENKLER, *supra* note 1, at 75-76 (recounting Google and Amazon successes using user-generated information); *supra* note 69 (describing profitable uses of user-generated information).

169. See BENKLER, *supra* note 1, at 63-89 (describing examples of how decentralization can facilitate complex tasks); TAPSCOTT & WILLIAMS, *supra* note 6, at 9 (describing positive effect of decentralization in business).

170. See *infra* notes 171-172 and accompanying text (explaining two economic considerations); see also

First, efforts to enforce copyright must be evaluated under a cost-benefit analysis to determine whether government expenditures for the protection of authors' rights exceed the value of the social benefit from affording the additional protection.<sup>171</sup> Second, Congress must ensure that the law does not stifle the competitiveness of the United States economy by creating an inefficiency that encourages outmoded business practices.<sup>172</sup>

The driving force behind the passage of the Act was economic; Congress passed the Act out of a desire to protect American intellectual property because of its significant position in the American economy.<sup>173</sup> Congress accurately recognized the need to protect American-made intellectual property because of its value to the economy, but the congressional attempt at cost-benefit analysis was far from complete.<sup>174</sup> On the cost side, one would expect to see an estimate of increased transaction costs and the cost of rent-seeking behavior, in addition to the hard dollar value of appropriations.<sup>175</sup> The House Committee on the Judiciary failed to identify either of these two items, thus running the risk of understating costs and skewing the analysis in favor of the Act.<sup>176</sup> On the benefit side, a full analysis would have reflected the extent of both static and dynamic benefits.<sup>177</sup> Although Congress examined the dynamic benefit from improved incentives for information production, it ignored the fact that static benefits are often minimal due to intellectual property's public-good characteristics.<sup>178</sup>

The Act assumed a public interest in increasing the protection of American intellectual property but failed to examine adequately whether the social benefit

---

PRO-IP Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256, 4271 (authorizing appropriations); Riehl, *supra*, note 56, at 1762 n.3 (noting \$10 billion industry created once producers stopped resisting VHS technology).

171. See LANDES & POSNER, *supra* note 29, at 21-24 (arguing need for cost-benefit analysis).

172. See VAIDHYANATHAN, *supra* note 5, at 133 (arguing law prevents new participants). Although this is really a cost factor in the cost-benefit analysis and counting it additionally here could be misleading, the importance of the point warrants enhanced exploration.

173. See H.R. REP. NO. 110-617, at 20 (2008) (mentioning significant position of intellectual property in American economy).

174. Compare H.R. REP. NO. 110-617, at 32 (2008) (articulating factors Congress identified for cost-benefit analysis), with LANDES & POSNER, *supra* note 29, at 12-21 (stating factors recommended for cost-benefit analysis of intellectual property policy).

175. LANDES & POSNER, *supra* note 29, at 16-21, 29 (explaining rent-seeking cost, protection cost, and transaction cost factors).

176. See H.R. REP. NO. 110-617, at 32 (2008) (performing cost-benefit analysis). By only comparing the cost of the Act with an estimation of additional tax revenue from intellectual property business that the Act would encourage, Congress only weighed protection costs in the analysis. *See id.*; see also LANDES & POSNER, *supra* note 29, at 18-21 (defining protection cost).

177. See LANDES & POSNER, *supra* note 29, at 12-16 (identifying social benefits of property rights).

178. See H.R. REP. NO. 110-617, at 32 (2008) (detailing economic benefit resulting from improved incentives for information production). For example, the Committee Report estimated the creation of between 174,000 and 348,000 new jobs during the third year of the legislation's enactment and between \$1.25 billion and \$1.50 billion, in present value terms over three years. *Id.* (stating economic benefits of Act). There is no mention of the fact that static inefficiencies from restrictive intellectual property policies could be significant. *Id.* (failing to acknowledge upper limit to thick copyright protection); see also LANDES & POSNER, *supra* note 29, at 12-13 (doubting significance of static benefits in intellectual property policy cost-benefit analysis).

justified the cost.<sup>179</sup> The legislation put additional government resources behind intellectual property enforcement, reflecting the congressional recognition that intellectual property “theft” constitutes an economic loss.<sup>180</sup> Notwithstanding this point, Congress focused primarily on how infringement deprives copyright holders of some portion of their lawfully guaranteed incentive for production.<sup>181</sup> Therefore, although the Act may have improved economic welfare, it also amounted to a taxpayer-financed protection of private business interests.<sup>182</sup> Without an accurate cost-benefit analysis, however, there is no way to be sure that the expenditures are, in fact, anything more than the latter.<sup>183</sup>

As a related matter, historical evidence suggests that strengthening copyright actually creates a static inefficiency in information production by creating entry barriers for new kinds of players.<sup>184</sup> This is a social cost that should be included in the above cost-benefit analysis, but because its cost is not easily quantifiable in dollar value, it warrants additional qualitative discussion here.<sup>185</sup> Before passing the Act, Congress should have found that the need for enhanced copyright protection justified the risk of precluding new business ideas.<sup>186</sup> No finding of the sort is present in the congressional report.<sup>187</sup>

New business models can create significant value, and ignoring them runs the risk of making the United States economy less competitive.<sup>188</sup> As such, the

---

179. See *supra* notes 174-178 and accompanying text (arguing Congressional cost-benefit analysis insufficient).

180. See PRO-IP Act of 2008, 122 Stat. at 4270-71, 4273 (authorizing appropriation estimated at over \$508 million over five-year period); see also H.R. REP. NO. 110-617, at 35 (2008) (providing table estimating both authorizations and actual outlays); LESSIG, *supra* note 13, at 63 (noting recording industry estimate of \$4.6 billion per annum loss due to physical piracy).

181. See H.R. REP. NO. 110-617, at 21 (2008) (finding negative impact of intellectual property theft on U.S. economy).

182. See *id.* at 34-35 (estimating cost and appropriations of public money); BENKLER, *supra* note 1, at 439 (asserting existence of “systematic preference for commercial producers” irrespective of welfare).

183. See LANDES & POSNER *supra* note 29, at 21 (discussing use of cost-benefit analysis in examining efficacy of exclusive rights).

184. See LESSIG, *supra* note 13, at 53-61 (noting historically lower entry barriers and resulting creation of important American industries).

185. See LANDES & POSNER, *supra* note 29, at 73 (contending some producers can create equivalent intellectual property more efficiently than others).

186. See *id.* at 21 (expecting intellectual property law to work to reduce cost of copyright rights).

187. See generally H.R. REP. NO. 110-617 (2008) (omitting any concern over stifling new business ideas).

188. See H.R. REP. NO. 110-617, at 20-21 (2008) (noting value of intellectual property in American economy); BENKLER, *supra* note 1, at 42 (charting nine intellectual property-producing business models); LANDES & POSNER, *supra* note 29, at 73-75 (offering contention that some firms can produce works more efficiently); see also *supra* notes 90-107 and accompanying text (describing new business opportunities for creating significant value without strengthening intellectual property laws). Despite this, it is possible for a business to structure itself in a way that minimizes the significance of infringement, both in quantity and in effect. See *supra* notes 97-107 and accompanying text (describing some ways businesses can profit without reshaping copyright law). According to Benkler, businesses may have no choice but to structure themselves in this way because the law may not be an effective tool for reinstating twentieth-century economic norms to assist intellectual property-producing businesses. See BENKLER, *supra* note 1, at 384-85 (questioning ability of law to ensure traditional intellectual property production).

legislation should have sought to protect existing intellectual property, but not without first justifying the stifling effect such legislation could have on new, more efficient methods of information production.<sup>189</sup> A resistance to change for the sake of entrenched business interests is not a sufficient justification.<sup>190</sup> Congress, however, provided exactly that justification when it passed the PRO-IP Act, finding that enhanced enforcement and its costs were necessary to preserve existing business interests.<sup>191</sup> Furthermore, Congress ignored the number of businesses profiting from the production of copyrightable works without additional, stifling enforcement measures.<sup>192</sup> Therefore, Congress failed to provide sufficient economic justification for the Act.<sup>193</sup>

#### IV. CONCLUSION

When Congress passed the PRO-IP Act, it did so in defiance of political, technological, cultural, and economic realities. Congress attempted to respond to a realization that enforcement has become increasingly difficult in recent years. The Act did so by intensifying penalties for infringement, broadening the scope of criminal infringement, and reorganizing the bureaucracy underlying intellectual property infringement investigations and enforcement actions. Additionally, the legislation authorized the DOJ to issue tens of millions in grant dollars over a five-year period to state and local governments to assist those governments in carrying out their own intellectual property investigations and enforcement operations. Lastly, the Act provided several measures to bolster international cooperation in protecting America's intellectual property from infringement overseas.

Although Congress accurately recognized the need to improve cooperation with the international community to preserve the rights of authors, it erred in many other respects. It is true that the Act squarely addressed the prevalence of infringement. Strengthening domestic enforcement through coordination with state and local governments, however, represented an oppressive approach, which Congress supported with ill-thought reasoning.

Recognizing that technology has aided infringement, Congress acted to curtail its harmful effects. At the same time, it continued refusing to recognize technology as providing a social benefit and not a method for mass infringement. Additionally, Congress erred because it passed legislation that

---

189. VAIDHYANATHAN, *supra* note 5, at 133 (contending shift in law disfavors emerging businesses).

190. See BENKLER, *supra* note 1, at 380 (arguing importance of allowing new kinds of business development); LESSIG, *supra* note 13, at 183 (decrying policies designed to protect old industries at expense of new).

191. See H.R. REP. NO. 110-617, at 20 (2008) (hailing American intellectual property producers' economic contribution).

192. See LANDES & POSNER, *supra* note 29, at 18 (describing enforcement costs); *supra* notes 90-107 and accompanying text (describing business's ability to profit under law before PRO-IP Act).

193. See *supra* notes 188-192 (arguing insufficient economic justification for Act).

continued to trample on individual civil liberties, including privacy and the freedom to use and access information.

The legislation also reflected Congress's lack of cultural awareness. The availability of affordable tools for information production has changed the role of individuals in information production, necessitating a legislative approach that facilitates access to and use of those tools. Congress failed to recognize this, instead passing an act that perpetuates a system that closes individuals off from information production. This underscored Congress's inability to conceive of widespread, diverse, and decentralized information production as more than simply a threat to entrenched business interests.

Finally, the Act's economic justification was flawed, leaving in jeopardy the efficacy of the legislation to actually bring about a net benefit to society. The Act ran the risk of providing a taxpayer-financed award to private business interests. This award cost more than its value in budget appropriations because it increased the copyright regime's ability to squeeze out new kinds of producers who might have offered more efficient methods for producing information.

Overall, the Act failed because it responded to changes in the intellectual property environment by escalating tensions between information's consumers and producers. Unfortunately, this Act is not the first time Congress has responded to these changes in a protectionist fashion, protecting existing stakeholders at the expense of individual citizens and new players in the business of intellectual property production. In the past, Congress has passed laws giving stronger benefits to copyright owners without thinking of what those laws take away from individuals. The PRO-IP Act continues to build on this imbalance.

*Morris A. Singer\**

---

\* I am grateful to Roger L. Smerage for his insightful comments and constructive editorial input on earlier drafts of this Note."