COPYRIGHT'S LAW OF DISSEMINATION

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Intellectual property law generally rests on the assumption that markets will bring about an ideal allocation of resources. Nonetheless, United States copyright law remains riddled with regimes that bypass or restructure normal market licensing between copyright owners and distributors such as streaming services, radio stations, and libraries. This Article provides the first comprehensive account of this "law of dissemination," examining how a range of seemingly unrelated judicial doctrines, statutory safe harbors, and regulatory institutions together affect the relationship between copyright owners and the entities that disseminate creative works to the public.

While these regimes are often treated as unintelligible historical relics, they reflect an important and underexplored aspect of copyright's policy agenda. This Article argues that copyright has a particular set of policy concerns related to the dissemination of creative works for the public's consumption, enjoyment, and personal use. In particular, four interrelated goals are reflected to varying degrees in copyright's many dissemination-regulating institutions: (1) facilitating exchanges in transaction cost-heavy contexts, (2) enabling more efficient and expansive public access to existing creative works, (3) reducing barriers to entry for innovative forms of distribution in concentrated markets, and (4) furthering distributive justice priorities.

Identifying these four goals and examining how they permeate the copyright system is a necessary first step in remedying many of the problems currently faced by copyright's law of dissemination, particularly its increasingly outmoded, piecemeal, and inconsistent regulatory design. By diagnosing these challenges and their potential

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roots, this Article provides grounding for assessing how copyright law can be reimagined to fit a world of almost entirely digital dissemination.

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INTRODUCTION

Copyright, like other forms of intellectual property, uses markets to facilitate the efficient allocation of resources. By vesting exclusive rights in the authors of creative works, the copyright system generally assumes that owners will bargain with downstream users and exchange licenses for royalty payments.[1] Building off of this logic, Paul Goldstein and others have argued that licensing markets, rendered increasingly efficient by digital technologies, "offer[] the surest prospect for the production and consumption of creative work in the widest possible variety and at the lowest possible price."[2]

And yet, even as new technologies have rendered copyright licensing more efficient, many copyright industries continue to operate in highly regulated environments. In a variety of different contexts, a collection of statutory carveouts, judicially managed exceptions to liability, and regulatory price-setting mechanisms control the relationship between copyright owners and the companies that distribute creative works to the public. Thanks to these mechanisms, satellite radio services pay government-set royalties to record labels; new technologies for accessing aspects of creative works, like Google Books, pay no royalties at all; cable TV services pay government-set royalties to rebroadcast network television; and libraries pay no royalties when they lend books or copy book chapters for patrons—and these are just a few examples.[3]

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1 *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 414 (2003) ("Markets and property rights go hand in hand. Property rights provide the basic incentives for private economic activity and also the starting point for transactions whereby resources are shifted to their most valuable use."); Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1602, 1604 (1982) ("[T]he copyright system creates private property in creative works so that the market can simultaneously provide economic incentives for authors and disseminate authored works . . . .").

2 PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 188, 202–03, 212–16 (Stanford Univ. Press rev. ed. 2003); *see also* Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557 (1998); Robert P. Merges, *The End of Friction? Property Rights and Contract in the "Newtonian" World of On-Line Commerce*, 12 BERKELEY TECH. L.J. 115, 129–30, 136 (1997).

3 *See infra* Part I.

This Article provides the first comprehensive account of all of the ways copyright law bypasses market licensing to regulate the relationship between copyright owners and the many different entities that distribute or enable distribution of copyrighted works to the public on a mass scale, i.e., disseminators. It argues that we need to start understanding copyright as having a cohesive approach to dissemination—a "law of dissemination" with its own set of normative goals—even if this is not readily apparent when looking at the complex web of doctrines and institutionally disjointed regulatory regimes that make up modern copyright law. And, though it was primarily crafted in a predigital age, this law of dissemination remains vital to ensuring that new digital technologies, such as streaming, can continue to benefit the public.

What do I mean by a law of dissemination? As many have explored, copyright is riddled with "limitations and exceptions" that limit the scope of a copyright interest, allowing certain uses to occur without permission of the copyright owner.[4] Scholars and judges frequently conceive of copyright as reflecting a tradeoff: copyright uses exclusive rights to incentivize the creation of new creative works, but also limits these rights in order to ensure that the public has sufficient access to creative content.[5] But the full scope of the "access" side of this incentives-access tradeoff remains underexplored. Most frequently discussed is the importance of ensuring that new creators can employ existing works to *create* new works, through active adaptation, cooption, or the simple use of the raw materials of creativity.[6] Principles like the idea-expression dichotomy, which prevents authors from asserting control over the basic ideas that underlie their works, help police this line, ensuring that copyright does not restrict new creation and thus undermine its own reason for being.

While certainly an essential feature of the copyright system, this concern with new creativity is not the only story behind how and why the law might limit copyright owner control to enable public access. While something like the fair use doctrine might step in to allow me to transform the melody of a song into a brand new work, such as a parody,[7] there are many other regimes within the copyright system that enable me to simply enjoy that song in an easily accessible manner, such as on the

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4 *See generally* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS (Ruth L. Okediji ed., 2017).

5 LANDES & POSNER, *supra* note 1, at 11–14; Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 285 (2007).

6 *See, e.g.*, Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 997 (1997) ("As countless economists have demonstrated, efficient creation of new works requires access to and use of old works."); Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid?*, 29 BERKELEY TECH. L.J. 1383, 1387 (2014) (discussing copyright's concerns with "new creativity").

7 *See generally* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

radio or via a streaming service.[8] This Article focuses on this more passive side of copyright's access agenda: the public's interest in consuming, enjoying, and learning from cultural works.[9]

Copyright's law of dissemination, then, encompasses any regulatory regime or liability exception that bypasses market-based licensing to facilitate large-scale distribution of copyrighted works to the public, both directly by entities like libraries or streaming services, or indirectly via user sharing on platforms. While this grouping includes some of copyright's more well-known judicial limitations—such as the first sale doctrine—it also encompasses a range of more unusual regimes housed in the administrative state, including various compulsory licenses and safe harbors.[10] While many have discussed aspects of this regulatory system, a coherent articulation has proven elusive. Indeed, scholars have tended to downplay the importance of copyright's regulatory mechanisms, treating them as sui generis or as outmoded relics of no-longer-existent market failures.[11]

In this respect, the analysis here attempts to provide something that existing accounts have lacked: a comprehensive picture, transcending the regulatory and judicial spaces, of all the ways copyright controls dissemination. The Article also attempts to identify a *why* for copyright's regulation of dissemination—an articulation of all the reasons market licensing may need to be bypassed in order to facilitate distribution of copyrighted works. Copyright's existing law of dissemination seems to partially reflects these goals, though it often falls short. Identifying the gulf between copyright's dissemination policies and existing regimes provides a necessary first step in understanding how copyright can complete its transition to a world of almost entirely digital dissemination, setting the stage for future reforms.

The Article makes this argument in three Parts, examining copyright's law of dissemination in practice, copyright's law of dissemination in theory, and some of the ways existing law is failing this normative agenda.

First, in Part I, the Article outlines and categorizes the seemingly unrelated regimes that make up copyright's law of dissemination.

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8 *See infra* Part I (describing various ways the dissemination of music is regulated).

9 As discussed below, this aspect of copyright's policy agenda can be conceived of in allocative efficiency terms or through a more normatively pluralistic framework. *See infra* Part II.

10 *See infra* Part I.

11 *See, e.g.*, Thomas M. Lenard & Lawrence J. White, *Moving Music Licensing into the Digital Era: More Competition and Less Regulation*, 23 UCLA ENT. L. REV. 133, 134 (2016) (criticizing compulsory licensing and proposing deregulation); Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies": Property Rights, Contracts, and Market*s, POL'Y ANALYSIS, Jan. 15, 2004, at 1, 4–5 (same); Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RSRV. L. REV. 673, 710 (2003) (same).

Copyright law employs a range of highly specific exceptions to copyright liability for certain forms of dissemination (such as for reproduction and distribution of works to the visually impaired), judicially delineated safe harbors, and regulatory regimes run out of the administrative state. The operations of these different mechanisms are rarely put in conversation with one another. But doing so reveals a system that affects large-scale dissemination in a variety of interrelated contexts. Though differences emerge in how these mechanisms affect price (zero-price carveouts vs. price regulation), the institutional actors involved (courts vs. regulatory agencies), and the level of control used (supplanting of market-based licensing vs. default rules that impact the price copyright owners can charge in negotiation), the effects of these regimes on dissemination are more comparable than is obvious.

Part II examines why regulation of dissemination would be a necessary feature of a sound copyright system. Bypassing market licensing in dissemination markets can be necessary to facilitate four distinct but interrelated policy goals that emerge from some prevailing theoretical accounts of intellectual property and innovation policy. First, some of copyright's market-regulatory mechanisms simply enable exchanges in situations where high transaction costs—especially the need to license with many disparate rightsholders—make dissemination difficult. Though sometimes overemphasized by scholars, this transaction costs-remediation goal explains certain elements of copyright's law of dissemination.[12] Second, copyright's law of dissemination can further forms of dissemination that expand or enhance the public's ability to consume creative works. In so doing, the regime counterbalances some of the inherent distributional harms caused by copyright's grant of exclusive rights in nonrivalrous works of information.[13] Third, regulation may be focused on the overall structure of dissemination industries, and, in particular, problems that can emerge when certain copyright owners accumulate large portfolios of copyrighted works and use their market power to block new disseminators from entering the market. These aspects of copyright's law of dissemination seem to reflect an antitrust-adjacent "entry policy" that helps reduce barriers to entry for new, innovative dissemination technologies.[14] Fourth, regulation may be necessary to reallocate

12 *See infra* Section II.A.

13 For example, the fair use doctrine and compulsory license rate setting have both been used to promote technologies that enhance user access to copyrighted works without overly compromising copyright's goal of incentivizing creativity. *See infra* Section II.B.

14 Several scholars have outlined aspects of this entry policy in prior work. *See, e.g.*, Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004); Randal C. Picker, *Copyright*

resources in order to facilitate distributive justice values. Indeed, some of the more unusual features of copyright's law of dissemination—such as its focus on uses by public libraries, public broadcasters, educators, and disability-centered nonprofits—are best understood as an effort to bring about a more just distribution of cultural works.[15]

Despite their distinct emphases, these goals share a concern with remedying the barriers to public access, enjoyment, and utilization of creative works imposed by copyright's system of exclusive rights. Accordingly, all are also in some tension with copyright's overarching purpose of financially incentivizing the creation of new works. In this respect, many features of copyright's law of dissemination function by helping weigh these four goals against copyright owners' interest in maintaining control over the use and price of their works and, relatedly, the social value of new creation generally.[16]

The existing tools employed in this balancing act are quite blunt; from an institutional design perspective, many of copyright's dissemination-related mechanisms are far from optimal when it comes to managing the complex tradeoffs between incentivizing creativity and furthering the four goals described above. Some of the existing regimes may even be actively thwarting these goals. As Part III examines, articulating and delineating these four goals is thus a necessary first step in the process of diagnosing the growing problems with copyright's law of dissemination and proposing solutions. As policymakers have failed to think comprehensively about copyright's approaches to dissemination (or recognize how various regulatory regimes or liability rules might be serving multiple goals), copyright's law of dissemination has grown increasingly complex, inconsistent, and untethered from sound policy. Perhaps most problematically, the law has failed to keep pace with the rapid technological change brought about by digitization, including the rise of online streaming. In this respect, as Part III also explores, the reframing suggested by this Article lays the groundwork for future work on restructuring copyright's law of dissemination to operate more efficiently and better accommodate new forms of distribution and consumption.

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as Entry Policy: The Case of Digital Distribution, 47 ANTITRUST BULL. 423 (2002); *see also* Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71 (2020) (considering intellectual property as part of the law's general approach to industry disruption); Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 VAND. L. REV. 1197 (2019) (comparing various ways intellectual property interacts with competition policy goals). This Article argues, however, that these accounts describe only one feature of a more expansive normative agenda. *See infra* Part II.

15 *See infra* Section II.D.

16 *See infra* Part II (exploring this balancing).

I. COPYRIGHT'S REGULATION OF DISSEMINATION

Copyright is predominantly concerned with the creative process: by establishing a property entitlement that vests in creators, copyright aims to provide financial incentives for the production of new, socially valuable creative works.[17] But copyright's range of doctrines and institutions also have direct and indirect effects on the downstream transactions through which copyrighted works reach members of the public for their consumption. In some instances, copyright owners themselves distribute their works directly to the public; for example, book publishers frequently own copyrights and also print and distribute books for sale. But, in many other instances, third parties—radio stations, streaming services, libraries, e-book vendors, and many more—fill this disseminator role.[18] This relationship between copyright owners and third-party distributors is the primary subject of this Article.

To disseminate a copyrighted work, a distributor must obtain legal authority from copyright owners.[19] They often do so by directly negotiating licenses in exchange for royalty payments. But copyright also employs a number of legal mechanisms that directly or indirectly regulate the relationship between rightsholders and disseminators. These regimes stretch across a range of industries, technologies, and forms of creative works. They are also administered using a wide array of institutional arrangements.

This Part provides a comprehensive description of these mechanisms, dividing them into four categories. The first category contains carveouts from copyright protection for a specific kind of dissemination, explicitly outlined in the Copyright Act. Second, there is a range of judicially delineated exceptions to liability that provide de facto safe harbors to certain forms of dissemination; the specific contours of these exceptions are frequent subjects of litigation. The third category includes a collection of administrative state-based regimes that regulate license prices in certain industries. Fourth, there are several regimes that include unusual combinations of statutory carveouts, judicial oversight, and direct regulation and thus do not fall neatly into any category. After introducing these mechanisms, some of their commonalities and differences are assessed.

It is also helpful to explain what is *not* included in this Part. In keeping with this Article's focus on legal regimes that primarily enable

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17 *See supra* discussion accompanying notes 1–6.

18 *See infra* Sections II.A–II.C.

19 *See* 17 U.S.C. § 106 (exclusive rights of a copyright owner).

mass-scale passive enjoyment of copyrighted works,[20] I do not include copyright limitations and exceptions that are predominantly concerned with ensuring that copyright law does not overprotect the raw materials of creativity and prevent follow-on authorship. Thus, for example, I do not include the idea-expression dichotomy[21] or its related doctrines and affirmative defenses.[22] I also do not include applications of the fair use doctrine that enable new creative expressions such as parody[23] or appropriation art[24]—though other applications of fair use are included.[25] Finally, the expiration of copyright, through which all work ultimately enters the public domain,[26] is not included. Some might find this particular omission perplexing; after all, as Justice Breyer has noted, copyright promotes its policy agenda "both by creating incentives for authors to produce and by removing the related restrictions on dissemination after expiration of a copyright's 'limited Tim[e].'"[27] But the breadth, comprehensiveness, and finality of expiration means there is simply not much more to say about it in the context of articulating copyright's dissemination policies. Works that enter the public domain through expiration are useable by all, for any purpose and for any reason. Thus, I decline to include this limitation because it is, in many respects, the antithesis of copyright[28]—while expiration is obviously an essential way in which creative works ultimately reach the public, it is so all-

20 *See* discussion accompanying notes 4–9.

21 *See* 17 U.S.C. § 102(b); *see also* ATC Distrib. Grp., Inc. v. Whatever It Takes Transmissions & Parts, Inc., 402 F.3d 700, 707 (6th Cir. 2005) ("Original and creative *ideas*, however, are not copyrightable, because . . . . Section 102(b) codifies the common-law principle that . . . 'protection is given only to the expression of the idea—not the idea itself.'" (quoting Mazer v. Stein, 347 U.S. 201, 217 (1954))).

22 Such as the merger doctrine, which denies protectability in situations where the "idea 'merges' with the expression, such that a given idea is inseparably tied to a particular expression," and the doctrine of scènes à faire, which "is often invoked to immunize from liability similarity of incidents or plot that necessarily follows from a common theme or setting." 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03[B][3][a], [B][4] (2022) [hereinafter NIMMER ON COPYRIGHT].

23 *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994); *see also* Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, *in* COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 4, at 12, 26 ("Most of the breathing room for ongoing authorship in U.S. copyright law comes from the fair use doctrine.").

24 *See, e.g.*, Cariou v. Prince, 714 F.3d 694, 698–99 (2d Cir. 2013).

25 *See infra* Section I.B.1.

26 *See* 17 U.S.C. § 302.

27 Eldred v. Ashcroft, 537 U.S. 186, 247–48 (2003) (Breyer, J., dissenting).

28 *See* Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y U.S.A. 137, 150 (1993) (referring to public domain as "reifying the negative"); *see also* Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1414 (2013) (examining the many arguments in favor of having all copyrighted works eventually fall into the public domain).

encompassing that *every* justification for regulating dissemination likely applies to it.[29]

A. *Statutory Carveouts*

The Copyright Act contains numerous provisions that identify specific uses by specific actors as exempt from liability. While most of these provisions affect only one-off uses of specific works,[30] there are some exceptions that, in effect, allow public dissemination of copyrighted works on a large scale without a license. This Section categorizes these statutory provisions into three groups: the exception for terrestrial radio sound recording performances, the exception for distribution to the visually impaired, and the exceptions for various library and educational uses.

1. Broadcast Radio Performance of Sound Recordings

The Copyright Act provides special rules for a "sound recording": essentially a recording, generally of music, that is able to be reproduced (such as through a record, CD, or digital file) or transmitted (such as via the radio).[31] Most importantly, the Act explicitly states that audio public performance of sound recordings can occur without a license,[32] unless the sound recording is being transmitted digitally.[33] One significant consequence of this rule is that conventional broadcast radio stations can play any recorded song without permission of the recording artist or record label that owns the copyright.[34] When it comes to radio, however, the exception is limited only to stations that broadcast on the AM or FM

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29 *See infra* Part II (examining the many justifications for regulating dissemination and noting that all of them correct problems generated by the creation of exclusive rights in works of information, such that regulation would be unnecessary if copyright did not exist); *see also* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 68–70 (2003).

30 *See, e.g.*, 17 U.S.C. § 110(3) (religious institutions); *id.* § 108(a)–(c) (archival activities); *id.* § 110(4) (certain charitable events); *id.* § 110(6) (agricultural or horticultural fairs); *id.* § 110(10) (veterans' associations).

31 *See id.* § 101. Confusingly, copyright law recognizes a separate copyright in the musical composition used to create a specific recording. *See infra* Section I.C.1.

32 17 U.S.C. § 114(a), (d)(1). Thus, for example, live non-broadcast performances of sound recordings in restaurants can occur without a license from the sound recording copyright owner.

33 *Id.* § 106(6); *see also* discussion *infra* Section I.C.1 (explaining special rules for digital performances).

34 *See* 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.14[A]; Peter DiCola, *Copyright Equality: Free Speech, Efficiency, and Regulatory Parity in Distribution*, 93 B.U. L. REV. 1837, 1848 (2013).

frequency radio spectrum; it does not apply to any internet-based form of dissemination, such as music streaming, or to satellite radio.[35]

2. Publication to the Print Disabled

Sections 121 and 121A of the Copyright Act provide detailed exceptions to copyright's reproduction right designed to allow the visually impaired to access works. Most importantly, these provisions permit nonprofit organizations or governmental agencies[36] to publish and distribute literary or musical works in "accessible formats" without a license.[37] While this rule was previously interpreted to allow only Braille reproduction, recent changes in the Marrakesh Treaty Implementation Act of 2018 clarified that any use that facilitates access for a person with any kind of visual impairment (for example, Braille, large print text, or audio files) is permitted.[38]

The full scope of these provisions—which dissemination entities they apply to and which kinds of copies they permit—has seldom been considered by the courts. The most important case on this topic involved the HathiTrust Digital Library (HDL), a repository for digitized books created by a group of university libraries. In wide-ranging litigation, the courts were asked to consider whether several features of this repository infringed the copyrights of book publishers. One issue was whether HDL's and the University of Michigan's use of the repository to provide print-disabled patrons with digital read-aloud copies of books was permissible.[39]

The district court determined that this service was not infringing, grounding its decision in both Section 121 and the fair use doctrine.[40]

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35 *See infra* Section I.C. The history of the broadcast radio exception is complex. Sound recordings were traditionally exempted from copyright protection entirely. In 1971, Congress established copyright protection for the duplication and sale of sound recordings, but declined to establish a public performance right. In effect, this meant that the sale or copying of a record required permission of the copyright owners, but the broadcast of a song did not. *See* Sound Recording Act of 1971, Pub. L. No. 92-140, 85 Stat. 391. Congress later narrowed this rule, establishing that "digital" transmission of sound recordings through the internet or via satellite would require payment to copyright owners—discussed further below—but terrestrial broadcast radio continued to be exempted. *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106, 114–115).

36 As long as their primary mission relates to serving the disabled. 17 U.S.C. § 121(d).

37 *Id.* § 121(a).

38 Marrakesh Treaty Implementation Act, Pub. L. No. 115-261, 132 Stat. 3667 (2018) (codified at 17 U.S.C. § 121A); 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.07[B][2].

39 Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 90–91, 102–03 (2d Cir. 2014).

40 Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 465 (S.D.N.Y. 2012), *aff'd in part, vacated in part*, 755 F.3d 87.

Among other things, the court found that HDL and the University of Michigan were the kinds of entities contemplated by Section 121 and that their activities were covered by the exemption.[41] The Second Circuit affirmed only on fair use grounds, declining to explicitly consider whether the use was covered by Section 121.[42] Nonetheless, the court's decision, in effect, read the fair use doctrine through the lens of Section 121, arguing that Congress's explicit "intent that copyright law make appropriate accommodations for the blind and print disabled"—manifested in the various pieces of legislation that gave rise to Section 121—provided grounding for the conclusion that HDL's services for the print-disabled were permissible.[43]

3. Distribution by Libraries and Educational Institutions

Several sections of the Copyright Act provide explicit (though limited) carveouts that allow libraries and educational institutions to disseminate works to the public without a license.

Thanks to Section 108 of the Copyright Act, a library may, without a license, copy and distribute parts of books or periodicals to a user at their request.[44] Libraries can also loan physical copies of books to the public thanks to the first sale doctrine, discussed further below, which allows an owner of a physical object embodying a copyrighted work (like a book) to sell or loan it without permission of the copyright owner.[45] But this loan privilege does not permit *copying*, and Section 108 explicitly exempts libraries from liability for making and distributing certain copies of works: specifically, a single article or chapter from a larger book or periodical,[46] or an entire written work if the library determines that the work cannot be obtained at a "fair price."[47] These exemptions only apply if the library has reason to believe the use is for "private study,

41 *See id.*

42 *Authors Guild*, 755 F.3d at 102–03, 103 n.7.

43 *See id.* at 102–03.

44 17 U.S.C. § 108(d).

45 *See* Ariel Katz, *Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge*, 13 I/S 81, 82 (2016).

46 § 108(d).

47 *Id.* § 108(e).

scholarship, or research."[48] The exceptions also do not permit digital copying and distribution outside the premises of a library.[49]

Both libraries and nonprofit educational institutions receive the explicit privilege of renting or lending physical media that contains recorded music, such as CDs and analog tapes, even though commercial entities are explicitly barred from doing so.[50] Nonprofit educational institutions receive additional exemptions from liability for a variety of uses, including displaying works in the course of classroom instruction,[51] as well as digitally transmitting copyrighted works (subject to various exceptions) in the course of remote instruction.[52]

The fair use doctrine frequently steps in to complement or supplement these statutory carveouts. Just like the *HathiTrust* case read fair use through the lens of Section 121's protections for the print-disabled, some cases have found special fair use privileges for educational uses.[53] In *Cambridge University Press v. Patton*,[54] for example, the Eleventh Circuit held that "use for teaching purposes by a nonprofit, educational institution" (specifically, the copying of copyright materials onto electronic course and library sites) can weigh in favor of fair use.[55]

B. *Judicial Exemptions*

The scope of copyright law is most commonly determined through infringement lawsuits. While the vast majority of such cases deal with uses of specific creative works—for example, the unauthorized

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48 *Id.* § 108(d)(1), (e)(1). Private entities are not eligible to make use of these provisions. *See* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 931 (2d Cir. 1994); *see also* U.S. COPYRIGHT OFF., SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS 14 (2017) [hereinafter SECTION 108 DISCUSSION DOCUMENT], https://www.copyright.gov/policy/section108/discussion-document.pdf [https://perma.cc/NU2Y-TYSE].

49 Argyri Panezi, *A Public Service Role for Digital Libraries: A Case of Emergency Electronic Access to Library Material and the Unequal Battle Against Misinformation Through Copyright Law Reform*, 31 CORNELL J.L. & PUB. POL'Y 65, 84 (2021); *see* SECTION 108 DISCUSSION DOCUMENT, *supra* note 48, at 32.

50 17 U.S.C. § 109(b). This ban on commercial music lending is an explicit exception to the first sale doctrine, described below. *See infra* Section I.B.3.

51 § 110(1).

52 *See id.* § 110(2).

53 This practice is bolstered by the fact that the fair use doctrine's codification in the Copyright Act explicitly refers to "teaching (including multiple copies for classroom use), scholarship, or research" as examples of fair use. *Id.* § 107.

54 *See* Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014).

55 *Id.* at 1267. The court, however, limited its holding by citing to the other fair use factors, meaning the applicability of the fair use exception to course sites remains uncertain. *See* Brandon Butler, *Transformative Teaching and Educational Fair Use After Georgia State*, 48 CONN. L. REV. 473, 513 (2015) (arguing that the decision provides little clear guidance).

reproduction of a photograph or the unauthorized creation of a sequel to a book—some cases also deal with large-scale uses of copyrighted works by distributors or on platforms. Through such cases, the courts have administered a number of defenses to liability that operate in effect as safe harbors that permit large-scale dissemination of copyrighted works without a license. While many of these exceptions are listed in the Copyright Act, their open-endedness and general applicability—in contrast to the highly specific exceptions described in the last Section—make their scope and application a frequent subject of judicial decision-making. This Section provides an overview of these limitations and explores how their contours have frequently shifted through judicial interpretation.

1. "Utility-Expanding" Fair Use

Copyright's fair use doctrine is the most widely used mechanism for selectively limiting a copyright owner's ability to control the use of her works. Originally a common law doctrine, fair use was codified in the 1976 Copyright Act, but its scope has continued to change through judicial reinterpretation.[56]

Fair use allows defendants in infringement actions to be excused from liability if they meet the requirements set out in a four-factor test.[57] While many different activities can qualify as fair use,[58] the concept of "transformative use" has begun to overwhelmingly guide judges' application of the four factors. In particular, the transformative use test views fair use as resting on whether the new use "adds something new, with a further purpose or different character," without overly harming the copyright owner financially.[59]

Creative activities that involve the repurposing of existing expression are the most frequent subject of transformative fair use. The quintessential example is a parody: the Supreme Court has held that a parody is lawful because it "shed[s] light on an earlier work, and, in the process, creat[es] a new one," doing so without "affect[ing] the market for the original . . . by acting as a substitute."[60]

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56 *See, e.g.*, Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1105–07 (1990).

57 *See* § 107.

58 Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2539 (2009).

59 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994); *see also* Leval, *supra* note 56, at 1111.

60 *Campbell*, 510 U.S. at 579, 591.

Recent years, however, have seen the extension of transformative use to *non-expressive mass-scale* uses by new technologies. As I have documented in prior work, these "utility-expanding" fair use cases have found that a use can "be transformative if it provides information about the original, 'or expands its utility.'"[61]

While many such cases involve the creation of tools, such as search engines, that do not provide meaningful dissemination of the underlying creative works,[62] some courts have found fair use for information-furnishing tools that also provide *partial dissemination* of the underlying copyrighted work. The most famous example involved the Google Books search tool. A group of publishers sued Google for digitizing their books without a license in order to create a search tool that allows users to make keyword searches of books and then view small "snippets" of the text in which the search term occurs. The Second Circuit found this to be a transformative fair use, holding that the snippet function bolsters the value of the search tool by "show[ing] the searcher just enough context surrounding the searched term to help her evaluate whether the book falls within the scope of her interest."[63]

In recent years, the Second Circuit has begun moving the utility-expanding fair use line of cases in even broader dissemination-related directions. Though that court had previously rejected the notion that a use that merely distributes a copyrighted work more efficiently could be transformative,[64] the court has opened to that possibility in recent cases. In particular, *Fox News Network, LLC v. TVEyes, Inc.* held that a service that provided keyword searches of televised content and several-minute-long clips of those programs was "transformative" because it helped users "access . . . material with targeted precision."[65]

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61 Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 661 (2d Cir. 2018) (quoting Authors Guild v. Google, Inc., 804 F.3d 202, 214 (2d Cir. 2015)). *See generally* Jacob Victor, *Utility-Expanding Fair Use*, 105 MINN. L. REV. 1887 (2021).

62 For example, the Fourth Circuit has held that a service that enables users to detect plagiarism by cross-referencing uploaded works against a database of copyrighted written materials (without providing direct access to this material) was fair use. *See* A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 638 (4th Cir. 2009). Other cases have similarly found fair use for search tools that allow users to gather information about a work (for example, on which page of a book a certain term appears) without accessing the work itself. *See, e.g.*, Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 97 (2d Cir. 2014) (holding that a search tool for books that did not provide access to book text was transformative fair use).

63 *Authors Guild*, 804 F.3d at 218; *see also* Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1165–66 (9th Cir. 2007) (finding fair use for a service that indexed internet images for search purposes but also provided the public with low-resolution versions of those images).

64 Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108–09 (2d Cir. 1998).

65 Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 177 (2d Cir. 2018); *see also Capitol Records*, 910 F.3d at 661 (noting that a technology that delivers works in a more "convenient and usable form" could be transformative).

At the same time, cases like *TVEyes* also display the limitations of the fair use doctrine in allowing dissemination-related uses to occur without a license. Indeed, *TVEyes*, despite finding the clip-viewing feature to be "transformative," ultimately declined to find fair use. Relying primarily on the market-harm aspect of the fair use test, the court found that TVEyes "undercut[]" and "usurp[ed]" copyright owners' markets, making a fair use finding inappropriate.[66]

While the utility-expanding technology cases showcase an explicit use of the fair use doctrine (and, specifically, the concept of transformative use) to provide space for certain new dissemination technologies, the doctrine has also been used in other dissemination-enhancing ways. In particular, the doctrine has been used to supplement and bolster exceptions found in other parts of copyright law, especially those related to noncommercial educational, library, or other nonprofit use. For example, as discussed above, *Authors Guild v. HathiTrust* applied fair use to recognize a privilege for dissemination to the print-disabled, and *Cambridge University Press v. Patton* cited the doctrine in support of nonprofit educational uses.[67]

2. Limitations on Secondary Liability

Copyright law's tolerance for new forms of dissemination is often tested in infringement suits that deal with new technologies that do not directly distribute or broadcast works, but rather enable individual users to do so. Copyright law recognizes secondary liability for acts that either encourage infringement or profit off infringement without attempting to stop it.[68] Technologies that enable individual users to copy and/or distribute protected works have often been sued under a secondary liability theory.

The courts have sometimes attempted to limit secondary liability for such technologies. In *Sony Corp. of America v. Universal City Studios, Inc.*, the Supreme Court considered whether Sony's Betamax recording technology gave rise to vicarious liability for the unauthorized copying of television shows by Betamax users.[69] Though that case has recently been claimed as part of the utility-expanding fair use line of cases discussed

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66 *See TVEyes*, 883 F.3d at 179–80 (second alteration in original) (quoting *Infinity Broad. Corp.*, 150 F.3d at 110); *cf.* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1263 (11th Cir. 2014) (examining a digital course reserve system that allowed professors to upload selections of works and finding that "facilitat[ing] easy access" to content was not alone sufficient to support a transformative fair use finding).

67 *See supra* Section I.A.3.

68 Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 930 (2005).

69 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 437–40 (1984).

above,[70] its primary concern was the scope of secondary liability for new technologies. Analogizing to patent law's contributory infringement rules, the Court held that a copying technology that is capable of "substantial noninfringing uses" cannot be subject to secondary liability.[71] The Court only then concluded that this was true of Betamax, finding that, under the fair use doctrine, individual users generally do not infringe copyright when they make copies of broadcast television shows for later viewing.[72]

As commentators have noted, *Sony* effectively established a "safe harbor" for technologies designed to allow users to make personal, noninfringing uses of copyrighted works.[73] While this safe harbor has played an important role in allowing the development of hardware, such as the VCR and DVR, it has become less influential as copyrighted content has migrated to the internet. In particular, the Supreme Court in 2004 concluded that Grokster, a peer-to-peer file sharing network, could not take advantage of the *Sony* safe harbor because of evidence that it had intentionally induced users to illegally share copyrighted files.[74]

The *Grokster* Court's unwillingness to apply *Sony* to peer-to-peer file sharing platforms appears to have reflected its recognition that such technologies do more than enable small-scale personal copying. Rather, they essentially create an alternative dissemination service; even though it is still individual users who are technically doing the copying and sharing, the service creates a mechanism for enabling mass-scale distribution of copyrighted works without permission.[75] But the *Grokster*

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70 *See TVEyes*, 883 F.3d at 177 (characterizing *Sony* as supporting the proposition that "a secondary use may be a fair use if it utilizes technology to achieve the transformative purpose of improving the efficiency of delivering content"); *Capitol Records*, 910 F.3d at 661 (same).

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

72 *See id.* at 442–56. The Court also relied on evidence that some television producers had in fact authorized recording for time-shifting purposes. *Id.* at 445–47.

73 Samuelson, *supra* note 58, at 2604.

74 Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 939–41 (2005); *see also* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001); *In re* Aimster Copyright Litig., 334 F.3d 643, 645–46 (7th Cir. 2003).

75 *See Grokster*, 545 U.S. at 929–30 ("When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement."); *see also infra* Part II (explaining this reasoning further).

Court took care to leave the *Sony* safe harbor in place, at least hypothetically,[76] and its precise scope will likely continue to be litigated.[77]

3. First Sale Doctrine

U.S. copyright law has long declined to grant copyright owners control over secondary markets for goods, like books, that embody copyrighted works. This exhaustion principle, often known as the "first sale doctrine," allows lawful owners of copyrighted works to resell, lease, donate, or otherwise dispose of their copies as they see fit.[78]

The first sale doctrine affects dissemination markets by permitting libraries and rental companies to function without the permission of copyright owners and without paying fees. Once a lawful purchase of a physical book has been made, a library may loan that book to patrons without a license. The same is true of a video rental store loaning a VHS or DVD to a customer.[79]

The first sale doctrine, however, is explicitly limited to the resale, lending, or donating of the physical object embodying the copyrighted work. It does not permit the *copying* of the protected work, which requires a license from the copyright owner regardless of whether the copied object is a product of resale.

While the first sale doctrine is outlined in the Copyright Act, its contours have shifted through judicial decision-making applying the doctrine to new contexts.[80] Indeed, like the *Sony* safe harbor, the first sale doctrine has been significantly limited by the transition to internet-based dissemination. In a world of digital copyrighted goods transferred seamlessly from person to person via the internet, the line between a resale/loan and a copy becomes blurry. Courts that have addressed this question have essentially concluded that a "digital first sale doctrine"

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76 The *Grokster* Court distinguished *Sony* by relying on the fact that there appeared to be evidence that Grokster had *induced* infringing uses. *Grokster*, 545 U.S. at 941. But various concurrences disagreed about whether *Sony* should protect peer-to-peer file sharing services in the absence of such evidence of inducement. *See id.* at 942–49 (Ginsburg, J., concurring); *id.* at 949–66 (Breyer, J., concurring). *See generally* 3 NIMMER ON COPYRIGHT, *supra* note 22, § 12.04.

77 *See* Lemley & McKenna, *supra* note 14, at 105–06.

78 *See* 17 U.S.C. § 109(a).

79 Picker, *supra* note 14, at 438–40. This rental privilege, however, does not apply to goods that embody musical recordings or computer software, like music CDs, unless a nonprofit educational institution or library is the entity loaning the music or software. § 109(b)(1)(A). This change was made by Congress in 1984 and 1990 thanks to music and software industry allegations that the burgeoning music and software rental markets were facilitating infringement. Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 129–30 (2003).

80 Thus, while some might suggest the first sale doctrine would be better situated in Section A of this Part, I have chosen to include it in this Section.

cannot exist without infringing the reproduction right. In *Capitol Records, LLC v. ReDigi Inc.*, the Second Circuit considered a service that purported to allow users to "sell" and "buy" music files that had been legally acquired from vendors like iTunes. Though ReDigi used technology to attempt to ensure that users could not maintain copies of their files after sale, the Second Circuit nonetheless concluded that ReDigi's system produced infringing copies and thus cannot be covered by the first sale doctrine.[81] While the court left open the possibility that a digital file could be hypothetically covered by the first sale doctrine,[82] under the court's reasoning it is difficult to envision how any such file could be "transferred" without also infringing the reproduction right. Indeed, recent cases have endorsed *Capitol Records*'s reasoning, further constraining the circumstances in which the first sale doctrine will continue to affect markets for copyrighted works.[83]

4. Operating Outside the Scope of Copyright's Exclusive Rights

The fair use and first sale doctrines are defined doctrines that explicitly contemplate that, under certain circumstances, disseminators will be able to avoid paying licenses to copyright owners. But entrepreneurial technology companies can also attempt to work around the exclusive rights enumerated in Section 106 of the Copyright Act in order to craft their own de facto safe harbors. By creating forms of dissemination that, they argue, do not implicate the reproduction, distribution, or public performance rights, these companies can attempt to evade liability and operate without licenses. Though the courts have grown increasingly skeptical of this strategy, it will likely continue to be a source of litigation.

In the early and mid-twentieth century, courts often found that new forms of dissemination did not implicate any of copyright's exclusive rights. For example, in 1908, the Supreme Court determined that the "mechanical" copying of sheet music into player piano rolls did not

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81 Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 657–59 (2d Cir. 2018).

82 *Id.* at 656 & n.10.

83 *See, e.g.*, Disney Enters., Inc. v. Redbox Automated Retail, LLC, 336 F. Supp. 3d 1146, 1156 (C.D. Cal. 2018) (granting preliminary injunction and endorsing *Capitol Records*); *see also* Disney Enters., Inc. v. Redbox Automated Retail, LLC, No. CV 17-08655 (AGRx), 2018 WL 1942139, at *8–10 (C.D. Cal. Feb. 20, 2018) (declining to grant injunction on the grounds that plaintiff had engaged in copyright misuse, but still noting the possible applicability of *Capitol Records*); Hachette Book Grp., Inc. v. Internet Archive, No. 20-cv-4160, 2023 WL 2623787 (S.D.N.Y. Mar. 24, 2023) (endorsing *Capitol Records*'s reasoning to deny fair use defense to practice of "controlled digital lending").

implicate copyright's reproduction right.[84] Similarly, in the 1960s and 1970s, the Supreme Court found that cable-based retransmission of broadcast programming did not involve "performance" of the copyrighted work within the meaning of the Copyright Act.[85] Congress responded to these early cases by modifying the law to bring the new technologies within the scope of copyright.[86] And following the general expansion and clarification of copyright law in the 1976 Copyright Act, such cases became less frequent. But courts have, on occasion, continued to find that some new uses do not implicate copyright's exclusive rights. For example, in *Cartoon Network LP v. CSC Holdings, Inc.*, the Second Circuit found that a cable company's remote storage digital video recorder (RS-DVR) system, which allowed subscribers to make digital recordings of television shows and house them on a server, was not infringing. Among other things, the court concluded that the playback of recorded television shows through this system did not implicate the public performance right.[87]

In recent years, some resourceful companies have *deliberately* developed technologies with the goal of operating in the negative space outside of copyright's exclusive rights.[88] The most prominent example was the company Aereo, which created a unique system that allowed users to watch broadcast television in near-real time on digital devices. Aereo used a system of thousands of small antennas, each dedicated to a single user, to receive broadcast transmissions and then stream content directly to users over the internet. The goal of this Rube Goldberg-esque system appeared to be to take advantage of precedent, especially *Cartoon Network*, that suggested that such individual copying and private transmission is outside the scope of copyright protection.[89]

Copyright owners sued and the case ultimately made its way to the Supreme Court. Aereo's primary argument was that the use of its individuated antenna system meant that its activities fell outside the scope of copyright's exclusive rights because it was not an entity that "perform[ed]" the protected works within the meaning of the Copyright

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84 White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 17–18 (1908).

85 *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390, 400–01 (1968); Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 408–09 (1974).

86 *See* Jane C. Ginsburg, *Copyright and Control over New Technologies of Dissemination*, 101 COLUM. L. REV. 1613, 1626–30 (2001) (describing this history).

87 Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121, 139 (2d Cir. 2008). Notably, this decision also rested on the court's conclusion that it was individual users who make the copies rather than the cable company itself, which served to immunize the cable company from direct and secondary liability. *Id.* at 139–40.

88 Kristelia García has noted that this strategy can be thought of as a kind of regulatory arbitrage. Kristelia A. García, *Copyright Arbitrage*, 107 CALIF. L. REV. 199, 229–31 (2019).

89 *See* Lemley & McKenna, *supra* note 14, at 93–95, 103–05.

Act.[90] The Supreme Court declined to accept this reasoning, concluding that Aereo was operating essentially as a cable company and thus its activities infringed copyright's public performance right.[91] On remand, the district court enjoined Aereo from operating key aspects of its services.[92] Other recent attempts to operate a dissemination service outside the scope of copyright's exclusive rights have also failed.[93]

C. *Regulatory Price Setting*

Most of the judge-made or managed exceptions described above operate as general defenses to liability and have only come to regulate dissemination through their application to specific large-scale uses of copyrighted works. But copyright law also contains dedicated regulatory regimes that manage a range of specific dissemination industries. Like the judicial safe harbors, these regimes sometimes remove copyright owner control over certain dissemination markets. But unlike the safe harbors, which provide no compensation to copyright owners, copyright's regulatory mechanisms more often take the form of compulsory licenses or levies that provide government-determined compensation to copyright owners. Run out of the federal government's Copyright Office and outlined in detail in the Copyright Act, this system of regulation is notoriously complex. What follows is an overview of the main regulatory mechanisms and their general functioning.

1. Music Compulsory Licenses

The most wide-ranging regulatory regime in copyright law governs the dissemination of music to the public. Understanding this complex web of regulations requires some background on the unusual nature of

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90 Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 445 (2014); *see also* 17 U.S.C. §§ 101, 106(4).

91 *Aereo*, 573 U.S. at 449–51.

92 Am. Broad. Cos. v. Aereo, Inc., Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at *8–10 (S.D.N.Y. Oct. 23, 2014).

93 Most notably, the nonprofit Locast, which attempted to digitally retransmit broadcast television for free, was recently found to be within the domain of copyright's exclusive rights and thus required to negotiate licenses. *See* Am. Broad. Cos. v. Goodfriend, 557 F. Supp. 3d 409, 410, 412–13 (S.D.N.Y. 2021). Following this decision and a multimillion-dollar judgment, Locast was forced to shut down. Edmund Lee, *Locast, a Nonprofit Streaming Service for Local TV, Is Shutting Down*, N.Y. TIMES (Sept. 2, 2021), https://www.nytimes.com/2021/09/02/business/media/locast-shuts-down.html (last visited Jan. 24, 2023); Bernie Pazanowski, *Locast Shut Down as $32 Million Damages Award Becomes Official*, BLOOMBERG L. (Oct. 29, 2021, 10:24 AM), https://news.bloomberglaw.com/ip-law/locast-shut-down-as-32-million-damages-award-becomes-official (last visited Feb. 28, 2023).

music copyright generally. Music, unlike other creative industries, implicates two distinct copyright interests: the underlying "musical composition," which is the collection of notes, orchestration, and lyrics in a song, and the "sound recording," which is the specific recorded version of that song. These distinct copyrights are often owned by separate parties. A musical composition copyright will generally be owned by a composer and/or a music publisher, and a sound recording copyright will often be owned by a performing artist and/or a record label.[94]

Most forms of music dissemination require a license from both sets of copyright owners in order to occur. To make things even more confusing, different types of music dissemination implicate different copyright interests, even if the uses seem analogous. The selling of a CD or MP3 file implicates the rights to *reproduce* and distribute the musical composition and sound recording.[95] But the playing of a song on an AM/FM radio station, a jukebox, or a webcasting platform like Pandora implicates the separate right to *publicly perform* these copyrights.[96] The streaming of a song on an interactive streaming platform like Spotify implicates both the reproduction and performance rights.

The disjointed nature of music copyright sets the stage for the unusually piecemeal set of regulations that govern certain forms of music dissemination, but not others. What follows is a description of the three primary areas of regulation: the Section 114 compulsory license for the digital and satellite performance of sound recordings; the Section 115 compulsory license for musical composition reproduction; and the Section 116 compulsory license for musical composition jukebox public performance.

a. Section 114

As discussed above, AM/FM radio stations are exempt from paying sound recording royalties to recording artists and record labels when broadcasting a song. But thanks to legislative changes in the 1990s, the same is not true for satellite radio and webcasting services (sometimes called "digital radio" or "non-interactive streaming" services).[97] Under Section 114 of the Copyright Act, these services—Sirius Radio and Pandora, for example—may publicly perform any sound recording as

94 *See* Peter DiCola & David Touve, *Licensing in the Shadow of Copyright*, 17 STAN. TECH. L. REV. 397, 408–10 (2014) (providing overview of music copyright licensing).

95 *See* 17 U.S.C. § 106(1), (3).

96 *See id.* § 106(4).

97 *See* Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (codified as amended at 17 U.S.C. §§ 106, 114–115).

long as they pay a government-set royalty.[98] Explicitly excluded from eligibility for the Section 114 license are "interactive" streaming services—like Spotify—which allow users to play a specific piece of music at will; these services must negotiate licensing agreements in order to use sound recordings.[99]

The Section 114 compulsory license is administered by an entity known as the Copyright Royalty Board (CRB). Consisting of three administrative judges appointed by the Librarian of Congress, the CRB is tasked with setting rates for most of the Copyright Act's compulsory licenses. The Board's rate-setting decisions must be approved by the Register of Copyrights and are appealable to the D.C. Circuit.[100]

The Section 114 regime charges the CRB with setting rates and terms for satellite radio and webcasters every five years.[101] Industry representatives take part in adversarial proceedings during which they advocate for certain rates, generally by presenting economic expert evidence. Ultimately, the CRB must choose a royalty that "most clearly represent[s] the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller,"[102] though other rate-setting criteria have been used in the past.[103] Industry representatives may avoid the rate-setting process by entering into a negotiated agreement for the five-year rates and terms.[104] If the CRB approves such a settlement, it becomes the official compulsory royalty rate, governing all covered copyright owners and services regardless of whether they took part in the negotiation.[105]

Section 114 royalties are distributed by a nonprofit entity known as SoundExchange. Like the private performance rights organizations (PROs) discussed in the next Section, SoundExchange helps facilitate licenses to digital and satellite radio platforms and arranges for the many different sound recording rightsholders to be paid. However, unlike the

98 *See* § 114. Section 112 of the Copyright Act also partially governs this process by allowing digital services to make temporary server copies in the course of performing the work in exchange for a compulsory rate. *See id.* § 112(e); *see also* U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 46 (2015) [hereinafter MUSIC MARKETPLACE REPORT], https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf [https://perma.cc/GM64-XCZB]. However, as the Section 112 provisions are almost always dealt with in the context of Section 114 rate setting, this Article refers exclusively to Section 114 in describing the overall regime.

99 *See* 17 U.S.C. § 114(d)(1), (d)(3)(A).

100 *Id.* §§ 801(a)–(b), 803(a)(1), (d)(1).

101 *Id.* § 114(f).

102 *Id.*

103 *See infra* Section II.B.1.

104 § 114(e).

105 *See id.* § 801(b)(7); 37 C.F.R. § 351.2(b) (2023).

PROs, SoundExchange is designated by the Copyright Act as the sole entity eligible to administer Section 114 royalties.[106]

b. Section 115

The oldest compulsory license in the Copyright Act, often referred to as the "mechanical license," is outlined in Section 115. Established in 1909, the mechanical license governs the reproduction of musical composition copyrights into any "mechanically" playable form.[107] While originally designed to cover the creation of player piano rolls and related forms of dissemination,[108] the regime now allows for the creation of any form of recorded music in exchange for a compulsory fee.[109] The musical composition copyright owner still controls the first recording of a song; for that reason, the Section 115 license has often been used to create cover versions of existing recorded music.[110] Like the Section 114 license, Section 115 royalty rates and terms are periodically set by the CRB or via an industry-wide settlement.[111]

Since the rise of online music dissemination, the Section 115 regime has taken on newfound importance in facilitating music dissemination, distinct from its role in facilitating cover songs. In a pre-internet world, music dissemination was relatively straightforward: a record label could utilize a private licensing agreement (or the Section 115 regime) to create a recording of a musical composition. When a record label would sell copies of this recording, embodied in a record or CD, they would generally pay a portion of the proceeds to the musical composition copyright owner.[112]

Internet dissemination, however, adds a new level to the distribution chain: an online retailer like iTunes or a streaming service like Spotify will generally negotiate with a record label for permission to digitally copy and distribute existing recorded music online. However, as this act of digital distribution also implicates the right to reproduce the underlying musical composition copyright,[113] digital disseminators must also receive

106 § 114(f)(4)(A) (designating the "receiving agent" for royalty payments); *see* Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 230 (2012) (explaining role of SoundExchange).

107 *See* MUSIC MARKETPLACE REPORT, *supra* note 98, at 17–18, 28–30.

108 Howard B. Abrams, *Copyright's First Compulsory License*, 26 SANTA CLARA COMPUT. & HIGH TECH. L.J. 215, 217–19 (2010).

109 *See* 17 U.S.C. § 115(c)(1).

110 *See* Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 U. PA. L. REV. 441, 465 n.120 (2016).

111 *See* 17 U.S.C. § 801(b).

112 *See* MUSIC MARKETPLACE REPORT, *supra* note 98, at 22–23.

113 Though, for a time, it was unclear if streaming implicated the reproduction rights of musical composition copyright owners. *See infra* Part III.

a separate license—that is, a mechanical license—from the musical composition copyright owner. The Section 115 license has taken on the role of allowing digital disseminators to more seamlessly "clear" such rights when distributing music.[114]

The recent Music Modernization Act cements this role for the Section 115 license. The Act replaced the burdensome process for utilizing the compulsory license—which generally required separate notices for each individual piece of music used by a service—with the ability to obtain a "blanket" license for musical composition rights in essentially all recorded songs.[115] The Act also requires the creation of an entity, modeled after SoundExchange, to negotiate on behalf of musical composition copyright owners and administer the distribution of Section 115 royalties.[116]

b. Section 116

The final music-related compulsory licensing regime governs the public performance of musical composition copyrights by "coin-operated" music players, otherwise known as jukeboxes.[117] Originally exempt from paying any royalties at all, the 1976 Copyright Act replaced this blanket exclusion with a compulsory licensing regime. While most other uses of musical compositions that implicate the public performance right—such as radio—obtain their licenses through the private performing rights organizations, discussed further below,[118] jukebox owners may utilize the Section 116 regime to obtain permission to play songs. Jukebox owners and copyright owners are encouraged to arrive at royalty rates and terms via negotiation, but the CRB is authorized to set rates in the event no agreement is reached.[119]

2. Cable and Satellite Television Compulsory Licenses

The second major compulsory licensing regime outlined in the Copyright Act deals with the retransmission of broadcast television via cable (Section 111) or satellite (Sections 119 and 122). This regime is

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114 Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 957–59 (2020) (describing this phenomenon).

115 *See* 17 U.S.C. § 115(d); *see also* Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2527 (2019) (describing changes).

116 *See* § 115(d).

117 *Id.* § 116; *see also* Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 108–09 (2004).

118 *See infra* Section I.D.1. Recall, however, that the rules for sound recording are quite different. Terrestrial radio is exempt from paying sound recording royalties entirely, while digital/satellite radio may pay royalties via the Section 114 license. *See supra* Sections I.A.1, I.C.1.

119 § 116(b).

notoriously complex—even, some say, incomprehensible[120]—but, in essence, it establishes that if a television network that operates on the broadcast spectrum (ABC, NBC, and the like) transmits a television program, a cable or satellite provider may make its own "secondary transmission" of the program as long as they pay a regulated fee to the copyright owners and comply with a Copyright Office-managed reporting system.[121]

The cable compulsory license was established in the 1976 Copyright Act as a solution to a longstanding dispute between the broadcast television industry and cable television providers, in both the courts and at the FCC.[122] In particular, the Supreme Court held on two occasions that cable transmissions of broadcast television were not "public performances" and were thus outside the scope of copyright liability.[123] As cable, in its early days, was primarily a system for retransmitting broadcast television (rather than providing its own specialized programming), these holdings were a source of ire for copyright owners, who believed they were being deprived of valuable royalties and advertising revenue. Through Section 111, Congress facilitated an industry-negotiated compromise: cable systems could continue providing broadcast television to viewers—as they had been doing for free under the Supreme Court's holdings—but were now required to pay a government-set fee.[124] Satellite television was later provided with its own compulsory license with similar rate-setting and reporting requirements.[125]

Unlike the nebulous rate-setting criteria for the music compulsory licenses, the royalty rate requirements for the cable compulsory license are outlined in detail in the statute through a complex formula. This formula primarily uses a "sliding scale of percentages of [cable companies'] gross receipts"[126] and is subject to minor adjustment by the

120 Samuelson, *supra* note 23, at 40.

121 *See* 17 U.S.C. §§ 111(c)–(d), 119(a)–(b). The cable or satellite operator must transmit the program at the same time as the broadcast and without alternation (including providing advertisements in their entirety) to be eligible. *Id.* §§ 111(c), 119(a). For a helpful description of the highly complex Section 111 reporting system, see Liu, *supra* note 117, at 110.

122 *See* Wu, *supra* note 14, at 311–23 (describing history).

123 *See* Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968); Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394 (1974); *see also supra* Section I.B.4.

124 Wu, *supra* note 14, at 322.

125 Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. ON TELECOMMS. & HIGH TECH. L. 217, 262–64 (2002) (describing history of this compulsory license).

126 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.18[E][4][b]. The sliding scale is designed to account for local versus national broadcast markets, and the increase in advertising revenue that copyright owners can achieve with national broadcasting. *Id.* § 8.18[E][4][a]–[b].

CRB periodically.[127] And unlike the music regime, which generally uses private or quasi-private entities for royalty distribution, the CRB is itself charged with arranging the distribution of both cable and satellite compulsory license payments, as well as adjudicating any controversies related to distribution.[128]

While the music compulsory licenses have been adapted to some new technological developments, through both regulatory and legislative changes,[129] the cable and satellite licenses have remained relatively fixed in the digital era.[130] In particular, internet streaming companies that have attempted to take advantage of the statutory licensing provisions have been rebuffed by both the Copyright Office[131] and the courts.[132] Most notably, Aereo—the entrepreneurial internet rebroadcast company that was found by the Supreme Court to infringe the public performance rights of television producers—argued that it should be eligible to take advantage of the Section 111 cable license. The Ninth Circuit and other courts rejected that argument, holding that Aereo must negotiate and pay market licenses.[133]

3. Public Broadcasting Compulsory License

The music and cable/satellite compulsory licenses regulate different forms of dissemination across large, lucrative industries. But copyright law also utilizes compulsory licenses in more narrow contexts. In particular, Section 118 of the Copyright Act establishes a compulsory licensing regime for public broadcasters, defined as any "noncommercial

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127 17 U.S.C. §§ 111(d), 801(b)(2); *see also* Adjustment of Cable Statutory License Royalty Rates, 85 Fed. Reg. 34467 (June 4, 2020). The CRB has a more active role in regulating the satellite compulsory license rates, though industry-wide settlement is encouraged. *See* 17 U.S.C. § 119(c).

128 § 801(b)(3).

129 *See supra* Section I.C.1.

130 This is not to say that Congress has not adjusted the compulsory licenses. In fact, numerous pieces of legislation have been passed to change or clarify aspects of the Sections 111 and 119 licenses. But this "incessant tinkering" has only affected existing industry players, rather than expanding the licenses to new forms of dissemination. *See* 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.18[F][5][e].

131 *See, e.g.*, U.S. COPYRIGHT OFF., A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 91–99 (1997); *Copyrighted Webcast Programming on the Internet: Hearing Before the Subcomm. on Cts. & Intell. Prop. of the H. Comm. on the Judiciary*, 106th Cong. 5–16 (2000) (statement of Marybeth Peters, Register of Copyright, Copyright Office of the United States).

132 *See, e.g.*, WPIX, Inc. v. ivi, Inc., 691 F.3d 275, 277, 279, 284–85 (2d Cir. 2012).

133 Fox Television Stations, Inc v. Aereokiller, LLC, 851 F.3d 1002, 1006, 1015 (9th Cir. 2017); Fox Television Stations, Inc. v. FilmOn X LLC, 150 F. Supp. 3d 1, 17–18, 32 (D.D.C. 2015); Am. Broad. Cos. v. Aereo, Inc., Nos. 12-cv-1540, 12-cv-1543, 2014 WL 5393867, at *3 (S.D.N.Y. Oct. 23, 2014).

educational" television or radio broadcast station, for the performance of musical works and certain visual artworks.[134]

Under this regime, a public broadcasting entity like PBS or NPR can use most musical composition copyrights without permission of the copyright owner,[135] as well as broadcast depictions of visual artworks, including sculptures.[136] The use of literary works and audiovisual works, however, is explicitly excluded from the compulsory license.[137]

As with the other compulsory licenses, the CRB is charged with setting rates for the Section 118 compulsory license, which it must do every five years. In lieu of setting rates, the CRB may adopt royalty terms negotiated by industry stakeholders, which take precedence over any CRB-established rates.[138] The negotiated rates are binding on all industry members regardless of whether they participated in the negotiations.[139] If the CRB ends up setting rates on its own, its only guidance is that it "may consider the rates for comparable circumstances under voluntary license agreements negotiated" by copyright owners and public broadcasters, and presumably replicate them throughout the industry.[140]

In this respect, the public broadcasting provisions strongly incentivize industry-wide negotiated rates, and the CRB's main function seems to be as facilitator and approver of industry-wide settlements. The CRB has discretion to reject industry-wide settlements based on objections, but seems to seldomly do so.[141]

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134 17 U.S.C. § 118(c), (f).

135 *See id.* § 118(b). Recall the unusual dual nature of music copyrights. *See supra* Section I.C.1. This compulsory license covers the musical composition right, but not the sound recording right. However, the exclusion of nondigital public performance means that most public broadcasting stations do not have to pay sound recording royalties anyway. *See supra* Section I.A.1. And digital performance is covered by special provisions of the Section 114 license. *See supra* Section I.C.1.

136 § 118(b).

137 *Id.* § 118(d).

138 *Id.* § 118(b); 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.16[D].

139 *See* Determination of Rates and Terms for Public Broadcasting (PB III), 83 Fed. Reg. 2739, 2739 (Jan. 19, 2018) (codified at 37 C.F.R. pt. 381).

140 *See* § 118(b)(4).

141 *See id.* § 801(b)(7)(A)(ii). Indeed, in the recent rate-setting proceeding, *Public Broadcasting III*, which established rates for 2018 through the end of 2022, private industry parties—including PBS, NPR, and various music copyright management organizations—reached a detailed agreement governing royalty rates. Despite objections from another music rights management organization, Global Music Rights (GMR), which had declined to participate in negotiations but would still be bound by the new rates, the CRB approved the settlement in its entirety. *See* Determination of Rates and Terms for Public Broadcasting (PB III), 83 Fed. Reg. 2739; *see also* Global Music Rights, LLC, Comments on Proposed Rule *In re* Determination of Royalty Rates and Terms for Performance or Display of Nondramatic Musical Works and Pictorial, Graphic, and Sculptural Works by Public Broadcasting Entities (PB III), at 1–5 (Nov. 27, 2017) (No. 16-CRB-0002-PBR), https://app.crb.gov/case/viewDocument/1646 [https://perma.cc/4553-RF3L].

4. Recording Device Levy

One of the more unusual regulatory interventions in copyright dissemination markets relates to technologies designed to facilitate individual copying of copyrighted works. As discussed above, the Supreme Court in the *Sony* case recognized a secondary liability safe harbor for such technologies as long as they have "substantial noninfringing uses."[142] But copyright owners have often attempted to narrow this rule, especially as digital technologies have made home copying more and more seamless.

One such campaign led to the Audio Home Recording Act of 1992 (AHRA), codified in Chapter 10 of the Copyright Act.[143] The AHRA was born out of concerns of music copyright owners that newly released digital audio tape (DAT) recording technology—which provided near perfect digital copying on tapes, in contrast to the lower quality copies of analogue tape recording—would lead to a dramatic increase in individual copying of musical works and significantly harm music sales.[144] Record companies and recording device manufacturers negotiated a compromise, which was essentially codified by Congress in the AHRA.[145]

The AHRA immunizes consumers from direct liability for personal copying using DAT technology, as well as device manufacturers from secondary liability.[146] In exchange, device manufacturers agreed to implement certain technological measures to prevent frequent copying and to pay a certain percentage of proceeds from sales of such technologies to copyright owners.[147]

This recording device levy is akin to a compulsory license, but rather than providing for direct use of a copyrighted work in exchange for a compulsory fee, it protects device manufacturers from secondary liability for the actions of individual users in exchange for a fee paid by those device manufacturers (and, presumably, passed on to users in the sale price for the device).[148] In practice, device manufactures are required to pay a percentage of the sale price (2% for the actual recording device and 3% for storage media, like tapes and disks) into a centralized pool.[149] This pool is then distributed to both musical work and sound recording

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

143 Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified as amended at 17 U.S.C. §§ 1001–1010).

144 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8B.01[A].

145 *See id.* at § 8B.01[C].

146 17 U.S.C. § 1008.

147 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8B.01[C]; *see also* §§ 1002, 1008–1010.

148 Liu, *supra* note 117, at 116–18.

149 17 U.S.C. § 1004(a)(1), (b).

copyright owners through a complex scheme administered by the Copyright Office, with disputes arbitrated by the CRB.[150]

Despite being heralded as a solution to the market disruption posed by digital copying,[151] the AHRA is all but irrelevant today. The tape-based digital recording technology explicitly covered by the Act never caught on and was quickly supplanted by technologies like CD burners and MP3 players. In the first case that tested the scope of the Act, the Ninth Circuit held that such newer technologies were clearly outside the scope of the AHRA and thus not subject to the levy scheme.[152] The *Sony* safe harbor stepped in to immunize such device manufacturers from secondary liability. As the scope of the *Sony* safe harbor began to erode with the rise of peer-to-peer file sharing, discussed above, Napster and other file sharing platforms argued that they could take advantage of the AHRA, but the courts also rejected that argument.[153] Thus, while the AHRA remains an interesting experiment in an alternative compensation mechanism for addressing digital dissemination, it is, in practice, a dead letter.

D. *Other Mechanisms*

The final set of dissemination-related regimes is not neatly categorizable. Some, like the ASCAP/BMI consent decrees and the DMCA safe harbor, discussed below, include elements of administrative state-based regulation and elements of judicial oversight; others, like the Section 1201 exceptions, govern an area of law that might be thought of as copyright-adjacent, but that still plays an important role in regulating the dissemination of creative works. What follows is an overview of these more unusual regimes.

1. Consent Decrees

The compulsory licensing regimes described above were explicitly created through legislation and are managed by a dedicated administrative tribunal, the CRB. In contrast, the two consent decrees that govern music licensing collectives present an example of similar

150 *See id.* §§ 1003–1007; *see also* 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8B.05.

151 *See* Menell, *supra* note 79, at 130–31 (discussing history).

152 Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072, 1073–74, 1081 (9th Cir. 1999); *see also* 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8B.02[A] (criticizing narrow scope of AHRA).

153 *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1024–25 (9th Cir. 2001).

market control achieved through a combination of private ordering, regulation, and judicial oversight.

Recall that some forms of dissemination, like music sales and streaming, implicate the exclusive right to copy and distribute, whereas others implicate the exclusive right to perform. Broadcast radio has always implicated only the public performance right in the musical composition copyright.[154] In the early 1900s, copyright owners, recognizing the potential for more efficient licensing and an improved bargaining position, united to create a central agent to represent their interests with respect to radio stations and other public performance licensees, such as restaurants.[155] This PRO is known as the American Society of Composers, Authors and Publishers (ASCAP). A second PRO, Broadcast Music, Inc. (BMI) was established in the late 1930s.[156]

Among other things, the PROs provide what are known as blanket licenses: a licensee, like a radio station, can receive permission to play every copyrighted work in the PRO's catalogue in exchange for a royalty. This royalty is then divided among copyright owners according to the PRO's internal rules.[157] This system creates a much more efficient licensing mechanism for both copyright owners and licensees, but also provides copyright owners with significantly more market power than they would otherwise have in individual licensing negotiations. Responding to concerns over the anticompetitive effects of this arrangement, the Department of Justice (DOJ) investigated ASCAP and BMI for antitrust violations. Both PROs entered into consent decrees that remain operative today.[158]

The consent decrees function as de facto compulsory licenses, but they are structured quite differently from the industry-wide regimes described in the last Sections. ASCAP and BMI must provide non-exclusive licenses to any licensee that requests one and are subject to

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154 Confusingly, this has not extended to sound recordings, which have historically been exempt from copyright protection for radio, as described above. *See supra* Section I.A.1. And sound recording licensing for digital and satellite radio are subject to the Section 114 compulsory license. *See supra* Section I.C.1.a.

155 *See* Wu, *supra* note 14, at 305.

156 *BMI's Timeline Through History*, BMI, https://www.bmi.com/about/history [https://perma.cc/XGN3-9HFY]. *See generally* Wu, *supra* note 14, at 309–10.

157 DiCola, *supra* note 34, at 1847.

158 *See* United States v. Am. Soc'y of Composers, Authors & Publishers, No. 41-1395 (WCC), 2001 WL 1589999 (S.D.N.Y. June 11, 2001); United States v. Broad. Music, Inc., No. 64 Civ. 3787, 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. Dec. 29, 1966), *modified*, 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. Nov. 18, 1994). The consent decrees have also been acknowledged—though not formally codified—in portions of the Copyright Act. For example, Section 104 of the recent Music Modernization Act altered the way that rate court disputes are assigned to judges in the Southern District of New York. *See* Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 104, 132 Stat. 3676, 3726 (2018) (codified in 28 U.S.C. § 137).

royalty rate setting by courts in the Southern District of New York (SDNY).[159] But rather than periodic industry-wide rate setting, the SDNY rate courts only set royalties if ASCAP, BMI, and the licensee cannot reach an agreement.[160]

The consent decrees' influence on dissemination markets are most apparent in the shadow they cast over private negotiations. As Daniel Crane has shown, rate-setting proceedings are comparatively rare, but the specter of judicial oversight helps galvanize private agreements.[161] That being said, the rate-setting courts have, in recent years, become more active, especially as new forms of dissemination have sought blanket licenses from the PROs. For example, in 2014, the rate court adjudicated a royalty dispute between Pandora and ASCAP. Even while applying the generally accepted "fair market value" standard for such rate proceedings, the court set a rate that is widely considered to be favorable for Pandora, rejecting ASCAP's requests for rate increases during the latter half of the licensing period.[162]

Despite its longevity, the DOJ has often considered sunsetting the consent decrees and replacing them with free market licensing.[163] Moreover, two newer PROs—SESAC and Global Music Rights (GMR)—are not subject to the consent decrees. Though these PROs are currently invitation-only, their freedom to charge any royalty rate they choose has made them an appealing option for copyright owners dissatisfied with the consent decree system.[164]

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159 *Am. Soc'y of Composers*, 2001 WL 1589999, at *4–6.

160 *See id.* at *6.

161 Daniel A. Crane, *Bargaining in the Shadow of Rate-Setting Courts*, 76 ANTITRUST L.J. 307, 308 (2009).

162 Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 6 F. Supp. 3d 317, 354–55 (S.D.N.Y. 2014), *aff'd*, 785 F.3d 73 (2d Cir. 2015); *see also infra* Section II.B.1 (discussing this decision in more detail).

163 *See* Makan Delrahim, Former Assistant Att'y Gen., U.S. Dep't of Just., Opening Remarks at the Antitrust Division's Public Workshop on Competition in Licensing Music Public Performance Rights (July 28, 2020), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-opening-remarks-antitrust-division-s [https://perma.cc/C6S7-3FD2].

164 Indeed, GMR is currently in litigation over whether it deliberately signed artists away from ASCAP/BMI in order to charge radio stations higher rates, in violation of the antitrust laws. *See* David Oxenford, *Litigation Continues as Court Rejects GMR Motion to Dismiss RMLC Lawsuit—and RMLC's Request to Dismiss GMR Claims*, BROAD. L. BLOG (Feb. 18, 2020), https://www.broadcastlawblog.com/2020/02/articles/litigation-continues-as-court-rejects-gmr-motion-to-dismiss-rmlc-lawsuit-and-rmlcs-request-to-dismiss-gmr-claims [https://perma.cc/TFL6-7AV7]. SESAC previously agreed to arbitration to address similar allegations. *Id.*

2. Online Service Provider Safe Harbor

The 1998 Digital Millennium Copyright Act (DMCA) dramatically changed copyright law to address the rise of internet distribution. One of the DMCA's greatest innovations is the Section 512 safe harbor for online service providers (OSPs). This safe harbor immunizes OSPs—like search engines, e-commerce sites, and many other digital platforms—from liability for infringing content uploaded by users.[165] To be eligible, OSPs must lack direct knowledge of the infringing content, as well as comply with a range of administrative requirements. Most notably, OSPs must provide a mechanism through which copyright owners can request that infringing content be taken down.[166] As failing to abide by any of these requirements can subject the OSP to infringement liability, the courts often play a role in policing the scope of the safe harbor.[167]

Commentary on the Section 512 safe harbor has tended to focus on its role (along with other internet safe harbors) in allowing for the dramatic growth of social media platforms, as well as its importance for individual creative expression and cultural participation on the internet.[168] But the safe harbors, in recent years, have also become an important mechanism for allowing the dissemination of creative works to the public. By operating primarily as user-uploaded-content platforms, rather than as dedicated streaming services, some internet companies have been able to function, in effect, as disseminators while still taking advantage of the safe harbor.

The most notable example of this phenomenon is YouTube. YouTube hosts an extraordinarily large range of content, much of which consists of purely user-generated videos posted by their creators. But users also frequently post copyrighted songs or videos in their entirety. Copyright owners can request removal using the take-down mechanisms, but this has quickly become a game of "Whac-A-Mole" where the removed content is immediately reposted.[169] Thus, YouTube users can access much of the content also available on dedicated services like

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165 *See* 17 U.S.C. § 512.

166 *See id.* § 512(c).

167 *See, e.g.*, Ellison v. Robertson, 357 F.3d 1072, 1076–77 (9th Cir. 2004) (assessing scope of safe harbor requirements).

168 *See* Matthew Sag, *Internet Safe Harbors and the Transformation of Copyright Law*, 93 NOTRE DAME L. REV. 499, 504–05 (2017); *cf.* Eric Goldman, *How the DMCA's Online Copyright Safe Harbor Failed*, 3 NTUT J. INTELL. PROP. L. & MGMT. 195 (2014).

169 *See* Todd C. Frankel, *Why Musicians Are So Angry at the World's Most Popular Music Streaming Service*, WASH. POST (July 14, 2017), https://www.washingtonpost.com/business/economy/why-musicians-are-so-angry-at-the-worlds-most-popular-music-streaming-service/2017/07/14/bf1a6db0-67ee-11e7-8eb5-cbccc2e7bfbf_story.html (last visited Jan. 29, 2023).

Spotify and Pandora. But whereas these dedicated streaming services are required to pay market-negotiated (or compulsorily licensed) royalty rates, YouTube, as an OSP, in theory does not have to pay anything as long as it complies with the notice-and-takedown requirements.[170]

YouTube, however, has recognized that it is often useful to actively license posted content—now often identified through proprietary content ID algorithms—from copyright owners, so as to avoid the notice-and-takedown process and instead monetize the content via advertising.[171] But, as some scholars have argued, because the baseline for negotiation is essentially free use—YouTube could always walk away and just allow the Section 512 safe harbor to take effect—copyright owners have little leverage to demand higher prices. Thus, there is some evidence that the royalties YouTube pays for licensed content are nearly seven times lower than those paid by dedicated streaming services like Spotify,[172] though the precise cause of these differences remains unclear.[173]

This situation has led copyright owners to frequently complain of a "value gap" between royalties received from traditional streaming services and royalties received from YouTube. A decade ago, copyright owners tried to argue that YouTube should be categorically excluded from the safe harbor because infringement is so rampant on the platform that YouTube cannot claim to lack knowledge, as is required by Section 512.[174] The Second Circuit, however, rejected such an argument, holding that only "knowledge of specific and identifiable infringements" removes the protections of the safe harbor, and only with respect to those acts of infringement.[175] Thus, YouTube and other platforms have continued to enjoy the possibility of seeking protection from the safe harbors, though

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170 García, *supra* note 88, at 235. To be clear, this Article refers only to YouTube's non-subscription service. YouTube also operates a conventional streaming service called YouTube Music.

171 Among other things, YouTube now uses a content ID system to detect infringing works. YouTube then offers copyright owners the option to license the work in exchange for advertising revenue, rather than taking it down. Sag, *supra* note 168, at 541–42; Mark A. Lemley, *Contracting Around Liability Rules*, 100 CALIF. L. REV. 463, 482 (2012).

172 García, *supra* note 88, at 234–35.

173 There are other reasons that might explain why YouTube royalties tend to be lower than those of streaming services. In particular, much of the content that YouTube licenses (such as a small piece of a song included in a mashup or other follow-on work) is not directly substitutive of music sales, rendering a lower royalty rate more appropriate. *See* Xiyin Tang, *Copyright's Techno-Pessimist Creep*, 90 FORDHAM L. REV. 1151, 1169–70 (2021). *See generally* Annemarie Bridy, *The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform*, 22 VAND. J. ENT. & TECH. L. 323 (2020).

174 Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 29 (2d Cir. 2012).

175 *Id.* at 30 (quoting Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 523 (S.D.N.Y. 2010), *aff'd in part, vacated in part*, 676 F.3d 19)).

copyright owners have increasingly sought legislative changes to the status quo.[176]

3. Section 1201 Exceptions

All of the mechanisms discussed above deal with exceptions to copyright's exclusive rights to copy, distribute, or perform creative works. Fair use, compulsory licensing, and other limitations all operate within the realm of these exclusive rights. But modern copyright law also employs another set of rules that govern the right to circumvent technological locks, such as encryption, designed to prevent access to or duplication of digitized works. These "anti-circumvention measures" and their exceptions place de facto controls on the diffusion of copyrighted works, and thus constitute an important and underexplored part of copyright's law of dissemination.

The anti-circumvention measures of Section 1201 were established in the DMCA out of recognition that when copyrighted works are disseminated in the "digital environment, ... [t]here will be those who will try to profit from the works of others by decoding the encrypted codes protecting copyrighted works, or engaging in the business of providing devices or services to enable others to do so."[177] Section 1201 addresses this issue in two ways. First, it prohibits anyone from circumventing "access controls" used by the copyright owner to regulate when, how, or by whom a work may be accessed.[178] These include activities like circumventing a password-protected paywalled website or disabling the decryption codes designed to prevent the playing of a copied video game.[179] Second, it prohibits the manufacturing or distribution of a device, technology, or service designed to circumvent such access controls[180] or designed to bypass technical measures that restrict copying.[181] This might include, for example, software that enables access

176 The recent European Union Copyright Directive has significantly changed the scope of a similar safe harbor in Europe, requiring services like YouTube to proactively block copyrighted content. *See* Bridy, *supra* note 173.

177 H.R. REP. NO. 105-551, pt. 1, at 10 (1998).

178 17 U.S.C. § 1201(a)(1).

179 U.S. COPYRIGHT OFF., SECTION 1201 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS 6 (2017) [hereinafter SECTION 1201 REPORT], https://www.copyright.gov/policy/1201/section-1201-full-report.pdf [https://perma.cc/BPB3-VXMG].

180 § 1201(a)(2).

181 *See id.* § 1201(b). The direct circumvention of such "copy controls" is not directly prohibited. But, as the courts have noted, that is likely because such direct copying would clearly run afoul of copyright law anyway, while circumventing an access control may not. *See* Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1196–97 (Fed. Cir. 2004).

to or copying of an e-book file purchased by someone else.[182] The statute provides civil causes of action, independent of copyright infringement, for violations of these provisions.[183]

Section 1201 provides what is essentially an alternative means for copyright owners to assert control over dissemination markets. Even if a form of dissemination does not run afoul of copyright's exclusive rights—for example, via the fair use doctrine—it may sometimes still require circumvention of access controls and thus be impermissible under Section 1201 without permission of the copyright owner. Though some courts have concluded that Section 1201 must be read as coterminous with copyright protection—meaning that any use that does not infringe copyright by its nature cannot violate Section 1201—this is still a minority position.[184]

Instead, Section 1201 provides its own set of exceptions to the anti-circumvention provisions. The enumerated exceptions are primarily designed to allow for certain individual uses deemed to be of particular social or political importance—for example, research,[185] security and law enforcement,[186] or privacy.[187] But the statute also establishes a triennial notice-and-comment rulemaking process through which the Copyright Office, in consultation with the Department of Commerce, can establish additional temporary exceptions.[188] This process was meant to be a "fail-safe" to prevent the anti-circumvention measures from preventing "otherwise lawful" activities or impeding "socially vital endeavors."[189] Accordingly, the rulemaking must be governed by a range of policy-oriented criteria, such as "the availability for use of copyrighted works" and "the impact that the prohibition on the circumvention of

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182 *See* SECTION 1201 REPORT, *supra* note 179, at 6.

183 § 1203.

184 *Compare Chamberlain*, 381 F.3d at 1202 ("We conclude that 17 U.S.C. § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners."), *with* MGE UPS Sys., Inc. v. GE Consumer & Indus., Inc., 622 F.3d 361, 365–66 (5th Cir. 2010) (rejecting reasoning), *and* MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 950 (9th Cir. 2010) (same), *and* Universal City Studios, Inc. v. Corley, 273 F.3d 429, 459 (2d Cir. 2001) (rejecting argument that a fair use of a copyrighted work cannot run afoul of Section 1201).

185 § 1201(d), (f)–(g) (exceptions for library shopping, reverse engineering, and encryption research, respectively).

186 *Id.* § 1201(e), (j) (exceptions for law enforcement use and security testing, respectively).

187 *Id.* § 1201(h)–(i) (exceptions for protecting minors and personal information, respectively).

188 *See id.* § 1201(a)(1)(C). The rulemaking process can only be used to establish exceptions to the access controls prohibition, not the restriction on developing or selling devices designed to circumvent access controls.

189 H.R. REP. NO. 105-551, pt. 2, at 35–36 (1998).

technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research."[190]

Over the last few years, the triennial review process has allowed for several forms of dissemination to temporarily operate without the permission of copyright owners. In particular, the process has been used to allow dissemination of e-books to the print disabled. Transferring such e-books into accessible formats, such as large-text or read-aloud formats, often requires circumvention of access controls, and the Copyright Office has exempted such uses from liability during every triennial review since 2003.[191]

E. *Taking Stock*

The preceding Sections outlined a range of different mechanisms that either explicitly or implicitly regulate the relationship between copyright owners and disseminators. Some might object to calling this piecemeal array of doctrines, regulations, and institutions a cohesive law of dissemination. However, in taking stock of this regime as a whole, some interesting features and patterns emerge.

First, all of these mechanisms limit copyright owners' control over licensing their works. That said, there is an important distinction between them: some provide for uncompensated use, but others utilize a price-setting mechanism. Fair use, the OSP safe harbor, the statutory exemptions, the first sale doctrine, the Section 1201 exemptions, and the *Sony* secondary liability safe harbor all provide no compensation, while the compulsory licenses, the PRO consent decrees, and the recording device levy provide compensation. The difference here may not be as extreme as it might appear; as some have noted, a safe harbor or affirmative defense to copyright liability can be conceived of as a "zero-price" liability rule, whereas compulsory licenses are positive-price liability rules.[192] Indeed, several of the compulsory licenses were created by Congress to replace rules that previously did not require compensation to copyright owners.[193] As the next Part explores in more detail, the

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190 § 1201(a)(1)(C).

191 Blake E. Reid, *Copyright and Disability*, 109 CALIF. L. REV. 2173, 2200–01 (2021). In its most recent iterations, the regulations established that the nonprofits explicitly exempted from copyright liability under Section 121 (the provisions governing access to the print disabled, discussed above) are also exempted from liability under Section 1201. *See* 37 C.F.R. § 201.40(b)(3) (2023).

192 *See* Lemley, *supra* note 171, at 480–81; *see also* Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217, 233–34 (1996).

193 The Section 115 compulsory license and the cable compulsory license were created after the courts found no liability for certain novel forms of use. The Section 114 compulsory license replaced

choice between a zero-price and positive-price liability rule can be related to the specific policy goals that copyright's law of dissemination may be aiming to achieve.

Second, the institutional contexts in which these mechanisms operate initially appear to be quite different. The courts seem to generally implement the zero-price carveouts—the fair use doctrine, the first sale doctrine, and the like. Most of the compulsory licenses, in contrast, are managed by dedicated regulatory bodies: the CRB or the Copyright Office as a whole. But there are exceptions on both sides: the courts also engage in rate setting via the ASCAP/BMI consent decrees, and the Copyright Office creates exceptions to liability through its Section 1201 triennial rulemaking. Overall, the choice of institution may relate to specific competencies; courts are generally better at engaging in subjective multi-factor balancing, like the fair use test, and administrative agencies are generally better at complex price setting.

Third, and relatedly, many similar types of dissemination are regulated across multiple institutions. Music dissemination, for example, is regulated through a staggeringly disjointed set of rules. AM/FM radio pays no sound recording royalties thanks to a specific legislative exception; webcasters (digital radio) pay regulated sound recording royalties via the Section 114 compulsory license; interactive streaming services pay market-negotiated royalties; YouTube, in theory, could sometimes pay no royalties thanks to the OSP safe harbor (though it now generally chooses to license works)—and this description does not even scratch the surface of the complexity of music licensing.[194] Similarly, dissemination to the visually impaired is regulated through the Section 121 exception, the fair use doctrine, and the Copyright Office's administratively created exceptions to Section 1201. As Part III discusses in more detail, this inconsistency and complexity has led to many calls for change to the current law.

Fourth, some of the regulatory mechanisms described above are seldom directly used by copyright owners and licensees, but still regulate dissemination through the shadow they cast over private licensing negotiations. Some of the compulsory licensing provisions are explicitly designed to facilitate private negotiation. For example, the public broadcasting provisions define the CRB's role as an organizer of private negotiations every five years, with rate setting serving only as a

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the rule that allowed all forms of radio to perform sound recordings for free. And the recording device levy regime replaced the *Sony* safe harbor for certain types of devices. *See supra* Part I.

194 *See supra* Section I.C.1.

backstop.[195] Similarly, the ASCAP/BMI consent decrees authorize judges to set rates only if the licensee and the PRO cannot come to a negotiated licensing agreement.

Others work more informally to facilitate private agreements. In particular, copyright owners and disseminators frequently reach private agreements for the "mechanical" rights covered by the Section 115 compulsory license for musical compositions.[196] A primary reason for this practice is the opportunity to customize the specific terms of the agreement, especially regarding payment, and to bypass the somewhat onerous formalities of the Section 115 process.[197] But the CRB-set Section 115 rate generally serves as a de facto cap on private negotiations; after all, a licensee would be unlikely to agree to a higher rate with knowledge that they could walk away from negotiations and utilize the compulsory license mechanism.[198]

Even zero-price mechanisms likely play some role in facilitating private ordering. This might at first appear counterintuitive: why would a disseminator choose to negotiate when they have the option of using copyrighted works for free? But sometimes the uncertainty over whether a form of dissemination would qualify—or continue to qualify—for an exception can motivate private licensing. For example, some radio stations have agreed to pay royalties to sound recording copyright owners despite being exempt from doing so. Some speculate that this is driven by uncertainty over whether the exemption will remain in place in the future.[199] Fair use presents a similar story; some new disseminators may attempt to license copyrighted works, even if they have a plausible fair use argument, likely out of recognition of the unpredictability of judicial decision-making in fair use cases.[200] The cost of compliance with administrative procedures might also play a role in motivating private licensing. As discussed above, YouTube bypasses the DMCA safe harbor and pays royalties to copyright owners in order to avoid the burdensome notice-and-takedown procedure and instead monetize content on its

195 However, unlike a truly privately negotiated agreement, the industry-negotiated rates apply to *any* copyright owner irrespective of whether they participated in negotiations. *See supra* Section I.C.3.

196 *See* MUSIC MARKETPLACE REPORT, *supra* note 98, at 29–31.

197 *See* DiCola & Touve, *supra* note 94, at 451.

198 MUSIC MARKETPLACE REPORT, *supra* note 98, at 29–31.

199 *See* Kristelia A. García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1169 (2014).

200 For example, Google Books initially settled with copyright owners and agreed to compensate them. But the class action settlement was rejected by the court, which then decided the case on fair use grounds. *See* James Grimmelmann, *The Elephantine Google Books Settlement*, 58 J. COPYRIGHT SOC'Y U.S.A. 497 (2011).

platform.[201] But, in all these cases, the shadow of the zero-price liability rule will generally keep royalty rates quite low.

The following Table summarizes some of these commonalities and differences:

Mechanism:	**Source:**	**Form of intervention:**	**Admini-stered by:**	**Regulatory process:**	**Compen-sation to rights-holders?**	**Affected content industry:**	**Affected dissemination industry:**
Broadcast radio exception	Statute	Explicit safe harbor	NA	NA	No	Music	Broadcast radio
Publication to print disabled	Statute	Explicit safe harbor	NA	NA	No	Publishing	Non-profit distributors to visually impaired
Library and educator exemptions	Statute	Explicit safe harbors	NA	NA	No	Primarily publishing	Brick-and-mortar libraries; non-profit education institutions
Fair use	Common law / statute	Defense to liability (Implicit safe harbor)	Courts	Individual infringement lawsuits	No	All, but especially publishing	Digital repositories, search tools, and more
***Sony* secondary liability safe harbor**	Common law / statute	Defense to liability (Implicit safe harbor)	Courts	Individual infringement lawsuits	No	Audiovisual works	Certain recording / playback devices
First sale doctrine	Common law / statute	Defense to liability (Implicit safe harbor)	Courts	Individual infringement lawsuits	No	All	Brick-and-mortar libraries and video rental stores
Operating outside copyright's exclusive rights	Common law	Defense to liability (Implicit safe harbor)	Courts	Individual infringement lawsuits	No	All (in theory)	None currently
Music compulsory licenses	Statute	Industry-wide compulsory license with regulated rate	Copyright Office / Copyright Royalty Board	Periodic rate setting	Yes	Music	Digital radio; streaming (partially); jukeboxes
Cable and satellite compulsory licenses	Statute	Industry-wide compulsory license with fixed rate	Copyright Office / Copyright Royalty Board	Periodic distribution proceedings	Yes	Audiovisual works	Cable and satellite TV
Public broadcast compulsory license	Statute	Industry-wide compulsory license with regulated rate	Copyright Office / Copyright Royalty Board	Periodic rate setting	Yes	Music; visual art	Public radio and television broadcasters
Recording device levy	Statute	Industry-wide compulsory levy with fixed rate	Copyright Office / Copyright Royalty Board	Periodic distribution proceedings	Yes	All (in theory)	None currently (Obsolete digital tape recording devices)
ASCAP & BMI consent decrees	Antitrust consent decrees	Common carrier obligation with compulsory license backstop	Courts / DOJ	As-needed rate setting	Yes	Music	Broadcast and digital radio; streaming (partially)
OSP safe harbors	Statute	Explicit safe harbor with administrative preconditions	Courts	Individual lawsuits	No	All, but especially music	Platforms that also function as disseminators (*e.g.*, YouTube)
Section 1201 exceptions	Statute	Explicit safe harbor	Copyright Office	Notice and comment rulemaking	No	All, but especially publishing	Primarily non-profit distributors to visually impaired

201 *See supra* Section I.D.2.

Overall, the patterns and shared features that emerge when comparing the mechanisms that control dissemination of copyrighted works point to what is potentially a shared regulatory agenda. What this agenda is, and how it relates to the copyright system overall, is discussed in the next Part.

II. COPYRIGHT'S DISSEMINATION AGENDA

Recognizing the patterns that emerge across the many regimes that govern the relationship between rightsholders and disseminators does little to explain why such regulation may be necessary. This Part addresses this question by articulating a set of dissemination-related policy goals that seem to be at least partially reflected in current law.

Attempting to explain legislation and regulation can be a fraught enterprise generally, but perhaps nowhere more so than in copyright law. As Jessica Litman and others have documented, much of modern copyright law is the product of backroom deals made by industry players and then codified by Congress with little scrutiny.[202] And it is certainly true that many of the regimes described in the last Part were the products of lobbying. Some can probably only be explained through the lens of political economy. For example, the jukebox compulsory license resulted from the demands of jukebox owners in the lead-up to the 1976 Copyright Act, and it is difficult to discern any lasting purpose in it.[203]

The complexity of copyright's law of dissemination, as well as its many inconsistencies,[204] makes it tempting to assume that industry lobbying is the whole story. But accepting that political economy can explain the origins of many of the mechanisms described in the last Part does not necessarily mean that copyright lacks any normatively sound approach to dissemination. This Part proposes that some of the difficulty in understanding copyright's law of dissemination is that these regimes likely reflect a complex combination of interrelated policy goals, sometimes expressed in tandem with industry agendas.

Disaggregating a coherent normative approach to dissemination from the messiness of modern copyright law thus first requires a

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202 *See* JESSICA LITMAN, DIGITAL COPYRIGHT 35–63, 122–40 (2006) (describing political economy of copyright legislation at various points in history); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870–79 (1987) (same, with respect to the 1976 Copyright Act); *see also* Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1247–48 (1996) (suggesting that lawmakers' interest in reinforcing their own privilege can lead them to turn a blind eye to such interest group politics).

203 *See* Samuelson, *supra* note 23, at 19 & n.39.

204 *See infra* Part III.

theoretical exploration of copyright's policy agenda. Copyright, in the Anglo-American tradition, is understood to be a solution to the problem of underinvestment in creative works.[205] If copyright owners are unable to control and monetize uses of their works, they would lack the incentive to invest in creative enterprises. Copyright creates limited exclusive rights to remedy this problem, and thus provide the public—who are, according to the Constitution, the target beneficiaries of intellectual property—with new, socially valuable works.[206]

Copyright law, however, also recognizes that too much protection can end up harming the public by allowing copyright owners to impede uses of creative works.[207] This tension between "incentives" and "access" is frequently invoked in general terms in both case law and scholarship, but the copyright's "access" agenda is itself multifaceted. The most discussed—and perhaps easiest to understand—conception of copyright's access policy is linked to copyright's authorship goal. On this account, the tension inherent in copyright is between immediate creators and future creators: if copyright law is not accompanied by a robust set of limitations, it may thwart its very reason for being by preventing future artists from making use of existing works in their own creative endeavors.[208] Furthering balance in this area is understood to sometimes require excusing liability—often via the idea-expression dichotomy or the fair use doctrine—in situations where copyright owners have asserted too much control over the raw materials of creativity.[209]

While copyright's concerns with cumulative creativity is an important driving force in the law's collection of limitations and exceptions, it does not appear to be the main animating principle behind

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205 LANDES & POSNER, *supra* note 1, at 13–14; *see* James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 41–42 (2003).

206 *See* U.S. CONST. art. I, § 8, cl. 8 ("Congress [has the] Power . . . [t]o 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 . . . ."); *see also* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'" (quoting U.S. CONST. art. I, § 8, cl. 8)); Fogerty v. Fantasy, Inc., 510 U.S. 517, 524 (1994) ("The primary objective of the Copyright Act is to encourage the production of original literary, artistic, and musical expression for the good of the public.").

207 Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1, 4–5 (2004) ("Historically, IP has been characterized by balance. On the one hand, its exclusionary rights provide incentives to create. On the other, its limits preserve roles in the nation's economy and democracy for competition, cumulative innovation, and free expression.").

208 *See* Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397, 405 (2003) (discussing the notion of "consumers as authors"); Menell, *supra* note 110, at 470 (discussing copyright's concerns with "cumulative creativity").

209 *See* Eldred v. Ashcroft, 537 U.S. 186, 219–20 (2003) (discussing copyright's "built-in First Amendment accommodations").

the regulation of large-scale dissemination of copyrighted works that characterizes the regimes described in the last Part. Copyright's law of dissemination appears to be more concerned with another aspect of the access equation, one that focuses on the value of the public's ability to easily consume and enjoy copyrighted works in general. Though some have argued that such forms of passive access are irrelevant to copyright's agenda (unless also linked to active follow-on creation),[210] many others have explored the normative value of public access as manifested in various features of copyright law.[211] Such accounts, however, have often been siloed from one another, homing in on specific justifications for specific limitations rather than examining copyright's dissemination system as a whole.[212]

The rest of this Part attempts to articulate copyright's normative dissemination agenda, with the aim of understanding how the various regulatory mechanisms explored in the last Part may be justifiable. Doing so requires distilling the voluminous literature on copyright's limitations to arrive at four access-focused goals that can help make some sense of copyright's law of dissemination. Though interrelated and often expressed through the same mechanisms, these four goals are not identical.

First, regulation may simply allow efficient exchanges in the face of prohibitive transaction costs, enabling a greater number of works to reach the public. Second, regulatory interventions may remedy the distributional inefficiencies generated by copyright's exclusive rights, enabling uses that expand or enhance consumer access to creative works to go forward. Third, regulation may address the overall structure of copyright dissemination industries and help prevent copyright owners invested in specific forms of dissemination from using their market power to prevent new, innovative forms of dissemination from entering the market. Fourth, regulatory regimes may privilege uses that are not necessarily justifiable from the perspective of allocative efficiency but make sense when considered through the lens of distributive justice. All

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210 *See, e.g.*, Jane C. Ginsburg, *Authors and Users in Copyright*, 45 J. COPYRIGHT SOC'Y U.S.A. 1, 3–4 (1997).

211 *See, e.g.*, Jessica Litman, *Readers' Copyright*, 58 J. COPYRIGHT SOC'Y U.S.A. 325 (2011) (examining the role of readers, listeners, and other passive users in the copyright system); Glynn S. Lunney, Jr., *Fair Use and Market Failure:* Sony *Revisited*, 82 B.U. L. REV. 975 (2002) (articulating a conception of public access grounded in furthering allocative efficiency and remedying some of the inefficiencies caused by the copyright); Wu, *supra* note 14 (examining the role of antitrust-like policy levers in governing copyright markets and helping facilitate the rise of access-enhancing technologies).

212 For example, the literature on the role of antitrust-like policy levers in remedying market power problems in copyright licensing, *see infra* Section II.C, has not been put in conversation with the literature on policy levers focused on copyright's inherent inefficiencies, *see infra* Section II.B.

four of these access-related goals must be set against the backdrop of copyright's overall incentives agenda and often demand tradeoffs between access and copyright owner compensation. Indeed, many of the existing regimes include tools that seem to allow decisionmakers to weigh these competing priorities.

Most of the mechanisms that make up copyright's law of dissemination are explainable through several of these normative lenses, and some are probably not explainable at all except as industry concessions. In this respect, the goal of this Part is not to argue for a simple or definitive justification for copyright's existing law of dissemination. Rather, the goal is to conceptualize the various ways that the opening up of licensing markets to disseminators is necessary, and to explore how the different features of copyright's market-regulation system can make sense when viewed from this perspective. To be clear, however, the argument presented here is not that the mechanisms described in Part I necessarily represent the best or only ways to implement the goals identified below. Indeed, as Part III explores in more detail, the existing regime is riddled with problems that often impede copyright's dissemination policies.

A. *Reducing Transaction Cost Barriers to Licensing*

Perhaps the most straightforward explanation for regulating licensing markets is the problem of transaction costs. On this account, the high costs of individual licensing negotiations—especially in markets characterized by numerous different copyright owners and licensees—can create a barrier to market exchanges. The state thus steps in to bypass market negotiations and allow uses of copyrighted works to occur cheaply and easily.

A transaction cost-focused account situates copyright's law of dissemination in the more widely recognized practice of using liability rules to create efficient exchanges in transaction cost-heavy contexts.[213] For that reason, it has frequently been cited as the primary motivating factor for many of the mechanisms described above, especially compulsory licensing and fair use.[214]

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213 *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

214 *See, e.g.*, Robert P. Merges, *Of Property Rules, Coase, and Intellectual Property*, 94 COLUM. L. REV. 2655, 2661–62 (1994); Daniel A. Crane, *Intellectual Liability*, 88 TEX. L. REV. 253, 270 (2009); Gordon, *supra* note 1, at 1613; Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 825 (2007); Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1306–07 (1996).

Allowing for licensing in the face of high transaction costs certainly provides a partial explanation for elements of the music and cable compulsory licenses. Mechanisms like Section 114 allow webcasting and satellite radio services to gain blanket access to all sound recordings, even if those recordings are owned by many different copyright owners.[215] Section 111 allows cable companies to seamlessly retransmit broadcast television without engaging in expensive or time-consuming licensing negotiations.[216] The public broadcasting compulsory license has similarly been justified because of the "burden" of individual licensing between small public broadcast stations and numerous copyright owners.[217]

Fair use has also been justified as a transaction cost-saving mechanism. In particular, Wendy Gordon's classic theory of fair use as market failure explained that a fair use finding was appropriate in cases like *Sony* because of the unfeasibility of licensing with individual users engaged in the recording of television shows.[218]

While often cited as a predominant (or even the only) justification for copyright limitations that bypass the market,[219] the role of transaction cost-remediation in copyright's law of dissemination may be somewhat overstated, both descriptively and normatively. For example, an implication of a transaction cost-focused account of fair use is that technological solutions to barriers to market licensing could render the doctrine unnecessary.[220] As technology has advanced, however, fair use has continued to be applied, often in situations where licensing markets were indeed feasible. In particular, many of the utility-expanding fair use cases involved situations where licensing markets were realistic, and the courts justified their decisions based more on copyright policy, rather than transaction cost grounds. Indeed, in the Google Books case, the

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215 *See* García, *supra* note 199, at 1127 ("[C]ompulsory licensing occurs in industries such as sound recordings . . . in which individual negotiation with numerous, disparate rights holders would be both time and cost prohibitive."); MUSIC MARKETPLACE REPORT, *supra* note 98, at 46–49.

216 *See* Liu, *supra* note 117, at 130. *See generally* 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.18 (discussing similar justifications for the satellite retransmission compulsory license).

217 Bernard Korman, *Performance Rights in Music Under Sections 110 and 118 of the 1976 Copyright Act*, 22 N.Y.L. SCH. L. REV. 521, 541 (1977); *see* Samuelson, *supra* note 23, at 24–25, 24 n.79.

218 *See* Gordon, *supra* note 1, at 1613 (advancing theory); Abraham Bell & Gideon Parchomovsky, *The Dual-Grant Theory of Fair Use*, 83 U. CHI. L. REV. 1051, 1066–67 (2016) (explaining application to *Sony*). Though Gordon's theory is frequently discussed in the context of transaction costs-based market failure, Gordon herself has argued that fair use can be justified in many other contexts as well. *See* Wendy J. Gordon, *Excuse and Justification in the Law of Fair Use: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149 (2003).

219 *See* sources cited *supra* note 214.

220 *See* Bell, *supra* note 2, at 583.

court *rejected* a class action settlement that would have essentially created a licensing system.[221] Transaction costs-based justifications for compulsory licensing have also been overstated. As several commentators have noted, private entities like the PROs could also provide efficient blanket licenses to public broadcasters, as they do for many commercial broadcasters, mitigating many transaction cost problems without the need for periodic price setting.[222]

Normatively, an exclusively transaction costs-focused approach does not tell us what *price* copyright owners should pay when the state steps in to remedy a market failure. As the last Part explained, liability exceptions tend to provide copyright owners with no compensation, whereas compulsory licenses utilize a positive price. Calculating a price (or determining that zero is appropriate) often requires a deeper inquiry into the allocation goals of the copyright system overall, as the next Section explores.[223]

Transaction cost-related market failures may certainly explain some features of copyright's law of dissemination, but as the remainder of this Part argues, this account must be supplemented with more copyright-policy–specific rationales to fully capture copyright's dissemination agenda.

B. *Reducing Copyright's Inherent Harm to Consumers*

Addressing transaction costs benefits many stakeholders in the copyright system, including copyright owners, disseminators, and consumers. After all, enabling exchanges in the face of prohibitive transaction costs allows copyright owners to be compensated (at least if a compulsory license is utilized), disseminators to make use of copyrighted works, and the public to receive access to these works.

But, as noted above, the policy goals at the core of copyright also involve a more difficult tradeoff between the importance of remuneration for copyright owners and the public's interest in access to copyrighted works. A common conception of the value of access focuses on the social harms that can come from providing exclusive rights in creative works to

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221 *See* Pamela Samuelson, *The Google Book Settlement as Copyright Reform*, 2011 WIS. L. REV. 479, 516 (2011) (discussing Google Books settlement). *See generally* Bell & Parchomovsky, *supra* note 218, at 1066–69 (discussing decline of transaction costs-focused theory of fair use).

222 Korman, *supra* note 217, at 541–42; *see also* Victor, *supra* note 114, at 935–36 (arguing that music compulsory licenses cannot be explained solely on transaction costs grounds); Liu, *supra* note 117, at 132 (arguing that many features of the cable compulsory license do not correspond to transaction cost justifications). *See generally* Merges, *supra* note 214, at 1306–07.

223 *See infra* Section II.B (examining balancing involved in allocating revenue between rightsholders and disseminators).

begin with. This issue is often framed in allocative-efficiency terms. In order to further its goal of incentivizing creation, copyright law allows copyright owners to price above what they would otherwise be able to charge (which, given the fact that copyright goods are nonrivalrous and cost very little to reproduce, can be close to zero).[224] But granting copyright owners the ability to charge above marginal cost generates a deadweight loss; some consumers will be priced out even though they would otherwise receive access in a world without copyright protection.[225] In the name of incentivizing creation, copyright's exclusive rights can reduce social welfare in other ways as well. In particular, allowing copyright owners to maintain too much control over uses of their work can limit the positive externalities or "spillovers" that such uses can generate, including technological innovation.[226]

As commentators have noted, copyright is not a "first-best" solution to this tradeoff.[227] Because it is impossible to know exactly how much compensation is necessary to adequately incentivize creation, copyright uses broad, across-the-board limitations to strike a balance between incentives and access. Most of these mechanisms constrain the scope or duration of the copyright entitlement. For example, copyright only protects expression, not the ideas that underlie it. Copyrights also only last for a limited amount of time; any work will ultimately end up in the public domain, useable by all.[228]

While these entitlement-level limitations are copyright's primary toolset for managing the incentives-access tradeoff, copyright's law of dissemination can be thought of as attempting to further fine-tune this balancing act in downstream licensing transactions in order to better fit it to the specific use at issue.[229] By selectively removing copyright owner control in certain circumstances (either with a zero-price carveout or by charging a compulsory price), many of these mechanisms seem designed to increase social welfare by permitting particularly socially valuable

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224 Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1059 (2005).

225 *Id.*

226 *See* Frischmann & Lemley, *supra* note 5, at 285.

227 Adi Libson & Gideon Parchomovsky, *Toward the Personalization of Copyright Law*, 86 U. CHI. L. REV. 527, 528 (2019); *see also* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 240 (2014); Carrier, *supra* note 207, at 34–35.

228 *See* Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1579 (2009) (describing the role of such mechanisms in the incentives-access tradeoff); Frischmann & Lemley, *supra* note 5, at 284–85 (describing copyright as creating a "semicommons").

229 *Cf.* Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 BERKELEY TECH. L.J. 1155 (2002) (exploring industry-specific divergences in patent law doctrines).

disseminative uses to occur, especially in circumstances where copyright's incentive function is unlikely to be harmed. The remainder of this Section identifies two particular strategies that seem to be at play in furthering this goal. First, copyright's law of dissemination is concerned with bolstering forms of dissemination that enhance the general usability of copyrighted works by the public. Second, parts of the regime help make space for individual uses of copyrighted works, as long as such uses do not too closely veer into widespread dissemination.

1. Enabling "Utility-Expanding" Forms of Dissemination

Many of the mechanisms described in the last Part seem concerned with enabling forms of dissemination that enhance the value of creative works for the public. Such access-enhancing tools enable consumer preferences to be better satisfied, such as by allowing users to access creative works more efficiently, by enhancing the consumer experience of accessing such works, or by enabling users to glean new useful information about such works.

Fair use is one of the tools most frequently used to weigh the social value of such uses against the social value of copyright's incentive function. Glynn Lunney, in particular, has argued that the fair use doctrine can and has been used to balance, on the one hand, "whether [an] unauthorized use would otherwise reduce the revenue associated with the copyrighted work; and . . . if so, how, if at all, that reduction would likely affect the production of copyrighted works," and, on the other hand, "what the public stands to lose if the use is prohibited."[230] The fair use analysis can attempt to weigh these two interests and "provide a clearer picture of whether a particular use improves social welfare and hence should be considered fair, or reduces social welfare and hence should be considered infringing."[231]

As I have argued in past work, the line of "utility-expanding" fair use cases presents a clear example of this balancing act at play.[232] Through the transformative use test, described above, courts have allowed new access-enhancing technologies, like Google Books, to operate without a license. In such cases, the courts have used the fair use test to weigh the value of the new use to consumers against the social value of copyright owner compensation in a specific licensing market. Indeed, *Authors Guild v. Google* explained that while "providing rewards for authorship" that incentivize the creation of new works is the primary way copyright serves

230 Lunney, *supra* note 211, at 999.

231 *Id.*

232 *See generally* Victor, *supra* note 61.

the public interest, "giving authors *absolute* control over all copying from their works would tend in some circumstances to limit, rather than expand, public knowledge."[233]

Fair use, however, is essentially an on-off switch, and this seems to have prevented courts from applying the doctrine to situations where a new dissemination technology threatened to financially harm copyright owners to a large degree. Courts appear to worry that granting what is essentially a zero-price license in such situations would overly harm copyright's incentive function and thus cannot be justified even if consumers derive a large amount of value from the new form of dissemination. In the *TVEyes* case, for example, the Second Circuit found that a new form of dissemination was of significant social value because "it enables users to isolate, from an ocean of programming, material that is responsive to their interests and needs, and to access that material with targeted precision."[234] But, despite these benefits, the market harm posed by depriving copyright owners of licensing revenues was too significant to allow for fair use.[235] Several other recent new-technology fair use cases have displayed a similar tension between the social value of a new dissemination technology and the risk to copyright's incentive function of denying compensation to copyright owners.[236]

Compulsory licensing, on the other hand, has been used to more finely calibrate the rewards to copyright owners and disseminators based on the value derived by consumers. As Peter DiCola has noted with respect to music regulation:

> What is Congress doing when it sets up a rate setting process? Ultimately it is engaged in an exercise of allocation. Congress is choosing the process for allocating the surplus from music distribution; that is, the value that consumers experience from listening to music over and above the costs of creating and distributing it. How much of the value of a radio broadcast of a recording comes from the radio station and how much comes from the owners of the sound recording and musical work copyrights?[237]

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233 Authors Guild v. Google, Inc., 804 F.3d 202, 211–12 (2d Cir. 2015); *see also* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 957 (2005) (Breyer, J., concurring) ("[T]he copyright laws are not intended to discourage or to control the emergence of new technologies, including (perhaps especially) those that help disseminate information and ideas more broadly or more efficiently.").

234 Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 177 (2d Cir. 2018).

235 *Id.* at 180.

236 *See* Victor, *supra* note 61 (outlining cases).

237 DiCola, *supra* note 34, at 1879–80.

Though DiCola himself is skeptical of many of the mechanisms utilized to deal with these questions,[238] several parts of copyright's regulatory price-setting regime do appear to be defined by efforts to assess (1) the costs of creation vs. the costs of distribution and (2) the value to consumers of the work itself vs. the value of the utility-expanding technology used to disseminate it, with the goal of arriving at an optimal division between copyright owners and disseminators.

Conceptualizing this goal can help make sense of which forms of dissemination have been regulated to begin with. Dissemination of sound recordings presents the most useful example. As the last Part explained, this form of dissemination is subject to an unusually disjointed set of regulations: broadcast radio pays no sound recording royalties, while webcasting (digital radio) and satellite radio services pay royalties via the Section 114 compulsory license. This unusual division makes some sense when assessed from the perspective of the incentives-access tradeoff. Broadcast radio has historically been exempted from paying for use of sound recordings on the assumption that radio provides "airplay and other promotional activities" to recording artists;[239] it not only does not harm copyright owners' traditional avenues for compensation but often *improves* sales by promoting artists.[240] Webcasting and satellite radio pose more of a risk to traditional copyright owner markets because they offer better opportunities to customize the music listening experience.[241] But, as Congress noted when creating the Section 114 license, such "new digital transmission technologies may permit consumers to enjoy performances of a broader range of higher-quality recordings than has ever before been possible[,] . . . increase the selection of recordings available to consumers, and make it more convenient for consumers to [listen to recordings]," thus increasing welfare.[242]

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238 *See id.* at 1879–82. Rightly so, in many respects. *See infra* Part III (discussing the disjointed and inconsistent approach to copyright industry regulation).

239 S. REP. NO. 104-128, at 14–15 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 356, 361–62.

240 *See* WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 103 (2004) (explaining this justification); Christopher Buccafusco & Kristelia García, *Pay-to-Playlist: The Commerce of Music Streaming*, 12 U.C. IRVINE L. REV. 803, 806–08 (2022) (linking distinction to the prevalence of payola, or "paying for plays," in determining radio plays); *see also* Picker, *supra* note 14, at 458–60 (suggesting that the scarcity of radio spectrum, which limits the number of stations that can operate at once, also informed this decision).

241 *See* FISHER, *supra* note 240, at 104–05.

242 S. REP. NO. 104-128, at 14. To be clear, this analysis does not suggest that the Digital Performance Right in Sound Recordings Act (DPRSRA) was a product of careful policy balancing on the part of Congress. The legislation was driven primarily by lobbying from many different actors, especially terrestrial radio and record labels. *See* DiCola & Sag, *supra* note 106, at 222. My main point here is that even industry horse-trading may sometimes arrive at a compromise that at least somewhat reflects a coherent policy approach.

Seen through this lens, terrestrial radio is exempted from paying royalties because the social value of its services is high, and the risk of harm to copyright owners is low. Webcasting, on the other hand, has high social value but greater potential to decrease copyright owners' market share, thus harming copyright's overall incentive function.[243] The Section 114 compulsory license, by providing a way to allow dissemination to occur while still compensating copyright owners, represents an intermediate approach.[244]

This value-focused balancing approach can also partially explain how rate setting for the compulsory license regimes has operated in practice. As I have argued in prior work, compulsory music licensing is unusual in that it is often guided by copyright-policy–focused rate-setting criteria.[245] Prior to recent changes that altered the music rate-setting standards, these policy factors asked the CRB to set rates that, among other things, "maximize the availability of creative works to the public" and "reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication."[246] In applying these factors, the CRB set Section 114 rates for webcasting (digital radio) and satellite radio that, at least in some instances, attempted to compensate these services based on both the costs of developing new dissemination technology and the value they add to the music-listening experience for consumers.[247] Like the utility-expanding fair use cases, these rate-setting

243 *See* S. REP. NO. 104-128, at 14 ("[I]n the absence of appropriate copyright protection in the digital environment, the creation of new sound recordings and musical works could be discouraged . . . .").

244 Some have questioned whether it is indeed true that terrestrial radio does not harm copyright owners' markets or whether webcasting does not also have promotional value that ultimately benefits music sales. *See, e.g.*, García, *supra* note 199, at 1135–36; DiCola, *supra* note 34, at 1880–81. *But see* Picker, *supra* note 14, at 458 (defending the distinction as reasonable).

245 Victor, *supra* note 114, at 962.

246 17 U.S.C. § 801(b).

247 *See* Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, 25405–08 (May 8, 1998) (codified at 37 C.F.R. pt. 260) (accounting for the services' work in "opening a new avenue for transmitting sound recordings to a larger and more diverse audience, including the creation of technology to uplink the signals to satellites and transmit them via cable; technology to identify the name of the sound recording and the artist during the performance; and technology for programming, encryption, and transmission of the sound recording"); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 73 Fed. Reg. 4080, 4096–97 (Jan. 24, 2008) (codified at 37 C.F.R. pt. 382) (accounting for costs of satellite maintenance); Determination of Rates and Terms for Preexisting Subscription Services and Satellite Digital Audio Radio Services, 78 Fed. Reg. 23054, 23069 (Apr. 17, 2013) (codified at 37 C.F.R. pt. 382) (accounting for costs of and value added by satellite radio services' "proprietary music distribution system").

decisions represent an effort to disaggregate the value of enhancing access from the value of producing new creative works.[248] But unlike fair use, the CRB was able to set a positive price that could more carefully split the difference.[249]

Even in the absence of explicit policy guidelines, rate-setting entities have sometimes attempted to engage in similar balancing. A useful example can be found in some recent rate-setting decisions in the PRO consent decree system. As noted above, in *Pandora Media, Inc. v. American Society of Composers, Authors, and Publishers*, the rate court was tasked with setting royalties for Pandora's licensing of musical composition performance rights from ASCAP. Despite having little explicit guidance—the rate court is only charged with setting a market-mimicking rate[250]—the court considered several features of the music licensing market that seem designed to "discern[] a rate that will give composers an economic incentive to keep enriching our lives with music, [but] that avoids compensating composers for contributions made by others either to the creative work or to the delivery of that work to the public."[251] For example, the court considered whether Pandora was "promotional" or "cannibalistic" of traditional music sales, concluding that it was likely promotional and thus posed little risk of harm to copyright owners' conventional distribution markets.[252] The court also rejected ASCAP's argument that Pandora's alleged success entitles copyright owners to a higher royalty fee, finding that Pandora's success is "attributable not just to the music it plays . . . but also to its creation of the [Music Genome Project, a database and algorithms designed to predict users' musical interests,] and its considerable investment in the development and maintenance of that innovation."[253] The court concluded that the value added by such innovation weighed in favor of higher compensation for Pandora, rather than for copyright owners. Ultimately, considering these factors, the court adopted a royalty rate that

248 Victor, *supra* note 114, at 935–38, 962–66.

249 *See id.*

250 *See* Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 6 F. Supp. 3d 317, 353 (S.D.N.Y. 2014) ("[I]n determining the reasonableness of a licensing fee, a court 'must attempt to approximate the "fair market value" of a license—what a license applicant would pay in an arm's length transaction.'" (quoting Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc., 681 F.3d 76, 82 (2d Cir. 2012))), *aff'd*, 785 F.3d 73 (2d Cir. 2015).

251 *Id.* at 321 (quoting MobiTV, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 712 F. Supp. 2d 206, 209 (S.D.N.Y. 2010), *aff'd*, 681 F.3d 76 (2d Cir. 2012)).

252 *Id.* at 367–68.

253 *Id.* at 369.

many believe is more favorable to Pandora than any rate it would have been able to receive in an open licensing market.[254]

2. Making Space for Personal Uses and Sharing

A second area in which copyright's law of dissemination appears to address copyright inefficiencies is in creating space for personal, noncommercial uses of copyrighted works by individuals; namely, the freedom to engage in acts of "reading, listening, viewing, watching, playing, and using copyrighted works" without restriction.[255] It is somewhat contestable whether, from the perspective of allocative efficiency, such individual uses should be privileged against copyright's incentive function in situations where transaction costs do not pose an impediment to licensing markets.[256] But non-efficiency-based accounts of the value of access, such as those oriented around the importance of cultural works for human flourishing, also provide support for limiting copyright's exclusive rights so as to allow space for individual uses.[257]

In any case, several aspects of copyright law seem designed to restrict copyright owner control over secondary markets so as to allow space for personal uses, including small-scale sharing. The *Sony* safe harbor essentially prevents copyright owners from demanding licensing revenue from consumers for personal copying or pursuing technology companies on a secondary liability theory for enabling such uses. And the first sale doctrine allows owners of lawfully obtained works to display or distribute such works on a small-scale basis.[258] Both of these exceptions seem to reflect a recognition that the social value of providing space for personal time shifting or sharing outweighs any potential damage to copyright's

254 *See id.* at 320, 369–72. Indeed, ASCAP alone appealed the rate, but the Second Circuit ultimately affirmed it. *Pandora Media, Inc.*, 785 F.3d at 75.

255 Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1879 (2007).

256 *Compare* Bracha & Syed, *supra* note 227, at 283 ("In the absence of significant transaction-cost impediments, personal uses . . . provide a channel for copyright owners to internalize the social value of works, thereby increasing incentives for production of supramarginal works. Under such conditions, there is also no reason to expect that the inframarginal social cost imposed by copyright on these uses will be unusually high compared to other entitlements. . . . In light of this, it may be difficult to generate definite efficiency-based conclusions." (footnotes omitted)), *with* Lunney, *supra* note 211, at 1026 ("To the extent that private copying expands access to existing works without decreasing the copyright owner's revenues and the resulting incentive to create additional works, private copying is Pareto optimal and should constitute a fair use.").

257 Bracha & Syed, *supra* note 227, at 285–87; *see also* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 349 (2005).

258 Litman, *supra* note 255, at 1896–97.

incentive function posed by preventing copyright owners from demanding licensing revenue for such uses.[259]

However, as the line between limited personal sharing and mass dissemination has become hazier—digitization may allow me to seamlessly read an eBook on any of my devices, but it may also allow me to transfer that book to as many other users as I would like—courts appear unwilling to allow mechanisms like the *Sony* safe harbor and the first sale doctrine to be used to promote space for personal uses. This provides some explanation for cases like *Grokster* and *Capitol Records*, which limited the doctrines' applicability.[260] Such cases appeared to recognize that applying broad exceptions to digital dissemination platforms would allow unbridled distribution among users, rather than only small-scale sharing, to the potential detriment of copyright owners' markets.[261] Implicit in these cases is that the value of personal use in such contexts does not exceed the risk to copyright's incentive function.

The recording device levy represents an alternative method that seems to be aimed at fine-tuning copyright law's approach to personal uses in a digital environment. By coupling a broad personal use exemption for users with a mechanism designed to compensate copyright owners—out of recognition that widespread personal digital copying may pose some harm to copyright owners' markets[262]—the levy, in theory, allows for a narrower approach.[263] However, as explained above, the fact that this mechanism was limited only to digital audio tape (DAT) recording technology rendered it almost entirely ineffectual.[264]

C. *Facilitating Market Entry in Concentrated Industries*

The last Section described copyright's concern with allocative efficiency and, specifically, the importance of balancing the value of incentivizing creativity against the harms of restricting dissemination. But copyright's law of dissemination also appears to be concerned with a different set of problems that can emerge on an industry-wide level. While these market failures also implicate allocative efficiency, they emerge more from the accumulation and aggregation of copyrighted works on a mass scale than from anything inherent to the copyright

259 *See* Lunney, *supra* note 230, at 1022–25.

260 *See supra* Section I.B.

261 *See supra* Section I.B.

262 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8B.01 (discussing legislative history of AHRA).

263 *Id.*

264 *See supra* Section I.C.4.

entitlement. Copyright law has developed its own approaches to managing industry-wide effects that can impede dissemination.

Timothy Wu, in particular, has examined the tools used in the copyright system to address the "problem deriving from copyright's grant of control over an asset essential to market entry (namely, copyrighted works), and the potential created for vertical foreclosure of rivals."[265] This account recognizes the fact that copyright owners are frequently invested in a specific form of dissemination—for example, the record labels that own most sound recording copyrights historically utilized record and CD sales as their primary means of monetization. As copyright owners, these incumbent disseminators control a must-have input for any new disseminator—for example, a streaming service that seeks to disseminate copyrighted works must receive permission to use copyrighted musical works in order to operate. As Wu notes, this strategic positioning gives incumbent disseminators who are also copyright owners the appealing option of using their control over copyrights to prevent entry to new competitors or to charge a supracompetitive licensing price.[266] What can follow is a socially harmful reduction of innovation in dissemination technologies, as new firms are essentially blocked by incumbents or prevented from growing by high licensing demands.[267]

Of course, copyright owners' ability to engage in such strategic behavior reflects a kind of market power. But despite frequent invocations of copyright conferring a "monopoly," it is important to note that a single copyright interest generally does not itself create meaningful market power.[268] Rather, it is the *aggregation* of copyrights on a mass scale—either via outright ownership or exclusive licensing arrangements—that can create bottleneck problems. Indeed, Peter Lee has documented in recent work how aggregation of copyrights can yield barriers to entry in distribution. In particular, the "vast libraries" and "copyright estates" of incumbent movie studios, record labels, and book

265 Wu, *supra* note 14, at 325–27 ("The foreclosure is 'vertical' because the incumbent uses its control over an independent input at another level (copyrighted materials) to affect competition at the level of dissemination.").

266 *Id.* at 326–27; *see also* DiCola & Touve, *supra* note 94, at 424–25 ("The relative strength or weakness of copyright law can be thought of as a parameter that increases or decreases the costs of firms that wish to use copyrighted works. . . . [C]opyright becomes a policy lever that, among other functions, increases and decreases distribution firms' costs.").

267 *See* Wu, *supra* note 14, at 338 ("From these conditions we can see that granting a copyright entitlement that covers all forms of dissemination will have the effect of giving the pioneer industry the power to control the follow-on development of technology. Assuming that the pioneer controls the creation of content (either by controlling copyrights, vertical integration, or through simple economic dependence), it can dictate what happens and what does not."); Picker, *supra* note 14, at 452–53.

268 Bracha & Syed, *supra* note 227, at 241 (discussing recent work on copyright and product differentiation).

publishers can be leveraged to foreclose entry to rival disseminators. Some new entrants may be able to effectively compete by reaching a significant enough scale or by producing their own creative content—Netflix, for example—but many new entrants face insurmountable barriers.[269]

The behavior of incumbents in blocking or overcharging new disseminators may, at first glance, seem irrational or counterproductive; such competitors often introduce technologies that have the ability to increase the overall market for copyrighted works, which, when coupled with efficient licensing, should benefit all.[270] But there are multiple reasons why copyright owners may nonetheless leverage their market power to impede new disseminators. Most importantly, incumbent industries frequently suffer from the "innovator's dilemma," which causes them to privilege short-term gains and the preservation of existing business models.[271] Indeed, there is a long history of incumbents attempting to prevent valuable new technologies from entering the market.[272]

The market power concerns presented by large-scale copyright aggregation might suggest that this problem should fall exclusively within the purview of antitrust law, rather than copyright. But the fact that an incumbent is using intellectual property ownership to control market structure can lead to policy prescriptions different from what a pure antitrust analysis might dictate. As Mark Lemley and Mark McKenna have noted in recent work:

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269 Lee, *supra* note 14, at 1244–45, 1254–55, 1260–63.

270 *See* Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829, 850–53 (2008).

271 *See id.* at 845, 848–53 (first citing CLAYTON M. CHRISTENSEN & MICHAEL E. RAYNOR, THE INNOVATOR'S SOLUTION: CREATING AND SUSTAINING SUCCESSFUL GROWTH (2003); and then citing CLAYTON M. CHRISTENSEN, THE INNOVATOR'S DILEMMA: WHEN TECHNOLOGIES CAUSE GREAT FIRMS TO FAIL (1997)); Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891 (2012) (discussing "innovator's dilemma" in context of music dissemination); Wu, *supra* note 14, at 294–95 (discussing public choice theory's insights on why incumbents may attempt to restrict market entry by innovators).

272 *See supra* Section I.C (discussing origins of compulsory licenses); *see also* Carrier, *supra* note 271, at 927 ("One innovator situated the [record] labels' response to Napster in the historical setting in which the labels 'fought cassettes, eight-track tapes before that,' and CDs. They 'fought every one of those things every step of the way until later they adopted them.'" (footnote omitted)).

> Patent and copyright law are intended to promote innovation and creativity. As a result, different kinds of [industry] disruption arguments matter in cases involving patent and copyright claims than in those involving antitrust and unjust enrichment claims. Where IP is at stake, courts should focus on whether the disruption will do too much to undermine private incentives to invest in new creation.[273]

Indeed, as creators often own or are invested in an incumbent form of dissemination, privileging market entry over the interests of incumbents may sometimes overly reduce the benefits to be gained from incentivizing creativity.[274] On the other side of the equation, however, copyright owners can try (and indeed have tried) to use their intellectual property to restrict *any* market entry whatsoever, and this overreach is also harmful to the innovation of new forms of dissemination. But antitrust law is not necessarily equipped to deal with this problem either. Most of the market power that allows incumbent disseminators to restrict entry comes from their accumulation of a large number of copyrights, rather than any problematic behavior, like tying arrangements or price fixing.[275] As Randal Picker has noted, antitrust law is not ideally equipped to handle such legally obtained market power, even if it ultimately harms welfare by restricting entry of new, innovative forms of dissemination.[276]

Ultimately, the policy goals at play when assessing copyright dissemination from the perspective of industry structure yields a tradeoff that looks quite similar to the incentive-access tradeoff described above, except the importance of "access" is conceptualized around maintaining low barriers to entry for innovators, rather than the directly user-focused

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273 Lemley & McKenna, *supra* note 14, at 113; *see also id.* at 109 (describing *Grokster* as a case that correctly privileged the importance of maintaining copyright owner compensation over market disruption by a new disseminator).

274 *See* Tim Wu, *Intellectual Property, Innovation, and Decentralized Decisions*, 92 VA. L. REV. 123, 123–24 (2006) ("[W]e must weigh the benefits of intellectual property assignments, which include subsidizing or making possible desirable economic activity, against the costs of the centralization of economic decisionmaking and the creation of barriers to innovation and market entry."); Wu, *supra* note 14, at 362–66.

275 *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 3–5 (2017), https://www.justice.gov/atr/IPguidelines/download [https://perma.cc/FFC5-THEC] ("As with any other asset that enables its owner to obtain significant supracompetitive profits, market power (or even a monopoly) that is solely 'a consequence of a superior product, business acumen, or historic accident' does not violate the antitrust laws." (quoting United States v. Grinnell Corp., 384 U.S. 563, 571 (1966))).

276 Picker, *supra* note 14, at 425–26 ("We know how it works: monopolies, if obtained legally, are fine, it is monopolization that is problematic. Antitrust really is not about calibrating the returns from an innovation or copyrighted work that results in substantial market power and monopoly profits."); *see also* Lee, *supra* note 14, at 1276–79 (discussing problems with applying antitrust analysis to copyright markets generally and noting, in particular, that "identifying instances of 'problematic' industry concentration is difficult given that no consensus exists regarding the optimal industry structure for fostering innovation").

problems discussed in the last Section.[277] Indeed, the Supreme Court has appeared to recognize this tradeoff, noting in *Grokster* the tension "between the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies . . . . The more artistic protection is favored, the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the tradeoff."[278]

Several of the mechanisms discussed in Part I indeed appear to be oriented around facilitating entry in dissemination markets. The remainder of this Section provides examples of how copyright's law of dissemination prevents vertical foreclosure and thus enables market entry of new disseminators, focusing first on compulsory license mechanisms and second on zero-price carveouts.

1. Compulsory Licensing

Many of the mechanisms described in Part I have helped prevent rightsholders that are invested in an incumbent form of dissemination from using their market power to bar entry to new, innovative disseminators. As scholars have documented, several of the Copyright Act's compulsory licensing regimes emerged to resolve disputes between incumbent copyright owners/disseminators and new, market-threatening forms of dissemination. Section 115 helped resolve a dispute between sheet music publishers and the creators of new player piano technologies who wanted to make use of copyrighted musical compositions.[279] Section 114 emerged because of clashes between

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277 *See* Wu, *supra* note 274, at 134 ("[W]e should assess intellectual property assignments by their effects on industry structure. In this model, the chief benefit of intellectual property is to subsidize selected industries whose assets are vulnerable to misappropriation. The chief costs are . . . the use of intellectual property rights to block or delay the market entry of threats to intellectual property owners . . . ."); Picker, *supra* note 14, at 452–53 ("It is one thing to shape the pliable aspects of copyright law in a way that creates meaningful entry incentives for those with distributional innovations, but we step too far if we allow entrants to hijack wholesale the works of copyright holders."); Randal C. Picker, *Copyright and Technology: Déjà Vu All over Again*, 2013 WIS. L. REV. FORWARD 41, 43–44 (2013) ("The critical question here is how we should calibrate the tradeoffs between copyright enforcement and open-ended innovation."); Lemley & McKenna, *supra* note 14, at 113 ("Courts . . . need to differentiate cases in which disruption would actually interfere with the purposes of IP law from those involving simple harm to the plaintiff that does not interfere with incentives."); Lee, *supra* note 14, at 1280–81 (discussing tradeoff between innovation in dissemination and new creative enterprises); *see also* Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 24–27 (2003) (explaining how accumulation of market power by a disseminator can "exacerbate[]" the access-restricting features of copyright generally).

278 Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 928 (2005).

279 Wu, *supra* note 14, at 297–98; Victor, *supra* note 114, at 938.

incumbent record labels and new digital and satellite radio services.[280] The cable television compulsory license helped resolve a longstanding dispute between movie and television studios, heavily invested in broadcast dissemination, and new cable dissemination technologies.[281] The satellite television compulsory license emerged because of an essentially identical dispute between broadcast and cable television producers and new satellite technologies.[282] The ASCAP/BMI consent decrees were a similar solution to a dispute between music publishers and radio stations.[283]

All of these mechanisms resolve bottleneck problems in essentially the same way. By requiring copyright owners to license to all comers and by regulating prices, these mechanisms prevent incumbents from using their control over copyright portfolios to bar new forms of dissemination. This account may partially explain why music is disproportionately regulated compared to other copyright industries; consumers generally expect that a radio station, music retailer, or streaming service will provide access to a wide array of songs, both new and old, giving copyright owners who own large portfolios of musical works particularly outsized bargaining power.[284]

Recognizing compulsory licenses as a tool for preventing vertical foreclosure can also help explain why private contracting in the shadow of a compulsory license—as occurs quite frequently—may be a useful, even intended, outcome. If one goal of copyright's law of dissemination is to open bottlenecks and enable new disseminators to receive permission to use copyrighted works, then this goal can be achieved by either directly transferring use-rights (via the actual compulsory license) or by simply motivating copyright owners to privately license at reasonable rates when they otherwise would have been able to resist doing so. Thus, even private deals in the shadow of this regime may show that the regime is working.[285]

That being said, a compulsory licensing mechanism can often be a relatively time-limited solution to industry structure problems that

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280 FISHER, *supra* note 240, at 103–04; Victor, *supra* note 114, at 953.

281 Wu, *supra* note 14, at 311–12.

282 Marvin Ammori, *Copyright's Latest Communications Policy: Content-Lock-Out and Compulsory Licensing for Internet Television*, 18 COMMLAW CONSPECTUS 375, 403–04 (2010); 2 NIMMER ON COPYRIGHT, *supra* note 22, § 8.18[F][1].

283 *See* Wu, *supra* note 14, at 304–05, 310.

284 *See* Victor, *supra* note 114, at 977 (discussing this phenomenon in the context of music licensing by streaming services, which essentially require access to all recorded music in order to successfully compete).

285 This is not true of the transaction costs justification for compulsory licensing, discussed above. *See supra* Section II.A. Private licensing may be evidence that purported transaction costs are not actually so prohibitive such that a compulsory license is necessary.

implicate dissemination. Many of the compulsory license regimes were galvanized by court decisions that had entirely immunized a new technology from copyright liability.[286] Congress, responding to these decisions, implemented a more balanced approach that would allow for both market entry and copyright owner remuneration. But these responses were often limited to a specific technology and did not foresee even newer forms of dissemination. For example, the cable compulsory license allowed cable disseminators to enter the market, but a new compulsory license had to be created when satellite disseminators tried to do the same. As discussed further below, the fact that internet-based disseminators, like Aereo, have now been barred from using the existing compulsory licensing regimes perhaps shows that a highly specific compulsory license will always be most useful in the early years of the new form of dissemination it regulates, but will ultimately become outmoded and may even begin to cement incumbent power at the expense of new entrants.[287]

But even a compulsory license that is not designed to facilitate new modes of dissemination can still have continued importance in maintaining reasonable prices in an *existing* licensing market. As the last Section explored, one way that license rate setting has done this is by attempting to set prices that weigh the value of disseminators' contribution to the consumer experience against the value added by copyright owners. Another aspect of this price regulation is accounting for market power imbalances that might skew prices too high in an unregulated market. The rate court judges for ASCAP and BMI are explicitly instructed to account for the fact that a PRO, "as a monopolist, exercises market-distorting power in negotiations for the use of its music," and they must factor this into their attempt to find a "fair market value" rate.[288] In applying this standard, the courts have rejected marketplace evidence from the PROs if it appears to be tainted by market power problems.[289] The CRB, under the current "willing buyer/willing seller" rate-setting standard, has no explicit mandate to consider market power but nonetheless rejected marketplace evidence in a recent Section 114 proceeding because it was drawn from a market that lacks

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286 *See supra* Sections I.C.1–I.C.2 (discussing origins of mechanical compulsory license and cable compulsory license).

287 *See infra* Part III.

288 Pandora Media, Inc. v. Am. Soc'y of Composers, Authors & Publishers, 6 F. Supp. 3d 317, 353 (S.D.N.Y. 2014) (quoting Am. Soc'y of Composers, Authors & Publishers v. MobiTV, Inc., 681 F.3d 76, 82 (2d Cir. 2012)), *aff'd*, 785 F.3d 73 (2d Cir. 2015).

289 *See, e.g.*, *id.* at 357 (rejecting evidence of existing licensing deals because they were tainted by the copyright owners having used "their considerable market power to extract supra-competitive prices").

competition.[290] Though copyright owners challenged this rejection as inconsistent with the rate-setting standard, the D.C. Circuit affirmed the CRB's decision.[291]

2. Exceptions from Liability

Zero-price carveouts from liability can also play an important role in enabling market entry. In particular, the OSP safe harbor has been justified as a way to prevent the prospect of secondary liability from impeding growth and competition within new OSP industries.[292] And, as explained above, a de facto result of the safe harbor is that services that blur the line between content platforms and disseminators can essentially operate without a license (or, as with YouTube, by licensing on favorable terms).[293]

The *Sony* safe harbor can also be framed as a market-entry mechanism. As several scholars have noted, the *Sony* decision prevented movie studios and other copyright owners from using their control over copyrights to essentially block the VCR from the market through the threat of litigation or prohibitively high licensing demands.[294] The first sale doctrine has played a similar role in allowing libraries and video rental companies to operate without restrictive licensing demands from copyright owners who may want to steer consumers towards purchasing, rather than renting, copyrighted content.[295]

But the growing judicial discomfort with applying wholesale liability exceptions to new digital dissemination technologies—*Grokster* with respect to the *Sony* safe harbor, *Capitol Records* with respect to the first

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290 Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316, 26332 (May 2, 2016) (codified at 37 C.F.R. pt. 380).

291 SoundExchange, Inc. v. Copyright Royalty Bd., 904 F.3d 41, 56–57 (D.C. Cir. 2018) (holding that it was reasonable for CRB to read an effective competition requirement into the "willing buyer/willing seller" rate-setting standard). Of course, a background question in all of these decisions is what a "free market" rate should look like in a market that has always been subject to compulsory licensing. *See* Victor, *supra* note 114, at 985–93; García, *supra* note 199, at 1141 (noting that "a standard intended . . . to emulate fair market value by looking at what a willing buyer and a willing seller would agree to in a hypothetical marketplace" is contradicted by "the fact that there is not, and never has been, a 'market' for digital radio because that business model has operated under the statutory license since its inception").

292 Menell, *supra* note 79, at 137–38; *see* Wu, *supra* note 14, at 356; Picker, *supra* note 277, at 43.

293 *See supra* Section I.D.2.

294 von Lohmann, *supra* note 270; Picker, *supra* note 14, at 425–26 (assessing *Sony* similarly); DiCola & Sag, *supra* note 106, at 214 ("*Sony* is both copyright policy and innovation policy."); *see* Picker, *supra* note 277, at 43; *see also* Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 957 (2005) (Breyer, J., concurring) (explaining how *Sony* is "technology protecting").

295 *See supra* Section I.B.3.

sale doctrine, and *Aereo* with respect to operating outside the bounds of copyright's exclusive rights[296]—shows the limitations of using a zero-price carveout to promote industry entry. The tradeoff identified above recognizes that copyright-owner investment in incumbent forms of dissemination means that overly privileging the market entry of industry-disruptive innovators through zero-price carveouts may reduce creative incentives to too high a degree. This concern appears to have explicitly animated some of the recent cases. For example, the opinion in *Grokster* noted the "tension" between "supporting creative pursuits through copyright protection" and "limit[ing] further development of beneficial technologies," ultimately concluding that the "the number of infringing downloads that occur every day using . . . Grokster's software" meant that the copyright owner's interests were greater.[297]

D. *Enabling More Equitable Distribution of Cultural Works*

The three preceding explanations of copyright's law of dissemination are all grounded in an allocative efficiency-focused account of copyright's policy goals. Copyright limitations can create efficient exchanges between copyright owners and users in the face of high transaction costs, can fine-tune the tradeoff between the harms of exclusive rights in information and the need to incentivize creative works, and can remove barriers to entry—all of these interventions aim to increase social welfare. But there is a broader account of copyright's balancing act that eschews framing access to creative works solely in terms of efficiency. These accounts have instead focused on the value of access for individual autonomy, cultural enrichment, free speech, democratic governance, and, in particular, distributive justice.[298] As Oren Bracha and Talha Syed have documented, these theories may overlap with an efficiency-oriented approach in some contexts, but depart in others.[299] They also, for the most part, recognize the value of providing remuneration to copyright owners, but instead weigh these benefits

296 *See supra* Sections I.B.2–I.B.4 (discussing these cases).

297 *Grokster*, 545 U.S. at 928–29; *see also* Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 462–63 (2014) (Scalia, J., dissenting) (discussing policy concerns posed by new technologies but arguing that Congress should be the one to determine a solution).

298 *See, e.g.*, Liu, *supra* note 208, at 406–20; Cohen, *supra* note 257, at 349; Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1814 (2000); Litman, *supra* note 255, at 1879–81; Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 983 (2006); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 341 (1996); BJ Ard, *Taking Access Seriously*, 8 TEX. A&M L. REV. 225 (2021).

299 Bracha & Syed, *supra* note 227, at 231.

against the harm that overprotection can cause to non-efficiency-driven values.[300]

A full account of these theories is beyond the scope of this Article. But some are particularly helpful in explaining features of copyright law that appear to privilege forms of dissemination that provide more equitable access to certain kinds of cultural works. This Section outlines three specific areas: libraries, public broadcasting, and special forms of dissemination for the print disabled.

1. Libraries and Educational Institutions

The ability of libraries to lend books to the public for free is generally enabled by the first sale doctrine, which exhausts copyright owners' rights in follow-on selling and lending of objects that embody copyrighted works. As discussed in Part I, the Copyright Act also establishes several statutorily defined exceptions designed to allow libraries to engage in various archival and preservation activities.[301] Most important from a dissemination perspective, libraries are permitted to copy and distribute sections of books or periodicals, and occasionally entire works, to users.[302] Nonprofit educational institutions are also permitted to use copyrighted works in classroom instruction, and, through application of the fair use doctrine, may allow students to download limited selections of copyrighted materials for educational use.[303]

These exceptions make particular sense when considering the special social role of libraries and other nonprofit institutions in enabling access to information and culture. As Rebecca Tushnet, in particular, has documented, libraries can be thought of as "repositories of nonmarket-based access to information and creative works"; through this role, they help enable democratic participation and cultural enrichment.[304] Libraries also further distributive justice goals by allowing those with limited resources to access creative works regardless of their ability to pay.[305] The Copyright Act's various carveouts allow libraries and

300 *See id.* at 247.

301 *See* 17 U.S.C. § 108.

302 *See supra* Section I.A.3.

303 *See supra* Section I.A.3 (discussing *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014)).

304 Tushnet, *supra* note 298, at 982–83; *see also* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 50 (2004) (discussing importance of free public libraries for furthering free speech values).

305 Bracha & Syed, *supra* note 227, at 308. *See generally* Panezi, *supra* note 49 (examining special role of libraries in providing equitable access to information).

educators to fulfill such roles without regard for the market-driven licensing demands of copyright owners.

2. Public Broadcasting

Public broadcasting, like the public library system, is another avenue of non-market-driven dissemination generally understood to be of special social importance. In the lead up to the 1976 Copyright Act, which established the compulsory license for public broadcasting, Congress noted "that encouragement and support of noncommercial broadcasting is in the public interest" and maintained that "special treatment" of stations through a compulsory license was necessary because of the "special nature of programming, repeated use of programs, and, of course, limited financial resources."[306] Though little scholarly work has been done on the public broadcasting compulsory license and its effects, this regime, like the library exceptions, might be understood as an attempt to bolster the activities of nonprofit entities that enable the public's cultural enrichment regardless of ability to pay.

3. Dissemination to the Print Disabled

Another area of special treatment in copyright's law of dissemination includes the carveouts that permit technologies to reproduce and distribute works in accessible forms, such as braille or read-aloud. Sections 121 and 121A, along with the fair use doctrine, have provided broad permission for nonprofits, like the HathiTrust Digital Library, to bypass the exclusive rights of copyright owners in creating dissemination technologies for use by the print disabled.[307]

These carveouts seem to rest on specific distributive justice concerns that are rarely given credence in other areas of copyright law.[308] Through using a "form of cross subsidy internal to the copyright regime," the provisions attempt to ensure that the print disabled can receive access to cultural works on a level playing field with other members of the public.[309] Indeed, the court in *HathiTrust* explained that such exceptions to

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306 H.R. REP. NO. 94-1476, at 116–17 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5732–33; *see also* Korman, *supra* note 222, at 537–44 (discussing history of this provision). *See generally* 17 U.S.C. § 118.

307 *See supra* Section I.A.2; 17 U.S.C. §§ 121–121A.

308 Bracha & Syed, *supra* note 227, at 300–02 (grounding these provisions in distributive justice concerns and explaining why a pure efficiency analysis likely would not explain the scope of the carveouts).

309 *Id.* at 303–04.

copyright's exclusive rights are a specific tool for "ameliorating the hardships faced by the blind and the print disabled."[310] As Blake Reid has argued in recent work, these efforts were implemented after a long history of copyright law ignoring the needs of the disabled, and even the current provisions are still very limited.[311] Nonetheless, the exceptions for the print disabled appear to be a relatively unusual example of Congress and the courts altering the normal channels of copyright licensing markets in order to explicitly further a distributive justice goal.

The Section 1201 exception process has provided additional support for this goal by excluding certain print-disabled uses from the DMCA's anti-circumvention rules.[312] Thanks to this exception, nonprofits can not only disseminate works without running afoul of copyright liability, but they can also transfer such works to accessible formats, such as read-aloud, without risking liability under the anti-circumvention provisions. Of course—as many have argued—a world without liability for anti-circumvention would also accomplish this goal. But considering that this additional liability regime does exist, the Section 1201 exception process represents an important feature of how copyright's law of dissemination grapples with distributive justice concerns.

Interestingly, Section 1201 is also the one area of copyright law in which a notice-and-comment rulemaking process has been used to generate exceptions. This has allowed for frequent input from civil society and public interest-oriented organizations.[313] In contrast, most other mechanisms for copyright lawmaking—legislation, infringement lawsuits between copyright owners and disseminators, or CRB proceedings—usually only involve industry players.

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The following Table summarizes some of copyright's dissemination-related policy goals, as well as how they are at least somewhat reflected in current law:

310 Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 102 (2d Cir. 2014).

311 Blake E. Reid, *Copyright and Disability*, 109 CALIF. L. REV. 2173 (2021).

312 *See supra* Section I.D.3; 17 U.S.C. § 1201.

313 SECTION 1201 REPORT, *supra* note 179, at 22–25 (discussing public participation in rulemaking); *see also* U.S. COPYRIGHT OFF., SECTION 1201 RULEMAKING: SEVENTH TRIENNIAL PROCEEDING TO DETERMINE EXEMPTIONS TO THE PROHIBITION ON CIRCUMVENTION (2018), https://cdn.loc.gov/copyright/1201/2018/2018_Section_1201_Acting_Registers_Recommendation.pdf [https://perma.cc/EUP9-XDPC].

	Allowing exchanges in the face of high transaction costs	Addressing copyright-specific harms to consumers		Enabling market entry in concentrated content industries	Addressing specific distributive justice concerns	
		1. Enabling "utility expanding" / access-enhancing uses	2. Providing space for limited personal use / sharing		1. Enabling free access to cultural works	2. Enabling access for the visually impaired
Broadcast radio exception	Yes	Yes	No	Yes	Yes	No
Publication to print disabled	No	No	No	No	No	Yes
Library and educator exemptions	No	No	Yes	No	Yes	No
Fair use	Yes	Yes	Yes	No	Yes	Yes
***Sony* secondary liability safe harbor**	Yes	No	Yes	Yes	No	No
First sale doctrine	Yes	Yes	Yes	Yes	Yes	No
Operating outside copyright	No	Yes	No	Yes	No	No
Music compulsory licenses	Yes	Yes	No	Yes	No	No
Cable and satellite compulsory licenses	Yes	Yes	No	Yes	No	No
Public broadcast compulsory license	Yes	No	No	No	Yes	No
Recording device levy	Yes	No	Yes	No	No	No
ASCAP & BMI consent decrees	No	Yes	No	Yes	No	No
OSP safe harbors	Yes	No	No	Yes	Yes	No
Section 1201 exceptions	No	No	No	No	No	Yes

III. TOWARDS A BETTER LAW OF DIGITAL DISSEMINATION

The foregoing analysis identified a set of dissemination-related normative goals that are necessary to a well-functioning copyright system. Some of copyright's existing doctrines and regulatory regimes seem to at least partially reflect these goals, often utilizing mechanisms designed to further greater public access, encourage innovation, and promote distributive justice without compromising copyright's overarching goal of incentivizing the creation of new works. Despite being partially born from industry lobbying rather than thoughtful regulatory design, copyright's law of dissemination thus exhibits more normative coherence than is conventionally believed.

That being said, copyright's current dissemination-related regimes are far from the optimal way of achieving the policy goals described above. Indeed, these doctrines and regulatory institutions are frequently criticized by both copyright owners and disseminators. This Part examines several areas of critique, focusing primarily on the regime's

complexity, inconsistency, and failure to accommodate new technologies of dissemination. Many of these problems might be traced to policymakers' failure to acknowledge that copyright law contains within it a cohesive approach to dissemination. In this respect, the reframing advanced by this Article aims to set the stage for future proposals on how copyright's law of dissemination might be improved.

Complexity. First, copyright's dissemination-related mechanisms are frequently criticized for being overly complex and poorly designed. Compulsory licensing regimes are criticized, in particular, for the intricacies of their rate-making processes and the burdensome formalities required to take advantage of the regimes.[314] This poor design not only leads to frequent disputes about the scope and meaning of various administrative rules, but also has required multiple small-scale interventions by Congress, at the behest of industry players, to remedy unforeseen problems.[315] Most recently, for example, the 2018 Music Modernization Act (MMA) removed a burdensome individual notice requirement for the Section 115 compulsory license, instead allowing streaming services to receive a blanket license to use all music composition copyrights.[316] This limited effort, however, left in place many of the other inefficiencies in the Section 115 regime, and even introduced new problems.[317]

Complexity thwarts dissemination policy in several ways. Repeat players are able to use their expertise in proceedings like rate setting or Section 1201 rulemaking to promote their own interests, leading to economically unsound rate-setting decisions,[318] and even allegations of

314 *See, e.g.*, David Nimmer, *Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right*, 7 UCLA ENT. L. REV. 189 (2000) (criticizing Section 114); R. Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIA. L. REV. 237, 239–40 (2001) (noting difficulties posed by forms of dissemination that implicate multiple copyright interests); David Nimmer, *Codifying Copyright Comprehensibly*, 51 UCLA L. REV. 1233 (2004) (critiquing several sections of the Copyright Act); MUSIC MARKETPLACE REPORT, *supra* note 98 (discussing criticisms of compulsory licensing); Samuelson, *supra* note 120, at 26 (describing cable compulsory licensing regime as "incomprehensible"); *see also* SECTION 108 DISCUSSION DOCUMENT, *supra* note 48 (criticizing complexity of library research carveouts).

315 *See, e.g.*, DiCola & Sag, *supra* note 106, at 228–31, 234–37 (discussing Congress's frequent interventions in the Section 114 regime, such as the Small Webcaster Settlement Act of 2002).

316 Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018) (codified in scattered sections of 17 U.S.C.).

317 *See* Loren, *supra* note 115, at 2526–31 (criticizing MMA's decision to codify interpretation of Copyright Act that requires streaming services to pay mechanical royalties to begin with); Victor, *supra* note 114 (criticizing new rate-setting criteria introduced in MMA).

318 In a recent example, the D.C. Circuit found that the CRB had failed to justify the evidence it used in setting rates under the Section 115 license and remanded to the Board for a new determination. Johnson v. Copyright Royalty Bd., 969 F.3d 363, 387 (D.C. Cir. 2020).

regulatory capture.[319] Relatedly, the Copyright Office lacks the resources to fully govern the many complex regimes under its auspices, leading to underenforcement.[320] Complexity is also costly—copyright owners and disseminators must invest in expert lawyers and economists in order to navigate the system. All of this can encourage parties to avoid using an otherwise useful mechanism, as well as to create prohibitively high barriers to entry for potential new competitors.[321]

Inconsistency. Second, copyright's dissemination regime is remarkably inconsistent. Within highly regulated industries, like music and television broadcast, similar types of dissemination are subject to very different forms of regulation and some are entirely unregulated. The music regime is notoriously inconsistent. When it comes to sound recording royalties, AM/FM radio pays no royalties, webcasting (digital radio) stations pay compulsorily licensed royalties, and streaming services pay market-negotiated royalties. The PROs ASCAP and BMI are subject to consent-decree rate setting, but newer PROs, like SESAC and GMR, are not.[322] Within television broadcast, cable and satellite services pay a compulsorily licensed fee to rebroadcast network television but digital services must negotiate a market-based license. And libraries maintain robust lending privileges when it comes to hard-copy books, thanks to the first sale doctrine, but no similar privilege for e-books, which must be licensed from publishers. As Part II explained, some of these distinctions—such as free use for terrestrial radio vs. compulsorily licensed use for webcasting—may reflect a meaningful policy choice

319 *See generally* MEREDITH ROSE, RYAN CLOUGH & RAZA PANJWANI, CAPTURED: SYSTEMIC BIAS AT THE U.S. COPYRIGHT OFFICE (2016), https://publicknowledge.org/wp-content/uploads/2021/11/Final_Captured_Systemic_Bias_at_the_US_Copyright_Office.pdf [https://perma.cc/CBQ4-Y5CL] (alleging, among other things, capture of the Section 1201 process).

320 Dave Fagundes & Saurabh Vishnubhakat, *Copyright's Administrative Law*, 69 J. COPYRIGHT SOC'Y U.S.A. (forthcoming) (manuscript at 32–33, 36–37), https://ssrn.com/abstract=4001078 [https://perma.cc/6P3Y-XHX9] (criticizing Copyright Office's management of cable and satellite retransmission royalties and Section 1201 rulemaking).

321 *See* MUSIC MARKETPLACE REPORT, *supra* note 98, at 12 ("Those seeking to launch new delivery platforms are constrained—and sometimes even defeated—by the complexities and expense of convoluted clearance processes.").

322 *See supra* Sections I.C.1.a, I.D.1. *See generally* Ed Christman, *Federal Judge Allows GMR Songwriters to Have Their Day in Court in Antitrust Lawsuit Against RMLC*, BILLBOARD (Feb. 15, 2020), https://www.billboard.com/articles/business/8551132/gmr-songwriters-rmlc-antitrust-lawsuits [https://perma.cc/SJK3-76MZ] (describing antitrust lawsuits involving GMR).

stemming from the potential for harm to copyright owners.[323] But others likely defy reasoned explanation.[324]

Regulation is also inconsistently applied across different content industries. Certain industries, like music and television broadcast, are riddled with interventions, while others, like film distribution, are mostly unregulated. While this may reflect the fact that industries like music have been characterized by persistent transaction cost and market power problems,[325] applying the same criteria across all content industries might justify increased regulation in other areas.[326] Regardless of its reasons, inconsistent regulation frequently yields distrust of regulators and allegations of unfairness.[327]

Adapting to New Technologies. Third, and perhaps most importantly, copyright's law of dissemination has failed to keep up with technological changes, leading the regime to become increasingly narrow in scope. This phenomenon is especially apparent when assessing the judicially administered safe harbors described above. Nearly all of these safe harbors have been limited by recent judicial decisions: in particular, the first sale doctrine does not apply to digital distribution,[328] the fair use doctrine has been held not to apply to several innovative forms of dissemination,[329] and a capacious reading of copyright's exclusive rights has prevented innovative services, like Aereo, from operating outside the scope of copyright.[330]

Such decisions may sometimes rest on solid normative foundations—after all, when a disseminator can use works for free such that copyright owners have no meaningful source of remuneration,

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323 *See supra* Part II (exploring how the balance between the public benefits of a form of dissemination and harm to copyright's incentive function may determine the choice between a free, compulsorily licensed, or market-negotiated licensing regime).

324 *See generally* DiCola, *supra* note 34, at 1841 (criticizing inconsistencies in music regime); García, *supra* note 88, at 234–35 (same).

325 *See supra* Part II. *See generally* Victor, *supra* note 114 (discussing these problems with respect to music streaming).

326 *See generally* Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 WASH U. L. REV. (forthcoming 2024) (on file with author) (examining problems posed by market power in various copyright industries and proposing regulatory solutions).

327 *See, e.g.*, Aloe Blacc, Irina D. Manta & David S. Olson, *A Sustainable Music Industry for the 21st Century*, 101 CORNELL L. REV. ONLINE 39, 41 (2016) ("The holders of music copyrights are treated differently from the holders of every other type of copyright . . . .").

328 Capitol Records, LLC v. ReDigi Inc., 910 F.3d 649, 657–59 (2d Cir. 2018); *see also supra* Section I.B.3.

329 *See, e.g.*, Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169, 180–81 (2d Cir. 2018); *see also supra* Section I.B.1; Victor, *supra* note 61.

330 *See* Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431, 449 (2014); *see also supra* Section I.B.4.

copyright's incentive function is put at risk.[331] Indeed, in the past, Congress removed several zero-price carveouts—such as the rule that cable broadcasters were immune from liability when rebroadcasting television—out of a belief that copyright owners required remuneration. However, when previously removing such safe harbors, Congress adopted alternative regulatory mechanisms that would allow innovative disseminators to function by controlling price and enabling market entry.[332] Thus, rather than replacing the cable carveout with free market licensing, Congress created the cable compulsory licensing. In practice, these compulsory licensing mechanisms have often shown themselves able to strike a balance between copyright owner compensation and the normative goals reflected in copyright's law of dissemination.[333]

In recent years, however, the courts' limitation of the scope of various safe harbors has generally not been accompanied by the creation of alternative regulatory mechanisms or the extension of existing mechanisms to new areas. Therefore, when courts have denied use of a zero-price carveout to a new disseminator, the end result is that such technologies are subject to the full market power of incumbent copyright owner/disseminators in licensing arrangements (or risk an injunction or prohibitively high statutory damages in an infringement lawsuit, as occurred in *Capitol Records*, *Aereo*, and *Grokster*).

Aereo's experience is particularly illustrative: after the Supreme Court rejected Aereo's argument that its television distribution system fell outside the scope of copyright's exclusive rights,[334] it attempted to operate under the cable compulsory license. But the courts adopted a narrow interpretation of the scope of that regime, holding that Aereo was ineligible to use it.[335] This left Aereo subject to the full scope of copyright's property-rule remedies, as well as the licensing demands of copyright owners, which left the service unable to continue most of its operations.[336]

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331 This, for example, was the clear rationale behind cases holding filesharing platforms like Napster secondarily liable. *See supra* Section I.B.2.

332 *See supra* Sections II.B–II.C; *see also* Wu, *supra* note 14.

333 *See supra* Section II.B; *see also* Victor, *supra* note 114.

334 *Aereo*, 573 U.S. at 449.

335 *See supra* Section I.C.2.

336 *See supra* Section I.C.2; *see also* Emily Steel, *Aereo Concedes Defeat and Files for Bankruptcy*, N.Y. TIMES (Nov. 21, 2014), https://www.nytimes.com/2014/11/22/business/aereo-files-for-bankruptcy.html (last visited Mar. 2, 2023). Interestingly, some of the Justices seemed to predict this outcome at oral argument. As noted by Justice Breyer,

> Once you take them out of the compulsory licensing system, they're going to have to find copyright owners . . . . I mean, the problem is that they might want to have perfectly good things that people want to watch and they can't find out how to get permission. That is

In this respect, the courts' and Congress's failure to replace safe harbors with new compulsory licenses (or extend existing compulsory licenses to new technologies) has created a lock-in effect that plainly undermines the goal, discussed above, of fostering market entry of new innovative technologies of dissemination. Under the status quo, disseminators that operate using older modes of dissemination (radio, book lending, cable, satellite) have a range of regimes that they can use to operate easily and often cheaply. But any technology that arose after the creation of the current regimes (on-demand streaming, digital TV distribution, e-book lending) is out of luck, leaving them subject to the often prohibitively high licensing demands of copyright owners or the risk of bankrupting litigation.[337]

A similar failure-to-update can be seen in other sectors of copyright's regulatory regimes. The AHRA recording device levy, for example, was designed to be a compromise solution that would allow for individual content sharing while still ensuring copyright owners were compensated. But this regime, which was limited to DAT technology that failed to become widespread, was quickly rendered ineffectual.[338] Ironically, it is likely that one of the reasons the DAT never caught on was because newer technologies, like MP3, could operate free from the levy requirements and thus had a much easier time outcompeting the regulated technologies.[339]

Finally, copyright's dissemination regimes that are focused on promoting free access to culture have also not been updated to reflect technological changes. Most importantly, it is unlikely that the first sale or fair use doctrines cover the ever-increasing use of digital books by libraries and educational institutions. Libraries' practice of "controlled digital lending"—in which libraries use digital rights management technology to limit the circulation of digital copies—is increasingly under attack by rightsholders.[340] Section 108's copying privilege also has unclear applicability to digital distribution, limiting its utility in enabling small-scale research uses.[341]

> a problem that worries me and it worries me again once you kick them out of the other systems.

See Transcript of Oral Argument at 53–54, *Aereo*, 573 U.S. 431 (No. 13-461).

337 For a discussion of why copyright owners often try to block technologies that may ultimately increase distribution of their works, see *supra* notes 270–27474 and accompanying text.

338 *See supra* Section I.C.4.

339 *See* discussion *supra* Section I.C.4 (discussing Recording Industry Association of America's failed efforts to apply AHRA to MP3).

340 *See* Hachette Book Grp., Inc. v. Internet Archive, No. 20-cv-4160, 2023 WL 2623787 (S.D.N.Y. Mar. 24, 2023) (granting summary judgment to book publishers on the grounds that Internet Archive's controlled digital lending program is infringing and not fair use).

341 *See* Tushnet, *supra* note 298, at 992 (noting limitations of Section 108 generally).

The following Table summarizes how copyright's law of dissemination has failed to keep pace with technological change:

	Limited by:	**Outcome:**
Broadcast radio exception	NA	NA
Publication to print disabled	NA	NA
Library and educator exemptions	Failure to update	No meaningful application to digital copying and distribution by libraries
Fair use	Recent caselaw (especially *TVEyes*)	Does not apply to most forms of dissemination that provide meaningful direct access to creative works
***Sony* secondary liability safe harbor**	Recent caselaw (especially *Grokster*)	No meaningful application to online platforms
First sale doctrine	*Redigi*	No application to "digital resale" and probably no application to digital lending
Operating outside copyright	*Aereo*	No clear avenues for digital dissemination
Music compulsory licenses	Failure to update	Increasingly convoluted and disjointed; limited application to predominant forms of music dissemination, like streaming
Cable and satellite compulsory licenses	Failure to update; recent case law	No application to digital retransmission (*e.g.*, Aereo)
Public broadcast compulsory license	NA	NA
Recording device levy	Failure to update	Applies only to outmoded digital audio tape technology
ASCAP & BMI consent decrees	Failure to update or extend	Applies only to two oldest PROs but not newer ones
OSP safe harbors	Failure to update	Can be used by platforms to operate de facto low-royalty streaming services
Section 1201 exceptions	Failure to update	Exceptions for print disabled have not been codified and require frequent renewal

There is no single explanation for why these problems have emerged. Political economy is certainly one factor; as explained above, Congress has largely delegated copyright legislation to industry players, and new legislation most frequently emerges through industry compromises or lobbying, rather than thoughtful institutional design.[342] The difficulties of crafting regulation in two-sided markets may also play a role.[343]

But these problems likely also stem from the fact that the lawmakers, judges, and regulators who administer copyright's dissemination-focused

342 *See supra* notes 202–03 and accompanying text. Relatedly, in recent work, Dave Fagundes and Saurabh Vishnubhakat have argued that copyright lacks a coherent "administrative law" that appropriately delegates responsibilities to entities like the Copyright Office, CRB, and USPTO according to their respective competencies and with the necessary resources. Fagundes & Vishnubhakat, *supra* note 320.

343 *See generally* Erik Hovenkamp, *Platform Antitrust*, 44 J. CORP. L. 713 (2019).

regimes tend to look at their choices in isolation, rather than reflecting any kind of cohesive approach to dissemination within copyright. While a judge adjudicating a case like *Aereo* and a regulator assessing the prices of compulsory royalties do not currently view their tasks as related, an implication of this Article is that they should. Only by laying out the full scope of copyright's normative approaches to dissemination, and the ways it is currently manifested, can an improved and updated law of dissemination be developed.

This diagnosis, of course, does not tell us what such a regime should look like. This would require advancing prescriptions for how copyright's law of dissemination can be reformed to more effectively accommodate a world in which dissemination is almost entirely digital; such a task is beyond the scope of this Article. Future work will take on this task, assessing what a better functioning and more comprehensive law of dissemination might look like. But the descriptive account laid out in this Article aims to provide a necessary foundation for ensuring that such prescriptions build on the existing regime and can learn from its successes and failures.

CONCLUSION

Copyright's many different dissemination-regulating institutions and doctrines display more commonalities than is conventionally believed. These similarities suggest a necessary reframing: we should not think of these mechanisms as sui generis, but rather as part of a broader law of dissemination within copyright, with a specific set of normative goals. This law of dissemination has played, and continues to play, an important role in safeguarding the public's interest in access to creative works without compromising copyright's creative-incentive function. Though the current regime is riddled with problems, the reframing advanced in this Article will hopefully provide necessary grounding for more thoughtful regulatory design in the future.