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7. Copyright and 'Market Power' in the Marketplace of Ideas

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Antitrust and intellectual property law increasingly fall within the common rubric of innovation policy.[1] There are excellent reasons for that. In the new economy, each focuses on dynamic efficiency. Both antitrust and intellectual property law seek to foster conditions for maximal innovation. And in contrast to antitrust's traditional antipathy towards the limited monopolies that intellectual property law makes possible,[2] contemporary antitrust jurisprudence recognizes that innovation may often be fueled by the prospect and proper exercise of market power.[3]

Yet, in fundamental respects, patent law fits more comfortably under that 'new economy' umbrella than does copyright. Indeed, neither innovation policy nor many of the tools used in antitrust can get to the heart of many of our questions regarding what should be the proper scope of copyright holder rights. A primary reason is that copyright law does not merely spur innovation. It also regulates speech. Copyright is an integral part of our system of free expression. It produces speech benefits, but also imposes speech burdens. As such, copyright's province is not merely, or even principally, innovation policy. Copyright, rather, falls within the ambit of law and policy regarding media, communications, and freedom of speech.

So while innovation policy and antitrust economics can tell us a great deal about how copyright law operates, they cannot ultimately determine copyright's shape and scope. In this essay, I elaborate that point and sketch some of its policy implications. My argument unfolds in three parts. Part I highlights the connection between copyright, the media, and free speech. Copyright promotes original expression and underwrites media that are not beholden to government for financial support. But copyright also imposes a number of speech burdens, including industry incumbents' use of copyright to bar entry to new speakers and speech distributors. Part II then considers a number of ways in which the marketplace of ideas differs from markets for goods and services. From a free speech perspective we value a diversity of speakers as much as, indeed at times even more than, differentiation of expressive product. In addition, when speech is at issue, we should tolerate a lesser degree of market power and consolidation than in markets for non-speech goods and services. Part II also seeks to shed light on the perennial questions of when, if ever, copyright confers market power and what that tells us about copyright's optimal scope. Part II concludes by showing how economic analysis of those questions must, by its very terms, ultimately turn on broad policies regarding the desirable contours of our system of free expression. Finally, building upon the discussion in Parts I and II, Part III outlines some ways in which copyrights should be tailored to ease copyright's free speech burdens while continuing to provide ample economic incentives for the creation and dissemination of original expression.

I. COPYRIGHT AND FREE SPEECH

A. Copyright's Free Speech Benefits

The United States Supreme Court has famously declared that copyright is 'the engine of free expression.'[4] Copyright, in other words, is part and parcel of the broad matrix of regulations, subsidies, liberties, speakers, and institutions that make up what Thomas Emerson famously termed our 'system of freedom of expression.'[5] Copyright's part in that system is to help underwrite free speech. Copyright does so in two principal ways.

First, copyright provides an economic incentive for the creation and dissemination of original expression. Without the copyright incentive, we would have less speech, at least the sorts of speech that depend upon some financial remuneration. And with less of that speech, we would likely have a more meager offering of information, opinion, art, and entertainment. Our public and cultural discourse would be bereft of many of the 'sustained works of authorship'[6] – expression whose creation entails a substantial commitment of time and money – that sometimes enlighten, sometimes entertain, and sometimes challenge us today.

Second, copyright can be thought of as a public subsidy for a robust, independent media – and by independent media, I mean not just journalists, but also publishers, filmmakers, artists, writers, and others. Copyright's contribution is not just quantitative. It is also qualitative. If all we cared about was getting *more* original expression, we could simply have the state produce and subsidize it, just as the state typically provides national defense, police protection, and many other public goods. Indeed, democratic states typically do provide funding for the arts, and that state support is arguably no less critical to public discourse than is copyright. Nevertheless, we would not want all authors and media to be entirely dependent on state largess. Even in democratic countries, that dependence would render them vulnerable to undue state influence and censorship. Copyright serves as a vehicle for authors – and their publishers – to find financial support from paying audiences rather than the patronage of the state or powerful elites.[7]

Having sketched copyright's two-pronged support for free speech, let me now qualify: copyright's free speech benefits are probably no longer as significant as the Supreme Court's 'engine of free expression' moniker suggests. The primary reason is the Internet. The Internet features a rich cacophony of expression, both cultural and overtly political, distributed the world over without any claim of copyright by the author (or at least without any effort to use copyright to prevent copying). That's not true of all Internet expression, of course. But even if copyright law were to disappear – and even in the absence of state patronage, the Internet would still undoubtedly present a surfeit of art, opinion, idea, and information, all freely available with a few clicks of the mouse. Digital technology and the Internet so greatly reduce the cost of disseminating and, in some instances, producing creative expression that speakers no longer require significant funding to reach a sizeable, geographically dispersed audience (although those hoping to reach a truly mass audience still need considerable funds to compete for audience attention).

Copyright's contribution to our system of free expression is thus one of *incremental* benefit. It lies in underwriting those 'sustained works of authorship' that would not be created without some means of compensation for the material commitment of time and money required to produce them. That category of works is far from negligible. It includes, among other types of expression, many full-length motion pictures, books, products of investigative journalism, paintings, musical compositions, and highly orchestrated sound recordings.[8] But at least in quantitative terms (albeit not in cultural and political influence), those works represent only a small fraction of the expression that would be available even without copyright.

B. Copyright's Free Speech Burden

Understanding the somewhat attenuated nature of copyright's free speech benefits is important because copyright also imposes free speech costs. I may need to copy or build upon another's words, images, or music to convey my own ideas effectively. I can't do that if the copyright holder withholds permission or insists upon a license fee that is beyond my means. And copyright does not extend merely to literal copying. It can also prevent me from parodying, remolding, critically dissecting, or incorporating portions of existing expression into my own independently created work. Indeed, today's copyright last far longer, extends to more subject matter, and accords copyright holders legal control over more uses of existing expression than ever before.

Consider *The Wind Done Gone*, a recent, bestselling novel by Alice Randall. Randall's novel revisits the setting and characters of Margaret Mitchell's classic Civil War saga, *Gone with the Wind*, from the viewpoint of a slave. In marked contrast to Mitchell's romantic portrait of antebellum plantation life, Randall's story is laced with miscegenation and slaves' calculated manipulation of their masters. As Randall has explained, she wrote her novel to 'explode' the racist stereotypes that she believes are perpetuated by Mitchell's mythic tale.[9]

If copyright law had remained as it stood in when Mitchell wrote *Gone with the Wind*, her novel would have long been in the public domain.[10] But given today's capacious, long-term copyright, Mitchell's heirs brought a copyright infringement action against Randall's publisher. A Georgia district court preliminarily enjoined publication of Randall's acerbically parodic sequel,[11] but the Eleventh Circuit Court of Appeals reversed and remanded, insisting that copyright law must be interpreted in line with First Amendment protections of free speech. The case settled before a final judicial determination of the heirs' claim and Randall's defense.

Like the Eleventh Circuit, US courts have long recognized that copyright can burden speech. But they have held almost universally that copyright law's internal 'free speech safety-valves' – the fair use doctrine, the idea/expression dichotomy, and copyright's limited term – are generally sufficient to protect speech. As a result, as the US Supreme Court recently held in *Eldred* v. *Ashcroft*, when 'Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.'[12]

European judicial bodies have reached a similar result.[13] They have recognized that copyright conflicts with free speech. However, they have generally found that limitations to copyright holder rights within copyright law, or the limited remedies sought by copyright holders in particular cases, are sufficient to mitigate the conflict.

In *France 2* v. *France*,[14] for example, the European Human Rights Commission, now part of the European Court of Human Rights, recognized that copyright is a restriction of freedom of expression within the meaning of Article 10 of the European Convention on Human Rights. But the Commission found no violation of Article 10 under the facts before it. In that case, France 2's television news story on the reopening of a theater bearing Edouard Villard frescoes led a visual artists collecting society to sue the broadcaster for infringing the copyright in the frescoes. Critical to its finding of no Article 10 violation, the Commission presumed that the collecting society sought only unpaid royalties, not an injunction prohibiting the defendant television station's broadcast. On that basis – because the copyright holder sought payment rather than to suppress the defendant's speech – the Commission held that copyright's restriction of freedom of expression met the proportionality test of Article 10(2).

1. Two facets of copyright's speech burden

Thus far, I have focused on what might be termed copyright's 'censorial' speech burden. In individual cases, copyright prevents particular speakers from effective speech. That 'censorial' effect often results from copyright holders' deliberate stifling of unwanted expression, as in the case of *The Wind Done Gone*. In other instances, it may be more a byproduct of prohibitive transaction costs and supracompetitive license fees deriving from certain copyright holder's market power and failure to price discriminate. In either event, the outcome is the same: copyright law has chilled speech.

Yet, to focus on speakers' inability to borrow from copyrighted expression in particular cases does not fully capture the speech burden that copyright imposes. The copyright regime as a whole, including the nature of copyright law, established patterns of copyright ownership, and the structure of copyright-holding industries, also results in a more systematic, 'distributive' speech burden. Copyrights in most popular expression are typically held not by individual authors, but by firms, including motion picture studios, record labels, print publishers, music publishers, and their affiliates.[15] The result is that copyright industries controlling vast inventories of copyrighted works enjoy a disproportionate share of copyright's benefits. And most of copyright's free speech burdens, most of the time, fall on individuals and independent speakers, particularly those, like Alice Randall, who want to recast a popular work in order to criticize it, alter or contest its meaning, or simply use it as a building block for personal expression and creativity.

In a truly competitive market, we might expect authors to find independent, new media outlets to reach audiences, thus eliding incumbent industry control. But as Yochai Benkler has pointed out, the nature of expression tends to support incumbent dominance.[16] All speech incorporates inputs, learning, or inspiration from prior speech. As a result, those who already own exclusive rights in vast inventories of expression enjoy economic advantages over those who do not. In creating new expression, media conglomerates can use their existing inventories at its negligible marginal cost. In contrast, non-conglomerates, including individuals, educational institutions, non-commercial media, and independent publishers, must generally pay the copyright-buttressed supra-marginal price for existing expressive inputs to their new expression. The more independents must pay for expressive inputs and the less able they are to offer a comprehensive package of content, the more costly is their expressive activity relative to that of media conglomerates. With an expanded copyright, therefore, conglomerate expression will increasingly dominate over non-conglomerate – and we would expect that to occur even absent other factors that contribute to media consolidation.[17]

2. Copyright industry structure

What I have termed copyright's 'distributive' speech burden does not arise merely from copyright industries' control of copyrights in most salient popular expression. That burden also stems from the industries' structure, their considerable horizontal and vertical integration. The industries' top-heavy configuration, coupled with the industry's repeated use of copyright as a vertical restraint, amplifies copyright's censorial effect and raises entry barriers to prospective new speakers.[18]

Copyright industries tend to be highly concentrated, increasingly under the roof of large media conglomerates.[19] Of particular concern are the sound recording, television production, motion picture, for-profit academic journal, and book publishing industries, in which a small number of firms enjoy oligopolist and oligopsonist dominance of their sector. And significantly, the major record labels, television and motion picture studios, and publishers do not merely produce (or finance creators to produce) expression. They also distribute that expression to the public. In fact, much of their dominance over their respective industries lies in their control over wholesale distribution and their ability at the retail level to influence which songs are played, movies shown, and records and books given prominent placement.[20]

Copyright industries' horizontal and vertical integration raises antitrust concerns on a number of fronts. Indeed, the industries have a long history of seeking to maintain and exploit their market dominance through anticompetitive behavior, resulting in repeated antitrust action.[21] Yet, despite antitrust authorities' periodic intervention in egregious instances of industry collusion, US antitrust doctrine largely leaves copyright's distributive speech burden undisturbed. US antitrust regulators do sometimes impose conditions on vertical mergers of content producers and distributors (including, notably, the 2000 merger of AOL and Time Warner), designed to insure that programming and distribution are made available to competitors on a nondiscriminatory basis.[22] But under the influence of Chicago school economics, today's antitrust review focuses almost exclusively on efficiency concerns, particularly on whether integration increases the subject firm's power over price (whether to consumers or advertisers). With isolated exceptions, and despite criticism advanced by a number of commentators,[23] contemporary antitrust law takes no cognizance of the desirability of safeguarding expressive diversity *per se*.[24]

The Federal Trade Commission's recent approval of the Bertelsmann-Sony joint venture, which left 80 percent of the US record industry market in the hands of four major labels, is a case in point. In concurring with the Commission's decision to close its investigation, Commissioner Mozelle W. Thompson expressed his deep concern 'about the impact of media mergers on the prices and quantity of media, as well as the diversity of content, available to consumers'.[25] Nevertheless, in a telling admission of the limits of antitrust, Commissioner Thompson felt obliged to support the Commission's decision because the investigation had 'not unearthed sufficient evidence on which to conclude with reasonable certainty that the proposed venture is likely to facilitate coordination in the relevant market in violation of the antitrust laws'.[26]

As Commissioner Thompson rightly intimated, even absent violating antitrust laws, copyright industries' horizontal and vertical integration can be inimical to expressive diversity. Industry concentration tends to narrow public discourse on a number of fronts. First, there is considerable anecdotal evidence that media conglomerates, far more than independent publishers, labels and studios, focus on the bottom line, including that of nonmedia businesses within the corporate umbrella. As a result, the conglomerates are more inclined to produce 'safe' content, designed to appeal to the lowest common denominator of the consumer public. They also increasingly tailor content towards marketing other conglomerate products.[27]

In addition, the conglomerates' control over distribution provides them with the opportunity and incentive to favor their own content over that of competitors and independents.[28] Vertical integration, indeed, has been fueled largely by copyright industries' desire for congenial and preferential distribution channels coupled with distributors' desire to gain inexpensive and favored access to affiliate content.[29] That's not surprising. In an industry with a small number of competitors (and like content production, the content distribution sector is highly concentrated), no firm can afford the high risk of being denied access to distribution or product.[30] In short, vertical integration makes it more difficult for unaffiliated, independent speakers – those who do not control distribution channels – to reach an audience. It also buttresses the industries' oligopsonist position vis-à-vis the vast majority of creators and performers who lack superstar status.

Finally, copyright industries do not merely use vertical integration to favor their own content; they also use their copyrights as vertical restraints to foreclose potential competitors. That practice has a long history, as old as modern copyright law itself. It stems back to Parliament's termination of the London Stationers' exclusive printing privilege, followed by the Stationers' ultimately fruitless battle, lasting through most of the 18th century, to reassert their dominance over the British book trade by claiming a perpetual common law copyright in books that emerging provincial booksellers now sought to publish.[31]

Similar incumbent industry efforts to expand the bounds of copyright protection to foreclose rivals have been repeated several times over in the US, especially as new distribution technologies have emerged.[32] In each instance, the copyright industry incumbent has argued, with varying degrees of success, that the new technology may not be deployed without a copyright license. In so doing, incumbents have typically sought either to bar entry outright or to charge license fees that would have the effect of impeding distribution technology deployment and innovation.

Consider these examples.[33] In the late 19th and early 20th centuries, sheet music publishers sought to use copyright to counter what they viewed as a major competitive threat, the nascent sound recording industry. When the Supreme Court held that mechanical renditions of music (in particular, player piano rolls) do not infringe the copyright in underlying musical compositions, the publishers sought relief in Congress. In the 1920s, ASCAP, a society representing sheet music publishers, composers, and songwriters, targeted commercial radio broadcasters, alleging that broadcasts of live music performances themselves constituted an independent public performance of the musical composition and thus required a separate copyright license. In the 1960s and 70s, incumbent broadcasters brought infringement actions against cable television operators for transmitting off-air television for programming. In 1976, the major motion picture studios sued Sony Corporation, contending that the consumer electronics manufacturer was contributorily liable for enabling users of its Betamax to copy television programs at home. In recent years the studios have brought similar lawsuits against manufacturers of digital video recorders and have lobbied Congress and the Federal Communications Commission to mandate 'broadcast flag' technology that would prevent home copying of programs from digital TV broadcasts. Likewise, the record labels have sought to enforce their copyrights, or to lobby Congress to make it possible to enforce their copyrights, against radio broadcasters, digital audio recorder and MP3 player manufacturers, MP3.com, webcasters, and, most famously of late, suppliers of peer-to-peer file trading software and services.

In many of these cases, Congress has ultimately brokered a compromise allowing proprietors of new content delivery platforms to engage in limited distribution of copyrighted works in return for paying a statutory fee rather than having to obtain copyright holder consent.[34] In the case of ASCAP and the radio broadcasters, much the same was accomplished in court through the ASCAP (and, later, BMI) antitrust consent decrees. These court orders require the performing rights society to license all radio broadcasters on 'reasonable' terms that are subject to judicial oversight.[35]

As crafted by Congress or the courts, the compulsory licenses aim to maintain copyright law's economic incentives to create and disseminate new expression. But they deprive incumbents of the use of copyright to foreclose potential rivals, whether directly, by refusing to license, or indirectly, by expropriating the surplus that provides an incentive for the development of new content delivery platforms. And, almost across the board, from cable television's multiple channels to webcasters' niche programming, by freeing new technological distributors from copyright incumbents' vertical restraints, the compulsory licenses have created alternative outlets for independent speakers and helped to foster expressive diversity.[36]

Not surprisingly, however, copyright incumbents continue to seek to enforce proprietary copyright against new technology media. And the law in this area remains in flux. A number of new media, including MP3.com and providers of some peer-to-peer file trading systems, have been enjoined from further infringing copyright (or facilitating others' infringement) and then driven out of business when the copyright industry plaintiffs refused to license.[37] The Ninth Circuit's ruling in *Napster* is typical of this line of cases. Despite Napster's allegation of recording industry collusion and anticompetitive refusal to license, a claim the trial court later recognized as quite plausible,[38] the Ninth Circuit refused to fashion a compulsory license. Absent an injunction, the court reasoned, '[p]laintiffs would lose the power to control their intellectual property; they could not make a business decision not to license their property to Napster'.[39]

At the same time, absent industry-wide collusion, antitrust law is likely to provide cold comfort to would-be entrants who find that copyright bars deployment of their new distribution technology. Antitrust doctrine places few limits on copyright holders' ability to use copyright as a vertical restraint.[40] Most pointedly, in 2000 the Federal Circuit bolstered the presumption that a copyright holder's unilateral refusal to license competitors does not normally run afoul of antitrust law.[41] The Court held that an antitrust plaintiff may not seek to overcome the presumption by showing that the defendant's exercise of its exclusive rights under copyright law was merely a pretext to mask anticompetitive conduct.[42] Moreover, in a 2004 decision that provides indirect support for the Federal Circuit's ruling, the Supreme Court limited the reach of prior antitrust precedent imposing a duty on firms to deal with competitors outside the intellectual property context.[43]

The current state of antitrust doctrine, copyright law, and copyright markets leaves us with a policy dilemma admitting of no easy solution. Copyright holders' propensity to use copyright as a vertical restraint presents an unacceptable burden on independent speech. But the untrammeled and unlicensed deployment of new distribution technologies might undercut copyright's incentive to create original expression. At the same time, the traditional compromise solution, compulsory licensing, is always difficult to administer, even more so in digital environments where new media, ranging from peer-to-peer networks to handheld devices with multi-gigabyte storage capacity, provide platforms for distributing multiple categories of works.[44] Yet, to complete the circle, absent compulsory licenses or some alternative means for circumscribing copyright holders' proprietary control, the copyright industries will continue to use copyright to raise entry barriers before new technological means of disseminating expression and, in turn, before independent speakers.

We will return to this point in Part III, where I propose some amendments to copyright law, including a compulsory license specifically tailored to the digital environment. While far from a panacea, these measures would constrain copyright holders' ability to engage in vertical foreclosure and reduce copyrights' speech burdens more generally.

II. THE MARKETPLACE OF IDEAS VERSUS MARKETS FOR COMMODITIES

The 'marketplace of ideas' is a metaphor often used in First Amendment case law and commentary to describe the exchange of information and opinion.[45] While the market metaphor may be apt for some purposes, it elides some important differences between the exchange of ideas and markets for goods and services.

A. Expressive Diversity

For one, our marketplace of ideas tolerates far less concentration than we quite willingly countenance in markets for goods and services. At least in the US, antitrust law is often said primarily to promote the welfare of consumers, not competitors.[46] High degrees of concentration and even monopoly can comport perfectly with antitrust precepts provided they do not result from restraints on trade and the oligopolist or monopolist does not abuse its dominant position.[47] It is not a violation of the Sherman Act to gain or maintain a monopoly by 'growth or development as a consequence of a superior product, business acumen, or historic accident' as opposed to by predatory or anticompetitive conduct.[48]

In sharp contrast, our marketplace of ideas values expressive diversity in the sense of speech from a broad range of speakers. As the US Supreme Court has repeatedly emphasized, a fundamental goal of US telecommunications policy and, indeed, of the First Amendment is to actively promote the 'widest possible dissemination of information from diverse and antagonistic sources'.[49] In this formulation, it is not enough that a single source or very few sources produce the speech that audiences want to hear or consumers want to acquire. And that is so even if those monopolist or oligopolist sources produce a broad spectrum of expressive genres. Rather we value the diversity of speakers, of sources of speech, as much as the diversity of expressive product.

Let me elaborate that last point. There is a vast scholarly literature on the causal relation between industry concentration and diversity of output.[50] As in other areas, scholars of media and cultural production present conflicting views and empirical results on this issue. Some decry conglomerates' production of bland, uncontroversial content for the lowest common denominator.[51] Others insist that large media firms in fact produce expressive works of diverse genres, ranging from reality TV to animated sitcom.[52]

As noted above, there is reason to suspect that today's copyright industry conglomerates in fact produce more homogeneous fare than would obtain in less concentrated markets. But media concentration stands at odds with expressive diversity even if that's not the case. From a free speech perspective, 'expressive diversity' requires much more than product differentiation, the production of a variety of genres and formats.[53] It must also entail ample opportunity for the creation and dissemination of 'oppositional expression', speech that directly challenges popular works. Like Alice Randall, oppositional speakers recast or appropriate seminal works of popular culture in order to subvert prevailing understandings, make an unpopular political statement, or even just present an iconoclast artistic conception. As Steven Shiffrin and others have iterated, among its central aims, the First Amendment tradition seeks to protect and foster dissent, 'speech that criticizes existing customs, habits, traditions, institutions, or authorities' and that 'communicates the fears, hopes, and aspirations of the less powerful to those in power'.[54] Oppositional speakers, those who build on popular works in order to subvert and criticize the views and assumptions those works reinforce, make up a vital part of that dissent.

Expressive diversity, in the sense of speech 'from diverse and antagonistic sources', is not at all coterminous with product differentiation. In some instances, indeed, effective dissent requires a partial *melding* of expressive product rather than complete product differentiation. Consider Alice Randall. What if she had written a novel that was fully differentiated from *Gone with the Wind* in the sense that her novel borrowed no expression whatsoever from the civil war saga? Or what if she wrote in an entirely different genre, say a scholarly article or op-ed piece that lambasted racism and the racist stereotypes perpetuated in Margaret Mitchell's work? Randall no doubt could have conveyed her message in that manner. But to do so would have been far less effective, far less self-expressive, and far less enriching of robust debate than to do what she did: upend Mitchell's idealized portrait by re-imagining its very story line, scenes, and characters from the viewpoint of a slave.

Randall's oppositional speech was quite deliberately less than fully differentiated from the target of her ire. And like the creative appropriations of many artists and dissenters who recast mainstream speech, her at once highly derivative and powerfully subversive expression is a crucial element of expressive diversity. It is certainly no less valuable for individual autonomy and robust democratic discourse than is the creation of differentiated product.

For that matter, the cardinal principle of expressive diversity encompasses not only dissenters but also speakers who incorporate elements of popular culture as salient reference points for self-expression that is not overtly oppositional. Even though the Internet enables people to express their views and engage in public discussion as never before, media conglomerates remain and, for the foreseeable future, will likely continue to remain the dominant fount of information, opinion, and interpretation. In a very real sense, mass media images, stories, commentary, and music make up much of our common language for speaking about and making sense of the world around us. As a result, individual self-expression ranging from expressing solidarity with others to personal whimsy – and not just dissent – often entails significant borrowing, if not outright copying, from existing works.[55] That less than fully differentiated expression comprises a prime component of our system of free expression. As Jack Balkin has rightly emphasized,[56] it is the essence of freedom of speech that individuals have an opportunity to participate in the making of culture and meaning, and to draw upon existing cultural materials in doing so. Here, too, then, the multiplicity of speakers – those who are able to draw upon existing expression in fashioning their own – has independent value for our 'marketplace of ideas' over and above variety in expressive output.

B. Concentration in Markets for Goods

At the same time, of course, even if the marketplace of ideas differs from markets for goods, it does encompass real markets. Expression, after all, is regularly licensed and sold. Yet there, too, we find some important differences between actual markets for expression and markets for other goods.

Most importantly, markets for expression offer far greater numbers of goods, yet in some ways tend to be more concentrated, than markets for many products. Expressive works exhibit characteristics of network goods. Consumer demand for expressive works tends to follow a winner-take-all, power law distribution; the lion's share of consumer demand at any given time is for a relatively small number of works.[57] Studies suggest, moreover, that this highly skewed consumer demand endures over time. Bestsellers tend to show extraordinary staying power relative to other works, and ongoing demand for particular works, authors, and recording artists follows the same power law distribution as demand for recent hits.[58]

This demand side concentration characterizes many traditional media and entertainment products, like movies, books, music recordings, and video games. Intriguingly, though, digital distribution mitigates that demand side concentration to some extent by making it possible to develop previously underserved niche markets. Free from the geographical, transport, and space limitations of brick-and-mortar retail stores, digital distributors like iTunes (and even online sites that aggregate and supply sizeable physical inventory, like Amazon.com and Netflix) foster a 'long tail' of numerous niche works for which there is a small but nontrivial demand.[59] Nevertheless, the power law distribution demand curve, in which only a few works stand out over the many that make up the long tail, is also found in the digital domain. In fact, it characterizes usage patterns even of purely Internet-based expression, like weblogs and websites.[60]

The reason for expression's winner-take-all character seems to be a sort of cultural network effect. People want to see the movies, read the books, newspapers, and commentary, and hear the music that others of their social group are talking about.[61] We do so partly for reasons of reputation; we want to be 'in the know'. In addition, given that expression is an experience good, we tend to rely heavily on the views of early buyers. As a result, consumer demand for expressive works is especially prone to herd behavior and information cascades.[62]

Like the high levels of concentration in the copyright industry, the blockbuster structure of markets for individual expressive products need not necessarily give rise to antitrust or efficiency concerns. But from a free speech perspective, these are the very markets we would most like to see populated with a plethora of truly competing products and producers. In that vein, while the 'long tail' of niche works that digital communication and distribution foster provide a welcome partial counterweight to blockbuster dominance, a robust system of free expression also demands that diverse speakers have an opportunity to compete for mass audiences.[63] It thus behooves us to ensure, to a degree far greater than what antitrust law would require, that markets for expression remain contestable, with minimal entry barriers.

At the same time, given cultural network effects and information cascades, it is probably inevitable that a small number of works within any given genre will be vastly more popular and thus more influential than others of that genre. And for the foreseeable future, these popular works will tend to be among the fare generated by media conglomerates. That, as we have seen, has significant import for our system of free expression. If ordinary individuals are to have the opportunity actively to engage mainstream culture and participate in making their own, copyright law must preserve sufficient space for us to incorporate, build on, and recast existing expression.

C. Market Power

There can be power in the marketplace of ideas without power in actual markets. The Margaret Mitchell Estate does not dominate the actual market for film or even classic films in an antitrust sense. Yet *Gone with the Wind* is a highly influential, culturally salient icon in the US. Alice Randall could try to make her point by commenting on some other movie or writing a new novel that does not refer to *Gone with the Wind*. These would be highly imperfect substitutes, however. Randall's target is not simply racism in general or racism in popular literature and film. It rather is the racist stereotypes reflected in and perpetuated by Mitchell's classic.

What then about market power in an actual market sense? Does copyright confer market power – generally defined as the ability profitably to charge a supracompetitive price for more than an insignificant period of time? That question raises yet another dimension for assessing copyright's speech burden. To the extent copyright confers market power, the result will be reduced output. Some prospective audiences and speaker-licensees will be deprived of access to expression that they would otherwise have.

Whether copyright confers market power turns out to be a highly complex question. Much turns on our demarcation of the relevant market and our understanding of what constitutes the competitive price within that market. Market definition is far from an exact science.[64] Indeed, the dimensions of an antitrust market flow largely from questions of policy. Market definition hinges upon a judgment of how much market power should be tolerated for a given sector, product category, or service.[65] In any event, for various policy reasons, largely the considerable expense and imprecision of antitrust enforcement itself, antitrust analysis generally groups together products that, while not perfect substitutes, constrain another's prices 'reasonably' close to what is deemed to be the competitive level.[66] And for that reason, commentators, judges, and regulators do not generally define the market for licensing, gaining access to, and purchasing copies of a single copyrighted work as a 'market' for antitrust purposes.

In that light, copyright would rarely confer market power in a conventional antitrust sense. Copyrights do accord a 'monopoly' in the narrow market for a single work.[67] But each copyrighted work is sold in monopolistic competition with works of the same or similar genre. So while a firm might enjoy market power by virtue of its control over a broad inventory of copyrights in a particular genre, it would be highly unusual that the copyright in a particular work confers market power over a range of goods or services that constitutes a relevant market for antitrust purposes.

But what about the narrow market for a single copyrighted work? Does copyright confer on copyright holders the ability profitably and consistently to charge a supracompetitive price, thus engendering the artificial scarcity and deadweight loss characteristic of monopolies? In and of itself, that market power would not generally be cognizable under antitrust law.[68] Nevertheless, it may still raise significant policy concerns, especially given that the artificial scarcity that copyright might engender burdens access to and the ability to build upon speech.

It is often said that copyright does indeed confer market power, certainly not for all or even most works, but at least for enduring blockbusters and classics, like *Gone with the Wind*, for which consumers have an ongoing demand that cannot readily be met by substituting some other work. If not for copyright, publishers and producers could compete with one another in the market for a given book, movie, or sound recording. Such competition, standard economics tells us, would drive down the price to the seller's 'marginal cost', the cost of producing one more unit of a good. When the good is a novel printed and bound as a book, the marginal cost would be the cost of printing and distributing one more copy of the book. In the case of text or music posted on a web site, the marginal cost would be virtually nothing – only the cost of transmitting the work over the Internet to one more user. In this view, accordingly, any download charge or access fee greater than zero would be a supracompetitive price.

We know that holders of copyrights in works for which there is more than trivial consumer demand typically charge a positive price for access, copies, or license, certainly more than marginal cost. Accordingly, commentators ranging from nineteenth century British parliamentarians to late twentieth-century Nobel laureates in economics have posited (in one iteration or another) that copyright in fact confers market power and leads to deadweight loss.[69] And whether referring to copyright's deadweight loss as a tax on readers, allocative inefficiency, or burden on speakers, commentators have cited it as cause for sharply circumscribing copyright holder rights.

In principle, copyright holder pricing above marginal cost does indeed bar many speakers, readers, and listeners from access to existing works that they otherwise could enjoy, learn from, and build upon. But that view is incomplete. Although copyright enables pricing above marginal cost for popular works, and thus might be seen to deprive some would be audiences and licensees, there are reasons to insist on a more nuanced account of whether that supra-marginal cost pricing reflects market power (or if you will, undesirable market power), even in the copyright policy sense of that term.

To begin with, the economic model of perfect competition in which price is driven down to marginal cost does not comport with the way most real markets operate. Pricing above marginal cost is ubiquitous in our economy.[70] Perfect competition, the requisite for marginal cost pricing, can exist only in markets for true commodities, where firms selling identical products compete entirely on price rather than different product characteristics or brand name identification. But most markets are characterized by at least some degree of product or brand differentiation, and when there is consumer demand for unique product characteristics or brand, the seller can generally charge more than marginal cost.[71]

Seen in that light, expressive works are much like other products. Many films, sound recordings and novels have unique characteristics for which there is consumer demand. When a work is popular, other works, even of the same genre, are less than perfect substitutes for the popular work. As a result, the seller of a popular work can profitably charge more than marginal cost – so long as copyright law prevents competitors from making and selling copies of the very same work. For our purposes, therefore, the question must be one of degree: Are holders of copyrights in popular works able to charge significantly higher above marginal costs than are typical sellers of most other goods in real-life markets?

Even if the answer to that question is 'yes', we need to consider further whether copyright holders' supra-marginal cost pricing might be explained by factors other than market power. Most importantly, pricing above marginal cost is generally a necessity in markets characterized by scale economies.[72] When scale economies are present, firms cannot recover their fixed costs if they price at marginal cost. For that reason, a firm with scale economies would be condemned to destruction if it adopted marginal cost pricing. Accordingly, for scale economy firms it makes more sense to define competitive pricing in terms of the average per unit price required to recover fixed costs, rather than marginal cost pricing.[73]

Likewise in the copyright marketplace. Copyright precludes marginal cost pricing for a reason. In a copyright-free, competitive market, the price to the consumer would not reflect the investment of time and money in producing the 'first copy', the original manuscript, film, or sound recording. That could bring about ruinous competition. An author's 'free riding' competitors could profitably price their copies at or near marginal cost because they would not have invested in producing the first copy. But if the author and her publisher were to sell copies at this competitive, marginal cost price, they could not recoup their first copy costs. And if authors and their publishers cannot hope to recover their first copy costs, it will often not be worth their while to create (or finance) the work in the first place.

So at least where copyright is in fact necessary to spur a work's creation and dissemination (and, let us remember, in many cases copyright may be entirely superfluous to that end), a better measure of competitive price would be the average price required for the copyright holder to recover its first copy costs, plus any marginal costs. Moreover, since most works do not achieve commercial success, the competitive price for a popular work would also have to account for copyright holder risk. Or put another way, copyright holder profits from successful works must make up for losses on the vast majority of works that are commercial flops.

At bottom, copyright holders cannot be expected to charge less than what is likely to yield 'normal' profits – that return required to keep copyright holders in business (i.e. a return that is no less than that which the copyright holder could garner from some alternative venture).[74] And prices at those levels, which will likely be well above marginal cost, must be considered competitive for purposes of determining whether copyright confers market power. Any price above marginal cost will deprive some consumers of access. But any price below that which yields normal profits will result in fewer new works being created and disseminated (again, to the extent audience and copyright licensee payments are necessary to spur creation and dissemination).

While easy to state, the normal profits metric provides no easy across-the-board answer as to when a copyright holder is charging supracompetitive prices and thus potentially causing the deadweight loss and artificial scarcity typical of monopolies. It is extraordinarily difficult to determine what are 'normal' profits for copyright holders. Production, marketing, and distribution costs vary considerably from industry to industry and, with the advent of digital technology and the Internet, are very much in flux.

Moreover, even in the most stable circumstances, markets for original expression usually lack the benchmarks for normal profits and competitive pricing that we can often find in other scale economy industries. The problem is that there are no actual fully competitive markets for copies of any given work. This is certainly the case when copyright law is in force and the copyright owner thus enjoys a monopoly in that market. But it is also true (or would be true) even absent copyright protection. When scale economies result from substantial fixed investment in physical plant or infrastructure, every competitor needs to make the same investment. But in markets for original expression it is only the author (and the author's publisher, studio, or record label) who invests in the fixed costs of creation. Absent copyright, the author's competitors need expend only the marginal cost of making copies. Accordingly, we can do no more than hypothesize what would be the price and profit equilibrium if competitors in the market for copies of (and access to) a given work of authorship each had to make roughly the same investment in the fixed costs of creating the work.[75]

As we'll see shortly, the normal profits metric, and with it the question of copyright's optimal scope and duration, ultimately devolves upon speech policy; economic analysis simply cannot answer that question by itself. But even resting with narrower economic analysis and even in the face of uncertainty regarding the benchmark for competitive pricing in copyright markets, there are a number of reasons to suspect that market forces do not fully constrain copyright license fees. For one, as I have discussed, many copyright markets are highly concentrated and less than fully competitive. The confluence of copyright industry horizontal integration, conglomerate control over vast inventories of copyrighted expression, and vertically integrated control over distribution channels, raises significant entry barriers before new works, resulting in less than fully contestable markets.[76]

Further, the works that speakers want to license are often among the very few that have enduring cultural resonance and commercial value, and few close substitutes.[77] These might range from the central scenes and characters from *The Simpsons*, classic Disney cartoons, *Star Trek*, or *Gone with the Wind*, to Picasso paintings, to Beatles songs. The license fees demanded for such works – if, indeed, licenses are even possible to obtain – are likely far in excess of those that would obtain in competitive markets.

Finally, as I have discussed elsewhere,[78] copyright holders do not typically engage in refined differential pricing to license speakers wishing to build upon such culturally salient works for new expression. Indeed, the prohibitive cost of obtaining copyright clearances has impoverished entire genres, ranging from documentary films to hip hop music, as creators have been forced to strip their expression of references to pre-existing works. Copyright holder intransigence may well flow from a rational decision to eschew to the administrative and transaction costs of individualized price discrimination. But, as economists have suggested, it might also in and of itself be a sign of market power, of copyright holders' ability to maintain a supracompetitive price and constrict supply.[79]

At bottom, it bears reiterating, the question of how much market power and supracompetitive pricing we are willing to tolerate cannot be answered in a vacuum. It always reflects broad policy concerns.[80] Unlike most legal regimes, to the extent that copyright confers market power and thus results in deadweight loss, it imposes a significant burden on speech. Copyright's deadweight loss means that some consumers – in other words, some prospective audiences and speakers – are deprived of access to existing expression and the ability to use that expression in conveying a message. Thus, when focusing on copyright's free speech burdens, we should tolerate a far lesser degree of suppliers' market power than we might in other sectors or when we are asking whether a copyright holder has run afoul of antitrust law.

D. Copyright's Optimal Scope Devolves Upon Speech Policy

Indeed, it is not merely that free speech concerns should, as a normative matter, inform our conclusions about how much copyright holders' market power – and thus how broad a scope of copyright – to accept. Rather, the economic analysis upon which antitrust and innovation policy rest simply cannot, in and of itself, answer the question of what is copyright's optimal breadth and duration. What begins as economic analysis must, by its very terms, ultimately turn on broad social policies regarding the desired shape and contours of our 'system of freedom of expression'. More precisely, the question of copyright's optimal scope devolves upon speech policy judgments regarding the desired quantity and quality of copyright-impacted expression: How much copyright-incented expression do we want and to what extent should we risk attaining somewhat less of that expression in order to foster greater expressive diversity?

Consider, first, the issue of quantity. As we have seen, from an economic efficiency standpoint, copyright's scope should be set just so copyright holders on average can earn a 'normal' rate of return, but no more. Yet even putting aside the difficulty in determining what in fact constitute normal profits, that metric does not tell us how broad copyright should be. The reason is simple: assuming copyright and capital markets operate as economic analysts posit, market actors on average will *always* invest just enough in producing and disseminating original expression to earn a normal rate of return. If copyright is broad, additional investment capital will flow to original expression and the pie of audience receipts will be divided among more original songs, movies, and books (or, more realistically, a greater percentage of original works will be failures). If copyright is narrow and thus the copyright incentive weak, those who would otherwise invest in original expression will siphon off some of their capital to alternative ventures of greater promise.[81] So from that perspective, copyright's optimal scope turns not on micro economics, but rather a question of social policy: How much of society's resources do we want devoted to producing and disseminating original expression? Or, more precisely, how much do we want allocated to those types of original expression that (*i*) require a considerable investment of time and money and (*ii*) we do not wish to fund by direct government subsidy?

As that last question suggests, our policies regarding copyright's scope involve not just a quantitative judgment, but a qualitative one as well.[82] Copyright aims primarily to foster a select category of expression: sustained works of authorship that are best funded through the market. Furthermore, economic analysis tells us, copyright's scope will impact the mix even of that category of expression that is created in response to copyright law. Applying the economic literature on product differentiation, Michael Abramowicz has perceptively demonstrated that an expansive copyright does not merely foster greater overall investment in original expression. It also leads to diversion of demand from existing works.[83] Like the numerous radio stations that compete for a slice of the top 40s market, publishers will tend to invest in expressive works that are close substitutes for proven, commercially successful hits. It generally makes more sense for an entrant to seek to siphon off even a small percentage of the mainstream market than to attempt to forge a new niche market. As a result, we would expect to see excessive entry and clustering in already popular genres. And, as Professor Abramowicz concludes, this is especially the case when marginal costs are low relative to fixed costs, as they are in many copyright markets, increasingly so in an era of digital distribution.

That economic analysis matches and provides a richer explanation for what many perceive to be the herd behavior of movie studios, television networks, record labels, and book publishers in chasing after blockbuster hits by producing copycats of the same genre. In conjunction with speech policy, it also tells us something about copyright's optimal scope. At some level of copyright protection, copyright's welfare benefits sharply diminish. Beyond the minimal scope and duration that might provide an economic incentive for the creation of numerous works of most genres, making copyright even broader will likely result only in more close substitutes. Like the reality TV shows that have proliferated in recent years, these substitutes will typically be sufficiently differentiated to avoid copying copyrightable expression. But on the margin, any new work of an already crowded genre will likely add little, if at all, to consumer welfare – or to public discourse.

At the same time, the very copyright expansion that provides an incentive for marginal works of little or no value significantly impedes the creation of oppositional works like Alice Randall's. These creative appropriations of culturally influential expression are not fully differentiated in the copyright sense. Yet they often make valuable contributions to public debate and culture, if for no other reason than that they challenge mainstream stereotypes and assumptions. Even from a narrowly defined economic analytic standpoint, that oppositional expression might improve consumer welfare. But the value of expressive diversity, in the sense of diverse political and artistic viewpoint as opposed to product differentiation *per se*, lies largely in our fundamental, extra-economic commitments to individual self-expression and a robust system of free speech.

III. LIMITING COPYRIGHT'S SCOPE TO LESSEN COPYRIGHT'S FREE SPEECH BURDEN

In that vein, a number of commentators, including myself, have grappled with how copyright law might be modified to minimize copyright speech burdens while still maintaining copyright incentives. Here I want to sketch three possibilities. Each would convert copyright from an exclusive, proprietary right of control to a right to receive remuneration in specified cases or categories of use. In that way, the potential for using copyright for censorial stifling of unwanted speech in individual cases and for vertical foreclosure, more systematically, would be reduced. Converting copyright in that manner would also help to overcome transaction cost barriers that prevent licensing much copyright work-derivative speech.

The first possibility is suggested by case law in both the US and Europe: in copyright infringement actions against unlicensed users who fall outside of exceptions to copyright holder rights but nevertheless demonstrate a strong speech interest in the unlicensed use, courts should fashion a remedy based on reasonable royalties rather than enjoining the use. The US Supreme Court has repeatedly urged that given copyright's paramount goal of stimulating 'the creation and publication of edifying matter',[84] in cases of colorable but failed claims of fair use, courts should award damages rather than grant injunctive relief – in effect, issuing a compulsory license to further the 'strong public interest in the publication of the secondary work'.[85] Similarly, the Eleventh Circuit voided the preliminary injunction that the trial court had issued against publication of Alice Randall's *A Wind Done Gone*, concluding that the injunction 'was at odds with the shared principles of the First Amendment and the copyright law, acting as a prior restraint on speech because the public had not had access to Randall's ideas or viewpoint in the form of expression that she chose'.[86]

While not explicitly holding that injunctions should sometimes give way to damages, European case law suggests support for that possibility. As I've discussed, in *France 2* v. *France*,[87] the European Human Rights Commission grounded its holding that copyright's restriction of the defendant broadcaster's freedom of expression met the proportionality test of European Convention on Human Rights Article 10(2) in the fact that the copyright owner sought only unpaid royalties, not an injunction prohibiting the defendant's broadcast.[88] A much discussed 2001 decision of a UK appellate court followed similar reasoning. In that case, *Ashdown* v. *Telegraph Group Ltd*,[89] the Sunday Telegraph had published excerpts from minutes of a secret high-level meeting at which Paddy Ashdown, then-leader of Britain's Liberal Party, had discussed forming a new cabinet coalition with Prime Minister

Tony Blair. Ashdown, the author of the meeting minutes, sued the Telegraph for copyright infringement. The Court of Appeal stated outright that copyright is antithetical to freedom of expression and, accordingly, that courts are bound so far as possible to apply the UK Copyright, Designs, and Patent Act in a manner that accommodates freedom of expression. Nevertheless, the Court ruled against the newspaper on the facts before it, holding that the Telegraph had quoted more than necessary to lend credence to its news reporting.

In its conclusion, however, the Court emphasized the narrowness of its holding in a way that supports my point. Like the Human Rights Commission in *France* v. *France 2*, it treated the copyright holder's claim as one for reasonable remuneration, not suppression of the defendant's speech. The Court rejected the argument that 'Article 10 requires that the Telegraph Group should be able to profit from [its] use of Mr. Ashdown's copyright without paying compensation'.[90] But the Court expressly declined to consider whether injunctive 'relief was appropriate having regard to section 12 of the [UK] Human Rights Act 1998 and article 10 of the Convention'.[91]

The second possibility for reform concerns noncommercial uses of copyrighted expression, including the sharing of files over peer-to-peer networks like Kazaa and the noncommercial creation and dissemination of mash-ups, re-edits, and other modified versions of existing works. I have elsewhere proposed that such noncommercial uses should be privileged, and that, in return, providers of services and devices the value of which are substantially enhanced by such P2P file-swapping should be charged a statutory fee – what I term a Noncommercial Use Levy – set as a percentage of gross revenue.[92] Likely candidates for the levy would include Internet access, peer-to-peer software and services, computer hardware, consumer electronic devices (such as CD burners, MP3 players, and digital video recorders) used to copy, store, transmit, or perform downloaded files, and storage media (like blank CDs) used with those devices. Once collected, levy proceeds would be allocated among copyright holders in proportion to the popularity of their respective works and of user-modified version of their works, as measured by digital tracking and sampling technologies.

The Noncommercial Use Levy would give noncommercial users and creators freedom to explore, share, and modify many of the expressive works that populate our culture. Yet in compensating copyright owners for displaced revenues, the levy would continue to underwrite the creation and dissemination of new original expression. In fact, by spurring manifold digital dissemination and weakening copyright industries' oligopsony position vis-à-vis new artists and authors, the levy would likely fund a broader spectrum of creators than under our current copyright-industry-dominated system.

Finally, a number of commentators have proposed that copyright holders’ exclusive rights be limited to exact or near-exact copies of their works. Jed Rubenfeld[93] argues, for example, that granting copyright holders proprietary rights to prevent modifications, reformulations, and derivative works suppresses secondary authors’ ‘freedom of imagination’ in contravention of the First Amendment. Rubenfeld insists that imaginative works must be free from claims for damages as well as injunction. Rather, secondary authors should be required only to allocate to the copyright holder the share of the secondary authors’ profits attributable to their use of the underlying work. In that way, copyright holders could neither prevent nor penalize speakers from using existing works in exercising their imagination. But copyright holders would be entitled to just apportionment of any profits speakers earn from using the copyright holder’s work.

I am not at all certain that the First Amendment mandates secondary authors’ wholesale freedom to appropriate copyrighted expression. Professor Rubenfeld’s proposal would also face a number of practical obstacles, including how to determine and apportion profits. But, in principle, the proposal does provide a solid basis for free speech policy. Removing copyright holders’ proprietary control would eliminate their ability to engage in private censorship or charge supracompetitive license fees for creative appropriation. It would also eliminate barriers to new, transformative speech posed by transaction costs and the fear of copyright infringement litigation. Moreover, setting the compulsory payment as attributable profits actually earned from the creative appropriation rather than a license fee at an hypothesized market rate would give speakers who wish to develop a commercially risky project greater reign to create and distribute transformative speech.

IV. CONCLUSION

Neither antitrust nor efficiency concerns would dictate the full scope of limitations on copyright holder rights that I have described. It is rather copyright’s propensity to suppress speech that gives force to arguments for converting copyright from a proprietary right to a right of remuneration in specified cases and categories.

That is not to say that antitrust and innovation policy have no bearing on copyright law. Particularly as applied to computer software and other technologies, copyright law does impact innovation policy. And, as in the past, copyright industries face incentives to abuse their dominant positions and engage in restraints on trade that give rise to antitrust concerns. Antitrust and innovation policy can also illuminate some of the ways in which copyright law and copyright industries might erect barriers before new speakers.[94] But, ultimately, while copyright operates in the market, it is not primarily of the market. To determine copyright's scope and limitations we must look to free speech law and policy, not just the law and policy that underlie antitrust.

NOTES

1 The current, express position of the US federal antitrust enforcement agencies is that '[t]he intellectual property laws and the antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare.' United States Dept of Justice and Fed. Trade Commission (1995), *Antitrust Guidelines for the Licensing of Intellectual Property*, §1.0, available at www.usdoj.gov/atr/public/guidelines/ipguide.htm.

2 See Landes, William M. and Richard A. Posner (2003), *The Economic Structure of Intellectual Property Law*, Cambridge and London: Harvard University Press, p. 372 (describing the traditional view that 'intellectual property law and antitrust law are enemies – that intellectual property authorizes patent and copyright (and perhaps also trademark and trade secret) monopolies that offend antitrust principles').

3 See, generally, Pitofsky, Robert (2001), 'Antitrust and Intellectual Property: Unresolved Issues at the Heart of the New Economy', *Berkeley Tech. L. J.*, **16**, 535; Posner, Richard A. (2001), 'Antitrust in the New Economy', *Antitrust J.*, **58**, 925. See also Motta, Massimo (2004), *Competition Policy; Theory and Practice*, Cambridge University Press, pp. 55–66 (demonstrating that while established monopolists might have a lesser incentive to innovate, the expectation of market power to appropriate investments in R&D, such as can be gained through intellectual property rights, may be a critical incentive to make those investments). On the other hand, the new emphasis on innovation does not always yield greater solicitude for monopolists. Some courts and commentators have suggested that a dominant firm's conduct in deterring potential competitors' innovations constitutes cognizable harm to consumer welfare and thus runs afoul of antitrust law, even absent a showing of immediate harm to competition. See Lopatka, John E. and William H. Page (2001), 'Monopolization, Innovation, and Consumer Welfare', *George Washington L. Rev.*, **69**, 367 (criticizing this position).

4 *Harper & Row, Publishers, Inc.* v. *Nation Enters*., 471 US 539, 558 (1985).

5 Emerson, Thomas L. (1970), *The System of Freedom of Expression*, New York: Vintage Books, pp. 3–5.

6 The term is Jane Ginsburg's. See Ginsburg, Jane C. (1995), 'Putting Cars on the "Information Superhighway": Authors, Exploiters, and Copyright in Cyberspace', *Colum. L. Rev.*, **95**, 1466, at p. 1499.

7 I discuss copyright' incentive for expressive production and support for independent media in Netanel, Neil Weinstock (1996), 'Copyright and a Democratic Civil Society', *Yale L. J.*, **106**, 283.

8 As I have discussed elsewhere, copyright's incremental speech benefit also resides in supporting media enterprises that possess the political independence and financial wherewithal to reach a mass audience, galvanize public opinion, and engage in sustained investigative reporting. A copyright-free Internet would continue to be populated by a plethora of individuals and not-for-profit associations. But institutional speakers that must rely on the market for sustenance are less likely to find sufficiently congenial business models that do not entail some measure of copyright-like protection for content. See Netanel, Neil Weinstock (forthcoming 2005), *Copyright's Paradox: Freedom of Expression/Property in Expression*, Oxford University Press.

9 See Kirkpatrick, David D., 'A Writer's Tough Lesson in Birthin' a Parody', *New York Times*, 26 April 2001, at E1. The book jacket to *The Wind Done Gone* describes the novel as '[a] provocative literary parody that explodes the mythology perpetrated by a Southern classic'.

10 *Gone with the Wind* was published in 1936. In accordance with the copyright term in force under the 1909 Copyright Act, Mitchell's novel would have gone into the public domain in 1992. In fact it would have gone into the public domain in 1964 if the copyright holder had not duly renewed the copyright that year. See Copyright Act of 1909, ch. 320, 24, 35 Stat. 1075, 1080–81 (1909) (current version at 17 USC. 302).

11 See *Suntrust Bank* v. *Houghton Mifflin Co.*, 136 F. Supp. 2d 1357 (ND Ga. 2001), rev'd, 252 F.3d 1165 (11th Cir. 2001).

12 *Eldred* v. *Ashcroft*, 123 S. Ct. 769, 774 (2003).

13 For an illuminating overview of European judicial treatment of the copyright and free speech, see Hugenholtz, P. Bernt (2002), 'Copyright and Freedom of Expression in Europe', in Elkin-Koren, Niva and Neil W. Netanel (eds), *The Commodification of Information*, London: Kluwer Law International. See also Suthersanen, Uma and Jonathan Griffiths (eds) (2005), *Copyright and Free Speech: Comparative and International Analyses*, Oxford University Press.

14 European Commission of Human Rights, 15 January 1997, Case 30262/96.

15 See O'Rourke, Maureen (2003), 'A Brief History of Author-Publisher Relations and the Outlook for the 21st Century', *J. of the Copyright Soc'y of the USA.*, **50**, 425.

16 See Benkler, Yochai (1999), 'Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain', *N.Y.U. L. Rev.*, **74**, 354, at pp. 401–8.

17 Ibid. at pp. 407–8.

18 See generally Benkler [1999], *supra* Note 16. See also Barton, John H. (2004), 'The International Video Industry: Principles for Vertical Agreements and Integration', *Cardozo Arts & Ent. L. J.*, **22**, 67; Edlin, Aaron S. and Daniel L. Rubinfeld (2004), 'Exclusion or Efficient Pricing? The "Big Deal" Bundling of Academic Journals', *Antitrust L. J.*, **72**, 1.

19 See, generally, Compaine, Benjamin M. and Douglas Gomery (2000), *Who Owns the Media? Competition and Concentration in the Mass Media Industry* (3d ed.), Mahweh, NJ: Lawrence Erlbaum. See also Baker, C. Edwin (2002), 'Media Concentration: Giving Up on Democracy', *Florida L. Rev*., **54**, 839. Eli Noam contends that while US mass media have, in the aggregate, steadily increased in concentration since 1988, that concentration remains fairly low by US antitrust standards. Noam's data appears to cover only mass media outlets, such as TV and radio station ownership, and newspapers, not the studios and other firms (aside from newspapers) that produce content. Noam also recognizes that mass media often exceed US antitrust concentration standards on a local level. See Noam, Eli, 'How to Measure Media Concentration', FT.com (Financial Times New Economy Policy Forum), 30 August 2004, http://news.ft.com/cms/s/da30bf5e-fa9d-11d8-9a71-00000e2511c8.html (reporting data from his forthcoming book, *Media Ownership and Concentration in America*).

20 See Compaine and Gomery [2000], *supra* Note 19, at pp. 326–27 (record labels), 375–80 (motion picture studios); Caves, Richard E. (2000), *Creative Industries: Contracts Between Art and Commerce*, Harvard University Press, pp. 286–96 (discussing payola in various industries); Blumenthal, Ralph, 'Charges of Payola over Radio Music', *New York Times*, 25 May 2002, at B7.

21 For a concise chronology of antitrust and the motion picture industry, see Orbach, Barak Y. (2004), 'Antitrust and Pricing in the Motion Picture Industry', *Yale J. on Regulation*, **21**, 317. For discussion of antitrust and the music industry, see Einhorn, Michael A. (2001), 'Intellectual Property and Antitrust: Music Performing Rights in Broadcasting', *Colum. VLA J.L. & Arts* **24**, 349; Fagin, Matthew, Pasquale, Frank and Kim Weatherall (2002), 'Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution', *B. U. J. Sci. & Tech. L.*, **8**, 451.

22 For a brief description of some of these instances, see Baker [2002], *supra* Note 19, at pp. 859–60; Rubinfeld, Daniel L. and Hal J. Singer (2001), 'Open Access to Broadband Networks: A Case Study of the AOL/Time Warner Merger', *Berkeley Tech. L.J.*, **16**, 631, at pp. 632–3, 663–4. The Federal Trade Commission's conditions on the AOL and Time Warner merger are set forth in the consent decree. See *Am. Online*, 2000 FTC LEXIS 170.

23 A number of commentators have argued that antitrust can and should account for possible adverse impact on the marketplace of ideas, not just competitive pricing and distribution in markets for goods and services. See e.g. Stucke, Maurice E. and Allen P. Grunes (2001), 'Antitrust and the Marketplace of Ideas', *Antitrust L.J.*, **69**, 249.

24 See e.g. Stucke and Grunes [2001], Ibid., at p. 253 (noting with dismay that as media consolidation continues apace, 'the issue of antitrust review of the marketplace of ideas is increasingly raised – usually by the press and elected officials rather than by the antitrust agencies'). See also Baker [2002], *supra* Note 19, at 856–60; Shelanski, Howard A., 'Antitrust Law as Mass-Media Regulation: Can Merger Standards Protect the Public Interest?', unpublished work-in-progress, 31 March 2005. For a more general argument that intellectual property law's internal limits on vertical restraints are considerably broader and more important than any imposed externally by antitrust law, see Meurer, Michael J. (2003), 'Vertical Restraints and Intellectual Property Law: Beyond Antitrust', *Minn. L. Rev.*, **87**, 1871.

25 Federal Trade Commission, Statement of Commission Mozelle W. Thompson, *The Proposed Joint Venture Between Sony Corporation of America and Bertelsmann AG*, File No. 041-0054, 28 July 2004, available at: http://www.ftc.gov/os/caselist/0410054/040728mwtstmnt0410054.pdf.

26 Ibid.

27 See Baker [2002], *supra* Note 19, at pp. 902–13; Schiffrin, André (2000), *The Business of Books: How International Conglomerates Took Over Publishing and Changed the Way We Read*, Verso Books; Friedman, Josh and Chuck Philips, 'At Warner Music, Cuts Go Deep', *L.A. Times*, C1, 12 March 2005 (reporting Warner Music's sharp reductions in its artists-and-repertoire budget for new songwriters and unknown acts, while funneling to investors some $1 billion in 'excess cash' and debt offerings).

28 See Rubinfeld and Singer [2001], *supra* Note 22, at pp. 654–70 (concluding that the AOL–Time Warner merger makes both conduit discrimination and content discrimination, including the extreme form of complete foreclosure of rival content and the form of partial foreclosure through increases the cost of accessing rival content, a substantially profitable strategy). See also Waterman, David and Andrew Weiss (1997), *Vertical Integration in Cable Television*, Washington, DC: AEI Press, at pp. 87–101 (demonstrating through econometric analysis that integrated cable television systems tend to favor their affiliated programming, whether by carrying affiliated networks more frequently, pricing them lower, or marketing them more vigorously).

29 See Compaine and Gomery [2000], *supra* Note 19, at pp. 379–80 (discussing motion picture studio motivations for acquiring distribution channels).

30 As a general rule, firms without market power cannot use vertical integration to foreclose competitors. See Posner, Richard A. and Frank H. Easterbrook (1982), *Antitrust* (2d ed.), Saint Paul: West Publishing Company, at p. 870. But this is not the case when the primary (producer) and secondary (distributor) markets are both highly concentrated, as they are in content production and distribution. See US Department of Justice and Federal Trade Commission (1992), *Non-Horizontal Merger Guidelines*, 57 Fed. Reg. 41, 552, available at http://www.usdoj.gov/atr/public/guidelines/2614.htm.

31 For considerably more detailed historical accounts, see Loewenstein, Joseph (2002), *The Author's Due: Printing and the Prehistory of Copyright*, Chicago and London: University of Chicago Press; Rose, Mark (1993), *Authors and Owners: The Invention of Copyright*, Cambridge and London: Harvard University Press, pp. 4–110.

32 See, generally, Ginsburg, Jane C. (2001), 'Copyright and Control over New Technologies of Dissemination', *Colum. L. Rev.*, **101**, 1613; Picker, Randal C. (2002), 'Copyright as Entry Policy: The Case of Digital Distribution', *Antitrust Bull.*, **47**, 423.

33 For further description, see Wu, Timothy (2004), 'Copyright's Communications Policy', *Mich. L. Rev.*, **103**, 278. See also Lessig, Lawrence (2004), *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, New York: Penguin Press, at pp. 53–61.

34 For a brief summary of compulsory licenses and private copying levies in the US and Europe, see Netanel, Neil Weinstock (2003), 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing', *Harv. J. L. & Tech.*, **17**, 1, at pp. 31–35.

35 See Einhorn, Michael A. (2001), 'Intellectual Property and Antitrust: Music Performing Rights in Broadcasting', *Colum.-VLA J.L. & Arts*, **24**, 349 (discussing Rate Court provisions in ASCAP and BMI antitrust consent decrees). In any such proceeding, ASCAP or BMI, as the case may be, bears the burden of establishing the reasonableness of its proposed fee. The ASCAP and BMI antitrust consent decrees have been modified a number of times. For the most recent versions, see *Second Amended Final Judgment*, *United States* v. *Am. Soc'y of Composers, Authors & Publishers*, 2001–2 Trade Cases P 73,474, 2001 Copr.L.Dec. P 28,341 (SDNY 11 June 2001) (NO. 41-1395(WCC); *United States* v. *BMI*, 1996–1 Trade Cases (CCH) 71, 378 (SDNY 1994).

36 For theoretical support, see Halonen-Akatwijuka, Maija and Tobias Regner (October 2004), *Digital Technology and the Allocation of Ownership in the Music Industry*, University of Bristol CMPO Working Paper No. 04/096 (presenting economic models predicting that if unleashed from incumbent control, digital distribution of music would foster new intermediaries and heighten artists' bargaining power and creative control).

37 See e.g. *A&M Records* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (holding that individuals who distribute copyrighted music files through a peer-to-peer network infringe copyright and that Napster was contributorily liable for its users' infringement); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) (supplier of P2P file sharing service held contributorily liable for its users' infringement); *UMG Recordings, Inc.* v. *MP3.com, Inc.*, 92 F. Supp. 2d 349 (SDNY 2000) (holding MP3.com liable for enabling its subscribers to access songs on subscriber-owned CDs via the Internet).

38 As Judge Patel iterated in granting Napster's request for discovery on issues of record label antitrust violations and copyright misuse, 'Even on the undeveloped record before the court, these joint ventures look bad, sound bad, and smell bad'. *In re Napster, Inc.* Copyright Litig., 191 F. Supp. 2d 1087, 1109 (N.D. Cal. 2002).

39 *A&M Records* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

40 For analysis and criticism of antitrust law's current leniency towards the use of intellectual property for vertical foreclosure, see Noll, Roger G. (2004), 'The Conflict over Vertical Foreclosure in Competition Policy and Intellectual Property Law', *J. of Institutional and Theoretical Economics*, **160**, 79.

41 *In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322, 1328–29 (Fed. Cir. 2000).

42 In so holding, the Federal Circuit explicitly rejected the Ninth Circuit's approach, which does allow antitrust plaintiffs to overcome the presumption of validity by showing that the defendant's asserted business justification was merely a pretext for anticompetitive conduct. See *Image Technical Services* v. *Eastman Kodak*, 125 F.3d 1195 (9th Cir. 1997).

43 *Verizon Communications* v. *Trinko*, 540 US 398 (2004). EU competition law generally views vertical restraints considerably more harshly than does US antitrust law. See Cooper, James C., Frieb, Luke M., O'Brien, Daniel P. and Michael Vita (5 April 2005), *A Comparative Study of United States and European Union Approaches to Vertical Policy*, Vanderbilt Law and Economics Research Paper No. 05-11, available at: http://ssrn.com/abstract=699582.

44 Compulsory licensing may also sometimes favor entrenched interests. For example, in compulsory licensing for digitally transmitting sound recordings, incumbent terrestrial

radio broadcasters successfully lobbied Congress and the Copyright Office for more favorable treatment than that accorded to non-radio station-owning webcasters. For discussion of developments through May 2002, see Picker [2002], *supra* Note 32.

45 See e.g. *McConnell* v. *FEC*, 124 S. Ct. 619, 729 (2003) (J. Thomas, dissent) ('The very "purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail".' (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 US 367, 390, 23 L. Ed. 2d 371, 89 S. Ct. 1794 (1969)).

46 *Brown Shoe Co, Inc.* v. *United States*, 370 US 294, 320 (1962) (holding that antitrust injury is to consumers, not competitors); *United States* v. *Microsoft Corp.*, 253 F.3d 34, 58 (DC Cir. 2001) (For a monopolist's act to violate antitrust law, 'it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice'.) European competition law is more protective of competitors *per se* than is its US counterpart. Fox, Eleanor (2000), 'Antitrust and Regulatory Federalism: Races Up, Down, and Sideways', *N.Y.U. L. Rev.*, **75**, 1781, at pp. 1791–92.

47 See *California Dental Association* v. *FTC*, 526 US 756, 775 n. 12, 776–78 (1999) (stating that antitrust should not intervene in absence of empirical evidence of output-limiting effects); *Brooke Group Ltd* v. *Brown & Williamson Tobacco Corp.*, 509 US 209, 224 (1993) (stating that antitrust is not about fairness, and that fact 'that below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured').

48 *United States* v. *Microsoft Corp.*, 253 F.3d 34, 50 (DC Cir. 2001), quoting *United States* v. *Grinnell Corp.*, 384 US 563, 570–71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966).

49 See *Turner Broad. Sys., Inc.* v. *FCC*, 520 US 180, 190 (1997); *FCC* v. *National Citizens Comm. for Broad.*, 436 US 775, 799 (1978).

50 I canvass some of that literature in Netanel, Neil Weinstock (2000), 'Market Hierarchy and Copyright in Our System of Free Expression', *Vanderbilt L. Rev.*, **53**, 1879, at pp. 1894–96. See also Barnett, Jonathan M. (2000), 'Cultivating the Genetic Commons: Imperfect Patent Protection and the Network Model of Innovation', *San Diego L. Rev.*, **37**, 987, at pp. 1022–33 (surveying the debate over Schumpeter's thesis that technological advance proceeds faster under concentrated, or even monopolistic, market conditions); Shelanski, Howard A. (2000), 'Competition and Deployment of New Technology in US Telecommunications', *U. Chi. Legal F.*, **2000**, 85, at pp. 91–97 (surveying the literature and applying it to the question of innovation in the telecommunications industry).

51 See e.g. Gitlin, Todd (1983), *Inside Prime Time*, New York: Pantheon, at p. 208; Sunstein, Cass R. (1993), *Democracy and the Problem of Free Speech*, The Free Press. Cf. Shelanski, *supra* Note 49, at 99–117 (finding that competition was a greater spur to innovation than monopoly in ten empirical studies in the telecommunications industry).

52 See e.g. Yoo, Christopher S. (2000), 'Copyright and Democracy: A Cautionary Note', *Vanderbilt L. Rev.*, **53**, 1879, at p. 1933.

53 Recent supporters of broad, proprietary copyright protection miss this point. See e.g. McGowan, David (2004), 'Why the First Amendment Cannot Dictate Copyright Policy', *U. Pitt. L. Rev.*, **65**, 281, at pp. 317–18; Yoo, Christopher S. (2004), 'Copyright and Product Differentiation', *N.Y.U. L. Rev.*, **79**, 212.

54 Shiffrin, Steven H. (1999), *Dissent, Injustice, and the Meanings of America*, Princeton: Princeton University Press, at p. xi; Shiffrin, Steven H. (1990), *The First Amendment, Democracy, and Romance*, Cambridge: Harvard University Press, at p. 96.

55 See Tushnet, Rebecca (2004), 'Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It', *Yale L. J.*, **114**, 535.

56 Balkin, Jack M. (2004), 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society', *N.Y.U. L. Rev.*, **79**, 1.

57 See De Vany, Arthur and W. David Walls (1996), 'Bose-Einstein Dynamics and Adaptive Contracting in the Motion Picture Industry', *The Economic J.*, **106**, 1493, at pp. 1504–5 (films); Scherer, F.M. (2001), 'The Innovation Lottery', in Dreyfuss, R., Zimmerman, D. and H. First (eds), *Expanding the Boundaries of Intellectual Property; Innovation for the*

Knowledge Society, at p. 12 (bestselling popular music albums and singles). See also Collins, A., Hand, C. and Snell, M.C. (2002), 'What Makes a Blockbuster? Economic Analysis of Film Success in the United Kingdom', *Managerial and Decision Economics*, **23**, 343 (finding power law in film distribution revenues in the UK).

58 See Scherer, *supra* Note 57, at pp. 13–14 (detailing the highly skewed distribution of the record sales of recording artists over a 50-year period and in the number of available recordings of works of classical composers). In the case of successful films, staying power may reflect marketing strategy. Consumer demand for a film is built by word-of-mouth (and reviews) from early viewers. Rather than charging a higher admissions price for films that garner excess consumer demand, and thus risking a decline in the number of people who would see the film in the opening weeks, the motion picture industry maximizes revenue by extending the film's run. See De Vany and Walls, *supra* Note 57, at p. 1511; cf. Becker, Gary S. (1991), 'A Note on Restaurant Pricing and Other Examples of Social Influences on Price', *J. of Political Economy*, **99**, 1109 (noting similar strategy for restaurants, theater owners, and booksellers).

59 See Anderson, Chris (October 2004), 'The Long Tail', *Wired*, Issue 12.10, at http://www.wired.com/wired/archive/12.10/tail.html. If the tail is long enough, aggregate consumer demand for the numerous niche works can even rival demand for the leading blockbusters.

60 See Shirky, Clay (2003), 'Power Laws, Weblogs, and Inequality', *Clay Shirky's Writings About the Internet*, 8 February 2003, at:
http://www.shirky.com/writings/powerlaw_weblog.html.
See also Huberman Bernardo A. and Lada A. Adamic (1999), 'Growth Dynamics of the World-Wide Web', *Nature*, **401**, 131. But see Pennock David M. et al. (2002), 'Winners Don't Take All: Characterizing the Competition for Links on the Web', *PNAS*, 99, 5207 (concluding that although the connectivity distribution over the World Wide Web as a whole is close to a pure power law, the distribution within some specific categories, while still heavily tilted towards the most popular sites, is not quite 'winner-take-all').

61 Information and cultural works share characteristics of 'solidarity' and 'associative' goods. See Netanel, *supra* Note 49, at pp. 1907–09.

62 See Bikhchandani, Sushil et al. (1998), 'Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades', *J. Econ. Perspectives*, **12**, 151.

63 See Baker [2002], *supra* Note 19, at p. 898.

64 Chin, Andrew (2004), 'Antitrust Analysis in Software Product Markets: A First Principles Approach', *Harv. J. Law & Tech*., **18**, 1, at p. 9. See also Hovenkamp, Herbert (1999), *Federal Antitrust Policy: The Law of Competition and Its Practice* (2d ed.), Saint Paul: West Group, p. 133 (deriding the large degree of uncertainty in the market definition formula set forth in the US Department of Justice and Federal Trade Commission 1992 Horizontal Merger Guidelines).

65 See Hovenkamp, Herbert, Janis, Mark D. and Mark A. Lemley (2001), *IP and Antitrust; An Analysis of Antitrust Principles Applied to Intellectual Property Law*, Aspen Law & Business Publishers, p. 4–43.

66 Ibid. See also Motta [2004], *supra* Note 3, at 102.

67 Even this nomenclature is contested. See Kitch, Edmund W. (2000), 'Elementary and Persistent Errors in the Economic Analysis of Intellectual Property', *Vanderbilt L. Rev.*, **53**, 1727, at pp. 1729–38 (contending that copyright is merely a property right, not a monopoly). Ultimately, whether the copyright holder's exclusive rights to exploit a work constitute a narrow monopoly or mere property right is probably a matter of context and semantics. As Richard Epstein points out, 'the concepts of "property right" and "legal monopoly" . . . are different terms with different connotations for the same legal institution'. Epstein, Richard A. (2002), 'The Dubious Constitutionality of the Copyright Term Extension Act', *Loy. L.A. L. Rev.*, **36**, 123, at p. 126. See also Landes and Posner [2003], *supra* Note 2, at pp. 375–78 (contending that Kitch makes the mistake of treating

monopoly and competition as dichotomous rather than viewing market power as a continuum).

68 See United States Dept of Justice and Fed. Trade Commission [1995], *supra* Note 1, §2.2 (positing that even '[i]f a patent or other form of intellectual property does confer market power, that market power does not by itself offend the antitrust laws').

69 In an often-cited speech delivered before the House of Commons in 1841, Thomas Macaulay decried that copyright is 'a tax upon readers for the purpose of giving a bounty to writers'. Macaulay, Thomas Babington, 'Speech Delivered in the House of Commons on the 5th of February, 1841', in Young, G.M. (ed.) (1952), *Macaulay: Prose and Poetry*, at p. 737. In their amicus brief before the Supreme Court in *Eldred* v. *Ashcroft*, seventeen leading economists, including five Nobel laureates, concluded that copyright may impose the social costs and deadweight loss common to monopolies: 'If copyright gives a producer substantial market power, the price may be well above marginal cost, in which case a large number of consumers may be excluded.' Brief of Amici Curiae George A. Akerlof et al., at pp. 10–11, *Eldred* v. *Ashcroft*, 534 US 1126 (2002) (No. 01-618).

70 See Motta [2004], *supra* Note 3, at 115–16; Shapiro, Matthew (April 1987), *Measuring Market Power in US Industry*, National Bureau of Economic Research Working Paper No. 2212.

71 Hovenkamp [1999], *supra* Note 64, at 84. Brand differentiation is not the only factor enabling producers to price above marginal cost. Consumer transportation costs and consumer-producer information asymmetries also play a major role in the ubiquity of supra-marginal cost pricing. See Hanson, Jon D., and Douglas A. Kysar (1999), 'Taking Behavioralism Seriously: Some Evidence of Market Manipulation', *Harv. L. Rev*., **112**, 1420, at pp. 1429–39; Kuttner, Robert (1999), *Everything for Sale: The Virtues and Limits of Markets* (2d ed.), Chicago: University of Chicago Press, at pp. 13–14; Landes & Posner [2003], *supra* Note 2, at p. 378.

72 See Baumol William J. and Daniel G. Swanson (2003), 'The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power', *Antitrust L. J.*, **70**, 661, at p. 662 (demonstrating that 'scale economies in general, and repeated sunk costs in particular, force firms in affected industries, if they operate in competitive markets, to adopt prices that are discriminatory and exceed marginal costs'); Levine, Michael E. (2002), 'Price Discrimination Without Market Power', *Yale J. on Reg.*, **19**, 1, at pp. 13–20 (contending that price discrimination, including supra-marginal cost pricing, is a necessity for firm survival in competitive markets involving the provision of goods or services that entail substantial common costs).

73 Ibid. at p. 671.

74 More precisely, normal profits are those in which the firm's return on investments of capital and labor equals total opportunity cost. See Abramowicz, Michael (2004), 'An Industrial Organization Approach to Copyright Law', *Wm. & Mary L. Rev*. **46**, 33, at p. 51.

75 For an attempt to sidestep this problem, see Edlin and Rubenfeld [2004], *supra* Note 18, at 142–44 (using pricing of non-profit journal publishers as a benchmark for measuring the market power of for-profit publishers).

76 See e.g. Edlin and Rubenfeld [2004], *supra* Note 18, at 142–44 (concluding that the large publishers that dominate the market for commercial scientific journals have accumulated and exercised substantial power over price).

77 Polk Wagner argues that according copyright holders broad proprietary control will create incentives for the production of additional near substitutes, thus reducing copyright holders' pricing power. Wagner, Polk (2003), 'Information Wants to be Free: Intellectual Property and the Mythologies of Control', *Colum. L. Rev*., **103**, 995, at p. 1028. Professor Wagner misses the point that there are no near substitutes for our most salient, iconic works, particularly for speakers who wish to creatively appropriate mainstream expression with high symbolic potency or draw upon the expression that most resonates with their intended audience.

78 See Netanel, (forthcoming 2005), *supra* Note 8.

79 See Baumol and Swanson, *supra* Note 72, at p. 675 (maintaining that under competitive conditions, in markets with scale economies, firms will normally have to price discriminate in order to break even, and thus implying that such firms are able to refrain from price discrimination only when they have market power). But cf. Posner, *supra* Note 3, at p. 932, Note 10 (noting that 'imperfect price discrimination can result in lower or higher output than under competition, or the same output').

80 See Noll, Roger G. (May 2002), *Resolving Policy Chaos in High Speed Internet Access*, Stanford Institute for Economic Policy Research Discussion Paper No. 01-13, http://papers.ssrn.com/paper.taf?abstract_id311900.

81 See Duffy, John F. (2005), 'Intellectual Property Isolationism and the Positive-Negative Externalities Thesis', *Texas L. Rev*., **83**, 1077, at pp. 1078–79.

82 For further discussion of copyright's qualitative import, with particular reference to copyright holders' ability to price discriminate, see Cohen, Julie E. (2000), 'Copyright and the Perfect Curve', *Vanderbilt L. Rev*., **53**, 1799, at pp. 1808–14.

83 See Abramowicz [2004], *supra* Note 74, at pp. 45–68.

84 *Campbell* v. *Acuff-Rose Music, Inc.*, 510 US 569, 578 n. 10 (1994) (quoting Leval, Pierre N. (1990), 'Toward a Fair Use Standard', *Harv. L. Rev.*, **103**, 1105, at p. 1134). The Supreme Court reiterated this point in *New York Times* v. *Tasini*, 429 US 298 (2001).

85 Ibid (quoting Leval, *supra* Note 84, at p. 1132).

86 Ibid. at p. 1277.

87 European Commission of Human Rights, 15 January 1997, Case 30262/96.

88 In a similar case, in which the estate of Maurice Utrillo, owner of the copyright in twelve paintings included in a two-minute television news broadcast about a Utrillo exhibition, sued the broadcaster for copyright infringment, the French Supreme Court (Cour de Cassation) was less solicitous of freedom of speech. It rejected the broadcaster's Article 10 defense, holding that the French legislature had already provided for free speech protection in the exceptions to the author's exclusive rights set forth in France's Intellectual Property Code. *Fabris* v. *France 2*, Cour de Cassation, 1st Civil Chamber, 13 November 2003.

89 3 W.L.R. 1368 (2001).

90 Ibid., ¶ 82.

91 Ibid., ¶ 83.

92 See Netanel [2003], *supra* Note 34.

93 See Rubenfeld, Jed (2002), 'The Freedom of the Imagination: Copyright's Constitutionality', *Yale L. J.*, **112**, 1.

94 The literature on open architecture and modularity in telecommunications, while generally phrased in terms of whether a multiplicity of independent producers best serves innovation policy, may also illuminate the issue of the need for copyright to ensure a multiplicity of speakers. On modularity in telecommunications, see generally Farrell, Joseph and Philip J. Weiser (2003), 'Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age', *Harv. J. L. & Tech*, **17**, 85.