It's All About Control: Rethinking Copyright in the New Information Landscape

_Niva Elkin-Koren_

Introduction

Copyright law became popular at the turn of the 21st century. The heavy news coverage of the Napster case was the peak of a process that turned copyright law from a relatively exotic legal discipline practiced by a limited group of experts into a subject of vigorous public debate regarding the future of content industries in the digital online age.

The copyright story, which emerges from this public debate, is the official story told by the courts and the literature; that is the "incentive paradigm". Copyright law, we are told, must secure incentives for potential creators to assure their continuous investment in the creation of copyrighted works. We are further told that it would be unfair to rip off the revenues produced by works and deprive creators from their just compensation.

Yet, a closer look at recent copyright disputes and legislative amendments reveals a different story. While the public debate over copyright issues focuses on remuneration, "just compensation" and pirating, the overall effect of the new copyright regime on the information environment is often overlooked. To fully appreciate the ramifications of recent copyright developments, one must examine the larger picture and look at some characteristics of the information age. In this context two observations are due: the first has to do with the nature of competition in the new information markets, and the second relates to the central role of information in the information society.

In the new information economy entry barriers are lower and market power is no longer measured by ownership of tangible goods. Furthermore, the potentially

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decentralized nature of online information markets increases pressure on the legal system to produce means of market control. In the absence of a central bottleneck in the infrastructure, market players increasingly rely on legal rights for exercising control over information markets and protecting market domination. Intellectual property laws have turned out to be a major means of expanding market power, reducing competition and concentrating control over production and distribution of information. Copyright law in recent years became a vehicle of control, and copyrights are being claimed for accomplishing strategic ends.

At the same time, however, information became more central to the human experience. The information society is characterized by an increasing significance of representations. Many basic human experiences, such as learning and transacting, turn out to be information processing. Social interactions are turned into information exchanges on email, chats, and online portals. Informational works, including entertainment products, computer programs, and data, occupy an increased share of overall consumption. Furthermore, we no longer consume merely commodities, but also representations such as images, labels, and signs. Representations are the very element of culture and affect processes of constructing identities, ideologies and meaning.

So, while copyright laws are increasingly exercised to gain control over diffused information markets, and the copyright regime is providing more powerful means of control, this body of law becomes relevant to many aspects of life in the information age and could affect individual autonomy and freedom.

Robust copyrights facilitate the turning of the public sphere into a concentrated market for goods dominated by economic conglomerates. I argue that such a process could be detrimental to democracy. Turning the public sphere into a concentrated marketplace could limit opportunities for meaningful participation in social dialogue, and could restrict freedom and autonomy. By strengthening commercialization and concentration of the market for content, this process may also produce alienation and weaken civic virtue.

This paper examines how the new copyright regime structures the information markets, and how this economic structure may affect the tenets of democracy. Focusing on copyright law as a market control mechanism may disclose what we are missing by using the property discourse in the context of copyright debates. It may also help us better understand the interconnection between copyright law and other laws affecting the exploitation of market power, such as antitrust laws. The paper begins by demonstrating how copyright law has served in recent years to centralize control over the information market. After briefly discussing the new role undertaken by copyright law in the information economy, I turn to discuss the ramifications for democracy. I examine whether such an information market could provide an adequate basis for a democratic public discourse: how does the “information market” shaped by copyright affect our freedom and autonomy? How does it affect our ability to participate in democratic life? And what effects does it have on civic virtue?
I. The New Copyright Regime

It is not by coincidence that copyright law has become the main focus of many of the legal battles among businesses that seek to build up their dominating position in emerging markets of electronic commerce. In retrospect, what we have been witnessing in the copyright arena in recent years seems inevitable. The increased pressure on legislators, both domestically and internationally, to expand copyright and the intensive litigation and legalization of electronic commerce seem to be necessary outcomes of the information economy.

The 'information economy' transformed the meaning of market power. Economic power is no longer based on possessing and controlling tangible assets, but is increasingly defined in terms of control over the production and distribution of information. Consequently, it is only natural that competition in the market for content is focused on gaining control over production and distribution of cultural artifacts. Market players seek to control decisions regarding which works would be produced, in what format, when, where and how these works would become available to the public. Copyright laws provide a set of exclusive rights allowing owners to restrict potentially competitive behaviors; and they therefore become essential.

In the past, control over distribution channels (such as television stations or motion picture studios) was central for acquiring control over content. Whoever controlled the production of copies and distribution channels could precondition distribution in the assignment of intellectual property rights. Furthermore, the high costs involved in producing copies and maintaining distribution channels resulted in a relatively concentrated information market governed by few publishers and distributors. Mass production of records or books required large-scale industrial enterprises.

Information flow over the Internet is decentralized and adheres to a different

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3 Ronald V. Bettig, Copyrighting Culture, The Political Economy of Intellectual Property, p. 36 (1996) (arguing that capitalists seek to eliminate competition in order to reduce the costs and risks that competition engenders).
4 Thus, musicians who sought to distribute their music on records or compact discs were dependent on recording companies and were often required to assign their copyright to the recording company. Similarly, authors were required to assign their rights to publishers.
set of economic rules. Technically anyone can post their content and make it available through various channels independently of music producers or large publishers. Entry barriers are presumably lower. The Internet is a highly dispersed communication network with live competition among various means of access such as telephone lines, cables, cellular and satellite networks. In the absence of a central bottleneck in the infrastructure, the significance of control over the content via copyright laws is growing.

The potentially decentralized nature of the Internet further increases pressure on the legal system to produce means of market control. The increased pressure to expand copyright law resulted in robust copyrights. Copyright law has become more pervasive as it was stretched to cover more behaviors and regulate more aspects of our use of informational goods. Heavy pressure from the content industry resulted in the anti-circumvention provisions in the 1996 Geneva Internet Treaties. Similar pressure on the U.S. Congress led to the enactment of the Digital Millenium Copyright Act (DMCA) in 1998. The anti-circumvention legislation expands the coverage of copyright law beyond the set of exclusive rights defined by standard copyright legislation. It introduces novel rights related to copyright management systems, allowing rightholders to act against any competing technology. The DMCA prohibits the development, manufacturing and distribution of technologies designed to circumvent protection measures employed by rightholders to control access to information distributed digitally. Thus the privileged status awarded to copyright management systems under the DMCA gives rightholders much stronger legal protection than the rights they held under traditional copyright regime. Moreover, copyright management systems are self-enforced and therefore are free of any legal scrutiny. Once adopted by a rightholder, these technological self-help means are no longer vulnerable to circumventing technologies because these technologies are now prohibited by law.

Copyright law not only covers new practices to which it was previously irrelevant, but it also regulates the behavior of an increasing number of individuals.

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5 Not only the costs of distribution are significantly low, but also the costs of production are going down. Indeed, the production of content still involves the high cost of human skills, but means of production are cheaper than they used to be. It is no longer necessary to own a high-tech studio, for instance, in order to record a song. The necessary equipment is now more widely available, and at a reasonable price.


7 In the U.S. these include the exclusive right of reproduction, the right to make derivative works, the right of public performance and public display, and the right of public distribution. 17 U.S.C. § 106.

8 See Pamela Samuelson, “The Copyright Grab”, Wired, 4.01, 1996.
and small businesses.\textsuperscript{9} Since potential threats to commercial interests are increasingly posed by individual users rather than exclusively by competitors, \textit{enforcement} efforts are also directed at a large number of users involved in the production and distribution of content over the Internet.

In recent years there is also an increased displacement of copyright law by other common law doctrines such as contract law. Copyright laws provide the legal infrastructure to control the use of information upon which private mechanisms are built. Contracts are employed to restrict or prohibit altogether certain uses of the work that are otherwise permissible under copyright law.\textsuperscript{10} The enforceability of automated contracts is still uncertain, and there are conflicting authorities on this matter.\textsuperscript{11} Other legal doctrine such as unfair competition, misappropriation and, recently, trespass to chattel are gaining an increasing importance.\textsuperscript{12}

Copyright law had always facilitated the commercialization of culture by enabling rightsholders to circulate copies of their works for a fee. Yet, information was never turned into a perfect commodity, and the law allowed owners to control only a limited number of uses.\textsuperscript{13} What we witness in recent years is the turning of

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\item The latter is due to the nature of e-commerce. E-commerce involves information processing and informational goods. Consider for instance a retail store that engages in selling clothing fashions off-line. This would rarely involve any intellectual property questions (often dealt with by the PR company). By contrast, operating a website would involve creating content (such as interfaces or product presentations) using various computer programs to execute the transaction (processing orders, billing, and sometimes the delivery itself such as in the case of information products that are downloaded directly from a website), and facilitating content created by others (such as messages and materials posted by customers on public forums).
\item For instance, a contractual provision may limit the use of mere data (such as search results of a search engine or listings of entertainment shows) that may not be copyrighted. \textit{Fest Publications v. Rural Tel. Services Co.}, 499 U.S. 340 (1991).
\item Several courts rejected the enforceability of such license. See \textit{Ticketmaster Corp. v. Tickets.com, Inc.}, 2000 U.S. Dist. LEXIS 4553 (2000) (holding that terms of use posted on a homepage, which prohibited commercial use of plaintiff's information, do not create a contract with anyone using the website), \textit{Spex v. Netscape Communications Corp.}, 2001 U.S. Dist. Lexis 9073 (distinguishing between "shrink-wrap licenses", "click-wrap licenses" and "browse-wrap licenses", and holding that while the first two could be enforceable browse-wrap licensing is not). Other courts, however, found such posted terms to constitute an enforceable contract. See \textit{Register.com, Inc. v. Verio, Inc.}, 2000 U.S. Dist. Lexis 18846 (holding that defendant manifested its assent to be bound by the terms of use posted on plaintiff's website by proceeding to submit a WHO IS query). See also \textit{Carpi v. Microsoft Network, L.L.C.}, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999) (holding that a choice of forum clause in a click-on agreement was enforceable). Finally, state legislation adopting the Uniform Computer Information Transaction Act ("UCITA") facilitates the enforcement of such contracts.
\item \textit{eBay, Inc. v. Bidder's Edge, Inc.}, 100 F. Supp. 2d 1059 (N.D. Cal. 2000) (holding that conducting automated searches by defendant on eBay's website without permission constituted trespass to chattel).
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information into a perfect commodity, granting rightholders a set of powerful legal rights to control every access and use of such information.

The legal regime is thus transformed from a relatively narrow set of rights necessary to guarantee incentives to create new works, into a claim for the protection of owners' expectations to maximize their profits and utilize every economic potential related to their work. If copyright law had once created islands of information, which are subject to the sovereign control of copyright owners, these islands are now turning into a continent leaving little available space in between. Copyright law thus becomes a very powerful means for accumulating control.

II. Strategic Use of Copyrights: It's All About Control

As the official copyright story tells us, copyright laws are about royalties. The law seeks to protect owners' expectations of selling copies in the market and of making a return on their investment. Copyright law has done so by turning works of art (a movie, play, or musical title) into an asset that could be sold in the marketplace. The mechanism for securing royalties under the copyright paradigm is therefore based on property law principles. Rightholders are granted a set of exclusive rights, and the state intervenes by injunction to protect the holder from an involuntary transfer. Consequently, license of use can materialize only through voluntary transactions.

Entitlement to compensation is independent, of course, of the method by which such entitlement ought to be protected. Property methods, rather than the compensation itself, enable concentration in the information market and make commodification of information so risky. Increasingly, copyrights are being used as a strategic corporate asset allowing content providers to increase barriers on entry (that are otherwise low) and reduce the risks of competition. The new copyright regime allows rightholders to expand their market power and accumulate control over the production and circulation of information.

Control rather than remuneration becomes the focus of legal disputes concerning copyright. Copyright law is exercised to gain control over how content becomes available to the public. Recent cases demonstrate the nature of control battles in information markets and the strategic use of copyright law by

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rightholders to protect their dominating market status. Such control is significant for keeping a competitive lead in traditional information markets, and for reducing competition in emerging online markets. Control over the production, circulation and adoption of representations is also crucial, however, for democracy. Centralized decision-making power in information markets could affect what is made available for reception and reinterpretation by the public. Examining these legal disputes from the perspective of control may therefore highlight some ramifications of the current pervasive copyright regime.

CONTROLLING THE DISTRIBUTION CHANNELS: WHO DECIDES WHAT TO DISTRIBUTE AND WHEN?

Control over distribution channels is a major concern in the content market. For rightholders it is essential to maintain control over decisions as to when and how content is to be delivered. While the capacity to administer supply and demand is always valuable for gaining market domination, this is particularly significant for content in the information market. The market for content lacks rigid demand, and all releases are competing for the scarce attention of the audience. Consequently, rightholders must exercise control over the number of releases, the timing of shows, and the frequency in which access to content becomes available.

Newcomers who introduced new online distribution methods have threatened the dominating position of traditional players. Consequently, copyright laws are increasingly employed to prevent newcomers from entering the market. Many of the copyright suits during the end of the 90s and the beginning of the 21st century were initiated by major rightholders, such as the Motion Picture Association and the Recording Industry Association of America. This legal campaign for copyright enforcement was not so much about remuneration, but rather focused on controlling new distribution methods. Analyzing the legal campaign launched by the major rightholders demonstrates these strategic goals.

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Internet streaming

The conflict over Internet retransmission of television broadcasts is one example. Simultaneous retransmission of television programs apparently doesn’t compromise revenues in existing markets. Broadcasters derive revenues from selling show time to advertisers, where the selling price pretty much depends on the size of the intended audience. In fact, when the expected audience of a television program is larger, the price would arguably be higher.\textsuperscript{18} Therefore, when retransmission expands the rating for television programs, broadcasters suffer no direct monetary harm and have no reason to object to retransmission other than for strategic purposes.

Internet streaming allows the delivery of television programs to Internet users. iCraveTV.com offered its users the option of viewing their favorite television programs over the net.\textsuperscript{19} The service captured the broadcasts off the air, digitized them and made them available to users by streaming. Access to the service was limited to Canadians only (identified by their telephone area code), namely, the intended receivers of the original, off the air broadcasts.\textsuperscript{20}

The Motion Picture Association filed a suit against iCraveTV.com claiming that it violates their exclusive right of public performance under copyright law and that Internet streaming must be subject to authorization. Rightsholders further alleged that since iCraveTV.com is available worldwide it interferes with their licensing schemes, which require that programs be licensed separately in many local markets. The court granted a preliminary injunction and a temporary restraining order, holding that iCraveTV.com operation infringed upon MPA members’ copyright.\textsuperscript{21}

The issue at stake was not remuneration. It went beyond an attempt to simply capture a share in the benefits made available by new technologies. In fact iCraveTV.com offered to pay the copyright fees and did not deny that rightsholders should be paid for their works. At stake was control over Internet streaming of TV signals, and whether those could be picked up without authorization and retransmitted over the net. Even though the movie studios didn’t suffer an

\textsuperscript{15} For further discussion of this standard business model of broadcasting see Michael Botein, Regulation of the Electronic Mass Media Law and Policy for Radio, Television, Cable and the New Video Technologies, p. 11 (3d ed., 1998); For a review of alternative business models see McQuail & Windahl, supra note 2.

\textsuperscript{19} The business model for iCraveTV.com was based on selling advertisements on banners that appeared on the screen simultaneously with the copyrighted programs that were being streamed.

\textsuperscript{20} The court found that the system could be easily circumvented and allow access to non-Canadian viewers. This should not have changed the legal analysis. If infringing nature of the service was based merely on its potential to allow transmission outside the region, then the court could have authorized the service contingent upon an upgraded security system.

\textsuperscript{21} Twentieth Century Fox Film Corp. v. icraveTV, 2000 U.S. Dist. Lexis 11670. iCraveTV.com has since reached a settlement and has ceased its streaming service.
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immediate loss, they sought to maintain their decision-making power over the distribution of their works: at what timing, in what format, and in which context their works may be made available to the public. Internet streaming offers a whole new range of business opportunities that challenge existing licensing schemes and allow international coverage, interactivity and customization. Rightholders sought to govern this new distribution method.²²

Interestingly, retransmission by cable operators was also controversial during the 1970s and 1980s. U.S. copyright holders similarly claimed that such retransmission is pirated and interferes with the owners' rights to authorize use of their works. However, that controversy was resolved differently. Although simultaneous retransmission of broadcast was not subject to royalties until January 1978, under the 1976 Copyright Act it was eventually subject to a compulsory licensing system, which successfully separated remuneration and control.²³

New distribution methods do not always replace the more traditional types of distribution and uses. Often such methods are expanding the overall market, introducing a wider range of available uses for each particular content. Some legal disputes thus focus on whether rightholders are legally entitled to control such new distribution methods.

The RIAA launched a series of lawsuits against online distributors who facilitated

²² Cellular transmission (cellecast) of Internet content through cellular phones raises similar issues. Should it be considered an extension of Internet circulation or does it constitute retransmission? In CNN, L.P. v. GOSMS, Inc., 2000 U.S. Dist. Lexis 16156 CNN filed a suit against GOSMS for allowing its users to receive information from the Internet on various devices such as mobile telephones and computers. GOSMS offers Short Messages Service to users of cellular companies, allowing them to define the scope of their interest (i.e., NBA news, cellular technology, NASDAQ, world news). GOSMS converts the selected content into a short message that strips the content of all non-text material, such as advertisements and graphics. Plaintiff argued that while doing so, GOSMS has copied the trademark and copyrighted content from plaintiffs' websites. The court found that the plaintiffs' allegations were insufficient to plead direct copyright or trademark infringement or either contributory infringement or vicarious liability.

²³ See 17 U.S.C. sec. 111 (subjecting cable operators to compulsory copyright fees). The courts first viewed cable systems as passive intermediaries and found their service was not a "performance for profit". See Fortnightly Corp. v. United Artists Televison, Inc., 392 U.S. 26, 401 (1968). Thus, cables could carry broadcast programming without obtaining permission from the copyright owners. See Botein, supra note 18 at 401–404; Donald E. Lively, Modern Communication Law, p. 161 (1991).

It is interesting to note that retransmission by Canadian cable operators was also controversial during the 1980s. U.S. copyright holders similarly claimed that such retransmission is pirated and interferes with the owner's rights to authorize use of their works. As part of the U.S-Canada Free Trade Agreement (Jan. 1989), the Canadian law was amended subjecting retransmission to a compulsory licensing system similar to the U.S. law. See Copyright Act Retransmission, R.S.C. 1985, c. C-42, sec. 31 (stating that retransmission of signals is not an infringement of copyright if the signal is local or distant; the retransmission is lawful under the Broadcasting Act, The signal is transmitted simultaneously and is permitted under the laws of Canada; and in the case of distant signal - the retransmitted has paid royalties and complied with any terms and conditions fixed under the act).
access to recorded music in MP3 format. In UMG Recording, Inc. v. MP3.COM, Inc., the RIAA sought to stop streaming of music over the Internet by services such as those offered by MP3.com. The MY.MP3.com service allowed owners of CDs to store and listen to recorded music contained on their CDs from any place where they have Internet connection. The new service did not rip off the charges collected by the record companies and did not threaten to reduce the profitability of existing plaintiff's markets. MP3.com compiled its library of sound recordings by legally acquiring CDs. Furthermore, the service was made available to subscribers who already had a CD version of the recording, and sought to listen to their music via the Internet. Consequently, the service did not substitute the purchasing of CDs, but simply offered new ways for utilizing the purchased copies. The record companies were therefore able to collect compensations for the use by individual consumers. They further collected compensation from MP3.com, which had purchased the CDs to create the digital library. Nevertheless, the court enjoined the service, holding that unless authorized, it infringes the copyright of copyright holders.

**Acquiring control over peer-to-peer distribution**

Peer-to-peer is the sharing of computer resources and services by direct exchange between computer systems. This architecture takes advantage of existing desktop computing power and networking connectivity. P2P networks can eliminate the need for servers and considerably enhance the efficient use of network resources. Peer-to-peer and file-sharing technologies have become increasingly popular. These distribution methods are decentralized, and allow direct exchange of content among members of online communities. They do not require central management and control. Control in such networks is diffused, and therefore gaining market domination is getting tricky. Such methods are challenging existing business models in the content market.

The effectiveness of copyright law for attaining exclusive control over

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25 Subscribers were required to either purchase a CD from MP3.com affiliated online retailers, or verify possession of a CD through the "Beam-it Service"; inserting a copy of the relevant CD into the computer CD-Rom drive for a few seconds. The fact that there might be users who didn't purchase their disks but rather copied them is irrelevant to the service provided by MP3.com. Copying of such disks is not made available by MP3.com service. This situation may be analogous to users who counterfeit a license to convince a distributor that they are authorized to use a computer program.
26 The court refused to consider such positive impact on plaintiffs’ market, holding that: "[a]ny allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted work." UMG Recording, Inc. 92 F. Supp. 2d at 352.
distribution channels was evident in the legal campaign held by leading rightholders associations against file-sharing services. The most notable example is the Napster case. Napster designed and operated a system that permits the transmission and retention of sound recordings employing digital technology. Napster facilitated the transmission of MP3 files among its users, using the P2P file sharing process. Users of Napster made available MP3 music files stored on their individual computer hard drives for copying by other Napster users. Napster further allowed searching for MP3 music files stored on other users' computers and transferring these files from one computer to another via the Internet. Napster was sued for contributory and vicarious copyright infringement.28

In A&M Records, Inc. v. Napster, Inc.29 the district court issued a preliminary injunction enjoining Napster "from engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings, protected by either federal or state law, without express permission of the rights owner." The Court of Appeals for the Ninth Circuit affirmed in part the district court decision.30 The court found sufficient evidence of contributory infringement for the purpose of preliminary injunction, holding that Napster's peer-to-peer file sharing service facilitated the direct infringement committed by its users. The court found that Napster had actual knowledge that specific infringing materials are available throughout its system, and that although it could block access to suppliers of such materials, it refused to do so.31 Rejecting Napster's defense that its users engaged in fair use, the court held that retransmitting an entire copyrighted work in a different medium is not deemed a fair use. The court reasoned that repeated downloading of music files by individual users was commercial since it was made to save the expense of purchasing authorized copies. The court found that copying by Napster's users not only harmed plaintiffs' CD sales, but also had a "deleterious effect on the present and future digital download market", thus holding the fourth fair use factor, the effect of the use on the market, to weigh against fair use.32 Similar suits have been filed against other operators of file sharing services.33

28 A&M Records, Inc. v. Napster, Inc. 239 F. 3d 1004, 1010–1011 (9th Cir. 2001).
30 A&M Records, Inc. 239 F. 3d, at 1011, 1029.
31 The court found that the "mere existence of the Napster system, absent actual notice, and Napster's demonstrated failure to remove the offending materials, is insufficient to impose contributory liability." The court held that contributory liability may only be imposed to the extent Napster "1) receives reasonable knowledge of specific infringing files containing copyrighted 2) knows or should know such files are available on the system, and 3) fails to act to prevent viral distribution of the works." A&M Records, Inc., id. at 1027.
32 The court further held that "lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets." A&M Records, Inc., id. at 1017.
33 See Twentieth Century Fox Film Corp. v. Scour, Inc. (MPAA sued Scour, Inc. for its Exchange service which enabled users to find and download music, image and video files. Scour Inc.
Hyperlinks

Hyperlinks constitute a fundamental part of the Internet infrastructure and are shaping the decentralized nature of online information flow. Content can be stored and posted by various providers, sometimes outside the jurisdiction, and accessed by users through various paths and in various contexts. It should therefore come as no surprise that the legality of links was contested in copyright litigation. If popular portals or Internet locating tools could be held liable for materials posted on the linked destination site, this could effectively reduce diffusion of information and strengthen the ability of rightholders to efficiently supervise online distribution channels.

Liability for links to infringing materials was the focus of a legal dispute between RIAA and MP3Board.com. The MP3Board.com website provides access to various search engines and indexing programs and posts lists of hypertext links automatically generated by search engines as a response to an inquiry entered by a user. The links refer users to publicly accessible websites on the World Wide Web, which post music files or other materials related to music. In Intellectual Reserve, Inc. v. Utah Lighthouse Ministry Inc. the court held that the defendant could be liable for referring its users to sites containing allegedly infringing materials, under the doctrine of contributory infringement.

Rightholders further succeeded in establishing that linking to circumventing means might be prohibited under the DMCA. Defendants in Universal City Studios v. Reimerdes posted links to a computer program that allowed circumventing the DVD encryption scheme ("DeCSS"). The court enjoined defendants from linking to copies of the DeCSS posted on other sites, holding that...
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defendants' linking was the "functional equivalent" of actual posting.\textsuperscript{37} The court recognized that exposing people to liability for linking under the DMCA could have a chilling effect, and therefore applied a high standard of culpability. It held that an essential element of trafficking is "a desire to bring about the dissemination".\textsuperscript{38} Under this standard, liability for links would require proof of intent and knowledge that the link was made to a circumvention device, by clear and convincing evidence. The court concluded, however, that even if linked sites offer additional content, linking could still be enjoined if defendants' main purpose was to provide the circumventing software to their users.

The overall effect of the recent line of cases significantly expands the ability of rightholders to control online distribution channels. It subjects emerging distribution methods to the exclusive discretion of copyright owners, who are free to determine whether a license is granted or refused, under what terms and conditions, and in what circumstances.

There is nothing new in the interpretation of copyright as comprising of a right to protect current markets, including the capacity to refuse licensing altogether.\textsuperscript{39} Yet, in the wake of online global distribution channels and the pervasiveness of copyrights under DMCA and common law doctrines, this approach should be reconsidered. Such robust rights allow rightholders to significantly reduce competition in the market for content, and thereby preserve their dominating role. It thus facilitates concentration in the information market.

Controlling the Format to Govern Access

While in the past, control over distribution channels facilitated control over copyrights, it is now possible to accumulate control over distribution means through the copyright system.

Consider the DVD case for instance.\textsuperscript{40} The DVD (Digital Versatile Disk) allows the distribution of full motion picture on a disk. DVDs are distributed in an encrypted form called CSS (Content Scrambling System), which is designed to prevent copying of the DVD. The CSS is an encryption-based security system that

\textsuperscript{37} Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 325 (S.D. N.Y. 2000).
\textsuperscript{38} Universal City Studios, Inc., id. at 341.
\textsuperscript{39} See Stewart v. Abend, 495 U.S. 207, 228–229 (1990) (the Copyright Act grants a copyright owner "the capacity arbitrarily to refuse to license one who seeks to exploit the work"). See also, UMG Recording, Inc., 92 F. Supp. 2d. at 352 (holding that the exclusive rights of a copyright holder includes the right "to curb the development of such derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable").
\textsuperscript{40} The attempt to impede the market penetration of MP3 format for music files provides another example. Recording Industry Association of America v. Diamond Multimedia Systems, Inc., 180 F.3d 1072 (9 Cir. 1999).

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requires the use of specific hardware (DVD player or computer DVD drive) to decrypt, unscramble and play back copies of the motion picture on DVDs. The key that is installed on the DVD becomes operative if it is accessed by an algorithm licensed by the DVD Copy Control Association (CCA) and installed in DVD players or in various programs available for PCs. DeCSS is a computer program that emulates the CSS algorithm, which operates the “key” and thus enables users to play a DVD even in the absence of the CSS algorithm. In fact, it allows a non-CSS-Compliant DVD player to play copies with DVD content.

Several international producers and distributors of films, television programs, and home videos filed a suit against a number of distributors of DeCSS under the anti-circumvention provisions of the DMCA. In Universal City Studios v. Reimerdes41 (the “DVD case”) the court granted a preliminary injunction ordering the defendants to remove all copies of DeCSS from their websites. The court held that CSS is a technological measure limiting the users’ ability to make unauthorized copies of DVDs, and that the DeCSS is a circumventing device within the language of the DMCA.42

The DVD Copy Control Association further filed a compliant in a California court against 72 defendants, some of whom were unnamed. The complaint asserted that the creator of the DeCSS violated the terms of a clickwrap license that prohibit reverse engineering and the disclosure of trade secrets embodied in the CSS. The court was therefore asked to enjoin the defendants from posting, disclosing or distributing the DeCSS. The court accepted CCA’s argument that CSS was a reverse engineered in violation of CSS license and that the trade secrets embodied in CSS were obtained unlawfully.43 The California State Appeals Court reversed, holding that the DeCSS is “pure speech” and therefore the preliminary injunction violated the defendant’s First Amendment rights.

The DVD case of course begs for a comparison with another challenge posed by technology to the motion pictures industry about 20 years ago. The challenges posed by the DeCSS to the DVD are pretty much the same as those presented by the VCR concerning domination of the motion picture industry during the 1980s. In the DVD case the Motion Picture Association (MPA) claimed that it was struggling for its survival in the digital world. It was further claimed that if DeCSS were to be allowed, it would destroy the home distribution of films and would severely injure the movie industry. These exact claims were raised by the movie industry when the VCR was introduced and was challenged by the studios in the

42 17 U.S.C § 1201(a)(2).
Sony case. A comparison of the two legal regimes, under which these two cases were litigated, highlights the extent to which copyright law has become a pervasive means of control.

In Sony, as in the DVD case, the Hollywood studios were fighting a device that allowed copying, some of which may have been infringing on the studios' copyrights while other types of copying probably not. Circumventing devices are blind to usage. They may be used for various purposes. Copyright law does not prohibit all copying. It incorporates checks and balances by recognizing instances in which copying may be privileged.

Under the DMCA once an owner employs a technical device for controlling access to their work, the law prohibits developing and distributing any devices that would allow access by avoiding such technological protection. In other words, the DMCA allows owners to control access to their works regardless of the scope of their copyright.

The fact that protection devices (CSS) were employed by studios is insignificant under traditional copyright law. Let us assume that in the Sony case, studios were able to employ encryption for broadcasting, making sure that no film could be recorded by VCR, and that VCRs were equipped to decrypt such security measures. This would not have changed the outcome in the Sony case – the reason being that Sony was litigated under copyright law. In the case of Sony, the court identified a legitimate use for the VCR, namely copying by television viewers for time shifting. Such use, the Court held, constitutes fair use and therefore Sony could not be liable for contributory infringement merely by making VCRs available to the public. In the DVD case the court refused to consider the fair use of the DeCSS, holding that fair use is not available under the DMCA. The DMCA, as interpreted by the court, not only provides new powerful rights, but also lacks the checks and balances of copyright law.

One of the claims raised by the defendants was that DeCSS allows users to make use of a legitimate copy of a DVD on operating systems such as Linux, which are not authorized by the rightholders. This claim was dismissed by the court, even though it is a claim of great importance. If all DVDs are protected so that they require a key-player, and that key-player is only available under the Windows operating system – then rightholders obtain the right to control not only the use of their works, but also the devices by which their works are accessed and distributed.

The motion picture industry tried to exercise its copyright to gain control over distribution in the past. Yet rightholders were never equipped with equivalent robust copyrights. The outcome of the DVD case demonstrates that rightholders

45 Universal City Studios, Inc., 111 F. Supp. 2d, at 319 [The court states that even if this claim is true (and that is questionable – p. 311, footnote 79) defendant is still responsible under the DMCA].
can now limit access to content, and subject it to whatever restrictions they choose. They are able to use contracts and also technological measures for this purpose. The law enforces this choice and protects it. Rightsholders can control the format in which their work is distributed and the hardware on which it is to be played. They are therefore able to control how the work is being used outside the relatively narrow scope of exclusive rights granted to them under copyright law.

When rightsholders govern the format of the work they are able to control what individuals can do with cultural texts. They can determine whether individuals can only passively consume cultural artifacts or whether they could actively use the texts and adopt them to reflect their own agenda. When individuals can use artistic works in a context of their choice, and adopt it to reflect their own agenda, they are able to contest the original meaning attached to it. Copies detached from their original context could be experienced (heard, read, watched) differently and allow individuals to create a new meaning. Information represented digitally, that is disentangled from physical formats, could adapt itself to its surroundings, and facilitate a plurality of voices.

CONTROL OVER VIRTUAL GATEKEEPERS: ON SEARCH ENGINES AND PROPERTIZING INFORMATION

In an age of information overload, search engines are becoming a focal point for controlling access to information. Search engines are becoming the new virtual gatekeepers of cyberspace and, consequently, they turn out to play a key role in shaping the information environment. Information that is undetectable, or otherwise remains unlisted on the search results, is almost nonexistent on the web. In an age of information overload, control over such virtual gatekeepers may give one the power to filter information, that is, to locate some information while avoiding another.

One example of control battles in the information markets is the eBay case. eBay, the largest online person-to-person auction site, objected to the unauthorized use of its database by metacrawlers and data aggregators. Bidder’s Edge, an

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46 One example for control stemming from the format of distribution is the distribution of computer programs. Most software publishers distribute mass market software without the source code. This does not allow modifying the program, fixing bugs, learning its operation, and adopting it to perform new functions. This is notwithstanding the claim made by various commentators that the open source model would produce technically superior software. See Eric Raymond, A Brief History of Hackersdom, in Opensources (Chris DiBona ed., 1999).

47 Walter Benjamin, “The Work of Art in the Age of Mechanical Reproduction”, in Illuminations 219, 223 (Hannah Arendt ed. & Harry Zohn trans. 1970) clearly describes this liberating potential of mechanical reproduction of works of art (“One might generalize by saying: the technique of reproduction detaches the reproduced object from the domain of tradition... in permitting the reproduction to meet the beholder or listener in his own particular situation, it reactivates the object reproduced”).

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auction aggregation site, allowed its users to search for items simultaneously across numerous online auctions by conducting a single search and without having to search each auction site individually.\textsuperscript{48} Like many search engines, eBay prohibited the automated use of its database in its users' agreement, and further employed technical means to block access to Bidder's Edge. Eventually eBay brought a suit against Bidder's Edge and was granted a preliminary injunction enjoining Bidder's Edge from accessing eBay's systems by use of any automated querying program without eBay's written authorization.\textsuperscript{49}

The reasons behind eBay's objection to Bidder's Edge activity are intriguing. Like many search engines and data aggregators, Bidder's Edge was not directly competing with eBay. eBay is a person-to-person trading site that allows sellers to list items for sale, and potential buyers to search the listings and bid on items. eBay collects commissions for sales. In fact, eBay's subscribers could benefit from the use of metacrawlers such as Bidder's Edge since they increase their listings' exposure. A greater number of potential bidders would tend to increase the likelihood of closing transactions at a higher price.\textsuperscript{50} Such contingency could potentially increase eBay's revenues, since eBay's commission is based on the closing price.\textsuperscript{51} If eBay's goal was to maximize profits, why did eBay object to the use by Bidder's Edge?

eBay sought to preserve its dominance in the online auction industry.\textsuperscript{52} If metacrawlers like Bidder's Edge are crawling around, then eBay may lose its key assets. These assets include its control over the community of users that occupies its site since they will no longer be captured and restricted to a single site. Another business advantage is the power to shape preferences and affect actual choices made by users, by determining what alternative transactions are made available to them. Finally, there were opportunities for branding and establishing a distinctive

\textsuperscript{48} Bidder's Edge created a database of information compiled from various auction sites. On March 2000 the site compiled information on items auctioned on more than 100 auction sites. Similarily, AuctionWatch offers for free a Universal Search function which allows users to send a single query and search for items available for auction over a couple hundred sites. \textit{eBay, Inc.}, 100 F. Supp. 2d.

\textsuperscript{49} \textit{eBay, Inc.}, id. Similarly, MySimon (www.MySimon.com) a popular Internet shopping search engine, sued Priceman.com meta-search engine, which was searching shopping engines, for using its search results and infringing its copyright. MySimon claimed that its search results are repeated on the site with no attribution to the source. Brian Banks, "Builder Beware". \textit{Canadian Business}, (October 25, 1999) available at <http://www.canadianbusiness.com/magazine_items/1999/0ct22_99_builderbeware.shtml>.

\textsuperscript{50} Indeed, posting the items for sale on data aggregators may normally introduce competition with sellers from other sites and push down the price. Yet, due to the method of auction such competition would not necessarily lower the closing price of any particular deal.

\textsuperscript{51} eBay.com charges a Final Value Fee - between 1.25% to 5% of the final sale price.

\textsuperscript{52} eBay further argued that it sought to protect its interest in the auction data compiled through its relationship with its customers. Steven Bonsite, "eBay Hints Other Auction Aggregators Could Be Blocked - Update", \textit{Newsbytes} (November 4, 1999) (citing eBay's spokesman kevin Parsglove).
reputation. Owning a powerful online brand would usually allow sellers to charge a higher price for identical products. When users are searching via bargain finders, competition turns to focus on price alone. Under such circumstances there are less opportunities for cashing the benefits of branding. To secure its brand, eBay objected to the display of its results next to those of its competitors.

While a right to exclude publicly available data is explicitly exempted under copyright law, claims based on other legal doctrines were raised by eBay, such as contract, unfair competition, misappropriation and trespass to chattel. The displacement of copyright law by other common law doctrines for establishing a right to control access to information is worrisome. Copyright law was designed to regulate use of information, and therefore it includes some checks and balances informed by the unique character of informational works and their social significance. Information policy could be easily obscured when general legal doctrines are strictly applied to create a new type of control over access to information.

Rejecting Bidder’s Edge’s claim that it cannot trespass eBay’s website because it is publicly accessible, the court held that eBay’s servers and their capacity are private property and therefore access is conditioned upon the owner’s permission. The court held that Bidder’s Edge searches constituted an unauthorized use of this property, depriving eBay of the ability to use the occupied portions of its personal property for its own purpose. The newly created right to exclude indexers, established by the eBay decision, is strengthening a trend of proprietizing information in recent years. The eBay rule opens new opportunities for accumulating control and interfering with competition in the search engines market. This rule may allow search engines to legally prevent the use of their search results, thus requiring anyone who wishes to use such results to acquire a license.

A right to exclude information mining and indexing is likely to hinder, rather than encourage, competition in the search engines market. Such a legal right may affect both vertical relationships between sites and search engines in which they are listed, and competition among search engines, metacrawlers and data aggregators.

At the site-search engine level, when search engines must acquire a license to

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54 The eBay rule allows far-reaching, expansive restrictions on the use of information. Indeed, we sometimes allow restrictions on the use of information that is publicly available, to protect certain entitlements, such as proprietary rights, individual privacy, individuals’ right to their good name, or the right of some individuals to control their public image. All these rights are subject to restrictions such as free speech. The eBay rule facilitates control over information that incorporates no such balances. We may wish to prevent information mining when it is necessary to protect the individuals to which information is pertained. Yet, when rather than protecting entitlements (such as users’ privacy) the court instead creates a broad right to control access to information, it also allows private parties to legally control other aspects of information that should be left uncontrolled, such as its informative value or its meaning.

55 The court held that “[t]he law recognizes no such right to use another’s personal property.” eBay, Inc., 100 F. Supp. 2d, at 1071.
locate and refer to posted information, the cost of the search increases. That is due
to higher transaction costs involved in negotiating and acquiring the necessary
licenses and paying the license fees. The commercialization of the reference process
would increase barriers on entry and allow a considerable advantage to
commercial engines.

The eBay rule further creates dependency of the indexer on the subject of
indexing. Sites could condition licensing in exchange for receiving a higher
ranking, specific presentation on the search results, or the exclusion of others on
search results. Such dependency of indexers in their subjects, created by law,
would hardly contribute to the reliability of the search engines market. Once
again, this is likely to give an advantage to commercial sites.

Search engines themselves could rely on the eBay rule to object to the use of
their output search results. They could use licensing search schemes to acquire
market domination, force business alliances when they are not technically
necessary, and limit the operation of competitors. Those business interests,
however, are not necessarily compatible with the public interest. It could
undermine the feasibility of introducing new, independent metacrawlers in the
search engines market.

Finally, a legal right to exclude, as opposed to the technical ability to do so, is
proprietary the search results. It is turning search results into a corporate asset.
An exclusive right to use search results, such as under the eBay rule, protects a
market share. Search results as a corporate asset could be accumulated. It could be
used strategically to prevent indexing by competitors, or restrict indexing to
advance commercial interests. A right to exclude indexing could therefore serve to
hinder competition among search engines and would facilitate centralization of the
search engines marketplace.56

The eBay rule introduces a broad right to control access. Information is
abstract and normally detached from any physical presence. Information in digital
form, however, requires some sort of electronic access to make it intelligible and
instrumental. Consequently, paradoxically, the virtual space accompanied by the
newly created rights to exclude access reconstructs the physicality of information.

Apparently the preliminary injunction issued in the eBay case allowed eBay to
deny only a particular type of access. It is arguable that access is technically
available to all information that is posted on the web, and that it remains so even
under the eBay rule. The court explicitly restricted the scope of the injunction to
automated search,57 excluding other forms of search from its scope: “[n]othing in

56 Niva Elkin-Koren, “Let the Crawlers Crawl: On Virtual Gatekeepers and the Right to Exclude
57 The court issued a preliminary injunction enjoining Bidder’s Edge “from using any automated
query program, robot, web crawler or other similar device, without written authorization, to
access eBay’s computer systems or networks, for the purpose of copying any part of eBay’s
this order precludes Bidder's Edge from utilizing information obtained from eBay's site other than by automated query program, robot, web crawler or similar device. Nevertheless, physical access is not sufficient to guarantee actual access to information. Access to information in cyberspace is enabled by search engines, and controlling such enablers and their use determines what information is actually made available.

The fact that in eBay, access was denied to otherwise publicly available search results suggests that control over the terms of access, rather than access per se, was at stake. Therefore, the legal right to exclude granted to eBay facilitates control over the terms of access.

Decentralized competition among search engines is essential for keeping a competitive market in electronic commerce. But in addition to their extraordinary commercial significance, search engines also affect the organization of information and the meaning it pertains to. Therefore search engines may potentially shape positions, concepts, and ideas by defining what information becomes available for each query. They create a type of virtual bottleneck governing access to information. Expensive limits on the use of search engines may reduce competition and result in an exclusionary information system.

IV. On Copyright Laws and Centralization in Information Markets

Some believe that even though rightholders won the legal disputes they lost the battle over online dissemination.

This rather naive view overlooks some serious consequences and ancillary effects of a pervasive copyright regime. Recent legal developments may have a chilling effect on decision makers, such as legal advisors of high-tech companies advocating avoiding the development of potentially infringing technological applications due to the perceived high legal risk. Similarly, recent litigation and court decisions could chill investors away from what would be perceived as legally risky technologies, thus shrinking the invested resources in the development of

58 eBay, Inc., id. at 45.
59 Elkin-Koren, supra note 56. Competition alone, however, may be an insufficient remedy for the biases created by search engines. See Lucas D. Introna & Helen Nissenbaum, "Shaping the Web: Why the Politics of Search Engines Matters", 16 The Information Society 169, (2000) (arguing that competition alone cannot guarantee access to the Web, because search engines would still give prominence to popular and wealthy sites at the expense of others, either through their algorithms or by selling prominence for a fee).
60 The aftermath of Napster could teach us that Napster lost but the p2p and file swapping technology won. See John Perry Barlow, "The Next Economy of Ideas", Wired 8.10 2000.
new technologies and business practices, which might threaten the rightholders’ position.

Recent case law may also affect access to infrastructure for controversial online services. For instance, online service providers might refuse to make some services available to the public over their facilities frightened of being sued. Rightholders often demand that Online Service Providers cease providing controversial services, threatening legal action against such providers.\(^{61}\)

Increased pressure to expand control over information via copyright law further lead to judicialization of the use of information. Pervasive copyright legislation and aggressive litigation policy of rightholders are turning more issues related to the use of information into legal questions and of making everything a matter of law. Indeed, new technologies also allow technical control of access, which could have resulted in less regulation. However, as it is apparent from recent anti-circumvention legislation, the introduction of technical protection devices induced a massive regulation governing anti-circumvention measures.

Judicialization of information usage may further centralize control over information and reduce competition in the information market. The anti-circumvention legislation increases potential legal exposure involved in developing new technologies. Legal considerations are implemented at an early stage of the creation process, completely prohibiting the development of some technologies. This in turn increases the cost of entry and reduces competition. Robust legislation such as the DMCA is also extremely complex and obscure, therefore the format of legislation communicates and maintains power. This type of regulation is in fact accessible only to wealthy businesses that can afford legal advice, thus creating a barrier on entry to the market.

Another outcome of judicialization is the increased cost of privileged use, which creates a chilling effect. Judicialization of information creates pressure to further regulate the use of information. That is because copyright laws that create abstract “fences” around (abstract) informational goods, are particularly dependent on legal definitions, government enforcement, and public compliance with the law. Intensive regulation and economic power associated with copyright law may lead to social alienation. This in turn increases enforcement efforts to ensure compliance by declaring certain infringements as criminal, increasing fines, and expanding the scope of liability to apply to contributors. Furthermore, since copying and distribution may be done by individual users and not merely by competitors, enforcement efforts are increasingly directed against individual users.

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\(^{61}\) See for instance, a cease and desist letter sent on October 1999 to the Online Service Providers of MP3Board (AboveNet Communication and Metromedia Company), demanding the removal, delete or disabling of the allegedly infringing site. Similarly, after receiving a cease and desist letter AbovePeer filed a suit against RIAA asking the court to declare that they are not infringing the copyright act. See complaint, Abovepeer, Inc. (available at: www. Boycottriaa.com/pdfs/complaint_of_AbovePeer.PDF).
This again reinforces alienation and resistance. The process is circular and may partly explain the robust copyright legislation developed in recent years.

V. Centralized Information Markets and the Information Society

The new copyright regime structures the market so that rightsholders can accumulate power and control over the use of information. Centralized information markets cannot provide sufficient outlets for democratic participation. The information market is not just another outlet for ordinary commodities. It also constitutes our cultural life and the public sphere in our communities. Consequently, the way information markets are structured is of great importance to our democratic life. I will highlight these ramifications by discussing two organizing concepts: participation and civic virtue. This analysis departs from the classical balance struck by copyright law between incentives and use, control and access. It is further distinguishable from other attempts to balance copyright claims and freedom of speech principles, which seek a resolution between conflicting entitlements. My interest is the way in which copyright laws shape our public sphere and thereby design the environment in which political freedom is exercised.

DEMOCRACY AS PARTICIPATION IN THE PUBLIC SPHERE

Democracy requires that people would have a reasonable opportunity to participate in political affairs on equal terms. The liberal ideal of "one person one vote" emphasizes voting as the prominent act of participation in democratic life, and thus focuses on neutrality and equal weight of voting rights. From this perspective the democratic scene is perceived as a competitive marketplace of ideas that must be kept free so it can best reflect the aggregated citizens' choice.

A growing awareness of the limits of the liberal model in recent years led commentators to acknowledge that politics cannot be reduced to voting. It has been increasingly recognized that preferences and values are not prior and exogenous to the political process. Instead, preferences are a by-product of a

62 Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction, p. 61–62 (1991) (rejecting the view of democracy as a black box intended to produce strict majority rule, and arguing that "a viable democracy requires that preferences be shaped by public discourse and processed by political institutions so that meaningful decisions can emerge."); Cass R. Sunstein, "The Republican Civic Tradition: Beyond the Republican Revival" 97 Yale Law Journal 1539, 1541 (1988); Jon Elster, Sour Grapes: Studies in the Subversion of Rationality, p. 35 (1983) (arguing that the central concern of politics should be the transformation of preferences rather than their aggregation).
political process that takes place in the public sphere and are shaped by deliberation or sometimes the inability to deliberate. Citizens develop their ideas, shape their positions, identify their interests, and ascertain their identity in the public sphere. The public sphere is thus the main scene of our democratic life. That is where our public decision-making process occurs and where the output of elections is in fact determined. The tenets of democracy must therefore apply to the public sphere in its various shapes and forms in modern life. Accordingly, to guarantee equal access to the political process, it is not sufficient to secure equal voting rights. It is necessary to guarantee reasonable access to will formation processes in the public sphere.

Elsewhere I argued that the notion of the public sphere should be given a broad understanding. It should not be limited to public debates on controversial political issues, but rather be understood as a discursive will formation process that takes place in our cultural life. Interaction and exchange in the public sphere create meaning. They affect one's views regarding living the good life, shape people's values and identity, and help them prioritize preferences and distinguish between good and bad.

Will formation processes occur through exposure to headline news, public debates on television shows and radio programs, editorials, and review articles. People are exposed to information, positions and analyses and react by adopting, rejecting, avoiding or denying such information. Will formation processes also occur through various media forms by consuming and interacting with cultural artifacts such as fictional super heroes and narratives created through different media manifestations such as films, television series, comic books, audio-visual clips, and toys. Individuals may create meaning by identifying or reinterpreting a fictional character or by challenging themes and ideas relevant to their social life. Such interactive processes consequently affect our preferences in the broad sense of the word. The production and circulation structures of popular cultural products therefore affect potential participation in the public sphere.

Participation in the public sphere thus refers to the ability of any individual to take an active part in this will formation process. Although there may always be disparities in participating power, it is necessary to guarantee reasonable access to means of participation. For this purpose it is necessary to eliminate extreme disparities in the ability to participate. Disparities of power – and not just absolute power – may affect opportunities for meaningful participation. Focus on participation is thus a focus on decentralizing the production of content and facilitating meaningful access to cultural production means.

Disparities of power are not necessarily disparities of wealth. Indeed, exercising

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central control over information markets serves the financial needs of content producers and increases inequality of wealth. Yet, the issue is not simply inequality of wealth, but rather the distribution of power – legal power – to determine what content is being produced and published. Aside from distributional consequences, such legal power may lead to cultural domination, which could affect personal autonomy and freedom.66

PARTICIPATION AND CENTRALIZATION

Securing sufficient participation in the democratic sense discussed above requires decentralization of the will formation processes. Accumulation of control over content, facilitated by copyright law in its recent comprehensive form, may interfere with this principle. When power accumulated in the market is used in the public sphere, it tends to distort equal participation and reduce fair access to participation means. Powerful economic bodies that control the means of production are better positioned to express their own agendas and thereby marginalize diversity. Corporate agenda must not be specific to have an impact on public discourse. It reflects an ideology of consumerism and consumption. Content in such an environment is no longer perceived as an authentic reflection of one's beliefs and autonomy, but as a product created with the purpose of being marketed as a commodity. Concentration of ownership and control over content may reduce pluralism and result in a “marginal” or “meaningless” diversity of the type of content created. Thus, pervasive copyright regime could affect the type of content that is being produced. While the focus of traditional copyright controversies is whether content will be created and distributed, the more interesting question, often overlooked by these discussions, is what type of creation is facilitated by this regime.67

It is arguable that users could participate in the “market for content”, understood as a site for contesting ideologies and meanings reflected in artifacts. When information is traded as an article of commerce, readers and viewers in their capacity as consumers could affect the content that is being produced by creating demand for certain content, thus affecting decisions regarding the production and circulation of content. Producers of content must be attentive to demand and rating and are likely to shape the type of content that is produced accordingly.

This perception has several significant limitations. First, a centralized content market could determine what is made available. Individuals are likely to adapt

65 See generally Meehan, supra note 16.
their preferences to the available choices and opportunities. Consequently, it would be inappropriate to take existing preferences as reflecting what individuals really want, since their choice was constrained by what was made available to them. It cannot be said to reflect individual autonomy, or what individuals would ideally prefer if the options were structured by the market differently.

Furthermore, information is not an ordinary commodity and the so-called “market for information” does not function as a regular market for goods. Information does not play by the old rules of offer and demand. Informational products affect their own demand. Consequently, centralized power in such a marketplace could be very powerful in shaping preferences and agendas. It could limit opportunities for meaningful participation in social dialogue, and restrict freedom and autonomy for ordinary participants.

Participation may take the form of actively communicating one’s positions, preferences, taste, values and ideas. Participation may also involve viewing, reading, listening, absorbing and making use of content that reflects one’s ideas, or those with which an individual identifies. Control over content may affect the extent to which people can appropriate content and adapt it to reflect their own agenda. When production of content is centralized, few bodies determine what becomes available to the public, and thus of the variety from which the public can decide what values, identities and positions to adapt.

DEMOCRACY AND CIVIC VIRTUE

Participation in the public sphere is further viewed as an independent good capable of constituting a civic virtue, a shared sense among citizens in pursuit of the public good, and an ability to actively participate and affect the outcome of some processes. This perspective assumes a significant distinction between the way people form and express their preferences in their capacity as citizens and the way in which they hold their preferences as consumers. In their role as

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69 On the affect of art on demand for new technologies see Benjamin, supra note 47 at 239 (“One of the foremost tasks of art has always been the creation of a demand which could be fully satisfied only later. The history of every art form shows critical epochs in which a certain art form aspires to effects, which could be fully obtained only with a changed technical standard, that is to say, in a new art form”).
70 Sunstein, supra note 62 at 1556.
consumers, citizens try to maximize their private interests. In their capacity as citizens deliberating and reasoning about polity, people may establish a civic virtue, namely the willingness to "subordinate their private interests to the general good." 72

Civic virtue describes an other-regarding rather than a purely self-interest approach—a willingness to give priority to the communal interest. Civic virtue is thus significant to democratic life in that it enables participants in their capacity as citizens to undertake responsible decisions that are informed by, and respectful of, the claims of other groups and individuals. This may also enhance the well-being of individuals by creating a sense of communal belonging and social solidarity. 73

Social dialogue is dependent on these virtues for its continuing existence. When the public sphere replicates the market for goods, citizens replicate their role as consumers rather than acting as citizens.

CENTRALIZATION AND ALIENATION

Concentration of power in the public sphere may weaken the sense of civic virtue, for when the public sphere reflects the views of few—and is driven by pure commercial interests—there is less trust and therefore less commitment to shared goals. In this sense, the alienation created by recent developments in intellectual property laws has a potentially destructive effect.

When decisions regarding the production of content tend to mirror commercial interests, culture is turned into a market. Culture is thus ruled by economic considerations that are irrelevant to the public sphere. Decisions regarding what would be produced, and when and where it would be distributed, are governed by the commercial interests of private companies seeking to maximize profits. When a movie, book or television show are manufactured and sold as commodities, their content is determined by their sales potential. 74

There is very little room for civic virtue when what appears to be social dialogue in the public sphere turns out to be merely a market for goods. This result is not merely the outcome of less access to information and opportunities for participation. It is also the outcome of a lower sense of trust. When cultural artifacts such as movies and television series are sold they cannot be taken as reflecting authentic views and concerns, ideas and agendas.

When production and distribution of content is centrally governed by few

73 Sunstein, supra note 62, p. 1547: "a system lacking widespread participation will suffer from the failure to cultivate the various qualities that may accompany political life—self-development, feeling of empathy, social solidarity, and so forth”.
74 Bourdieu, supra note 64, Beitzig, supra note 3 p. 36.
Rethinking Copyright in the New Information Landscape

Commercial businesses, the public sphere is structured, and increasingly understood, as a market for information rather than a forum of exchange. When music, films, and news stories are produced and traded as commodities that must be purchased rather than expressions that could be shared, we are not only losing the free flow of information but we are also diminishing trust. Such an attitude promotes separate self-interest rather than communal exchange. Trust is a social capital that may improve communal and civic life, benefiting society by strengthening solidarity.75

When culture is turned into a market it reduces citizens into potential consumers of goods, and sometimes treats them as goods themselves (such as in the case of advertisers-supported television and increasingly also the Internet). Consequently citizens become suspicious and lose trust in social dialogue. A public sphere that is merely a market for informational goods focuses on private profits and control rather than on public goals. It therefore supports cynicism and alienation regarding public discourse and thereby weakens civic virtue. Consequently, turning our entire culture into a market for goods leaves very little room for political action of individuals as citizens rather than as consumers.

Summary

While modern legal systems recognized the risks involved in centralized communication markets, awareness of the centralization of information market has not yet matured.

Copyright law has come a long way from its origins. Copyrights are perceived as a legitimate claim of individual creators for “just reward”, a return on investment, a claim for royalties, and a share in profits. Realistically, however, copyright law must serve content production by profit-oriented corporations. Thus copyright is a mechanism for inducing corporations to invest in innovation and distribution of informational goods. Copyright in this sense protects a market share. It defines rights to exploit the commercial potential of the work.76 The issue concerning copyright law is therefore the extent to which commercial expectations in the information market ought to be protected.

Copyright law now allows complete commodification of content in a way that was not available before. During the last couple of years copyright law was

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76 Christopher Lind, “The idea of capitalism or the capitalism of ideas? A moral critique of the Copyright Act”, 7 Intellectual Property Journal 65, 69 (1991) (“What is being stolen is not the object nor a property of the object, but rather a market for the object or the possibility of being able to exploit the commercial potential of the object”).
transformed (if not revolutionized) to provide owners with a substantially more powerful right to control information. This transforms copyright law from a law that sought to serve policy goals and secure incentives for creators into a law that facilitates control in information markets.

I argue that copyright law has gone too far. This argument is neither a claim against capitalism, nor is it a claim against a capitalist market as a mechanism for producing informational goods and cultural artifacts. In fact, private incentives have many advantages when compared with other alternatives for creating content.\textsuperscript{77} If copyright returned to serving its original purpose, it may well be able to provide an adequate basis for cultural creation and social dialogue. It may well be that copyright law should be adjusted to undertake such new roles in the information economy.

Furthermore, the significance of control over information in the information economy calls for reconsidering the traditional balance drawn between copyright and freedom of speech. Copyright law in its current form and role in the information economy challenges freedom of speech. This may not be apparent when the analysis stops at the right to free speech. The challenge posed by copyright law to freedom of speech is structural and is concerned with the actual power to participate. Freedom of speech can no longer be understood as merely a negative right against government interference in a complex world of information managed by various producers and private owners of distribution channels.\textsuperscript{78} It is therefore necessary to develop a better understanding of freedom of speech, which goes beyond the rights discourse, and could encompass the notion of participating in social dialogue in a meaningful way.

Finally, drawing the balance between copyright law and freedom of speech in the new information environment may require transforming copyright law from its property paradigm into a liability rule that secures compensation but does not provide control. The use of copyright law as a means of control is related to the property paradigm of copyright law. As long as copyrights are protected as a property right, they require the owner’s consent prior to the use of the work. When prior authorization is required, copyright law ends up as a means of control. A liability model would entitle rightholders to monetary compensation only, leaving the issue of control outside their reach.

\textsuperscript{77} Alternatives to a copyright system include sponsorship by advertisers (selling audiences to advertisers rather than selling informational goods to consumers) patronage. Such alternatives are also suffering from significant shortcomings.

\textsuperscript{78} An analysis of the legal opinion of Judge Kaplan in the DVD case reveals the shortcomings of the current freedom of speech discourse. The court’s discussion examined violation of the legal right of free speech rather than the actual ability to exercise rights. It also focused on a particular expression rather than on availability of information and ability to participate.