

## Conclusion

# The Packet-Switched Society\*

Two sharply contrasting views dominate the debate over copyright policy. On the one hand—the left one, we might say—copyrights represent mere policy tools, no better in principle than any other legal mechanism and, indeed, more modern, rationally planned, and democratically chosen than anything the common law can offer. On the other hand—the right one, we might say—copyrights represent property rights no less than real estate or moveable goods do. On that view, copyrights deserve strict enforcement and our solemn respect.

This book has presented copyright policy on a third hand. So grasped, copyright represents nothing better than a clumsy attempt to correct an alleged market failure. Common law rights, implemented by technological advances, social networks, and growing wealth, increasingly suffice to stimulate the production of original expressive works. More and more, then, we find that we do not need copyright. To that extent, it does us little good and much harm to remain imprisoned within the confines of the Copyright Act. Even if they wanted to, federal lawmakers could not put copyright policy into a delicate balance, and they face powerful incentives to not even try. Better we should cast aside copyright's statutory privileges and rely on the common law to promote the public good.

Many people—well informed, intelligent, and sincere people—will doubtless disagree with this third view of copyright policy. Many will have good reasons for doing so, too. Some, though, will have perhaps been misled by their reliance on an older, less flexible understanding of copyright—what we might call a circuit-switched model. In fact, however, we can best understand copyright policy, and much else, by following the example set by packet-switched networks.

As courts and commentators traditionally describe copyright, it arises through the collective deliberation of central authorities who, after a delicate balancing of competing interests and in the name of the general welfare, create statutory rights to expressive works. In that model, lawmakers let copyright holders borrow the State's power to violate natural and common law rights, empowering copyright holders to control others' pens, presses, and voices. That approach strongly recalls the policy model applied to earthbound, closed, circuit-switched networks, in which a central authority controls all communications.

Those who build circuit-switched networks invoke the State's power of eminent domain to justify violating common law rights, laying wires that cut across private property. Regulators supervise the monopoly that results, imposing common carrier obligations, cross-subsidizing universal service, and controlling rates. So, too, goes the circuit-switched model of copyright: The Act empowers copyright holders to violate the

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\* This conclusion borrows liberally from my paper, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 803-05 (2001).

common law, granting them statutory privileges that cut across customary rights, while lawmakers carefully calibrate the ebb and flow of expressions to maximize the general welfare.

This book takes a fundamentally different approach to public policy, an approach inspired by packet-switched networks like the market, person-to-person communications, and the internet. In such a network, message-bearing packets flow from point to point over any of many different paths, routed not according to the dictates of a central authority but rather by generally accepted protocols. So long as a packet follows a few, simple rules, it can take any route it likes. Packet switching has many virtues; it often proves more flexible, robust, and scalable than circuit switching, for instance. It supports layer upon layer of complexity, too, encouraging a wealth of unplanned order. Most importantly for present purposes, packet switched networks offer us an apt model for understanding that vast web of consent-rich relations we call the liberal society.<sup>1</sup>

Each of us a liberal society pursues a variety of goals, some shared and some unique. Each of us follows his, her, or (in the case legal persons) *its* own route through a network of voluntary ties. No central authority directs how we pursue our goals. Nor could it, given the complexity of the system and the distribution of information. Our packet-switched society instead relies on a few simple rules—based in natural rights and implemented through the common law—to define a protocol universally just and locally fair.<sup>2</sup> Our society spontaneously generates peace and prosperity, the fruit of conscious action but not of conscious design.<sup>3</sup>

As wire-bound parts of the internet demonstrate, a packet-switched network sometimes runs on a circuit-switched infrastructure. Similarly, liberal societies typically rely on some measure of State intervention to help patch the gaps where private mechanisms fail. But in neither case should we confuse an old fix for a necessary feature. Thanks to open-access<sup>4</sup> and packet-switched radio communications,<sup>5</sup> for instance, the Internet can—and probably should—escape from circuit-switched bottlenecks, which prove all too susceptible to disruption and censorship.<sup>6</sup>

Similarly, common law now stands ready to finally cure the market failure that

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<sup>1</sup> True to its roots and its meaning everywhere but in contemporary mass U.S. media, "liberal" here means not "left-wing" but rather "free."

<sup>2</sup> See generally RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995).

<sup>3</sup> For descriptions of spontaneous orders, see RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 44-62 (Oxford 1998); FRIEDRICH A. HAYEK, *I LAW, LEGISLATION, AND LIBERTY* 35-54 (Chicago 1973).

<sup>4</sup> See, e.g., Eli M. Noam, *Beyond Auctions: Open Spectrum Access*, in *REGULATORS' REVENGE: THE FUTURE OF TELECOMMUNICATIONS DEREGULATION* 113 (Tom W. Bell & Solveig Singleton eds., 1998).

<sup>5</sup> See, e.g., David R. Hughes & Dewayne Hendricks, *Spread-Spectrum Radio*, *SCIENTIFIC AMERICAN*, Apr. 1998, at 94.

<sup>6</sup> See David G. Post, *Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace*, 1995 *J. ONLINE L.* art. 3, ¶¶ 25-31 (June 1995).

<<http://warthog.cc.wm.edu/law/publications/jol/post.html>> (discussing how network bottlenecks facilitate control by third parties).

alone justifies copyright's statutory privileges. When thus rendered superfluous, the Copyright Act transforms from a *necessary* evil into a *net* evil. Let us not remain trapped within copyright after we have outgrown the need for its shelter. Let us instead escape its confines, to seek the common good in the common law.