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INNOVATIVE COPYRIGHT

*Greg Lastowka**

INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW. By *Michael A. Carrier*. New York: Oxford University Press. 2009. Pp. viii, 412. \$65.

INTRODUCTION

For over a decade, Michael Carrier¹ has been exploring the intersection of antitrust and intellectual property (“IP”) law, contributing many articles that offer new solutions and approaches to the vexing problems confronting the law of innovation.² Carrier’s academic writing is situated in a voluminous scholarly discourse about the appropriate rules and goals of the laws of copyright, patent, and antitrust.

While Carrier easily could have written an “insider” tome for specialists in this area, his new book, *Innovation for the 21st Century*, is targeted at a broader audience. Carrier’s book is directed at legislators, jurists, and opinion makers—as well as interested readers—who want to understand these questions and may play some part in legal reforms. It follows, given his broad audience, that Carrier faces some challenges describing the specialized fields of copyright, patent, and antitrust law.

To overcome this hurdle, Carrier writes two books in one. Carrier spends the first hundred pages of his book providing the general reader with a basic primer on the laws of copyright, patent, and antitrust (Chapters One to Five). This primer is reason enough to recommend Carrier’s book. With clarity and verve, it leads the novice quickly and effectively through the key doctrines and cases. Carrier notes important scholarly voices, but does not get bogged down in excessive complexities.

The primer, however, is just a stepping stone on the way to Carrier’s real agenda, which is convincing the reader that the existing law he describes must be reformed to better promote innovation. To put it mildly, Carrier is enthusiastic about the social benefits attending technological innovation. He argues, congruently, that innovation should be the pole star guiding both IP and antitrust policy (p. 33).

* Professor of Law, Rutgers School of Law—Camden. While Professor Carrier is my colleague and friend, I assure the reader that both the praise and the criticism of his book in this Review are heartfelt and genuine. I would like to thank my research assistant Jake Flothe for helping me with this project.

1. Professor of Law, Rutgers School of Law—Camden.

2. E.g., Michael A. Carrier, *Resolving the Patent-Antitrust Paradox Through Tripartite Innovation*, 56 VAND. L. REV. 1047 (2003) [hereinafter Carrier, *Patent-Antitrust Paradox*]; Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 U. PA. L. REV. 761 (2002).

Carrier spends the majority of his book applying his innovation-centered framework to existing law (Chapters Six to Thirteen). He does this by offering ten specific proposals for reforms of copyright, patent, and antitrust law. Even those who are skeptical of Carrier's proposals must admire his ambition here: he moves from his guiding theory to a general legal primer to ten contextual applications, all in the span of less than four hundred pages.

Legal specialists will no doubt find the velocity of the book somewhat alarming and perhaps ill-advised. Tackling the future of patent, antitrust, and copyright in separate books might seem like a more prudent and conservative methodology. Yet Carrier is concerned primarily about intersections and overarching goals. He therefore makes the strategic decision to summarize a broad field and cut to the chase about a range of problems and solutions. Amazingly, he manages to pull it off. Without taking shortcuts, Carrier makes a soup-to-nuts argument for legal reforms in three diverse fields in a way that is accessible to the general reader.

In the next few pages, I will briefly explore Carrier's threshold problem, the tension between the law of IP and antitrust. Carrier offers to solve this tension by refocusing the law on innovation policy, letting innovation steer the agenda for resolving any conflicts at the IP-antitrust border.

Following this discussion, I will turn to Carrier's proposals for copyright law reform. After describing these reform proposals, I conclude with my reaction: while I support Carrier's proposed reforms wholeheartedly, I worry that they do not go far enough. Copyright law, I argue, is in need of much more radical reforms in order to resolve its contemporary conflicts with innovative technologies.

I. INTELLECTUAL PROPERTY & MARKET COMPETITION

A large part of Carrier's book is about the tension between antitrust and intellectual property. The history of the legal intersection is explored in some detail in his primer (Chapter Four). Carrier's solution to the tension is to let innovation harmonize IP and antitrust law.³ Yet the tension that Carrier seeks to overcome is itself a subject of some dispute. So first, I should briefly summarize how Carrier understands that tension.

Antitrust law is generally wary of granting individuals and firms exclusive rights to sell particular commodities in the marketplace. Courts will frequently prefer market competition to monopoly power (accompanied by the monopolist's predatory activity), given that vibrant competition among firms lowers consumer prices and rewards more efficient producers of goods and services (pp. 56–61).

Intellectual property law, on the other hand, creates what seem to be monopolies. Patent and copyright owners enjoy the exclusive right to commercialize their inventions and creative works (Chapter Two). Intellectual property rights necessarily entail the legal suppression of market competition in favor of these exclusive rights (pp. 37–43, 72). While the substitution

3. Carrier, *Patent-Antitrust Paradox*, *supra* note 2, at 1053–62.

of replacement inventions and works might serve to reduce or even negate the market power represented by a copyright or patent, the law does seem designed in a way that prevents a form of market competition for the protected work or invention itself. So, we might ask, is intellectual property generally problematic from an antitrust perspective?

The answer to that question has varied over time, as Carrier explains (Chapter Four). As a matter of theory, it should first be noted that IP laws are not designed for the purpose of granting commercial monopolies, even if a sort of monopoly is obtained through copyright and patent entitlements. Instead, these rights are provided, in theory, to benefit society, albeit indirectly. As the Constitution tersely explains (and IP rights holders sometimes forget), copyrights and patents are intended to “promote the Progress of Science and useful Arts.”⁴

Patents and copyrights are, from the standard legal theoretical perspective, a sort of bargain between society and those who create new things: they establish commercial incentives designed to entice more individuals to invest more resources in creativity and technological innovation.⁵ The right to monopolize, commercially, one’s own works and inventions presumably leads more authors and inventors to pursue copyrights and patents. Society benefits from this race for property rights, the theory goes, because in the absence of IP rights, fewer individuals would engage in this sort of labor. Society would be left with less creativity and less innovation.

Of course, while the theory provides that IP contributes to innovation and creativity, everyone knows that IP rights are not absolutely necessary to produce art and inventions. A glance at the history books tells us this. Ancient civilizations produced quite a few original artworks and clever inventions. IP rights clearly had no part in all of this ancient creativity and invention. This is because patent and copyright are legal newcomers, only a few centuries old. The theory must be, therefore, that IP rights encourage *greater*, more *socially optimal* production of inventions and artistic works. The law seems to be designed on the premise that *some* additional incentive is needed, but the question is really how much of an IP right produces the optimal social benefits. IP law, courts often say, strikes a “delicate balance” between limited exclusive rights and the default condition of free market competition.

Perhaps the clearest restriction on IP protection is the limited duration of copyrights and patents. According to the Constitution, these are granted “for limited Times.”⁶ Given that neither people nor commercial firms live forever, perpetual and exclusive property rights in inventions and creative works are not required to optimally encourage individual and collective creativity and invention. Because copyrights and patents are limited in duration, it follows

4. U.S. CONST. art. I, § 8, cl. 8.

5. Eldred v. Ashcroft, 537 U.S. 186, 214–15 (2003) (discussing the “bargain” established by copyright between the public and the author).

6. U.S. CONST. art. I, § 8, cl. 8.

that all works and inventions must eventually be fully returned to the commons of the competitive marketplace.

The “delicate balance,” however, is struck not only with regard to the duration of IP rights, but also with regard to the power and scope of those rights. Strong or weak legal protections might be applied to existing IP rights and the market strength of existing IP rights must also be balanced against the background presumption of vigorous market competition.

In explaining the history of this balancing act, Carrier briefly describes the story of *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*, a 1917 Supreme Court decision.⁷ The plaintiff dominated the U.S. film industry and also held a patent in its film projector technology. As a condition of the patent, it required those who used its projectors to display only its own films. The defendant had used the projector with independent films, but argued that this was not an infringement of the patent because the patent concerned only the film projector, not the films shown on it.

When the case arrived at the Supreme Court, antitrust instincts won out over the power of IP rights. The Supreme Court found the plaintiff’s restriction was invalid “because such a film is obviously not any part of the invention of the patent in suit.”⁸ To enforce the patent right against the defendant “would be to create a monopoly in the manufacture and use of moving picture films wholly outside of the patent in suit.”⁹

Justice Holmes, joined by Justices McKenna and Van Devanter, dissented. Summarizing his argument, Holmes stated that, because a patent owner “may keep his device wholly out of use I cannot understand why he may not keep it out of use unless the licensee, or, for the matter of that, the buyer, will use some unpatented thing in connection with it.”¹⁰

Holmes’s argument was actually consistent with the late-nineteenth- and early-twentieth-century consensus on this issue, which gave patent owners effective immunity from antitrust law when they relied on their patent powers (pp. 73–74). As Carrier explains, the prior rule held that if a patent holder could bar others from using the patent absolutely, it followed that a patent holder should also have the right to bar, absolutely, particular sorts of uses (p. 74).

As the twentieth century progressed, courts retreated further from their extreme deference to patents, often limiting patent rights in favor of antitrust scrutiny (pp. 74–77). Yet in the later decades, the pendulum swung back, reinvigorating patent strength and defeating any antitrust presumptions based on IP rights (pp. 78–85). Five years ago, the Supreme Court concluded that IP rights should not serve to establish any general presumption of “market power” (in the antitrust sense of that term).¹¹ Yet, although IP has

7. 243 U.S. 502 (1917).

8. *Id.* at 518.

9. *Id.*

10. *Id.* at 519 (Holmes, J., dissenting).

11. *Ill. Tool Works, Inc. v. Indep. Ink Inc.*, 547 U.S. 28, 45–46 (2006).

the edge on antitrust at the moment, the borders in this area are still not firmly fixed. Litigation and debate over the relationship continues.¹²

II. PRIORITIZING INNOVATION

In any complex legal field, the law's animating goals can easily be lost in clouds of nebulous doctrine and thickets of statutory text. Carrier's answer to this ongoing tension between IP and antitrust law is to focus on a pole star: innovation. Since the promotion of innovation is certainly an important goal in both IP and antitrust law, this will seem to many readers like a rather sensible idea.

Yet some beg to differ. Patent, antitrust, and copyright vary in the degree to which they pay service to innovation goals. As Carrier notes, patent law is, at least in theory, firmly wedded to the pursuit of innovation. Patent law doctrine may express, at various places and in various contexts, a considerable range of deontological commitments. However, the prime directive of patent law is clearly the pursuit of technological innovation.

But what about antitrust? Antitrust certainly promotes innovation indirectly by promoting competition. But antitrust also seeks to lower market prices. And copyright, as Carrier readily admits, is not usually thought of as a law that promotes technological innovation at all. Instead, it is understood as promoting new forms of creative expression, which is arguably a rather different thing (pp. 102–03).

Carrier is therefore proposing to redirect the internal compasses of these three doctrines to differing degrees. Patent law is minimally reoriented by Carrier; antitrust is significantly reoriented (but given its current deference to patent, perhaps not so very much); and copyright law is set on a nearly perpendicular course to its traditional momentum. So with respect to copyright law, we can brand Carrier's innovation theory as somewhat radical. Of course, for the specialist, selecting a radical theoretical engine is all well and good, but the devil of any reform proposal is in the details.

Taking a holistic view of Carrier's ten proposals, my general impression is that Carrier has, consistent with his decision to write a book that motivates a broad audience to action, managed to artfully combine practical politics with the norms of scholarship. He uses the former's consensus-building tactics to marshal the latter's voices.

This is no mean feat. Legal scholars tend to write against each other, favoring novel insights and critically attacking conventional wisdom. They score scant career points, so to speak, by agreeing with each other on the details of what must be done. Politicians, on the other hand, are more effective in their work when they appeal to eternal truths, popular understandings, and consensus—glossing over nuances and minor disagreements. Carrier's book strikes a balance between the two, drawing, in a

12. See, e.g., Herbert Hovenkamp, *Innovation and the Domain of Competition Policy*, 60 ALA. L. REV. 103 (2008); Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 ARIZ. L. REV. 837 (2007).

political manner, on the scholarly consensus found in legal writings about IP and antitrust. He has pinpointed multiple areas where a majority of IP and antitrust scholars will agree about, at the very least, the nature of the problem. His proposals steer through the ongoing debates by locating careful and consensus-building compromises between various contemporary legal scholars who have also explored these areas.

For instance, consider the following three proposals—one regarding patent, one regarding antitrust, and one at the patent-antitrust intersection. First, in patent law, Carrier observes that perhaps half of granted patents are, when tested in court, held invalid. Where innovators are required to pay for licenses to use invalid patents, this operates as an anticompetitive drag on innovation. To tackle the problem of bad patents, Carrier proposes that the United States Patent and Trademark Office (“USPTO”) adopt a means for post-grant challenges (Chapter Nine) to provide innovators with a quick and inexpensive alternative to licensing (or an infringement lawsuit). The problem of invalid patents is widely recognized today, and Carrier’s proposal seems like a sensible shortcut designed to avoid protracted litigation.

Second, in the antitrust arena, fear of antitrust law often prevents business from collectively adopting useful industry standards, despite the benefits of such standards in terms of innovation-promoting interoperability. Greater consensus on interoperability standards would surely promote greater capacity for technological innovation. Carrier accordingly supports the relaxation of antitrust scrutiny of standard-setting organizations (Chapter Fourteen). Again, this mirrors the arguments of other scholars writing on the standards issue, not to mention mirroring the positions generally taken by antitrust enforcement agencies.

Third, Carrier criticizes the contemporary practice in the pharmaceutical industry of engineering “reverse payment settlements,” a practice by which patent owners sue and then pay off allegedly infringing generic drug makers. These payments seem to indicate that firms with weak patents are, in fact, sustaining monopoly profits by preventing patent challenges and keeping generic drugs off the market. With respect to reverse payment settlements, Carrier argues that antitrust scrutiny should be stronger (Chapter Fifteen). Again, the problem here has garnered substantial attention and Carrier’s proposal seems reasonable and modest: he seeks an industry-specific default presumption.

These three proposals, and four other patent and antitrust proposals, have already weathered a first round of review from law professors who are specialists in these fields.¹³ They were the subject of a double blog symposium held in March 2009 by the “Truth on the Market” blog (which focuses on competition law) and the “Patently-O” blog (which focuses on patent law).¹⁴ Notably, criticism was largely focused on the details of

13. The pool of blog reviewers consisted of Dan Crane, Dennis Crouch, Brett Frischmann, Scott Kieff, Geoff Manne, Phil Weiser, and Josh Wright.

14. Symposium, *Welcome to the 1st TOTM Blog Symposium on Michael Carrier’s Innovation in the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law*, TRUTH

Carrier's specific proposals and the proper weight that should be granted to the evidence Carrier uses to support his claims.¹⁵ Carrier has already responded extensively to this first round of critical commentary.¹⁶

Rather than recapitulate that earlier debate, I want to focus on a particularly large and important stone that was left substantially unturned. With the exception of some brief reactions by Professor Brett Frischmann,¹⁷ Carrier's discussion of copyright law and innovation was essentially ignored.

Yet Carrier devotes roughly one hundred pages of his book to copyright law (pp. 101–97) and identifies his copyright proposals as the most far-reaching reforms he proposes. He declares: "Of all the changes recommended, the copyright proposals promise to unleash the greatest innovation" (p. 12). As I stated above, Carrier's copyright proposals are, at least at a theoretical level, his most radical reforms. So, setting aside the debate concerning Carrier's antitrust and patent proposals, I want to respond to his prescriptions for copyright.

III. CARRIER'S COPYRIGHT PROPOSALS

In Chapters Six to Eight, Carrier offers three proposals for the reform of copyright law. First, in Chapter Six, Carrier recommends a return to the copyright infringement standard known as the *Sony* rule, which applies to those who make and distribute devices that are used to commit copyright infringement (pp. 105–45).

*Sony Co. of America v. Universal City Studios, Inc.*¹⁸ is the landmark 1984 Supreme Court case where the motion picture industry failed in its efforts to outlaw (or at least license) the technology of the videocassette recorder. Sony manufactured the Betamax, which was used by consumers to make copies of television broadcasts.¹⁹ Since copying television broadcasts ostensibly amounted to copyright infringement, the motion picture industry brought suit against Sony, arguing it should be held liable under a "contributory copyright infringement" standard.²⁰

The Supreme Court, in a 5–4 decision, sided with Sony. The vote was close: Justices O'Connor and Brennan apparently switched sides after

ON THE MARKET (Mar. 29, 2009), <http://truthonthemarket.com/2009/03/29/welcome-to-the-1st-totm-blog-symposium-on-michael-carriers-innovation-in-the-21st-century-harnessing-the-power-of-intellectual-property-and-antitrust-law/>. These reviews have now been edited and republished as a printed issue of the *Alabama Law Review*. See 61 ALA. L. REV. 553 (2010).

15. E.g., Daniel Crane, Crane on Carrier's Innovation in the 21st Century, TRUTH ON THE MARKET (Mar. 30, 2009), <http://truthonthemarket.com/2009/03/30/crane-on-carriers-innovation-in-the-21st-century/>.

16. Michael A. Carrier, *Innovation for the 21st Century: A Response to Seven Critics*, 61 ALA. L. REV. 597 (2010).

17. Brett Frischmann, *Frischmann on Carrier's Innovation in the 21st Century*, TRUTH ON THE MARKET (Mar. 31 2009), <http://truthonthemarket.com/2009/03/30/frischmann-on-carriers-innovation-in-the-21st-century/>.

18. 464 U.S. 417 (1984).

19. *Id.*

20. *Id.* at 434.

initially favoring the motion picture industry.²¹ The *Sony* decision, however, was a win for those who favored new consumer technologies over copyright. It is read to create a safe harbor for “dual-use” technologies that shields manufacturers from copyright infringement liability. This safe harbor is important to legitimate uses of these technologies because although, for instance, videocassette recorders can be useful in infringing copyrights, they can also be used to make lawful copies (including “fair use” copies). Completely outlawing new copying technologies would effectively prevent the use of those technologies for noninfringing and socially productive purposes.

While the *Sony* safe harbor rule still applies to those who make and sell devices with “substantial non-infringing uses,” more recent caselaw, including the Supreme Court’s *Grokster* decision,²² place new limitations on the *Sony* rule, arguably undercutting its power to shield technology manufacturers from litigation and liability. Carrier argues that courts should return to the technology-favoring standard announced in *Sony* (pp. 144–45).

The innovation benefits from this proposal are fairly straightforward. With a strong *Sony* rule, companies will be more likely to invest in the creation and marketing of dual-use technologies, which can pave the way for add-on innovations. Without a strong *Sony* rule, creators of dual-use technologies will be less likely to attract business partners and investors. These parties will have a reasonable fear that copyright law will outlaw new technologies and—worse yet—expose those offering new technologies to crippling damage awards. A strong *Sony* rule helps to avoid this outcome.

Carrier’s second proposal, set forth in Chapter Seven, takes up the question of those crippling damage awards directly. Specifically, he proposes reducing the statutory damages awards provided under copyright law (pp. 147–61). Under existing law, a copyright owner is entitled to elect to receive, as an alternative to the actual damages caused by the infringement, a statutory damages remedy of up to \$30,000 per work infringed. This remedy can be increased to \$150,000 per work in cases where the infringement is “willful.”²³ It follows that under the current statute, a teenager who knowingly and willfully violates copyright law by copying a “mix” of ten songs on an iPod or a home computer could, in theory, be liable for over \$1,000,000 in damages to copyright holders.

Carrier does not suggest that statutory damages should be eliminated (p. 160). Rather, he proposes limiting the remedy to apply only to direct infringers. In a case like *Sony*, where the defendant is charged with contributing to infringement by virtue of supplying a technology, Carrier would make statutory damages unavailable, forcing those who sue makers of dual-use technologies to prove their actual damages (pp. 160–61). Carrier

21. Various blow-by-blow accounts of the *Sony* case exist. See, e.g., Jessica Litman, *The Sony Paradox*, 55 CASE W. RES. L. REV. 917 (2005); Peter S. Menell & David Nimmer, *Unwinding Sony*, 95 CALIF. L. REV. 941 (2007).

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

23. 17 U.S.C. § 504(a)-(b) (2006).

supports this proposal by pointing to cases where makers of innovative technologies have been ordered to pay millions or billions of dollars in statutory damages. In effect, Carrier's argument is that the statutory damages remedy, when applied to technology manufacturers, amounts to virtual capital punishment.

Just as a strong *Sony* rule will allow innovators to better attract investors and business partners, Carrier's second proposal will reduce the downside risks of launching innovative technologies, achieving essentially the same result. Under Carrier's proposal, damage awards against technological innovators must be premised on facts, not punitive zeal. This approach recognizes the social benefits of innovative technology.

Carrier's third copyright proposal concerns the anticircumvention provisions of the Digital Millennium Copyright Act ("DMCA") (pp. 163–97). The DMCA made many changes to copyright law, but the anticircumvention provisions are easily the most controversial. Though they are embodied in fairly complex statutory language, in simple terms they prohibit the circumvention of technological measures that control access to copyrighted works.²⁴ Essentially, the provisions outlaw both "hacking" the technologies that protect copyrighted material and the distribution of tools that are used to do the same. The DMCA ensures that the technological "locks" of copyrighted works cannot be broken by the general public.

The anticircumvention provisions have no doctrinal connection to any actual infringing use of the copyright-protected work. Arguably they are not really akin to traditional copyright law at all, but constitute a new form of private right in the architecture of consumer goods. In any case, in their short history, these provisions have enabled a great deal of anti-competitive mischief. Given that (1) computer software is protected by copyright law, and (2) computer software is now found in all manner of devices, it is no surprise that the DMCA has been employed by plaintiffs primarily interested in preventing competition in the markets for interoperable devices.

For instance, contemporary printer cartridges interact with and gain access to printers' programs. Indeed, in one well-known case discussed by Carrier, Lexmark, a printer manufacturer, attempted to use the DMCA to prohibit the sale of replacement printer cartridges by a competitor (pp. 185–86). In another case, a plaintiff attempted to use the DMCA to prevent the sale of replacement garage door openers, where the replacement transmitter allegedly "circumvented" the technological access controls on the receiving opener device (pp. 186–87). In both cases, the plaintiffs lost, but on grounds that might not discourage similar attempts in the future.

Both of these cases recall the essential situation in the *Motion Picture Patents* case, where the patent holder attempted to control the market for films played on the patented machine.²⁵ Yet copyrights are obtained much more easily and apply for a much longer time than patents, making the

24. See 17 U.S.C. §§ 1201–1205 (2006).

25. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917).

extension of a copyright monopoly to control a market for interoperable devices substantially more troubling from an antitrust policy perspective.

To address these sorts of cases, Carrier argues that plaintiffs bringing anticircumvention claims under the DMCA should be required to prove (1) that the expressive qualities of the product (the copyright-relevant qualities) are what is driving consumer demand for the product, and (2) that the alleged violations actually threaten direct market harm (pp. 193–97). If this standard were adopted, we could at least be assured that copyright claims based on the sale of replacement parts for garage door openers and printer cartridges would fail. (Most consumers, I imagine, do not buy garage door openers or printer cartridges to enjoy the poetry of their operating code.) Additionally, even in cases involving products at the core of copyright, plaintiffs would need to explain to a court exactly how a defendant's activities would threaten to erode prospective sales.

Most technology manufacturers and consumers would welcome Carrier's proposal. It seems sensible to require DMCA claims to have some true connection to a copyright-like interest. Additionally, by requiring copyright owners to provide evidence of harm, Carrier's proposal recognizes the fact that many technologies that entail the circumvention of technological barriers are not intrinsically harmful to the economic interests of copyright holders (pp. 195–97). Indeed, in some cases, they can benefit the copyright owners, making their products more flexible and valuable.²⁶

My intuition is that, as I said earlier, Carrier has picked three proposals for copyright law reform that will be supported by a majority of legal scholars. I am not saying that every person in the legal academy would endorse these proposals, but they are clearly targeted at well-recognized problems where copyright law is thought to be failing to serve the public interest.

Personally, I would be delighted if these proposals were adopted. The technological upside here significantly outweighs the copyright downside. Indeed, I'm not sure that modifying copyright in the ways suggested by Carrier results in any social costs at all. In other words, copyright law does not need to bend from its own stated purposes to better serve the goals of innovation. It serves its own purposes *better* with these pro-innovation modifications.

And this is why, while I'm entirely supportive of Carrier's reforms, I wish he had taken his arguments a little further.

IV. INNOVATION'S COUNTERWEIGHT?

To present my concern, I want to start by walking through Carrier's three proposals again, asking a few questions along the way. (I should note at the outset that the ground I am about to cover is well traversed.)²⁷

26. See generally JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET AND HOW TO STOP IT* (2008) (explaining how open technological architectures can be "generative").

27. I frame these as brief personal reactions to Carrier's copyright proposals here, but they are in fact reactions that reflect the volumes that have already been written about the many potential

Carrier's first proposal is to return to the *Sony* rule established in 1984 with respect to copyright infringement standards applied to consumer dual-use devices. Quite a few important and copyright-relevant things have happened, however, in the last twenty-five years. *Sony* was decided ten years prior to the popular explosion of the internet, itself a dual-use technology that is delivering innovations that are changing the world in quite profound ways. If nothing else, a return to the *Sony* rule in this new technological age seems conservative. Arguably, the social benefits being delivered by the internet and digital networks warrant a standard *more* favorable to innovative technologies than the *Sony* rule.²⁸

Carrier's second proposal could also go further. Carrier, when it comes down to framing the proposal, is taking no issue with the existing liability imposed by copyright law on direct infringers, who are increasingly average consumers with no knowledge of how copyright law's stiff penalties might play out in their own lives. The parent of a teenager surfing for music online may find it troubling that two copyright owners have a plausible legal claim to potential statutory damages of \$150,000 for a single willfully infringing mouse click.²⁹ The recording industry, as Carrier notes, has already sued tens of thousands of individuals (including parents of teenagers) for copyright infringement (p. 122). Would parents settling these suits for thousands of dollars feel better knowing that the creators of the file-sharing programs used by their children were insulated from statutory damages?

Finally, Carrier argues that the DMCA's anticircumvention provisions should be limited to cases at the core of copyright. Most critics of the anticircumvention provisions, however, don't limit their claims in this way. They complain about how the law is ineffective in preventing infringement, how it is chilling with respect to academic research and free speech, and how it abrogates traditional rights of consumer fair use.³⁰ To the minds of many scholars, the social costs of the anticircumvention laws today seem to clearly outweigh the benefits provided by the statute as a whole. So while the DMCA might be limited to cases where real copyright interests are involved, why stop there? Why not jettison the anticircumvention provisions altogether?

Carrier's book does not make any explicit case for these broader proposals. Yet the tenor of his criticisms suggests that he would not oppose them. So exactly why does he avoid a more aggressive stance toward copyright

variations of copyright reform. Taking the *Sony* case alone, over 2,000 law reviews make mention of the case, and I would bet that the majority of these endorse some carefully considered view of *Sony* and ultimately advocate some sort of legislative or doctrinal reform. See pp. 109–11, 133–35.

28. Citing to anyone may risk a chain reaction of obligatory footnotes, but to my mind, one of the best critiques of the *Sony* rule is Litman, *supra* note 21.

29. As all copyright lawyers know, musical mp3s can infringe (at least) two copyrights: one in the musical composition and one in the sound recording.

30. Again, there are too many arguments to cite, but the Electronic Frontier Foundation certainly deserves to be listed as one of the most strident critics of the anticircumvention provisions. See FRED VON LOHMANN, UNINTENDED CONSEQUENCES: TWELVE YEARS UNDER THE DMCA (2010), <https://www.eff.org/files/eff-unintended-consequences-12-years.pdf>.

reform? What is the copyright counterweight operating against further forwarding of technological innovation? What would the public lose, exactly, if we were to expand the protections of the *Sony* rule, do away with all forms of statutory damages, and repeal the DMCA's anticircumvention provisions entirely?

My impression is that Carrier does not make this move because he wants to limit his proposals to those that directly promote technological innovation. The problem, Carrier claims, is that "the link between copyright and innovation . . . has been lost in the glare of the creativity spotlight that courts and scholars have shined on copyright law" (p. 103). So Carrier's strategy is to explain how courts are actually weighing innovation against creativity in many cases, and disfavoring innovation in the process.³¹

Carrier argues that even when courts do not do it explicitly, this is the way things play out as a result of three systemic asymmetries (pp. 128–33). The first and most important is what Carrier calls "innovation asymmetry." Contemporary copyright holders, when they appear before courts and legislators, are adept at showing the present harms they suffer from the arrival of innovative dual-use technologies. They point to widespread popular infringements and quantify how much they might have made if each downloaded song had instead been subject to a lawful sale or license. By contrast, those who distribute dual-use technologies can point to little more than their investment costs and the popularity of the new technology with consumers (both of which may be attributed, by plaintiffs, to the prospect of the technology's infringing uses). Yet this account fails to represent the true social benefits that dual-use technologies ultimately deliver.

As Carrier points out, unanticipated applications of new technologies are often the rule rather than the exception. The telephone was first envisioned as a broadcast medium, while the phonograph was thought to be marketable as a means to memorialize last words (p. 129). In the early stages of any new technology's introduction, society can only guess about the technology's ultimate utility.³² Indeed, the private parties introducing important new technologies will likely obtain only the smallest fraction of the value of the benefits that society obtains. Yet courts and legislators often weigh copyright's bird in hand more heavily than new technology's hundred in the bush. This is a mistake, since it favors a clearly perceptible but limited social benefit over a currently uncertain and unseen—but potentially vast—social gain.

Carrier has two related asymmetry arguments that flow from the first. Carrier's "error-costs asymmetry" is essentially the observation that when courts favor copyright over new technology, not only do they act with prejudice to future social benefits, but the social costs of their balancing errors

31. Carrier relies in part on Tony Reese's contribution to the voluminous corpus of *Sony* commentary. See R. Anthony Reese, *The Problems of Judging Young Technologies: A Comment on Sony, Tort Doctrines, and the Puzzle of Peer-to-Peer*, 55 CASE WES. RES. L. REV. 877, 881–98 (2005).

32. *Id.* at 889–90.

are never appreciated, since the future benefits of the stifled technology may never become apparent (p. 131).

Carrier's third asymmetry, the "litigation costs asymmetry," notes how firms that benefit from copyright entitlements have the power and the motive to limit the socially beneficial Schumpeterian "creative destruction" of their business models (pp. 131–33). Copyright incumbents will have incentives to impose substantial litigation costs on smaller entrepreneurs who threaten their profits. Again, present private wealth trumps future popular wealth.

Carrier's innovation asymmetry certainly supports his argument, but it works to cabin his claims as well. By focusing only on innovative technologies, Carrier effectively takes our focus away from the core of copyright law theory. He works to trim the antitechnology excess off copyright's frame, getting it down to a more competitive weight. But I would argue that the core "creativity" theory of copyright has its own problems that go hand in hand with Carrier's pro-innovation arguments.

Carrier's reform arguments make even more sense when they are supported and supplemented by a broader critical perspective on contemporary copyright law.

V. PUBLISHERS AND THE PUBLIC INTEREST

While Carrier suggests that copyright is largely unrelated to the promotion of innovation, there is actually a deep historic link between copyright law and new technology. Ironically, while the internet is sometimes described as a mechanism for destroying copyright, the birth of copyright is inseparable from state attempts to control a different innovative technology: the printing press.³³ While the printing press was recognized as a great innovation with commercial potential, it was also a technology that threatened contemporary powers by enabling the circulation of heretical and seditious texts.

The English crown answered this technological threat in various ways over the course of time. Most importantly for our purposes, in 1557 it created a licensing regime whereby a particular guild, the Stationers' Company, enjoyed, in essence, a form of commercial monopoly on the printing of books as well as the exclusive right to police against the sale of heretical and seditious books.³⁴ The term "copy right" was not coined as a state policy for promoting creativity by vesting rights in authors, but rather as a method for efficient market exploitation within a censorial cartel.³⁵ By

33. I am not a historian, but I should note that there is general agreement about the facts that follow. This thumbnail sketch is based on the work of others, such as JOSEPH LOEWENSTEIN, *THE AUTHOR'S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT* (2002); LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968); MARK ROSE, *AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT* (1993). There are, at this point, many learned scholars who study the early history of copyright.

34. See PATTERSON *supra* note 33, at 28–29.

35. See *id.* at 42–43.

providing a system by which individual printers could register with the Stationers' Company exclusive rights to print a particular text, the cartel established the basis for modern copyright.³⁶ This arrangement endured for over a century.³⁷

Given the standard invocation of the “authorial incentive” notion of copyright by courts and commentators, this may seem like a radical reframing of copyright history. However, it is in fact the consensus account of copyright prior to 1710 by historians.³⁸ After 1710, “modern” copyright emerged with the Statute of Anne, the English legislation that vested original copyright in the hands of authors, rather than commercial printers.³⁹ Since modern copyright is now officially 300 years old, there will surely be much more said about the Statute of Anne and its origins in the next couple of years. Yet it is already the case that scholars disagree about exactly how much the Statute of Anne changed things and how much it left the same.⁴⁰

Rather than join this debate, I will make a fairly innocuous observation: it seems clear that the Statute of Anne was not enacted in response to some pervasive crisis concerning insufficient creative literary output in England at the time. Instead it was, according to the majority of scholars, enacted primarily at the behest of the Stationers' Company as a compromise measure following the failure of Parliament to renew its monopoly privileges.⁴¹ In other words, the London booksellers sought and managed to obtain the first modern copyright law in an effort to replace some of what they had lost when the crown failed to perpetuate their monopoly.

After the enactment of the Statute of Anne, it seems there were no radical changes in the quality or quantity of authorship being produced. Certainly, the presence or absence of copyright did play a role in the way authorship was understood and the way the texts were created and circulated in England. The pre-Anne works of Shakespeare, Milton, and Donne were different, in some ways, than the post-Anne works of Swift, Pope, and

36. See *id.* at 42–77.

37. See *id.* at 143–44.

38. See Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 922–25 (2005); Edward Lee, *Freedom Of The Press 2.0*, 42 GA. L. REV. 309, 320–27 (2008); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 815–17 (2001); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 320–21 (2004); Malla Pollack, *Purveyance and Power, or Over-Priced Free Lunch: The Intellectual Property Clause as an Ally of the Takings Clause in the Public's Control of Government*, 30 SW. U. L. REV. 1, 95–99 (2000); Mark Rose, *The Public Sphere and the Emergence of Copyright: Areopagitica, the Stationers' Company, and the Statute of Anne*, 12 TUL. J. TECH. & INTELL. PROP. 123, 133–39 (2009); Diane Leenheer Zimmerman, *It's an Original! (?): In Pursuit of Copyright's Elusive Essence*, 28 COLUM. J.L. & ARTS 187, 191–93 (2005).

39. 1710, 8 Ann., c. 19 (UK).

40. For a wonderful sampling of contemporary thoughts on the Statute of Anne, you can visit the website of the Copyright@300 conference and download free—and legal—mp3s featuring the remarks of various luminaries within the copyright scholarship pantheon. See *Copyright@300*, BERKLEY LAW, <http://www.law.berkeley.edu/institutes/bclt/statuteofanne/schedule.htm>.

41. E.g., Pollack, *supra* note 38, at 95–99; Rose, *supra* note 38, at 138.

Jonson.⁴² But while copyright may have influenced the lives of authors and their business strategies as well as the ways in which authorship happened and was performed, the fact is that copyright law was still primarily a specialized concern of those in the business of printing and publishing. After all, publishers generally obtained, by transfer, the copyrights of original authors, who generally had little control of their copyright after that point.⁴³

So we can see that copyright originated in a manner somewhat at odds with its ostensible goals of rewarding authors for creativity. Its historical progression over the last three hundred years is even stranger if one buys into the authorial incentive story that is so frequently cited by courts and commentators as the rationale behind copyright. Copyright law has gained substantial power during the last three centuries without any clear theoretical justification for its expansion. Indeed, the Supreme Court has implied that a reasonable author should not just anticipate the current copyright bargain, but should also anticipate that entitlements will continue to expand, because that is the sort of thing that copyright law just seems to do.⁴⁴

The Statute of Anne granted an initial fourteen-year copyright term to authors. Yet today, a typical new copyright will last at least a century, probably longer. In terms of copyright's scope, the original laws in the United States were limited to books, charts, and maps. Today, copyright includes artwork, theatrical performances, photography, phonographs, film, computer programs, and physical architecture—and even things unknown, if they are expressive and fixed in a tangible medium.⁴⁵

Why so many expansions in duration and scope? At no time in the past three hundred years was the world suddenly confronted with a crisis in creative production. Instead, the most plausible answer seems to be that the industries that stand to benefit from broader copyright protection have succeeded in convincing legislators to expand the power and scope of copyright without much of a theoretical basis for doing so. After legislators were convinced that copyright law was good, more expansive copyright law almost always seemed better. As Jessica Litman has said, the history of copyright is the history of a one-way ratchet.⁴⁶

But most importantly and most pertinent to the present situation, the class of individuals subject to copyright law has been broadened. During the majority of copyright's history, including its prehistory, copyright has been primarily a law of unfair competition, wielded by publishers against other publishers in the trade. But today, given the proliferation of computer

42. The relation of the author to the text and its circulation has always been complex, but the availability of copyright certainly shaped how Swift, Pope, and Jonson understood their place in society. See JOSEPH LOEWENSTEIN, *BEN JONSON AND POSSESSIVE AUTHORSHIP* (2002).

43. Daniel J. Hulsebosch, *An Empire of Law: Chancellor Kent and the Revolution in Books in the Early Republic*, 60 ALA. L. REV. 377, 395–96 (2009).

44. *Eldred v. Ashcroft*, 537 U.S. 186, 215 (2003) (“[T]he author of a work created in the last 170 years would reasonably comprehend . . . a copyright not only for the time in place when protection is gained, but also for any renewal or extension legislated during that time.”).

45. 17 U.S.C. § 102 (2006).

46. JESSICA LITMAN, *DIGITAL COPYRIGHT 80* (2001).

networks and other new dual-use technologies that evolved from the photocopier and videocassette recorder, copyright law reaches out to police ubiquitous public behaviors, such as the everyday use of personal computers. As the pioneering lawsuits of the recording industry have shown, members of the general public can now be counted among the ranks of potential copyright defendants.

All of this is to say that we may be at an inflection point in copyright law. Copyright's guiding theory seems substantially unmoored. The benefits it provides to the general public are being subjected to thorough re-examination. The time may be ripe, therefore, to bring innovation policy to bear more centrally and forcefully on the institution of copyright.

VI. A FOOT IN THE DOOR?

As I stated earlier, Carrier's proposals are modest and supported by abundant common sense. Yet I worry that they face a substantial challenge, given that they sail into a buffeting legislative headwind of increasing copyright protections. Trimming a small bit of the fat off contemporary copyright law in favor of the public's benefit might not sound like a radical idea, but it would fly in the face of everything we've known about copyright law up to this point.⁴⁷ As Herbert Hovenkamp has noted, "[T]he Copyright Act reads like a recipe book for capture, with numerous special provisions favoring this or that interest group."⁴⁸

If we look to the recent history of copyright legislation, this description rings true, and hence the prospect would seem bleak for any public-minded copyright reform. Yet there are glimmers of hope. In recent years, some major technology companies that often find themselves on the sharp end of copyright (such as Google) have started paying closer attention to the legislative process. At the same time, popular concern about copyright law seems to be growing. A cadre of contemporary copyright law scholars (including many operating outside of law schools) are writing books, blogs, and articles targeted at broad audiences expressing profound skepticism about contemporary copyright law.⁴⁹ Grassroots consumer-focused organizations, like the Electronic Frontier Foundation and Public Knowledge, are playing an active role in bringing copyright issues to the attention of the media and decision makers. If Carrier's three proposals were actually supported by legislators, this would constitute a major turning point.

47. For an excellent overview of how recent copyright legislation has worked in practice, see *id.*

48. Hovenkamp, *supra* note 12, at 125. Along similar lines, see Christina Bohannon, *Reclaiming Copyright*, 23 CARDOZO ARTS & ENT. L.J. 567, 568 (2006) ("[T]he Copyright Act confers overly broad rights to copyright owners at the expense of the public interest . . ."); Marci A. Hamilton, *Copyright Duration Extension and the Dark Heart of Copyright*, 14 CARDOZO ARTS & ENT. L.J. 655 (1996); Lunney, *supra* note 38.

49. See, e.g., YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); TARLETON GILLESPIE, *WIRED SHUT: COPYRIGHT AND THE SHAPE OF DIGITAL CULTURE* 27 (2007); LITMAN, *supra* note 46; SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS* 148 (2001).

Ideally, though, we would do so much more. Carrier's innovation asymmetry suggests that when law prevents innovation, we never know the true social benefits offered by the road not taken. It follows that likewise, we do not know exactly what the world might look like if contemporary copyright had a more reasonable duration, a less punitive system of remedies, a clearer system of rules, and a greater solicitude for the needs and concerns of the average citizen. Most importantly, we do not know what effects, if any, such a regime would have on the promotion of cultural creativity, the putative goal of our contemporary copyright law.

The internet, however, might give us some hazy glimpses of that path not followed. As Carrier notes, there is a very odd fact about the internet: it does not seem that the network's failure to facilitate strong proprietary rights in information has led to any marked deficit in creative production. To the contrary, it seems that technologies granting authors the ability to share their creativity widely, without strong proprietary controls and attendant financial rewards, are eagerly deployed by authors seeking to reach popular audiences.⁵⁰ Network technology, not copyright, is the force behind this explosion of socially beneficial creative production.

When we consider phenomena like blogs, wikis, and other forms of internet-based creativity, it seems possible that copyright law today is doing at least as much to limit creativity as it does to enable it. The copyright stories that hail from the internet often seem to feature corporate copyright owners seeking to stifle the work of creative amateurs who write fan fiction or create "mashup" works and parodies. The consumer who seeks to create and share is cast as a copyright pirate. To the extent that copyright law is used in this manner, it seems to operate, in Carrier's calculus, as a counterweight to both innovation and creativity itself. It may be that if we favor new technologies very broadly, do away with statutory damages entirely, and completely repeal the anticircumvention provisions of the DMCA, we may find ourselves in a world that we have failed to imagine—a world with even more innovation, and better yet, even more creativity.

Many legal commentators today boggle at the current trend of legislators pursuing even more expansive and draconian copyright laws to tame network technologies. (The recent secret international Anti-Counterfeiting Trade Agreement negotiations, apparently driven by U.S. copyright industries, are a case in point.)⁵¹ Increasingly, it seems that the politician's "middle-class America" is growing tired of being repeatedly informed via compulsory DVD messages that making noncommercial copies of motion pictures may subject them to a stint of five years in federal prison. Those who take this prospect seriously are among the many people fired up about copyright reform. Copyright critics may be devotees of Lawrence Lessig's

50. Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 955 (2004).

51. See, e.g., David Kravets, *ACTA Draft: No Internet for Copyright Scofflaws*, WIRED, Mar. 24, 2010, <http://www.wired.com/threatlevel/2010/03/terminate-copyright-scofflaws/>.

“remix culture,”⁵² they may be students unlawfully swapping mp3 files with friends, or they may be technology enthusiasts who are members of the free software movement.⁵³ Whatever the case, they have a common thought: copyright may be the law, but the law is not working.

Carrier’s innovation-based policy arguments will add fuel to these fires, but I imagine that if his proposals are adopted—if the public interest in copyright is taken seriously—more reforms will inevitably follow. If the public indeed gets the copyright law that it wants, it will ask for reforms that go substantially beyond Carrier’s limited carve-outs for innovative technologies.

CONCLUSION

Michael Carrier asks his readers to seriously consider the effects of today’s IP laws on innovation. He gives us three modest proposals for copyright law reform that will promote technological innovation. But if we can really move copyright law to better serve the public interest, we should not stop there. We should create a truly innovative copyright.

52. LAWRENCE LESSIG, *REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY* (2008).

53. See FREE SOFTWARE FOUNDATION, <http://www.fsf.org/>.