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ARTICLE

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American copyright law has undergone an unappreciated conceptual transformation over the course of the last century. Originally conceived of as a form of private law—focusing on horizontal rights, privileges, and private liability—copyright law is today understood principally through its public-regarding goals and institutional apparatus, in effect as a form of public law. This transformation is the result of changes in the ideas of law and lawmaking that occurred in American legal thinking following World War II, manifested in the deeply influential philosophy of the Legal Process School of jurisprudence which shaped the modern American copyright landscape. In the Legal Process conception, determining the substantive content of the law is fundamentally a matter of identifying the institution with formal competence (and legitimacy) to decide the matter, and then deciphering its policies and directives for an area of law in a purposive manner. The heyday of the Legal Process School, the 1950s and 1960s, coincided with the period during which the current U.S. copyright regime was being constructed. Several of its core lessons find direct veneration therein, including: the centrality of legislation as the harbinger of copyright's policy and purposes; the primacy of collectivist copyright policy over individual copyright principles; a recognition of the limitations of courts and judge-made law; and the treatment of copyright as a specialized but autonomous body of law requiring expert administration. As this Article argues, the U.S. copyright regime is today better conceived of as a "legal process," wherein the law is dynamic, purposive, and multi-institutional in origin. Modern copyright thinking would do well to embrace this reality and develop mechanisms to deal with this fundamental—yet unacknowledged—transformation, which explains a variety of perceived anomalies and puzzles within the working of the system.

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INTRODUCTION

Modern American copyright law is not what it was less than a century ago. Not only is the substantive content of current copyright law characterized by an overbearing complexity, but the proliferation of institutional and private actors within the system has fundamentally transformed its own understanding of law and lawmaking, and thereby the very goals of copyright law. Copyright's formal blackletter directives undoubtedly originate in the text of the Copyright Act of 1976,[1] the most detailed copyright statute ever enacted in the United States.[2] Nevertheless, the statute is in many important respects underinclusive and incomplete. This reality has required federal courts to develop rules and principles for different copyright questions, sometimes working within the interstices of the statute's directives and

1 Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101–805 (2018)).

2 *See* 1 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT xiii-xiv (1978) (lamenting the complexity of the new Act and noting that its "body of detailed rules [is] reminiscent of the Internal Revenue Code"); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 859 (1987) (describing it as a "detailed comprehensive code, chock-full of specific, heavily negotiated compromises"); Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L.S. L. REV. 477, 479 (1977) (describing the novelty of the new Act).

congressional intent,[3] and at other times out of whole cloth, guided by their own sense of the system's values.[4]

Adding to this legislative–judicial dynamic is the role that the Copyright Office plays in developing copyright rules. As the agency with expertise in the area, the Office regularly intervenes in copyright disputes, advises Congress and other agencies on copyright matters, offers its own interpretation of statutory and judge-made law, and engages in notice-and-comment rulemaking in different specialized domains.[5] And then there is private ordering. Customs, norms, and industry-wide collective practices continue to flourish and grow in a wide range of domains and thereby introduce additional constraints on the behavior of actors.[6] Some of these norms and practices find their way into the formal content of copyright's rules through judicial opinions, but most thrive independently.[7]

Determining what U.S. copyright law actually says about an issue is therefore an indelibly complex exercise. It involves navigating the roles of the system's various institutional actors, unraveling their goals for the system and their potential for realization, and then understanding how their respective directives interact and coalesce to collectively constitute "copyright law." Yet, this complexity is hardly just an incidental byproduct of the system. As this Article argues, it is instead the result of a particular and unique conception of copyright law that has come to dominate modern American copyright

3 *See, e.g.*, ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 440-50 (2014) (relying on legislative history and the text of the statute to understand the definition of a "public performance"); Feist Publ'ns v. Rural Tel. Serv. Co. Inc., 499 U.S. 340, 354-61 (1991) (same with the originality doctrine); Pivot Point Int'l, Inc. v. Charlene Prods., Inc., 372 F.3d 913, 920-21 (7th Cir. 2004) (same with conceptual separability for useful articles); Aalmuhammed v. Lee, 202 F.3d 1227, 1231-32 (9th Cir. 2000) (same with the joint works doctrine); Childress v. Taylor, 945 F.2d 500, 505-07 (2d Cir. 1991) (same).

4 *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 941 (2005) (developing a standard of liability for inducement of infringement); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (developing a "transformative use" defense within the fair use context); Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 706-12 (2d Cir. 1992) (developing a test for assessing the infringement of computer software).

5 *See* 17 U.S.C. § 701(a)–(b) (2018) (detailing the "functions and duties" of the Register of Copyright, the "director of the Copyright Office"); *see also* U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 101.3 (3d ed. 2017) (describing the functions of the Copyright Office) [hereinafter U.S. COPYRIGHT OFFICE, COMPENDIUM].

6 *See generally* Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293 (1996) (describing the emergence of collective licensing within certain copyright industries); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (discussing the use of custom in copyright—and intellectual property law—more generally).

7 One such example of custom making its way into copyright doctrine is in the fair use doctrine. *See, e.g.*, Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 562 n.7, 593 (1985) (considering "standard journalistic practice" in determining whether news organization's taking was fair use); Ringgold v. Black Entm't. Television, 126 F.3d 70, 79-80 (2d Cir. 1997) (rejecting fair use defense for failure to follow industry custom and pricing in licensing set decorations).

thinking ever since the second half of the twentieth century. Built around the ideas of the Legal Process School of legal analysis that was deeply influential in the 1950s and 1960s,[8] this approach to copyright law treats it principally as a form of public law, wherein the advancement of the overall public welfare takes normative precedence over—and thereby motivates—the promotion of private interests, i.e., the interests of the author and of the user. Public welfare is in turn understood as a multifaceted goal, constructed and realized through the involvement of numerous public institutions that bring different collectivist values to the table, while imposing crucial checks on each other's power and legitimacy.

The modern legal process conception of copyright law is in stark contrast to the approach that preceded it, which viewed the subject as one of private law. Areas of private law—such as tort law, contract law, and property law—are characterized by their primary emphasis on the private parties involved in a legal dispute, and their individual interests at stake.[9] To the extent that they care about broader social goals and policies, they do so only ever *through* the lens of the private dispute at hand.[10] Within copyright law, this meant a focus on the author's rights and the defendant-user's privileges and immunities, with the broader public welfare a welcome byproduct of those entitlements that was nonetheless secondary in importance.

Late nineteenth- and early twentieth-century copyright case law and commentary epitomized this private law understanding. In a little known essay published at the turn of the century, Christopher Columbus Langdell characterized copyright law as the public's (i.e., the "State['s]") intervention on behalf of a private purpose, through its grant to authors of a "power to enforce" a prohibition against unauthorized copying.[11] Courts in this era echoed these ideas, implicitly acknowledging that copyright was about balancing exclusivity

8 The seminal text of the school is *The Legal Process*. HENRY M. HART, JR. & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW (William N. Eskridge & Philip P. Frickey eds., 1994). For a historical overview of the school and its texts, see William N. Eskridge & Philip P. Frickey, *An Historical and Critical Introduction to* The Legal Process, *in* HART & SACKS, *supra*, at li-cxxxvi [hereinafter Eskridge & Frickey, *Introduction*].

9 *See* John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012) (explaining how private law "defines the rights and duties of individuals and private entities as they relate to one another"); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1719 (1976) ("Private legal justice supposedly consists in the respect for rights."); Roscoe Pound, *Public Law and Private Law*, 24 CORNELL L.Q. 469, 471-74 (1939) (characterizing private law as law that "treat[s] all individuals as equal" and focuses on restoring the individual to their position from before the legal wrong).

10 For a fuller discussion of this idea, see Ernest J. Weinrib, *Private Law and Public Right*, 61 U. TORONTO L.J. 191, 192 (2011) (noting how, from a private law perspective, "arguments that seek to have the law achieve goals external to the parties' relationship . . . are all structurally inconsistent with fair and coherent determinations of liability").

11 Christopher Columbus Langdell, *Patent Rights and Copy Rights*, 12 HARV. L. REV. 553, 555 (1899).

and use, as between plaintiff and defendant.[12] Copyright law was thus, first and foremost, a body of private law regulating a horizontal relationship. By the middle of the twentieth century, this would change dramatically. One mid-twentieth century Supreme Court opinion captured the shift most dramatically when it unequivocally concluded that in copyright law the author's benefit was little more than a "secondary consideration," less important than copyright's "public purpose."[13] The private interests at issue were, in other words, merely in service of a public purpose, copyright's "ultimate aim."[14]

The roots of this fundamental transformation are to be found in important developments in American legal thinking that took place after World War II. While the Legal Realists of the 1930s and 1940s had succeeded in debunking the claim that legal reasoning was an autonomous enterprise wholly immune from politics,[15] they had at the same time failed to propose a constructive alternative in its place. The identification of law as rampantly indeterminate and driven by purely instrumental considerations seemed grossly unsatisfying to many, especially in light of the events of the war.[16] It is in this climate that the Legal Process School emerged, principally in the work of Lon Fuller, Henry Hart, and Albert Sacks, all professors at the Harvard Law School.[17] While acknowledging the instrumental nature of law,

12 *See, e.g.*, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249-52 (1903) (discussing copyright in commercial advertisement pictorial illustrations); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 61 (1884) (developing the idea that the author of the photograph was the person who was the "effective cause" for its existence); Baker v. Selden, 101 U.S. 99, 102 (1880) (developing and refining the exclusion of ideas and methods from copyright protection as a limit on the scope of the plaintiff's right).

13 United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

14 *See* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (noting how the "ultimate aim" of copyright was to "stimulate artistic creativity for the general public good").

15 *See* Eskridge & Frickey, *Introduction*, *supra* note 8, at lxvi-lxviii. For Legal Realist efforts to expose the myth of autonomous legal reasoning, see generally JEROME S. FRANK, LAW AND THE MODERN MIND (1930); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step*, 30 COLUM. L. REV. 431 (1930).

16 *See* Eskridge & Frickey, *Introduction*, *supra* note 8, at lxvi (noting that "positivism's separation of law and morals" was heavily disfavored leading up to World War II); *see also* ROSCOE POUND, CONTEMPORARY JURISTIC THEORY 10 (1940) (writing on the eve of World War II that "[o]ur faith in" an objective judiciary "is futile").

17 *See generally* LON FULLER, THE MORALITY OF LAW (1964); HART & SACKS, *supra* note 8, at 1-181; Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). Of these, *The Legal Process* is widely considered to be the classical work of the school. In addition to *The Legal Process*, the other classic of this school was the work on federal courts by Henry Hart and Herbert Wechsler. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953). The literature on the Legal Process School is quite voluminous. For a small sample, see Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1 (2013); William N. Eskridge, Jr. & Philip P. Frickey, *The Making of* The Legal Process, 107 HARV. L. REV. 2031 (1994) [hereinafter Eskridge & Frickey, *Making*]; Richard H. Fallon, Jr., *Reflections on the Hart and Wechsler Paradigm*, 47 VAND. L. REV. 953 (1994).

the Legal Process School argued that the content of the law was to be determined by the appropriate allocation of decisionmaking authority among different institutions, a principle it described as "institutional settlement."[18]

Institutional settlement allowed the law to move seamlessly between the *is* and the *ought* on different substantive questions, enabling it to grow organically, while maintaining its rational edifice.[19] Whether something was settled law was seen as a question of *who* (i.e., which institution) had the authority to determine it, in turn a product of whether that institution ought to be considered the right one for the particular substantive question at issue. Institutional settlement embodied a dynamic conception of law that consciously merged *means* and *ends*, premised on the idea that law is a continuous "doing of something."[20] Such allocation would facilitate each institution (within a legal area) to develop the law in accordance with its own core competence, thereby enabling the law as a whole to further its avowed goals, in turn identified based on such competence.[21] Institutional settlement therefore directly addressed the indeterminacy of legal rules through a principled allocation of lawmaking authority, which at once acknowledged the role of discretion while also evidencing a strong commitment to the rule of law.

The Legal Process principle of "institutional settlement" had an important prescriptive component to it. And this was the recognition that while courts were principled decision-makers in the adjudicative setting, they nonetheless had obvious limitations in their problem-solving and lawmaking capacities.[22] Congress was instead the "principal agent of change and policy development" which it realized through statutes.[23] Courts were to operate within the interstices of congressional enactments and defer to other institutions in a given area whenever needed. Law was therefore recognized to be a "purposive" enterprise, with every legal doctrine embodying an

18 HART & SACKS, *supra* note 8, at 5.

19 LON L. FULLER, THE LAW IN QUEST OF ITSELF 5-8 (1978); HART & SACKS, *supra* note 8, at 4-6. In Fuller's vision, which Hart and Sacks adopted, the merger of "is" and "ought" entailed embracing the connection between law and morality, or the recognition that identifying what the law is on a question always entails engaging the question of what it ought to be. Or, as Fuller himself put it, the law embodied in a "statute or decision is not a segment of being, but . . . a process of becoming." FULLER, *supra*, at 10.

20 HART & SACKS, *supra* note 8, at 148.

21 Eskridge & Frickey, *Introduction*, *supra* note 8, at xciii.

22 *See* Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 923 (2003) (noting that an awareness of these limitations was the "first step" of the paradigm); Eskridge & Frickey, *Introduction*, *supra* note 8, at lxxxiii ("[L]aw is not juricentric, and courts are part of a larger institutional system . . . ."); Fallon, *supra* note 17, at 966 (noting how the theory limited the judicial role to elaborating principles and policies "traceable to more democratically legitimate decisionmakers"); Fuller, *supra* note 17, at 393-404 (explaining the limits of adjudication as a method of lawmaking from within Legal Process).

23 Fallon, *supra* note 17, at 957-58.

objective, and courts tasked with ascertaining that purpose and elaborating on it.[24] Implicit in this formulation of law as a purposive enterprise was the belief that when it came to statutory regimes—areas of law created by Congress through legislation—the purpose of the law was to be found in the statute.[25] The soundest "starting point" in identifying the policy of a legal area was therefore the statute, which courts had to accept, elaborate on, or supplement as needed in a purposive manner.[26]

Institutional settlement as such was, of course, far from suggesting a mechanistic role for courts. All the same, it marked a genuine departure from the prior Legal Realist accounts, which appeared perfectly fine with juricentric common law rule development wherein courts would bring their own views of policy and purpose to bear on legal doctrine. In the Legal Process School, courts were "valorize[ed]" for their strengths as principled decisionmakers,[27] with the simultaneous recognition that in important respects those principles might be overridden by "policy preferences" better delineated by other institutions.[28] Principled (or reasoned) argument had its limits and policymaking was therefore presumptively outside the natural forte identified for courts,[29] and was instead within the domain of Congress.

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24 HART & SACKS, *supra* note 8, at 148.

25 The clearest statement of this idea is found in the theory's observation that a judge is always "obliged" to relate the decision to the statute out of which the question arises, rather than to "think of himself as in the same position as a legislator taking part in the enactment of the statute in the first place." *Id.* at 143. This was central to the idea of "reasoned elaboration." *Id.* (emphasis omitted).

26 Eskridge & Frickey, *Making*, *supra* note 17, at 2038. This idea does in reality predate Hart and Sacks and can be traced to earlier scholars who had grown skeptical of the role of courts after the successes of Legal Realism. Eskridge & Frickey, *Introduction*, *supra* note 8, at lviii-lxii. This view was most fervently held by Justice Felix Frankfurter, well known as a "patron saint" of the Legal Process School on the Court. Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2133 (2014); *see also* Eskridge & Frickey, *Introduction*, *supra* note 8, at lxi. For Frankfurter's insistence on restraint and deference to legislatures, see Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533-34 (1947).

27 *See* ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 143-59 (1998) (describing this trend and its conformity with institutional settlement).

28 Geoffrey C. Shaw, *H.L.A. Hart's Lost Essay:* Discretion *and the Legal Process School*, 127 HARV. L. REV. 666, 679 (2013); *see also* Edward L. Rubin, *Legal Reasoning, Legal Process and the Judiciary as an Institution*, 85 CALIF. L. REV. 265, 278-79 (1997) (book review) (identifying the idea that courts "should not make policy decisions" as a key facet of Legal Process); Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 217 (1983) (noting how Legal Process "would counsel judges to leave all matters of substantive policy to the other more representative branches").

29 *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1396 (1996) ("The particular task of courts . . . is to decide cases on the basis of reasoned argument, and only issues that can be resolved by that approach are appropriate for judicial resolution.").

A natural corollary to institutional settlement in the Legal Process tradition was the theory's faith in administrative agencies.[30] Developed as it was following the New Deal, the theory took the complexity of legal regimes as an innate feature of the legal landscape, but was completely sanguine about such complexity by empowering specific expert agencies to deal with it. In particular, the theory augmented its account of judicial skepticism vis-à-vis the legislature with the idea of judicial deference to administrative expertise, well before this became an accepted interpretive method.[31] This method was seen to enhance the overall "effectiveness" of a legal regime.[32]

The heyday of the Legal Process School, the 1950s and 1960s, coincided with the call for a comprehensive revision of U.S. copyright law. In 1955, Congress authorized a series of studies to document the problems that needed to be addressed in a new statute.[33] An overarching feature of these efforts was the idea that it was Congress—empowered by the Constitution—that assumed primary responsibility for delineating not just the content of copyright law, but also its policies and purposes. The revision sought to convert into legislation aspects of copyright doctrine that had been created by courts, and in so doing gave effect to the idea that copyright's commitment to "public welfare" was something that Congress alone was best positioned to realize.[34] Principles of copyright doctrine that had been developed through judicial reasoning were now enshrined in a systematic exposition of the entire regime, in an effort to introduce a degree of uniformity and coherence into the law around an identified policy: promoting public welfare by inducing creativity.[35]

The comprehensive revision unfolded over the next two decades, culminating in the enactment of the Copyright Act of 1976. The new regime that eventually resulted had at the end venerated several key tenets of the Legal

30 Eskridge & Frickey, *Introduction*, *supra* note 8, at cxxxi.

31 HART & SACKS, *supra* note 8, at 1288-90. Indeed, the book's first example is one where a federal court defers to administrative expertise in an area, despite being inclined to go in a different direction. *Id.* at 57-58; *see also* Dorf, *supra* note 22, at 923 n.184 (discussing this example).

32 *Id.* at 151.

33 U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW ix (1961) [hereinafter REGISTER OF COPYRIGHTS 1961 REPORT].

34 *See id.* at 5 (observing that the "primary purpose" of copyright legislation is "to foster the creation and dissemination of intellectual works for the public welfare"). The idea that Congress alone had power can be traced back to the deliberations accompanying the 1909 Act, which the *Report* quotes from with approval on the point that "Congress shall have the power to grant such rights *if it thinks best*." *Id.* (emphasis added) (citation omitted).

35 *See* BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 40 (1967) (noting how the 1909 Act "leaves the development of fundamentals to the judges"); NIMMER, *supra* note 2, at vi (describing how the 1976 Act consciously sought to depart from the judicial flexibility of the prior regimes); Litman, *supra* note 2, at 858-59 (discussing how some provisions of the 1976 Act "purport[ed] to adopt common law doctrine" while "others purport[ed] to abrogate it."); *see also* H.R. REP. No. 94-1476, at 129 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5745.

Process School. First, it firmly entrenched the idea that Congress had a dispositive say in the development of copyright policy (and when needed, principles), constrained only by the vague directives of the Constitution. While the idea had been latent in the buildup to the revision, the resulting regime made it explicit.[36] Not only was Congress's say on copyright policy to be definitive, but Congress was itself seen as the originator of such policy and free to disregard, override, or modify prior policy or copyright principles.[37] Second, courts were to limit themselves to the "reasoned elaboration" of congressional policy, as contained in the statutory scheme.[38] Even when the statute vested significant discretion in courts, they were to exercise this discretion in accordance with the broader goals emanating from the scheme, in a principled manner. No longer were courts seen as "partners" with Congress in this enterprise.[39] Judicially crafted copyright principles had to give way to statutorily delineated policy, when an accommodation was impossible. Third, the regime began to value greater deference to the expert body, the Copyright Office, which had played a key role in the comprehensive revision. It became standard practice to solicit and look to the Office's views on the statute and policy.[40] What thus emerged was the idea of copyright law as a regime with parts that needed to be "administered" using specialized expertise.[41]

Perhaps most importantly though, these structural shifts in the regime produced a more far-reaching—but largely unnoticed—change in the conception of *law* that copyright was. Given its emphasis on legislation, the Legal Process School had succeeded in characterizing questions of statutory interpretation and deference to expertise, regardless of the content of the underlying area, as a matter of *public law*. Indeed, Legal Process has been characterized as having set the "public law agenda" since its origins.[42] In

36 REGISTER OF COPYRIGHTS 1961 REPORT, *supra* note 33, at 5 (quoting the legislative history of the prior Act).

37 Litman, *supra* note 2, at 859 nn.16-17.

38 The Register of Copyright at the time described this as a "shift in direction for the very philosophy of copyright itself." Ringer, *supra* note 2, at 479; *see also* KAPLAN, *supra* note 35, at 41 (noting the problem of "a crowding of suggestive case law" under the prior Act); Litman, *supra* note 2, at 858 (noting the extensive role of courts under the prior Act and its reversal in the 1976 regime).

39 *See* Pierre N. Leval, *An Assembly of Idiots*, 34 CONN. L. REV. 1049, 1062 (2002) (describing and lamenting this change).

40 For the first attempt by the Supreme Court to do this, see Mazer v. Stein, 347 U.S. 201, 211-12 (1954). By 2014, this had become common practice, such that the Register noted that the "Copyright Office is aware that deference to its expert administrative authority turns upon . . . the correlation . . . [of its] practices to the state of the law." Maria A. Pallante, *The Next Generation Copyright Office: What it Means and Why it Matters*, 61 J. COPYRIGHT SOC'Y U.S.A. 213, 225 (2014).

41 *See, e.g.*, Goldstein v. California, 412 U.S. 546, 568-69 (1973) (describing the Office as the "agency empowered to administer the copyright statutes"); U.S. COPYRIGHT OFFICE, ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS: FISCAL YEAR ENDING SEPTEMBER 30, 2012, at 3 (2013) (describing how the Office "administered the copyright law").

42 Eskridge & Frickey, *Introduction*, *supra* note 8, at lii.

internalizing the structural lessons of the Legal Process School, copyright law readily signed onto this agenda. Since then, copyright law and jurisprudence have focused on the public administration of the statutory entitlement, one whose goals and ideals were set and constrained through institutional settlement. The regime's focus shifted from the allocation of private rights (and duties) to the allocation of decisionmaking power. And with this shift, copyright law underwent a quiet metamorphosis into an area of public law.

The effects of this transformation have been pervasive and continue to be felt in the copyright system to this day.[43] By grafting public-focused, institutional, and administrative ideals onto copyright's basic framework of right and liability, the new regime produced a veritable conflation of principle and policy. Individual copyright rules and doctrines reveal little alignment with the system's overall avowed goal of incentivizing creativity.[44] Courts—including the Supreme Court—consider themselves powerless to second-guess Congress's construction of the system's goals and policies, both generally and in individual cases.[45] They instead make every effort to artificially align copyright's well-worn rules and principles with the regime's overall policy as manifested in the statute. Additionally, the system's overall structural complexity is seen as an innate feature of the system, and copyright reform efforts seem perfectly willing to add to this complexity in multiple ways.[46]

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43 Scholars have previously predicted and documented these changes. *See, e.g.*, Joseph Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 129-31 (2004); Peter Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 194 (2002). Menell presciently predicted that "Congress will increasingly delegate authority to regulatory bodies and administrative officials . . . . [C]opyright lawyers will need to learn a lot more about administrative law as this new era unfolds." Menell, *supra*, at 197. Liu's account focuses on the complexity of the 1976 Act—in contrast to prior regimes—to argue that modern copyright law has become "regulatory" in structure. Liu, *supra*, at 90. While descriptively accurate, it simplifies a variety of important conceptual distinctions in characterizing the modern system as "regulatory." It also altogether disregards the possibility that the change in copyright law was produced by a broader transformation of the very concept of law in America that occurred at the time and focuses entirely on factors *internal* and *unique* to the copyright system. Liu, *supra*, at 129-31.

44 *See, e.g.*, Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1581-88 (2009) (documenting the mismatch between copyright's avowed purposes and actual doctrine); Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1198 (1996) (describing the gulf between copyright justification and copyright doctrine).

45 *See* Golan v. Holder, 565 U.S. 302, 324 (2012) (refusing to "second-guess the political choice Congress made" in enacting copyright legislation); Eldred v. Ashcroft, 537 U.S. 186, 188 (2003) (concluding that on the question of whether Congress "rational[ly] exercise[d]" its legislative power it would "defer[] substantially to Congress").

46 As examples, consider the Copyright Office's report on a small claims court for copyright disputes and its study on music licensing. *See* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE 133 (2015) (providing analysis and recommendations); U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS 92 (2013) (providing key findings and recommendations). Both reports focus on legislative reform as their solutions to current problems.

American copyright law is today better understood as a "legal process" rather than just a body of legal rules, and this Article traces the intellectual history of this transformation. The concept of law underlying copyright bears the unmistakable imprint of the Legal Process School, wherein (a) the law is continually attempting to identify and realize an external purpose, and (b) the public institutional dynamics of law production are just as important as the content of legal directives. Instead of fighting this reality, modern copyright thinking would do well to acknowledge it and move to understanding just how the legal-process features of the system might be better perfected and rationalized through the lessons of Legal Process theory. At a minimum, this will include: appreciating the working of the unstated "institutional settlement" ideal within the system; articulating a coherent account of what "reasoned elaboration" means for courts interpreting the copyright statute and deferring to expertise in that exercise; and embracing the complexity of the system by better managing it through the ideals of public administration. This, in turn, is likely to generate the important realization that modern copyright law is in a true sense a hybrid public–private system, wherein both public law and private law ideals attempt to coexist in equilibrium, albeit a dynamic one.

The argument that follows proceeds in four Parts. Part I begins with a brief description of the modern "public law" model of copyright that is today seen in U.S. copyright law and jurisprudence. It shows how copyright is today conceptualized as a private right that exists principally/only to further a public purpose, characterized by a commitment to divided lawmaking and interlaced with regulatory goals. Part II sets out the classical private law conception of copyright law that existed through the middle of the twentieth century, beginning with the era of Legal Formalism (or "classical legal thought"[47]) and culminating in the heyday of Legal Realism. During this era, copyright law and jurisprudence focused on the horizontal structure of the copyright entitlement and emphasized the role of principle (over policy) in the functioning of the system, which in turn recognized a central place for judges in the overall skein. Part III then documents the Legal Process turn in copyright jurisprudence that emerged post-World War II. It first sets out the central tenets of the Legal Process School and shows how several of its core lessons came to be all too readily internalized by the emergent copyright regime of the period. Having established the existence of this turn, Part IV then moves to the prescriptive and briefly shows how modern copyright discourse might actively embrace this turn to rationalize its public law elements through Legal Process thinking.

47 *See* DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 28 (2006) (using the term "classical legal thought" to refer to legal thinking that "emerged between 1850 and 1885" and "flourished between 1885 and 1935" but declined thereafter).

I. AMERICAN COPYRIGHT LAW: PUBLIC LAW IN DISGUISE

As a way of classifying various areas of law, the distinction between the domains of *public law* and *private law* is far from being analytically precise. Indeed, the lack of such precision has over the years produced calls to abandon the distinction altogether.[48] Nonetheless, it captures important intuitions in legal thinking and analysis—about the role of the state, collectivist (versus individualist) ideals, and private action—that continue to exert influence.[49]

Distilled down to its basics, public law implies a direct and central role for the state—as the protector of public welfare and public goals—in different aspects of the legal regime. This role can emerge in a variety of different ways, both structural and normative. Structurally, it has been seen to entail the state taking a direct role in the enforcement of legal directives (criminal law),[50] the creation of vertical rights and duties between individuals and the government (constitutional law),[51] or the horizontal relationship between different branches of the government (administrative law).[52] Normatively, it has come to include situations where an area of law is structured and driven primarily by the "public interest," such that the resolution of private disputes is about the vindication of public policy.[53] This is in contrast to private law, wherein the state plays an indirect role and the law focuses instead on the horizontal

48 *See* Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982) (noting the "decline" of the public/private distinction); John Henry Merryman, *The Public Law-Private Law Distinction in European and American Law*, 17 J. PUB. L. 3, 4 (1968) ("The public law-private law distinction is not taken as seriously in the United States."); Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanization, Globalization, Privatization*, 54 AM. J. COMP. L. 843, 844 (2006) (identifying the frequent assumption that "all law is public law"); Pound, *supra* note 9, at 469 ("Public law . . . is gradually eating up private law." (quoting William Ivor Jennings, *The Institutional Theory*, *in* MODERN THEORIES OF LAW 68, 72 (Humphrey Milford ed., 1933)).

49 For uses of the distinction, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 790-91 (1991); Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 876 (1991); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1436 (1988).

50 *See* Morton J. Horwitz, *The History of the Private/Public Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (identifying criminal law as public law).

51 *See id.* (identifying constitutional law as public law).

52 *See* Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 620 (1927) [hereinafter Frankfurter, *Administrative Law*] (classifying administrative law as an area of public law).

53 *See* Chayes, *supra* note 49, at 1284 (identifying the rise of "public law litigation" in federal court); George P. Fletcher, *Remembering Gary—and Tort Theory*, 50 UCLA L. REV. 279, 289 (2002) ("[T]he resolution of private disputes is supposed to further the public interest."); Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1, 2 (1959) (emphasizing that courts do and should consider the interests of "we the people" in adjudicating private disputes).

relationship and interaction between private parties.[54] Both structurally and normatively, private law operates between private actors.

In its functioning, U.S. copyright law today manifests its public law orientation in multiple ways, both normative and structural. The normative dimension relates to the way in which the law's purposes are understood, constructed, and instantiated into individual doctrine, while the structural relates to the substantive and institutional content of copyright doctrine. Three key attributes of the contemporary copyright landscape highlight its emergent public law orientation.

A. *Private Right for a Public Purpose*

The dominant justification for U.S. copyright law today is utilitarian, deriving from the language of the Copyright Clause of the Constitution.[55] In this understanding, "[t]he purpose of copyright is to create incentives for creative effort."[56] All the same, such individual creative effort is worthwhile only because it inures to the overall public benefit, or as one court put it, "The economic philosophy behind . . . copyright[] is the conviction that encouragement of individual effort by personal gain is the best *way to advance public welfare* . . . ."[57] Individual creative activity is seen as worthy of encouragement for its role in advancing public welfare. This public-regarding utilitarian logic therefore recognizes the existence of a causal and hierarchical relationship between the generation of a private benefit and the enhancement of overall public welfare. Copyright jurisprudence regards the private benefit the law produces as a "secondary consideration,"[58] while the benefits to the public form its "primary object."[59] Discussions of the modern copyright system today underscore this utilitarian, public-oriented logic, giving it the aura of an uncontested dogma.[60]

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54 Chayes, *supra* note 49, at 1282-83.

55 *See* U.S. CONST., art I, § 8, cl. 1, 8 ("Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing . . . to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .").

56 Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

57 Mazer v. Stein, 347 U.S. 201, 219 (1954) (emphasis added).

58 United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

59 Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

60 *See, e.g.*, *Sony*, 464 U.S. at 429 (noting that in copyright "the limited grant is a means by which an important public purpose may be achieved"); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); NEIL W. NETANEL, COPYRIGHT'S PARADOX 81-84 (2008) (describing modern copyright law as an "engine of free expression"). For an argument that copyright law is not utilitarian enough, see Sara K. Stadler, *Forging a Truly Utilitarian Copyright*, 91 IOWA L. REV. 609 (2006).

As understood in this justification, the private interests of the parties directly affected by the copyright system—authors, owners, and potential copiers—are little more than the *means* identified by Congress (via the Constitution) to realize an ultimate *end*. These private interests have, to copyright, no independent justification beyond the overall public-regarding purpose that they serve in enhancing the public welfare.[61] The end justifies the means, which has no separate reason for existence. Modern copyright's normative orientation is therefore collectivist, public-focused, and associated with a clear policy goal: inducing greater creativity through a private benefit at minimal social cost, for the benefit of the public. A direct consequence of modern copyright's focus on its public welfare policy has been that its internal doctrinal mechanisms— its rules, concepts, and principles—have assumed a secondary status to the overall collectivist goal. In other words, when there is a conflict between this external policy and the internal rules and principles of copyright, the latter is understood as needing to accommodate the former and not vice-versa. Copyright's internal logic is thus dependent on its overall collectivist policy.

The normative supremacy of copyright's public welfare policy is more than just of rhetorical significance. To the contrary, it actually impacts the way in which courts adjudicating copyright disputes prioritize policy considerations, which are invariably collectivist in orientation, over those deriving from principles relating to individual rights and liability. Established principles of copyright, such as the fact-expression distinction (i.e., the exclusion of facts from protection),[62] the merger doctrine,[63] originality,[64] or the use of a "reasonable observer"[65] standard for the infringement analysis are routinely recast (artificially) as emanating from copyright's overall policy goal determined for it by Congress, and having little independent salience on their own. Even independent of such recasting, courts make reference to copyright's "policy" commitment to the "common good" when attempting to

61 *See* ABRAHAM DRASSINOWER, WHAT'S WRONG WITH COPYING? 17-19 (2015) (noting the limitations of this approach); Shyamkrishna Balganesh, *The Obligatory Structure of Copyright: Unbundling the Wrong of Copying*, 125 HARV. L. REV. 1664, 1664 (2012) (criticizing this trend).

62 *See, e.g.*, Nash v. CBS, Inc., 899 F.2d 1537, 1542 (7th Cir. 1990) (noting that the exclusion of facts from protection "do[es] not come straight from first principles" but is instead a policy).

63 *See, e.g.*, CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc., 44 F.3d 61, 73 (2d Cir. 1994) (finding that "a withholding of the merger doctrine would not seriously impair the policy of the copyright law . . . .").

64 *See id.* at 66 (noting that "there is no reason under the policies of the copyright law to demand a high degree of originality"); DRASSINOWER, *supra* note 61, at 17-19.

65 *See* Dawson v. Hinshaw Music Inc., 905 F.2d 731, 733 (4th Cir. 1990) (concluding that "the policy underlying the ordinary observer test requires a recognition of the limits of the ordinary *lay* observer characterization of the ordinary observer test").

resolve conflicts between competing principles in individual cases.[66] The ideal of overall public welfare therefore looms large in the actual functioning of modern copyright law, even in individual cases.

In relying on the private enforcement (of individual rights) to realize its public-regarding (collectivist) goals, copyright is of course in good company. Decades ago, tort scholars identified a similar change in discourse within tort law, which they characterized as tort law's move to "public law."[67] The shift from a singular focus on the rights and duties of the parties involved in a dispute to the overall public policy sought to be realized in the enforcement of the law at hand was central to this characterization. A similar trend was seen in contract law, which scholars treated as a conferral of public power to individuals, which "could be justified only by public purposes."[68] More recently, political scientists have come to see this structure as a conscious design choice deployed by Congress in different contexts.[69] By creating a set of private rights and setting up an incentive mechanism for private actors to enforce those rights, Congress realizes several of its overall (public) policy goals through a cost-effective and politically expedient mechanism: private litigation to vindicate public values.[70] Implicit in such deliberate design is the recognition that the regime so created is indelibly a form of public law, given the omnipresence of Congress's ultimate aim.

Given the rhetorical, analytical, and justificatory primacy of copyright's overall public welfare goal, the modern copyright statute might therefore well be understood as representing a similar mechanism wherein Congress is attempting to realize a public goal (of generating creative expression at minimal cost) through the creation of private incentives and benefits. As an analogy, consider a situation wherein a legislative body decides that automobile accidents are bad for society (owing to some public-oriented reason) and develops a mechanism to deter such accidents through the creation of a private action for an individual harmed by an accident to recover.

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66 *CCC Info. Servs.*, 44 F.3d at 66.

67 For an account of tort law's public law shift, see generally Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1 (1959); Leon Green, *Tort Law Public Law in Disguise-II*, 38 TEX. L. REV. 257 (1960). For arguments in favor of this public law shift, see generally David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984). For doubts about this shift and its "surrender [of] the individual to the demands of" public welfare, see George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537-40, 556-73 (1972).

68 Horwitz, *supra* note 50, at 1426; *see also id.* (describing this trend in the 1930s and 1940s).

69 *See, e.g.*, SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 3 (2010) (asserting that Congress makes "a *legislative choice* to rely upon private litigation in statutory implementation"); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LIFE 3 (2001) (defining this phenomenon as "adversarial legalism").

70 FARHANG, *supra* note 69, at 3-5.

In this model, it certainly would be the case that individuals who suffer harm (from accidents) recover and are benefited privately, yet the system is self-consciously not about individual plaintiffs and defendants—whom it treats as a means to an end—and necessarily contingent on the overall enterprise of "social engineer[ing]."[71] To put the point most bluntly, if the legislature were to one day decide that there is in fact a better and more effective way to realize the same policy goal (of reducing accidents—e.g., criminal law), it would find little reason to hold on to the model of private liability for accidents.[72]

And so it is with copyright law too, in the modern understanding. Copyright's private liability apparatus and the principles undergirding it are seen as entirely subsidiary to the primary ideal of promoting overall creativity and enhancing the public welfare. The means identified are unquestionably *secondary* to the primacy of the end.

B. *Market Regulation as a Goal*

The modern copyright system's logic of focusing on the public interest (i.e., public welfare) as its normative goal finds further instantiation in the manner in which the system is actually structured. Instead of just focusing on the provision of an inducement to create and ensuring that creative expression is indeed generated as a result of such inducement, current copyright law goes significantly further by constructing the very terms of the market for expression so produced, in certain domains. Consider in this regard the reality that after setting out the subject matter that can obtain protection and the scope of such protection through its delineation of exclusive rights, the copyright statute recognizes that for various categories of protected subject matter, market transactions need further regulation and facilitation.[73]

Consequently, in a variety of contexts, the statute sets up comprehensive systems of "compulsory" and "statutory" licensing schemes, under which a user of the work is allowed to use a protected work upon the payment of a

71 *See* Roscoe Pound, *The Lawyer as a Social Engineer*, 3 J. PUB. L. 292, 292 (1954) (defining "social engineer[ing]" as the activity of making a social process realize its purpose with "a minimum of friction and waste").

72 Indeed, this was the argument of two prominent tort scholars. *See* Walter J. Blum & Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641, 723 (1964) (offering a similar argument and concluding that "[p]rivate law cannot borrow goals from public law fields without accepting the obligation to make a proper public law analysis").

73 *See* 17 U.S.C. § 111 (2018) (addressing secondary transmissions); 17 U.S.C. § 114 (2018) (sound recordings); 17 U.S.C. § 115 (2018) (nondramatic musical works); 17 U.S.C. § 116 (2018) (coin-operated phonorecord players); 17 U.S.C. § 118 (2018) (noncommercial broadcasting); 17 U.S.C. § 119 (2018) (distant television programming by satellite); 17 U.S.C. § 122 (2018) (local television programming by satellite).

determined royalty.[74] These licensing schemes delineate the conditions that must be met for parties to invoke them, the scope of the license obtained, and in addition the manner in which the royalty is to be computed.[75] As if this were not enough, the statute even creates a specialized body—the Copyright Royalty Tribunal—under the authority of the Copyright Office, and vests it with power to determine fair royalties for various licensing schemes.[76] Not only are these mechanisms detailed and complex, but they are also highly tailored and specific to particular industries and at times even sub-groups within industries, reflective of the industry-level compromises that came to be reflected in the 1976 Act.[77]

Scholars have previously documented this regulatory turn in the 1976 Act and in modifications to it since. Indeed, some have even predicted that this approach would continue to dominate copyright lawmaking in the years to come. In very prescient terms, Peter Menell noted how copyright had effectively become a "regulatory regime" and compared it to the evolution of environmental regulation, where government controls in the marketplace in pursuit of a collective goal had become the norm.[78] Joseph Liu has similarly described this post-1976 turn in copyright law as the move towards a form of "regulatory copyright."[79] Regulatory copyright is characterized by its complexity and detail, industry-specific rules, and unique institutional features.[80]

What it also reveals, however, is the injection of additional policy goals into the working of the copyright system, beyond the ideal of enhancing public welfare through the production of creative expression, all under the rubric of regulating the market for creative expression. These include policies relating to: the ideal industry-structure in certain creative domains (industrial policy);[81] the role of copyright in fostering innovative means of

74 *See, e.g.*, 17 U.S.C. § 111 (2018) (statutory licensing scheme for secondary transmissions by cable systems); 17 U.S.C. § 114 (2018) (same for sound recordings); 17 U.S.C. § 116 (2018) (same for coin-operated phonorecord players).

75 *Id.*

76 17 U.S.C. § 801 (2018).

77 For a full account of these compromises and their translation into legislative provisions, see Litman, *supra* note 2, at 870-79.

78 Menell, *supra* note 43, at 194-97.

79 Liu, *supra* note 43, at 102-03.

80 *Id.* at 103-05.

81 For a discussion of industry structure, product differentiation, and entry, see Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 423-25 (2002); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 220-25 (2004); *see also* PETER BALDWIN, THE COPYRIGHT WARS: THREE CENTURIES OF TRANS-ATLANTIC BATTLE 17 (2016) (noting how American copyright law is perceived as being an instrument of "industrial policy").

communication (communications policy);[82] and the copyright system's support for digital self-help technologies (digital rights management ("DRM") policy),[83] just to name a few.

Going back to our automobile accident analogy, the modern copyright regime is therefore analogous to one where Congress decides not just to institute a form of private liability for accidents, but also further (i) determines the actual rules that drivers must follow to avoid such liability; (ii) mandates a system of insurance for compensation; (iii) specifies how such insurance should be obtained; and also (iv) creates a body to determine insurance payouts when an accident occurs. A regime such as this could quite justifiably be characterized as a regime of "public law" accident regulation, rather than a regime of tort law.[84]

Beyond its structural component, the modern copyright regime's growing focus on regulating the market for creative expression also introduces new normative goals into the functioning of the system. Those goals originate in the very ideal of "regulation" and encompass both economic and noneconomic considerations. Notably, all of the considerations are driven by a conception of the "public interest," which in turn self-consciously adopts a collectivist stance.[85] The regulation of the market for creative expression is therefore a presumptively *public* goal—seeking to serve the *collective* interests of creators, copiers, and the general public.

C. *Divided (and Coordinated) Lawmaking*

A third feature of the modern public law model of copyright is structural and originates in its presumptive adherence to the constitutional ideal of "separation of powers."[86] The modern copyright system is characterized by a

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82 For an account of copyright's communications policy and its development, see generally Timothy Wu, *Copyright's Communications Policy*, 103 MICH. L. REV. 278 (2004).

83 For more about the intersection of DRM and copyright, see Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised*, 14 BERKELEY TECH. L.J. 519, 537-46 (1999) (criticizing the Digital Millennium Copyright Act's anti-circumvention rules); Molly Shaffer Van Houweling, *Communications' Copyright Policy*, 4 J. TELECOMM. & HIGH TECH. L. 97, 99, 105-13 (2005) (discussing the benefits of DRM for "good copyright policy").

84 *See* Blum & Kalven, *supra* note 72, at 642-46 (characterizing such a regime as an "auto[mobile] compensation plan").

85 For prominent accounts of regulation and the role of public interest therein, see STEPHEN BREYER, REGULATION AND ITS REFORM 22-25 (1982); MIKE FEINTUCK, 'THE PUBLIC INTEREST' IN REGULATION 35 (2004); Michael Hantke-Domas, *The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?*, 15 EUR. J.L. & ECON. 165, 172-78 (2003); Sidney A. Shapiro, *Keeping the Baby and Throwing out the Bathwater: Justice Breyer's Critique of Regulation*, 8 ADMIN. L.J. AM. U. 721, 734 (1995).

86 For overviews of U.S. separation of powers doctrine and its precepts, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950-71 (2011), which discusses the modern U.S. approach to separation of powers, and Bruce Ackerman, *The New Separation of*

division of lawmaking authority among different institutional bodies within the system. As copyright thinking came to be infused with collectivist ideals and regulatory goals, the complexity that it generated was seen to necessitate a division of responsibility among different institutions, each of which emphasizes a different aspect of the public interest.[87] This trend continues unabated to this day. While this division of authority produces an obvious fragmentation in the regime's conception of law, it has also necessitated the development of mechanisms of interbranch coordination for the regime to function, or rules of *administrative copyright law*.

The public law model assumes the supremacy of Congress in the realm of copyright lawmaking.[88] While Congress has always been formally responsible for the blackletter of copyright law (i.e., the statute), the modern trend has seen Congress reassert its lawmaking role in the copyright domain, by attempting to weigh in—albeit imperfectly—on most aspects of copyright doctrine.[89] Courts, for their part, have moderated their own lawmaking role accordingly, to give effect to this trend and thereby acknowledged the reality that Congress may be better suited to ascertaining the "public interest" and giving effect to the balancing that it necessitates.[90] Beginning with Justice Brandeis' infamous recognition that "[c]ourts are ill-equipped" to make public interest determinations in the realm of intellectual property law, and that they are "powerless" to construct the machinery and regulations needed to make such considerations real,[91] courts in the public law model approach copyright

Powers, 113 HARV. L. REV. 633, 640 (2000), which identifies the purported goals of U.S. separation of powers doctrine as the protection and promotion of democracy, professional competence and fundamental rights.

87 *See generally* Robert E. Goodin, *Institutionalizing the Public Interest: The Defense of Deadlock and Beyond*, 90 AM. POL. SCI. REV. 331 (1996) (discussing the connection between the public interest and divided lawmaking).

88 This is unexceptional in light of the Constitution's express grant of copyright lawmaking authority, under Article I, to Congress. U.S. CONST., art. I, § 8, cl. 8. Nothing about this constitutional provision has changed since the founding era, yet under the public law model it has come to be given an unequivocal reading that favors congressional supremacy in the area. *See, e.g.*, Eldred v. Ashcoft, 537 U.S. 186, 208 (2003) ("[W]e are not at liberty to second-guess congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be.").

89 *See* Christopher S. Yoo, *The Impact of Codification on the Judicial Development of Copyright*, *in* INTELLECTUAL PROPERTY AND THE COMMON LAW 177, 177 (Shyamkrishna Balganesh ed., 2013) ("[M]odern copyright has been widely acknowledged to be statutory in nature.").

90 *See, e.g.*, Golan v. Holder, 565 U.S. 302, 335 (2012) (concluding that "[t]he judgment . . . expresse[d by Congress in the statute] lies well within the ken of the political branches" and that the Court's only "obligation, of course, [is] to determine whether the action Congress took, wise or not, encounters any constitutional shoal"); *Eldred*, 537 U.S. at 208 (refusing "to second-guess congressional determinations").

91 Int'l News Serv. v. Associated Press, 248 U.S. 215, 267 (1918) (Brandeis, J., dissenting).

adjudication as primarily and overtly an exercise in statutory interpretation.[92] Copyright's collectivist ideals are presumptively congressionally determined, and taken to lie within (or behind) the terms of the copyright statute. Even when developing the law as a matter of first impression, they strive to render their reasoning compatible with Congress's presumptive grand plan for the public welfare, as supposedly captured in the copyright statute.[93]

Beyond recalibrating the legislative-judicial dynamic, the public law model of copyright also places unprecedented faith in the role of an expert agency—the Copyright Office—to guide both Congress and the courts on matters of copyright.[94] The Office is vested with a variety of functions under the statute,[95] in the exercise of which it regularly intervenes as an expert agency in major court cases,[96] engages in administrative rulemaking exercises,[97] and perhaps most importantly, interprets and supplements statutes and case law on important doctrinal questions of copyright law, a practice that has received the tacit approval of courts and Congress.[98] This last practice is particularly important to appreciate, since it operates today as an independent—and significantly persuasive—formal source of copyright law.[99] Coupled with the

92 *See, e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 530 (2013) (relying on statutory "language," "context," and "common-law history" to interpret a provision, instead of policy considerations). *But see* Shyamkrishna Balganesh & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. REV. 1859, 1860-61 (2015) (arguing that even with this approach, courts have relied on mechanisms of discretion to increase their role).

93 For a prominent example, see Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994). While the Court developed the "transformative use" doctrine variant of fair use in common law fashion in *Campbell*, it nonetheless emphasized the need to render its reasoning compatible with the four fair use factors contained in § 107 of the copyright statute. *Id.* at 578-94; *see also* ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 438-45 (2014) (approaching the question of whether a new technology is a public performance under the law as entirely a matter of presumptive congressional intent and policy).

94 17 U.S.C. § 701 (2018).

95 *Id.* § 701(b).

96 *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Respondents, Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017) (No. 15-866), 2016 WL 5116853; Brief for the United States as Amicus Curiae Supporting Petitioners, ABC, Inc. v. Aereo, Inc., 573 U.S. 431 (2014) (No. 13-461), 2014 WL 828079; Brief for the United States as Amicus Curiae Supporting Petitioners, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), 2005 WL 154148.

97 *See, e.g.*, 17 U.S.C. § 702 (2018) (vesting the power to make regulations with the Copyright Office); 17 U.S.C. § 1201(a)(1)(C) (2018) (vesting rulemaking power under the DMCA with the Copyright Office). For an example of a rule made under these powers, see 37 C.F.R. § 201.4 (2020) (prescribing requirements for the recordations of copyright ownership transfers).

98 *See* U.S. COPYRIGHT OFFICE, COMPENDIUM, *supra* note 5, at 2 ("Courts have cited the *Compendium* in numerous copyright cases."); *id.* § 101.1 ("[The Office] provides expert subject matter assistance to Congress on copyright policy and interpretation of the copyright law . . . .").

99 For cases placing express reliance on the *Compendium*, see Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 480 (6th Cir. 2015); Olem Shoe Corp. v. Washington Shoe Corp., 591 F. App'x 873, 882 n.10 (11th Cir. 2015); Batjac Prods. Inc. v. GoodTimes Home Video Corp., 160 F.3d 1223, 1230 (9th Cir. 1998).

crucial role that the Office plays in registering individual works,[100] its interpretation of copyright doctrine assumes a level of everyday importance to the functioning of the copyright system that is often underappreciated.

The net effect of the public law model's institutional dynamic of separation of powers is that approaching any question of copyright law now requires an account of the interaction and coordination between these different lawmaking branches, in order to understand an issue. The public law-based rules of engagement between these agencies on issues of copyright law[101] have thereby become an integral part of the landscape of copyright law.

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In its (i) emphasis on collectivist public welfare over private right, (ii) attempt to regulate the marketplace for creative expression, and (iii) use of a disaggregated framework of lawmaking, modern copyright law thus embodies a strong public law dimension to its functioning, one that is rarely acknowledged.

The public law orientation of modern copyright exerts a significant—but unappreciated—influence on the working of the system, its self-understanding of its goals, and the public's perception of its successes and failures. It contributes to the extensive confusion that permeates copyright's justificatory debates by injecting a new set of public-regarding ideas and variables into the conversation, all of which are routinely seen to be in opposition to—rather than compatible with—copyright's private benefits.[102] In the process, the goal of a "balance" between the public and private thus emerges as central.[103] Additionally, the complexity underlying the regulatory landscape of public law copyright endorses the view that copyright law is to be understood as an autonomous body of law. Copyright law expertise is today seen as independent from general legal/administrative expertise.

The U.S. public law conception of copyright is of modern vintage, and something of an outlier in the global copyright system. It is, however, the product of important changes in general legal thinking and analysis that occurred in America over the course of the last century, and which came to influence the copyright discourse as well. Examining the process through which this occurred sheds important light on what exactly this complicated and seemingly sprawling public law framework for copyright is intended to

100 17 U.S.C. § 408 (2018).

101 *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 30 (1985) (describing the purpose of administrative law as relating to the behavior of public officials).

102 *See* ISABELLA ALEXANDER, COPYRIGHT LAW AND THE PUBLIC INTEREST IN THE NINETEENTH CENTURY 3-4 (2010) (discussing this general oppositional stance).

103 *Id.* at 1-2; *see also* Peter B. Maggs, *The Balance of Copyright in the United States of America*, 58 AM. J. COMP. L. 369, 371 (2010).

realize, and how its functioning might be better appreciated and refined. It is to this task that the next two Parts turn.

II. THE PRIVATE LAW CONCEPTION OF COPYRIGHT

Through most of its history American copyright law adopted a relatively straightforward understanding of its functioning, premised on its structure as a private right directed at governing the horizontal interaction between creators and copiers through a regime of civil liability. In this private law conception, copyright law and reasoning came to focus on governing the rights of creators, the correlative duties of potential copiers, the wrongdoing that a breach of these duties entailed, and the various immunities and defenses that copiers could avail themselves of. The law therefore emphasized its governance of the legal relationship between copyright plaintiff (creator) and copyright defendant (copier) and derived its normative ideals from within the contours of that relationship.

Put in slightly more abstract terms, the analytical focus of the private law conception was its reliance on criteria internal to copyright for its analysis and reasoning. Often characterized as the distinction between "principles" and "policy," the contrast between the two is well documented in the literature.[104] A policy refers to an external "goal to be reached" through the use of a rule or doctrine and treats the law in avowedly instrumental terms (e.g., the goal of reducing automobile accidents through a liability regime).[105] Arguments from policy are most commonly collectivist in orientation.[106] By contrast, a principle refers to a norm that mandates something based on considerations of "justice or fairness" that make no appeal to external criteria (e.g., preventing a wrongdoer from benefiting from the wrongdoing) but are instead taken to be embedded within the law itself.[107] Principle-based arguments are usually couched as arguments of "right."[108] An argument from welfare is the archetypical policy-based reason, while one based on equality is a paradigmatic principle-driven one. The private law conception of

104 The classical account is that of Dworkin. *See* Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 23 (1967) [hereinafter Dworkin, *Model of Rules*]; *see also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 82-84 (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY]. For a broad overview and analysis of Dworkin's account, see generally Donald H. Regan, *Glosses on Dworkin: Rights, Principles, and Policies*, 76 MICH. L. REV. 1213 (1978).

105 Dworkin, *Model of Rules*, *supra* note 104, at 23.

106 DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 104, at 82 (noting how arguments of policy focus on showing that the decision "advances or protects some collective goals of the community as a whole")

107 Dworkin, *Model of Rules*, *supra* note 104, at 23.

108 DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 104, at 82.

copyright revealed an unabashed emphasis on the internal logic of copyright, and thereby extolled the search for copyright principles.

The private law conception manifested itself in copyright jurisprudence and reasoning in three distinctive ways. First, it treated copyright as an individual *right*, vested in the author and with correlative obligations (duties) imposed on others. Very importantly, this emphasis was more than just rhetorical. Adjudicating copyright cases entailed an explication of the regime's myriad doctrines through the use of the right-duty structure. In so doing, such explication routinely gave doctrines a rationale that appeared self-evident, naturalistic, and on occasion immanent[109] (i.e., internal).

Second, to the extent that copyright's purpose was ever discussed in the jurisprudence, it was seen as always connected to the right-duty structure of copyright. Courts and scholars treated copyright's goals as either embedded within the institution's right-duty structure, or instead as flowing normatively therefrom. Rarely ever was copyright's public-regarding purpose seen as independently defensible in a manner that rendered its doctrinal apparatus wholly contingent; the interests of the plaintiff and defendant thus informed—and constrained—the construction of copyright's purposes in the discourse.

Third, the judicial development of copyright doctrine focused very little on locating a legislative intent—either actual or implied—to answer a question directly, despite acknowledging the statutory basis for copyright (an exception was of course when the issue itself was purely interpretive in nature). Courts and scholars focused instead on deciding copyright cases using precedent-based "principles" that they developed and declared, or by focusing on the unique factual specificities of a case, which they used to expound the doctrine.[110] This certainly did not mean that they ignored the statute altogether—just that they showed it little deference. This underemphasis on legislation had both an institutional and a substantive implication. Institutionally, it validated the role of courts as active lawmakers in the field, who policed copyright doctrine through principles and fact-specific determinations; substantively, it enabled courts to embrace transsubstantivity in their willingness to treat copyright law as connected to

109 *See generally* Shyamkrishna Balganesh, *The Immanent Rationality of Copyright Law*, 115 MICH. L. REV. 1047 (2017) (book review) (discussing the merits and downsides of such an approach to copyright); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (defining and defending an immanent approach to legal analysis).

110 *See* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 613-21 (1993) (discussing the centrality of principles in legal reasoning across different schools of American legal thought).

other areas of the law and capable of drawing therefrom, rather than as a hermetically sealed area.[111]

While some elements of the private law conception of copyright law emerged in the decades immediately following the enactment of the first copyright statute in the U.S., it crystallized during the era of classical legal thought (or Legal Formalism), which developed its own distinctive legal consciousness by the last quarter of the nineteenth century.[112] The same conception of copyright then continued to hold sway through the era of Legal Realism, an approach that emerged as a reaction to Legal Formalism and dominated American legal thinking beginning in the second third of the twentieth century.[113] The discussion below is therefore isolated into two sequential phases, even though both embodied a largely similar conception of copyright law.

A. *Classical-Era Copyright Law*

Following the Civil War, American legal thinking came to develop a unique conception of law and legal institutions, one that is commonly (albeit pejoratively) referred to as "Legal Formalism."[114] Central to the consciousness underlying Legal Formalism was the idea that law was capable of being understood as an autonomous enterprise, independent in large (even if not all) measure from political power, social goals, and economic considerations.[115]

Most accounts of Legal Formalism are usually associated with the legal theory of Christopher Columbus Langdell, a law professor and first dean of the Harvard Law School.[116] Indeed, it is occasionally referred to as

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111 For a general discussion of inter-doctrinal borrowing, see Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651 (2002).

112 *See* KENNEDY, *supra* note 47, at 27 (defining "legal consciousness" as "the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment").

113 *See* L. L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 429 (1934) (noting that Legal Realism reached its heyday around 1929).

114 For accounts of the emergence of formalism post–Civil War, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 9-10 (1992); Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 251-54 (1975). For characterizations of Legal Formalism, see GRANT GILMORE, THE AGES OF AMERICAN LAW 62 (1977); Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 92-93 (1995); Charles C. Goetsch, *The Future of Legal Formalism*, 24 AM. J. LEGAL HIST. 221, 221 (1980).

115 GILMORE, *supra* note 114, at 62; HORWITZ, *supra* note 114, at 14-16; KENNEDY, *supra* note 47, at 2-3.

116 *See, e.g.*, HORWITZ, *supra* note 114, at 128-29; BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 51-52 (2009); R. Blake Brown & Bruce A. Kimball, *When Holmes Borrowed from Langdell: The "Ultra Legal" Formalism and Public Policy of Northern Securities (1904)*, 45 AM. J. LEGAL HIST. 278, 278 (2001); Patrick J. Kelley, *Holmes,*

"Langdellianism," given that Langdell's approach epitomized almost all of the core attributes of Formalism.[117] In his seminal work on Langdell's theory, Tom Grey notes that the core of the theory lay in the idea that "law is a science."[118] Grey argues that formalization, conceptual ordering, and the identification of core principles were essential features of the approach, which operated on the enduring assumption that individual rules could be "derived" or "deduced" from these principles.[119] Overarching and open-ended considerations such as "justice and policy" were of relevance only insofar as they were embodied *within* principles that were capable of precise exposition and application.[120]

In the Legal Formalist—or Classical—understanding, maintaining the divide between private law and public law was crucial.[121] Whereas private law could be conceptually ordered in their "scientific" way and organized around abstract principles and categories, public law was seen as overtly political, "unscientific," and "hopelessly vague."[122] The private law subjects of property, contract, and tort, all of common law origin, were treated as defining the very content of the law and capable of being rationalized through the development of legal principles articulated, developed, and applied by courts in individual cases. Scholars have argued that this emphasis on private law was a product of the Formalists' attempt to protect the ideology of the individualist market and maintain the status quo, which favored business and commercial interests over collectivist ideals.[123] Whether this actually occurred as an empirical matter or not,[124] as an analytical matter Formalist analysis of legal doctrine certainly held collectivist and public-regarding ideals at bay in the development and refinement of doctrine.

The Legal Formalist affinity for private law also caused them to develop a deep discomfort with legislation, which they saw as "haphazard."[125] Indeed, to Langdell the term "law" did not cover legislation, but was limited to "law as administered by courts of justice" in individual cases.[126] The common law was

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Langdell and Formalism, 15 RATIO JURIS 26, 26 (2002); Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 LAW & HIST. REV. 345, 345-47 (2007).

117 *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 11 (1995); Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335 (1987).

118 Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983).

119 *Id.* at 6-11.

120 *Id.* at 14-15.

121 *Id.* at 47-48; *see also* HORWITZ, *supra* note 114, at 10-11.

122 Grey, *supra* note 118, at 34.

123 *Id.* at 33; *see also* HORWITZ, *supra* note 114, at 4-5.

124 *See* Grey, *supra* note 118, at 34 (expressing doubt over the pro-business orientation of actual judicial decisions in this period).

125 *Id.* at 34.

126 Christopher Columbus Langdell, *Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation, or the Absence of It, During That Period*, 19 HARV. L. REV. 151, 151 (1906).

therefore structurally and normatively superior to legislation, given its ability to be rationalized through principles and categorized as such. When actually forced to grapple with the text of a statute, i.e., when the question itself was clearly covered by a provision, Formalists tended to be textualist in their approach, eschewing any effort to understand the purpose/policy behind the statute.[127]

Classical-era Legal Formalism therefore exhibited a distinct preference for principle over policy, for judge-made law over statutes, and for private law over public law. Much of this translated into the copyright setting, but with some important modifications. Copyright is—and has always been—statutory in origin. The first Copyright Act was enacted in 1790, amended a few times,[128] and then comprehensively revised in 1831 and 1870.[129] Thus by the advent of the Classical era, there was little doubt that copyright was statutory as a matter of formal origin. Nevertheless, the conception of copyright in this era maintained its adherence to the overall Formalist credo, while acknowledging the statutory origin of the institution. We see this not just in the writings of scholars and treatise authors, but also in judicial formulations of copyright questions and disputes during the period.

Writing in 1899, Langdell himself attempted to develop a private law account of copyright, which showcases the dominant Formalist approach of the time.[130] An author's right in his creation, to Langdell, was not a right conferred by the state, but instead a right "recognize[ed] and protect[ed]" by the state.[131] The right—a "personal right"—had to be distinguished from a property right in the embodiment of the creation and was instead a right in the creation "regarded as an incorporeal thing," which furnished the author with an "effective means of preventing the use and enjoyment of his creation . . . by others without his consent."[132] The source of the right was *not* the state, "but is deduced as a consequence of the creation."[133] The logic of copyright was thus to be found internal to the activity that formed the subject of the regime, i.e., creation. Crucially, the source of this logic was not the statute nor the mere idea of property, but instead taken to be "well settled by authority" and "clear upon principle."[134] That the act of creation *ipso facto*

127 *See* Christopher Columbus Langdell, *The Northern Securities Case and the Sherman Anti-Trust Act*, 16 HARV. L. REV. 539, 551 (1903) (noting that "a lawgiver is supposed to mean only what he says" in the context of the Sherman Act).

128 *See* Act of May 31, 1790, Pub. L. No. 1-15, 1 Stat. 124.

129 *See* Patent Act of 1870, Pub. L. No. 41-230, 16 Stat. 198 (revising the statutes related to patents and copyright); An Act to Amend the Several Acts Respecting Copyrights, Pub. L. No. 21-16, § 14, 4 Stat. 436, 439 (1831) (repealing the Act of May 31, 1790).

130 Langdell, *supra* note 11.

131 *Id.* at 553.

132 *Id.* at 553 n.2, 554.

133 *Id.* at 554.

134 *Id.*

could give rise to an exclusive right in the intangible matter underlying the creativity was taken to be a matter of *principle* rather than a product of statutory policy. The statute—and its policy—were therefore clearly relegated to an inferior position. What then of the obvious reality, which Langdell could certainly not deny, that there was in fact a copyright statute that unambiguously dealt with the subject, i.e., copyright?

It is here that we see Langdell acknowledging a role for the state, but one that reaffirmed the naturalistic principles underlying his conception of copyright. He takes as "deemed settled by authority" the fact that the act of publication terminates the personal right to exclusivity that existed prior to publication.[135] Langdell treats the precise source of this authority as irrelevant, given its settled nature.[136] Upon such termination, the state "interfere[s]" in favor of the author "by issuing its prohibition against the use of his creation" and "arming him with the power to enforce such prohibition" through a law.[137] This right so produced was "wholly independent" of property, "incorporeal" in structure and "radically different" from the pre-publication right, which treated the creation as an incorporeal thing.[138] In later work, Langdell supplemented this account by distinguishing between the common law (pre-publication) right and copyright and conceding that "copyright is conferred directly by statute."[139] Yet, this was not out of an external purpose. It was instead "as a partial atonement for the wrong done by the State in putting an end, upon publication" to the pre-publication right of the author.[140]

In thus deducing the logic of copyright from the act of creativity and the common law's naturalism, Langdell provides an early articulation of the private law conception of copyright. The right in copyright was a personal right that is "negative" in nature, i.e., "a right against some person or persons . . . not to have something done."[141] The role of the legislature was acknowledged, but heavily circumscribed and treated as normatively subsidiary to, and dependent on, the pre-legislation common law right. Additionally, the legislature's motivations behind the enactment were treated as altogether immaterial to the deduction of copyright's rationale and goals. The only invocation of institutional authority was the idea of something being

135 *Id*.
136 *Id*.
137 *Id*. at 555.
138 *Id*.
139 Christopher Columbus Langdell, *Classification of Rights and Wrongs*, 13 HARV. L. REV. 537, 554 (1900).
140 *Id*. at 555.
141 *Id*.

"settled by authority,"[142] a conscious equivocation with clear overtones of the judicial settlement of an issue through the common law process.

Langdell's account embodies all of the salient features of the private law conception of copyright, developed through Legal Formalism. It attempts to describe copyright as a "right" vested in an individual exclusively by virtue of that individual's actions, eschews any search for external policies, focuses instead on deducing the rationale of copyright law using an immanent logic, and treats the law to be "settled by authority" quite independent of statute. Langdell's account had little to say about individual copyright doctrines, given his focus on deriving an overall rationale for copyright. All the same, we see a similar conception at play in the work of copyright treatise writers who came to play a prominent role during this period given Formalism's focus on categorization and the deduction of abstract principles from individual cases.[143]

The most prominent copyright treatise of the Classical era was authored by Eaton Drone, in 1879.[144] In true Formalist style, Drone characterized his task at the very outset as entailing the distillation, derivation, and explication of copyright's fundamental principles in a systematic and scientific manner. In the preface to his book, he described his endeavor in the following terms:

> The task of the juridical writer is to set forth the true principles which govern the law; to point out the proper meaning of the statutes; to show what decisions are right and what are wrong; to explain what is doubtful or obscure; and, generally, to give the law in a form as true, clear, systematic, and harmonious as it is in his power to do. . . . Jurisprudence is a science based on principles rather than on single decisions. By the former rather than by the latter the law is to be determined. It is true that one as well as the other are made by judges, and that principles which are not judicially settled or recognized are without force. But principles are fundamental and general. On them decisions are grounded, by them governed, and with them must harmonize.[145]

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142 Langdell, *supra* note 11, at 554.

143 *See* Morton J. Horwitz, *The Rise of Legal Formalism*, 19 AM. J. LEGAL HIST. 251, 255-56 (1975) (describing the role of the treatise in the emergence of Legal Formalism).

144 EATON S. DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS (Boston, Little, Brown & Co., 1879). Mention here might also be made of another copyright treatise, published in 1848 by George Ticknor Curtis. *See* GEORGE TICKNOR CURTIS, A TREATISE ON THE LAW OF COPYRIGHT (Boston, Little, Brown & Co., 1848). Even though written a little before the crystallization of Legal Formalism, it exhibits several of the same conceptual characteristics and a focus on principles. *See, e.g.*, *id.* at vi (exhorting that treatise writers not ever forget that they are "dealing with principles"); *id.* at 1 (observing that copyright originates "in the principles of general right").

145 DRONE, *supra* note 144, at vii-viii.

In area after area, Drone then proceeded to describe his account of the law through the use of myriad "principles."[146] While he acknowledged the existence of the copyright statute, and occasionally discussed its provisions,[147] the statute as such received no additional deference. To the contrary, he criticized several of its provisions as "[m]eaningless, inconsistent, and inadequate," and noted that copyright statutes had "been often drawn by incompetent persons."[148]

Drone's treatment of the standard for copyright infringement—"piracy"—is illustrative.[149] The discussion begins by identifying the statutory provision at issue, which prohibited the printing, publication, importation, or sale of "any copy" of the original.[150] Drone then notes that it is unclear whether the legislature intended to cover the "substance" of a work, or just its "verbatim" form, but proceeds rather quickly to the conclusion that "[t]hese and kindred questions have been left to the courts . . . to be determined by adjudicated principles."[151] The answer was thus to be found in the *principles* of copyright protection, not in an independent legislative purpose or intent. Accordingly, Drone deduces his answer through copyright's structure, as follows:

> We must first understand what that is for which protection is given, before we can determine what is an unlawful use of it. It has been shown elsewhere that literary property is not limited to the precise form of words, the identical language, in which a composition is expressed, but that it is in the intellectual creation of which language is but a means of expression and communication. The same production may be expressed and communicated in various languages, without affecting its identity. The means of communication are changed; but the thing communicated remains the same. So, in the same language, the words may be varied; but the substantial identity of the composition is preserved. It is this intellectual production, and not merely one form of language in which it may be expressed, which is the fruit of the author's genius or mental labor. It is this which is his property, and to which the law guarantees protection. It is this whose unlawful appropriation is piracy.[152]

Despite allusions to copyright's purpose, the ultimate determinant of the doctrinal answer for Drone is seen to lie in the structure of the right

146 *Id.*

147 *Id.* at 178 (discussing copyrightable subject matter); *id.* at 275-76 (discussing and criticizing the statute's provisions dealing with the delivery of copies).

148 *Id.* at v.

149 *Id.* at 383-86.

150 *Id.* at 384.

151 *Id.*

152 *Id.* at 384-85.

underlying copyright and the object of protection. From the principle that intellectual creation generates a right in the "fruit[s]" of the creation, the scope of the infringement analysis is thus determined to extend to non-verbatim copies as well.[153]

Perhaps the most direct—and impactful—instantiation of the private law conception during the Classical era was to be seen in the judicial opinions of the period. As scholars have noted, the Legal Formalism of this period took shape principally in the manner in which courts adopted a "narrower, deductive approach to decision-making whereby legal relationships were treated as somehow subsumed under a small collection of fundamental legal principles."[154] Within copyright, this Formalism contributed directly to the crystallization of the private law conception wherein copyright was treated as a naturalistic private right, immune from external policy considerations including those espoused by Congress, and to be developed through "principled" reasoning.

In his magisterial work on the evolution of authorship in the nineteenth century, Oren Bracha notes how during the Classical era, judges "recoiled" from infusing the originality doctrine with overt policy considerations, preferring instead to confine their reasoning to the innate logic of presumptively neutral principles.[155] Bracha argues that this trend was in keeping with the judicial self-imagery of Legal Formalism, wherein judges chose not to be seen as engaged in policymaking and social engineering (as they once had in a prior era).[156] For our purposes, Bracha's claim also confirms the logic behind the entrenchment of the private law conception of copyright in this period. By eschewing considerations of social value and public welfare directly, and by preferring to focus on the neutrality of principles as applied to the case at hand, judicial reasoning forced itself into the exercise of emphasizing the particularized claims and concerns of the parties before the court, i.e., the plaintiff and defendant. And in so doing, such reasoning showcased the horizontal, rights-driven nature of copyright as a private claim, rather than its functioning as an instrument of broader social policy. Indeed, we see this to be true when we examine some of the well-known Supreme Court opinions of the period, many of which went well beyond the doctrine of originality.

Consider in this vein the celebrated case of *Baker v. Selden*.[157] Written during the Classical era, it showcases the working of the private law conception. At issue was the question of whether the plaintiff, who had

153 *Id.* at 385.

154 DUXBURY, *supra* note 117, at 9.

155 Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 222 (2008).

156 *Id.*

157 101 U.S. 99 (1880).

described a new method of bookkeeping in a monograph, could use copyright law to prevent a defendant from using that method.[158] The Court framed the issue thus as whether the plaintiff's copyright gave him an "exclusive right to the use of the system" described in the book.[159] *Baker* is understood to have unequivocally confirmed the proposition that copyright does not so give its claimant an exclusive right to the use of the underlying method or process. Indeed, it is commonly treated as an early instantiation of copyright's rule excluding functionality from the gamut of protection,[160] a rule that has since been expanded in multiple ways and is today understood as embodying crucial public-regarding goals relating to the protection of a vibrant public domain,[161] the encouragement of free speech,[162] and the facilitation of derivative creativity.[163] Yet, *Baker* itself makes no appeal to such public-regarding policy goals and purposes to arrive at its conclusion; indeed *Baker* places surprisingly scant reliance on any purpose for copyright. Instead, it bases its reasoning explicitly on the "principle" underlying copyright's exclusive right, and the rationale that a claim to the "description" (i.e., expression) of some teaching in a book "lays no foundation for an exclusive claim" to the teaching itself.[164] Nor does the Court attempt to find a legislative basis for its conclusion, despite the reality that the plaintiff's claim—of copyright infringement—was clearly derived from a statute. *Baker*'s principled logic exemplifies the right-duty focus of the private law conception in this period and its naturalistic predisposition towards copyright that rejected an outward search for purpose/policy and legislative guidance. The search was entirely internal to copyright law and its structure of rights.

Baker also highlights an additional reality about the private law conception of copyright during this era, namely that it did not necessarily favor plaintiffs and rightsholders at the cost of defendants and the general public. As noted previously, the standard historical account of Classical-era jurisprudence and Legal Formalism has argued that the private law reasoning seen in this period was driven in large measure by an ideological desire to serve the market and business interests, by preserving the status quo.[165] It is thus distinctly treated

158 *Id.* at 100-01.

159 *Id.* at 101.

160 *See, e.g.*, Pamela Samuelson, *Why Copyright Law Excludes Systems and Processes from the Scope of Its Protection*, 85 TEX. L. REV. 1921, 1922 (2007); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel*," 38 EMORY L.J. 393, 400-01 (1989).

161 *See* Samuelson, *supra* note 160, at 1933 (dealing with *Baker's* concern for the public domain).

162 *See id.* at 1928 (noting the connection between the principle in *Baker* and First Amendment considerations).

163 *See id.* at 1933 (connecting *Baker* to the concern with follow-on creativity).

164 *Baker*, 101 U.S. at 105.

165 HORWITZ, *supra* note 114, at 4-5; Grey, *supra* note 118, at 33.

as antiprogressive in orientation. To the extent that *Baker* represents the private law conception, it shows us that *at least within copyright* the private law conception of the regime appears to have likely had relatively little such ideological motivation behind its adoption. This certainly doesn't refute the existence of such an ideological basis behind the overall jurisprudence of the Classical era. The private law conception of copyright that emerged in this era was instead quite likely the unwitting result of an approach to reasoning that may have originated with a certain ideological/political valence in other common law contexts.

Burrow-Giles Lithographic Co. v. Sarony,[166] decided by the Court shortly after *Baker*, adopted the same approach in reaffirming the private law conception. The case is understood as having confirmed the copyrightability of photographs.[167] The question presented to the Court was whether Congress had the authority to cover photographs in the copyright statute, in light of the language of the specific language used in the Copyright Clause of the Constitution.[168] Being expressly called upon to review Congress's power to enact copyright law, the Court unhesitatingly embraced the task and identified limitations on that power.[169] Very interestingly, its focus was not on the purpose-driven and public-regarding limits embodied in the language of the Constitution ("promote the progress"[170]) but on the supposedly principled limitations contained therein, namely, the concepts of "authorship" and "writing."[171] In concluding that photographs satisfied these conceptual criteria, *Burrow-Giles* nonetheless affirmed a naturalistic approach to copyright, at one point even referencing a freestanding "nature of copyright,"[172] described as "the exclusive right of a man to the production of his own genius or intellect,"[173] which it saw as applicable to photographs with little difficulty. Copyright's purpose was thus taken to lie internal to the act of authorship, which on its own was the very logic for protection. Legislative policy or public goals as such deserved no independent deference.

A third landmark decision from this period highlights the compatibility of the private law conception of copyright with the statutory basis for copyright. The case of *Bobbs-Merrill Co. v. Straus*[174] is credited with having

166 111 U.S. 53 (1884).

167 Christine H. Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 389-90 (2004); Justin Hughes, *The Photographer's Copyright—Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 340 (2012).

168 *Burrow-Giles*, 111 U.S. at 55.

169 *Id.* at 56-59.

170 U.S. CONST., art I, § 8, cl. 8.

171 *Burrow-Giles*, 111 U.S. at 58, 61.

172 *Id.* at 58.

173 *Id.*

174 210 U.S. 339 (1908).

created the "first sale"[175] doctrine, which exempts owners of lawful copies of a work from the reach of the distribution right when they resell or otherwise distribute those copies to others. The plaintiff publisher in *Bobbs-Merrill* had inserted a notice on the first page of its books, forbidding purchasers from reselling them below a certain price and threatening to treat such resales (below the said price) as copyright infringement.[176] When a purchaser breached the condition, the plaintiff claimed that this amounted to infringement of its "sole right of vending the copyrighted book."[177] In considering the issue, the Court conceded that it was "purely a question of statutory construction" wherein it was merely "ascertaining the legislative intent in its enactment."[178] Nonetheless in actually addressing the issue, the Court's actual reasoning does little to distill any legislative history or statutory purpose, beyond quoting large portions of the statute.[179] It eventually concluded that allowing a plaintiff to unilaterally expand the scope of infringement through a declaration was "beyond [the statute's] meaning."[180] But why, precisely? Hidden within the Court's reference to meaning and intent lies its real rationale: the plaintiff's actions would "qualify the title of a future purchaser" even when there was "no privity of contract,"[181] something that was at odds with the common law's discomfort with equitable servitudes on chattels.[182] The Court's logic was thus unquestionably a matter of principle, internal to the interaction between copyright and property law and relating to the scope of the parties' respective horizontal rights.

In the end then, the Court in *Bobbs-Merrill* restricted the scope of the plaintiff's exclusivity.[183] And it did so by locating copyright's primary purpose in giving an author/owner the ability to restrict the multiplication of copies, and little more. As the Court acknowledged, "[T]he nature of the property and the protection intended to be given the inventor or author as the reward of genius or intellect in the production of his book or work of art is to be considered in construing the act of Congress . . . ."[184] But, the Court observed,

175 *See* 17 U.S.C. § 109 (2018) (codifying the first sale doctrine in copyright).

176 *Bobbs-Merrill,* 210 U.S. at 341-42.

177 *Id.* at 349.

178 *Id.* at 350-51.

179 *Id.* at 348-49.

180 *Id.* at 351.

181 *Id.* at 350-51.

182 For an overview of this discomfort over the past century, see Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945, 954-56 (1928); Zechariah Chafee, Jr., *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250, 1254-62 (1956); Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1455-60 (2004).

183 *Bobbs-Merrill,* 210 U.S. at 351.

184 *Id.* at 347.

"[I]t is evident that to secure the author the right to multiply copies of his work may be said to have been the main purpose of the copyright statutes."[185]

Baker, *Burrow-Giles*, and *Bobbs-Merrill* together symbolize the judicial crystallization of the private law conception of copyright during the Classical era, even though they each dealt with different doctrinal questions. Noticeable in each opinion is the absence of any effort to locate the purposes of copyright in goals external to the interests of the private litigants, or in public-regarding (or social) policy considerations. They each take copyright's structure as a private "right" seriously, proceeding to then examine the scope, operation, and correlatives of that right on the horizontal plane. Despite acknowledging the legislative origins of copyright and the role of Congress in enacting copyright law, the statutory basis of the regime as such is seen to constrain them very little in their reliance on the identification and explication of copyright "principles" to decide individual cases and indeed even understand the meaning of the statute.

As should be obvious, much of the motivation for the private law conception during the Classical era drew from the Formalist belief in the autonomy of legal reasoning. This enabled courts to downplay the role of statutes and congressional motives therein, while relegating to themselves a more central role in the development of copyright law through a declaratory process. Courts saw themselves as merely declaring—rather than making—the law by extracting principles from precedent and doctrine. With the decline of Legal Formalism in the 1930s—under the Legal Realists—courts and scholars grew to reject the idea of legal reasoning as an autonomous endeavor that was immune from sociopolitical considerations, and the idea that judges were not themselves making the law whilst declaring it.[186] Nonetheless, the private law conception of copyright endured through the era of Legal Realism as well.

B. *Copyright Law in the Time of Legal Realism*

Beginning in the 1920s, American legal thinking developed a noticeable disenchantment with Legal Formalism. The core of this pushback emanated from Formalism's commitment to the autonomous nature of legal reasoning and its corresponding belief that adjudication was altogether immune from political (and other) influences.[187] The Formalist cloak of legal determinacy and the

185 *Id*.

186 *See* Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 468-75 (1988) (book review) (providing a general outline of this pushback). For the accepted account of this conflict and a critique of it, see TAMANAHA, *supra* note 116, at 13-110.

187 For further discussion of Realist critiques of Formalism, see LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 3 (1986); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM

study of legal doctrine as "science" came to be viewed with deep suspicion, producing what came to be identified as the Legal Realist movement.[188]

The central premise of Legal Realism was its acknowledgement that legal doctrine was innately indeterminate, in the sense of being unable to determine outcomes on its own.[189] The invocation and application of doctrine was itself seen to be a value-laden enterprise, wherein a judge brought his or her individual considerations and influences to bear on the enterprise. What this then meant was that judges quite obviously "made" law, and did much more than just discover it.[190] The law's formal conceptual categories and abstract statements were seen as devoid of content on their own, until invested with actual normative ideals by decision-makers. Prominent Legal Realist academics included Roscoe Pound, Karl Llewelyn, Felix Cohen, Thurman Arnold, Leon Green, Walter Wheeler Cook, and Arthur Corbin, who wrote several pieces that are considered classical works of the school.[191]

Beyond identifying legal doctrine to be indeterminate and nonautonomous in nature, the Legal Realists tended to differ in their views

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AND EMPIRICAL SOCIAL SCIENCE 1 (1995); SEBOK, *supra* note 27, at 3; TAMANAHA, *supra* note 116, at 67-71; JUSTIN ZAREMBY, LEGAL REALISM AND AMERICAN LAW 87 (2013).

188 DUXBURY, *supra* note 117, at 11-12; TAMANAHA, *supra* note 116, at 28-32; WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 13 (2d ed. 2012).

189 *See* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 273 (1997); Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749, 749-50 (2013); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 474 (1990).

190 *See, e.g.*, FRANK, *supra* note 15, at 41 (criticizing the notion that judges only discover law as "myth"); GILMORE, *supra* note 114, at 62 (noting the belief that "[j]udges do not make law" and criticizing it).

191 For some of their seminal work, see THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT (1962); THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM (1937); KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930); Thurman W. Arnold, *Apologia for Jurisprudence*, 44 YALE L.J. 729 (1935); Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53 (1930); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931); Walter Wheeler Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333 (1933); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Walter Wheeler Cook, *Equitable Defenses*, 32 YALE L.J. 645 (1923); Arthur L. Corbin, *Rights and Duties*, 33 YALE L.J. 501 (1924); Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919); Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); K. N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355 (1940); K. N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940); K. N. Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938); K. N. Llewellyn, *On Philosophy in American Law*, 82 U. PA. L. REV. 205 (1934); K. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641 (1923); Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195 (1914); Roscoe Pound, *Justice According to Law*, 13 COLUM. L. REV. 696 (1913); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

on what normative criteria judges should and do use in arriving at decisions. To some, the facts of individual cases and a judge's subjective reaction to them was the only realistic way of deciding cases and judges were exhorted to acknowledge and articulate this reality in their opinions.[192] To others, general social facts beyond the black letter of the law provided an answer;[193] and to yet others, ethical and moral ideals filled in the space of legal indeterminacy.[194] At its core, then, Legal Realism was a theory about adjudication.[195] And it focused on the creative role of the judge in *making* law, which it understood to extend beyond mechanically applying legal doctrine.

Above all else, what made Legal Realism a particularly powerful (and controversial) movement at the time was that several of its protagonists were themselves prominent federal judges serving on the bench. Not only did these judges advance the core premises of the movement in their nonjudicial writing, but they also readily gave effect to these creeds in their actual judicial opinions. Prominent Legal Realist judges included Jerome Frank, Joseph Hutcheson, and Leon Yankwich.[196] Given the wide-ranging influence of Legal Realism between 1920 and 1940, copyright law and jurisprudence came under its reach. And yet, the private law conception continued to hold sway during the Realist era even though it assumed a different expository character and emphasis.

To the Legal Formalists, maintaining the distinction between private law and public law was crucial, given their emphasis on the autonomous and apolitical nature of legal reasoning, which demanded equating law with private law.[197] In acknowledging the essentially indeterminate nature of legal rules and the role of politics in judging, the Realists had little to gain from the distinction. As historians have noted, they repudiated the rigidity of the distinction in many respects.[198] Nevertheless, the category of "private law"

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192 *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 173-85 (1949) (discussing judges' subjective decisionmaking processes); Joseph C. Hutcheson, Jr., *The Judgement Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 277 (1928) (acknowledging that judicial "decision[s] will depend on a judgment or intuition more subtle that any articulate major premise").

193 *See* KARL LLEWELLYN, THE THEORY OF RULES 63-77 (Frederick Schauer ed., 2011) (drawing a distinction between real rules and paper rules).

194 *See* FELIX COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS 129 (1933) (arguing that a system of ethical norms belongs in the law).

195 *See* Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 CORNELL L. REV. 335, 335 (1988) ("[T]he realists were interested primarily in adjudication."); Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1147 (1999) (book review) (describing Realism as an account of "how adjudication *really* works").

196 *See* generally JEROME FRANK, LAW AND THE MODERN MIND (1930); Hutcheson, Jr., *supra* note 192; Leon R. Yankwich, *The Art of Being a Judge*, 105 U. PA. L. REV. 374 (1957).

197 Grey, *supra* note 118, at 48; HORWITZ, *supra* note 114, at 10-12.

198 *See* HORWITZ, *supra* note 114, at 252-53 (describing the Realist challenge to the public–private distinction); Horwitz, *supra* note 50, at 1426 ("By 1940, it was a sign of legal sophistication to understand the arbitrariness of the division of law into public and private realms.").

played an important role to the Realists, both in copyright law and beyond.[199] And this was primarily—though not perhaps exclusively—because Legal Realism at its heart was a theory about adjudication, which advanced the ideals of judicial creativity and craftsmanship in the lawmaking process as well as the law's receptiveness to changing circumstances. Yet all of these ideals were most capable of direct instantiation only in the "common law," which valorized the role of the judge and from which *all* of private law traced its provenance.[200] Consequently, Realism actively embraced private law not because of its normative significance as a category, but instead owing to its common law genealogy which emphasized the judicial role.

This explains why an early Legal Realist such as Wesley Hohfeld drew entirely on areas of private law in constructing his "jural relations."[201] Given his focus on such conceptions as employed in "judicial reasoning," the focus on private law was inevitable.[202] Similarly, Karl Llewellyn, considered by many to be the intellectual leader of the movement, exhibited a distinctive private law bias in all of his work.[203] Some of it originated in his own focus as a scholar of contract law; yet it also drew in significant measure from his focus on the role of the judge in the "common law" appellate process, for which areas of private law remained indispensable.[204] The connection between private law and the judicial function was thus a descriptive reality that the Realists took for granted—and which allowed for the continuation of the private law conception of copyright during this era.

In drawing attention to the role of the judge in actively shaping the law, Legal Realism adopted the private law conception of copyright that had been given shape during the Classical era. Yet, it emphasized certain aspects of the conception over others. Much like before, it downplayed the role of the legislature within the system and showed scant deference to legislative intent and design. This was in keeping with the general disdain for the enterprise of statutory interpretation that some Realists had openly expressed.[205]

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199 *See generally* HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY (2013); Joseph William Singer, *Private Law Realism*, 1 CRITICAL ANALYSIS L. 226 (2014).

200 *See* Singer, *supra* note 199, at 228 (noting the connection between common law and private law in Realist thinking).

201 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 19 (1913).

202 *Id.* at 58.

203 *See* K. N. Llewellyn, *On the Problem of Teaching "Private" Law*, 54 HARV. L. REV. 775, 776, 778-79 (1941) (expressing a reluctant skepticism and affirmation of the category of private law).

204 TWINING, *supra* note 188, at 512 (describing the roots of the bias).

205 *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396, 399 (1950) (criticizing the indeterminancy of accepted methods of statutory interpretation).

Instead of looking to the legislature (except when necessary[206]), judges deciding copyright cases embraced their expository role through an elaborate synthesis of fact and principle, and often set out to *create* copyright law. Holding true to the common law style of reasoning that this employed, judicial reasoning in copyright cases therefore relied heavily on precedent and the analytical structure of the copyright claim, which continued to emphasize the right-duty interaction underlying its entitlement structure.

On the question of purpose however, the Legal Realist variant of the private law conception occasionally exhibited a marked ambivalence. In attempting to break down the public–private distinction across a range of areas, Legal Realism attempted to show how hitherto insular areas of legal doctrine were (and could be) driven by normative considerations that often extended well beyond the immediate context of the parties before the court; i.e., that the judicial function could be employed for the enterprise of social engineering.[207] On occasion, this therefore necessitated overtly recognizing the role of public-regarding goals within the analysis. At the same time, the legitimacy of the judicial function, which Realism greatly valued, required the approach to ground itself in the internal, doctrine-driven purposes of an area of law. Consequently, discussions of copyright law (especially judicial) either avoided engaging copyright's purpose and justification altogether, or on the rare occasion that it did do so, moved between inward- and outward-looking purposes while giving the former a distinctively superior position in the discussion.[208]

Scholarly writing during the Realist era manifested the private law conception rather readily, and with few problems. Writing in 1939, Kenneth Umbreit, a lawyer-historian set out to answer the seemingly simple question: "[w]hat is a [c]opyright?"[209] In answering the question, his argument attempts to ascertain the "nature of the property" underlying copyright.[210] The

206 Such as when it involved a statutory provision that squarely and unambiguously covered a certain question—e.g., copyright duration.

207 *See* G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1020 (1972) (discussing the roots of the Realists' conception of progress).

208 *See, e.g.*, Pearson v. Wash. Publ'g. Co., No. 6921, 1938 WL 27406, at *3 (D.C. Cir. Apr. 25, 1938) (describing the "two major purposes" of copyright law as "(1) to secure to the author, or his successors in interest, a monopoly, more or less in the nature of a reward for his genius and industry . . . as well as for the encouragement of others, similarly as in the case of patents" and "(2) to give notice to the public that the author or other owner has not abandoned the child of his intellect, or dedicated it to public use" (footnote omitted)); Patterson v. Century Prods., 93 F.2d 489, 493 (2d Cir. 1937) (noting that copyright laws have "for their object the protection of the property which the author has in the right to publish his production, the purpose of the statute being to protect this right in such manner that the author may have the benefit of this property for a limited term of years").

209 Kenneth B. Umbreit, *A Consideration of Copyright*, 87 U. PA. L. REV. 932, 951 (1939).

210 *Id.* at 952.

argument's use of property is worthy of attention. Unlike in the Classical era where property was thought to have a determinate meaning and bring with it a set of fundamental normative consequences, during the era of Realism the very idea of property came under scrutiny.[211] As a result of such scrutiny, the concept of property was itself shown to be devoid of static meaning that could be contextually transposed from one setting to another.[212] Consequently, when copyright writing during this period used the word "property," it was often as a mere analytical stand-in for the idea of an exclusive right, rather than a loaded term that carried implications drawn from real or personal property.

Umbreit's writing showcases the Realist use of the term "property" by revealing a natural restraint in having it do any normative work in the argument. Umbreit's argument also highlights the Realist disdain for the statute, which at the time was the Copyright Act of 1909, produced as part of a comprehensive general revision of the law.[213] He thus notes that "the statute is about as useful to a lawyer confronted with [copyright] questions as a copy of *Quia Emptores* is to a modern conveyancer" and that the law revealed a "judicial tendency" to develop the law "without awaiting statutory recognition."[214]

Perhaps the best known scholarly treatment of copyright during the Realist era was that of the famed First Amendment scholar Zechariah Chafee, Jr., a Harvard Law School professor.[215] Reflecting on the need for copyright reform and the development of copyright principles under the 1909 Act, Chafee—despite being something of a public law scholar—was firm in noting that "[t]he primary purpose of copyright is, of course, to benefit the author."[216] All the same, he was under no illusion that "the very effect of protecting them is to make the enjoyment of their creations more costly."[217] Consequently, the answer to him was balancing the private and public interest: ensuring that copyright "does not impose a burden on the public substantially greater than the benefit it gives to the author."[218] Here, we see the Realist era ambivalence towards allowing public-regarding ideals into the working of a private law institution; Chafee is fully content doing so, but

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211 For Realist scrutiny of the traditional definition of and justifications for property, see generally Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357 (1954); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Singer, *supra note 186, at* 487. For an account of the Realist move to treat property law as public law, see HORWITZ, *supra* note 114, at 165.

212 *Id*.

213 Copyright Act of 1909, Pub. L. No. 60-320, 35 Stat. 1075.

214 Umbreit, *supra* note 209, at 951.

215 For an overview of Chafee's contributions, see generally DONALD L. SMITH, ZECHARIAH CHAFEE, JR.: DEFENDER OF LIBERTY AND LAW (1986).

216 Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 506 (1945).

217 *Id*. at 507.

218 *Id*.

introduces a clear hierarchy wherein the individual author's interest is treated as paramount and the basis of legal doctrine.

Chafee's writing also affirms the era's use of property as an analytical idea lacking independent content. Noting that "there is no magic in words like 'property' or 'ownership'" when applied to copyright, he thus concluded that "[t]he scope of protection for each kind of property should depend on its nature and on the appropriate benefits and burdens caused by private ownership."[219] Characterizing copyright as property was therefore acceptable, but of little consequence as such.

Ultimately, it was in courts' jurisprudence of this era that the private law conception of copyright continued to hold sway. As scholars have noted, it was the Second Circuit during this era (rather than the Supreme Court) that emerged as the most important and influential court.[220] Much of this was a consequence of the court's composition, which comprised several prominent scholar-judges, many who were Legal Realists, and came to exert a lasting impact on the jurisprudence of the era. Prominent among the court's judges at the time were Learned Hand and Jerome Frank.[221]

Hand alone played a hugely influential role in the development of copyright law during this period. While he publicly distanced himself from being labelled a Legal Realist,[222] his views mirrored those of his Realist colleagues in multiple respects. Hand's copyright opinions were marked by a common law flourish and willingness to connect copyright principles to the facts of individual cases that made them especially noteworthy.[223] While he often advocated a philosophy of judicial restraint in general, as scholars have noted, he used this as a mechanism to liberate his own legal reasoning within the domain that he relegated to himself.[224] We see this in his copyright opinions no less.

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219 *Id.* at 510.

220 *See* MARVIN SCHICK, LEARNED HAND'S COURT 336-37 (1970).

221 *Id.* at 13, 34.

222 *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 450 (2011) (detailing an episode where Hand publicly disparaged Legal Realism). Despite this reality, Hand's affinity for the Legal Realist method and credo cannot be doubted. His opinion in *Carroll Towing*, wherein he crafted the now famous "Hand Formula" for negligence using economic insights, remains a perfect example of Realist legal reasoning. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (distilling negligence liability to the formula B < PL, wherein "P" stands for the probability of injury, "L" stands for the extent of injury, and "B" stands for the burden of avoiding that injury); ZAREMBY, *supra* note 187, at 109 (noting that with the Hand Formula "economic analysis was used to further the law").

223 GUNTHER, *supra* note 222, at 268-73.

224 *See* Carl Landauer, *Scholar, Craftsman, and Priest: Learned Hand's Self-Imaging*, 3 YALE J.L. & HUMAN. 231, 240 (1991) ("[D]espite Hand's exaggerated belief in the limits of judicial power, he was convinced that there was a realm in which judges had immense authority.").

Hand's copyright opinions disavow reliance on any grand philosophical motivation in their reasoning.[225] Nor do they come across as mechanistic or rule-driven, despite their extensive reliance on past precedent. Instead, they reveal an acute engagement with the factual record and the nature of the work seeking protection.[226] In then relying on precedent and principle to fashion a rule of application to the facts, Hand's exposition adopted a declaratory and prophetic tone that marked his confidence with the subject. His opinion in the oft-cited case of *Nichols v. Universal Pictures Corp.* illustrates this.[227] After setting out the facts of the case and analyzing prior precedent on the infringement analysis to distill a rule,[228] the opinion goes out of its way to make a variety of observations that have since then stood the test of time: the "abstractions" formulation,[229] the notion that "nobody ever can" fix the boundary between idea and expression,[230] and perhaps most importantly that even though judicial line-drawing on the issue may seem "arbitrary," courts should not shy away from the issue.[231] A similar pattern is to be seen in several of his other leading copyright opinions.[232] Indeed, a hallmark of Hand's jurisprudence in the copyright realm appears to be his express willingness to treat copyright's "principles" as being independent of the formal origin of the law itself, i.e., whether statutory or common law. In one case, he would thus observe that "[c]opyright in any form, whether statutory or at common-law, is a monopoly; it consists only in the power to prevent others from reproducing the copyrighted work."[233] All the same, there were occasions when Hand's ideal of judicial restraint came through, especially when expressly called upon (by a party) to make law in an area altogether devoid of

225 *See, e.g.*, G. Ricordi & Co. v. Haendler, 194 F.2d 914 (2d Cir. 1952); National Comics Publ'ns v. Fawcett Publ'ns, 191 F.2d 594 (2d Cir. 1951); Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266 (2d Cir. 1944); Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697 (2d Cir. 1941); RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (1929).

226 *See, e.g.*, *G. Ricordi*, 194 F.2d at 915 (exploring how the nature of typography affects copyright); *Shapiro, Bernstein & Co.*, 123 F.2d at 699-700 (examining the context surrounding a song's creation); *Sheldon*, 81 F.2d at 49-53 (comparing, in detail, the stories in a movie and a play); *Nichols*, 45 F.2d at 120-22 (outlining, in-depth, the plots and characters of two motion picture plays).

227 *See Nichols*, 45 F.2d at 119-23.

228 *Id.* at 120-222.

229 *Id.* at 121.

230 *Id.*

231 *See id.* at 122 ("[W]hile we are as aware as any one that the line, where-ever it is drawn, will seem arbitrary, that is no excuse for not drawing it . . . .").

232 *See, e.g.*, G. Ricordi & Co. v. Haendler, 194 F.2d 914, 914-16 (2d Cir. 1952); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 53-55 (2d Cir. 1936).

233 RCA Mfg. Co. v. Whiteman, 114 F.2d 86, 88 (2d Cir. 1940).

precedent.[234] Copyright principles were thus, first and foremost to Hand, principles embedded in the positive law of the time.

Hand's more openly Realist-leaning contemporaries on the Second Circuit, such as Frank, were significantly less informed about copyright law and doctrine than Hand was, a reality that comes across in their decisions. Nonetheless, taking their cue from Hand, their opinions too adopted the same general pattern as Hand's did. Heavily fact-dependent and driven by the search for copyright principles, they reveal a willingness to embrace judicial lawmaking in the domain with little deference to the legislature or to an implicit legislative design. Frank's majority opinion in *Arnstein v. Porter* epitomizes this tendency.[235] Developing the law from first principles, the case does not so much as reference the copyright statute above-the-line even once, and instead gives it an overtly transsubstantive dimension.[236] The only allusion to copyright's purpose is to be found in one sentence in the opinion, where he notes that the plaintiff's "legally protected interest" is not a reputation-driven one, but instead the "potential financial returns" from the work.[237] Interestingly, Frank derives this proposition from prior case law, and at the end of a string of judicial precedent introduces a citation to a few provisions of the Copyright Act, revealing its use of the word "profit."[238] Frank's opinion in *Alfred Bell & Co. v. Catalda Fine Arts* exhibits the same trend.[239] Drawing on his own conception of the creative process, Frank develops the rule that unintentional—and purely fortuitous—variations could constitute original contributions that render a work copyrightable.[240] Frank's rationale for this innovation is seemingly driven entirely by first principles with no reference whatsoever to the statute or legislative intent, nor indeed to any conception of copyright's purposes.[241]

The Realist variant of the private law conception was hardly limited to the Second Circuit. *Cain v. Universal Pictures Co.* exemplifies its broader reach.[242] In that case, Judge Leon Yankwich coined the notion of "scènes à faire" stock elements used by all creators working within a genre, and which were

234 *See* Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 281 (2d Cir. 1929) ("Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice.").

235 125 F.2d 464 (2d Cir. 1946).

236 *Id.* at 468-75.

237 *Id.* at 473.

238 *Id.* at 473 n.20.

239 191 F.2d 99 (2d Cir. 1951).

240 *Id.* at 105.

241 *See id.* at 105 nn.24-25 (drawing his conclusion from the principle that "great scientific discoveries have resulted from accidents" and prior cases that held that "a patentable invention may stem from an accidental discovery").

242 47 F. Supp. 1013 (S.D. Cal. 1942).

unprotectable components of the work.[243] In so doing, the opinion placed reliance entirely on related precedent and copyright "principles."[244] In reflecting on his work as a judge many years after the decision in *Cain*, Yankwich identified "creative judging" as an important hallmark of the judicial enterprise, wherein "judges apply and adapt to [new conditions] old precepts and principles," thereby producing "new law" through "adjudication" that reveals judges' views on the "social needs" of the time.[245] In later work, he even echoed Hand's understanding that copyright was the "right of printing or multiplying copies of an original work . . . to the exclusion of others."[246] Yankwich's thinking internalized the dominant Realist credo, as refracted through the constraints of the judicial process and copyright law. In *Cain*—and in Yankwich's thinking and writing—we once again see the private law conception at play: an emphasis on copyright's horizontal structure, a downplaying of legislative guidance, the derivation of copyright logic, purpose, and principle from within its functioning, and an overt affirmation of the judicial role in expounding copyright principle and developing copyright doctrine.

To be sure, the generic Realist disaffection for the private law/public law distinction had the effect of diluting the private law conception of copyright over time and introduced important cracks in its foundations. If legal reasoning was not autonomous and indeed took color from social, economic, and political considerations, what reason was there to continue to look *within* copyright doctrine and principles to shape the course of the law? If outward-facing considerations were relevant to copyright, why did judges need to have a monopoly over the exposition and development of copyright doctrine? And if considerations beyond those embodied in the formal sources of law became fair game in the development of copyright law, would not this render copyright law rampantly indeterminate and subject it to the whims of an unelected judiciary? Embodied within the Realist variant of the private law conception were therefore important analytical contradictions, most of which had been successfully cabined off by the courts themselves in order to allow the system to flourish. It was therefore but a matter of time before this equilibrium was unsettled and the approach unraveled.

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The private law conception of copyright thus thrived in the period between 1860 and 1940, and was characterized by an emphasis on the horizontal,

243 *Id.* at 1017.

244 *See id.* at 1016 (citing precedent and then noting that "[w]ith these principles in mind, the problems involved here can be solved easily").

245 Yankwich, *supra* note 196, at 377-78.

246 Leon R. Yankwich, *What is Fair Use?*, 22 U. CHI. L. REV. 203, 204 (1954).

principle-based, and common law-oriented aspects of the regime. The purpose of copyright was rooted in the justification for the author's rights in the creative work and the copier's correlative wrongdoing, both of which almost always assumed an individualist dimension. While copyright jurisprudence retained this general orientation under the Legal Realists, Legal Realism nonetheless posed a real challenge to the narrowly analytical focus of the private law conception, which exalted judicial lawmaking while simultaneously confirming the indeterminacy of law and legal reasoning. What was needed was an approach that could address the challenge of indeterminacy posed by Realism, while simultaneously retaining its claim to democratic legitimacy and the integrity of law and the legal method. Enter the Legal Process.

III. THE LEGAL PROCESS TURN IN COPYRIGHT

Even though the private law conception of copyright continued to dominate through the 1940s, the central insights of Legal Realism had put serious cracks in its foundations. Above all else, its reliance on the conceptual architecture of the entitlement for its normative ideals and purposes seemed largely misplaced. While the juricentric focus of Realism had enabled the survival of the private law conception, it was only a matter of time before that last thread was severed.

In drawing attention to the myth of doctrinal determinacy, as well as the necessarily political nature of judicial decisionmaking, Legal Realism had succeeded in debunking the Formalist belief in the autonomous nature of legal reasoning.[247] All the same, it failed to offer a sufficiently coherent alternative in its place. If legal reasoning and adjudication were as indeterminate and unpredictable as they claimed, the legal system appeared indelibly irrational. The system's commitment to the rule of law would then be little more than a farce.[248] While the Realists might have been willing to maintain this position as an academic matter, the events of the Second World War—and the birth of totalitarianism around the world—made their commitment to skepticism altogether unpalatable, especially as a prescriptive matter.[249]

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247 DUXBURY, *supra* note 117, at 158-59.

248 *See* Eskridge & Frickey, *Introduction*, *supra* note 8, at lxv; William M. Wiecek, *American Jurisprudence After the War: "Reason Called Law"*, 37 TULSA L. REV. 857, 859 (2002) (describing how Legal Realism succeeded in debunking the determinacy of law but also "wash[ed] away the law's foundations in certitude, truth, stability, permanence, and above all, impartiality"); *see also* EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 235-60 (1973) (describing the "reorientation" in thought from empiricism and relativism to "pragmatic and naturalistic attitudes").

249 *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 191 (1937) (comparing the views of the "extreme Legal Realists" to the "uncontrolled positivism" in Europe that produced the World War).

Following the war, the Realists distanced themselves from their commitment to the prediction-theory of the law.[250] Llewellyn thus openly retracted his statement that the law was nothing more than official action devoid of ethical content and claimed to do "open penance" for pushing the skeptical agenda.[251] The juricentrism of Realist thinking therefore came under direct attack, especially insofar as it was associated with the school's theory of law. Llewellyn himself conceded that appellate court decisionmaking faced a "crisis of confidence" and was viewed with extreme "cynicism" during any effort to discern the law.[252]

Ironically, juricentrism also came under direct attack within copyright law circles, but for seemingly unrelated reasons. With technological developments having rendered several aspects of the Copyright Act of 1909 obsolete and in serious need of updating, courts had come to play a major role in keeping the system afloat—through their development of the law in common law fashion.[253] And as with other areas of the common law, this approach had generated its own fault lines including conflicting and inconsistent decisions, circuit splits, frequent changes, and judge-made rules that contradicted the text of the statute.[254] This brought the role of courts within the copyright system into disrepute, with some describing the judiciary's attempted upkeep of the regime as "ridiculous" and "chaotic."[255]

There is little evidence that the problems identified with the judge-made copyright law of the time were any greater—or indeed of any greater significance—than similar problems long understood as a byproduct of judge-made law and the common law process more generally.[256] The system-wide concern with rule indeterminacy and unbounded discretion, which assumed a level of "frenz[y]" and "intensity" because of the war, appears to have coalesced with the call for copyright reform that had begun even before the war.[257] The ideals of certainty, accountability, and democratic legitimacy had

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250 *See* HORWITZ, *supra* note 114, at 247-48 (describing this retraction).

251 KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 152 (rev. ed. 2008). For a charitable reading and account of Llewellyn's move away from traditional Legal Realism, see William Twining, *The Idea of Juristic Method: A Tribute to Karl Llewellyn*, 48 U. MIAMI L. REV. 119, 124 (1993).

252 KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 4, 198 (1960).

253 For examples of courts fashioning or updating rules to address new technologies, see Washingtonian Publ'g Co. v. Pearson, 306 U.S. 30 (1939); Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931); Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955); White v. Kimmell, 193 F.2d 744 (9th Cir. 1952); Heim v. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946).

254 *See* KAPLAN, *supra* note 35, at 80-85.

255 U.S. REGISTER OF COPYRIGHTS, SUPPLEMENTARY REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 81 (1965); KAPLAN, *supra* note 35, at 81-82.

256 For an overview of these problems, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

257 PURCELL, *supra* note 248, at 176, 219.

assumed new meaning after the war, and copyright law/reform got swept up by their obvious allure. With American legal thinking shedding its affinity for juricentrism, conceptualism, and skeptical positivism, the time was ripe for a fundamentally different approach to legal reasoning and analysis; one that emphasized the centrality of the rule of law by giving it functional content, and at the same time attempted to realize a democratic consensus in the creation and application of legal rules. Moving lawmaking away from courts and towards the other more representative branches of government emerged as an obvious direction—both within copyright law and beyond. Thus emerged the Legal Process turn in American thinking.

A. *Legal Process Theory*

The intellectual roots of this move took shape at the Harvard Law School. Just before the war, then law professor Felix Frankfurter began to advocate a move away from the school's focus on common law-based private law subjects, and towards a greater understanding of "administrative law," which he saw as crucial to understanding the modern administrative state that had emerged following the New Deal.[258] "[A]dministrative solutions to social problems" formed a recurrent theme in his writing.[259] When he took his position on the Supreme Court, his judicial opinions in the decades after revealed a similar emphasis, including an application of his insistence on "judicial self-restraint" and judicial "humility."[260] Even after his departure from the Harvard law faculty, Frankfurter's views continued to hold sway on his colleagues, and scholars have noted how leading into the 1950s, he was "God" to many of them.[261] His influence on three such colleagues produced the Legal Process School.

The first was Lon Fuller, a legal theorist and scholar of contract law.[262] While initially a Legal Realist, Fuller had grown disenchanted with the movement and become an outspoken critic of the school's skeptical ideas. This anti-skepticism coalesced with his well-known attack on legal positivism,

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258 *See* Frankfurter, *Administrative Law*, *supra* note 52, at 614-15, 620-21 (calling for "[i]ntensive studies" of "the processes, the practices, the determining factors of administrative decisions"); *see also* HORWITZ, *supra* note 114, at 236 (noting how Frankfurter's emphasis as a professor had been to "move the center of intellectual gravity away from an exclusive emphasis on nineteenth-century private law subjects toward a twentieth-century public law focus").

259 HORWITZ, *supra* note 114, at 236.

260 *See* Erwin N. Griswold, *Felix Frankfurter—Teacher of the Law*, 76 HARV. L. REV. 7, 11 (1962); Wiecek, *supra* note 248, at 868-69.

261 *See* Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1799 (1991) ("At the Harvard Law School which Justice Scalia attended in the late 1950s, Felix Frankfurter was God.").

262 For thorough accounts of Fuller's scholarship and contributions to jurisprudence, see generally KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L FULLER (2012); ROBERT SUMMERS, LON L. FULLER (1984).

resulting in the famous Hart-Fuller debate.[263] Fuller's work emphasized the law's intrinsic connection between the "is" and the "ought" and maintained that "reason" was the ultimate methodology of law, which give it its ethical component.[264] And it was adjudication that gave "formal and institutional expression to the influence of reasoned argument in human affairs" but at the same time had its own limits insofar as there were questions unsuited to adjudicative disposition and better "left to the legislature."[265]

Frankfurter's two other fellow travelers were Albert Sacks, his former law clerk, and Henry Hart, the intellectual leader of the Harvard Law faculty at the time.[266] Fuller, Hart, and Sacks formed a "mutual admiration society" and built on each other's ideas and writings.[267] Beginning in the 1950s, Hart and Sacks assembled a set of teaching materials for their class, which they titled "The Legal Process." In it, they provide an elaborate account of their approach to law. While acknowledging the Realist insight that legal doctrine was on its own incapable of cabining discretion, they nonetheless sought to argue that legal discretion could be channeled through "institutionalized . . . arrangements" that distributed the lawmaking function among different legal actors.[268] Whereas Fuller had constructed his argument in largely theoretical/abstract terms, Hart and Sacks developed their theory through a set of problems. In *The Legal Process*, which became the classical work of the Legal Process School, they thus effectively developed a systematic account of what law was, one that connected the actual content of legal rules ("substantive" arrangements) to the method and process through which they were generated and accepted ("procedural" arrangements).[269] Much has been written about the theory of law advanced by the Legal Process School.[270] All the same, to appreciate its significance for the transformation of copyright law, three aspects of the theory are worthy of elucidation.

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263 Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). For Hart's work, see H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

264 *See* LON L. FULLER, THE LAW IN QUEST OF ITSELF 5-12 (1940).

265 Fuller, *supra* note 17, at 354, 366.

266 *See* JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 82 (1978) (describing the stature and influence of Hart at the time); William M. Wiecek, *The Birth on the Constitution: The United States Supreme Court, 1941-53*, *in* 12 THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 451 n.47 (Stanley N. Katz ed., 2006) (discussing Sacks and his connection to Frankfurter).

267 Eskridge & Frickey, *Introduction*, *supra* note 8, at lxxxiii.

268 HART & SACKS, *supra* note 8, at 3-4.

269 *Id.* at 3-4.

270 For an overview of this voluminous literature, see generally Eskridge & Frickey, *Making*, *supra* note 17; *see also* Barzun, *supra* note 17, at 8-18 (discussing the influence and criticism of Hart & Sacks' work).

1. The (Collective) Instrumentalism of Law

Fundamental to Legal Process thinking was the recognition that law was an intrinsically instrumental or purposive enterprise that does not exist for its own sake. While Hart and Sacks gave this version of instrumentalism its functional content, the idea finds its origins in the work of Fuller, who maintained that any attempt to neatly separate out the "is" and the "ought" in the law was a futile exercise.[271] Analogizing legal reasoning to the process of retelling a story, Fuller argued that a "statute or decision is not a segment of being, but [is] . . . a process of *becoming*."[272] Through the process of reasoned interpretation, "it becomes . . . something that it was not originally."[273] Laws therefore embody both "words" and "an objective sought," and the two go hand in hand in the very idea of law, a premise that positivism stridently rejected.[274]

Fuller's theoretical observations formed the premise of the Hart-Sacks formulation of law, seen in *The Legal Process*. To them,

> Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living . . . . Legal arrangements (laws) are provisions for the future in aid of this effort. Sane people do not make provisions for the future which are purposeless. It can be accepted as a fixed premise, therefore, that every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective . . . .[275]

In identifying the ultimate purpose of law as inhering in the realities of social living, Hart and Sacks readily subscribed to a collectivist vision. Early on in their book, they give the idea more direct expression and note that it remains an undeniable reality of "human existence" that human beings live "under . . . conditions of interdependence," which generates a "common interest."[276] Laws—i.e., legal arrangements—arise because of this common enterprise, with the overarching purpose of fostering interdependence.[277]

Hart and Sacks thus gave the inherent purposiveness of law an avowedly collectivist orientation in their framing. Yet this was not because of their belief in any form of simple utilitarianism, a reading of their theory that is far too simplistic.[278] It was instead because of their attempt to connect "arrangements"

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271 FULLER, *supra* note 264, at 8-10.

272 *Id.* at 10 (emphasis added).

273 *Id.* at 10.

274 *Id.* at 9.

275 HART & SACKS, *supra* note 8, at 148.

276 *Id.* at 2.

277 *Id.* at 2-4.

278 This simplistic reading seems to derive from their use of the term "wants" and their claim that the satisfaction of these wants was a basic purpose of social living, terms that are commonly

to legal institutions and the mechanisms that such institutions employed.[279] The essence of law was thus the "institutionaliz[ation] [of] procedures for the settlement of questions of group concern."[280] Law was collectivist problem solving, which made it a process rather than a static result. As Charles Barzun has argued, the overarching orientation of this account was therefore pragmatic, rather than utilitarian.[281]

The instrumental orientation of law achieved two things at once. First, it distanced the account from the idea of law as an autonomous enterprise, which embodied its own normative premises. And second, it infused the law with a plausible ethical component, one that was rooted in the collectivism inherent in a functional democracy. In so doing, it distinguished itself from the skeptical project of Legal Realism and gave the idea of law a functioning set of normative commitments, all of which were rooted in the idea of "arrangements" for "group" living.[282]

At its core then, the instrumentalism of law that the Legal Process School emphasized was an institutional instrumentalism. This institutional turn was an inflection that it introduced in order to reiterate the existence of an ethical content for law, which it readily located within the paradigm of American democracy. Since institutions epitomized the ideal of democratic legitimacy, the institutional turn necessarily embodied a majoritarian emphasis. And by rooting the purpose of law in the maintenance of conditions for collective (or group) living, the theory implicitly seemed to prioritize collective ideals—enshrined in its institutional vision—over individual ones.

It bears emphasizing that the collectivism of the Hart-Sacks conception of law was in the end an abstract one, in that it focused on the ultimate aims of law and legal arrangements rather than on individual decisions and doctrines. Yet, it was to inform and guide all decisions, even at lower levels, and even if only indirectly.[283] Inconspicuous as it may have seemed, it performed an important framing role for legal analysis and reasoning.

2. Institutional Settlement and the Primacy of Legislation

Closely related to the instrumental orientation of law in the Legal Process account was its core idea—"institutional settlement."[284] Described by Hart

associated with the utilitarian ideas of Bentham and Mill. *See* ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 94 (1989).

279 HART & SACKS, *supra* note 8, at 3.

280 *Id.* (emphasis omitted).

281 Barzun, *supra* note 17, at 21-25.

282 HART & SACKS, *supra* note 8, at 3.

283 *Id.* at 148-49.

284 *Id.* at 4-5.

and Sacks as the "central idea of law," institutional settlement stood for the principle that decisions arrived at through "duly established procedures" were to be accepted as "binding" on all of society, until those procedures themselves were changed.[285] The intrinsic democratic legitimacy of the institutional arrangements created by the legal order (and the Constitution) required accepting the substantive outcomes of those arrangements. The overriding motivation for this framework was fairly apparent: it sought to root the substantive legitimacy of the law in the institutional framework through which it was generated.

Institutional settlement was also the mechanism that the Legal Process School employed to give effect to its conflation of the "is" and the "ought." Whether something is *the* law on a point was seen as primarily a product of whether it was generated by the institutional framework and body that ought to be tasked with its creation. In so doing, institutional settlement gave the notion of separation of powers real significance in determining the substantive content of the law.

Determining whether a question is "settled" by an institution therefore begins with an account of what kinds of questions are appropriately within the domain of each institution—in different substantive areas of law.[286] And it is here that the Legal Process School developed a coherent normative framework. Even though they recognized the importance of "decisional law" within the legal system, Hart and Sacks noted a fundamental difference between the forms of lawmaking that courts and legislatures could engage in.[287] At the top of the hierarchy, and vested with peremptory authority, was the legislature:

> In the American legal system final responsibility for making such changes [in the body of working arrangements] is entrusted to the legislature, subject to such limits as the governing constitution places upon the legislature's powers and subject also to the extraordinary procedure of constitutional amendment. The function is inherently discretionary. For the number of potential changes that can be made in existing arrangements is infinite, and choice among the infinity of possibilities can never be controlled by any "scientific" test.
>
> Discretion also must include whether to legislate or not to legislate . . . . In the field of arrangements governing private activity, every American legislature possesses and constantly exercises this vitally significant discretion whether to legislate at all.
>
> In the exercise of this discretion . . . legislatures make . . . changes in the grounds of decision that courts are directed to employ—of changes, in other

285 *Id.* at 4.
286 *Id.* at 5.
287 *Id.* at 163-65.

> words, in the content of self-applying regulatory arrangements. . . . In making changes of [this] type, the legislature reviews the soundness for the future of the specific judgments of policy embodied in the ground of decision it replaces. The changes it decides upon will in many, if not all, cases be changes which it would have been within the power of a court to introduce in the first instance. In this sphere . . . court and legislature are in some sense in competition, with the legislature having the last word for the future.[288]

Courts were to play an important role within the system, principally as problem solvers. In so doing, courts engaged in a task that the Legal Process School identified as "reasoned elaboration."[289] Reasoned elaboration was intricately connected to the idea that laws—of all kinds—embodied a "policy" or objective/purpose and were based on an admonition to courts to situate their decisionmaking around the identification and clarification of the law's purposes.[290] Purposes were seen to abound in different parts of the legal system (owing to law's intrinsic purposiveness), and the courts' job was to "rationaliz[e]" these purposes, recognizing there to be an obvious hierarchy between the specific and more general ones.[291] With decisional law, the body of court-made law, courts were free to utilize a variety of sources and principles to elaborate on the purpose of the law at hand. But with areas of law defined by statutes, Hart and Sacks were clear that courts should not see themselves as being "in the same position as a legislator" but instead "respect the position of the legislature in the institutional system."[292]

Thus, in domains where Congress had acted—statutorily—Congress was to be regarded as the primary determinant of the law's policy (or objectives), which courts were to glean from the terms of the statute as well as its context, and then elaborate on when needed. In other words, the "policy" of the law for a statutory regime was the ultimate responsibility of Congress, which courts could do little to question, negate, or override.[293] This was an idea first enunciated by Roscoe Pound, and later further developed by Felix Frankfurter.[294] Statutes—on their own—could serve as freestanding sources of both law and legal reasoning, and thus embody a distinctive policy within their four corners.

On the face of things, this may have appeared to resuscitate the positivist divide between the "is" and the "ought," especially insofar as it appeared to

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288 *Id.* at 164-65 (citation omitted).

289 *Id.* at 145-52.

290 *Id.* at 147-49.

291 *Id.* at 148.

292 *Id.* at 143.

293 *Id.* at 165.

294 For an account of Pound's arguments, see Eskridge & Frickey, *Introduction*, *supra* note 8, at lviii. For Frankfurter's view, see Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 531-32, 538 (1947) [hereinafter Frankfurter, *Reflections*].

require courts to focus entirely on stating the law as it is. This is where the idea of reasoned elaboration assumed significance, to collapse the is/ought divide by giving courts a good amount of—but nonetheless bounded—leeway in developing the purposes of the law.[295] In requiring courts to deploy their powers of reason and persuasion in deciding cases and in interpreting the law, the Legal Process School has been understood as implicitly affirming a purposivist or "dynamic" approach to interpretation.[296] While courts were thus subservient to the legislature in determining a statute's policy, they nonetheless had a responsibility to elaborate on it, and then show a connection between their decisionmaking in an individual case and the statutory policy at issue. While courts could thus elaborate on the policy once created by the statute, this subsidiarity was critical; or, as Frankfurter put it, judges were to develop a "trained[] reluctance" to cross the line from adjudication to legislation.[297]

The extent of subsidiarity was of course not constant. In situations where the legislature has itself delegated policymaking to courts (e.g., "common law statutes"[298]), the deference was to be fairly minimal. But in comprehensive statutory regimes, courts were to glean the policy from the text and context. "[W]here policy is expressed by the . . . legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers use no more than is called for by the shorthand nature of language."[299] The law's purposes (or policy) were thus embedded within the terms of the statute, which the legislature alone had the ability to dictate and change; courts were to elaborate and interpret this policy with due deference.[300]

Related to the primacy of the legislature (and of statutes) was the role that the Legal Process theory accorded to administrative expertise. While Hart and Sacks only dealt with the question in passing,[301] they nonetheless observed the importance of having the legislature delegate its lawmaking "discretion" to administrative agencies in different domains in order to

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295 HART & SACKS, *supra* note 8, at 147.

296 Eskridge & Frickey, *Introduction*, *supra* note 8, at cxxix; *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1481-97 (1987) (detailing the "dynamic" approach).

297 Frankfurter, *Reflections*, *supra* note 294, at 535.

298 *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899-900 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute." (citations omitted)); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("The statute books are full of laws . . . that effectively authorize courts to create new lines of common law."); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1052 (1989) ("The Court's invocation of common law principles to fill in gaps within fairly detailed statutes . . . is a regular occurrence . . . .").

299 Frankfurter, *Reflections*, *supra* note 294, at 535.

300 *See id.* at 538 (observing how policy is to be within the "words" of the statute).

301 *See* HART & SACKS, *supra* note 8, at 165-66.

enhance the "effectiveness" of the regime.[302] Courts were meant to follow administrative action using the same general framework of institutional settlement, depending on the precise kind of question being addressed by the agency. Later scholars have applied the Legal Process framework in even more detail to administrative regulation, arguing that its ideas about reasoned elaboration, purposive interpretation, and deference to expertise carry over to the realm of administrative agencies with few problems.[303]

3. The Structured Collapse of the Private Law/Public Law Distinction

A third, and hitherto underappreciated move that the Legal Process School deployed is of direct relevance to our discussion of copyright law. This was its conscious–analytical conflation of public law and private law through its theory of law and its idea of institutional settlement. While some aspects of this move were implicit in the working of the theory, other aspects were deliberate extensions of its central ideas. The traditional (and standard) understanding of private law focused on analyzing a substantive area through the horizontal relationship between the parties to a dispute, using the ideas of right and duty. Social considerations of a collectivist nature—that would extend beyond the immediate context of the claimants—were treated as distinctively secondary in this understanding.

The theory's attempt to dilute the primacy of juricentrism, discussed previously,[304] formed its implicit move in this direction. Since historically most areas of private law were also common law subjects that were developed substantively by courts, the dismantling of juricentrism naturally moved the theory's construction of "law" away from a private law orientation that emphasized the parties' claims (horizontal in nature) as the primary basis for lawmaking in the area. Additionally, insofar as courts—even in state jurisdictions—could be overridden by legislatures on questions of social policy, the common law (in both substance and in method) ceased to represent the core ideal of what a well-functioning legal system represented in the Legal Process account.[305]

The theory's more overt conflation of private law and public law was systematic, and a consequence of its institutional focus. Recall that for Hart and Sacks, the idea of "policy" was synonymous with the purposes and

302 *Id.* at 151.

303 *See, e.g.*, Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 383-408 (2012) (deriving the idea of "purposivism" from the Legal Process School and applying it to the interpretation of administrative regulations).

304 *See supra* text accompanying notes 253-258.

305 *See* HART & SACKS, *supra* note 8, at 165 (noting how the legislature has the "last word" on the content of the law).

objectives of a regime.[306] And since the ultimate purpose of any legal arrangement was its furtherance of "group" living or collectivism, the very idea of policy readily partook of a public orientation.[307] Policy, in other words, was principally a stand-in for notions of "social engineering" that sociological jurisprudence had made famous.[308] Insofar as legislatures held primary responsibility for questions of collectivist social policy, and statutes were seen as embodiments of such policy when brought into existence, statutory regimes were presumptively, to Hart and Sacks, public-regarding in their orientation.

Statutes had purposes—or policy goals—which emanated from the legislature's attempt to develop arrangements to govern interactions between individuals in the future.[309] Since the legislature was by definition a collectivist institution presumptively representative of diverse segments of society, its focus was meant to be on public goals. Consequently, every legislative intervention was in effect a manifestation of public goals, quite regardless of the individual subject area at issue. It is crucial to note that this was hardly just a serendipitous consequence of the Legal Process theory's other precepts. It emerged instead from a fairly conscious realization (on the part of Hart and Sacks) that all conflicts—even when private—had important spillover effects for the public that required collective management. One scholar thus analyzes their impetus in the following terms:

> [A]s scholars whose primary focus was private law, Hart and Sacks were well aware of both the ubiquity of conflict and the diversity of interests in human affairs. They understood that law must accommodate the often competing interests of producers, distributors, wholesalers, retailers, and consumers, taking account of the parallel competition among federal, state, and local regulators acting through legislative, executive, administrative, and judicial channels.[310]

Private (law) conflicts were thus more than just the concern of the private parties involved in it. Such conflicts needed to be proactively managed and, as far as possible, avoided. To this end, collective solutions that were legislatively (or administratively) developed allowed for such management. Insofar as legislation represented a collective solution produced through a public process, and indelibly derivative of social concerns, statutes came to be understood within the Legal Process account as the subject of "public law."[311]

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306 *See id.* at 141 ("A *policy* is simply a statement of objective.").

307 *Id.* at 3.

308 ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 64 (1968).

309 *See* Eskridge & Frickey, *Introduction*, *supra* note 8, at lviii.

310 Dorf, *supra* note 22, at 925.

311 Eskridge & Frickey, *Introduction*, *supra* note 8, at lxix-lxxvii; *see also* Julius Cohen, *Towards Realism in Legisprudence*, 59 YALE L.J. 886, 887-90 (1950) (describing the role of legislation as public policy formulation).

In equating statutes and legislation with public law, Legal Process theory therefore consciously underemphasized the traditional divisions of law that had predated its advent. While Hart and Sacks were themselves less explicit about this move, later scholars writing in the tradition have emphasized how the theory laid the ground work for a "public values" based approach to the construction and interpretation of statutes.[312] It is important to appreciate the far-reaching significance of this move: any legislative intervention (statute) in an area of law traditionally considered "private law" was now quite legitimately infused with public/collectivist considerations.[313]

Legal Process theory is credited with having created the modern "public law" curriculum that is today the mainstay of American legal education.[314] It achieved this result by emphasizing the transsubstantive nature of its precepts and arguments, and by downplaying the significance and normativity of the law's traditional divisions. In focusing on the arrangements of law and its "administration," Legal Process underplayed the role of substantive rules in individual areas and avoided specification of the discrete normative values that influenced them. The divide between private law and public law areas, which had until then been a mainstay of American (and indeed most common law) thinking, fell victim to this move.

As a prime example of this move within Legal Process thinking, consider the very first problem that Hart and Sacks use to illustrate the functioning of their theory in *The Legal Process*: "The Case of the Spoiled Cantaloupes."[315] On its face, the problem is a simple contractual one relating to the sale and shipment of cantaloupes from a wholesaler to a distributor, who discovers them to be decaying upon arrival.[316] The dispute proceeds to litigation—which is private in nature, being about contractual performance.[317] In their exposition of the problem, Hart and Sacks first set out information about the agreement and then information relating to the nature of the American industry involving the trade of fruits and vegetables.[318] They later move to describing the federal regulations issued by the U.S. Department of Agriculture concerning the different grades of fruits, and the influence of this gradation on the practices and norms among merchants.[319]

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312 William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1012-13 (1989).

313 For a recent attempt to examine the interaction between private law and statutory interpretation, see Jeffrey A. Pojanowski, *Private Law in the Gaps*, 82 FORDHAM L. REV. 1689 (2014).

314 Eskridge & Frickey, *Introduction*, *supra* note 8, at liii.

315 HART & SACKS, *supra* note 8, at 10.

316 *Id.* at 10-11.

317 *Id.* at 12.

318 *Id.* at 10-15.

319 *Id.* at 35-45.

What converts the dispute from an ordinary breach of contract lawsuit into a more complex case is the presence of a special enactment known as the Perishable Agricultural Commodities Act ("PACA"), which authorizes the Department of Agriculture to regulate the sales of fresh and frozen fruits and vegetables to ensure against unfair practices.[320] In addition to authorizing the issuance of regulations, the PACA also creates a special dispute resolution mechanism that allows for the adjudication of private disputes without a formal civil complaint.[321] In their problem, Hart and Sacks therefore have one party commence a proceeding under the PACA when the nonperformance occurs.[322] The adjudication results in a finding for the respondent, who then promptly appeals the matter to the district court, which then relies on standard contract law principles to find for the petitioner, concluding that the implied warranties of quality and description were breached.[323] On appeal to the First Circuit, the court vacates the district court decision, concluding—as a matter of simple contract law—that the contract had no right of rejection, despite the warranty being breached, but that damages could be claimed.[324]

Yet the matter does not end there. The Department of Agriculture files a petition for rehearing with the First Circuit, seeking a reconsideration, claiming that its interpretation of the relevant administrative regulation—under the PACA—covered the dispute and was owed due deference under principles of administrative law.[325] The court relents and issues an amended opinion, this time deferring to the Department's interpretation since it was not "plainly erroneous," despite conceding that it might have chosen to interpret and apply the Act differently.[326]

All of the decisions that the problem represents are actual cases decided by courts. Hart and Sacks use the problem to illustrate the working of institutional settlement and the idea that legislative and administrative guidance should override judicial discretion in many situations, even where a court thinks that its own judgment would be substantively better than the one actually reached by another institution.[327] Lurking underneath the institutional settlement, however, is a subtle and underemphasized conversion of the dispute from one about private law to one about public law, a move that the Legal Process account celebrates.

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320 Pub. L. No. 71-325, 46 Stat. 531 (1930) (codified as amended at 7 U.S.C. §§ 499a–499t (2018)).

321 7 U.S.C. § 499f(a) (2018).

322 HART & SACKS, *supra* note 8, at 46-47.

323 Joseph Martinelli & Co. v. L. Gillarde Co., 73 F. Supp. 293, 296 (D. Mass. 1947).

324 L. Gillarde Co. v. Joseph Martinelli & Co. (*Gillarde I*), 168 F.2d 276, 280 (1st Cir. 1948).

325 HART & SACKS, *supra* note 8, at 56-57.

326 L. Gillarde Co. v. Joseph Martinelli & Co. (*Gillarde II*), 169 F.2d 60, 61 (1st Cir. 1948).

327 HART & SACKS, *supra* note 8, at 57-58.

The existence of a legislative intervention in the area produces a comingling of private contract law concerns and broader institutional/social ones in the case. This in turn forces the appellate court to consider not just the parties' interests and claims, but also the broader (social) implications of its holding. Whereas the administrative tribunal and the district court both treat the problem as one of contract interpretation and breach, the appellate court adopts an interpretive rule that "[w]hen terms which have been given a definite meaning under [a statute] are used . . . in transactions governed by the [statute], it can not later be maintained that a different meaning was intended."[328] Legislative intention therefore overrides any presumptive contractual intention. On reconsideration, the appellate court then makes an all-important structural move. It affirms the primacy of the "policy" underlying the statute (that is, the PACA) over not just its own ruling and interpretation of the law, but also the basic ideals of contract law and the autonomy of the parties that had specifically contracted in the case.[329] The court thus agrees with the executive's (i.e., the United States's) position that "buyers would not be discouraged from rejecting" if they are able to obtain damages and reverses itself, apparently agreeing that the policy of discouraging wrongful rejections was paramount.[330] Regulating the collective behavior of all parties (that is, all future buyers) thus overtly overrides a contractual rule that the court otherwise saw as sound and as being in step with basic, established contract law principles. Implicit in the supremacy of the legislature and executive over the judiciary here is the primacy of the collectivist policy over individual/private contract law principles.

Hart and Sacks' first problem merely highlights a recurring, but hitherto unacknowledged, impulse in *The Legal Process*, which is to develop public law solutions—driven by institutional considerations and collectivist normative motivations—to private law problems and disputes. And in the process, the theory dismantled the traditional divide between private law and public law.

B. *Remaking American Copyright Law*

As noted previously, the private law conception of copyright continued to hold sway through the Legal Realist era, principally owing to its emphasis on juricentrism, even when unconstrained. The era of Legal Realism coincided with the New Deal, the extensive economic relief and regulatory legislation passed by the Roosevelt Administration as a response to the Great

328 *Gillarde I*, 168 F.2d at 280.
329 *Gillarde II*, 169 F.2d at 61.
330 *Id.* at 60-61.

Depression.[331] While scholars have debated the intellectual cross-currents between Legal Realism and New Deal thinking, the latter undoubtedly took the focus of law and legal reasoning in the direction of public law and administration. Indeed, some have even argued that the emergence of New Deal legislation during the period itself played a role in diluting Legal Realism's reliance on juricentrism.[332]

Leaving aside this independent cross-fertilization, the New Deal agenda seems to have had little direct impact on domestic copyright thinking as such, other than delaying its reform. The dawn of World War II also contributed to this. In the period between 1925 and 1940, debates about copyright reform focused on ensuring that U.S. copyright law conformed to the international copyright system, manifested in the Berne Convention.[333] The war and its aftermath—among other reasons—resulted in an abandonment of these efforts, with the U.S. eventually deciding not to join Berne.[334] Following this decision, the U.S. decided to propose its own alternative international copyright regime, the "Universal Copyright Convention," which produced minimal changes to domestic copyright law.[335] Thus, by 1955, U.S. copyright lawmakers had made a self-conscious decision to allow domestic copyright law to remain *sui generis* in the international landscape.

The heyday of Legal Process theory was the 1950s, a period during which post-New Deal thinking coalesced with the perceived need for a new account of law (and legal institutions). It was also during this very period that the growing call for domestic-focused copyright reform finally met with success, when in 1955, Congress authorized the Copyright Office to initiate a "program of research and studies" leading to a "general revision" of domestic copyright law.[336] The impetus for this delegation to the Copyright Office appears to have been twofold: one, the perception that the Copyright Office was indeed the body with the requisite expertise on the subject; and two, the unique structure of the Office as a branch of the Library of Congress, which ensured direct congressional oversight over the process.[337] Over the next

331 Marcus J. Curtis, Note, *Realism Revisited: Reaffirming the Centrality of the New Deal in Realist Jurisprudence*, 27 YALE J.L. & HUMAN. 157, 157-58 (2015). For a more elaborate account of the New Deal and its effect on lawmaking and adjudication, see BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT (1998); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL (2000).

332 Curtis, *supra* note 331, at 159.

333 REGISTER OF COPYRIGHTS 1961 REPORT, *supra* note 33, at x (describing this history); *see also* ABE A. GOLDMAN, STUDY NO. 1: THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION FROM 1901 TO 1954, 4-12 (1955) (providing a history of these debates).

334 GOLDMAN, *supra* note 333, at 12.

335 *See id.* at 14. For a thorough overview of the Universal Copyright Convention, see generally Paul J. Sherman, *The Universal Copyright Convention: Its Effect on United States Law*, 55 COLUM. L. REV. 1137 (1955).

336 REGISTER OF COPYRIGHTS 1961 REPORT, *supra* note 33, at x.

337 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1185-86 (1994).

three years, the Office produced thirty-four studies on different aspects of U.S. copyright law.[338] What is important to note in this revision is that the Office selected not just areas that had been hitherto legislated upon, but, in addition, areas of copyright law that had until then been entirely the creation of courts.[339] Between 1958 and 1974, Congress (and the Copyright Office) held a series of meetings and consultations, which in turn produced myriad compromises that allowed the passage of the Copyright Act of 1976.

The legislative history leading up to the Act certainly does not reveal an express reliance on the Legal Process framework of thinking. Yet, as scholars have noted, the influence of Legal Process theory—in its Hart-Sacks formulation—was at once pervasive and indirect.[340] Its intellectual influence emerged through multiple indirect channels. Law students, who would go on to clerk for prominent federal judges and Supreme Court justices, were trained on the Hart-Sacks materials and cognate texts that incorporated several of its basic ideas.[341] Several prominent Supreme Court justices were not just aware of the framework, but openly subscribed to its ideas.[342] With courts and judges openly channeling the theory's basic precepts, especially the "tripartite structure of government" and the "authority of administrative agencies" in specialized domains, the influence of the theory was therefore mostly indirect but intellectually powerful—representing a shift in mindset, rather than a direct application.[343] Indeed, few legal theories see their influence ever realized directly, and so it is with Legal Process and copyright. This perhaps also explains why the academic decline of Legal Process thinking in 1960s did little to stymie its influence as a model of lawmaking and reasoning among courts and policymakers.

The best evidence of the Legal Process theory's influence on copyright thinking is seen in the legal regime that eventually emerged from the comprehensive revision process, which reveals a direct instantiation of the theory's central insights. In examining this revelation, two preliminary observations are worthy of note here.

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338 REGISTER OF COPYRIGHTS 1961 REPORT, *supra* note 33, at x-xi.

339 *See, e.g.*, GEORGE D. CARY, STUDY NO. 12: JOINT OWNERSHIP OF COPYRIGHTS (1958); ABRAHAM L. KAMINSTEIN, STUDY NO. 11: DIVISIBILITY OF COPYRIGHTS (1957); ALAN LATMAN, STUDY NO. 14: FAIR USE OF COPYRIGHTED WORKS (1958).

340 *See* Eskridge & Frickey, *Making*, *supra* note 17, at 2047-48 (noting the prevalence of the Hart-Sacks formulation in the legal academy).

341 *Id.* at 2046-47.

342 *Id.*; *see also* Philip P. Frickey, *Avoiding Constitutional Questions in the Early Warren Court: Judicial Craftsmanship and Statutory Interpretation*, *in* EARL WARREN AND THE WARREN COURT: THE LEGACY IN AMERICAN AND FOREIGN LAW 209, 213-14 (Harry N. Schreiber ed., 2007); Eskridge & Frickey, *Introduction*, *supra* note 8, at civ.

343 Wiecek, *supra* note 248, at 870.

First, the new "regime" that emerged was much more than just the text of the statute. It instead encompassed a complete shift in mindset, encapsulated not just in congressional intervention (i.e., the statute) but also in corresponding changes in the approaches of the federal judiciary and administrative agencies on questions of copyright. Indeed, their interaction and coordination formed a central part of the theory's core. Consequently, the transformation that occurred was not purely a post-1976 one, but instead one that began to take shape in the 1950s and 1960s as well, and which coalesced with the eventual text of the legislation that emerged in 1976. Indeed, the seeds of this change are to be seen in some of Justice Frankfurter's opinions on copyright law. In one opinion delivered during the war, he thus openly advanced a new account of what courts should be doing in copyright cases:

> It is not for courts to judge whether the interests of authors clearly lie upon one side of this question rather than the other. . . . We do not have such assured knowledge about authorship, and particularly about song writing, or the psychology of gifted writers and composers, as to justify us as judges in importing into Congressional legislation a denial to authors of the freedom to dispose of their property possessed by others.[344]

The shift therefore had begun well before the passage of the 1976 Act, which merely cemented it.

Second, as a causal explanation it is very plausible that the central tenets of Legal Process theory that were developed by Hart and Sacks (and Fuller) were themselves representations of a changing landscape, which had begun to emerge around them. In other words, insofar as much of their theory was plausibly descriptive (rather than prescriptive) of the contemporary legal system of the time (a reality reflected in the fact that many of their hypotheticals were actual legal cases and problems), the dramatic change that came to be seen in the copyright regime was hardly a direct effect of the theory in isolation, and more the product of changes in overall legal thinking that Legal Process theory merely captured and distilled. This latter insight certainly does not in any way diminish the influence of Legal Process theory on copyright. It merely suggests that such influence may have been explanatory and justificatory, rather than purely causal.

1. The Triumph of Copyright Collectivism

The copyright regime that emerged following World War II represented a clear triumph for collectivist ideals. Beginning in the 1950s, after a full century and a half of U.S. copyright law having been in existence, federal

344 Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 657 (1943).

courts deciding copyright cases began to speak of a "copyright policy" for the first time, a trend that continues to this day.[345] This is far from being a mere coincidence, given how commonplace the phrase eventually became thereafter and its complete absence from copyright jurisprudence until then. Indeed, what is worth emphasizing is that nothing significant had changed as such in the content of the copyright statute (or in related jurisprudence) from the prior era to this one, rendering the sudden onset of this usage intriguing.

A closer analysis of courts' use of the idea reveals a few additional details about their reasons for doing so. First, it came to be used as a stand-in for the purposes and objects underlying the copyright *statute*.[346] In other words, statutory policy and statutory purpose came to be used interchangeably, in much the same way as Hart and Sacks had. What is important about this development is therefore that courts for the first time began expressly identifying a deliberate purpose to the enactment of copyright law, beyond those internal to the doctrine itself. *Purposivism* thus emerged as an express hallmark of copyright law. Equally crucial to note is that courts remained deliberately vague on the precise contents of this policy, which they merely referenced on a case-by-case basis.[347] Nonetheless, it alluded to the existence of an overarching reason behind the existence of copyright, one that some courts even traced back to the Constitution.[348] This leads us to a second observation about the prevalence of this usage, namely that courts used it to hint at the existence of a systematic "scheme" behind U.S. copyright law.[349] Not only was the reference to "copyright policy" an allusion to the existence of legitimate purposes behind the statute, but it also was meant to suggest a systematicity, comprehensiveness, and organization behind these purposes.

Courts thus began the practice of referring to copyright policy, or "federal copyright policy"[350] in deciding individual cases, as an added justification for

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345 For the earliest usage of the term in federal copyright jurisprudence, see F.W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228, 233 (1952). For more recent uses of the term, see Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 929 (2005); Bouchat v. Balt. Ravens Ltd. P'ship, 737 F.3d 932, 944 (4th Cir. 2013); Forest Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 433 n.1 (2d Cir. 2012); SoundExchange, Inc. v. Librarian of Congress, 571 F.3d 1220, 1224 (D.C. Cir. 2009).

346 *See F.W. Woolworth*, 344 U.S. at 233-34 (equating the two).

347 *See supra* note 345 and cases therein.

348 *See, e.g.*, Gates Rubber Co. v. Bando Chem. Indus., 9 F.3d 823, 839 (10th Cir. 1993) (referencing the Constitution and then noting that "[c]opyright policy is meant to balance protection, which seeks to ensure a fair return to authors and inventors and thereby to establish incentives for development, with dissemination, which seeks to foster learning, progress and development").

349 *See, e.g.*, Goldstein v. California, 412 U.S. 546, 551 (1973).

350 *See, e.g.*, S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1088 (9th Cir. 1989) ("This result is contrary to federal copyright policy . . . ."); Fantastic Fakes, Inc. v. Pickwick Int'l, Inc., 661 F.2d 479, 483 (5th Cir. 1981) ("[A]pplication of Georgia rules to determine parties' contractual intent . . . [does not] violate federal copyright policy." (citations omitted)); Tape Indus. Ass'n of Am. v. Younger, 316

their interpretation and elaboration of particular rules. Not only was such policy presumptively external to the doctrine itself, but as representative of broader social concerns, such policy was generally seen as constraining on the doctrine in individual cases,[351] and most importantly, beyond the purview of courts to question. In one oft-quoted decision, Justice Jackson for instance relied on "copyright policy" to insist on relying on statutory damages to achieve a punitive result and deter infringement.[352] Influential commentators during this period too began using the phrase, some with a direct link to Hart and Sacks.[353] In his 1958 Foreword to the *Harvard Law Review*, Harvard Law Professor Ernest Brown, a contemporary of Hart and Sacks and an interlocutor of the *Legal Process*,[354] used the term "copyright policy" to refer to the balancing of the "incentive to artistic creativity against the resulting burden which the copyright imposes upon the public in limiting the available supply of artistic works."[355]

Beyond the rhetoric of judicial reasoning and scholarly opinion, the idea of a collective social policy undergirding the copyright system reached its zenith during the comprehensive legislative revision of the statute, which began in 1955. During this process, copyright collectivism was given an overtly democratic color through the idea of interest group representation. During the drafting of the bill, Congress actively solicited participation from "authors, publishers, and other parties with economic interests" in the copyright system, and then mediated a negotiated compromise between them, which it enacted into law.[356] Even when Congress was dubious of the substantive wisdom of such a provision, it nonetheless allowed it into law in the belief that the representational process—and the compromise that it produced—represented the "best solution" as a matter of the process values that it embodied.[357] Examples of such compromises abound in the text of the

F. Supp. 340, 345 (C.D. Cal. 1970) (examining whether a statutory provision "interferes with the Federal copyright policy devised pursuant to this Constitutional authority by Congress in the Copyright Statutes").

351 *See, e.g.*, Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 205 n.13 (3d Cir. 2003) (noting that the "fair use doctrine excuses copying that would otherwise be infringement in order to vindicate the copyright policy promoting the diffusion of ideas").

352 F.W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228, 233-34 (1952).

353 *See* Chafee, *supra* note 216, at 526; Benjamin Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469, 475 (1955).

354 *See* Shaw, *supra* note 28, at 691 (describing Brown's role in a reading group organized by Hart).

355 Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77, 147 (1958).

356 Litman, *supra* note 2, at 861.

357 *See id*. at 862 ("The record demonstrates that members of Congress chose to enact compromises whose wisdom they doubted because of their belief that, in this area of law, the solution of compromise was the best solution.").

1976 Act.[358] Compromise was thus seen as worthy for its own sake, and because it functioned as a stand-in for the representativeness of the process. One scholar makes the following point: "Such veneration for compromise runs through the entirety of the Act's legislative history. Congress invited, nurtured, and occasionally compelled the compromises embodied in the 1976 Act. Sometimes, it disregarded everyone's better judgment in favor of giving effect to the agreement of interested parties. Congress welcomed compromise for compromise's sake."[359]

Scholars have referred to this process to question the utility of courts' reliance on the legislative history to discern a congressional "intent," a question that need not detain us here.[360] All the same, Congress's overbearing emphasis on compromise highlights its recognition that the content of the law was to be collectively determined, through the best representation of the social interests involved in the regime. Copyright law was not something innate or naturalistic that required elucidation based on first principles (such as matters of right), but instead a matter of (group) policy, that was guided by overtly utilitarian considerations emanating from the constitutional text.

A natural, and expected, consequence of this turn towards a collectivist compromise was a resurgence of utilitarian thinking and rhetoric in copyright reasoning. While utilitarianism had long informed copyright analysis in the U.S., the postwar turn towards collectivism gave this dormant framework new life. Courts, scholars, and lawmakers began to extol copyright's logic of "incentives" and "encouragement" for creativity as the raison d'être of the regime.[361] But unlike in the past, this rationale began to make its way into actual copyright doctrine. The revision process paid closer-than-ever attention to "market" effects and the idea of incentives,[362] and courts leading

358 *Id.* at 861-62; *see also, e.g.*, 17 U.S.C. § 101 (2018) (defining "work made for hire"); 17 U.S.C. § 109(b)(1)(B) (2018) (describing an exemption from the first sale doctrine); 17 U.S.C. § 111 (2018) (describing the cable retransmission licensing scheme).

359 Litman, *supra* note 2, at 878.

360 *Id.* at 879.

361 By the 1950s and 1960s, referencing the utilitarian logic of authorial incentives as copyright's primary purpose became commonplace. *See, e.g.*, Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Goldstein v. California, 412 U.S. 546, 555 (1973); Mazer v. Stein, 347 U.S. 201, 219 (1954); Jondora Music Publ'g Co. v. Melody Recordings, Inc., 506 F.2d 392, 397 (3d Cir. 1974); United Artists Television, Inc. v. Fortnightly Corp., 377 F.2d 872, 881 (2d Cir. 1967). The first serious examination in the scholarly literature of the incentives logic emerged from Justice (then Professor) Stephen Breyer. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281, 291 (1970). In his argument, Breyer expressly notes how several aspects of the 1976 Act (then Bill) were motivated by the utilitarian/incentives logic that he describes in his paper. *Id.* at 323-50.

362 *See* H.R. REP. NO. 94-1476, at 47-50 (1976), *as reprinted in* 1976 U.S.S.C.A.N. 5659, 5659-5663 [hereinafter H.R. REP. NO. 94-1476].

up to and following the revision readily followed suit.[363] With its insistence on the collective good—and social welfare—utilitarianism thus became the central dogma of American copyright thinking, providing the collectivist orientation of "policy" and the legislative compromise of 1976 with a strong normative foundation, a reality that continues unabated to this day.[364]

2. The "Limits" of Copyright Adjudication

In embarking on a comprehensive "general" revision of the copyright statute and thereupon choosing to codify parts of copyright jurisprudence that were hitherto judge-made, Congress was of course asserting its primacy as copyright lawmaker.[365] In one sense, this was hardly surprising given that the Constitution expressly treats copyright as legislative in origin.[366] Yet, as the Register of Copyright at the time pointed out, the new regime "mark[ed] a shift in direction for the very philosophy of copyright."[367] And this was undoubtedly its institutional reorientation.

The comprehensiveness of the 1976 codification was meant to send an affirmative message about the existence of a well-thought-out national copyright policy for the country. Even when the Act omitted codifying an area, Congress—through the legislative history and in the text of the Act—took great pains to make clear that this omission was deliberate or instead represented a conscious delegation of lawmaking authority to courts.[368] And in so doing, Congress managed to entrench a strong *intentionalist* framework into copyright lawmaking.[369] Congress's "intent" was to be treated as paramount within the domain; other institutions (including courts) were to glean this intent, elaborate on it, or at the very least make every effort to avoid vitiating it. Congress was presumed to have either (i) thought about an issue and made its

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363 *See, e.g.*, Harper & Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539, 566 (1985) (adopting a market-based rationale in discussing a fair use defense).

364 *See* Balganesh, *supra* note 44, at 1576-77 ("[C]opyright law in the United States has undeniably come to be understood almost entirely in utilitarian, incentive-driven terms.").

365 The Amending Act of 1976 was itself titled a general revision. *See* General Revision of Copyright Law, Pub. L. No. 94-553, 90 Stat. 2541 (1976); *cf.* Ringer, *supra* note 2, at 479 (characterizing the Act as a "radical . . . departure").

366 U.S. CONST. art. I, § 8, cl. 8.

367 Ringer, *supra* note 2, at 479.

368 *See, e.g.*, H.R. REP. NO. 94-1476, *supra* note 362, at 66-67 (dealing with the fair use doctrine and noting that the provision was "intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way"); *see also id.* at 61 (referencing the text's "[u]se of the phrase 'to authorize' is intended to avoid any questions as to the liability of contributory infringers," a doctrine that had been judicially created).

369 For a general overview of this approach, see Cheryl Boudreau et al., *Statutory Interpretation and the Intentional(ist) Stance*, 38 LOYOLA L.A. L. REV. 2131, 2133-38 (2005); Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 930 (1989) (book review). The origins of intentionalism as a distinctive approach are traced back to Hart and Sacks. *See id.* at 930 n.65.

intentions clear in the text;[370] (ii) thought about an issue and chosen to remain silent in the text but spoken to the issue elsewhere;[371] or (iii) only indirectly thought about an issue, which was nonetheless to be respected.[372] Different areas of the statute came to be understood as representing these various intentionalist stances, all of which exalted congressional intent.

It took hardly any time for courts to embrace the intentionalist mindset in their development of copyright jurisprudence.[373] In reality though, the move in this direction had begun even prior to the enactment of the new statute. Even the immediate post-1950 copyright jurisprudence is striking in its turn towards discerning a legislative intent/purpose underlying the 1909 Act, something that was visibly absent in copyright jurisprudence during the decades before.[374] The enactment of the 1976 Act and the elaborate revision process that it was premised on (all of which was very well-documented) furthered this trend, such that the search for a congressional intent underlying different provisions of the statute (and thereby a purpose) became *de rigueur* after and has subsisted ever since.[375]

The adoption of this intentionalist framework within copyright certainly affirmed the idea of "legislative supremacy."[376] Yet it also undid a seemingly symbiotic relationship between courts and Congress that had existed in

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370 *See, e.g.*, Rodriguez, *supra* note 369, at 930 (observing how even for intentionalists, the text remains the first stop). For an example in the copyright context, see 17 U.S.C. § 201(d)(2) (2018), which codifies the principle of divisibility of copyright's rights. The legislative history indicates that the text represents Congress's intent to change the law. H.R. REP. NO. 94-1476, *supra* note 362, at 122-124.

371 An example of this is the role of intent in understanding whether two or more authors are joint authors. The text does not emphasize the role of intent as such, see 17 U.S.C. § 101 (2018) (defining "joint work"), but the legislative history makes clear that the "touchstone here is the intention" of the parties. H.R. REP. NO. 94-1476, *supra* note 362, at 120; *see also* Childress v. Taylor, 945 F.2d 500, 505-06 (2d Cir. 1991) (discussing the legislative history concerning intent in joint authorship).

372 A good illustration here is the debate about whether copyright's distribution right covers the "making available" of a work. For an overview of this debate, and an argument that Congress indirectly addressed this issue, see Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1, 6-27, 52-63 (2011).

373 For the use of legislative history to ascertain intent immediately following the passage of the 1976 Act, see Esquire, Inc. v. Ringer, 591 F.2d 796, 803 (D.C. Cir. 1978); Eltra Corp. v. Ringer, 579 F.2d 294, 296-97 (4th Cir. 1978); Encyclopaedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243, 248 n.2 (W.D.N.Y. 1978).

374 Hardly any pre-1950 decisions paid serious attention to the legislative history of the 1909 Act. Yet, post-1950 (prior to the passage of the 1976 Act), we begin to see courts referencing the history of the 1909 Act. *See, e.g.*, Miller v. Goody, 139 F. Supp. 176, 180 (S.D.N.Y. 1956); Davis v. E. I. DuPont de Nemours & Co., 249 F. Supp. 329, 339 (S.D.N.Y. 1966); Williams & Wilkins Co. v. United States, 487 F.2d 1345, 1351 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975). This inquiry reached its fullest recognition in the 1954 Supreme Court case of *Mazer v. Stein*, 347 U.S. 201, 214 (1954).

375 For recent instantiations, see ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 441-45 (2014); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 533-38 (2013).

376 *See* Rodriguez, *supra* note 369, at 930 n.66 (discussing the idea of "legislative supremacy").

copyright lawmaking until then. Judges and scholars have lamented this turn, and argued that it unduly limits courts' role (and expertise) in developing copyright law.[377] All the same, understood through the lens of Legal Process theory, this framework successfully introduced an important component into the copyright landscape: institutional settlement.

To Legal Process theory, the subordination of the judicial role—in law*making*—was simultaneously both limiting and enabling. On the one hand, courts were to comply with Congress's statutory directives, which limited their broad discretion. At the same time, "reasoned elaboration" made courts the principal gatekeepers of reason and persuasion in the legal system. And this gatekeeping function entailed recognizing that there were indeed moments in the operation of the law where reason had to give way to broader social considerations.[378] Reason was the domain of "principle" and it had to be continually balanced against the demands of "policy," a message that was implicit in the limits placed on courts.

This is precisely what occurred within copyright law, especially following the comprehensive revision. With the compromise delicately enshrined into the new regime, courts were obligated to tread cautiously. Implicit in this mandate was the recognition that in numerous situations (though not all), copyright *policy* took precedence over copyright principles. Even when their reasoned application of principle (to the individual facts of a case) pushed them in one direction, courts were to remain acutely aware of unsettling the regime's policy embedded into the statute. And when the two conflicted, the latter was to unequivocally prevail.[379]

Copyright adjudication was therefore *not* to be the primary vehicle for policymaking. Copyright policymaking came to be seen as firmly "polycentric" in nature, a term that Fuller had used to describe situations where a single decision had implications beyond those limited to the litigating parties, necessitated greater consideration of its long term effects, and encompassed areas where "courts move too slowly to keep up with [] rapidly

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377 *See, e.g.*, Leval, *supra* note 39, at 1062 (arguing that the "old [symbiotic] model worked pretty well").

378 *See* Dorf, *supra* note 22, at 981 (observing how "reasoned elaboration" was "subordinated" to institutional arrangements).

379 For an early example, see Mazer v. Stein, 347 U.S. 201 (1954). In *Mazer*, the petitioners advanced the argument—drawn from principle—that patentable subject matter should be excluded from the gamut of copyrightable works. *Id.* at 204-05. Their reasoning had to do with the need for additional scrutiny before designs obtained protection, something that design patents offered but copyright did not. *Id.* at 215. The Court rejected this principle-based argument, by reference to the statutory policy. *See id.* at 217 ("Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted."). The Court later expressly referenced the overall "economic philosophy" behind the statute to justify its holding. *Id.* at 219.

changing" circumstances.[380] Fuller, on whom Hart and Sacks relied heavily for their theory,[381] was clear that polycentric problems were "unsuited to solution by adjudication," and had to be solved by tuning elsewhere, specifically to legislative (or "deal" based) solutions.[382] Fuller's arguments found obvious resonance in copyright law. Whereas copyright adjudication had in previous times been seen as itself generative of the system's core principles and ideas, the conception of copyright that emerged from the new regime was one of a negotiated bargain, wherein the distributional effects and long-term costs of individualized lawmaking necessitated limiting the role of courts. The problems of copyright were therefore polycentric.

Fuller's argument for the limits of adjudication went further: "Adjudication is not a proper form of social ordering in those areas where the effectiveness of human association would be destroyed if it were organized about formally defined 'rights' and 'wrongs.'"[383] Implicit in the new regime's treatment of copyright as polycentric was therefore the recognition that it was indeed more than just about rights and wrongs, or in other words, more than a private law institution that could be managed through the horizontal interaction between parties. The inadequacy of copyright adjudication as a method of lawmaking was therefore as much normative—driven by a vision of the public law/private law distinction—as it was structural, and driven by the existence of a coherent and comprehensive legislative policy for the area.

3. Administering the Copyright System with Expertise

While the Copyright Office was established in 1897[384] and tasked with administering the various formalities associated with the copyright statute, its role as an actual *lawmaker* had remained fairly minimal through 1950. While the Office had issued regulations under the 1909 Act dealing with the types of works it would register and the conditions for such registration, these regulations seldom entered the landscape as an independent source of law. This changed dramatically in 1954, with the Court's decision in *Mazer v. Stein*.[385]

In *Mazer*, the Court was called upon to determine whether the copyright statute allowed protection for artistic articles (a statuette) that were embedded into articles that served a useful purpose (a table lamp).[386] In

380 Fuller, *supra* note 17, at 394-95. The essay was written in 1959 but published after Fuller's death. *Id.* at 353.

381 *See supra* note 265 and accompanying text.

382 Fuller, *supra* note 17, at 398, 400.

383 *Id.* at 370-71.

384 Act of Feb. 19, 1897, Pub. L. No. 54-265, 29 Stat. 538, 545.

385 347 U.S. 201 (1954).

386 *Id.* at 202-05.

answering the question in the affirmative, the Court made direct reference to the regulations issued by the Office on the question and concluded that "we have a contemporaneous and long-continued construction of the statutes by the agency charged to administer them that would allow the registration of such a statuette as is in question here," which was probative on the coverage of the statute.[387] A few things are noteworthy about this observation.

First, it recognized—for the first time in copyright jurisprudence—that the agency (the Office) was "charged" with administering the statute.[388] In other words, this amounted to an open affirmation that the Office had a distinctive role in the copyright landscape beyond just accepting registrations and deposits. Second, the Court was nonetheless silent on the quantum of weight the Office's interpretation had to be afforded. While *Chevron*[389] and *Mead*[390] had of course not yet been decided, the case of *Skidmore v. Swift & Co.*[391] was at the time a whole decade old; and yet, the court chose not to cite to it.[392] Third, the Court did more than just point to the Office's interpretation. Instead it readily adopted the language of the regulation into its holding, noting that it could "hardly do better than the words of the present Regulation."[393] This language would then make its way into the comprehensive revision, and eventually the 1976 Act as well.[394]

Mazer was hardly a one-off event. To the contrary, it signaled the regime's acceptance of the growing role of the Office within the copyright system. A few years later, when Congress embarked on the project of comprehensively revising the copyright statute, it commenced the task by appropriating funds for the Office to carry out a "comprehensive program of research and studies" to lay "the groundwork for general revision."[395] The Office then commissioned a series of reports, and generated a draft statute which formed the basis of subsequent congressional action and eventually produced a compromise among the competing interest groups involved in the process.[396] Of the thirty-four reports that were eventually produced, five dealt with the

387 *Id.* at 213.

388 *Id.*

389 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

390 United States v. Mead Corp., 533 U.S. 218 (2001).

391 323 U.S. 134 (1944).

392 The Court in *Mazer* instead chose to cite to the case of *Great Northern Railway Co. v. United States*, 315 U.S. 262 (1942). *Mazer*, 347 U.S. at 213 n.26. *Great Northern Railway* held that a "contemporaneous administrative interpretation" of a statute is pertinent to its construction. 315 U.S. at 275.

393 *Mazer*, 347 U.S. at 214.

394 *See* 17 U.S.C. § 101 (2018) (defining "[p]ictorial, graphic, and sculptural works").

395 REGISTER OF COPYRIGHTS 1961 REPORT, *supra* note 33, at x.

396 *Id.* at iii, 149-60.

functions and roles of the Office.[397] One report in particular, delved into the question of the Office's (i.e., the Register's) "discretion" under the Act and the extent to which courts should defer to decisions and interpretations of the Office.[398] According weight and discretion to the Office was seen as naturally connected to "a limit on the court's power to overrule the Register."[399] Acutely aware of its growing prominence, this report further recommended:

> [T]here is no articulated body of decisions dealing with the extent to which the courts should attach weight or a presumption of correctness to the Register's determinations. Although ultimately expressed in the issuance or denial of an original or renewal certificate, these determinations cover a wide range, from decisions on whether a notice is in the right place to decisions on copyrightability of large classes of works. If it should be thought advisable to define the courts' proper attitude toward Register's determinations, distinctions might be taken in terms of the kinds of decisions involved.[400]

While largely unexceptional from today's perspective, these observations were fairly bold at the time, given the existing lawmaking dynamic that subsisted in copyright. Not only had the Office begun to see itself as playing a central role in the formulation of the new regime, but it recognized some value in having the system limit courts' ability to second-guess its determinations and rulemaking in various domains.

While Hart and Sacks did not pay as much attention in their account to administrative agencies as they did to other institutions,[401] they nonetheless saw the exercise of delegated administrative rulemaking as making important inroads into the role of courts. When such a delegation of lawmaking power was made, the agency assumed "first-line official responsibility" for the area.[402] They further argued that when this occurred, "courts will usually recognize the practical significance of the agency's primary responsibility and will hesitate . . . to overturn any well-considered determination which the agency has made . . . ."[403] In developing their account of administrative

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397 *See* CARUTHERS BERGER, STUDY NO. 18: AUTHORITY OF THE REGISTER OF COPYRIGHTS TO REJECT APPLICATIONS FOR REGISTRATION 81 (1959); ELIZABETH K. DUNNE, STUDY NO. 20: DEPOSIT OF COPYRIGHTED WORKS ix (1960); ELIZABETH K. DUNNE & JOSEPH W. ROGERS, STUDY NO. 21: THE CATALOG OF COPYRIGHT ENTRIES 51 (1960); BENJAMIN KAPLAN, STUDY NO. 17: THE REGISTRATION OF COPYRIGHT ix (1958); ; ALAN LATMAN, STUDY NO. 19: THE RECORDATION OF COPYRIGHT ASSIGNMENTS AND LICENSES 107 (1958).

398 KAPLAN, *supra* note 397, at 27-28.

399 *Id.* at 28.

400 *Id.*

401 HART & SACKS, *supra* note 8, at 165-66. Hart individually appears to have spent significant time considering the role of agencies separately. Eskridge & Frickey, *Making*, *supra* note 17, at 2038.

402 HART & SACKS, *supra* note 8, at 165.

403 *Id.* at 166.

agencies, Hart and Sacks were to a large extent echoing the more elaborate views of a prior Legal Process theorist—James Landis. Much like his colleague and mentor Frankfurter, Landis saw administrative agencies as the solution to a variety of regulatory issues in the post-New Deal economy.[404] Institutionally, agencies were endowed with the ability to specialize in a singular domain and develop an expertise that allowed them to avoid becoming "jacks-of-all-trades and masters of none," a problem that he saw as plaguing courts and Congress.[405] *Expertise* thus emerged as the primary justification for agencies, which Hart and Sacks embellished with an institutional account in their theory.

Leading up to the general revision, the Office had come to establish itself as the institutional repository of copyright expertise. Further advantaging it in this regard was the reality that as a branch of Congress—unlike traditional executive agencies—the Office could legitimately play a role in the revision process that affirmed the ideal of legislative supremacy. And this it realized with few noticeable downsides. Seemingly in return, Congress came to expressly delegate actual lawmaking authority to the Office under the terms of the statute.[406] Since 1976, this has expanded dramatically, with the effect that the Office is today quite legitimately an independent institutional source of copyright law.[407]

While the Office has come to be widely recognized as the agency with primary expertise on copyright, its unique status—as a branch of the legislature—continues to impede its recognition as a full-blown executive agency that is to be shown the level of deference ordinarily accorded to other federal agencies interpreting their parent statutes.[408] While courts continue to disagree over its status as a pure executive (as opposed to legislative) agency, they nonetheless continue to afford its interpretations *Skidmore* deference, dependent on their persuasiveness in the situation.[409] This

404 JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 30-37 (1938). For an overview of the intellectual cross-currents between Landis and Frankfurter, see THOMAS K. MCCRAW, PROPHETS OF REGULATION 155-57 (1984); JUSTIN O'BRIEN, THE TRIUMPH, TRAGEDY AND LOST LEGACY OF JAMES M LANDIS: A LIFE ON FIRE 50 (2014).

405 LANDIS, *supra* note 404, at 31.

406 *See* 17 U.S.C. § 701(a) (2018) ("All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights . . . .").

407 For a general overview of the Office's role in the current copyright system and its efforts to improve that system, see Pallante, *supra* note 40.

408 *See* United States v. Brooks, 945 F. Supp. 830, 834 (E.D. Pa. 1996) (adopting the view that the Office is a legislative institution). *But see* Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd., 684 F.3d 1332, 1341-42 (D.C. Cir. 2012) (taking the position that the Office is an executive branch agency).

409 *See, e.g.*, Inhale, Inc. v. Starbuzz Tobacco, Inc., 755 F.3d 1038, 1041-42 (9th Cir. 2014) (finding Office's reasoning set forth "[i]n an opinion letter and an internal manual" to be persuasive); Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co., 747 F. 3d 673, 684-86 (9th Cir. 2014) (finding the Office's longstanding registration policy persuasive and worthy of deference). The Office

phenomenon is precisely what both Legal Process theory and the Court in *Mazer* contemporaneously advanced, to effectively introduce a new source of institutional lawmaking into the domain.

In entrenching the idea of the Copyright Office as the expert body on copyright law, and investing it with lawmaking and policymaking authority, the post-1950 copyright regime effectively came full circle in adopting and venerating the structural and functional lessons of Legal Process theory and its emphasis on institutional settlement as the central idea of law. Copyright law was thus no longer *just* about either judicially crafted principles, or indeed legislatively delineated directives, but instead *also* about the Office's interpretation and application of those sources (i.e., case law and statutory directives) in individual cases. Copyright law had thus fully entered the consciousness of the modern administrative state.

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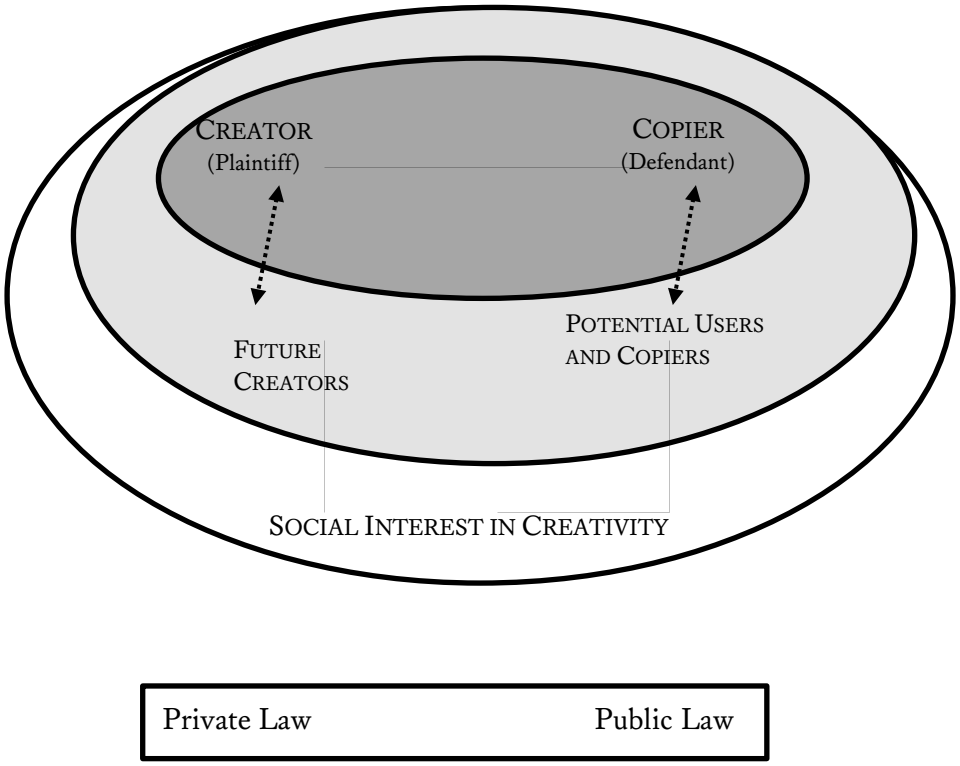
Copyright Register Barbara Ringer was undoubtedly correct when she emphasized that the regime coming out of the comprehensive copyright revision of 1955–74 had adopted an altogether new "philosophy."[410] And this was its move in the direction of a public law model, wherein institutional, administrative, and policy-based considerations would dominate. Indeed, what it produced was an altogether different conception of copyright *law*. Therein the content of the law was directly connected to the question of institutional authority, and the overt instrumentalism that such authority came to represent—under the influence of Legal Process theory.

The figure below graphically illustrates much of this move away from the private law conception, which focused on the rights and duties of the litigants around core principles, to the Realist conception of copyright that had courts adopt an ex ante but nonetheless juricentric approach to copyright lawmaking, to finally the Legal Process-influenced public law approach wherein the regulation of creativity and creative markets through institutional coordination came to dominate, and produce the regime described in Part I.

acknowledges that *Skidmore* deference is the appropriate level of deference to be accorded to its interpretations. *See* U.S. COPYRIGHT OFFICE, COMPENDIUM, *supra* note 5, at 2.

410 Ringer, *supra* note 2, at 479.

Figure 1: The Move from Private Law to Public Law in Copyright



IV. DEALING WITH A HYBRID COPYRIGHT SYSTEM

The U.S. copyright regime that emerged from the 1976 revision—and which remains in existence today—was therefore fundamentally different from anything that had preceded it. Fully ensconced in the realities of the administrative state and driven by a turn towards collectivist thinking, it had quite successfully internalized the core lessons of Legal Process thinking. Despite the pervasive influence of Legal Process thinking on its functioning, modern copyright thinking and jurisprudence have done surprisingly little to acknowledge this reality and to embrace the fact that it is today a truly hybrid legal regime revealing a confluence of private law and public ideas and concepts in its everyday operation. Accepting the reality of this postwar transformation in the American copyright regime, this Part offers a few (albeit brief) suggestions on what it would mean for the regime to accept and embrace its Legal Process orientation.

Perhaps the most important lesson to take away from the Legal Process turn in modern copyright law is its influence on what "copyright *law*" today denotes in the American legal system. While copyright law is ordinarily taken to denote the formal substantive rules of the regime (both statutory and decisional), the influence of Legal Process suggests that this conception is myopic. Copyright law is instead better understood as a "process,"[411] and it encompasses the entirety of the institutional, structural, and directive arrangements that are collectively directed towards achieving a set of plural goals—revolving around the management of creative expression. Understood in this vein, American copyright law is neither exclusively about the private rights and immunities of creators and copiers, nor indeed entirely about the public regulation of creative markets. It is instead a combination of mechanisms and ideas that interact with each other as *a system* in the pursuit of coordinating the production and use of creative expression. This holistic, systems-based approach to the regime produces three further prescriptive insights for modern copyright thinking.

A. *Protocols for Institutional Settlement in Copyright*

With the formal content of copyright law today emanating from multiple institutional actors—Congress, federal courts, and the Copyright Office—the regime would benefit from a set of norms and principles allocating different aspects of copyright lawmaking to different actors. While each institution individually plays an active role in the lawmaking process, the questions of allocation and appropriate settlements become all-important whenever a potential overlap presents itself.

Looking to the Supreme Court's copyright jurisprudence over the last two decades reveals some useful patterns of institutional settlement in the copyright regime. While these patterns have never been expressly articulated by the Court in its decisionmaking, their development and explication would prove to be of enormous guidance and value to lower courts (district courts and courts of appeal) where the problems of such settlement present themselves on a fairly regular basis.

Indeed, examining the Court's jurisprudence reveals the following *general* patterns of institutional settlement. First, when it comes to questions involving the structure of the copyright entitlement as expressly and unambiguously delineated by Congress in the statute, Congress's views are to be treated as peremptory. Courts are not to "second-guess" congressional "policy judgments" even if seen as overtly "unwise," unless it alters the

411 HART & SACKS, *supra* note 8, at cxxxvii, 148.

"traditional contours" of copyright.[412] Second, on questions relating to the copyright entitlement where Congress has not expressly spoken or acted, courts may develop and elaborate Congress's policy preferences while ensuring that such preferences are not overridden or negated.[413] Third, where Congress has not indicated a preference at all, or has instead revealed an incomplete preference, courts can treat the question as an implicit delegation of power to them to settle the question through situational adjudication.[414] Fourth, where the question relates directly to copyright adjudication and the settlement of individual disputes, courts are at liberty to develop the law through the use of general principles.[415]

We might usefully call each of these settlement approaches: *peremptory* settlement, *compatibility* settlement, *adjudicative* settlement, and *principled* settlement, respectively; and each is well-represented in the Court's copyright jurisprudence. The problem is of course that the Court itself hardly articulates these norms, with the result that they remain hidden underneath the substantive content of the law, often eluding lower courts. Embracing the Legal Process turn in copyright thinking would likely enable a clearer articulation of these protocols, all of which derive from the theory's core idea of "institutional settlement." The table below reflects this variation in settlement approaches.

412 Eldred v. Ashcroft, 537 U.S. 186, 208, 221 (2003).

413 *See, e.g.*, ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 451 (2014) (interpreting the public performance right to apply to online retransmissions); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 525 (2013) (interpreting the first sale limitation on the distribution right to apply internationally).

414 *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936-37 (2005) (developing the principle of liability for inducement of infringement); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (developing the transformative use variant of fair use).

415 *See, e.g.*, Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U.S. 663, 684 (2014) (finding the doctrine of laches inapplicable to the copyright statute); Feltner v. Columbia Picures Television, Inc., 523 U.S. 340, 355 (1998) (looking to historic practice to conclude that the award of statutory damages was a question for the jury); Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994) (developing an equal treatment principle in the award of attorney's fees).

Table 1: Institutional Settlement Protocols in Copyright

SETTLEMENT	QUESTION	PROTOCOL	EXAMPLES
Peremptory	Express Delineation of the Entitlement	Congress has final say; complete deference unless "traditional contours" impacted	*Eldred v. Ashcroft; Golan v. Holder*
Compatibility	Indirect/Implied Delineation	Congress has final say; but determining congressional intent a matter of compatibilist elaboration	*Kirtsaeng v. John Wiley; ABC, Inc. v. Aereo, Inc.*
Adjudicative	Complete or Partial Delegation	Contextual lawmaking in common law style	*Campbell v. Acuff-Rose, Inc.; Metro-Goldwyn-Mayer Studios Inc. v. Grokster*
Principled	Aspects of Copyright Adjudication	Lawmaking through transsubstantive general principles	*Petrella v. Metro-Goldwyn-Mayer, Inc.; Fogerty v. Fantasy; Feltner v. Columbia Pictures*

B. *Reasoned Elaboration as the Elaboration of Copyright Principles*

While the idea of institutional settlement certainly reveals a preference for copyright lawmaking to emerge primarily from majoritarian institutions, i.e., Congress, this hardly implies a passive role for courts. Indeed, this is a reality that is often forgotten about Legal Process theory. In requiring courts to avoid second-guessing Congress on certain questions, the theory nonetheless encourages them to assume primary responsibility on others.[416] The theory therefore implicitly carves out a domain of legitimacy for courts within the copyright space. This domain of legitimacy derives from courts' presumptive monopoly over "reasoned argument."[417]

416 HART & SACKS, *supra* note 8, at 146-47.

417 Fuller, *supra* note 17, at 366.

The hallmark of courts therefore lies in their reliance on "reason" as a mechanism of social ordering, and the primary conduit of such reasoned argumentation was seen to be the use of "principles"—arguments internal to the doctrinal domain at issue, and which are asserted as claims of justice or morality demanded by that domain.[418] Courts therefore rely on principles in their elaboration, whereas Congress relies on considerations of policy, which are external to the regime itself.

Whereas copyright reasoning in the post-1950 regime has paid acutely close attention to issues of policy and to ensuring the existence of a coherent copyright policy, courts have yet to fully embrace their role as the regime's guardians of principle. In elaborating on congressionally determined policy, under the protocols of settlement described previously, courts should remain steadfast in identifying and developing a set of "copyright principles," a domain that is their exclusive prerogative. To the contrary, modern courts seem content to identify and examine the scope of Congress's copyright policy to decide individual cases, taking the question of settlement (and deference) entirely at face value.[419]

A large part of why copyright law has remained a coherent subject through the ages is because several of its bedrock principles have remained constant and meaningful over the years, despite the regime's transition in policy priorities. Indeed, even the Supreme Court appears to have endorsed this idea, when it noted that Congress was not at liberty to alter the "traditional contours" of copyright law, a phrase that references what have long been thought of as copyright principles such as the idea-expression dichotomy or copyright's unwillingness to protect facts.[420]

Copyright law would thus benefit from a more direct judicial engagement with its basic principles. Courts ought to see themselves as the guardians of reason within the copyright system, work towards identifying the internal rationality of copyright doctrine using various principles,[421] *and then* attempt to synthesize congressional policy with these principles. The balance between principle and policy was an integral component of the Legal Process theory, which allowed the law to retain an internal intelligibility and determinacy

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418 *Id.* at 372.

419 *See, e.g.*, ABC, Inc. v. Aereo, Inc., 573 U.S. 431, 447 (2014) (relying purely on the statute to find liability); Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 523-25 (2013) (focusing on statutory policy to develop the first sale doctrine rather than offering principles); Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758-59 (7th Cir. 2014) (abandoning the judicially-formulated transformativeness principle and focusing on interpreting the statute using statutory policy).

420 Eldred v. Ashcroft, 537 U.S. 186, 221 (2003). For more on the traditional contours of copyright, see generally Robert Kasunic, *Preserving the Traditional Contours of Copyright*, 30 COLUM. J.L. & ARTS 397 (2007).

421 These principles could include the idea/expression dichotomy, the exclusion of facts, originality, fixation, authorship, merger, substantial similarity, and the like.

that rendered it more than purely political. If copyright law is to subsist as a coherent idea in the new regime, it will inevitably fall to courts to assume their role as the gatekeepers (and protectors) of reason within the functioning of the regime and effect a balance between policy and principle. Courts ought to give the idea of "traditional contours" more consideration in their adjudication[422] and use it to elaborate on different aspects of the copyright statute, adopting what has been described as a "dynamic" approach to statutory interpretation.[423]

C. *Developing an Administrative Copyright Law*

While the Legal Process turn in the copyright regime has forced it to confront the realities of the modern American administrative state, including the ideals of divided lawmaking and interbranch coordination, the substantive law governing this interface has lagged behind. The role of the Copyright Office within the copyright system has only grown over the course of the latter half of the twentieth century.[424] The truest affirmation of its status as a full-fledged rulemaking body emerged in 1998, when it was granted the power to create exceptions to the copyright statute's anticircumvention provisions for "particular class[es] of copyrighted works" through a rulemaking proceeding.[425] During such rulemaking, the Office is allowed to consider a variety of different factors on a discretionary basis.[426] Quite independent of this, the Office is also given the unilateral authority to appoint Copyright Royalty Judges to adjudicate various royalty disputes under the statute.[427]

Despite this growth in the role and responsibilities of the Office, copyright jurisprudence itself has spent surprisingly little time addressing the substantive integration of the Office into the skein of copyright law. To the contrary, courts routinely attempt to avoid such questions even when confronted with them.[428] Complicating the matter is the growing diversity of

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422 Very few courts have given the concept due consideration since the Supreme Court's use of the phrase in *Eldred*. *But see, e.g.*, Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 893 (9th Cir. 2005) (en banc) (noting how the balance between authors and society is realized in "the traditional contours of copyright protection" (quoting *Eldred*, 537 U.S. at 221)).

423 *See* Eskridge, *supra* note 296, at 1484 (describing the "evolutive perspective" as a core part of this approach).

424 *See* Pallante, *supra* note 40, at 213-14 (discussing the Office's public education programs and revisions of Office standards and practices).

425 17 U.S.C. § 1201(a)(1)(C) (2018).

426 *Id.* § 1201(a)(1)(C)(v).

427 *Id.* § 801(a)–(b).

428 *See, e.g.*, Fox Television Stations, Inc. v. Aereokiller, LLC, 851 F.3d 1002, 1013 (9th Cir. 2017) ("To resolve this issue, we would be required to rule on constitutional questions that could have outsized consequences relative to this case—such as determining whether the Library of Congress is a legislative or executive agency.").

functions and determinations that the Office itself makes—which range from the mere registration of works and digesting substantive law as part of its operations manual, to coordinating with other branches and agencies and making actual rules in specific areas. If copyright law is to fully embrace the Legal Process turn and accept its role as a hybrid public–private law, it is about time for it to develop a body of administrative law dealing with its working, a body of "administrative copyright law," so to speak.

First and foremost among these questions is the level of deference that the Office should be accorded by the other branches.[429] The Office's various decisions and rulings are worthy of being disaggregated and treated differently. Some merit greater judicial (and legislative) scrutiny and conversely less deference, and vice-versa. The Office's decisions on individual registrations for instance, are vastly different from its efforts to synthesize case law into abstract principles without applying them to individual cases.[430] Second are issues of interagency coordination.[431] Since the Office is commonly seen as a branch of the legislature, in recent years the U.S. Patent and Trademark Office (USPTO) has begun to assume a role in the development of copyright law and policy.[432] As a formal branch of the executive, the USPTO is seen as performing the role of a true executive agency, which has created obvious operational friction and produced a shared administrative space that would benefit from overt mechanisms of coordination. A third set of administrative law issues relates to the Office's role in copyright adjudication, through the appointment of royalty judges and the creation of claims tribunals. While agencies routinely create "administrative law judges" (ALJs), the Office's unique status again requires examining the extent to which the constraints (and enablement) of the traditional framework carry over into this domain,[433] especially given the reality that copyright law—unlike other forms of intellectual property—depends extensively on adjudication for its functioning.[434]

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429 For past consideration of this question, see Inhale, Inc. v. Starbuzz Tobacco, Inc., 755 F.3d 1038, 1041-42 (9th Cir. 2014); Southco, Inc. v. Kanebridge Corp., 390 F.3d 276, 286 (3d Cir. 2004); Norris Indus., Inc. v. Int'l Tel. & Tel. Corp., 696 F.2d 918, 922 (11th Cir. 1983).

430 *See* Varsity Brands, Inc. v. Star Athletica, LLC, 799 F.3d 468, 478 (6th Cir. 2015) (discussing the levels of deference to be accorded to different Office interpretations).

431 For an overview of how and why agencies share regulatory responsibilities, see generally Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

432 *See generally, e.g.*, DEP'T. OF COMMERCE INTERNET POLICY TASK FORCE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013) (offering suggestions for copyright reform as part of the USPTO).

433 For an overview of the role of ALJs in the administrative system, see generally Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981).

434 Given the absence of registration as a prerequisite for protection, courts undertake the first real scrutiny of the existence and scope of protection.

If the Legal Process turn in the copyright system is to become meaningful, it will require confronting some of the complex issues dealing with the functioning of the administrative state—*as they apply to copyright*. This is hardly just an unintended byproduct of the Legal Process turn; instead it should be legitimately seen as the culmination of the theory's core premises, as it has in other domains.

CONCLUSION

Modern American copyright law is an evolved system—nuanced, textured, and complex. Once understood as primarily a private law institution, focused on the horizontal interaction between authors and copiers, it is today treated as a form of public regulation wherein collectivist ideals and utilitarian goals dominate individual interests. This intellectual transformation was hardly just a coincidence. It was instead the result of changes in the very conceptions of law, legal reasoning, and legal institutions seen in American legal thinking over the course of the last century, which came to influence copyright law in significant ways.

The modern American copyright system reflects the triumph of a very influential approach to legal thinking that emerged in the United States following World War II: Legal Process theory. Predicated on legislative primacy and democratic governance, and committed to the centrality of institutional arrangements and divided lawmaking, Legal Process thinking came to inflect copyright law with an analytical vision that has dominated the discourse ever since. And this inflection, in turn, systematically converted copyright law into a framework of public law, a metamorphosis that has gone largely unnoticed. As this Article has argued, understanding—and embracing—this transformation yields important functional insights about the working of the modern copyright system, as well as lessons for future reform efforts in the area.

The intellectual trajectory of American copyright law over the last century further suggests that it is only likely to mutate even further in the future, especially as legal thinking and reasoning themselves continue to evolve and keep up with changes in socioeconomic and political conditions. The key to fully appreciating copyright therefore lies in recognizing that its underlying legal normativity is incapable of being understood in isolation, or as disconnected from the rest of the political and legal system. It may therefore be premature to speak of the "next great Copyright Act" or the "next great Copyright Office" in isolation, both of which are phrases that derive from the current Legal Process framing of American copyright law—which may well no longer be the regime's dominant intellectual paradigm decades from now. Should that occur, copyright law will be a very different creature from what it is right now. Fortunately or not, only time will tell.