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Market Hierarchy and Copyright in Our System of Free Expression

*Neil Weinstock Netanel**

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I. INTRODUCTION: MARKET HIERARCHY AND SPEECH

If trends of the past two decades persist, a vast inequality of wealth may well become a fundamental, defining characteristic of political and social life in many Western democracies, particularly

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the United States.¹ Among its potentially pernicious effects, massive wealth disparity threatens the integrity of the democratic process. Liberal democracy aspires to political equality, which demands that opportunities to acquire and assert political power be widespread and broadly distributed.² Political equality does not require economic equality. But political equality may be undermined by severe disparities of wealth. Absent preventive regulation, private wealth buys political power. It enables those with greater private means to exercise a disproportionate influence over legislation and to steer the course of public debate.³ For that reason, substantial inequalities of wealth may prove fundamentally incompatible with liberal democratic governance.⁴

Concentrations of private wealth and power in communications and mass media give cause for particular concern.⁵ At the cen-

1. See generally Joel F. Handler, *Questions About Social Europe by an American Observer*, 18 WIS. INT'L L.J. 437 (2000) (chronicling the disintegration of the social welfare state in the United States and Europe). Among developed democracies, wealth inequality is particularly pronounced in the United States. See LAWRENCE MISHEL ET AL., *THE STATE OF WORKING AMERICA 1998-99* (1999); Robert M. Solow, *Welfare: The Cheapest Country*, N.Y. REV. BOOKS, Mar. 23, 2000, at 20, available at <http://www.nybooks.com/nyrev/WWWarchdisplay.cgi?20000-323020R>.

2. See JOHN RAWLS, *A THEORY OF JUSTICE* 224-26 (1971) (discussing "fair opportunity to take part in and to influence the political process"); Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, in ASSOCIATIONS AND DEMOCRACY 7, 36 (Erik Olin Wright ed., 1995) (liberal democracy posits that "the chances to hold office and to influence political choices ought to be roughly equal across citizens").

3. See Burt Neuhorne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1058-61 (1999) (presenting a cogent argument that First Amendment jurisprudence in the area of campaign financing must be reconfigured to account for the threat to the democratic process posed by massive wealth disparity).

4. See ROBERT A. DAHL, *A PREFACE TO ECONOMIC DEMOCRACY* 60-61 (1985) (arguing that "when differences in political resources cause citizens to be politically unequal, then that inequality necessarily reveals itself by a violation of the criteria [for democracy]"); see also BENJAMIN I. PAGE, *WHO GETS WHAT FROM GOVERNMENT?* 2 (1983) (contending that "extreme inequalities of income or wealth undermine the values of order and stability, communal harmony, liberty, self-fulfillment, and equal opportunity"). Empirical data supports these theorists' hypotheses. Studies show a strong association between income inequality and the likelihood of the breakdown of democracy, even independent of a country's level of economic development. See MARK GRADSTEIN & BRANKO MILANOVIC, *DOES LIBERTÉ = ÉGALITÉ? A SURVEY OF THE EMPIRICAL EVIDENCE ON THE LINKS BETWEEN POLITICAL DEMOCRACY AND INCOME INEQUALITY* 17 (University of Munich, Ctr. for Econ. Studies Working Paper No. 261, 2000) available at http://papers.ssrn.com/sol3/delivery.taf?22567&_UserReference=A7FA65BC8A15900339F0927D (citing Edward N. Muller, *Democracy, Economic Development, and Income Inequality*, 53 AM. SOC. REV. 50 (1988)).

5. See BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 174-92 (4th ed. 1992); OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 9-20 (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 17-51 (1993); see also ERNST-WOLFGANG BOCKENFORDE, *STATE, SOCIETY, AND LIBERTY: STUDIES IN POLITICAL THEORY AND CONSTITUTIONAL LAW* 250 (J.A. Underwood trans., 1991) (discussing, within the framework of

ter of our understandings of political equality and democratic governance lies what might be termed the “Free Speech Principle,” the idea that liberal democracy both depends upon and is largely manifested by “uninhibited, robust, and wide-open” debate⁶ from “diverse and antagonistic sources.”⁷ Underlying the Free Speech Principle is the empirical assumption that, at least in the long run, only diverse and antagonistic sources will likely give play to a full panoply of competing views, calling to task established élites and challenging settled positions and understandings.

Wealth inequality, commentators have cogently argued, subverts the Free Speech Principle in a number of ways. The first concerns disparity in the ability to make oneself heard. At least until the emergence of the Internet, only those who have owned or had meaningful access to a mass media outlet have been able to reach an extended audience.⁸ Yet for most people, the cost of acquiring access to the mass media is prohibitive. As a result, effective communication in the modern era has been overwhelmingly the province of economically powerful entities and individuals (and the government).⁹

German political theory and constitutional law, the threat that concentration of publicly funded and privately owned media poses for freedom of information and opinion); Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (arguing for a twentieth-century interpretation of the First Amendment imposing affirmative responsibilities on newspapers to act as sounding boards for new ideas and old grievances).

6. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

7. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (arguing that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”); cf. JOHN STUART MILL, *ON LIBERTY*, ch. 2 (1859) (emphasizing the need to allow ample expression of competing views if truth is to emerge). As Christopher Yoo rightly points out in his Comment, there are various rationales for the First Amendment protection of free speech. Christopher Yoo, *Netanel's Democratic Theory of Copyright: A Cautionary Note*, 53 VAND. L. REV. 1933 (2000). In focusing on the importance of free speech for liberal democracy, I do not mean to suggest that the instrumental value of free speech for democratic institutions is the sole rationale underlying our free speech jurisprudence. I mean merely to say that there is a widespread belief, a belief I share, that expressive diversity is both a precondition for and an element of liberal democracy. Contrary to Professor Yoo's contention, it does not follow from that proposition—and neither do I argue—that the value of expressive diversity for democracy is the only reason we ought to protect free speech. The proposition merely supposes that we want robust democratic institutions (and, therefore, ought to consider how markets and regulatory regimes impact upon them) even if we believe that individual autonomy or some other good constitutes the ultimate purpose of those institutions and of free speech protections.

8. As I will discuss, moreover, the extent to which the Internet is likely to overcome this barrier has been greatly exaggerated by some commentators. See *infra* text accompanying notes 26-48.

9. See Martin H. Redish & Kirk J. Kaludis, *The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma*, 93 NW. U. L. REV. 1083,

This intertwining of wealth and speaker, commentators argue, narrows and skews public debate.¹⁰ When only the wealthy control newspapers and television stations, media content reflects the views and interests of the wealthy. Most strikingly, media moguls like William Randolph Hearst and Robert Murdoch may use their vast media holdings to trumpet their personal views and causes.¹¹ More subtly and systematically, media conglomerates strategically administer their content portfolios to exploit synergies and maximize portfolio value. To one degree or another, they both favor the content of corporate affiliates at the expense of independent producers¹² and tailor content to suit non-media corporate parents, affiliates, and partners.¹³ As media enterprise consolidation and vertical integration proceed apace, such potential distortions become more likely and more insidious.

1099-105 (1999) (describing the problem of unequal media access, but arguing that the risks in government mandated access outweigh its benefits).

10. See, e.g., J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 390-92, 407-10; Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412-13 (1986); Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1150-54 (1993).

11. See Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 378 (1999) (citing anecdotal evidence that Hearst and Murdoch used their media holdings in this fashion).

12. See Lili Levi, *Reflections on the FCC's Recent Approach to Structural Regulation of the Electronic Mass Media*, 52 FED. COMM. L.J. 581, 597-98 (2000) (noting that consolidated conglomerates, such as that composed of Viacom and CBS, may prefer their entities' own content and thus discourage independent investment in content production); see also Lawrie Mifflin, *CBS-Viacom Deal Raises Competition Questions*, N.Y. TIMES, Sept. 9, 1999, at C1 (reporting television executives' views that favoritism for affiliates exists, but varies in degree depending on the circumstances and entities involved).

In addition to maximizing the value of content, enterprises have an incentive to favor affiliates in order to economize on marketing and transaction costs. See OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 20-40 (1975) (presenting the general proposition that vertical integration may often be undertaken to minimize a variety of pre- and post-contracting transactions costs); Douglas Gomery, *The Economics of Hollywood: Money and Media*, in *MEDIA ECONOMICS: THEORY AND PRACTICE* 175, 179 (Alison Alexander et al. eds., 2d ed. 1998) [hereinafter *MEDIA ECONOMICS*] (noting that vertical integration in the motion picture industry enables a company to take full advantage of cost reductions associated with not having to sell content to third-party distributors and outlets).

13. Commentators present considerable anecdotal evidence of media enterprises withholding criticism of advertisers and affiliates and modifying content to promote those entities' products. See C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 50-56 (1994) (presenting anecdotes of self-censorship by the press to avoid offending advertisers); C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 362 (1998) (noting pressure to favor non-media partners). For a discussion of the practice of giving placement to advertiser and affiliate products in films, see Stephen L. Snyder, Note, *Movies and Product Placement: Is Hollywood Turning Films into Commercial Speech?*, 1992 U. ILL. L. REV. 301, 304-08; Mark Crispin Miller, *Hollywood: The Ad*, ATLANTIC MONTHLY, Apr. 1990, at 41, 48-49.

Of course, media owners do not merely trumpet their own views and aim to maximize corporate synergies. To a significant degree, they also seek to tailor content to audience tastes.¹⁴ But even when they do so, media owners systematically favor audiences who are most able and likely either to pay for content or to purchase media advertisers' products and services.¹⁵ For this reason as well, the commercial mass media will be likely to underproduce content reflecting the views, sensitivities, and tastes of the poor.¹⁶ Wealth disparity among potential audiences impacts public debate no less than wealth disparity among content producers.

Finally, over and above the distortive effect of wealth disparity per se, the market may generate a mix of expression that broadly supports the status quo. Commercial media, critics assert, routinely produce bland, uncontroversial expression, designed to put audiences in a buying mood and to attract a broad cross-section of viewers, readers, and listeners without unduly offending any of them.¹⁷ To the extent that criticism holds true, even a competitive media marketplace may ultimately serve entrenched corporate and

14. It is sometimes argued that in a competitive market, consumer demand, not producer predilection, ultimately determines what speech the media produces and disseminates. For example, in his classic article arguing for broadcast deregulation, former FCC Chairman Mark Fowler contended that the government "should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace." Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 210 (1982); see also *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (contending that regulations that tie minority ownership of broadcast stations to expressive diversity are unconstitutional because broadcasters are rational economic actors, and it would be impermissible racial stereotyping to assume that minority broadcasters would broadcast a different mix of content than whites). As Ed Baker has convincingly argued, however, the classic price-system model of consumer demand ill fits the media market. See C. Edwin Baker, *Giving the Audience What It Wants*, 58 OHIO ST. L.J. 311, 316-46 (1997) (contending that media products' public good characteristics, the reliance of many media on advertising, and expression's role in preference formation leads the media market to deviate substantially from the classic model of consumer demand); see also Cass R. Sunstein, *Television and the Public Interest*, 88 CAL. L. REV. 499, 514-22 (2000) (detailing ways in which television market differs from markets for non-expressive consumer products).

15. See BAKER, *supra* note 13, at 66-69 (detailing newspapers' and magazines' tailoring of content to readership sought by advertisers); TODD GITLIN, *INSIDE PRIME TIME* 208 (1983) (describing CBS cancellation of highly-rated programs when revised Nielsen ratings revealed that the programs appealed disproportionately to elderly and rural viewers rather than younger, urban audiences that earned more and spent more).

16. See BAKER, *supra* note 13, at 17-21 (noting newspapers' failure to target poor, minority audiences); Weinberg, *supra* note 10, at 1153-54 (aptly concluding that "the 'marketplace of ideas' [that] the mass media creates . . . is as democratic as a political voting system weighted by income").

17. See, e.g., GITLIN, *supra* note 15; Barron, *supra* note 5, at 1641-47; see also JAMES G. WEBSTER & PATRICIA F. PHALEN, *THE MASS AUDIENCE: REDISCOVERING THE DOMINANT MODEL* 101 (1997) (stating that "[m]any contemporary analysts from both ends of the political spectrum have portrayed the media as inexorably committed to the production of standardized content").

commercial interests, and may overwhelmingly reflect the values and culture of dominant social and ethnic groups, at the expense of outlying minorities and the poor.¹⁸ At the very least, such mainstreaming is unlikely to provide adequate expression to minority interests and concerns. More insidiously, it might help to engender a widespread sense of complacency and a diminished capacity to envision potential challenges to the status quo.¹⁹

In sum, absent preventative regulation, market hierarchy—the perennial condition of substantial inequality of wealth—translates inevitably into what I will refer to as “speech hierarchy”—the disproportionate power of wealthy speakers and audiences to determine the mix of speech that comprises our public discourse. By effectively silencing outlying minorities and the poor, speech hierarchy runs directly counter to the Free Speech Principle. It produces a mix of speech that neither encompasses a wide, representative spectrum of viewpoint nor carries the voices of diverse and antagonistic sources. If sufficiently severe, speech hierarchy may thus subvert liberal democratic values and governance.

Of course, the above depiction and critique of our communications landscape is not uncontroversial. And even those who share the concern that private wealth skews public debate disagree sharply over what, if anything, ought to be done about it. The controversy generally centers on government media policy: To what extent should government—and to what extent may government consistently with the First Amendment—regulate commercial media or subsidize noncommercial media to promote uninhibited, robust, and wide-open debate from diverse and antagonistic sources?²⁰

My goal in this Article is not to rehearse the arguments regarding speech hierarchy and how traditional government media policy should address it, although I will have something to say on these points. My focus rather will be on copyright law. I will examine copyright's role in contributing to speech hierarchy. In so doing,

18. See Weinberg, *supra* note 10, at 1152-53 (noting that media coverage may seem broad because it is all we know and that it may seem broader to those who generally share mainstream views than those who do not).

19. See W. RUSSELL NEUMAN, *THE FUTURE OF THE MASS AUDIENCE* 28-30 (1991) (summarizing the viewpoint of critical media theorists and other critics that commercial media trivializes political life).

20. Compare, e.g., C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 (arguing that certain government regulation of media structure and content to promote expressive diversity and robust debate is both sound policy and constitutional), with Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905 (1997) (contending that media regulation is merely disguised rent allocation and should be presumptively invalid under the First Amendment).

I do not mean to bracket off media policy. Rather I aim to cast copyright within the ambit of government media and information policy.²¹

Nor do I argue that speech hierarchy is an entirely bad thing for liberal democracy. I contend, indeed, that some degree of hierarchy, some concentration of expressive power in media enterprises, is the price we must pay if the press is to be able to fulfill its vital watchdog and agenda-setting roles. The commercial media falls far short of perfection in fulfilling those roles. Nevertheless, liberal democracy requires media enterprises that are independent from state support and that possess the financial wherewithal to reach a mass audience, galvanize public opinion, and engage in sustained investigative reporting and critique (what we might term the "Free Press Principle") no less than it requires wide-open debate from diverse sources (the Free Speech Principle). A "system of freedom of expression" in a modern democratic state requires a pluralism of types of voice, including well-heeled, mainstream commercial media, as well as government subsidized non-commercial media, independent publishers, political and nonprofit associations, universities, and individuals.²² Such a system is a complex mechanism. In order to engender the shared understandings required for public discourse, it must necessarily comprise mainstream—and mainstreaming—expression that addresses a limited set of broadly cognizable issues. Yet in order to maintain a democratic society's vitality and equity, a system of free expression must also nurture minority and marginal speech capable of propelling new issues and perspectives onto the public stage. That system must include powerful commercial media able to stand up to other centers of power, both governmental and private. But it must also provide ample room for speakers capable of prodding the commercial media and of offsetting its mainstream impulse.

21. In so doing, I build in part on my prior work, see Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 288 (1996) (contending that "copyright is in essence a state measure that uses market institutions to enhance the democratic character of civil society"), and in part on the instructive work of others, see generally, e.g., Benkler, *supra* note 11 (viewing copyright within a broader system of free expression); Jessica Litman, *Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587 (1997) (emphasizing that copyright law cannot be viewed apart from information policy).

22. As Thomas Emerson emphasized some three decades ago, liberal democracy must encompass and nurture a "system of freedom of expression," comprising various speech-related rights, institutions, and types of speakers, and requiring affirmative state support as well as limitations on the power of the state to abridge speech rights. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 3-5 (1970).

Given these multifarious and divergent needs, to the extent that speech hierarchy supports the Free Press Principle but runs counter to the Free Speech Principle, copyright law and media policy must seek to moderate between the two. They must enable, and indeed support, a degree of market hierarchy in the expressive sector. But at the same time, they must seek to ameliorate the most deleterious effects of media concentration and to foster expression from a broad spectrum of adverse and antagonistic sources.

This Article begins with the concern that speech hierarchy threatens the Free Speech Principle. In so doing, it largely takes as a given the depiction of speech hierarchy outlined above. In Part II, however, I briefly consider and refute two salient objections to that depiction. The first is that the Internet promises a new era of "cheap speech" in which anyone can be an effective speaker. The second is that speaker concentration actually enhances the diversity of expressive content. In Part III, I examine copyright's role. Copyright, I contend, affords content producers considerable market power and contributes significantly to speech hierarchy. In Part IV, I turn to the Free Press Principle, fleshing out the argument that some concentration of private wealth and power in the expressive sector is a necessary condition for liberal democracy. In Part V, I contend that as an integral part of government media policy, copyright entitlements should be tailored to support an independent media, while limiting copyright holders market power in order to preserve space for expressive diversity. I suggest, indeed, that in an age of digital and global communication, a properly tailored copyright might serve in some respects as a more effective tool for modulating between speech hierarchy and expressive diversity than would traditional media regulation.

II. TWO OBJECTIONS

The Free Speech Principle posits that expressive diversity and robust debate are vital to democratic governance. But in an unregulated market, wealth disparity skews public discourse in favor of speakers with the financial wherewithal to own a mass media outlet and consumers likely to buy speech and the products that advertisers want to sell. In the face of this political and market failure, it is incumbent upon the state actively to promote expres-

sive diversity. Indeed, the media policies of the United States and other democratic nations purport in large part to serve this aim.²³

I cannot fully develop or defend these propositions here. Nor can I contribute to the ongoing debate concerning the efficacy of government media policy in actually furthering expressive diversity.²⁴ But I do want to consider and reject two particularly salient challenges to the idea that market hierarchy subverts the Free Speech Principle. This first is the notion that the Internet will effectively eliminate market hierarchy in speech. The second is the claim that it is speaker concentration, not attempts to give voice to adverse and antagonistic sources, that best enhances expressive diversity.

A. *The Internet*

The early Internet promised, and to a large extent delivered, a communications revolution. Previously only the very wealthy could reach a mass audience. But the availability of digital networks drastically reduces entry costs into the mass communication market. Today, almost anyone with Internet access can communicate to and with a global audience. While it should not be forgotten that the prerequisite of Internet access continues to leave behind most of the world's population, including many in developed countries,²⁵ millions can now participate in the abundance of web sites, virtual discussion groups, and other fora freely available online.

23. For examples involving the United States, see Jerome A. Barron, *Structural Regulation of the Media and the Diversity Rationale*, 52 FED. COMM. L.J. 555 (2000); Benkler, *supra* note 11, at 364-86. Regarding the United Kingdom, see Broadcasting Act, 1996, ch. 55, § 19(2)(b) (Eng.), which provides that digital program licenses shall be subject to the condition that "in each year not less than 10 per cent of the total amount of time allocated to the broadcasting of qualifying programmes included in the service is allocated to the broadcasting of a range and diversity of independent productions." Regarding the European Union, see generally Gillian Doyle, *From Pluralism to Ownership: Europe's Emergent Policy on Media Concentrations Navigates the Doldrums*, 1997(3) J. INFO. L. & TECH. 3, available at http://elj.warwick.ac.uk/jilt/comms-reg/97_3doyl/.

24. For criticism of the United States' media policy, see, for example, THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 277-96 (1994) (maintaining that efforts of the FCC, courts, and Congress to regulate broadcast programming reflect poor regulatory policy); Glen O. Rebinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 908-45 (1998) (presenting critical survey of broadcast and cable regulation); Weinberg, *supra* note 10, at 1110-30 (discussing history of the United States' broadcast regulatory system and its current structure).

25. See Clive Walker & Yaman Akdeniz, *Virtual Democracy*, PUB. L., Autumn 1998, at 501 (noting that much of the world's population has no connection to the telephone infrastructure, let alone the Internet); see also NATIONAL TELECOMMS. & INFO. ADMIN., U.S. DEP'T OF COMMERCE, FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE, at viii (1999) (finding significant disparities in Internet access across wealth, ethnic, and geographic lines in the United States).

The result is the cacophony of diverse voices that has come to characterize the Internet.

Critics of government efforts to promote expressive diversity in mass communication maintain that the abundance of "cheap speech" on the Internet renders government media regulation unnecessary and constitutionally infirm.²⁶ On the Net, they emphasize, everyone can be a speaker and everyone can find a wealth of diverse expression and information. Concomitantly, they point out, the Internet drastically reduces the control of publishers, broadcasters, newspapers, bookstores, and other private intermediaries over what speakers will say and audiences will hear. In cyberspace, authors can communicate directly to readers, and readers can freely become authors, not only selecting what they read but also responding to it.²⁷ In this new, richly pluralist information marketplace, critics claim, the speech hierarchy rationale for government regulation and intervention no longer holds.²⁸

As I have detailed elsewhere, however, the critics' portrait of a highly democratic Internet bears scant resemblance to what much of the Internet is rapidly becoming.²⁹ The Internet, indeed, is poised to change in ways that will bring back many of the structural characteristics of the predigital mass media market. Our communications universe, to be certain, will continue to feature a lively and widely diverse array of virtual street corner podia, including email discussion groups, chat rooms, individual web sites, and other fora heretofore unimagined. But the recent Tsunami wave of telecommunications and media company mergers, capped as of this writing by America Online's acquisition of Time Warner, portend domination by a few corporate behemoths, online as well as off. Akin to today's mass media markets, purveyors of broadband access to high-production-value video and audio content will likely determine who can provide what content through which distribution channels. If current trends continue, indeed, the communications market will exhibit unprecedented levels of vertical as well as horizontal integration, enabling each telecommunications conglomerate to provide

26. See, e.g., Redish & Kaludis, *supra* note 9, at 1129-31; Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1836-38, 1843-50 (1995).

27. See Jerry Berman & Daniel J. Weitzner, *Technology and Democracy*, 64 SOC. RES. 1313 (1997) (emphasizing decentralized, interactive capabilities of cyberspace communication).

28. See Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1670 (1998); Volokh, *supra* note 26, at 1836-37.

29. See Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View From Liberal Democratic Theory*, 88 CAL. L. REV. 395, 440-42, 463-64 (2000).

and exercise control over a full component of access, distribution, and content.³⁰

As a result, those seeking to reach a mass audience will need to do so through conglomerate-controlled outlets. They will have to attempt to license their speech to a conglomerate-owned content provider or purchase communications capacity from a conglomerate-owned portal. In each case, they will compete against conglomerate affiliates, which, for reasons of management predisposition and transaction cost savings, will often enjoy preferential treatment from their corporate partner.³¹ Alternatively, like the recent sale of *Africana.com* to Time Warner,³² small, independent speakers will seek to be acquired by major media/telecommunications firms, further extending conglomerate reach. In such a world, speaking in virtual street corners will be much like handing out leaflets on an urban street corner and independent web publishing will be akin to small, independent press and book publishing. While continuing to occupy a respected position in our system of free expression,³³ they will largely be lost in the din of Disney-ABC, AT&T-Media One, CBS-Viacom, and AOL-Time Warner.

Of course, neither telecommunications-media concentration nor corporate dominance of online and offline communications arise spontaneously and inevitably. Rather, like the emergence and growth of the Internet itself,³⁴ they are largely products of govern-

30. See *Measuring a Combined Viacom/CBS Against Other Media Giants*, N.Y. TIMES, Sept. 8, 1999, at C15 (presenting chart showing vertical integration among media conglomerates prior to the AOL-Time Warner merger); *And Who Might Be Next?*, N.Y. TIMES, Jan. 11, 2000, at C10 (presenting table of media, information technology, and Internet companies likely to participate in mergers and alliances following the AOL-Time Warner merger). Similar concerns have been raised about concentration in Europe's new media market. See, e.g., Carles Llorens-Maluquer, *European Responses to Bottlenecks in Digital Pay-TV: Impacts on Pluralism and Competition Policy*, 16 CARDOZO ARTS & ENT. L.J. 557, 570-72 (1998).

31. See *supra* note 12; see also Helen Thorpe, *The Assault of the Salonistas*, N.Y. TIMES MAG., Feb. 20, 2000, at 42 (reporting on difficulties faced by pioneer online magazine *Salon*, including possible loss of placement on AOL as a result of the sharply increased price for placement and the future possibility that AOL will provide placement only for Time Warner magazines).

32. See David R. Kirkpatrick, *Co-Founders of Africana.com Sell Venture to Time Warner*, N.Y. TIMES, Sept. 7, 2000, at C2 (reporting that Harvard University professors Henry Louis Gates, Jr. and Kwame Anthony Appiah, founders of *Africana.com*, a web site devoted to Africa and the African diaspora, have sold their venture to Time Warner Inc. in order to keep the site alive).

33. For a discussion on the function and political import of "marginal public spheres" centered around non-mass media publications and discussion groups, see generally Susan Herbst, *Public Expression Outside the Mainstream*, 546 ANNALS 120 (1996).

34. The Internet began as a United States Department of Defense initiative. See Steve Bickerstaff, *Shackles on the Giant: How the Federal Government Created Microsoft, Personal Computers, and the Internet*, 78 TEX. L. REV. 1, 38 (1999). Its use remains heavily subsidized by

ment policy: in part government subsidy and licensing, in part the removal of regulatory obstacles and conditions to telecommunications and media company mergers,³⁵ and in part government delimitation, allocation, and enforcement of proprietary rights in content, distribution channels, and expressive capacity.³⁶ That is not to say, however, that government encouragement of and acquiescence in telecommunications-media conglomeration comprise its primary, underlying cause. Rather, various market dictates and technological developments exert a powerful centripetal force in the expressive sector, fueling concentration and corporate dominance in online communications, just as, and possibly even more so than, they do offline.

Among those market factors is intense competition for "user eyeballs." In a world awash in "cheap speech," audience attention becomes an exceedingly scarce and highly sought-after resource.³⁷ Internet users are awash in more information and expression than they can possibly process. As a result, they are highly reliant on tools, including search engines, links, desktop icons, advertising, brand recognition, and familiar, well-known expressive elements that reduce their search costs.

Commercial players are better positioned than noncommercial speakers to gain and keep user attention by exploiting users' inertia and need for search-cost reducing tools. Content producers face vociferous competition to draw Internet users to their portals and web sites and to retain those users as long as possible.³⁸ Ultimately, like in the offline world, it is the large commercial players

the public fisc and by telecommunications regulations maintaining cross-subsidies from telephone and other non-Internet services. *See id.* at 45-55, 82-83.

35. *See Levi, supra* note 12, at 582 (noting that the recent wave of media enterprise mergers "would not have been possible without the deregulatory turn in mass media policy that began with the Fowler Commission in the Reagan era and was codified in the Telecommunications Act of 1996").

36. For an insightful discussion of the far-reaching implications of government determination of whether communications infrastructure is to be governed by a license, property, or commons regime, see generally Yochai Benkler, *Overcoming Agoraphobia: Building the Commons of the Digitally Networked Environment*, 11 HARV. J.L. & TECH. 287 (1998).

37. As Bill Gates presciently describes the Internet's near future: "If a stranger . . . wants to send you [electronic] mail, [he'll] have to put up a certain amount of money in order to get you to read it because your time is the valuable resource." Bill Gates, Public Lecture (Nov. 1995), *quoted in* ANDREW L. SHAPIRO, *THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW* 130 (1999).

38. *See SHAPIRO, supra* note 37, at 98-99 (describing efforts of search engine companies to keep users at portal sites); *see also* *A CBS Internet Portal Builds In Data for Ads*, N.Y. TIMES, Oct. 6, 1999, at C14 (reporting that in order to induce Internet users to visit its new portal, CBS will expend \$70 million in advertising and will give visitors chances to win cash prizes).

who succeed in capturing the lion's share of audience attention.³⁹ Only they have the financial and organizational resources to advertise their products, exploit product and corporate partner synergies, purchase first position in search engine search results and prominent placement of their icons on portal desktops, populate the Internet with links to their sites, and produce star-studded, attention-grabbing content.⁴⁰

In addition, emerging Internet technologies give large commercial players significant additional advantages in the market for user attention. Prominent among these technologies, high speed modems, digital signal compression, and broadband infrastructure, make possible the transmission of high-quality video programming,⁴¹ rendering the next generation Internet largely indistinguishable from tomorrow's high-definition, interactive television.⁴² The virtual leafleter or independent online magazine will thus have to compete for user attention with slick, expensive video programming, as well as with the full array of commercial player

39. According to Nielson/Netratings, aside from portal sites such as AOL and Yahoo! (which were, respectively, the first and second most visited web sites during August 2000), the top five visited sites during August 2000 were those operated by Microsoft, Disney, Time Warner, Amazon.com, and NBC Internet. See Nielson/Netratings, *Apparel and Sports Categories Led Internet Traffic Gains In August, According To Nielsen/Netratings*, Sept. 12, 2000 (table of "Top 25 Web Sites, Month of August 2000, Combined Home and Work"), available at http://63.140.238.20/press_releases/pr_000914.htm; see also Andrew Chin, *Making the World Wide Web Safe for Democracy: A Medium-Specific First Amendment Analysis*, 19 HASTINGS COMM. & ENT. L.J. 309, 322-25 (1997) (presenting evidence of corporate domination of the World Wide Web based on surveys of users' web site visits and Internet links).

40. See Timothy Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1179 (1999) (concluding aptly that given the increasing cost of attracting users to one's web site, "describing today's World Wide Web as a free and open forum of equal speech is a bit delusional"). For a discussion of some such strategies, see SHAPIRO, *supra* note 37, at 95-96. See also Lucas D. Introna & Helen Nissenbaum, *Shaping the Web: Why the Politics of Search Engines Matters*, 16(3) INFORMATION SOC'Y 169 (2000) (discussing the search engine bias towards firms with resources to gain prominent placement in search results); Alec Klein, *AOL Restrictions Alleged*, WASH. POST, Oct. 10, 2000, at E1 (reporting America Online executive's statement that it is common business practice for AOL to prohibit AOL partners from linking to sites that compete with AOL or other AOL partners); cf. Arthur de Van & W. David Walls, *Uncertainty in the Movie Industry: Does Star Power Reduce the Terror of the Box Office?*, 23 J. CULTURAL ECON. 285, 315 (1999) (concluding that the presence of a star in a full-length motion picture increases the odds, but far from guarantees, that the picture will be a commercial success).

41. See generally DEBORAH A. LATHEN, FCC, BROADBAND TODAY (1999) (discussing then-current state of broadband industry and technology), available at <http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf>; Edward D. Horwitz, *The Ascent of Content*, in THE FUTURE OF THE ELECTRONIC MARKETPLACE 91, 96-101 (Derek Leebaert ed., 1998).

42. See SHAPIRO, *supra* note 37, at 99-100 (discussing WebTV, a technology purchased by Microsoft in 1997, that offers basic Internet access over a television and a menu of channels accessible through a specially designed remote control); Michael Lewis, *Boom Box*, N.Y. TIMES MAG., Aug. 13, 2000, at 36 (describing expected transformation of television into Internet-like medium of vast user-directed choice).

marketing strategies and corporate partner synergies described above.

In sum, while it costs little to participate in virtual street corner podia, those who wish to use online communications to reach a mass audience face significant entry cost barriers. That factor, in turn, greatly magnifies the market power of telecommunications, information technology, and media conglomerates that establish an early dominating presence in the new digital media.⁴³ At the same time, moreover, the market for Internet-delivered expression shares with offline media markets structural characteristics that exert a powerful force towards content producer and distributor consolidation. First, the negligible marginal cost of Internet connection and communication, coupled with the high front-end costs of content production and infrastructure construction, gives rise to significant economies of scale for the business of producing and disseminating information. Commercial players capable of spreading content production, infrastructure construction, and other fixed, market-entry costs over a mass customer base enjoy significant competitive advantages over those who cannot.⁴⁴ Second, demand-side tipping, among both advertisers and viewers, towards speakers with the largest audience further entrenches large commercial players in many content sectors.⁴⁵ As a result of these and other factors, online markets already exhibit the marked dominance of heavily branded

43. Cf. David P.T. Young, *Modeling Media Markets: How Important is Market Structure?*, 13(1) *J. MEDIA ECON.* 27, 29-30, 37 (2000) (noting that media and other markets characterized by incumbent concentration and significant entry costs generally lack the "contestability" required to discipline incumbents).

44. As economists have long recognized, "where technology creates significant economies of scale, markets tend towards dominance by a few large players." Julie E. Cohen, Lochner in *Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 *MICH. L. REV.* 462, 522 (1998). Economies of scale are already pronounced in traditional media markets. See JAMES N. ROSSE & JAMES N. DERTOUZOS, *ECONOMIC ISSUES IN MASS COMMUNICATION INDUSTRIES* 55-78 (1978) (contending that economies of scale have contributed greatly to prevalence of single newspaper local markets in the United States); Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 *MINN. L. REV.* 1415, 1491 (1996) (noting substantial economies of scale in broadcasting); Robert B. Ekelund, Jr. et al., *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 *J.L. & ECON.* 157 (2000) (enumerating economic efficiencies of concentration in radio station ownership); Eric W. Rothenbuhler & John M. Streck, *The Economics of the Music Industry*, in *MEDIA ECONOMICS*, *supra* note 12, at 199, 213-15 (discussing economies of scale and barrier to entry in recorded music industry).

45. Regarding advertiser tipping, see BAKER, *supra* note 13, at 7-43, who contends that advertiser stampedes to the local paper with the largest circulation have contributed to the demise of newspaper competition in many locations; Randolph E. Bucklin et al., *Games of Survival in the US Newspaper Industry*, 21 *APPLIED ECON.* 631, 636 (1989), who states that newspapers' reliance on advertising increases the instability of competitive equilibrium in two-newspaper localities. On consumer tipping, see *infra* notes 99-102 and accompanying text.

providers characteristic of winner-take-all markets.⁴⁶ As commercial players and video-delivery technology assume an increasing role in Internet communications, the Internet will likely tend, even more than today and possibly even more than offline media, toward oligopoly and monopoly.⁴⁷ Thus, while predicting the future of a complex, global organism like the Internet can only be a highly precarious task, it does seem increasingly improbable that the Internet will radically undermine speech hierarchy.

Finally, while my principal aim in this Section is simply to dispel the notion that the Internet offers a panacea for the problem of speech hierarchy, it is worth noting another point as well. Internet speaker concentration, like speaker concentration offline, does not necessarily correlate with what we might surmise is exogenous consumer demand for speakers' expressive products.⁴⁸ Rather it arises largely from a complex interplay of structural market characteristics and existing disparities of wealth. As we have seen, speaker concentration on the Internet reflects the ubiquity of consumer search costs, producer entry barriers, supply-side economies of scale, and demand-side tipping. And to the extent that concentration does reflect consumer preferences for particular types of expression (such as star-studded, high-production-value video), existing offline distributions of wealth, production capacity, and corporate partnering provide conglomerate players with far greater capability than independents of producing that expression and thus of furthering conglomerate dominance of speech.

46. See Erik Brynjolfsson & Michael D. Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, 46 MGMT. SCI. 563, 577-79 (2000), available at <http://ecommerce.mit.edu/papers/friction/friction.pdf>; Lada A. Adamic & Bernardo A. Huberman, *The Nature of Markets in the World Wide Web*, at <ftp://ftp.parc.xerox.com/pub/dynamics/web-markets.pdf> (May 6, 1999) (finding that the top five percent of Internet web sites account for almost 75% of user volume); James G. Webster & Shu-Fang Lin, *Internet Audiences: Some Features of Mass Behavior 6* (July 25, 2000) (unpublished paper, on file with author) (finding that the top 200 web sites out of the 1,766 sites studied accounted for roughly half of all user visits). Such asymmetrical distributions are common to television programs, magazines, records, and other cultural products. Webster & Lin, *supra*, at 5-6.

47. For an early prediction of this development, see Weinberg, *supra* note 10, at 1203. See also Chin, *supra* note 39, at 318-29 (noting corporate domination of the web and presenting a mathematical model suggesting that web linking leads to concentration).

48. Indeed, given the social, culturally grounded nature of speech and speech consumption, the very notion of exogenous consumer preference might be considerably more suspect in the market for expression than in other areas. See Baker, *supra* note 14, at 321-22 (noting that speech consumers often seek edifying, preference-shaping speech); Cohen, *supra* note 44, at 553-54 (discussing endogeneity of consumer preference generally); see also *infra* notes 100-03 and accompanying text (discussing solidarity and associative characteristics of expressive products).

B. Speaker Concentration and Diversity

A common reading of the Free Speech Principle equates expressive diversity with speaker diversity; we will have “uninhibited, robust, and wide-open” debate only if our system of free expression provides effective speech outlets for “diverse and antagonistic sources.” In marked contrast, however, a number of commentators have contended that media monopolists would provide greater expressive diversity than do media enterprises in competitive markets, and indeed that there is a positive correlation between media concentration and expressive diversity.⁴⁹ If that contention is true, then expressive pluralism and wide-open debate may not, in fact, depend upon the presence of diverse and antagonistic speakers and speech distributors. That means, to return to the context of online speech, that even if Disney-ABC and AOL-Time Warner do come to dominate the Internet, they will likely offer a spectrum of opinion and genre that is just as broad, if not broader, than they would obtain in a realm of speaker plurality. If that is so, government regulation designed to counter media consolidation, whether online or off, may be ineffective and ill-advised.

To be certain, the number of media owners and outlets need not necessarily correlate with diversity of expressive product. Nevertheless, contrary to the monopoly-yields-diversity contention, the economic literature, both theoretic and empirical, in fact suggests that considerable ownership concentration would produce far less expressive diversity than would a speech universe comprising a multitude of yeomen speakers, somewhat like that which was obtained on the early Internet. For one, the notion that media monopolies would provide greater diversity is based on economic model assumptions that bear little relevance to actual conditions in today’s media markets. Game theoretic and monopolistic competition models predict greater diversity among broadcaster monopolists on the assumptions that viewers are unwilling to watch anything but first choices, that viewers’ first choices are highly skewed, and that

49. See, e.g., *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1054-55 (7th Cir. 1992) (Posner, J.) (“It has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity.”); Chen, *supra* note 44, 1448-49 (asserting that the “positive correlation between concentration and diverse programming testifies to the unpredictability of regulatory strategies that aim to offset uneven levels of market power” in media markets); cf. Yoo, *supra* note 7 (describing models that employ game theory and principles of monopolistic competition to show that the relationship between media concentration and expressive diversity is quite complex).

the number of channels is quite limited.⁵⁰ But when any of these assumptions are substantially relaxed, the models predict that competitors will produce as much or more programming that would appeal to minority tastes than would monopolists.⁵¹ In particular, competition can be expected to produce a greater range of diverse programming than would concentration in an online environment characterized by heterogeneous consumer tastes and vast numbers of web sites and other virtual channels.⁵²

In addition, the economic models presuppose that media firms operate as rational market actors. Neoinstitutional economics literature suggests, however, that a concentrated market composed of large integrated firms will often underproduce controversial and minority-oriented content even if rational actors would do otherwise. Intrafirm agency costs and bureaucratic organizational structure lead the management of large, dominant firms to exhibit considerable risk-aversion in pursuing product innovation.⁵³ That pro-

50. See Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 304-19 (1991) (presenting an instructive and detailed survey of the economic literature on this point).

51. See *id.* Not surprisingly, as Spitzer notes, under these models "intermediate cases yield intermediate results." *Id.* at 317; see also WEBSTER & PHALEN, *supra* note 17, at 103 (noting that economic models of audience behavior suggest that competition need not lead to uniform content catering only to the broadest possible audience when "the number of channels, and hence competing services, is unconstrained").

52. In addition, research suggests that audience choices depend in large part on what others of their social group are watching, listening to, and reading. See *infra* notes 100-03 and accompanying text. Thus, to the extent the economic models depend upon a view of consumer choice as exogenous to both the expressive mix and to the choices of other consumers, those models may have weakened predictive value.

53. The principal innovation-reducing agency cost is that managers can expect little pecuniary reward if a risky research and development project succeeds, but significant reputational cost if the project fails. Bureaucracy costs include communication and coordination costs, a propensity to engage in excessive control management, and slowness to identify and counter incompetence. See OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 135-53 (1985) (discussing agency and bureaucracy costs and their adverse impact on incentives to innovate); WILLIAMSON, *supra* note 12, at 200-01 (concluding, after review of the literature and discussion of large firm organization, that "innovation—which is a poorly structured, high-risk activity—may not be an activity that the large, mature bureaucracy is constitutionally well-suited to handle"); Bengt Holmstrom, *Agency Costs and Innovation*, in *MARKETS FOR INNOVATION, OWNERSHIP AND CONTROL* 131 (Richard H. Day et al. eds., 1993) (focusing on agency costs). For empirical studies showing greater innovation among smaller firms and competitive markets, see generally PAUL GEROSKI, *MARKET DYNAMICS AND ENTRY* (1991), which survey studies that show generally higher innovation rates in smaller firms, albeit with some variation across industries; Zoltan J. Acs & David B. Audretsch, *Innovation in Large and Small Firms: An Empirical Analysis*, 78 AMER. ECON. REV. 678 (1988), which examine data on innovations introduced to the market in 1982. But see JOHN BALDWIN ET AL., *THE DETERMINANTS OF INNOVATIVE ACTIVITY IN CANADIAN MANUFACTURING FIRMS: THE ROLE OF INTELLECTUAL PROPERTY RIGHTS* 1-32 (Statistics Canada Working Paper No. 122, 2000), available at http://papers.ssrn.com/sol3/delivery.taf?23765&_UserReference=A7FA65BC8A15900339F0927D, which found that firm size

ensity has been identified in cultural industries as well as other sectors.⁵⁴ Moreover, empirical studies, while not unequivocal, support the results one would expect under both the neoinstitutional literature and the relaxed assumptions under the traditional model. They suggest that a multiplicity of expressive outlets, combined with the presence or threat of competition, is in fact more conducive to expressive diversity than market concentration.⁵⁵

Finally, the theoretical literature positing that, under certain conditions, monopolists will create greater diversity than competitors, fails to account for non-commercial speakers. Empirical studies support the intuition that speakers, such as publicly-funded broadcasters and minority-owned commercial broadcasters, whose choice of speech at least in part reflects non-market commitments and concerns, produce a higher proportion of minority-oriented programming than more decidedly market-driven broadcasters.⁵⁶ These studies also support more general findings that most non-

correlates positively with innovation but that intermediate levels of competition are more closely associated with innovation than are highly concentrated markets. Much of the neoinstitutional literature seeks to refute Schumpeter's thesis that both market concentration and large firm size correlate positively with R&D intensity. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 131-34 (5th ed. 1975). While that literature shows numerous instances in which Schumpeter's thesis fails, Schumpeter's critics concede that they have not, and perhaps cannot, establish "[a]n 'optimum' degree of competition, which holds across all industries and all times, for promoting technical progress." See WILLIAMSON, *MARKETS AND HIERARCHIES*, *supra* note 12, at 176.

For an excellent survey of the literature in this area, see Jonathan M. Barnett, *Cultivating the Genetic Commons: Imperfect Patent Protection and the Network Model of Innovation*, 37 *SAN DIEGO L. REV.* (forthcoming 2000).

54. See Paul DiMaggio, *Market Structure, the Creative Process, and Popular Culture: Toward an Organizational Reinterpretation of Mass-Culture Theory*, 11 *J. POPULAR CULTURE* 436, 440 (1977) (noting that larger, established media organizations have a poorer record than do smaller, independent firms in providing innovative products).

55. See, e.g., August E. Grant, *The Promise Fulfilled? An Empirical Analysis of Program Diversity on Television*, 7 *J. MEDIA ECON.* 51, 62 (1994) (presenting results of empirical study supporting assumption that an increase in the number of television channels leads to an increase in the number of program types offered); Robert P. Rogers & John R. Woodbury, *Market Structure, Program Diversity, and Radio Audience Size*, 16 *CONTEMP. ECON. POL'Y* 81, 90 (1996) (finding positive relationship between format diversity and number of stations, but finding that program diversity effects will be substantial only if the increase in the number of additional stations is very large); cf. STEVEN T. BERRY & JOEL WALDFOGEL, *MERGERS, STATION ENTRY, AND PROGRAMMING VARIETY IN RADIO BROADCASTING* 18 (National Bureau of Econ. Research Working Paper No. W7080, 1999), available at <http://www.nber.org/papers/w7080.pdf> (finding that concentrated media ownership in local radio station markets leads to a greater multiplicity of programming in similar, but not identical formats because entities owning several stations in a given broadcast market and facing the realistic threat of competition choose to locate in closely related formats to avoid creating holes in the product space for new entrants).

56. See, e.g., Jeff Dubin & Matthew L. Spitzer, *Testing Minority Preferences in Broadcasting*, 68 *S. CAL. L. REV.* 841, 866, 869, 872 (1995) (studying programming for racial minorities).

commercial, government-subsidized stations fill programming niches that commercial stations leave unserved.⁵⁷ In sum, absent a robust sector of non-commercial speakers, media markets, particularly concentrated but also competitive, will likely produce a suboptimal quantum of expressive diversity.⁵⁸

I do not mean to overstate this. Certainly, even an Internet characterized by considerable ownership concentration would likely produce an abundant menu of content choices for consumers.⁵⁹ Among other factors, the Internet's global reach enables the aggregation of geographically dispersed minority preferences so as to render commercially feasible media product differentiation tailored to those preferences.⁶⁰ But even in a regime of narrowcasted content, a global Internet market characterized by considerable ownership concentration and material barriers to entry may well tend to homogenize minority content and exclude—or at least relegate to the virtual street corner—expression designed for marginal audiences.⁶¹

Consider Time Warner's recent acquisition of *Africana.com*. *Africana.com* is a web portal established by celebrated Harvard University professors, Henry Louis Gates, Jr. and Kwame Anthony Appiah.⁶² Inspired by the work of W.E.B. Du Bois, the portal has a distinctly (although not exclusively) Africanist perspective. It aims to provide authoritative information and opinion regarding "Africa and her Diaspora" in an entertaining manner and to build ties among African and African Diaspora communities worldwide.⁶³

57. See Steven T. Berry & Joel Waldfogel, *Public Radio in the United States: Does it Correct Market Failure or Cannibalize Commercial Stations?* 71 J. PUB. ECON. 189, 208-09 (1999), available in earlier format <http://papers.nber.org/papers/w6057.pdf>.

58. See BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 101-50 (1992) (finding that commercial speakers, particularly those who are advertiser supported, underserve minority tastes); JOEL WALDFOGEL, PREFERENCE EXTERNALITIES: AN EMPIRICAL STUDY OF WHO BENEFITS WHOM IN DIFFERENTIATED PRODUCT MARKETS (National Bureau of Econ. Research Working Paper No. 7391, 1999), available at <http://www.nber.org/papers/w7391> (finding that majority preferences tend to crowd out minority ones in markets, like media markets, characterized by large fixed costs and preferences differing sharply across consumers).

59. See Lewis, *supra* note 42, at 36 (discussing narrowcasting and personal customization possibilities of Web TV).

60. See WALDFOGEL, *supra* note 58, at 29-30.

61. Cf. OWEN & WILDMAN, *supra* note 58, at 101-50 (noting that traditional media's congenital bias against minority tastes and in favor of large audiences' tastes is exacerbated in media characterized by firm concentration and in media supported by advertising).

62. Professors Gates and Appiah founded the site to promote an encyclopedia they edited, *Africana*. See Kirkpatrick, *supra* note 32, at C2.

63. Darrol G. Roberts, *About Us: A Message from the President*, available at <http://www.africana.com> (last visited Oct. 23, 2000) (describing *Africana.com*'s mission statement in a click-through link entitled "About Us").

Unable to maintain the portal as a commercially viable independent voice, Africana.com's founders have now sold it to Time Warner.⁶⁴ Now, Time Warner might continue to operate the portal in line with the founder's original mission, as Professors Gates and Appiah clearly hope.⁶⁵ But it seems likely that the company will seek to tailor portal content to suit the marketing priorities of Time Warner affiliates. This would primarily involve the promotion of Time Warner inventory. A company spokesman has told reporters that Time Warner hopes to use the portal to exploit the company's extensive library of film, television, and music of interest to African-Americans.⁶⁶ Time Warner's marketing plan is likely also to involve the elimination of some of the radically Africanist and anti-status quo expression that currently appears (together with much decidedly mainstream expression) on portal sites and discussion fora. Indeed, Time Warner has gained some notoriety in the past for discarding a lucrative gangsta rap record label and pressuring popular rap artist Ice T to eliminate a controversial song from an album, apparently out of a concern for its overall corporate image.⁶⁷

If my conjecture is correct, then even within the context of narrowcasting to a minority audience, Time Warner will blunt more controversial, politically marginal expression. It will do so, moreover, for reasons of corporate synergy and overall marketing strategy, not necessarily because the controversial speech it declines to distribute lacks a viable audience.

C. Sum

Those who contend that speech hierarchy unduly stifles expressive diversity raise a serious and continuing concern. Africana.com's integration into Time Warner and the probable stifling of the portal's independent voice will likely be typical of Internet speech markets. Whatever the mix of exogenous consumer preference—and one can assume that, almost by definition, politically marginal expression would attract a small audience—the structure of online and offline media markets raises significant entry barriers for independent speakers like Africana.com's founders. The Internet

64. See Kirkpatrick, *supra* note 32, at C2.

65. See Henry Louis Gates, Jr. & Kwame Anthony Appiah, *A Message from Our Founders* (last visited Oct. 23, 2000) (stating that "Time Warner's resources will enable use to fulfill [our] mission even more effectively and expeditiously"), available at http://www.africana.com/index_20000908.htm.

66. See Kirkpatrick, *supra* note 32, at C2.

67. See Joel Selvin, *Warner Knuckles Under*, S.F. CHRON., Sept. 29, 1995, at C1.

makes possible greater product differentiation than in offline media. But online as well as offline, narrowcasted commercial content is tailored to maximize corporate synergies and skewed towards audiences likely to buy content and advertiser's products.⁶⁸ Even on the Internet, market forces propel speaker concentration, which then tends towards the crowding out of minority views.

Of course, the notion of expressive diversity is quite elusive. We have no way of measuring how much expressive diversity is enough. Nor is it a simple matter to determine whether any given mix of speech meets whatever standard for diversity we decide to employ. Nevertheless, the apparent fact that speech hierarchy both skews public debate and limits expressive diversity should at least require that we consider the extent to which we are truly committed to fostering a broad—or broader—spectrum of opinion. It should also dictate further investigation into whether alternative institutions might yield greater expressive diversity (however defined) than do online and offline media markets as currently structured.

III. COPYRIGHT FOSTERS SPEECH HIERARCHY

I will argue in this Part that copyright contributes to speech hierarchy. It is widely recognized that copyright imposes allocative costs.⁶⁹ But my point here is that the exclusive rights in original expression that copyright law accords have a distributive, as well as allocative effect. Copyright presents differential incentives and burdens across our system of free expression. In so doing, it fosters media centralization and fortifies the barriers to entry that face independent speakers like *Africana.com*.

68. See WEBSTER & PHALEN, *supra* note 17, at 103 (noting that with unlimited channels, it may be profitable to "produce minority content for relatively small segments of the audience, particularly if those segments have characteristics appealing to advertisers" or if those audience segments "are willing and able to pay for it").

69. Without some method by which an author can exclude unauthorized copying of an expressive work, competition in copying and disseminating the work would drive the price for copies (and other forms of access) to their near-zero marginal cost. In order to provide an incentive for the creation and dissemination of original expression, copyright enables authors (and their assigns) to charge a supracompetitive price, i.e., a price above marginal cost. In so doing, however, copyright imposes a deadweight social loss; some consumers who value the copyright-protected expression at more than its marginal cost but at less than its supracompetitive price, will not acquire a copy (or some other form of access). See William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1661, 1701-03 (1988); Wendy J. Gordon, *Asymmetric Market Failure and Prisoner's Dilemma in Intellectual Property*, 17 U. DAYTON L. REV. 853, 869 (1992); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 564 (1996).

First, some fundamentals. All authorship builds upon pre-existing expression. Authors—all of us who share our thoughts and creative impulses through traditional media or over the Internet—regularly borrow from existing art, literature, music, and film. At the very least, our work reflects the information and inspiration we draw from existing speech. Further, much of our expressive creation is populated with explicit references to the works of others. We commonly excerpt, cite, translate, critique, comment upon, parody, sequel, and otherwise creatively reformulate existing works. Our nominally original works are actually “tissues of quotations.”⁷⁰ The speech of our predecessors comprises our raw material; our refinements nourish those that follow.⁷¹

Yet copyright law accords providers of expressive content with ever-expanding control over others’ uses of that content, significantly increasing the cost of reformulating or even gaining access to existing expression. Throughout most of the nineteenth century, the United States copyright acts provided for a narrowly tailored exclusive right to make copies of an original work. Under that regime, authors were free to borrow extensively from prior works in creating their own,⁷² and in any event works entered the public domain at most forty-two years after they were first published.⁷³ Today, however, copyright owners in the United States and elsewhere enjoy a vastly broader set of prerogatives. These include the exclu-

70. ROLAND BARTHES, *The Death of the Author*, in IMAGE, MUSIC, TEXT 146 (Stephen Heath trans., 1977).

71. Moreover, “speech,” in both common parlance and the First Amendment sense, need not involve “authorship,” the creation of original expression. It is no less “speech” to convey verbatim what someone else has created than to express oneself in one’s own words. The Supreme Court’s iteration in *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 673 (1998), is instructive: “When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity Although programming decisions often involve the compilation of the speech of third parties, the decisions nonetheless constitute communicative acts.” *Id.* See also *Hurley v. Irish-American Gay, Lesbian & Bisexual Group, Inc.*, 515 U.S. 557, 570 (1995) (a speaker need not “generate, as an original matter, each item featured in the communication”).

72. My favorite example is the mid-nineteenth century case, *Stowe v. Thomas*, 23 F. Cas. 201 (C.C.E.D. Pa. 1853) (No. 13,514). In that action, the German translator of *Uncle Tom’s Cabin* defeated Harriet Beecher Stowe’s copyright infringement action against him; the court held that the translation was a new work and not merely a reproduction of the original. *Id.* at 207-08.

73. Under the first federal copyright statute, the Act of May 31, 1790, the term of copyright protection was fourteen years, but copyright could be renewed for a second fourteen-year term if the author was still living at the expiration of the first term. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124. In 1831, Congress doubled the original term. See Act of Feb. 3, 1831, ch. 16, § 1, 4 Stat. 436, 436. It then doubled the renewal term in 1909. See Act of Mar. 4, 1909, ch. 320, § 23, 35 Stat. 1075, 1080.

sive right to make derivative works,⁷⁴ even those that may bear scant resemblance to the owner's preexisting work.⁷⁵ Moreover, given the current copyright term of the life of the author plus 70 years in both the United States and European Union, copyright owner control commonly endures for more than a century before a work enters the public domain.⁷⁶ As a result, except for works of a bygone age, much of the literature, art, film, and music that serves as the wellspring for further creative expression is subject to copyright holders' proprietary control.⁷⁷

Digital technology has the effect of further constricting the public domain by narrowing the scope of uses that were traditionally outside the copyright owner's prerogative or enforcement power. Outside the digital realm, readers are free to browse through books and magazines at bookstores and libraries. Purchasers are also free to read their books or listen to their CDs as many

74. The Copyright Act of 1976 accords authors the exclusive right to prepare derivative works based upon any type of copyrighted work. See 17 U.S.C. § 106(2) (1994). It defines "derivative work" broadly to include "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." *Id.* § 101. In addition, under the "total concept and feel" and "fragmented literal similarity" tests, courts have broadly construed the exclusive right to make copies to include defendants' works that bear only a loose resemblance to, or only copy a very small portion of, the copyright owner's work. See Netanel, *supra* note 21, at 302-03.

75. Several cases have involved either the derivative right or a very broad interpretation of the reproduction right. See *Castle Rock Entertainment, Inc., v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 146 (2d Cir. 1998) (holding that a multiple choice trivia quiz regarding the television series, *Seinfeld*, infringes the copyright in the series episodes); *Horgan v. Macmillan, Inc.*, 789 F.2d 157, 163 (2d Cir. 1986) (holding that a set of still photographs of a ballet may infringe the copyright in an original choreographic work); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970) (holding that defendant's imitative greeting card may be infringing even though it copied neither copyrighted text nor copyrighted artwork).

76. On October 27, 1998, President Clinton signed into law the "Sonny Bono Copyright Term Extension Act," Pub. L. No. 105-298, sec. 102, 112 Stat. 2827, 2827 (1998), which extends the copyright term by an additional 20 years. The general term is now the life of the author plus 70 years, and the term for anonymous works, pseudonymous work, and works-for-hire is 95 years from the year of the work's publication or 120 years from the year its creation, whichever expires first. See 17 U.S.C. § 302 (1994). In 1993, the European Union directed its member states to enact copyright terms of the life of the author plus 70 years. See Council Directive 93/98, arts. 1, 7, 1993 O.J. (L 290) 9.

77. Significant exceptions under United States copyright law include: (1) works that fell into the public domain for publication without a copyright notice failure prior to March 1, 1989, when Congress eliminated the notice requirement, see 17 U.S.C. § 405(a) (1994), (2) works published before January 1, 1964, for which the copyright was not renewed for a second term, see MELVILLE B. NIMMER & DAVID NIMMER, 3 NIMMER ON COPYRIGHT § 9.05[A] (1999), and (3) works created by United States government employees within the scope of their employment, which under section 105 of the Copyright Act, 17 U.S.C. § 105 (1994), are not subject to protection under the Act.

times as they like and to share those items with others to enjoy.⁷⁸ Finally, individuals may freely copy magazine articles and music recordings, and may modify or add notations to many types of works, whether because the law permits such personal uses or because they are simply beyond the copyright owner's power to prevent.

However, the move to digital storage and distribution of many expressive works carries the potential for sharply constricting such uses.⁷⁹ For one, merely viewing or listening to a work on the Internet may infringe the owner's copyright because such Internet browsing involves the temporary replication of the work in the RAM of the user's computer, which, recent cases suggest, might constitute a potentially actionable reproduction of the work.⁸⁰ While content providers often license and encourage such browsing, many restrict or impose conditions on access, making judicial characterization of Internet browsing as reproduction a potentially important tool for enforcing such restrictions both against individual users and those who are deemed to have facilitated individuals' unauthorized access. At the same time, digital watermarking and other encryption techniques give content providers unprecedented ability to trace the source of unauthorized copies and to extract payment even for single personal copies. Such "trusted systems" raise the specter of content providers' hermetic control over each and every use of original expression.⁸¹

While market and technological conditions are not yet conducive to such a draconian regime, recent legislation lays the

78. Under the first sale doctrine, one who purchases a copy of a copyright-protected work may generally dispose of that copy as she wishes without running afoul of the copyright owner's exclusive public distribution right. See 17 U.S.C. § 109(a) (1994).

79. Of course, digital technology also creates possibilities for rampant easy, instantaneous, unauthorized copying and worldwide distribution of perfect quality facsimiles of expressive works, a phenomenon that, if left unchecked, would radically undermine copyright owner entitlements.

80. See, e.g., *Intellectual Reserve, Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290, 1294-95 (D. Utah 1999) (holding that in making a RAM copy of infringing material while browsing through the pages of a web site, "the person who browsed infringes the copyright," and thus that one who encourages others to visit the web site is liable for contributory infringement); see also *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 518 (9th Cir. 1993) (holding that loading a computer operating system into RAM constitutes the making of an infringing copy). But see *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp. 1361, 1365-66 (N.D. Cal. 1995) (holding that copying that is automatic and incidental to Internet operation is not an actionable reproduction). For an illuminating discussion of the RAM-copy issue, see R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy Over RAM Copies*, 2001 U. ILL. L. REV. (forthcoming 2001).

81. See Mark Gimbel, Note, *Some Thoughts on the Implications of Trusted Systems for Intellectual Property Law*, 50 STAN. L. REV. 1671, 1679-80 (1998).

groundwork for trusted systems' widespread deployment. The Digital Millennium Copyright Act ("DMCA"),⁸² which Congress enacted in October 1998, prohibits both the circumvention of technology that controls access to copyrighted works and the manufacture and sale of devices that are primarily used to circumvent technological controls over access to or uses of copyrighted works.⁸³ Under the DMCA, indeed, content providers may often effectively prevent circumvention even when the encrypted work is largely or entirely in the public domain and even when the desired use would otherwise be permitted under copyright law.⁸⁴ Further, the Uniform Computer Information Transactions Act,⁸⁵ already enacted or under consideration in a number of states, would validate mass market "click-wrap" licenses, including provisions that impose access and use restrictions far exceeding those that content providers could otherwise obtain under copyright law.⁸⁶ The result will likely be de facto perpetual protection and universal pay-for-access.⁸⁷

82. Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, sec. 103, § 1201, 112 Stat. 2860, 2863-65 (1998).

83. 17 U.S.C.A. §§ 1201(a)(1)(A), 1201(a)(2)(A), 1201(b)(1)(A) (West 2000) (banning circumvention of access controls, trafficking of devices for circumventing access controls, and trafficking of devices for circumventing use controls).

84. Although the DMCA purports to protect the integrity only of technological measures controlling access to and uses of works protected by copyright, its prohibitions would also encompass works containing little copyrighted material (such as a Shakespeare play with a new introduction) and public domain works subject to the same technological control measures as copyrighted works (such as where public domain and copyrighted works are in the same data base). The Act would also prohibit the trafficking of devices that enable users to make fair use of copyrighted works. See David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. PA. L. REV. 673, 727-32 (2000) (presenting case studies); see also *Universal City Studios, Inc. v. Reimerdes*, 55 U.S.P.Q. 2d (BNA) 1873 (S.D.N.Y. 2000) (holding that distribution of software enabling the circumvention of encryption designed to control access and copying of films stored on DVDs contravenes the DMCA even if user copying would constitute fair use).

85. UNIFORM COMPUTER INFORMATION TRANSACTIONS ACT (1999), available at <http://www.law.upenn.edu/bll/ulc/ucita/ucita200.htm>.

86. For critical analysis, see generally David Nimmer et al., *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17 (1999).

87. See Nimmer, *supra* note 84, at 741 (contending that, under the right market conditions, the DMCA will lead to "universal pay-per-use and de facto perpetual protection"). Digital technology makes possible the aggregation of access to expression, through the sale of site licenses and subscriptions, no less than the disaggregation of such access, though micro-charges for each use. Both are vehicles for producer appropriation of consumer surplus: disaggregation by differential pricing based on frequency and, possibly value of use, and aggregation by flattening differential demand through product or user bundling. Critics of the deployment of digital technology to effectively expand copyright owner prerogatives generally raise the specter of pay-per-use. But recent literature on the economics of digital information predicts, I think correctly, that producers will more often deploy a no less expansionist strategy of product or user bundling, through the sale of site licenses and subscriptions. See Yannis Bakos & Eric Brynjolfsson, *Aggregation and Disaggregation of Information Goods: Implications for Bundling, Site Licensing, and Micropayment Systems*, in INTERNET PUBLISHING AND BEYOND: THE ECONOMICS OF DIGITAL

Significantly, this copyright-centered enclosure of what was once free use and public domain exacerbates speech hierarchy.⁸⁸ It does so both statically and dynamically. First, copyright favors conglomerate copyright owners over those with an immediate need to use existing copyright-protected speech in creating new expression. In so doing, copyright erects barriers to would-be entrants into the speech arena. Second, over time copyright favors those speakers with substantial copyright portfolios over speakers who lack them. This leads to ever-greater media concentration.

A. *Copyright's Static Effect*

Traditional media enterprises and, now, emerging telecommunications conglomerates amass vast inventories of copyright-protected expression. Consequently, individuals, educational and non-profit institutions, and independent publishers and producers must increasingly obtain permission from those conglomerates in order to access, use, and build upon existing expression.⁸⁹ In the best of circumstances for prospective users, obtaining permission simply involves payment: a transfer of consumer surplus from prospective user to content provider. As I will discuss below, such transfers may contribute dynamically to greater concentration in speech arena, but from an immediate, static perspective, so long as the prospective user actually makes use of the existing expression, they do not directly implicate speech hierarchy. In many other cases, however, would-be users cannot obtain permission for their desired use. Rather they must eschew that use because of the prohibitive cost of purchasing and negotiating for permission or because the provider flatly denies permission.⁹⁰ The result in that

INFORMATION AND INTELLECTUAL PROPERTY 114 (Brian Kahin & Hal R. Varian, eds., 2000) [hereinafter INTERNET PUBLISHING]; Peter C. Fishburn et al., *Fixed-Fee Versus Unit Pricing for Information Goods: Competition, Equilibria, and Price Wars*, in INTERNET PUBLISHING, *supra*, at 167, 168-73.

88. See generally Benkler, *supra* note 11.

89. See *id.* at 400-07; see also Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (presenting a prescient, early view that media enterprises' control over a broad portfolio of expressive works may threaten First Amendment interests).

90. As Julie Cohen correctly observes, "there is no particular reason to believe that creative ability will always correlate with ability to pay market price for improvement rights, or that owners will be equally willing to license all types of improvements." Cohen, *supra* note 44, at 482 n.67. With regard to the former, it must be remembered that, given the widespread and significant positive externalities attendant to the consumption and reformulation of expression, secondary users are no more able to appropriate the full social value of their use than is the creator of the work they seek to use. That is especially the case with regard to individuals and non-commercial entities who lack financing, marketing networks, and distribution outlets, and

event, with a possible qualification that I will discuss shortly, is an immediate, differential chilling of speech. Copyright provides the conglomerate content provider with a continuing incentive to build upon its inventory to create new speech of the conglomerate's choosing. But at the same time, a non-conglomerate user who might have otherwise created new expression, or simply benefited from gaining access to existing expression, has effectively been prevented from doing so.⁹¹

This result, I wish to emphasize, transcends copyright's allocative cost, the deadweight loss measured by the consumer and producer surplus foregone because the sale of access or use of expression does not take place.⁹² Given existing patterns of copyright ownership, the ramifications of such foregone transactions are systematically distributive as well. Firms owning large inventories of copyrighted expression are far more likely to be the unwilling or monopoly-rent-seeking licensor. Others, including in particular non-wealthy individuals, not-for-profit entities, and critics of the licensor's expression, are far more likely to be the frustrated would-be licensee.⁹³ Effective speech almost always requires the use of existing expression. Some speakers use existing expression for edification, inspiration, or raw material in creating expression.⁹⁴ Some

who, indeed, might not wish to market their own expressive product. Cf. Diane Leenheer Zimmerman, A Lesson for the Digital Future from the Old Media: Photocopying, Journal Pricing and Their Impact on the Enterprise of Scholarship and Research n.36 (unpublished manuscript, available at <http://www.law.nyu.edu/ili/conferences/freeinfo2000/abstracts/zimmer-man.htm>) (Apr. 1, 2000) (citing data suggesting that dramatic increases in subscription prices for scholarly journals distributed by commercial publishers have led academic institutions to forgo subscriptions, eliminating researcher and student opportunities to browse through journal issues and leading to considerable delays for those seeking to view particular articles).

91. Significantly, moreover, the express or anticipated threat of copyright infringement litigation amplifies that differential chilling effect. Faced with such a threat, would-be users regularly desist even from uses that might well be privileged or non-infringing. See Zimmerman, *supra* note 90 (discussing chilling effect of threat of copyright infringement litigation on academic institutions).

92. See *supra* note 69.

93. One might assume that even non-wealthy prospective consumers who seek to use expression in socially valuable ways could finance their purchase of a copyright license. However, even when the copyright owner is willing to license, secondary users are generally unable to appropriate the full social value of their use, and thus often cannot rely on their prospective use to finance purchase of a copyright license. See *supra* note 90.

94. Copyright law's idea/expression dichotomy is supposed to allow speakers to copy other's ideas, and is thus traditionally viewed as a vehicle for ensuring that copyright does not impinge upon free speech for First Amendment purposes. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Entors.*, 471 U.S. 539, 560 (1985) (stating that First Amendment protections are "embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas"). But effective speech often does involve the use of particular expression, including building upon or simply copying someone else's original expression. See *supra* note 71. Moreover, as copyright's scope expands, creative reformulations that were once deemed permis-

effective speech simply involves selecting and conveying another's original expression, whether because that expression perfectly reflects one's own ideas or because one wishes to expose a text one finds repugnant or ridiculous.⁹⁵ Whatever the desired use, copyright accords media conglomerates a decided speech advantage and imposes entry barriers upon prospective speakers who do not own vast content portfolios.

Now for the possible qualification. The extent to which copyright exacerbates speech hierarchy by favoring owners over users depends largely on the elasticity of consumer demand for particular expressive works. If, as some commentators assert,⁹⁶ expressive works generally have close substitutes among other expressive works of the same or similar genre, then prospective users faced with content providers' unacceptable terms or refusal to permit the requested use can simply select a different work. Put another way, content providers' power in the market for a given work is largely a function of the uniqueness versus substitutability of the work for prospective users.⁹⁷ To the extent works are substitutable and consumer demand for any given work elastic, content providers, like electric appliance salesmen, will compete to offer their product on terms that are favorable to potential users.

Of course, copyright law is built on what appears to be a correct assumption that copyright does, in fact, create a degree of market power. At best, content providers engage in monopolistic

sible appropriations of idea are now commonly found to be infringing on copyrighted expression. Netanel, *supra* note 21, 301-04.

95. See *supra* note 71. The *in toto* replication of another's copyrighted expression for purposes of criticism has sometimes been held to be fair use, see, e.g., *Belmore v. City Pages Inc.*, 34 U.S.P.Q. 2d (BNA) 1294 (D. Minn. 1995) (newspaper's replication of a racist fable appearing in a police department newsletter), and sometimes not, see, e.g., *Religious Tech. Ctr. v. Lerma*, 40 U.S.P.Q. 2d (BNA) 1569 (E.D. Va. 1996) (Church of Scientology suit to prevent critic from posting Church documents on the Internet). I am not aware of any case in which replication for purposes of expressing one's own belief in the copied material has been held to be a fair use. See *Worldwide Church of God v. Philadelphia Church of God, Inc.*, No. 99-55850, 2000 U.S. App. LEXIS 23390 (9th Cir. Sept. 18, 2000) (holding that the fair use privilege did not apply to a church offshoot, which copied and distributed, for the religious observance of its members, a text, written by the now-deceased principal church founder, that the principal church leaders had determined was inconsistent with church doctrine).

96. See, e.g., Tom W. Bell, *Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine*, 76 N.C. L. REV. 557, 588-89, 601-08 (1998); Maureen A. O'Rourke, *Copyright Preemption After the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 81-90 (1997).

97. Content providers' market power will also depend on consumers' elasticity of demand for expressive products generally. To the extent that activities and goods other than the experiencing of expressive products are substitutable for a given consumer, then the providers of expressive goods will have less power to dictate the terms of access to them.

competition between similar, but not identical, copyright-protected expression. That competition cannot drive down the price for access and use of copyrighted works to their fully competitive, near-zero marginal cost without destroying the copyright incentive to create and make such works available in the first place.⁹⁸ Nevertheless, a disciplined market of readily substitutable expressive goods would reduce (but not eliminate) a copyright owner's power in the market for any particular work. And in so doing, it might sharply curtail (but, again not eliminate) copyright's potentially chilling effect on the speech of those who must obtain conglomerate permission to use copyrighted works.

The extent of substitutability of expressive goods and, indeed, the elasticity of consumer demand for such goods in general remain open questions.⁹⁹ One would expect that empirical investigation would yield varying results across different categories of expression and different consumers. Nevertheless, a number of factors suggest that many expressive works—including most popular novels, newspapers, songs, movies, and television programs, as well as many scholarly publications—are generally less substitutable than toasters, toothbrushes, and other such consumer goods. To the extent this is in fact the case, content providers may enjoy considerable power in the market for expression.

First among these factors, informational and cultural works share characteristics of "solidarity" and "associative goods." "Solidarity goods," like the President's State of the Union Address or a popular movie, have value for the individual viewer largely because they are consumed by many people.¹⁰⁰ "Associative goods," like country clubs and institutions of higher education, have value for the individual consumer largely because they are also consumed by a certain select category of other people.¹⁰¹ In either event, part of

98. See *supra* note 69; cf. Johannes Ludwig, *The Essential Economic Problem of the Media: Working Between Market Failure and Cross-Financing*, 13(3) J. MEDIA ECON. 187, 188-89 (2000) (noting that media firms not only could not recover their fixed costs through marginal cost pricing but indeed must often find additional revenue, such as advertising, to make up the difference between fixed costs and actual net sales revenue).

99. For illuminating efforts to grapple with this issue, see Cohen, *supra* note 44, at 520-21; Fisher, *supra* note 69, at 1700-03.

100. Cass Sunstein and Edna Ullman-Margalit label as "solidarity goods" those "goods whose value increases as the number of people enjoying them increases." CASS R. SUNSTEIN & EDNA ULLMAN-MARGALIT, SOLIDARITY IN CONSUMPTION 1 (University of Chicago John M. Olin Law & Econ. Working Paper No. 98 (2d Series), 2000), available at http://papers.ssrn.com/sol3/delivery.taf?2983&_UserReference=6706C6CE3207B7B939D23ACA.

101. See HENRY HANSMANN, HIGHER EDUCATION AS AN ASSOCIATIVE GOOD (Yale Int'l Ctr. for Fin. Working Paper No. 99-13, 1999), available at http://papers.ssrn.com/sol3/delivery.taf?23624&_UserReference=A7FA65BC8A15900339F0927D.

what consumers are willing to pay for, when they buy solidarity or associative goods, are the benefits they glean from the fact that other people—or certain other people—are also enjoying the same good.¹⁰² Such goods thus have value far greater than each individual's personal benefit from consuming the good. To the extent that a given product has solidarity or associative value, a second product that few others—or few others of a particular group—are consuming would be an inadequate substitute for the first even if the two products are quite similar to each other.

Newspapers, movies, books, songs, and television shows that are read, watched, and listened to by many people in a particular social group are classic solidarity and associative goods. We do not read a newspaper or book, watch a movie or television show, or even listen to a song merely because of the solitary, personal benefit and enjoyment it gives us. Rather, we generally want to read, see, and hear at least in part what we think others of our social group are reading, seeing, and hearing. We want to experience cultural events and phenomena jointly with others and to share a common basis for conversation with our friends and colleagues. We also want to know what others think is important, current, and of interest, and to show others in our social group that we also are "in the know." As a result, our demand for popular, opinion-leading, or prestigious expression is likely to be considerably less elastic, and other expressive works—even those that otherwise impart much the same information and enjoyment—considerably less substitutable, than is the case with consumer goods that merely provide more atomistic, solitary benefits.

Significantly, moreover, the solidarity or associative character of certain expressive works may be as strong or stronger for authors—those who wish to refer to, critique, learn from, or reformulate existing expression in creating their own—than it is for those whose use is more passively consumptive. Critics and commentators of cultural expression, authors of scientific and scholarly publications, and many novelists, filmmakers, and artists must be conversant in the relevant art and literature if they are to communicate effectively to their audience. Existing works of authorship comprise and contain a significant part of the language, understandings, standards, and norms of social and professional

102. SUNSTEIN & MARGALIT, *supra* note 100, at 3.

groups.¹⁰³ Without access and the ability to borrow from and refer to key representative works, authors can neither participate in the joint conversation that defines their social or professional group nor, in some cases, successfully engage a mass audience.

A second factor diminishing the availability of substitute expression is content provider integration. In concentrated media markets, those who wish to buy the right to use existing content for the purpose of creating new expression will likely have to deal with one of a few media conglomerates. Even absent oligopolistic constraints on competition, such content providers are likely to share a fundamental conservatism in licensing transformative or competing uses of items in their respective inventories.¹⁰⁴ Media conglomerates are in the business of managing, not selling off, their content portfolios. Their goal is to build upon existing inventory, exploit synergies with corporate partners, and selectively license content in ways that will maximize the value of the inventory as a whole. Media conglomerates accordingly have a strong incentive to avoid controversial reformulations of their content that might (1) subvert that content's carefully cultivated conventional meaning, (2) diminish its commercial value or the value of other inventory items, or (3) potentially compete with planned uses of that or other content by conglomerate divisions and corporate partners.¹⁰⁵ Far from licensing controversial or competing uses of their inventory, media enterprises thus aggressively seek to stifle such uses.¹⁰⁶

103. See Zimmerman, *supra* note 90 (discussing professional need of researchers and academics to be conversant in the scholarly literature of their field).

104. Cf. Hal R. Varian, Market Structure in the Network Age (unpublished paper, available at <http://www.sims.berkeley.edu/~hal/Papers/doc/doc.pdf>) (August 30, 1999) (surveying studies showing that firms often match the prices of dominant firms rather than seeking to undercut them, especially when those firms are able to discover or anticipate competitors' price increases before consumers).

105. Media conglomerate conservatism parallels dominant firm reluctance to undertake research and development projects or commercialize innovations when doing so might cannibalize the firm's existing revenue streams. See MORTON I. KAMIEN & NANCY L. SCHWARTZ, MARKET STRUCTURE AND INNOVATION 110 (1982) (noting reluctance of firm managers to pursue innovation that conflicts with existing product revenues); Barnett, *supra* note 53 (discussing large firm reluctance to engage in research and development that might cannibalize existing products).

106. See, e.g., Doreen Carvajal, *What Is a Book Publisher to Do When a Parody Hits Home?*, N.Y. TIMES, Feb. 12, 1996, at D1 (reporting that Crown Publishers cancelled its contract to publish a book that spoofed the works of another, more popular author, also published by Crown); see also *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (action by music publisher to enjoin rap parody of song in its repertoire after refusing to license parody); *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978) (action brought by Disney to enjoin parody of Disney characters in counterculture comic book); cf. Jon M. Garon, *Media and Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 590-91 (1999) (describing HarperCollins' breach of its agreement to publish the memoirs of Chris Patten, the last British Governor of Hong Kong, under instruction from Rupert Murdoch, the

Significantly, given media conglomerates' common conservatism, prospective speakers seeking to reformulate popular expression in controversial ways are unlikely to find substitutes when denied a license by any given content owner. Consider the often-cited copyright infringement case, *Walt Disney Producers v. Air Pirates*.¹⁰⁷ There, the creators of a counterculture comic book sought to contest Disney's all-American "world of scrubbed faces, bright smiles and happy endings" by depicting Mickey Mouse engaged in various illicit activities.¹⁰⁸ That effort at social critique was stifled, however, when Disney obtained a court order enjoining publication. There are, of course, many ways to challenge romanticized imaginings of American life. But the humorous denigration of a cultural icon that immediately brings those imaginings to mind may be a particularly potent way to do so. And in that regard, it is highly unlikely that, having been thwarted by Disney, the comic book creators could have obtained a license from Time Warner or another Disney competitor to use any of those entities' proverbial characters in a similar manner for a similar purpose.

In sum, an expanded copyright, together with concentrated media markets, accords content providers with nontrivial market power over expression.¹⁰⁹ Significantly, moreover, that market

controlling shareholder of HarperCollins' corporate parent, who was concerned about the memoirs' impact on his media interests in China).

107. *Walt Disney*, 581 F.2d 751.

108. *See id.* at 753.

109. In addition to the solidarity good characteristics of many expressive works and the increasing concentration of media markets, the ability to charge for the use rather than the sale of hard copies, greatly enhanced by digital technology and backed by the Digital Millennium Copyright Act, might also increase copyright owners' market power. As Ronald Coase conjectured, monopolists selling durable goods face reduced market power. *See* Ronald Coase, *Durability and Monopoly*, 15 J.L. & ECON. 143 (1972); *see also* John Shepard Wiley Jr. et al., *The Leasing Monopolist*, 37 UCLA L. REV. 693 (1990) (analyzing the Coase Conjecture and surveying literature that applies it). The reason is that high-valuation consumers, who might otherwise pay the seller's monopoly price, know that the seller will be unlikely to maintain that price. They know that once the seller clears the market of high-valuation consumers, he would then face the temptation to drop the price in order to sell to low-valuation consumers. Anticipating this price reduction, high-valuation consumers will not buy at the initial high price, thus denying the seller his monopoly profit. But if the monopolist leases the good instead of selling it, the high-valuation consumers remain in the market and the monopolist has no incentive to lower the future rental charge. Since high-valuation consumers now have no reason to expect a future price decrease, they will be willing to pay the high-rental charges immediately, thereby enabling the seller to earn a supracompetitive profit. A similar phenomenon might be expected to occur when a provider of expressive content "leases" access to content rather than selling hard copies. It is unclear, however, whether such "leasing" enhances content provider ability to extract consumer surplus over and above the price that the provider can obtain through price discrimination and bundling, which digital technology also renders more effective than in the pre-digital world. I thank Michael Meurer for raising and discussing this point with me.

power may often burden speakers' ability effectively to express ideas. *Air Pirates* is only one of numerous instances in which courts have enjoined the use of copyrighted expression despite a colorable argument that defendants, ranging from church dissidents and media critics to computer hackers and TV quiz book authors,¹¹⁰ have sought to use plaintiff's expression in order to effectively convey an idea. And reported cases, no doubt, represent a mere fraction of instances in which defendants and those threatened with suit have refrained from expressing themselves in order to avoid the threat of copyright infringement liability.¹¹¹

Now that burden on speech might be a price we are willing to pay for copyright's benefits for our system of free expression, some of which I will discuss below. But in assessing copyright policy, we must give due weight to copyright's free speech burdens. And, more to the point here, we must consider whether copyright's *differential* free speech burdens—the extent to which those who, lacking vast inventories of copyrighted expression, enjoy lesser ability to use existing expression in conveying their ideas than do large media and telecommunications firms—might conflict with the Free Speech Principle.

B. Copyright's Dynamic Effect

Copyright's differential static effect arises from occasions in which users are unable or unwilling to license conglomerate-owned expression. As Yochai Benkler has convincingly demonstrated, today's expansive copyright also has a dynamic effect on media enterprise consolidation, which arises even when users are able and

110. See *Castle Rock Entertainment, Inc., v. Carol Publ'g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998) (holding that a multiple choice trivia quiz regarding the television series, *Seinfeld*, infringes the copyright in the series episodes); *Universal City Studios, Inc. v. Reimerdes*, 55 U.S.P.Q. 2d (BNA) 1873 (S.D.N.Y. 2000) (defendants enjoined from posting software containing "expressive elements" and from posting links to other web sites containing the software); *Los Angeles Times v. Free Republic*, 54 U.S.P.Q. 2d (BNA) 1453 (C.D. Cal. 2000) (injunction against right-wing critics of the mass media who sought to post copies of newspaper articles on a web site in order to criticize the media's coverage of current events); *Intellectual Reserve Inc. v. Utah Lighthouse Ministry, Inc.*, 75 F. Supp. 2d 1290 (D. Utah 1999) (preliminary injunction forbidding defendant web site operator from posting the addresses of other web sites containing plaintiff's copyrighted Church Handbook of Instructions); *Religious Tech. Ctr. v. Lerma*, 40 U.S.P.Q. 2d (BNA) 1569 (E.D. Va. 1996) (Church of Scientology suit to prevent critics from posting Church documents on the Internet).

111. See *supra* note 87; see also Jean O. Lanjuow & Josh Lerner, THE ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: A SURVEY OF THE EMPIRICAL LITERATURE (National Bureau of Econ. Research Working Paper No. 6296, 1997) (stating that litigation costs fall most heavily on small firms, who may choose to settle because they cannot afford long-term litigation).

willing to license expression.¹¹² Since all speech incorporates inputs, learning, or inspiration from prior speech, those who own exclusive rights in vast inventories of expression enjoy economic advantages over those who do not. In creating new expression, media conglomerates can use their existing inventories at their negligible marginal cost. Non-conglomerates, including individuals, educational institutions, non-commercial media, and independent publishers, must generally pay the copyright-butressed supracompetitive price for existing expressive inputs to their new expression. The more non-conglomerates must pay for such expressive inputs, the more costly is their expressive activity relative to that of media conglomerates. With an expanded copyright, therefore, conglomerate expression will increasingly dominate over non-conglomerate. Over time, indeed, one would expect that speakers and expressive activity will move from the non-conglomerate sector to the conglomerate, further spurring media concentration.¹¹³

Significantly, moreover, today's expansive copyright, coupled with technological and contractual control measures, amplifies this dynamic effect by enabling large firms to capture a significantly greater portion of consumer surplus from the marketing of expressive products than can individuals and firms with lesser resources and smaller content inventories. Digital technology and control measures enable firms to capture consumer surplus in two ways. First, they make possible increasingly comprehensive and effective price discrimination.¹¹⁴ Second, they create new opportunities for product and audience aggregation, or "bundling."

Even predigital copyright promotes a degree of price discrimination.¹¹⁵ It enables copyright owners to release works in different market segments at different times (for example, films released first in movie theaters, then airplanes and hotels, then video rental and sale, then pay television, cable, and, eventually, free television broadcast) and to release different versions of a work (novel, translation, dramatization, motion picture version) at prices that, at least in part, reflect heterogeneous consumer demand

112. See generally Benkler, *supra* note 11, at 401-08.

113. See generally *id.* at 407-08.

114. See generally Michael J. Meurer, *Price Discrimination, Personal Use, and Piracy: Copyright Protection of Digital Works*, 45 BUFF. L. REV. 845 (1997).

115. As Wendy Gordon astutely points out, indeed, copyright itself can be seen as a mechanism for price discrimination between consumers who want to use a copy only for their personal use and consumers (like publishers) who want to make and distribute further copies. See Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367, 1371-72 (1998).

rather than the costs associated with product differentiation.¹¹⁶ Yet, digital delivery of content greatly enhances possibilities for effective price discrimination. With digital technology, copyright owners can refine and narrow market segments. They can charge different prices for downloading a work, for downloading specified portions of the work, or for access without downloading. With digital enforcement and licensing, they can also charge differentially for a menu of individual uses, ranging from use of the entire work in an educational or commercial setting to quoting from the work in criticism. In so doing, moreover, copyright providers can finely tune pricing by gathering significant information about consumer buying habits, enabling an individualized assessment of preference and preference intensity.¹¹⁷ Finally, digital trusted systems and encryption augment price discrimination capability by making it possible to prevent buyer arbitrage, the purchase of an expressive good at a low cost for resale, in competition with the copyright owner, to a high-valuing purchaser.

While price discrimination captures consumer surplus by differential pricing tailored to heterogeneous consumer demand, aggregation accomplishes that result by effectively homogenizing consumer demand through product or user bundling.¹¹⁸ The most salient examples of such aggregation in the digital network arena are site licenses (which aggregate users) and data base subscriptions (which aggregate products over time). By bundling large numbers of users or products (or both), they effectively reduce consumer heterogeneity so that a single price fits all consumers.¹¹⁹ Alternatively,

116. The determination of when price differentiation constitutes price discrimination can be quite complex. *See id.* at 1376-78 (underscoring complexity with respect to copyright). Very basically, price discrimination occurs in two principal instances: first, where the seller sells the same good to two or more buyers at different net prices, and second, where the seller sells two varieties of a good to two or more buyers at different net prices, the net price being the price paid by the buyer corrected for the cost associated with the product differentiation. *See* LOUIS PHILIPS, *THE ECONOMICS OF PRICE DISCRIMINATION* 5-7 (1983).

117. For a brief discussion of providers' capability for gathering information about Internet users' buying habits and preferences, and the privacy issues that capability raises, see Netanel, *supra* note 29, at 473-80.

118. *See generally* Bakos & Brynjolfsson, *supra* note 87. The aggregation effect reflects the law of large numbers; as more and more goods are added to a bundle, the sum of consumer valuations for the bundled goods becomes more concentrated around the mean, thus flattening the demand curve. *See id.* at 120-21. Aggregation might be thought of as a type of price discrimination, since it enables sellers to set a single price that efficiently allocates goods to consumers. *See id.* at 121. But I use the term "price discrimination" in the more conventional and narrow sense of differential pricing for the same or similar good.

119. *See id.* at 129-32; *see also* CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 73-78 (1999) (noting that by bundling various expressive goods in a single package instead of selling each individually, sellers can enhance

the content provider might combine price discrimination and bundling strategies by offering a menu of different bundles at prices that correlate with various flattened subsets of consumer demand.

It is uncertain—and a matter of considerable controversy—whether these strategies will actually benefit consumers of expressive goods.¹²⁰ Moreover, to the extent price discrimination and bundling increase the cost of gaining access to or using expression that would otherwise have been available for free or (in the case of bundling) a lower cost, they heighten the static distributive effects discussed above.¹²¹ But the point I want to make here centers on the strategies' likely dynamic distributive impact among speakers.

Effective price discrimination, especially individualized marketing of the sort anticipated by digital technology, will often require a considerable investment.¹²² Content providers seeking to engage in such price discrimination will need to gather or buy information about potential consumers and to process and apply that information in product marketing.¹²³ They must also be able to meet highly varied demands for different forms of expression, access, and use, to offer product lines containing various versions of product,

profit since consumer valuations for the right package of goods may be greater than the aggregate of consumer valuations for each good individually); Yannis Bakos et al., *Shared Information Goods*, J.L. & ECON. 117 (1999) (noting that pricing goods with the knowledge that they will be shared informally may have some of the same profit enhancing benefits as more formal consumer aggregation).

120. Most critics, including a number of contributors to this Symposium, focus on price discrimination. See, e.g., Yochai Benkler, *An Unhurried View of Private Ordering in Information Transactions*, 53 VAND. L. REV. 2063 (2000); James Boyle, *Cruel, Mean or Lavish? Economic Analysis, Price Discrimination and Digital Intellectual Property*, 53 VAND. L. REV. 2007 (2000); Julie Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799 (2000); Gordon, *supra* note 115, at 1381-84; Jonathan Weinberg, *Hardware-Based ID, Rights Management, and Trusted Systems*, in *THE COMMODIFICATION OF INFORMATION: POLITICAL, SOCIAL, AND CULTURAL RAMIFICATIONS* (Neil Netanel et al. eds., forthcoming 2001). It seems, more likely, however, that bundling or mixed bundling/price discrimination strategies will dominate digital markets. See Fishburn et al., *supra* note 87, at 168-73 (discussing consumer preference for flat-rate pricing).

121. As a number of commentators have noted, while price discrimination is sometimes touted as a means to provide universal access to expression, it may be that certain secondary uses of copyrighted expression would be available just as widely and without any harm to the copyright incentive if the copyright quasi-monopoly were not extended to encompass them. See, e.g., Benkler, *supra* note 120; Cohen, *supra* note 120; Gordon, *supra* note 115, at 1381-84; Weinberg, *supra* note 120.

122. See Benkler, *supra* note 120 (contending that information and implementation costs will always leave price discrimination imperfect).

123. See Weinberg, *supra* note 120 (noting that “[t]o the extent that sellers’ ability to price discriminate will rest on their access to personally identifiable information about buyers, publishers with access to those databases will have a competitive advantage over those who do not”).

assessing consumer sorting costs as they do so.¹²⁴ Finally, they will reap significant advantages from economies of scale and a large customer base that includes customers of varied preferences and preference intensities.¹²⁵

Similarly, the use of product and consumer aggregation will generally maximize the seller's appropriation of consumer surplus only when the seller is able to aggregate a very large number of products or consumers.¹²⁶ Firms with extensive content inventories and an established customer base will thus be able to exploit this profit-enhancing advantage to a far greater extent than small firms and individuals. As commentators have noted, moreover, in the presence of fixed production costs and minimal marginal costs of reproduction and dissemination—as is the case with expressive goods transmitted over the Internet—large scale bundling can provide significant competitive advantages.¹²⁷ Indeed, aggregation can keep or drive competitors out of the market, even when their non-bundled goods are superior and are produced with lower fixed costs.¹²⁸

At bottom, then, price discrimination and bundling may present yet another factor in tipping the content market towards a handful of large players. Media enterprises with the resources effectively to engage in those strategies will attract larger audiences and will glean a greater share of consumer surplus from their audiences than will those without such resources. To the extent that an expansive copyright and ownership of a vast and varied content portfolio enhance possibilities for price discrimination and bundling, they will favor wealthy speakers over others, further propelling media concentration.

C. *Partial Caveat*

As we have seen, copyright has a dual distributive consequence. It promotes speech hierarchy in the static sense by erecting

124. By bundling various expressive goods in a single package instead of selling each individually, sellers can enhance profit since consumer valuations for the right package of goods may be greater than the aggregate of consumer valuations for each good individually. See SHAPIRO & VARIAN, *supra* note 119, at 73-78; Yannis Bakos et al., *supra* note 119, at 124-25.

125. See C. Edwin Baker, *International Trade in Media Products, in THE COMMODIFICATION OF INFORMATION*, *supra* note 120 (discussing advantages of economies of scale in price discrimination in the context of international trade in expressive goods).

126. See Bakos & Brynjolfsson, *supra* note 87, at 132.

127. See Yannis Bakos & Erik Brynjolfsson, *Bundling and Competition on the Internet* (Apr. 1999), available at <http://www.stern.nyu.edu/~bakos> (last visited Oct. 2, 2000).

128. See *id.* at 17-20.

entry barriers before prospective speakers and in a dynamic sense by fueling media concentration. At the same time, however, there is one way in which copyright might ameliorate the worst diversity-stifling effects of media concentration. As I have argued elsewhere, some level of copyright protection might actually allow for greater expressive diversity than might otherwise be possible under conditions of media conglomeration.¹²⁹ Copyright serves as a vehicle for media conglomerates to outsource expressive production to independent entities rather than integrating authors within the firm. Statutorily defined and readily enforceable copyright holder rights lower transaction costs and reduce the risks involved in acquiring expressive products from unrelated firms and personnel.¹³⁰ Copyright thus enhances possibilities for contract-based alliances and producer networks, as opposed to vertical integration and intra-firm organization.¹³¹ Significantly in that regard, studies suggest that, on the margins, large firms that acquire rights to expression from a variety of independent producers exhibit a greater propensity to expressive diversity than those that produce expression entirely within the firm's internal organizational structures.¹³²

In short, absent copyright, media conglomerates might concentrate content production within integrated subsidiaries. To the extent copyright facilitates more open, network production, it appears to have a diversity-enhancing effect that, to some degree, mitigates copyright's overall diversity-diminishing force.

D. Sum

Copyright acts as an "engine of free expression" in the broad sense that it provides a monetary inducement for the creation and dissemination of new speech.¹³³ But neither that inducement nor the levy copyright imposes on prospective users of existing expres-

129. See Neil Weinstock Netanel, *Asserting Copyright's Democratic Principles in the Global Arena*, 51 VAND. L. REV. 218, 271 (1998).

130. See Robert P. Merges, *Intellectual Property and the Costs of Commercial Exchange: A Review Essay*, 93 MICH. L. REV. 1570, 1573-74 (1995).

131. For a parallel argument that both patent protection and the imposition of limitations to patent holder rights assist in the formation of biotechnology research networks comprising a dominant large firm and numerous small research firms, see Barnett, *supra* note 53.

132. See ROBERT BURNETT, *THE GLOBAL JUKEBOX: THE INTERNATIONAL MUSIC INDUSTRY* 115-16 (1996) (noting that large cultural industries using an open system of production and development may show significant expressive diversity despite ownership concentration); Paul D. Lopes, *Innovation and Diversity in the Popular Music Industry, 1969 to 1990*, 57 AM. SOC. REV. 56, 60-70 (1992) (similar finding with regard to music industry).

133. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) (labeling copyright the "engine of free expression").

sion is equally distributed. Rather, conglomerate content providers reap the lion's share of the copyright benefit and others bear most of the copyright burden. Copyright thus leads to more works being created by conglomerates and fewer works being created by others than might otherwise be the case. Seen in that light, by thus promoting speech hierarchy, copyright acts sharply to the detriment of the Free Speech Principle of uninhibited, robust, and wide-open debate from diverse and antagonistic sources.

That is not to say that copyright ought to be jettisoned, even if the Free Speech Principle were the sole criteria for measuring copyright's worth. It may well be, indeed, that on the whole, copyright better serves the Free Speech Principle than would other plausible alternatives, such as a regime of no legal protection against unauthorized copying of original expression or one in which authorship depends heavily on government subsidy.¹³⁴ Nevertheless, copyright's apparent promotion of speech hierarchy ought to place a heavy burden of persuasion on those who would justify strengthening and expanding copyright owner rights on the basis of copyright's purported compatibility with or furtherance of expressive diversity.

IV. THE FREE PRESS PRINCIPLE

I have argued thus far that, in conjunction with other government media-related policies, copyright supports speech hierarchy and that, to the extent this is the case, copyright acts inconsistently with the Free Speech Principle. I will now contend that, despite this inconsistency, copyright's support of at least some market hierarchy in speech may well comport with—and indeed be highly conducive to—liberal democracy.

The critique of market hierarchy in speech rises from a broad spectrum of liberal democratic thought.¹³⁵ Liberal critics concerned with personal autonomy see the disproportionate power of the commercial mass media as an obstacle to individuals' control over their communication environment—individuals' ability to choose to whom and with whom they communicate, to determine

134. For an interesting proposal that would give authors the option of choosing between copyright and a government grant, see STEVEN SHAVELL & TANGUY VAN YPERSELE, REWARDS VERSUS INTELLECTUAL PROPERTY RIGHTS (National Bureau of Econ. Research Working Paper No. 6956, 1999), available at <http://www.nber.org/papers/w6956.pdf>.

135. As Jonathan Weinberg points out, however, traditional First Amendment doctrine dispenses with the tension between speech hierarchy and the Free Speech principle by bracketing off speech hierarchy, treating the "marketplace of ideas" as if it were a private conversation, untinged by inequality in expressive resources. Weinberg, *supra* note 10, at 1142-43.

their mode of expression, and to have access to a broad spectrum of information sources.¹³⁶ Critics concerned with democratic pluralism deride market hierarchy's deleterious impact on the exchange of opinion from a multiplicity of sources.¹³⁷ Habermasian "liberal republicans"¹³⁸ lament the transformation of the early liberal public sphere from a realm of politically autonomous and equal discussants to one of mass media distortion and stifling of minority voices.¹³⁹ Democratic process theorists worry about speech hierarchy's corrosive effect on democratic institutions.¹⁴⁰ Finally, with greater optimism and considerable self-satisfaction, Internet libertarians revel in what they perceive to be the death knell of institutional mass media at the hands of a swelling multitude of individual web site operators and virtual discussion groups.¹⁴¹

This critique, in all its variant forms, cogently underscores the sharp tension between speech hierarchy and the Free Speech Principle. Contrary to what some commentators seem to suggest,¹⁴²

136. See, e.g., Benkler, *supra* note 36, at 387-88 (noting that privately owned broadcast infrastructures tend to "homogenize and standardize" information for mass public appeal).

137. See Baker, *supra* note 14, at 395-96 (noting that "something like equal expenditures supporting each perspective" would best promote cultural pluralism, but concluding that a strict equal expenditure regime would likely be unfair and unworkable); Fiss, *supra* note 10, at 1406-13 (arguing that, under conditions of vast inequality of wealth, rigid adherence to a speaker autonomy model of free speech jurisprudence will perpetuate disparate power of the wealthy in public discourse and will effectively stifle robust debate from a multiplicity of sources).

138. I borrow the phrase "liberal republicans" from Ed Baker's enlightening comparison of "liberal republican" versus "republican liberal" thought, focusing on the former's emphasis on prepolitical individual autonomy and the latter's stress on democratic process and participation as the guarantor of individual rights. C. Edwin Baker, *Republican Liberalism: Liberal Rights and Republican Politics*, 41 FLA. L. REV. 491, 504-07 (1989).

139. See SUNSTEIN, *supra* note 5; Baker, *supra* note 13, at 395 (summarizing republican conception of media equality); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1500-06 (1988). See generally JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (1989). For an illuminating analysis of Habermas' move from Marxian critical theory to a position well within the parameters of liberal democratic thought, see William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 L. & SOC. INQUIRY 969 (1998) (reviewing JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996)).

140. See, e.g., Burt Neuborne, *Media Concentration and Democracy: Commentary*, 1999 ANN. SURV. AM. L. 277, 279-80 (stressing that media concentration poses a danger for democracy).

141. See SHAPIRO, *supra* note 37, at 187-97 (describing the Internet libertarian position without agreeing with it).

142. See, e.g., BRIAN MARTIN, *INFORMATION LIBERATION: CHALLENGING THE CORRUPTIONS OF INFORMATION POWER*, ch. 3 (1998) ("Against Intellectual Property"), extracts available at www.danny.oz.au/free-software/advocacy/against_IP.html (last visited Oct. 20, 2000); Yochai Benkler, *A Speakers' Corner Under the Sun*, in *THE COMMODIFICATION OF INFORMATION*, *supra* note 120; see also Nicholas Garnham, *The Media and the Public Sphere*, in *HABERMAS AND THE PUBLIC SPHERE* 359, 367-68 (Craig Calhoun ed., 1992) (criticizing postmodernist emphasis on

however, one need not and ought not conclude that a wholly non-hierarchical, decentralized expressive arena would better serve liberal democratic values and governance. The reason is straightforward: Even assuming that a wholly non-hierarchical arena would in fact yield greater expressive diversity, the Free Speech Principle does not constitute the sole pillar of liberal democratic public discourse. No less than expressive diversity, liberal democracy rests upon the Free Press Principle.¹⁴³ It requires an institutional media that possesses the financial strength to reach a mass audience and engage in sustained investigative reporting, free from a potentially corrupting dependence on state subsidy.¹⁴⁴ In contrast to the Free Speech Principle, therefore, the Free Press Principle necessarily entails a degree of market hierarchy. Its realization envisions not a two-dimensional expressive universe composed entirely of yeoman speakers, but rather a speech realm comprising varied bubbles of wealth and power.¹⁴⁵ It requires that certain expressive enterprises must have sufficient resources to reflect and galvanize public opinion and to stand up to, hold accountable, and effectively chasten powerful governmental and non-governmental entities.

Individual authors and web site operators lack the resources to fulfill the press' traditional, vital role of watchdog against government myopia and oppression. Nor can individuals adequately expose corporate unlawfulness, labor union corruption, and political party self-aggrandizement. Liberal democratic nations necessarily encompass multiple concentrations of power.¹⁴⁶ Only an equally

proliferation of interpersonal electronic communication as desirable move away for mass communication).

143. For a discussion of the distinction between the role and import of the free speech clause versus the free press clause of the First Amendment, see C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 225-49 (1989); Potter Stewart, "Or of the Press," 26 *HASTINGS L.J.* 631, 633-34 (1975). Regarding the central importance of a free press for democratic states generally, see Pnina Lahav, *An Outline for a General Theory of Press Law in Democracy*, in *PRESS LAW IN MODERN DEMOCRACIES* 339 (Pnina Lahav ed., 1985).

144. See DAVID L. PROTESS ET AL., *THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BUILDING IN AMERICA* 233-35 (1991) (describing significant investment of news organizations' resources involved in investigative reporting and in responding to counterattacks by government officials and private firms who are subjects of exposés). On the potential for state interference attendant to state subsidy, see *infra* note 172.

145. *But see* Benkler, *supra* note 11, at 400 (criticizing expanded copyright on the grounds that it "tends to produce market-based hierarchy, rather than to facilitate and sustain independent yeoman authors").

146. See PETER H. SCHUCK, *THE LIMITS OF LAW: ESSAYS ON DEMOCRATIC GOVERNANCE* 204-50 (2000); see also Mark P. Petracca, *The Future of an Interest Group Society*, in *THE POLITICS OF INTERESTS: INTEREST GROUPS TRANSFORMED* 345 (Mark P. Petracca ed., 1992) [hereinafter *POLITICS OF INTERESTS*] (noting the continuing, vital role played by interest groups in the democratic process).

powerful press—not just the daily press, but also a full array of publishing houses, film studios, and broadcasters—can effectively check other entities' and associations' deployment of their power by exposing it to the light of public opinion. Indeed, only a mass media can both catalyze and, to a degree, embody public opinion in the face of government authority and corporate fiefdom.¹⁴⁷

Moreover, in addition to their watchdog function, media enterprises serve a vital role in laying a foundation for public discourse. Internet discussion groups and other diverse, decentralized fora devoted to individuals' particular views and concerns are highly significant, laudable components of our system of free expression. But a discursive realm consisting solely of such fora, without any mass media, would yield little more than self-congratulatory refrain.¹⁴⁸ It would be a realm in which many individuals lock in existing preferences, speaking only to those who share common views and interests, rather than engaging in discourse across the political and cultural spectrum.¹⁴⁹ In contrast, liberal democratic governance requires, and the Free Speech Principle must entail, not merely expression from diverse sources but also

147. In a sense the media itself often acts as the public to which the democratic process responds. See PROTESS ET AL., *supra* note 144, at 244-49 (noting, on the basis of detailed case studies of investigative reporting, that government officials tend to respond to investigative reporters and media exposés before interest groups or the public at large take up the issue, treating the press as if it were the public).

148. For discussion of the problem of excessive insularity in the context of the Internet, see LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 180 (1999); SHAPIRO, *supra* note 37, at 105-09; Netanel, *supra* note 29, at 462-63. Of course, the likelihood of considerable audience fragmentation in the face of the broadband Internet and multitudinous-channel television raises the question of whether we will continue to have a mass media in anything like the sense we know it today. I think we will. First, existing data suggests that, despite some fragmentation, mass appeal network television is likely to continue to dominate media consumption in the United States for the foreseeable future. See WEBSTER & PHALEN, *supra* note 17, at 144. Perhaps this is because individuals' desire to see what others are seeing balances their desire to custom-design their speech consumption menu to suit their personal idiosyncratic interests. See *supra* note 100-03 and accompanying text; see also Webster & Lin, *supra* note 46 (finding, on the basis of a study of Internet usage, that people "opt for a more varied diet than the worst fears [of customized tunnel vision] would suggest"). Second, although digital media enables asynchronous delivery, even if individuals do not view the same content at the same time, they may reconstitute a mass audience by viewing it at different times. See WEBSTER & PHALEN, *supra* note 17, at 114. Finally, concentration of speaker ownership and media herd behavior suggest that even the future Internet will contain a large core of mainstream information and opinion. See Sunstein, *supra* note 14, at 515-16 (discussing media herd behavior).

149. Indeed, as studies of group psychology suggest, discursive insularity may well promote great polarization and extremism, not merely stasis. See CASS R. SUNSTEIN, *THE LAW OF GROUP POLARIZATION* (University of Chicago John M. Olin Law & Econ. Working Paper No. 91 (2d Series), 2000), available at http://papers.ssrn.com/sol3/delivery.taf?28665&_UserReference=A7FA65BC8A15900339F0927D.

robust debate among contrary views.¹⁵⁰ It requires some measure of *public* discourse, some means for identifying issues of widespread concern and some forum for confronting opposing perspectives.¹⁵¹ Left on its own, the diverse sources prong of the Free Speech Principle breeds atomistic insularity. It is the robust debate prong—one that entails a cross-sectoral exchange of views—that combines with the diverse sources prong to make the Free Speech Principle a cornerstone of liberal democratic governance.

Of course, media outlets do not serve merely as passive conduits for discursive exchange. Rather, they present a forum for mediated and edited deliberation and debate. In so doing, the media both delimits a range of passable opinion and actively contributes to shaping a rough consensus regarding what are the important public issues that need to be addressed.¹⁵² Such media agenda-setting has positive as well as negative ramifications. The mass media indeed narrows the public agenda to a limited set of resonant issues.¹⁵³ But while a limited agenda might seem antithetical to the Free Speech Principle's diversity prong, public debate in a highly pluralistic, advanced democratic state cannot proceed without some measure of broad public consensus on the major priorities of the day.

The need for media filtering and agenda-setting is particularly apparent with respect to the Internet. Without trusted intermediaries to serve as filters and guides, citizens who are awash in cheap information would likely face considerable difficulties in evaluating that information's accuracy and in assessing the relative

150. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 605 (1985) (Brennan, J., dissenting) (emphasizing that "the robust debate of public issues" is the "essence of self-government"); see also STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 179-81 (1995) (discussing John Stuart Mills' thesis that liberal state requires a robust exchange of views).

151. See CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 186-87 (1997) (contending that liberal democracy requires a realm of discursive exchange in which citizens can test their preferences and produce better collective decisions).

152. For further discussion of this point, see Netanel, *supra* note 129, at 263-67. See also Owen M. Fiss, *The Censorship of Television*, 93 NW. U. L. REV. 1215, 1217 (1999) (noting that television, unlike today's computer communication, has the capacity to create a shared understanding among a mass audience).

153. See Maxwell McCombs et al., *Issues in the News and the Public Agenda: The Agenda-Setting Tradition*, in *PUBLIC OPINION AND THE COMMUNICATIONS OF CONSENT* 281, 292 (Theodore L. Glasser & Charles T. Salmon eds., 1995) [hereinafter *PUBLIC OPINION*] (noting that given competition among issues for saliency among the public, the public agenda typically consists of no more than five to seven issues).

import of purported issues.¹⁵⁴ Only media financially and institutionally capable of checking facts and holding a stake in industry-wide standards of quality, candor, and accuracy can serve as reasonably reliable sources of the information upon which both individual elucidation and public discourse depend.¹⁵⁵ A realm composed entirely of yeomen speakers would more resemble impenetrable babble than the public square of discursive exchange that the Free Speech Principle envisions.

Let me emphasize that I do not mean to idealize the commercial media. In performing its watchdog and discourse-enabling functions, the commercial media skews as well as narrows public debate.¹⁵⁶ Part of the reason for this, and one that appears increasingly to be so as media enterprises consolidate into conglomerates with non-media corporate parents, is that media enterprise self-interest and concern for the bottom line pushes coverage to favor commercial interests.¹⁵⁷ Media's skewing also grows out of market dictate, both real and perceived. Sensationalism, a mainstream worldview, and reporting that focuses on current political leaders and dominant institutions sells better to broader audiences than alternative content.¹⁵⁸ Moreover, media exhibit considerable herd behavior, imitating the format of existing commercially successful movies, books, and TV shows, thus exacerbating the homogenized, uniform character of much media content.¹⁵⁹ As a result of these factors and others,¹⁶⁰ while the mainstream mass media may often exhibit moderate-reform-oriented norms, it rarely challenges our basic social, economic, and political structures.¹⁶¹ Nor, for better or

154. See SHAPIRO, *supra* note 37, at 188-92 (discussing need for trusted intermediaries to sort out bad data from good); SUNSTEIN, *supra* note 151, at 185-87 (same). For a colorful depiction of this problem, see DAVID SHENK, *DATA SMOG: SURVIVING THE INFORMATION GLUT* (1997).

155. For further discussion of this point, see Neil Weinstock Netanel, *Cyberspace 2.0*, 79 TEX. L. REV. (forthcoming 2000).

156. See *supra* notes 17-19 and accompanying text.

157. See Neuborne, *supra* note 140, at 280.

158. As Ed Baker demonstrates, sensationalist violence and sex sell particularly well across cultures, and thus assume greater portions of media content as markets for that content become increasingly global. See Baker, *supra* note 125.

159. See Netanel, *supra* note 21, at 333-34; Sunstein, *supra* note 14, at 515-16.

160. With respect to the press, some commentators claim that reporters' dependence on government officials and prominent, well-organized associations for raw news material also vitiates radical challenges to the status quo. See, e.g., Clarice N. Olien et al., *Conflict, Consensus, and Public Opinion*, in PUBLIC OPINION, *supra* note 153, at 301, 306 (noting media dependency on power relationships); Weinberg, *supra* note 10, at 1154-55.

161. Weinberg, *supra* note 10, at 1157. At the same time, critics charge that noncommercial, government-subsidized media also generally fall well within the mainstream. See FRANK WEBSTER, *THEORIES OF THE INFORMATION SOCIETY* 107 (1995) (noting that the BBC's presentation of public affairs has generally "limited itself to the boundaries of established party politics").

for worse, does it provide a full spectrum of fathomable expression and opinion.

On the other hand, however, at least within a moderate reform-oriented framework, the presence and activity of market-based mass media watchdogs serve as an important check on both government and private entity malfeasance. And critical to this watchdog presence are the media's ability to reach a mass audience and the media's reputation as a relatively reliable source of information.

The story of former tobacco company researcher Jeffrey Wigand is a case in point.¹⁶² While employed at cigarette-maker Brown & Williamson, Wigand discovered that, despite repeated public denials and testimony under oath to the contrary, leading tobacco company executives had long known that the nicotine in cigarettes is an addictive substance. In 1995 Wigand relayed his discovery to a reporter for the widely watched CBS news magazine, *60 Minutes*, and agreed to be interviewed on the program. In so doing, Wigand violated his Brown & Williamson non-disclosure agreement and undertook considerable financial and personal risk. Instrumental in Wigand's decision to divulge the tobacco company misdeeds despite that risk was CBS's promise to indemnify him for any liability to his former employer and, no less important, the knowledge that he would have the opportunity to present his findings before millions of prime time television viewers.¹⁶³ It is highly unlikely that Wigand would have exposed Brown & Williamson at his own peril without the backing and mass audience of a major media outlet. And even if he had, perhaps by posting information and documents on his personal web page, his story may well have been lost in the chorus of tobacco company denials (if they had even bothered to respond) and against the backdrop of tens of thousands of crank web pages presenting sundry allegations that few find credible even when true.

Of course, there is more to the Wigand story. CBS management initially scuttled the Wigand interview shortly before it was to appear on *60 Minutes*. Apparently, CBS did want to take the unlikely, but not immaterial risk of having to pay a multi-billion dollar damage award to Brown & Williamson, especially since that

162. My account of the Wigand story draws heavily upon Paul Starr, *What You Need to Beat Goliath*, AM. PROSPECT, Dec. 20, 1999, available at <http://www.prospect.org/archives/V11-3/starr.html>.

163. Some ten million households watch *60 Minutes* each week. See Fiss, *supra* note 152, at 1217 (citing research performed by Nielsen Media Research on 1998 television viewing).

contingency would have reduced CBS's share price at a time when the company was negotiating to be acquired by Westinghouse. Additional, and more insidious, corporate entanglements might have also contributed to the decision.¹⁶⁴ Laurence Tisch, CBS's chairman at the time, was also an owner of Lorillard Tobacco Company, and his son Andrew was Lorillard's president. In fact, Andrew Tisch was one of the tobacco executives who had sworn before Congress that nicotine was not addictive, and Wigand was a witness in the perjury investigation regarding that testimony.¹⁶⁵ At that time, moreover, Lorillard was negotiating with Brown & Williamson to buy six of its brands.¹⁶⁶ In sum, CBS's broadcast of the Wigand interview might have caused CBS and Laurence Tisch considerable financial loss and might have helped send Tisch's son to jail, facts that could hardly have been lost on the CBS lawyers and executives involved in the decision to cancel the Wigand broadcast.¹⁶⁷

The circumstances surrounding CBS's cancellation of the Wigand interview graphically illustrate the potential vulnerabilities and limitations of the media-as-watchdog model, especially in an age of increasing media consolidation and conglomeration. But some three months after the Wigand interview was to have been aired, CBS reversed its decision to scuttle the interview and did in fact broadcast it; and in so doing, it dealt a significant blow to the tobacco industry. Significantly, it was the presence and coverage of competing media that pushed a reluctant CBS into reasserting its watchdog role. CBS broadcast the Wigand interview only after the New York Times had detailed CBS's capitulation in a front page story,¹⁶⁸ the New York Daily News had obtained and reported on the transcript of the omitted interview,¹⁶⁹ and the Wall Street Journal had published Wigand's deposition testimony containing his central allegations.¹⁷⁰ Moreover, critical media coverage did not end with the CBS broadcast. Most notably perhaps, in its 1999 motion picture, *The Insider*, Disney/ABC presented a widely-acclaimed

164. See Starr, *supra* note 162.

165. See *id.*

166. See *id.*

167. See *id.*

168. See Bill Carter, '60 Minutes' Ordered to Pull Interview in Tobacco Report, N.Y. TIMES, Nov. 9, 1995, at A1.

169. See Joe Calderone & Kevin Flynn, What '60 Minutes' Cut: Attack on Cig Maker Was Axed, Transcript Shows, N.Y. DAILY NEWS, Nov. 17, 1995, at 2.

170. See Bill Carter, CBS Broadcasts Interview With Tobacco Executive, N.Y. TIMES, Feb. 5, 1996, at B8 (reporting that CBS broadcasted the interview a week after the *Wall Street Journal* had published the transcript of the Wigand deposition).

dramatized version of the entire Wigand episode, castigating CBS for the network's striking, if temporary, abdication of its journalistic integrity. That contemporaneous and subsequent coverage by competing media enterprises, an instance of such enterprises exposing each other's wrongdoing, may deter such lapses in the future.

The moral I wish to draw from this story is not that "all's well that ends well," that we can complacently rely on an increasingly consolidated mass media to expose corporate wrongdoing. Rather, the Wigand story illustrates both that mass media entities are critical to exposing government and corporate wrongdoing, and that media's propensity and capability to act as watchdog cannot be taken for granted. Government media policy must actively foster the media's checking function through cross-ownership and consolidation restrictions, subsidizing non-commercial media outlets, and other measures designed to support a multiplicity of expressive sources.

In that connection, our system of expression should include considerable space for decentralized, individual expression, such as on the Internet. In addition to constituting a vast forum for alternative discourses, the Internet spawns gadflies, media critics, and others who may sometimes successfully bring a story to mass media attention or challenge media silence.¹⁷¹ But that is not to say that we should aspire, even as a liberal democratic ideal, to an egalitarian expressive universe composed entirely of virtual and street-corner pamphleteers. Rather, our system of free expression must include a plurality of speaker types, including commercial mass media, government-subsidized noncommercial media,¹⁷² independ-

171. An already classic example is Matt Drudge's web site scoop of the Monica Lewinsky story. See SHAPIRO, *supra* note 37, at 41.

172. In many democratic countries, state-funded television and other media play important, perhaps even vital, watchdog and discourse-building roles. However, incidents abound of even democratic governments seeking to use the power of the purse to extract influence over the speech of state-funded media. See ELI NOAM, *TELEVISION IN EUROPE 96-97 (1991)* (chronicling decades of post-war French government attempts to influence coverage on state-run French television and radio); *Furore over IRA Film Could Put Peace Talks in Jeopardy*, THE INDEPENDENT (London), July 27, 1997, at 1 (noting that under a United Kingdom government ban, Sinn Fein representatives were not allowed to speak on British television until 1993); see also Frances H. Foster, *Information and the Problem of Democracy: The Russian Experience*, 44 AM. J. COMP. L. 243, 257-58 (1996) (detailing instances of government censorship in the supposed "defense of democracy" in post-Soviet Russia); cf. FRANCES STONOR SAUNDERS, *THE CULTURAL COLD WAR; THE CIA AND THE WORLD OF ARTS AND LETTERS (1999)* (documenting the CIA's covert funding of select academic conferences, magazines, and cultural activities in post-war Europe in an effort to lure Western European intelligentsia away from its fascination with Marxism toward a more favorable understanding of the American worldview). Accordingly, while state-funded media can contribute significantly to liberal democratic governance, they

ent publishers, political and nonprofit associations, universities, and individuals. To some extent, each of these speaker types offsets, complements, and checks the rest. Like other speaker types, the commercial media plays a unique and vital role within this complex mix.

Liberal democratic values would thus be ill-served by speech hierarchy's eradication, even assuming that a regime of cheap speech and no-copyright could make that possible. Media and information policy should rather seek to accommodate speech hierarchy while containing its dimensions and blunting its most severe adverse effects. The Free Press Principle, and, indeed, the Free Speech Principle as well, demand that we preserve and promote a robust, autonomous mass media, even as we strive to foster expressive diversity in the face of media concentration and mainstreaming.

V. COPYRIGHT'S PROPER ROLE

I have argued thus far that copyright contributes significantly to market hierarchy in public discourse, but that such hierarchy is conducive to liberal democratic governance and values so long as it leaves ample room for expression from a multiplicity of sources. The optimal mix of speech hierarchy versus source diversity can hardly be discerned with anything even remotely approximating mathematical precision. Very broadly, liberal democratic governance requires sufficient concentration of expressive resources to yield a media capable of checking other powerful entities, but also sufficient speaker diversity to challenge media complacency and provide widespread opportunities for personal and minority expression. Media and information policy can aim only to afford a measure of support for both the Free Speech and Free Press Principles while seeking to reach a rough accommodation between the Principles when they inevitably conflict.

Among other policies and regulatory schemes, copyright law can serve as a useful tool for such accommodation. By according copyright owners a limited proprietary entitlement in authors' expressive works, copyright has the salutary effect of helping to support a robust, independent media.¹⁷³ Copyright protection does not

ought no more comprise the entirety of our system of free expression than should yeomen speakers and Internet discussion groups. The Free Press Principle—and liberal democratic governance—must rely as well and in large part on financially and politically autonomous commercial media.

173. For further discussion of this point, see Netanel, *supra* note 21, at 352-62.

merely afford authors, publishers, broadcasters, filmmakers, and the press a financial incentive to create and disseminate original expression. It also supports a sector of creators and publishers who earn financial support for their activities by reaching paying audiences rather than by depending on government or elite largess. Indeed, copyright helps to enable commercial media to amass sufficient consumer surplus to fund the democracy-enhancing functions—checking governmental and private power centers, representing public opinion, laying foundations for public discourse, and serving as a relatively trustworthy source of information—embodied in the Free Press Principle.

Yet, as I have discussed above, in fulfilling this structural function, copyright fosters and contributes to speech hierarchy. The copyright incentive is enjoyed disproportionately by corporate entities holding vast inventories of expressive works, while the burden to obtain permission to use existing works falls most heavily on individuals and other non-conglomerate speakers. Conglomerate owners, moreover, employ copyright strategically to manage content portfolios, effectively stifling competing and controversial derivative uses of that content. Copyright thus does not merely enable rich speakers to become richer. It also directly skews public discourse in favor of wealthy entities that control a large share of our expressive universe.

Copyright law has traditionally been tailored to moderate copyright's most pernicious, hierarchy-entrenching effects. It has imposed considerable limits on copyright owners' legal entitlement to control expression, and those limits, together with technological constraints on copyright owner control, have preserved rich possibilities for critical exchange and diverse reformulation of existing works.¹⁷⁴ But that moderating force has greatly dissipated as copyright's scope has steadily expanded, media enterprises have consolidated and amassed ever-larger content inventories, and digital encryption has enabled content providers to achieve near hermetic control over those inventories.

Given all these factors, indeed, copyright's ever more bloated scope seems far to exceed that which would be necessary or desir-

174. Such public interest limits lie at the heart of United States copyright jurisprudence. *See, e.g.,* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (stating that copyright's goal of promoting science and the arts is "generally furthered by the creation of transformative works" and emphasizing that such works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright"). While their role in continental European copyright law is less pronounced, they are far from absent in that "authors' rights" regime. *See* Netanel, *supra* note 129, at 305-06.

able to further copyright's role in supporting an independent media without unduly hampering expressive diversity. If copyright is to serve both the Free Speech and Free Press Principles, it must enrich the public domain no less than subsidize media enterprises. While continuing to underwrite a robust sector of independent publishers, it must provide substantial breathing room for critical, controversial, and competing reformulations of existing expression. More particularly, although I cannot develop the argument here,¹⁷⁵ I would contend that in order properly to accommodate those twin, yet partly competing goals, copyright law ought to incorporate a reinvigorated fair use doctrine; a scaled-back term of protection; something approaching a liability, rather than property, regime for most derivative uses of existing works; and the application of copyright entitlement limitations to content provider rights under the Digital Millennium Copyright Act, rather than the pay-for-access and perpetual protection that the Act appears to make possible. Such a regime would continue to furnish plentiful funding for an independent media sector. But it would act towards dismantling much of the excessive speech hierarchy that copyright increasingly serves to buttress.

Significantly in that regard, copyright law offers some advantages over traditional media regulation in addressing the issue of speaker hierarchy, especially in an age of global, digital media markets. Traditional "command-and-control" media regulation aims to promote expressive diversity by imposing requirements regarding media content or regulating media industry structure.¹⁷⁶ Under the fairness doctrine, for example, the Federal Communications Commission long required television and radio broadcasters both to cover public issues and to present a diversity of views regarding those issues.¹⁷⁷ Other content regulation has required that media accord access to speakers who might not otherwise reach a mass audience, including requirements that cable operators set aside channels for "public, educational, or governmental use" without charge.¹⁷⁸ Structural regulation focuses on ownership restrictions

175. For further discussion of some of these points, see Netanel, *supra* note 21, at 364-85.

176. For a brief history and summary of broadcast content regulations, see Sunstein, *supra* note 14, at 506-08. For a brief history and summary of media ownership and structural regulations, see Levi, *supra* note 12, at 582-92.

177. The fairness doctrine was largely repealed in 1987. See *Syracuse Peace Council v. Television Station WTVH*, 2 F.C.C.R. 5043, 5052-55 (1987), *aff'd sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

178. Federal law permits local franchising authorities to require that cable operators designate channel capacity for "public, educational, or governmental use" without charge. 47 U.S.C. §

designed to limit media concentration. It has included restrictions on cross-ownership among different media and on the number of media outlets and percentage of specified markets that a single entity may control.¹⁷⁹

Traditional media regulation has been designed for predigital domestic markets, particularly those, such as off-air broadcasting and cable television, that have been characterized by limited communications capacity and private entity control over physical bottlenecks to access. Even within those market segments, media regulation has been of uncertain effectiveness, with critics presenting cogent arguments that the untoward effect of much regulation has been to inhibit, rather than promote, expressive diversity.¹⁸⁰ Moreover, traditional media regulation faces significant obstacles in an era of digital and global media markets. Digitization brings the convergence of media sectors, like television, that have been traditionally subject to considerable regulation, with sectors, like the dissemination of printed text, which have traditionally operated with little content or structural regulation. The distribution of content on open digital networks like the Internet also eliminates, or minimizes, the capacity scarcity and entities' physical control over distribution bottlenecks that have served as the rationale for much media regulation and, indeed, may well be central to the permissibility of such regulation under the First

531 (1994). Although I refer to such compelled access provisions as content rather than structural regulation, it is unlikely, at least in the near future, that they would be deemed content-based restrictions on speech for First Amendment purposes. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), the Supreme Court held, in a 5-4 decision, that federal law requiring cable television operators to carry local off-air broadcasts was content-neutral regulation designed to "protect[] noncable households from loss of regular television broadcasting service due to competition from cable systems," *id.* at 663 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)), and to serve the interrelated goal of "promoting the widespread dissemination of information from a multiplicity of sources," *id.* at 662.

179. See, e.g., Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. The "subscriber limits provision" of that Act directs the FCC to limit the number of subscribers a cable operator may reach. 47 U.S.C. § 533(f)(1)(A) (1994). The "channel occupancy provision" directs the Commission to limit the number of channels on a cable system that may be devoted to video programming in which the operator has a financial interest. *Id.* § 533(f)(1)(B); see also Stefaan Verhulst, *European Responses to Media Ownership and Pluralism*, 16 CARDOZO ARTS & ENT. L.J. 421, 422 (1998) (noting that the United Kingdom and Germany "have replaced the classic approach, which was mainly based on ownership restrictions, with one based on market shares").

180. See, e.g., Benjamin M. Compaine, *The Impact of Ownership on Content: Does it Matter?*, 13 CARDOZO ARTS & ENT. L.J. 755, 764 (1995) (providing examples of broadcaster attempts to break significantly out of the programming mainstream that have been dealt with harshly by the FCC); Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997) (arguing that the fairness doctrine discouraged stations from covering controversial issues at all).

Amendment.¹⁸¹ Finally, digitization speeds the globalization of media markets and the transnational consolidation of media firms, making it difficult to determine the relevant market parameters for capping media centralization and difficult for national regulators to impose such caps even if the relevant parameters can be determined.¹⁸²

Delimiting copyright owner rights to control expression might constitute a more flexible and effective tool than command-and-control regulation for modulating between speech hierarchy and expressive diversity in the digital environment.¹⁸³ By reallocating underlying entitlements to control and use expression, a suitably tailored copyright would lower the costs of expression for non-conglomerate users. In so doing, it would support the viability of diverse uses and reformulations of existing expression, and would do so across media sectors, markets, and formats. It would also benefit a broad spectrum of non-conglomerate speakers, not just those whom government regulators have determined ought to have privileged access to media outlets. At the same time, a tailored copyright would counter media concentration arising from conditions in digital markets. Unlike much traditional media regulation, it would not be limited to situations of media or telecommunications enterprise control over physical bottlenecks. At the same time, however, legislation that narrows copyright entitlements would not give rise to the potential First Amendment obstacles facing com-

181. For commentary taking the position that both structural and content regulation are constitutionally infirm in the digital network environment, see PETER HUBER, *LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM* (1997). See also *Review of the Comm'n's Regulations Governing Attribution of Broad. and Cable/MDS Interests, Report and Order*, 14 F.C.C.R. 12,559, 12,664 (1999) (Commissioner Furchtgott-Roth, dissenting in part and concurring in part) (challenging constitutionality of FCC broadcast and cable regulation); Jonathan W. Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401 (1989) (arguing that the FCC broadcast ownership restrictions abridge the First Amendment right to free speech); Sunstein, *supra* note 14, at 503 (raising the "large question" of whether traditional "command-and-control" public interest broadcast regulation continues to make policy sense or "even to survive constitutional scrutiny" in the new communications environment); Yochai Benkler & Lawrence Lessig, *Net Gains: Will Technology Make CBS Unconstitutional?*, NEW REPUBLIC, Dec. 14, 1998, at 12, 14 (contending that broadcast regulation may run afoul of the First Amendment if "spread-spectrum technology" enables multiple, non-interfering uses of spectrum frequencies). *But see* Baker, *supra* note 20, at 80-82, 93-114 (arguing that concentration and market power do and should suffice to justify selective media regulation in the interest of promoting expressive diversity).

182. See Verhulst, *supra* note 179, at 421 (questioning whether, given transnational media consolidation, "national attempts to control ownership are still feasible or even useful").

183. *Cf.* Sunstein, *supra* note 14, at 531-63 (exploring possibilities for replacing traditional command-and-control media regulation with a "third way," including disclosure requirements, economic incentives, and voluntary self-regulation).

mand-and-control regulation of new media enterprises and activity.¹⁸⁴ And finally, while copyright laws are national in scope, they apply to all domestic uses.¹⁸⁵ A tailored copyright may thus support expressive diversity without requiring a complex determination of national media concentration within a global market.

184. No court or, to my knowledge, commentator has suggested that content providers enjoy a First Amendment right to copyright protection. Indeed, courts and commentators have long maintained the opposite, that the First Amendment imposes limits on the scope and duration of copyright owner prerogatives, whether directly or through the incorporation First Amendment values into copyright doctrine. See, e.g., *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) (explaining that First Amendment protections are “embodied in the Copyright Act’s distinction between copyrightable expression and uncopyrightable facts and ideas”); *New Era Publications Int’l v. Henry Holt & Co.*, 873 F.2d 576, 588 (2d Cir. 1989) (Oakes, C.J., concurring) (stating that the imposition of a permanent injunction in the copyright infringement action before the court would diminish public knowledge and thus implicate First Amendment concerns); *Sid & Marty Krofft Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977) (stating that copyright law’s idea-expression dichotomy serves to accommodate First Amendment concerns); Robert C. Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CAL. L. REV. 283, 289-99 (1979) (attempting to structure a workable accommodation between the First Amendment and the property rights granted by federal copyright law); Goldstein, *supra* note 89, at 988-1055 (outlining possible conflicts between copyright law and the First Amendment); Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998) (contending that preliminary injunctions in copyright cases should be treated as prior restraints under First Amendment doctrine); Jessica Litman, *Copyright and Information Policy*, L. & CONTEMP. PROBS., Spring 1992, at 185, 204-06 (criticizing judicial pronouncements that copyright doctrine adequately reflects First Amendment free speech protections); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180, 1186-1204 (1970) (attempting to reconcile copyright with the First Amendment); cf. Daniel A. Farber, *Afterword: Property and Free Speech*, 93 NW. U. L. REV. 1239, 1240-42 (1999) (suggesting that some media regulation ought to be reconceived as an allocation of proprietary entitlements rather than command-and-control regulation and thus ought more readily to pass First Amendment muster).

185. International copyright law aims to achieve greater harmonization among national laws and to prevent discrimination against foreign authors, but not to replace national law. See *Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, *as last revised* July 24, 1971, S. TREATY DOC. NO. 99-27 (1986), 828 U.N.T.S. 221, art. 5 (requiring national treatment); *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31; 33 I.L.M. 81, art. 1(1) (1994) (providing that signatory countries may implement in their domestic intellectual property laws more extensive protection than required by Agreement); *id.* art. 3(1) (requiring that signatory countries apply the principle of national treatment). Under choice of law principles applicable in copyright infringement actions, the issue of whether a given use of a copyright-protected work constitutes copyright infringement is generally determined by the law of the country where the use took place. See *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 (2d Cir. 1998); (*Jerusalem Dist. Ct.*) *Qimron v. Shanks*, (1993) 69 (3) P.M. 10, 21-22, *aff’d*, C.A. 2790/93, 2811/93 (Israel Supreme Court, August 30, 2000).

VI. CONCLUSION

The deepening of market hierarchy in public discourse underscores a tension between the Free Speech and Free Press Principles that cannot ultimately be resolved. It is the ongoing task of media and information policy in a liberal democratic state to further both Principles while seeking to modulate between the two. Copyright law has significant import for that effort. Indeed, the support of some degree of speech hierarchy counts among copyright's quintessential benefits to the extent that support helps to underwrite a robust, independent media without unduly burdening expressive diversity. But copyright's current expanded scope, coupled with ongoing media enterprise consolidation and content providers' potential widespread deployment of digital encryption technology, gives far less weight to promoting expressive diversity than need or ought to be the case. If copyright is to lend a hand in furthering both the Free Speech and Free Press Principles and constructively moderating the tension between them, it must be more carefully and narrowly tailored to those ends. If copyright is so tailored, it may prove to be a valuable supplement or even partial replacement for traditional media regulation in seeking to accommodate speech hierarchy and expressive diversity, particularly in digital and global media markets.